

# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Ms Y Liu

AND

China Daily UK Co Limited

Employment Judge: H Clark

Date of Hearing: 28 October 2020

Appearances:

Claimant: In person

Respondent: Mr S Flynn - Counsel

## REMOTE OPEN PRELIMINARY HEARING VIA CLOUD VIDEO PLATFORM

### JUDGMENT

1. The Respondent's application to strike out the Claimant's claim is refused.

AND it is ordered:

2. The Claimant's application for specific discovery is refused.

Ms H Clark  
EMPLOYMENT JUDGE CLARK

SIGNED: 9 November 2020

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SENT TO THE PARTIES ON : 10/11/2020

FOR SECRETARY OF THE TRIBUNALS

## REASONS

1. This Open Preliminary Hearing was listed to determine the Respondent's application dated 10 July 2020 to strike out the Claimant's claims. The Respondent suggests that a fair trial is no longer possible, due to the manner in which the Claimant has conducted these proceedings, specifically her threatening behaviour towards the Respondent's witnesses. A case management hearing on 12 August 2020 identified two other potential issues for decision, firstly an application for specific discovery from the Claimant and an application by her to amend her Claim Form. At the outset of the hearing, the Claimant confirmed that she does not pursue her application to amend. The Tribunal, therefore, heard evidence and submissions on the strikeout application and, separately, submissions in relation to the application for specific discovery.
2. For the purposes of this hearing, the Tribunal read primary and supplementary witness statements from both the Claimant and, on behalf of the Respondent, Mr Yu, the latter's Managing Director. A joint bundle of documents running 293 pages was provided, together with a copy of the application and written submissions from both the Claimant and Mr Flynn. The Claimant and Mr Yu gave oral evidence and were cross-examined. Both the Claimant and Mr Flynn made oral submissions which finished at 15.15, when the Tribunal reserved its decision which it now gives with its reasons.
3. The Respondent suggests that the Claimant has made false allegations against the Respondent's witnesses to an investigative arm of the Chinese Government in an effort to intimidate them and discourage them from giving evidence. Further, that she has contacted members of the Respondent's staff or of its parent Company in China directly, contrary to an instruction from Employment Judge Khan at a case management hearing on 16 April 2020.
4. The conduct of which complaint is made is admitted, but the Claimant strongly opposes any suggestion that its purpose was to intimidate the Respondent's witnesses. The Claimant regards herself as a whistle-blower, who should not be penalised for highlighting fraud and corruption. It is the Respondent's case that one of its three proposed witnesses at the full merits hearing, Mr Lei, is no longer willing to give evidence.

### **The Law**

5. The Tribunal's power to strike out a claim is set out in rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in circumstances

which include where the manner in which the proceedings have been conducted by a party has been “*scandalous, unreasonable or vexatious*” (rule 37(1)(b)). If that threshold is passed, there remains a discretion as to whether to strike out a claim. Such discretion is subject to the overriding objective in the 2013 Rules to do justice between the parties.

6. If the way that a party is conducting proceedings is deliberately difficult or obstructive, this might justify a strike out or if it is such as to render a fair trial impossible. The term “scandalous” includes conduct which is abusive of the other party and vexatious behaviour in the conduct of litigation implies that one party is using the litigation to cause inconvenience to the other party or to harass them.
7. *Bolch v Chipman* [2004] IRLR 140 gave guidance on the circumstances in which a claim might be struck out on the basis of unreasonable behaviour. In that case, the Respondent had physically threatened the Claimant. Firstly, the Tribunal must be satisfied that a party has behaved in a prohibited way in conducting the proceedings. If that is the case, the Tribunal should consider whether a fair trial remains possible. If it does, the case should generally be permitted to proceed. The Tribunal should consider whether it is a proportionate to strike out a claim rather than impose a lesser penalty (such as by making a costs order).
8. A strike out order was made against a Respondent in *Force One Utilities Ltd v Hatfield* [2009] IRLR 45 where a witness had threatened the Claimant with physical violence. It was decided that the Claimant had been sufficiently intimidated that a fair trial was no longer possible. Mr Flynn referred the Tribunal in particular on a passage at paragraph 37 in which the EAT stated,

