EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr C Jones	v	**(1) Frelan Hardware Limited.** **(2) Karen Muggleton**

OPEN PRELIMINARY HEARING

Heard at: London South **On: 23 July 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **no appearance or representation**
For the Respondent: **Mr G Graham of Counsel**

JUDGMENT on PRELIMINARY HEARING

1. The Claimant's application to postpone the hearing is refused.

2. The claim is struck out on the grounds that (1) the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable (2) for non-compliance with an order of the Tribunal and (3) the claim is not being actively pursued. In consequence, the hearing fixed for 12 April 2021 is discharged.

3. No award of costs is made.

REASONS

Preliminary

1. This has been a remote hearing on the papers because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully audio. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. The preliminary hearing was fixed to determine whether to strike out the Claimant's claim under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). An application has been brought by

the Respondents [261] as well as being considered on the Tribunal's own initiative [217]. There is an application for costs on behalf of the Respondents.

3. The Claimant did not participate in the hearing. Mr G Graham, barrister, represented the Respondent and provided a witness statement from Mr Pincott, a paralegal working for DAS Law, who was their legal representative. There was a bundle of documents in excess of 300 pages to which reference will be made where necessary.

Chronology

4. The ET1 was submitted on 31st October 2018 which had attached to it a four page submission and a five page letter of resignation.

5. On 20 March 2019, DAS Law wrote to the Employment Tribunal to intimate notice of its interest for the Respondents [62-63]. A copy of this correspondence was provided to the Claimant's then representative, Mr Michael Jones, the Claimant's father. On the same date, a letter was sent to the Claimant's representative advising him directly that DAS Law had gone on the record as acting on the Respondents' behalf and requesting that any future correspondence be sent direct to DAS Law and not to the Respondents themselves [64].

6. An administrative error led to Karen Muggleton, the Second Respondent, being referred to as a Claimant in the initial notification to the Tribunal [63], The Claimant's representative responded to this error by contacting the Respondents directly and advising them of the error and stating that only the Respondents themselves could rectify the error [65-66]. In response to this, a letter of correction was sent to the Tribunal dated 21 March 2019 which also raised concerns with the general behaviour of the Claimant's representative in the proceedings to date [67-68]. A further letter was sent direct to the Claimant's representative on the same date advising him that such behaviour was inappropriate and again requesting that any future correspondence be sent direct to DAS Law and not to the Respondents. It was stated that continued inappropriate behaviour adding to the time and cost of responding to proceedings may lead to a costs application being made against the Claimant [69-70].

7. The Claimant's representative continued to write to the Respondents direct, although he did for a time also provide copies to DAS Law [71-74].

8. DAS Law wrote to the Tribunal on 22 March 2019 requesting that guidance be issued to the Claimant's representative in respect of the correct operation of rule 92 of the ET Rules [75-77].

9. On 25 March 2019 correspondence was received by Simon Pathé, Mr Pincott's team leader within DAS Law [80-82]. The identity of Mr Pathé would appear to have been specifically sought out by the Claimant's representative in telephone calls to the DAS Law offices [80]. This letter alleged unregulated litigation activity, breaches of SRA regulations and criminal offences by DAS Law including blackmail and was again copied direct to the Respondents [82]. This letter was not copied to Mr Pincott. Further correspondence was addressed to Mr Pathé on 26 March 2020 [83-84].

10. An application to strike out the Claimant's claims was submitted on behalf of the Respondents on 28 March 2019 [85-88].

11. The Tribunal issued guidance at the behest of Employment Judge Siddall on 29 March 2019 advising the Claimant's representative that communication should be sent to DAS Law as the representatives and not to the Respondents direct [92-93]. This guidance was not followed by the Claimant's representative who, in acknowledging the Tribunal's correspondence, copied the Respondents direct [94-95].

12. On 1 April 2019, the Claimant's representative's response to the strike out application made further unfounded serious allegations against DAS Law [96-104].

13. DAS Law wrote direct to the Claimant's representative on 2 April 2019 highlighting the wording of the Tribunal's guidance advising the Claimant not to correspond direct with the Tribunal, setting out in detail the relevant parts of the ET Rules and providing clear instructions on the form of any future correspondence, directing that this should be direct to Mr Pincott as the representative of DAS Law and not to Mr Pathé [105-107]. This letter renewed the warning of an application for costs against the Claimant in the event of non-compliance [107].

