Case Number: 2405098/2019
2410182/2019
2410983/2019
2400082/2020
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr M Turner

Respondent: UK Visas and Citizenship, The Home Office

Following a preliminary hearing

Heard at: Liverpool

On: 3 November 2020 and (in the absence of the parties) 11 January 2020

Before: Employment Judge Horne

Representatives
For the claimant: In person
For the respondent: Mr S Redpath, counsel

RESERVED JUDGMENT

1. The claim is not struck out.
2. The response is not struck out.
3. The claimant's application for a preparation time order is refused.

REASONS

Format of the hearing

1. This judgment follows a preliminary hearing on 3 November 2020.
2. The heading to this judgment marked with the hearing code "V". This code indicates that part of the preliminary hearing took place on a remote video

platform. Most of the hearing was conducted inside the tribunal room, but the tribunal used the CVP platform to hear evidence from one witness who participated remotely.

3. There was some disagreement amongst the parties about whether or not the respondent had complied with an order of the tribunal for the provision of equipment. Following some discussion, it was agreed that the hearing would proceed on a partly-remote basis.

Representation

4. According to the tribunal's records, the claimant represents himself in the conduct of his claim. Towards the end of the preliminary hearing, counsel for the respondent asked the claimant to clarify whether this continued to be the case, or whether the claimant in fact had a representative. The reason for this enquiry was that a number of e-mails have emanated from the claimant's e-mail address, but appear to have been written by someone else. The claimant confirmed at the hearing that he continued to represent himself, but that he had had assistance in writing e-mails from a "pal" who was legally trained. He did not name his pal. He confirmed that he knew what was in the e-mails that had been written for him when he sent them. For convenience, I refer to e-mails sent from the claimant's address as having been written and sent by the claimant.

Matters to be decided at the preliminary hearing

5. At a preliminary hearing on 3 November 2020, I was required to consider three applications. The first application was made by the claimant on 6 March 2020. In that application he sought an order that part of the responses be struck out and that the respondent be ordered to pay the claimant's costs. The second was the respondent's application dated 1 April 2020 for the claims to be struck out. The third was the claimant's further application dated 7 April 2020 for an order striking out the responses.

The claimant's first strike-out application

6. The grounds for the claimant's first strike-out application were that the respondent had failed to comply with a case management order. The respondent had been required to state its position in relation to the claimant's alleged disability and had failed to do so by the deadline.

The claimant's application for costs

7. The claimant also sought an order that the respondent pay his costs caused by the respondent's failure to concede that he was disabled. The application was for:

> "the time it took to draft a disability impact statement for him and the cost of obtaining his medical records (£50) and the recent report from Dr Kumar (£600). The Claimant had already provided the Respondent with nearly all of the medical documents provided and the Claimant would not have incurred those costs had the Respondent conceded disability."

The respondent's strike-out application

8. The respondent's application, dated 1 April 2020, was made on the following grounds:

   "

   (1) The manner in which proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious (Rule 37 (1)(b) [of the Employment Tribunal Rules of Procedure 2013)

   (2) The Claimant has not complied with an order of the Tribunal (Rule 37(1)(c))"

9. In broad outline, the alleged factual basis for the respondent's application was that the claimant had made covert recordings whilst at work, had e-mailed media organisations inviting them to listen to those recordings, and had failed to comply with tribunal orders requiring him to provide further information about what he had done.

10. The application concluded:

   > "The Claimant's conduct, in sending information about the hearing, to various journalists is unreasonable. When advised that his conduct was unreasonable, the Claimant sent further e-mails to journalists. The Respondent is extremely concerned about the Claimant's behaviour because he worked in UK Visas and Immigration which is run by the Home Office, and conversations will have been taking place within the vicinity of the Claimant that contained highly sensitive and personal confidential data in relation to potential immigration applications. In addition, we have concerns that the privacy of the Claimants colleagues, many of whom are not part of the Claimant's claim, will have been breached by these recordings. Despite numerous requests by the Respondent and the Tribunal, the Claimant has failed to provide any further information regarding where these recordings are stored, who they have been given to and what they contain. The Claimant appears to be using this litigation as a vehicle to play games with the Respondent without any comprehension of how serious this is. In addition, the Claimant's multiple references to the Respondent's solicitor, Ms Sample, being a liar and threatening to report her to the SRA is unnecessary and unreasonable."

The claimant's second application

11. The claimant made an application on 7 April 2020, again to strike out the response. This time the grounds of the application were:

   11.1. that the respondent had "wilfully and deliberately not complied with every order the tribunal issued at the PH on 20 January 2020…";

   11.2. that the respondent had "scandalously and unreasonably conducted the proceedings" in that:

11.2.1. the claimant would "provide audio evidence that [the respondent] wilfully and deliberately lied in their defence of [the claimant's] discrimination claim to mislead the Tribunal";

11.2.2. after the claimant presented his first claim, the respondent "engaged in verbally abusive and threatening behaviour to intimidate [the claimant]";

11.2.3. in breach of section 55 of the Data Protection Act 1998, it "distributed" a password that the claimant had been ordered to provide;

11.2.4. it "willfully and deliberately started destroying evidence to prejudice [the claimant's] case";

11.2.5. "the respondents … started phoning [the claimant] on withheld number… breathing down the phone and intoxicated telling [the claimant] they're going to "fuck [the claimant] up" and to "fuck off you weirdo" forcing [the claimant] to change his phone number;

11.2.6. the respondent's solicitors had applied to strike out the claimant's case "on the basis of fabricated documents" and refused to provide witness statements.

Evidence and submissions

12. I considered documents from a variety of sources. The claimant relied on documents in a 95-page bundle e-mailed to the tribunal on 2 November 2020. This bundle was unfamiliar to the respondent's counsel, because the claimant had sent it to an incorrect e-mail address. I permitted the claimant to rely on it and gave the respondent a limited period of time to digest its contents.