*“In our judgment, once a tribunal finds that a party is sufficiently intimidated as to affect his or her ability to give evidence without fear of consequences, the only proportionate response can be to bar the other party from participating in the trial.”*

9. A similar conclusion was reached in *Gainford Care Homes Ltd v Tipple* [2016] EWCA Civ 382 in which a witness was threatened at the Tribunal, including with the exposure of personal matters to the press and then driven at at speed by the Respondent in a car such that she had to jump out of the way to avoid being hit. The Tribunal accepted that the witness was “*very, very frightened*” and so fearful for her safety that she would be unable to manage that fear when giving evidence.

### **Procedural History**

10. By a Claim Form presented on 16 December 2019 the Claimant claimed to have been unfairly and wrongfully dismissed and to have suffered detriments on the basis of having made a flexible working request on 19 May 2019. She alleges her dismissal was related to that request, whereas the Respondent relies on a number

of allegations of gross misconduct against the Claimant. A full merits hearing is listed over four days from 12 – 15 January 2021, postponed from 12 -14 August 2020 for reasons related to the pandemic.

11. There have been three case management hearings to date, on 13 February 2020, 16 April 2020 and 12 August 2020. At the case management hearing on 16 April 2020 before EJ Khan, the Respondent named its three proposed witnesses to be Mr Yu, Ms Tan and Mr Lei. Whilst the instruction does not appear in the notes of the case management hearing, it is not disputed that EJ Khan told the Claimant that she should correspond with the Respondent's Solicitors concerning issues relating to discovery rather than members of the Respondent's staff.

### **Background Facts**

12. The Claimant was employed by the Respondent from 16 May 2011 until 2 December 2019. At the time of her dismissal she was the Financial Director and Chief Financial Officer (CFO). The Claimant is a qualified accountant.
13. The Respondent publishes an English-language daily newspaper and is a subsidiary of the China Daily Group ("the Group"), which is based in China. It is owned and supervised by the State Council of the Chinese Government.
14. It is the Claimant's case that the Respondent's Managing Director, Mr Yu, made false allegations of gross misconduct against her, leading to her summary dismissal. The allegations included providing false information about a Company which the Claimant ran, which she claimed to be dormant; working for that personal Company during her working hours for the Respondent and deliberately providing false information to HMRC in the course of her employment.
15. The primary conduct about which the Respondent complains within this application is the Claimant's making allegations of misconduct against the Respondent's witnesses to an organ of the Chinese State, the Central Inspection Team (CIT). The latter oversees the conduct of Chinese companies and the civil servants who operate them. The CIT goes into organisations to conduct an inspection every few years to ensure compliance with Chinese laws and uncover any wrongdoing. Employees are encouraged to feed concerns they may have about governance or management to the CIT. If the CIT uncovers wrongdoing, it can instigate disciplinary action against officials which can potentially lead to legal action. A CIT inspection of the Respondent was announced in mid-May 2020
16. On the 17 May 2020, the Claimant emailed the Respondent's Solicitor in the course of correspondence concerning disclosure within these proceedings as follows: *"I attach the documents you required. Some documents are potentially relevant to the 10th Central Inspection Team to China Daily and the Tribunal*

*confirmed that anyone can attend to the final hearing in August. Could I send an invitation to ask them attend, with your previous warning incorrectly?"* The Respondent suggests that this was designed to intimidate the Respondent and its witnesses.