14. The Claimant's representative's response was to seek out the details of even more senior personnel within DAS Law by way of a series of telephone calls over a number of days [108]. Emails were subsequently directed to Hannah Parsons, the then head of DAS Law's Legal Advice service and to Kimberly Whalen-Blake, then head of DAS Law's Employment Law department [108 – 118]. These emails copied correspondence with the Tribunal of 5 April 2019 setting out further allegations of breaches of SRA regulations by DAS Law and demanded a written apology.

15. DAS Law were notified that the Claimant was no longer to be represented by his father on 23 April 2019 [119-121], This email was sent direct to the Respondents and not copied to DAS Law [119] claiming that the writer (the Claimant's mother, Carol Jones) was unaware of the Respondents' representatives' contact details [119]. The letter of 23 April 2019 also advised that correspondence to the Claimant should henceforth be "by LETTER MAIL ONLY" (Claimant's representative's emphasis) [121]. DAS Law subsequently copied all mail to the Claimant by letter except where requested by the Tribunal to send by email.

16. On the morning of 30 April 2019, DAS Law were informed by the Employment Tribunal by telephone that the hearing scheduled for that day would not go ahead following an indication by the Claimant that he would not be attending due to ill-health. Neither DAS Law nor the Respondents themselves were advised by the Claimant's representative (his mother writing on his behalf) of the application to postpone the hearing which was made in writing to the Tribunal on 26 April 2019 [122-125]. The claimant's mother stated in that application that she had knowingly not followed Rule 92 of the ET Rules [123]. The application relied upon a fit note issued to the Claimant by his GP on 13 March 2019 [125] and further stated the Claimant felt unable to be present at the hearing at the same time as the Respondents [123]. DAS Law sought to have further information gathered by the Tribunal to ascertain the exact reason why the Claimant was unable to attend and the prognosis of his condition given that if he

is unable to attend a hearing with the Respondents it is difficult to see how the matter can progress at all [130].

17. The Respondents had instructed Counsel and had not been given an opportunity to respond to the postponement application or cancel Counsel and had subsequently incurred unnecessary costs, an application was also made for costs against the Claimant [130].

18. The Claimant's representative responded to this on 3 May 2019 [132-134] by again writing direct to the Respondents rather than addressing correspondence to DAS Law [132]. This letter specifically stated that the Claimant would not correspond with DAS Law [134] requiring DAS Law to again contact the Tribunal to request intervention on the issue on 13 May 2019 requesting an unless order be made to require the Claimant's representative to correspond only with DAS Law and not with the Respondents direct [137 – 140].

19. The Claimant's representative responded on 17 May 2019 [141-142] writing to Kimberley Whalen-Blake and the then Managing Director of DAS Law, James Christacos, again suggesting wrongdoing on behalf of DAS Law under the SRA regulations and raising private family issues relating to the Respondents [141].

20. DAS Law wrote to the Tribunal on 23 May 2019 requesting that a preliminary hearing be scheduled as a matter of urgency to settle the issues between the parties such that the matter could be dealt with in a manner consistent with the overriding objective [143-144].

21. DAS Law received a letter of complaint from the Claimant's mother on 29 May 2019. This was passed to the Compliance of Legal Practice team which at that time was being operated by DAS Law's in-house counsel, Bianca Huggins, a practising barrister. A response was made to the Claimant by Ms Huggins reiterating DAS Law's position and denying any wrongdoing on its behalf [151-153]. This letter further requested that an individual who was repeatedly calling DAS Law's offices purportedly on behalf of the Claimant cease doing so and reminding the Claimant that it was for the Respondents alone to choose their representatives. This letter was copied to the Tribunal on 4 June 2019 and further advised the Claimant that DAS Law would not continue to engage in correspondence of the sort sent going forward.

22. The Claimant's representative responded to this letter on 11 June 2019 making further allegations against DAS Law [154-160]. Having already advised the Claimant that it would not continue to engage in correspondence of this sort DAS Law did not make any further response to this further letter.

23. A Preliminary Hearing was scheduled by the Tribunal for 25 November 2019 [161-167]. However, despite being informed by email at the same time as the Respondents [161] and receiving further correspondence from the Respondents in relation to the hearing [169-175] neither the Claimant nor any representative attended the Preliminary Hearing on 25 November 2019. The Claimant's mother wrote to the Tribunal on the morning of the hearing [176] but no application was made to postpone and no explanation was given at the time for non-attendance. It has subsequently been suggested that the Claimant was not given notice of the hearing [178]. A number of

directions were made by the Tribunal at that Preliminary Hearing [183-193]; The Claimant has, to date, not complied with any of the directions made. No correspondence has been received explaining this failure.