13. The respondent's bundle was e-mailed to the tribunal on 29 October 2020. The claimant objected to my reading the respondent's bundle. I nevertheless decided to consider it. This was a case management decision for which written reasons are permitted to be very brief. I did not think that reading the respondent's bundle would cause any disadvantage to the claimant. None of the documents in the bundle were new to him: they were all either documents that the claimant had already received weeks beforehand or documents submitted by the claimant. I was also satisfied that the claimant could not reasonably be thrown by any change in page numbering. The respondent had already sent a previous electronic copy to the claimant on 26 August 2020. The previous copy was substantially the same in numbering and content as the bundle for this hearing, except that that the previous bundle did not contain the claimant's most recent outline submissions.

14. The respondent called Mrs Amy Wakefield as a witness. She gave oral evidence using the CVP video platform. She confirmed the truth of her written statement and answered questions. Unfortunately, the equipment in the room was not well suited to partly-remote hearings. There were multiple laptops in the room. If more than one laptop had its microphone switched on at any one time, there was so much feedback that it was virtually impossible to hear what

Mrs Wakefield had to say. We made most progress when the claimant told me his question and I put it directly to Mrs Wakefield. I checked with the claimant periodically whether he was happy to proceed to question Mrs Wakefield in these circumstances. He confirmed his agreement to proceed.

15. Amongst the facts in dispute were what Mrs Wakefield had seen and done when accessing the claimant's DropBox account. Her evidence in this regard would have been more robust had she taken screenshots or photographs of what she saw. As it was, she had to rely on a verbal description of what was on the screen, based on her own recollection of what she had seen.

16. The claimant made factual allegations about what the respondent and its representatives had done with data on his DropBox account. His evidence in support of those allegations consisted of screenshots that he had taken from his own computer, coupled with explanations given orally by him about what those screenshots tended to show.

17. There was no expert evidence. I do not make any criticism of either party for not calling an expert: the cost of expert evidence will almost always be disproportionate to satellite issues such as this. But the absence of expert evidence made it harder for me to make findings about what had happened.

18. During the claimant's final submissions, he reminded me that one of his grounds for striking out the responses was that they contained lies. He went to to say that the ET3 responses had sought to deny knowledge of his disability and had denied that the claimant had provided medical evidence. That denial was false, he said, because "I am on tape providing my medical evidence." I asked the claimant if he wanted me to listen to the audio recording. Correctly in my view, the claimant told me that this would need to wait until the final hearing.

19. On 6 January 2021, the claimant e-mailed the tribunal making further observations. His e-mail appeared to try to resurrect the argument that I ought to strike out the responses because his audio recordings would show that Ms Sample had lied by seeking to deny knowledge of disability.

20. The claimant did not make a witness statement. During the hearing I asked him if he wished to give oral evidence. He replied that he would be happy to rely on his written submissions and the documents he had provided. I explained to him that, if he did not give oral evidence and was not prepared to answer questions, I would not be able to attach as much importance to what he had to say, because I would have no idea how it would stand up to questioning. The claimant confirmed that he would not give oral evidence, stating, "I don't want to be interrogated by Mr Redpath". He told me that he had "severe difficulties", which I took to be the effect of his ADHD and OCD on his ability to answer questions. He did not ask for any adjustments to be made to enable him to answer questions more easily.

21. Taking the claimant's disability into account, I did not think that it was appropriate to draw any inferences adverse to the claimant from the fact that he had not given evidence. But I was still left with the fact that the claimant had

not confirmed his version of events on oath or with a written statement of truth; nor had his version of events been tested by questioning. I could not therefore give it as much weight as that of Mrs Wakefield.

Background

22. The claimant is disabled with Obsessive Compulsive Disorder (OCD) and Attention Deficit and Hyperactivity Disorder (ADHD). He was employed by the respondent as an Executive Officer between 15 October 2018 and 10 October 2019. Amongst the work done by the claimant and his colleagues was processing and discussing applications for asylum.

23. The claimant makes a great many allegations of breaches of the Equality Act 2010 in relation to his disabilities. The Statements of Claim in his first four claim forms, when taken together, run to over 450 pages. He complains of having been badly treated by a succession of line managers and colleagues and of having been victimised for raising a grievance. His later claims complain of being victimised for presenting the earlier claims. Many of his claims arise out of words spoken during conversations in the workplace. His Statement of Claim quote colleagues' and managers' comments at length, giving the appearance of having kept a word-for-word record of their conversations.

24. The respondent obtains Human Resources support from the Ministry of Justice. During the claimant's employment and in the course of these claims, the respondent has obtained advice from Mrs Amy Wakefield, a Ministry of Justice employee based in Newport, South Wales. Mrs Wakefield has security clearance to enable her to have access to Home Office information. Also based in the Newport office is a call centre operated by Shared Services Connected Limited (SSCL).

25. In its response to these claims, the respondent is represented by Womble Bond Dickinson. During early 2020, the solicitor dealing with the case was Ms Clare Sample.

Procedural history

26. The claimant has presented five claims against the respondent. The first four claims have case numbers 2405098/2019 (presented on 29 April 2019); 2410182/2019 (presented on 16 July 2019); 2410983/2019 (presented on 21 August 2019); and 2400082/2020 (presented on 5 January 2020). A fifth claim is currently stayed, awaiting the outcome of the applications in the first four claims.

27. The respondent's responses to the first three claims all stated that the respondent did not admit that the claimant had a disability within the meaning of section 6 of the Equality Act 2010.

28. On 5 January 2020 the claimant presented his fourth claim. He received an e-mail from the tribunal acknowledging receipt.

29. The Statement of Claim for the fourth claim ran to 66 pages. It quoted conversations at length and stated that the claimant had audio-recorded his conversations with numerous colleagues.