17. This was the second occasion on which the Claimant raised the issue of publicity with the Respondent. By email dated 16 March 2020 the Claimant wrote to the Respondent's Solicitors stating: *"just to let you know, in order we are all getting a true and fair picture, the leaders in China Daily Beijing and some media will be invited to attend the hearing as it opens [sic] to the Public."*
18. In early June 2020 the Claimant says she discussed her allegations against Mr Yu and Mrs Tan with the CIT on the telephone. On 18 June 2020 the Claimant sent a copy of allegations she was making to the CIT against the Respondent's proposed witnesses to senior members of staff at the Group stating: *"I hereby inform you how to retrieve the documents of the UK company in order to facilitate the enquiries by the Central Inspection Team."* She then set out 8 allegations dating between 2016 and 2019 variously against Mr Yu and Ms Tan making allegations of fraud and corruption relating to expense payments or the diversion of commission, excessive use of business trips and general poor attendance/performance. The Claimant raised a specific complaint about a claim for air travel from Mr Yu amounting to £2,500, which the Claimant says should have cost £800. Regarding Ms Tan, in addition to some serious financial allegations, the Claimant set out, *"As Human Resources Director, she cried several times in the office and banged on tables, many colleagues in the office have witnessed. Hope the Central Inspection Team could investigate in details. Is this a sign of strong working capabilities? Or is it a sign on capabilities of leveraging on her connections."*
19. In relation to Mr Lei, she suggested to the CIT that he recommended a performance assessment of Ms Tan regarding her allegedly high number of business trips, but that he *"had to stop proceeding with this suggestion"* due to *"strong connection of [Ms Tan] with the senior level"* (the implication being Mr Yu). The Claimant says she copied Mr Lei and Mr Liu (at the Group) into this email to demonstrate to them that she had made these allegations rather than Mr Yu. It is the Claimant's case that both Mr Lei and Mr Liu are afraid of Mr Yu's power and influence. She says there was a deadline of 25 June 2020 for the letter to be delivered to the CIT, so the Claimant wanted HQ's assistance to ensure that her responses to the CIT were received on time, given the UK was in lockdown due to the pandemic.
20. The CIT concluded its investigation into the Respondent in late July 2020, but Mr Yu explained that the time frame for the completion of the report is uncertain. The Tribunal is invited to infer that Mr Liu has been recalled to China as a result of the Claimant's allegations to the CIT and that Mr Yu and Ms Tan are at risk of the same fate. Mr Lei, however, was due to return to China at the end of his current

(extended) term. Mr Lei's initial 2 year appointment in the UK was renewed in 2018 until October 2020. Whilst the Respondent anticipated that Mr Lei might remain in the UK until March 2021 for reasons related to the pandemic, that has not proved to be the case. The lease on Mr Lei's residential property was extended until March 2021, which supported that expectation. However, it also appears that a member of staff's replacement sometimes occupies the previous employee's property on arrival in the UK. It is not invariably the case, however, as employees' domestic circumstances and personal preferences for accommodation vary.

21. In an email dated 3 July 2020, the Respondent's Solicitor had cause to remind the Claimant of EJ Khan's instruction that she should not contact the Respondent directly but should raise any queries with the Respondent's Solicitor. This followed the Claimant's contacting the witness, Mr Lei, to ask for copies of emails passing between him and Ms Tan.
22. Mr Yu explained that he was "*very intimidated*" and very concerned as to what the Claimant will do next. He also said his confidence has been damaged and he faces uncertainty in his career. Reputation is very important in China and his has been damaged by the Claimant's "*malicious*" allegations. He is of the view that the Claimant is making allegations against him and the other witnesses to put the Respondent under pressure to settle the claim. Given the additional delay to the full merits hearing, the Claimant has further opportunity to make further allegations to Head Office to make his life more difficult.
23. In his oral evidence, Mr Yu accepted that there would be a proper investigation into any allegations by the CT and that he would be permitted to return to the UK eventually if he was cleared of wrongdoing. He is fearful as to what the Claimant will do next. Mr Yu said that 10 people in the previous year had been imprisoned in China following CIT investigations. He did not know any of the details of the individual cases, however. He confirmed that this was the "severe punishment" to which he referred in his witness statement.
24. Although Mr Yu accepts the Tribunal cannot determine the truth or otherwise of the Claimant's allegations, he points to one in particular relating to his flight expenses. Whilst he accepts a normal return flight to China would cost in the region of £800, he points out that he could not book such a flight, as he was flying in and out of different airports. The Claimant herself had authorised this expenditure when she was the Respondent's CFO.
25. The Claimant accepts that she had a professional duty to report allegations of fraud and corruption of the type she outlined to the CIT to the UK authorities and the Respondent's auditors, but did not do so. She considered the CIT the most appropriate body given the cross-jurisdictional nature of the issues. In answer to questions from Mr Flynn, she claimed to have raised the allegations with senior