24. Following a further breach of the directions issued at the Preliminary Hearing on 25 November 2019, the Tribunal issued a strike out warning of its own volition on 4 December 2019 [216-218].

25. There was a further series of communications from the Claimant's representative which included serious allegations against DAS Law, the Respondents' former solicitors and the Tribunal itself [219-223 and 227-240 and 245-247]. The initial responses were not provided to the Respondents at the time of writing and then only after prompting by the Tribunal direct to the Respondents themselves (with multiple copies) and not to DAS Law. This led to a further request for the Tribunal to take steps to curtail the Claimant's representatives' behaviour [248-251].

26. A further preliminary hearing to consider the Respondents' applications for strike out and costs was scheduled for 30 April 2020 [184]. As a result of the Covid 19 arrangements, this hearing was converted to a case management hearing by telephone [293-295].

27. On 29 April 2020, the Claimant's mother, stating that she was the Claimant's representative for correspondence only, advised the Tribunal (copied only direct to the Respondents and not to DAS Law) that "due to circumstances beyond his control, the Claimant is unable to join you by telephone" [296-298]. No further explanation was offered and neither the Claimant nor his representative attended the hearing on 30 April 2020.

28. The Claimant was advised through his representative that the outcome of that hearing was that a preliminary hearing was scheduled to consider the applications for strike out and costs by telephone on 23 July 2020l [299].

29. The Claimant's mother forwarded correspondence with the Tribunal in relation to non-receipt of the Case Management Summary and orders of the 30 April 2020 [304-305]. As a result of this, Mr Pincott reviewed his files and became aware that the Tribunal had sent the orders to an incorrect email address (carol_jones_2005@yahoo.co.uk rather than carol_jones_2005@yahoo.com) [300]. Mr Pincott forwarded the orders to the Claimant's mother direct [306-310].

30. The Claimant's mother responded to this by suggesting that DAS Law had made unsupported allegations about the conduct of the Tribunal [311-312].

31. An application was made for the Claimant to postpone the hearing on 23 July 2020.

32. A preliminary costs schedule was drafted for work undertaken by the Respondents up to 20 February 2020 showing that total costs incurred in dealing with this matter up to that date, including disbursements, amounted to £12,469.72 [313-330]. The total costs to date are likely to exceed £15,000.

Submissions

33. The Tribunal considered written submissions on behalf of the Respondents.

Law

STRIKING OUT

34. Rule 37 provides:

> Striking out
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

35. The grounds relied on in this case are, the manner in which the proceedings have been conducted, rule 37(1)(b), for the non-compliance with an order of the Tribunal - rule 37(1)(c) - and that the claim is not being actively pursued – rule 37(1)(d).

36. It has been held that there are two 'cardinal conditions' for the exercise of the power under [SI 2013/1237 Sch 1 r 37(1)(b)], namely, that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (see **Blockbuster Entertainment Ltd v. James** [2006] IRLR 630*,* at para 5*,* per Sedley LJ). Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. As Sedley LJ put it, the power to strike out under [r 37(1)(b)] is 'a Draconic power, not to be readily exercised'. At paragraph 23, he said:

> "The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of

> proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."

37. The scope of the rule was examined in some detail by the Court of Appeal in **Bennett v. London Borough of Southwark** , [2002] IRLR 407.

38. In a helpful summary of what is required to be decided by an employment tribunal before making a striking out order under what is now SI 2013/1237 Sch 1 r 37(1)(b), Burton J, giving judgment in **Bolch v. Chipman** [2004] IRLR 140 EAT, stated that there are four matters to be addressed (see para 55). First, there must be a conclusion by the tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on his behalf in such a manner. As Burton J stated: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Such conduct is not confined to matters taking place within the curtilage of the tribunal, and could comprise, for example, the making of threats as to possible consequences if the proceedings are not withdrawn. Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation (see *De Keyser*), but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order.