30. At 8.30am on 7 January 2020, the claimant forwarded the tribunal's 5 January e-mail to Mr Mark McEvoy of the respondent and Ms Clare Sample of the respondent's solicitors. His forwarding e-mail was copied to three other e-mail addresses. These addresses appeared to belong to three newspapers: *The Guardian*, the *Manchester Evening News* and *The Mirror.* The text of his e-mail read:

> "A second e-mail with the dates of the liability hearing will be sent to the same inbox.
>
> If you're coming to have a listen all of the covert recordings have been uploaded to an **iCloud** if you'd like the log in details and a copy of the hearing bundle pop me an e-mail."

31. I have added emphasis to the word, "iCloud". This is because its meaning has taken on some significance in the parties' arguments before me. iCloud is an online file storage service provided by Apple Inc. Its association with Apple is very well known, not least because the "i" prefix is common to the iPhone and iPad (which followed the iPod and iTunes). The claimant contends that he never uploaded any recordings to Apple iCloud, but did upload some recordings to DropBox.

32. On 9 January 2020, at 6.34pm, Ms Sample e-mailed the tribunal expressing her concern about the claimant's e-mail. On the respondent's behalf she alleged that the claimant's conduct was a breach of the General Data Protection Regulation (GDPR) and was an abuse of the disclosure process. She warned of an application to strike out the claim if the claimant's conduct persisted. Her e-mail was copied to the claimant.

33. The claimant sent a further e-mail at 9.39 the same evening. This time, the e-mail was addressed to two television networks: ITV and Channel 4. Copied into the e-mail were Ms Sample and Mr Richard Parkinson, the respondent's Operations Manager. Like the e-mail of two days before, it forwarded the tribunal's 5 January e-mail. This time, the covering e-mail read:

> "A second e-mail with the dates of the liability hearing will be sent to the same inbox.
>
> If you're coming to have a listen all of the covert recordings have been uploaded to an iCloud if you'd like the log in details and a copy of the hearing bundle pop me an e-mail."

34. The claimant's e-mails of 7 and 9 January 2020 had the following in common:

    34.1. No audio files were attached to either e-mail

    34.2. Neither e-mail contained a link to any cloud storage location

35. There is no evidence that the claimant sent any other e-mails to media organisations. Nor is there any evidence that any media organisations e-mailed the claimant asking for login details or audio recordings. Indeed, the claimant's screenshots of his Gmail account tend to show that no such e-mails were received.

36. A preliminary hearing took place before Employment Judge Buzzard on 20 January 2020. All four claims were discussed. The claimant represented himself and the respondent was represented by Mr Redpath, who also represented the respondent at the hearing before me.

37. There is some common ground about what was said at that hearing:

    37.1. The claimant told EJ Buzzard that, throughout his employment, he had recorded the entirety of events audible within his vicinity for the whole working day. The claimant further confirmed that these recordings had been made covertly.

    37.2. The claimant also told EJ Buzzard that he had brought claims against previous employers and been found to have been disabled. He said that he would under no circumstances, regardless of any orders made, ever permit the respondent to have access to his medical records. He said that there were a number of medical documents in his possession, including a medical report from Dr Kumar, which he expected within the next 1-2 weeks.

38. There is a considerable amount of dispute about what else was said. I have not heard any oral evidence or been provided with any witness statements or contemporaneous notes.

39. Following the hearing, EJ Buzzard prepared a written case management summary which was sent to the parties on 10 February 2020. Paragraphs 36 and 37 of the summary stated:

> "(36) The claimant further confirmed that he had, on or before 9 January 2020, uploaded and sent at least some recordings to an iCloud location. He had then, on 9 January 2020 proceeded to e-mail a number of journalists, including Channel 4 and Granada TV journalists, with a link to the iCloud location where the recordings had been uploaded, offering to provide them with the log in details for that location. The claimant confirmed he had provided such login details to at least some of the journalists.
>
> (37) The claimant copied the respondent into the initial email sent to the journalists. This email clearly states that, "*All of the covert recordings have been uploaded*". At the preliminary hearing the claimant asserted that this statement was not correct. **Specifically he asserted that he had not, in fact, uploaded all the covert recordings to the iCloud location, but only those parts of the recordings which he believed were relevant to his claims of discrimination and unfair dismissal**."

40. The case management summary made no mention of DropBox.

41. The claimant later challenged the accuracy of seven specific paragraphs in the case management summary including paragraphs 36 and 37. He contended, and still maintains, that he did not tell EJ Buzzard that he had provided a "link" to any iCloud location, or that he had provided login details to any journalists. The claimant's version of what happened at the preliminary hearing was that Mr Redpath had wrongly stated that the claimant had "sent audio evidence to 'the media'" and the claimant had denied that this had occurred. The claimant did not challenge the part of paragraph 37 which I have indicated in bold.

42. The case management summary was followed by a series of case management orders. These included, at paragraph 2.1, a requirement to provide four different pieces of medical evidence to the respondent in connection with his contention that he was disabled. One of these was a report from Mr Kumar. Then, at paragraph 2.3, the order continued,

> "By … 2 March 2020… the respondent shall confirm to the claimant and Tribunal the following:
>
> 1. whether the respondent accepts the claimant was a disabled person as defined by the Equality Act 2010 at all or any of the relevant times to the claimant's claims; and
> 2. the extent to which the respondent accepts they were aware of the claimant's medical conditions which are now relied on as amounting to a disability as defined by the Equality Act 2010."

43. On the subject of the claimant's audio recordings, paragraph 4.1 of the order provided:

> "The claimant must by no later than 4.00pm on 21 January 2020 have disclosed to the respondent details of the access login and password so that the respondent can access the recordings uploaded to the iCloud and disclosed to the media. The claimant shall ensure that the recordings available at those login details are not in any way changed, and that the access provisions given to the respondent allow them full access to those recordings. The claimant confirmed he understood that he was obligated to comply with this deadline despite the fact that the written order to that effect would not reach him prior to the deadline expiring."