personnel in the Group, including Mr Liu, on a number of occasions, via email or Wechat, although had no documentary evidence of this. The Claimant said this was because she is not legally represented and did not realise such evidence would be necessary.

26. The Claimant considers that Mr Yu has exaggerated the significance of the CIT investigation and says the obvious solution would be for the Tribunal to determine the parties respective allegations in a public hearing. If Mr Yu has a clear conscience, he has nothing to fear.
27. On 8 October 2020 the Respondent obtained a High Court Order prohibiting the Claimant from using or disclosing any confidential information acquired during the course of her employment, ordering her to deliver up any documents belonging to the Respondent or which contain confidential information and ordering the deletion of electronic copies. The Claimant did not enter a defence to the proceedings as she missed the deadline to respond because she says she was busy moving house and arranging schools for her children. The Claimant has obtained a copy of an internal email at the Respondent concerning Ms Tan's return to work following her maternity leave in October, which the Respondent uses to illustrate the Claimant's willingness to do whatever it takes to gain an advantage in these proceedings.

### Submissions

28. It is the Claimant's case that she is a whistle-blower and her communications with the CIT are entirely separate from these proceedings. She suggests that it is in all parties' interests that the allegations are publicly aired in a hearing. If, as Mr Yu claims, she has made malicious allegations, he would have an opportunity to be vindicated by a Tribunal hearing. She does not consider she has made any negative allegations concerning Mr Lei. She asserts that Mr Lei was worried about Mr Yu's influence and power and reprisals from him if he gave evidence at the Tribunal. The Claimant points to the fact that she had a good relationship with Mr Lei as he sent solicitous messages on WeChat to her during lockdown confirm.
29. The Claimant asserts that Mr Yu is a "liar and manipulator" and points to the fact that the latter did not amend his written witness evidence to inform the Tribunal that Ms Tan had returned to work on 1 October 2020. Whilst Mr Yu's first witness statement was drafted in July 2020 (before Mrs Tan's return to work), his supplemental witness statement dated 19 October 2020 did not refer to her return. He did, however, confirm her return in his oral evidence. The Claimant suggests this is only because someone at the Respondent forwarded to her an email confirming Ms Tan's return to work.
30. The Respondent invites the Tribunal to find that the timing of the Claimant's allegations to the CIT, her disregard of Employment Judge Khan's instruction to

correspond with the Respondent's Solicitors rather than the Respondent direct and the fact that she did not raise any of the allegations during the currency of her employment or at any time before the naming of the witnesses in this case points to the fact that the Claimant's allegations were malicious and made with the purpose of intimidating the Respondent's witnesses. Although the Respondent acknowledges that Mr Lei sent friendly messages to the Claimant after the termination of her employment, these pre-dated the Claimant's naming Mr Lei in her submission to the CIT. Mr Lei has not been in contact with the Claimant since.

31. It is suggested that Mr Lei is no longer willing to give evidence in these proceedings for fear of the consequences and that Mr Yu is intimidated and concerned about what the Claimant will do next. It is said that Ms Tan is very distressed about the allegations and the Respondent is concerned that she might not wish to give evidence. The threshold set out in *Force One Utilities v Hadfield* has been "significantly passed" as each of the witnesses have been sufficiently intimidated that their ability to give evidence has been affected.