39. In **Rolls Royce plc v. Riddle** [2008] IRLR 873, it was said, at paragraph 19:

> "…cases of failure to actively pursue a claim will fall into one of two categories. The first of these is where there has been 'intentional and contumelious' default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent…"

40. The importance of tribunals adopting a structured approach when considering whether to strike out a pleading, and carrying out a careful and dispassionate analysis of the factors indicating whether a fair trial is or is not still possible and whether a strike out is or is not a proportionate penalty, has been stressed in a number of cases. For example, in **Arriva London North Ltd v. Maseya** UKEAT/0096/16 *(*12 July 2016, *unreported)* Simler J (as she then was) stated: 'There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles' (para 27). That case concerned a tribunal's decision to strike out a response to a disability discrimination claim on the grounds that the respondents had conducted the proceedings in a scandalous and unreasonable manner by pursuing a 'false defence' and deliberately failing to disclose documents. Allowing the respondents' appeal, Simler J held that, on the facts, there was no justification for categorising the response as 'false', and no basis for concluding that there had been a deliberate failure to disclose relevant documents. In reaching

these conclusions, the tribunal had failed to analyse the facts properly and had fundamentally misunderstood the nature of the cases put forward by the claimant and the respondent. Moreover, it had crucially failed to consider the authorities on striking out and the principles to be applied. It did not properly investigate whether a fair trial was still possible and did not consider the question of proportionality. Simler J found that the problems regarding amendments to the response and the disclosure of documents, which were at the heart of the decision to strike out, were all capable of resolution without causing undue delay, so that there was nothing to prevent a fair trial from taking place. Further, and in any event, she held that the draconian sanction of strike out was disproportionate in the circumstances. The case was accordingly remitted to a fresh tribunal for a full hearing on the merits. Again, in **Baber v. Royal Bank of Scotland plc** UKEAT/0301/15 (18 January 2018, unreported), Simler J expressed similar views on the draconian nature of striking out orders when setting aside an order striking out the claimant's unfair dismissal claim for non-compliance with case management orders. Pointing out that such orders are neither automatic nor punitive, she held that not only did the tribunal fail to identify the extent and magnitude of the claimant's non-compliance with the order, merely stating that there had been non-compliance, but it had not examined whether a fair trial was still possible or whether a lesser sanction could be imposed (see para 56).

COSTS

41. The grounds for making costs orders fall into two categories: (*a*) a general discretionary ground relating to the bringing or conducting of the proceedings, and (*b*) specific grounds relating to postponements and adjournments, to non-compliance with orders, and witness expenses.

42. The 2013 Rules have continued the process, begun with the 2004 Rules, of enlarging the powers granted to a tribunal to make costs orders in favour of a party to proceedings before it. The main changes brought about by the 2013 Rules were these: a costs order can be made not only where a party is legally represented but where he is represented by a lay representative; and an employment judge is granted the power to carry out a detailed assessment of costs in excess of £20,000, applying the same principles as a county court. However, despite these changes, and despite an apparently greater willingness on the part of tribunals and employment judges to consider making an award of costs on the three bases available to them, the fundamental principle remains that costs are the exception rather than the rule, and that costs do not follow the event in employment tribunals (see **Gee v. Shell UK Ltd** [2003] IRLR 82*, at* paras 22, 35*;* **Lodwick v. Southwark London Borough Council** [2004] ICR 884*,* at paras 23–27; **McPherson v. BNP Paribas (London Branch)** [2004] ICR 1398*,* at para 2; **Barnsley Metropolitan Borough Council v. Yerraklava** [2012] IRLR 78*,* at para 7).

43. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the *interim* stages of the proceedings, to the conduct of the parties at the substantive hearing. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the

award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (**McPherson v. BNP Paribas (London Branch)**; **Salinas v. Bear Stearns International Holdings Inc** [2005] ICR 1117 EAT). In **McPherson**, Mummery LJ stated (at para 40): 'The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred'. In a subsequent case, Mummery LJ stressed that this passage in **McPherson** was never intended to be interpreted as meaning either that questions of causation are to be disregarded or that tribunals must 'dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect"' (**Barnsley Metropolitan Borough Council v. Yerrakalva***,* at para 40). In **Yerrakalva**, Mummery LJ stated (at para 41): 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had'. He also pointed out (at para 42) that, as with any decision based on the exercise of a discretion, a decision on costs only stands as authority for what are, and are not, the principles governing the discretion and serves only as a 'broad steer on the factors covered by the paramount principle of relevance'. Thus, 'a costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them.'