44. Paragraph 4.2 of the order required the claimant, by no later than 17 February 2020, to disclose to the respondent full transcripts of each and every recording he uploaded to the iCloud.

45. On 21 January 2020, the claimant e-mailed the respondent's solicitors with what appeared to be a username and password, followed by the words, "Have fun". The e-mail did not mention DropBox or any other cloud storage location. Ms Sample tried entering the details into iCloud, but was informed that the login details were incorrect.

46. The claimant has produced a screenshot purporting to show that, at 11.44 on 22 January 2020, a new user attempted to gain access to the claimant's DropBox

account. According to the screenshot, the new user was based in Newport. I believed Mrs Wakefield when she told me that she had not attempted to gain access to DropBox on that day. In fact, she had not been in the office at all on 22 January 2020.

47. On 23 January 2020 Ms Sample asked the claimant to provide the correct details, but received no response. On 29 January 2020 she e-mailed the tribunal requesting an Unless Order. The e-mail was copied to the claimant. Her e-mail specifically stated three times that the account she had tried to access was "iCloud".

48. The claimant replied the same day. He confirmed that his login details were correct. He accused Ms Sample of lying and stated that she had been reported to the Solicitors Regulation Authority. Nowhere in the e-mail did he mention that Ms Sample might have been looking in the wrong place. It was only when the respondent's solicitors replied, inviting the tribunal enter the login details into iCloud for themselves, that the claimant first stated in writing that the file storage location was DropBox all along.

49. Ms Sample provided the claimant's login details to Mrs Wakefield. Ms Sample told Ms Wakefield that her work computer would not give her access to DropBox, and asked Ms Wakefield to check what files were there.

50. On 30 January 2020, Mrs Wakefield opened a Chrome Book laptop and signed into DropBox using the claimant's username and password. There is a conflict of evidence about what she found and what she did.

51. Mrs Wakefield told me that she had never used DropBox before. When she opened the claimant's DropBox account, she saw a "dashboard" showing recent activity. All she could find on the dashboard were two audio recordings which were marked as having been "uploaded" on 29 January 2020. Their duration was 17 minutes and 4 minutes respectively. When she listened to the recordings, all she could hear was muffled background noise. She looked for more files, but could find none. She did not see any personal information such as photographs or records.

52. I believe that Mrs Wakefield was telling me the truth.

53. The claimant contends that her evidence is disproved by his screenshots. I disagree. Here is my analysis of the screenshots, together with my reasons for thinking that they do not undermine Mrs Wakefield's account.

    53.1. One screenshot shows that a user based in Newport signed into the claimant's DropBox account on 30 January 2020. The screenshot is timed 1.35pm and lists the Newport user's last activity as having been "1 hour ago". The claimant says that the screenshot shows that the Newport user was signed in for over an hour, and therefore must have done more than listen to two brief recordings. But that is not what the screenshot shows. It shows that the Newport user had not *signed out*, but that their activity had ceased an hour ago.

53.2. There is a screenshot which indicates that the IP address of the Newport User was the same address as SSCL in Newport. That does not necessarily mean that the Newport user was not Mrs Wakefield, or that Mrs Wakefield works for SSCL. It may be explained by the IT platform that Mrs Wakefield was using for the IT platform.

53.3. Another screenshot shows that something happened in the claimant's DropBox account to trigger a multi-factor authentication code to be sent to the claimant's mobile phone at 1.01pm. That may have been Mrs Wakefield signing in to the account. But if that is correct, I do not understand why, 34 minutes later, the Newport user's last activity would be recorded as having been "1 hour ago". I cannot discount the possibility that the claimant may have been required to enter an authentication code simply by accessing DropBox on his app.

53.4. A series of screenshots show the folders and files that it was possible for the claimant to open in DropBox. The claimant says that these screenshots demonstrate that Mrs Wakefield was able to see and open more files than she has told the tribunal about. The difficulty with relying on these screenshots is that there is no evidence to explain what they mean. They show what was available using the DropBox mobile phone app to someone who knew exactly what they were looking for. The screenshots do not give me any real idea of what someone using a Chrome Book would have seen, or how obvious the files and folders would have been on the "dashboard".

53.5. One screenshot time-stamped 1.34pm shows that, 30 minutes previously, someone had opened a file ending "191.wav" in a folder. Another shows that "191.wav" had been deleted at 1.07pm. A second file (ending "127.wav" was deleted at 1.33pm. If the first screenshot is correct, the timings suggest that this was not done by the Newport user. At that time, according to the first screenshot, the Newport user was inactive in the account. By 1.35pm (one minute after the second file was deleted), the claimant was an active user and had started taking screenshots.

53.6. A photo file, according to one screenshot was opened on 24 November 2017. That might tend to suggest that the DropBox account had not been created especially for the purpose of the litigation. But it does not tell me what Mrs Wakefield was able to see on 30 January 2020.

54. The respondent's solicitors e-mailed the tribunal on 31 January 2020 pointing out what they had found and asking for orders for the claimant to provide specific information.

55. Having reviewed the correspondence, EJ Buzzard caused a letter dated 22 February 2020 to be sent to the parties, giving the following instructions:

> "The claimant must confirm, by no later than 11 March 2020, to the Tribunal and the respondent, full details of any covert recordings he made during his employment with the respondent that he has uploaded to any online or cloud storage system at any time. He must for each recording state:

1. the date it was uploaded to the online storage; and
2. the filename of the recording; and
3. the file size of the recording; and
4. the date the recording was created (or first downloaded from the recording device); and
5. details of the online storage service used for that recording, to include the username of the storage account holder; and
6. the date that the correct access information to allow the respondent to access the recording was sent; and
7. details of any persons who have accessed that storage (other than the claimant); and
8. the date of each and every access to the recording (other than by the claimant; and
9. the dates when any recordings that have been deleted from the online storage were deleted; and
10. confirmation of who deleted any recording from the online storage if that information is available to the claimant."