### **Conclusions**

32. The Tribunal does not accept that the Claimant has made the allegations she now makes against Mr Yu and Ms Tan on a number of occasions to personnel in the Group based in China. The Claimant suggested that she had done so for the first time in her oral evidence to this Tribunal. She omitted to mention it in either of her two witness statements or in the detail on her Claim Form. In cross-examination she stated that she "forgot" to put it in her witnesses statement. In its application, the Respondent expressly relied on the coincidence of timing in the Claimant's making serious allegations against the witnesses for the first time having had their identity confirmed within these proceedings. Whilst it is acknowledged that the Claimant is conducting litigation in her second language, she speaks excellent English and neither requested an interpreter for this hearing and nor did the Tribunal have any concern that she might need one. As a senior employee and a qualified Accountant, the Claimant is a sophisticated litigant, who would have appreciated the relevance and importance of evidence which directly contradicted assertions made in the Respondent's application. As a result, the Tribunal does not accept that she simply forgot to include this evidence in her witness statement. The fact that the Claimant has provided no documentary evidence concerning prior complaints about Mr Yu and Ms Tan to personnel in the Group and has only belatedly asserted that she made these complaints, leads the Tribunal to conclude that she did not.
33. The Claimant maintains that she copied her allegations to the CIT to Mr Lei to reassure him that she had made the allegations rather than Mr Yu and that the only reason she sent them via the Group was due to her concern that they might not arrive in time in the post and there was no option to email the CIT. Given the

Claimant suggests that she repeatedly complained to personnel (including Mr Liu) at the Group (the inference being the Group did nothing about the allegations), it would have been an illogical of the Claimant to rely on the same personnel at the Group forwarding her allegations to the CIT and the Tribunal does not accept the Claimant's explanation in this regard.

34. The Tribunal is not in a position to draw any conclusions as to whether the Claimant's allegations made to the CIT against Mr Yu and Ms Tan (or Mr Lei) are true, just as it cannot make findings about whether the allegations against the Claimant on which the Respondent relies to justify her dismissal are accurate. However, in the Tribunal's judgment, there is sufficient evidence to conclude that at least part of the Claimant's motivation for making the allegations when and how she did to the CIT was to further her claim made in this Tribunal. Whether it was simply fighting fire with fire (the Respondent having made serious allegations against her), to discredit the Respondent's witnesses, to put pressure on the Respondent to settle the claim or specifically to make the witnesses think twice about giving evidence or a combination of any of these considerations, is unclear.
35. The Claimant contacted Mr Lei directly, contrary to a verbal instruction from EJ Khan that all contact with the Respondent and its staff should be directed at the Respondent's legal representative. This was not a breach of an order of the Tribunal (and the instruction was not recorded in the notes of the case management hearing), such that the Tribunal is not satisfied that this amounted to unreasonable conduct of the litigation on the Claimant's part (as a litigant in person). The Claimant can now be in no doubt that she should not contact members of the Respondent's staff except through their Solicitors and a repeat of this behaviour is now more likely to amount to unreasonable conduct of the proceedings. The same can be said of her use of confidential information obtained from the Respondent in arguable breach of High Court injunction.
36. It is not unusual for a party to make it clear to their opponent that they will be inviting the press (or others) to attend a Tribunal hearing. It is a move generally designed to raise the stakes of the hearing, but falls short of witness intimidation without more. The fact that the Claimant informed the Respondent's Solicitors on two occasions of her intention to invite the press or the CIT or members of the Respondent's parent Group to Tribunal hearings does, however, illuminate her wider motivations, in the Tribunal's judgment.
37. Notwithstanding the fact that some of the Claimant's actions in this litigation can be partly explained or excused by her status as a litigant in person, the manner and timing of her allegations and the wider context of her conduct in the litigation reveal at least part of her reasons for making allegations against the witnesses in these proceedings to the CIT. Individually, none of these factors might sustain the drawing of negative inferences, but cumulatively the Tribunal is satisfied that one of

the reasons the Claimant made allegations to the CIT and ensured that the witnesses were aware that she had done so, was in order to try to obtain an advantage in the litigation. In concluding this, the Tribunal acknowledges that some or all of the Claimant's allegations might still be true.