43. In **Jilley v. Birmingham & Solihull Mental Health NHS Trust** UKEAT/0584/06, [2008] All ER (D) 35 (Feb), the EAT held that, although ability to pay would be taken into account by the county court on such an assessment, it is also open to the employment tribunal to take it into account when making the order. It could do so, for example, by ordering that only a specified part of the costs should be payable or by placing a cap on the award. But whether or not it takes ability to pay into account, tribunals should always, according to Judge Richardson in **Jilley**, give reasons for their decision. He stated (at para 44):

> 'If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential.'

DISCUSSION and DECISION

Postponement of hearing on 23 July 2020

44. The Claimant sought a postponement of the hearing for reasons which were not clear. The Tribunal reviewed the history of this claim and decided that progress must be made. The Tribunal refused the application for a postponement.

Strike out

45. The Respondents have refined its application, and no longer pursues a strike out application on the basis that the claim has no reasonable prospect of success or in the alternative, a deposit order. In regards to costs, the Respondents have withdrawn its application under rule 76(1)(b). All other applications remain.

46. Three grounds for strike out under rule 37 are insisted upon. Considering first rule 37(1)(b), the Tribunal noted that the Claimant has not repudiated the actions of either his mother or father whilst representing him, and as such their actions should be taken as being those of the Claimant. If the Claimant wished to repudiate the conduct of his parents then he should have taken the opportunity at any point.

47. The Respondents have set out a full list of all of the identified conduct at [263] – [265] and in the witness statement of Mr Pincott. The Tribunal applied the four stage test identified Burton J in **Bolch v. Chipman** when assessing such conduct:

i. There must be a conclusion that not only has a party behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably;
ii. A finding that proceedings have been conducted scandalously, unreasonably or vexatiously does not lead to an automatic strike-out, however it can occur if there has been *"wilful, deliberate or contumelious disobedience"* of the Order of a Court such as a fair trial is no longer possible as per *De Keyser Limited v Wilson* [2001] IRLR 324;
iii. If the Tribunal concludes that a fair trial is not possible, it must then consider what remedy is appropriate and proportionate in the circumstances;
iv. The Tribunal should consider the consequence of the strike out order, including whether a party can still participate in proceedings or test the evidence in some other way (this is more applicable to when a Respondent's case is struck out).

48. On a fair reading of the correspondence, the Claimant has sought to use the legal process to vilify others and give insult to the Tribunal, including:

a. Mr Muggleton on behalf of the First Respondent and the Second Respondent in person [123], [141], [254];
b. DAS Law [81], [97] – [104], [114], [135];
c. Mr Pincott [66], [74], [99] – [100], [156], [297], [312]
d. The Employment Tribunal [254], [257]
e. Mrs Gangadeen on behalf of the ET [219] – [220]
f. EJ Wright [219] – [220]
g. Bianca Huggins (A Barrister employed by DAS Law at the material time) [154]

49. The facts of this case fall within the first of these categories because of:

a. The Claimant's failure to attend the 30 April 2019 preliminary hearing, which involved a late application to adjourn [122], which was not copied into the Respondent in breach of rule 92 and included a Fit Note dated 13h March 2019 [125] saying that the Claimant was not fit to attend work for a period of three months. There was no evidence that the Claimant was unfit to attend a

preliminary hearing in person, or that his representative could have attended on his behalf.

b. The Claimant's failure to attend the preliminary hearing on 25 November 2019, purportedly due to having never received the notice of hearing (as referred to above). Whilst the Tribunal will be able to easily ascertain the veracity of the Claimant's account, it is noteworthy that on the same day as the PH, the Claimant wrote to the Tribunal [176] declaring that there was a conflict of interest with the Respondents' Solicitor. An inference can be drawn that the Claimant was aware of the preliminary hearing and was simply seeking to obfuscate and delay matters further;

c. The Claimant's breach of the order of EJ Wright, namely to properly particularise his claim and provide information pertaining to his potential disability;

d. The Claimant's failure to attend the telephone preliminary hearing on 30 April 2020 without providing a proper excuse. The Claimant wrote to the Tribunal on 29 April 2020 [297] stating "unfortunately, due to circumstances beyond his control, the Claimant is unable to join you by telephone…" without explaining what the circumstances were or providing any evidence to support his assertion.

e. The Claimant's failure to attend this Preliminary Hearing.

50. Taking all of these matters cumulatively, the Claimant has failed to "take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures" (see Riddle at paragraph 20). Factors that the Tribunal should take into account include not only the Claimant's failure to attend and lack of persuasive explanation, but also the "quality of the claimant's conduct" (per Riddle at paragraph 33) in the round.