56. The tribunal's letter also laid down procedural requirements for any application for an unless order, "or any other application, in the light of the confirmation provided by the claimant as set out above."

57. By 6 March 2020, the respondent had not informed the tribunal whether or not it conceded the claimant's disability. The respondent accepts that the deadline was actually 2 March 2020. On 6 March 2020, the claimant made his first strike-out application, as already indicated, on the basis that the respondent had breached the order by failing to provide this information. Ms Sample replied almost immediately on the respondent's behalf, with an apology, a concession that the claimant was disabled, and an explanation that the deadline had been wrongly diarised.

58. In continued breach of paragraph 2.3(2) of the case management order, the e-mail did not indicate whether or not the respondent denied knowledge of the claimant's disability. The claimant informs that the respondent has indicated that it will not rely on lack of knowledge as a defence. I could not find a reference to that concession having been made by the respondent.

59. On 12 March 2020, the claimant provided 8 screenshots, apparently from his mobile phone, showing a long list of recordings. For each recording, the screenshot indicated the file size and date of the recording, but did not give any of the information required by the tribunal as to when the recording had been uploaded to or removed from the cloud storage.

60. On 1 April 2020, as already indicated, the respondent applied for the claims to be struck out.

61. Attached to the respondent's application were 52 pages of documents. They fell into three categories: orders and correspondence from the tribunal, documents supplied by the claimant and correspondence between the parties. The claimant does not suggest that any of the correspondence was not sent, or that he did not provide the documents on which the respondent relied.

62. On 7 April 2020, the claimant e-mailed the tribunal. This is one of the e-mails that appears to have been written by someone on his behalf. Part of his e-mail contained his second application to strike out the responses, which I have already set out in some detail.

63. His e-mail also set out his version of events in response to the respondent's strike out application. He challenged incorrect statements that Mr Redpath had made about his e-mails of 7 and 9 January 2020. The claimant then gave his own explanation of what the e-mails meant. This is what he had to say:

> "The first e-mail is dated 07 January 2020: it was addressed to [the respondent's] solicitor Ms Sample: in the e-mail [the claimant] was obviously asking Ms Sample if she wanted his Dropbox password to listen to the part of the tape he intended to play to the EJ he'd digitally copied and synced with Dropbox because he'd transcribed that part of the tape in the pleadings: and a copy of the bundle he brought with him (the blue folder he gave the clerk EJ Buzzard left on the desk when leaving the room) in advance of the hearing. The other e-mail to which I have referred is merely [the claimant] forwarding that e-mail to [the respondent] to ensure that [the respondent] had received the e-mail from the ET in advance of the PH: because an automated e-mail advised that Ms Sample would be out of the office and her e-mail would not be checked."

64. In his various iterations of written submissions, the claimant has advanced essentially the same explanation for the two e-mails.

65. I cannot accept this explanation. It is inconsistent with the e-mails themselves. In particular,

    65.1. The claimant says that the purpose of sending the e-mail was to enable Ms Sample to listen to the audio-recording he intended to play to the employment judge at the preliminary hearing. That explanation lacks credibility. If the offer was really meant for Ms Sample, it would not have been prefaced with the words, "If you're coming to have a listen". The claimant knew that the respondent's representatives would not just be passive listeners at the hearing.

    65.2. The e-mails did not just offer access to a select "part of the tape" that the claimant intended to play to a judge at a hearing. It offered access to "all the recordings". To any reasonable reader of the e-mail, the phrase "all the recordings" can only have meant all the recordings referred to in the attached Statement of Claim. There was nothing else in the e-mail to suggest any different meaning.

65.3. The 9 January e-mail was not just "merely the claimant forwarding [the tribunal's 5 January] e-mail to the respondent". As well as copying Mr Parkinson, he named two further media organisations.

66. I think it is more likely that the claimant was trying to attract interest from media organisations in the facts of his claim and to give them the opportunity to listen to the audio-recordings if they were interested. He also wanted Ms Sample to know that this was what he was doing, so she would know that she might have to take on the media as well as the claimant himself.

67. The 7 April 2020 e-mail went on to explain why the claimant had not complied with the instructions in the tribunal's letter of 22 February 2020. He stated,

> "[The claimant] didn't understand the instructions and lacked the ability to answer them because of the learning disability, and so to try to comply sent the requested information for the recordings he has."

68. Despite, by then, having had help from a legally-trained assistant, he still did not provide the information that the letter of 22 February 2020 had required him to provide.

69. There were a number of delays in the strike-out applications being heard. A preliminary hearing had been listed to take place on 1 May 2020, but that hearing could not proceed, because the strike-out applications needed to be heard in public and, at that time, the tribunal was conducting all its hearings by telephone as a response to the COVID-19 pandemic. The hearing was re-listed for 5 August 2020, but postponed to 30 September 2020 to accommodate the availability of the respondent's counsel. Unfortunately, the hearing could not proceed on 30 September 2020 either. Shortly before the hearing, the claimant informed the tribunal that he had contracted COVID-19 and could not take part in the hearing. The preliminary hearing was relisted to take place on 3 November 2020.

70. For the purpose of the hearing the claimant has prepared three sets of outline submissions and a final written closing submission. Each of these documents maintains the allegation that Ms Sample has lied.

71. The claimant still has not provided any transcripts of any audio recordings. His position is that the conversations are already set out in his Statements of Claim.

72. The claimant has continued to send e-mails to the tribunal. His latest e-mail, dated 6 January 2021 observed:

> "I am satisfied that the Court of Appeal will agree that is I am also satisfied that if it was any other respondent you would strike out their response without hesitating."