38. The following factors support the drawing of a negative inference concerning the Claimant's motivation: that the Claimant accepted that she had a professional obligation as an accountant to report the sort of misconduct she alleges against Mr Yu and Ms Tan to the UK authorities or the Respondent's auditors, but did not do so. The misconduct is alleged to have occurred during the Claimant's employment between 2016 and 2019, a time when she was CFO. In her oral evidence, the Claimant said some misconduct occurred as early as 2011, which pre-dated the previous CIT in 2016/2017, but the Claimant did not raise allegations at that time. The Claimant did not make these complaints to the Group either whilst employed by the Respondent or after her dismissal, when she accepts she had a professional obligation as the CFO to do so. She personally signed off one of the expense claims of Mr Yu about which she has now complains to the CIT. The fact that the Claimant has twice felt the need to inform the Respondent's Solicitors that the press, the Group or the CIT will be invited to attend hearings and, most importantly, that the Claimant copied Mr Yu and Mr Lei into her complaints to the CIT suggests that she is seeking to leverage her allegations within these proceedings. The coincidence of the only three personnel at the Respondent's being identified in her allegations to the CIT for negative comment being also those involved in her dismissal (and giving evidence in this claim) is notable. The inclusion of criticisms of Ms Tam's behaviour in the office (allegedly banging on the table and crying) is not consistent with the Claimant's claim to be a whistle-blower. The High Court was persuaded that it was necessary to make an order against the Claimant in relation to her retention and use of the Respondent's confidential information and yet the Claimant has used confidential internal correspondence obtained after that High Court order concerning Ms Tan's return to work within these proceedings.
39. In all the circumstances, the Tribunal is satisfied that the fact of the Claimant's allegations to the CIT and, more importantly, ensuring that Mr Yu, Ms Tan and Mr Lei were aware that she had made these allegations amounted to unreasonable conduct of these proceedings, as they constituted an attempt to obtain an advantage in the proceedings outside the Tribunal's normal processes. The Claimant has not used the Tribunal process itself to harass the Respondent such as might lead to a finding that the Claimant was acting vexatiously. Whilst the Claimant has made serious allegations against Mr Yu and Ms Tan, the Tribunal does not have the evidence to determine whether they are accurate or simply abusive.