51. A further example of this is the Claimant's repeated failure to comply with the direction of EJ Siddall [93] and continue to copy in both the First and Second Respondent to all correspondence. The Claimant purportedly does this on a strict interpretation of rule 92 and the reference to *"all other parties"* but has clearly done so to cause inconvenience and increased cost to the Respondent.

52. A finding that the conduct identified above and by the Respondents in their application is unreasonable is not determinative that the claim must be struck out. The Tribunal must examine whether strike-out is a proportionate response, or whether other steps, such as "firm case management" (see **Bennett** at paragraph 29) could provide a better solution.

53. The Tribunal is confident that further robust case management would not resolve the situation or get this case back on track. The Claimant has failed to attend both in-person and telephone hearings without proper excuse. He has disregarded orders of the Tribunal to particularise his claim and disclose evidence. At every turn he has accused the Respondents' legal representatives of misconduct, frequently inferring a report to the SRA. When he feels that the Tribunal is against him (as with the strike-out warning from EJ Wright), he threatens reports to the President of the Employment Tribunal and an appeal to the Employment Appeal Tribunal.

54. Any further directions of the Tribunal would likely be flouted, any further hearing dates would be ignored. There is no possibility of the Claimant working constructively with the Respondent's representatives to comply with disclosure obligations or agree a bundle of documents.

55. Therefore in all the circumstances it is proportionate to strike-out the claim due to the Claimant's conduct of these proceedings. Such conduct is deep-rooted and irreversible, and to allow such behaviour unchecked will have a significant impact upon the fairness of the entire proceedings.

56. The Tribunal acknowledges, as per paragraph 5 of **Blockbuster Entertainment Limited v. James** that rule 37 is a "draconic power, not to be readily exercised". However, the Claimant has demonstrated unreasonable conduct which "has taken the form of deliberate and persistent disregard of required procedural steps".

57. The final hearing is set down for 12 April 2021 and there could still be time in which orderly preparation can be made. However, the Claimant's has continued with his unreasonable conduct, which has been present since 20th March 2019 [65], and includes but is not limited to the late application to adjourn the 30th April 2019 preliminary hearing [122] (which the Respondents asserts was deliberately not sent to the Respondent) and repeated threats against the Respondents' solicitors, including inferences of being reported to the SRA [154] – [163].

58. In this case, considering the lengthy duration of the most extraordinary conduct by the Claimant, the overall interests of justice require the claim to be struck out. The Claimant has demonstrated no intention to assert his statutory rights and actually have his claim heard, but rather seems to determined to conduct a campaign of harassment against all who he perceives have wronged him – including the Respondent, the Respondent's Legal Representative and latterly the Employment Tribunal.

59. In relation to rule 37(1)(b), the Tribunal finds that the manner in which the Claimant has conducted proceedings has been unreasonable.

60. In relation to rule 37(1)(c), the Tribunal finds that a number of important orders of the Tribunal have not been complied with. At a preliminary hearing (which the Claimant did not attend) on 25 November 2019 [284], EJ Wright ordered the Claimant to, *inter alia:*

a. acknowledge receipt of the CMO within 48 hours
b. provide an explanation and evidence of his non-attendance by 9 December 2019
c. particularise his claim for 'other payments' (box 8.1 of the ET1) by 6 January 2020;
d. confirm which conditions he relied upon as a disability for the purpose of section 6 EqA 2010 by 23 December 2019;
e. provide a disability impact statement and supporting medical evidence by 3 February 2020;

61. The order of EJ Wright also included assistance to the Claimant in setting out aspects of his claim that he was expected to provide better particulars in respect of his claim at [190] – [193].

62. The Tribunal emailed a copy of the CMO to both parties on 3 December 2019 [183]. A further copy was sent by both email and hard copy from the Respondent on the same day [194].

63. The Claimant complied with the first direction [228] and in part, provided an explanation for his non-attendance [178], although the Respondent says the explanation is misleading, and has resulted in further allegations by the Claimant that the Respondents' Solicitors had doctored the 24 July 2019 email attaching the notice of hearing [180] and [275].

64. The Claimant stated that he suffered from depression [229] but to date has failed to comply with any of the other directions, and instead threatened a complaint against EJ Wright to the President of the Employment Tribunals, an appeal to the Employment Appeal Tribunal and/or a complaint to the SRA (in the belief that EJ Wright was still practising as a Solicitor at the time of the CMO) [219] – [222] and [228] – [231].