73. The claimant did not explain on what basis he was satisfied that this would be the case.

Unresolved factual disputes

74. There were some factual disputes on which I was unable or unwilling to reach a conclusion. This was because of the lack of reliable evidence, coupled with the need to take a proportionate approach. In particular:

74.1. The respondent implies that the claimant uploaded audio files to DropBox after 20 January 2020 as a way of camouflaging his true activity which was on iCloud. This is a serious accusation. Whilst it is not baseless, bearing in mind what Mrs Wakefield saw on 30 January 2020, and the claimant's initial use of the word "iCloud" in his e-mails, I did not think that the evidence was reliable enough to enable me to conclude that this had happened. Screenshots from the claimant appeared to show DropBox in use long before 20 January 2020.

74.2. I was unable to make a finding as to whether or not the claimant mentioned DropBox to EJ Buzzard at the preliminary hearing on 20 January 2020. The bundle did not contain any contemporaneous notes. There was no witness statement from anyone about what was said.

74.3. For the same reasons, I also found it difficult to make any finding about what, if anything, was said at the preliminary hearing about the importance of keeping the claimant's login details confidential.

74.4. The claimant says that someone tried to gain access to his DropBox account on 22 January 2020. I made no finding about that, other than to conclude that, if it happened, it was not Mrs Wakefield.

Relevant law

<u>Overriding objective</u>

75. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing and dealing with cases in ways that are proportionate to the importance and complexity of the issues.

<u>Striking out</u>

76. Rule 37 provides, so far as is relevant:

> (1) At any stage of the proceedings…. 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 … 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 [or] unreasonable…;
>
> (c) for non-compliance … with an order of the Tribunal;
>
> …

(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

…

77. In *Blockbuster Entertainment Ltd v. James* [2006] EWCA Civ 684, at paragraph 5, Sedley LJ said this:

> [The power to strike out a claim is] a Draconic power not to be readily exercised. It comes into being if as in the judgement of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. If these conditions are fulfilled it becomes necessary to consider whether even so, striking out is a proportionate response..."

78. In *Abegaze v. Shrewsbury College of Arts & Technology* [2009] EWCA Civ 96, at paragraph 15, Elias LJ summarised the legal principles applicable to an application to strike out under what it now rule 76(1)(b).

> "…it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed."

79. Intimidatory behaviour can be unreasonable conduct justifying a decision to strike out *Force One Utilities Ltd v. Hatfield* [2009] IRLR 45.

80. What is done in a party's name is presumptively, but not irrebuttably, done on that party's behalf: *Bennett v. Southwark LBC* [2002] EWCA Civ 23 per Sedley LJ at paragraph 26.

81. Where a tribunal is considering striking out a claim or response for a party's unreasonable conduct, it must follow four steps:

81.1. First, it must ask itself whether the party has not just behaved unreasonably, but has conducted the proceedings unreasonably.

81.2. Second, it must decide whether or not the conduct was deliberate and persistent or so serious that it would be an affront to the tribunal to allow the party to continue to pursue their case. Unless the conduct falls into those categories, the tribunal must decide whether or not a fair hearing is still

possible. If a fair hearing is still possible, the claim or response should not be struck out.

81.3. Third, even where a fair hearing is no longer possible, the tribunal must consider whether striking out is a proportionate sanction, or whether some lesser remedy is appropriate.

81.4. Fourth, in the case of a response being struck out, the tribunal should consider whether it would be appropriate to allow the respondent to contest certain issues, such as the claimant's remedy.

(See *Bolch v. Chipman* [2004] IRLR 140.)

82. Where a party has disobeyed an order, the guiding consideration is the overriding objective. The tribunal must consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still whether a fair hearing is possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience: *Weir Valves & Controls (UK) Ltd v. Armitage* [2004] ICR 371, EAT, at para 17.

83. When considering whether or not to strike out a claim or response for non-compliance with an order, it is a relevant consideration that tribunal orders are there to be obeyed. Otherwise, tribunals cannot case manage and achieve fairness between the parties: *Essombe v. Nandos Chickenland Ltd* UKEAT 0550/06 at para 18.

84. A party is not to be deprived of their right to a proper trial as a penalty for disobedience of rules relating to disclosure, even if such disobedience amounts to contempt for or defiance of the court, if that object of the rules is ultimately secured. But where a litigant's conduct amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled and bound to refuse to allow that litigant to take further part in the proceedings and, where appropriate, to determine the proceedings against that party: *Arrow Nominees Inc v. Blackledge* [2000] 2 BCLC 167, CA.

Costs

85. Rules 74 to 76 of the Employment Tribunal Rules of Procedure 2013 provide, relevantly:

> **74.**—(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party …
>
> (2)"Legally represented" means having the assistance of a person … who—(a)has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

75.—

…

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented."Preparation time"means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.…

76.—(1) A Tribunal may make a… preparation time order, and shall consider whether to do so, where it considers that—

(a) a party… has acted … unreasonably … in the way that the proceedings (or part) have been conducted; [or]

(b) any … response had no reasonable prospect of success.

…

86. A tribunal faced with an application for costs must decide, first, whether the power to award costs under rule 76 has been triggered and, second, whether in its discretion it should make a costs order and, if so, in what amount.

87. In deciding whether unreasonable conduct should result in an award of costs, the tribunal should have regard to the "nature", "gravity" and "effect" of the conduct. There is no need for rigid analysis under the separate heading of each of those three words. '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': *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78.

Social context – ADHD and OCD

88. The *Equal Treatment Bench Book* provides guidance to tribunals about the impact of ADHD on a party's ability to participate in tribunal proceedings. Relevantly, it reads:

"Some experts believe the following symptoms are typical of ADHD in adults:

- Carelessness and lack of attention to detail
- Inability to focus or prioritise.