Whether A Fair Trial Remains Possible

40. Although the Tribunal is satisfied that the threshold for striking out the Claimant's claims is met, the Tribunal considers that a fair trial remains possible. The Tribunal is not satisfied that Mr Lei is no longer willing to give evidence as a result of the Claimant's conduct, nor that Mr Yu or Ms Tan have been intimidated by her allegations in such a manner which bears on their ability to give evidence within these proceedings.
41. The Claimant's allegations against Mr Lei were qualitatively different from those which were levelled against Mr Yu and Ms Tan. The Claimant accused Mr Lei (implicitly) of failing to stand up to Mr Yu. It is the mildest of criticisms. In light of this and the fact that Mr Lei's term of office ended in October 2020 in any event, the Tribunal is not satisfied that there was any causative link between Mr Lei's return to China and the Claimant's allegations to the CIT. It would make no sense that Mr Lei was recalled to China in the face of a single, mild allegation and yet Ms Tan and Mr Yu, who faced multiple, more serious allegations, were not. For the same reasons, the Tribunal is not satisfied that Mr Lei was reasonably concerned that his being mentioned in the Claimant's complaint to the CIT might lead to his being recalled to China.
42. Apart from Mr Yu's account in his witness statement, there is no evidence before the Tribunal to suggest either that Mr Lei was concerned about the Claimant's disclosures to the CIT or that he is no longer willing to give evidence to the Tribunal as a result. Mr Flynn submitted that there was no evidence which the Respondent could have adduced to prove Mr Lei's unwillingness to give evidence, particularly as he is now back in China and likely to be in quarantine. Whilst the Tribunal appreciates the practical difficulties of obtaining evidence from Mr Lei now he is in China and a party always faces the bind in calling a witness to give evidence to prove their unwillingness to give evidence. However, it is not unreasonable to expect a reluctant witness in these circumstances to confirm in writing, at least internally within the Respondent or to its legal representatives, that he was not prepared to give evidence and the reason for this. The Tribunal is faced with the Respondent's claim that Mr Lei has been intimidated by the Claimant and the Claimant's claim that it is a fear of Mr Yu which is likely to be the source of any reluctance on Mr Lei's part to give evidence, but no independent evidence from or on behalf of Mr Lei as to the true position. Although the Tribunal has not accepted some of the Claimant's evidence, Mr Yu did not correct his own evidence concerning Ms Tan's return to work until the Claimant obtained a document confirming it. The Tribunal is, therefore, very cautious about drawing a conclusion concerning the central disputes of evidence between the Claimant and Mr Yu on such limited evidence.
43. The Tribunal acknowledges that Mr Yu and Ms Tan will have suffered at least temporary reputational damage as a result of the Claimant's allegations to the CIT (and no doubt a degree of trepidation that anyone would feel when under

investigation for serious misconduct). It is not the role of this Tribunal to determine whether that reputational damage is justified and nor does it have the evidence to do so – it will be a matter for the CIT. The Claimant too has presumably suffered as a result of the allegations and investigation for which she has been dismissed by the Respondent. She is also a Chinese national and subject to any pressures which arise thereby.

44. In relation to the CIT, there is no suggestion that the consequences of a CIT investigation would be persecutory in nature. The Tribunal was not referred to any independent evidence or country information which would suggest otherwise. Mr Yu accepted in his evidence that a proper investigation would be carried out by the CIT and, in re-examination, that he would be able to return to the UK if exonerated, albeit it might take months or even years for him to be able to do so. Whilst imprisonment could be an outcome from a negative finding of fraud or corruption, that would be the same in the UK in relation to those in public office who are found to have committed the same. In the context of the population of China, with a commensurately large civil service, 10 people imprisoned last year as a result of a CIT investigation is a very modest number and certainly not of a scale to suggest that Mr Yu or Ms Tan are at real risk such a fate.
45. The Tribunal takes judicial notice of the fact that the State holds a more prominent role in the lives of Chinese citizens than it does in most Western democracies (at least outside times of national emergency) and for that reason Mr Yu and Ms Tan's concern about a state investigation into their conduct is likely to be heightened. Although the Mr Yu expressed the fear that he could be recalled to China as a result of the Claimant's allegations, it is notable that this has not happened, neither has he or Ms Tan been suspended from their roles. The parent Group and the CIT have been aware of the Claimant's allegations against him and Ms Tan since May 2020 and the CIT completed the on-site investigation in July 2020. As such, unless the CIT eventually conclude there is substance in the Claimant's allegations, there is no logical reason why Mr Yu or Ms Tan would be recalled to China so long after the Claimant's allegations were first made. Whilst not wishing to minimise the stress involved in being investigated for serious misconduct, whether by an employer or by an external body, including the CIT, there is no evidence to suggest that any of the potential witnesses in this case would be medically unfit to give evidence as a result of such stress.
46. In the context of a case in which the respective parties make serious allegations against each other, the Tribunal is mindful of the danger of suppressing the ability of one party to raise genuine concerns about the other. In this case, the Claimant asserts that Mr Yu has fabricated allegations against her to conceal the true reason for her dismissal, which she considers relate to her request to work flexibly. To prevent these allegations being the subject of judicial process in a public hearing because the Claimant has allegedly fabricated allegations against her accuser(s) is

problematic in principle as it invites a summary assessment of which assertion of fabrication is the more compelling.