65. The pleadings in the ET1 remain deficient and the Claimant has refused to comply with the order of EJ Wright to remedy this.

66. Applying the same structure of reasoning as previously (**Bolch**), the Tribunal concluded that the claim should also be struck out under rule 37(1)(c).

67. In relation to rule 37(1)(d), considering the same facts and applying the same structure of reasoning, the Tribunal has decided to strike out the claim. He is not pursuing his claim, he is pursuing perceived grievances.

Costs

68. The conduct described above is unreasonable conduct within the meaning of rule 76(1) of the ET Rules. The vast majority of the Claimant's correspondence contained little or no discernible attempt to advance proceedings and rather was designed to subject the Respondent to *"inconvenience, harassment and expense…"* as per Lord Bingham in **G v. Barker** [2000] 1 FLR 759 at para 19.

69. In **Yerrakalva** (at paragraph 41) it was said that the Tribunal should *"…identify the conduct, what was unreasonable about it and what effects it had"*. The conduct described above had the effect of creating additional costs for the Respondents, as can be evidenced from the schedule of costs prepared for this application.

70. The conduct of the Claimant's representative is taken for the purpose of rule 76(1)(a) as being that of the Claimant as well. Whilst a representative not acting for profit cannot be the subject of an order for wasted costs – rule 80(2), rule 76 treats the actions of the representative as being those of the Claimant.

Costs – Adjournment on 30 April 2019

71. The Respondents seek their costs thrown away by the Claimant's conduct in seeking an adjournment on 26 April 2019, without copying in the Respondents' representative [122] – [123]. Under rule 76(3), a Tribunal shall consider whether to make a costs order where a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

72. The application was made on the Friday morning before the PH scheduled the following Tuesday. The notice of hearing was sent out to the parties at the same time as the claim was accepted [25] on 30 November 2018. The Claimant's Fit Note is dated 13 March 2019 and the Claimant has not explained why he did not make the application sooner.

73. In any event, the Claimant's Fit Note did not state that he was unfit to participate in a Tribunal hearing, nor has any evidence been adduced to indicate that was the position. This does not satisfy the definition of *"exceptional circumstances"* as per rule 30A(1)(c) and (4)(b) of the ET Rules.

74. The Claimant's Mother (who was not on record for him at the time) did not copy in the Respondent, as required by rule 92 and rule 30A(1) of the ET Rules. The Claimant appears to have ignored the Presidential Guidance on 'Seeking a Postponement of a Hearing'.

75. Rule 30A(2) and 76(3) are read in conjunction. Both deal with circumstances of late applications for an adjournment within 7 days of the hearing date. Rule 76(3) is designed to be a potential sanction for such applications. That is not to say that every application within 7 days of a hearing will be met with a costs order, however given that there are only three criteria which a Tribunal should grant an adjournment, the rules clearly envisaged situations where the opposing party was put to unnecessary costs by the adjournment and that costs could follow the event.

76. In this case, the Respondent was put to the expense of instructing Counsel which resulted in Counsel's fee as well as additional time spent by the Respondent's Legal Representatives in preparing for the aborted hearing.

77. In this case the Claimant has embarked upon a campaign of unreasonable conduct against nearly everyone involved in his claim. The Claimant's repeated refusal to attend preliminary hearings and comply with orders designed to progress the litigation and clarify the issues between the parties is indicative of a Claimant who is abusing the Tribunal process to vilify the Respondent on a personal level without any consideration or desire to actually litigate the matter. In these circumstances, costs might be expected to follow the event.

78. The Tribunal recognised that It would be an extremely rare case where a claim is struck out due to the conduct of the Claimant (either under rule 37(b), (c) or (d)) and that conduct did not also meet the definition of unreasonable conduct within the meaning of rule 76(1)(a). However, conscious of the perversity argument which might be deployed, the Tribunal considered the fundamental principle that costs do not follow the event except in exceptional cases to be applicable. The Tribunal had no

information about the means of the Claimant. He says he suffers from depression. His behaviour has undoubtedly caused additional costs to the Respondent which might not be recoverable. The Tribunal considered that the most appropriate way to deal with the claim overall is to bring the matter to a complete end. The Tribunal accordingly did not award costs against the Claimant.

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Employment Judge Truscott QC
Date: 10 August 2020