…

- Forgetfulness
- Restlessness and edginess.
- Difficulty keeping quiet and speaking out of turn. Blurting out responses and often interrupting others.

- Mood swings, irritability and quick temper.
- Extreme impatience.
- Inability to deal with stress.

The consequence of inability to focus can be that as a person is listening to a judge explain procedure or trying to focus on cross-examination questions, entirely different thoughts on an entirely different subject uncontrollably interpose.

Reasonable adjustments In case preparation prior to the hearing, especially with a litigant in person. Reasonable adjustments might include:

•Giving one case management instruction or Order at a time, not several at once.

•Spelling out in writing what actions need to be taken.

•Not asking the person to provide over-complex particulars and schedules.

Where appropriate, adjustments for the hearing may include:

•Speaking, asking questions and giving information in short sentences.

•Allowing pauses for the person to process what has been said and respond.

•Readiness to calmly repeat instructions and questions.

•For a litigant in person, frequent summing up of the current stage of court process and what is expected.

•Choosing a room with minimal outside noise and reducing distractions within the room.

•Increased short breaks to refocus.

•In severe cases, allow the person to provide written answers to written questions.”

Conclusions – claimant’s first strike-out application

Breach of order

89. Paragraph 2.3(1) of the order sent to the parties on 10 February 2020 required the respondent to indicate its position in relation to the claimant’s disability. In technical breach of that order, the respondent made its concession one day late.

90. So far as I can tell, the respondent still has not complied with paragraph 2.3(2) of the order. It has not stated whether or not it resists any of the claims on the ground of lack of knowledge of the claimant’s disability.

91. The tribunal therefore has the power to strike out the responses, or part of them.

Discretion

92. It would be wholly disproportionate to strike out any part of the responses for the delay in conceding disability. The disability issue has now disappeared. The delay has not affected the tribunal's ability to determine the other issues fairly.

93. It would also be disproportionate to strike out the responses for breach of paragraph 2.3(2). In my view, fairness can easily be restored by requiring the respondent to make its position clear by a new deadline, but this time with a sanction for non-compliance. The sanction should be limited to the issue of knowledge. Delays in clarifying the respondent's position on knowledge do not make it any more difficult for the remaining issues to be determined fairly.

Conclusions – claimant's costs application

No power to make a costs order

94. The claimant has not demonstrated that the person who has given him assistance has any of the rights of audience described in rule 74(2). He is therefore not legally represented and was not legally represented during the time he allegedly incurred costs.

No power to make a preparation time order

95. The power to make a preparation time order should be examined separately in respect of the claimant's preparation time and the cost of his medical records and expert report.

96. A preparation time order is limited to time spent working on the case at an hourly rate. There is no power to make a preparation time order for expenses or disbursements.

97. I also consider that the tribunal has no power to make a preparation time order in respect of drafting his disability impact statement. This is because the claimant has not persuaded me that any of the threshold criteria in rule 76 applies. I do not think the respondent acted unreasonably in failing to admit the claimant's disability. Nor do I consider that the respondent's stance of not admitting disability (as set out in its ET3 responses) had no reasonable prospect of success.

98. The respondent was not a party to any previous proceedings concerning the claimant's disability. If a previous tribunal had given judgment declaring the claimant to have had a disability, that judgment would not have been binding on the respondent. The written judgment may well have had a persuasive effect if it had been disclosed to the respondent. I do not know if it was disclosed or not; it did not form part of the bundle before me.

99. In any case, the respondent was not obliged to take the claimant's assertion of disability at face value. It was reasonable of the respondent to ask the claimant to provide some information before deciding whether or not to make a concession. The amount and type of information that a respondent can reasonably request will vary from one case to another. Where, for example, a cancer patient has provided evidence of their diagnosis, it may be unreasonable

to ask for anything else. Where a person's alleged disability is based on a condition such as ADHD, which has a variety of effects and a range of seriousness, it is not usually unreasonable to ask a claimant to describe how that condition affects their ability to carry out normal day-to-day activities.

100. The claimant, of course, says that he had supplied medical evidence to the respondent, and had audio footage which confirms that he had done so whilst still in employment. The difficulty with that argument is that, when I asked the claimant if he wished to play the footage, he told me that this was a matter for the final hearing. Until that recording is played or transcribed, I can make no finding that the respondent had the claimant's medical evidence at any particular point in time.

Conclusions - respondent's strike-out application

<u>Power to strike out – unreasonable conduct</u>

E-mails of 7 and 9 January 2020

101. I start with the claimant's e-mails of 7 and 9 January 2020.

102. I did not accept the claimant's explanation of why he sent them. In my view, it was plainly the claimant's intention to invite interest from media organisations in his claim and in one or more audio recordings on which his claim was based.

103. In my view it is not necessarily unreasonable of a claimant to seek out media interest in their claim. Nor is it unreasonable to let the respondent know that this is what he is doing. It may come across as a show of bravado – carrying with it the implication that the employer might have to take on the media as well as himself – but that may be understandable when the employer has considerably more resources than the employee.

104. What made the claimant's conduct unreasonable was the open invitation to media organisations to be given access to all the audio recordings referred to in his Statement of Claim. The claimant must have known that such an offer would cause the respondent great concern. The respondent had a duty to protect the privacy and confidentiality of any of the colleagues whose voices could be heard on the audio-recordings, and any individuals whose details they may have been discussing. Following Ms Sample's e-mail of 9 January 2020, the claimant could have been left in no doubt of the seriousness with which the respondent took the matter, yet he sent a further e-mail to two more media organisations again offering access to audio-recordings.