47. The Tribunal is not satisfied that the Respondent's ability to defend itself against the Claimant's allegations within these proceedings has been restricted by the Claimant's unreasonable conduct. In so far as the Claimant's conduct has led the Respondent to incur additional cost, there is a potential remedy for that in the Tribunal Rules. As set out above, the Tribunal is not satisfied that Mr Lei now refuses to give evidence due to the Claimant's conduct and it is not said that Mr Yu and Ms Tan are unwilling to give evidence (Mr Yu clearly did so at this hearing and the Tribunal has received no evidence from Ms Tan). To strike out a claim is a draconian order and whilst witnesses can clearly be intimidated by actions short of violence or the threat of violence, the Tribunal is not satisfied that this has yet happened in this case. Given a fair trial remains possible, it would not be proportionate for the Tribunal to strike out the Claimant's claims.
48. Whilst Mr Yu expressed the concern that the delay within these proceedings would give the Claimant more time to take other steps against him, it is clear that the Claimant has stopped contacting the Respondent and its employees save through its Solicitors, which suggests that the Claimant now has an appreciation of the need to do this (or at least the potential consequences of not doing so). In light of this application and judgment, Mr Yu and Ms Tan can be reassured that the Claimant should now be in no doubt as to the potential consequences of putting pressure on the Respondent's members of staff to gain an advantage in these proceedings. If further attempts are made for the Claimant to do so or to ignore Court or Tribunal orders, it is always open to the Respondent to renew their application to strike out the Claimant's claim.

### **Discovery**

49. The Claimant seeks discovery of her annual appraisals from 2011 to 2018. She asserts they are relevant because she was dismissed for performance related reasons and wishes to demonstrate that her appraisals did not reveal any such issues, when they would have done had she underperformed. The Claimant also wishes to demonstrate to the Tribunal that she had a good "track record" with the Respondent. The Tribunal established with the Claimant that her last appraisal had been at the end of 2018. With one exception (that the Claimant was conducting business through a limited company controlled by her prior to January 2019), the Respondent's allegations of misconduct which led to the Claimant's dismissal, post-dated the Claimant's 2018 appraisal.
50. The Respondent resists the application on the basis that the Claimant was dismissed for gross misconduct rather than poor performance, so her appraisal history is not relevant to the issues before the Tribunal. The Respondent is already

concerned about the size of the bundle for the full merits hearing, so adding seven years' worth of appraisal documentation will compound that. In relation to the one allegation which predates the Claimant's 2018 appraisal, the Respondent explains that the circumstances of this allegation were not known to the Respondent in 2018, so the omission of this issue from the appraisal is not significant.

51. The Tribunal has the power to order specific disclosure of documents, if such documents are relevant to an issue between the parties and it is proportionate to order their disclosure. The Claimant's historic capability is not in issue in these proceedings, indeed the Respondent confirmed that the Claimant had a "fairly good" appraisal record. The only appraisal which could be of any potential relevance to the determination of the reason for the Claimant's dismissal is her final one in 2018, as one of the allegations of misconduct against her pre-dated that appraisal. However, in circumstances where the Claimant denies that misconduct occurred and the Respondent says the alleged misconduct was not discovered until 2019 in any event, the Claimant's appraisal documentation is not going to assist the Tribunal to determine the issues in dispute between the parties. It is, of course, understandable, that the Claimant wants to balance some of the negative evidence relied on by the Respondent concerning her alleged misconduct with a more positive history of her performance for the Respondent, however, as that evidence is not relevant to an issue between the parties, the obligation to disclose it does not arise. The Claimant's application is, therefore, refused.
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