105. I have taken into account the fact that the claimant is disabled. It may have been that he was acting impulsively when he sent the two e-mails. But there are aspects of his conduct which his disability does not explain. For example, the claimant has put forward a misleading explanation of his 7 and 9 January 2020 e-mails. It is hard to attribute that conduct to his disability. The 7 April 2020 e-mail and the various written submissions were clearly the product of a lot of thought and work. The claimant's pal had helped him prepare them all.

Failing to provide information about the recordings

106. The claimant did not fail to inform the respondent of whom he had provided with access to his recordings. He has consistently maintained that he did not actually send any audio recordings to a third party. There is no evidence to suggest that he did. I cannot find that the claimant behaved unreasonably by failing to give information about things that did not happen.

107. The claimant has provided a basic amount of information about the recordings on his phone. His screenshots show a long list of recordings and indicate when they were created. His written submissions indicate that at least one audio file is on the claimant's "android computer and the DropBox App is installed an on all his devices". His 7 April e-mail stated that the file is "synced with DropBox". That tends to suggest his files stored offline are duplicated on his online DropBox storage platform. His screenshots also suggest that it is possible to use claimant's DropBox account to gain access to files held offline on his various devices.

108. This information, if it is correct, at least implies what the claimant's answer would be to the specific pieces of information required by the tribunal's letter of 22 February 2020. In particular:

108.1. *the date it was uploaded to the online storage* – the claimant appears to be saying that the files were "synched" and therefore stored online for as long as they are stored on one of his devices

108.2. *the filename of the recording* – the filenames of the recordings he has disclosed are displayed on the screenshots

108.3. *the file size of the recording* – the file size of disclosed recordings is displayed on the screenshots

108.4. *the date the recording was created (or first downloaded from the recording device)* – the creation date for disclosed recordings is displayed on the screenshots

108.5. *details of the online storage service used for that recording, to include the username of the storage account holder* – the claimant asserts that he used DropBox and not Apple iCloud.

108.6. *the date that the correct access information to allow the respondent to access the recording was sent* – it is fairly clear that the claimant considers that he sent the correct access information on 21 January 2020 with the "Have fun" e-mail.

108.7. *details of any persons who have accessed that storage (other than the claimant)* – the claimant's position is that no media organisations accessed the storage. The claimant has given details of two occasions on which others gained access to the storage. These were on 22 and 30 January 2020. He says that on both occasions it was someone on the respondent's behalf who gained access*;* and

108.8. *the date of each and every access to the recording (other than by the claimant* – the claimant implies that, other than the respondent's

representatives, nobody besides himself has gained access to the recordings; and

108.9. *the dates when any recordings that have been deleted from the online storage were deleted* – the claimant accuses the respondent of deleting his recordings but does not provide any dates on which anybody else deleted them*;* and

108.10. *confirmation of who deleted any recording from the online storage if that information is available to the claimant* – this is alleged to have been done by the respondent.

109. I have pieced together this information as best I can from the information that the claimant has provided, piecemeal, since 12 March 2020. The claimant missed the original deadline and made no attempt to engage in a structured way with EJ Buzzard's specific queries. This was unreasonable. It cannot be wholly explained by the claimant's disability. If the claimant's ADHD and OCD made it difficult for him to respond, paragraph-by-paragraph, to the tribunal's letter by the deadline, he has still had numerous opportunities to do so afterwards, either in the 7 April 2020 letter or his written submissions, which he has clearly had help in drafting.

110. The information that the claimant did provide still leaves questions unanswered:

110.1. Are there more recordings? There are not nearly enough recordings in the claimant's screenshots to account for each working day "throughout his employment", as the claimant told EJ Buzzard.

110.2. Is there another online storage location? The claimant has said that he did use DropBox and he did not use Apple iCloud, but he has not expressly stated that there were no other online storage locations where his recordings were stored.

Failure to provide transcripts

111. The claimant still has not provided any transcripts of any recordings other than the passages that are set out in the Statements of Claim.

112. I have considered whether or not this failure amounts to a breach of paragraph 4.2 of EJ Buzzard's case management order sent to the parties on 10 February 2020.

113. On a literal reading of the order, the claimant would only be in breach if he had uploaded any recordings to iCloud. I was not able to finding as to whether or not the claimant had actually uploaded any recordings to that particular platform. On this technicality, the claimant was not literally in breach.

114. I do, however, consider that it was unreasonable of the claimant not to provide a transcript of any recordings. He must have known what EJ Buzzard meant by "iCloud". That was a clear reference to the use of "iCloud" in the claimant's 7 and 9 January e-mails. In EJ Buzzard's order, "iCloud" clearly meant whatever online storage location the claimant had been referring to in those e-mails.

115. If the claimant is correct that his recordings were all synched with DropBox, he knew what transcripts he had to provide: that was all of the recordings that were accessible via his DropBox account. It may have been onerous for him to have provided them all by the deadline, but he did not even try to provide a transcript for any of them. If, as he told EJ Buzzard, he had actually uploaded parts of recordings, and it was only those parts of the recordings that were available on DropBox, then it would have been a far simpler matter to transcribe only those parts. Yet the claimant provided nothing.

Accusing Ms Sample of lying

116. On 29 January 2020 the claimant accused Ms Sample of lying. His accusation came in response to Ms Sample e-mailing the tribunal to say that she could not get access to iCloud using the login details that the claimant had provided. If, as the claimant contends, the audio recordings were actually stored in DropBox, it would have been obvious to the claimant that Ms Sample was looking in the wrong place. Looking at Ms Sample's e-mail with any objectivity, it would not be an unreasonable mistake for her to make, even if the claimant had mentioned DropBox at the preliminary hearing on 20 January 2020. The claimant specifically identified the storage location as "iCloud" in his two e-mails. He chose to accuse Ms Sample of lying rather than to suggest that she look in DropBox. That conduct was unreasonable.

117. The claimant's written submissions assert that the claimant "blurted out" that Ms Sample was a liar "because of his learning disability". But the same accusation was repeated in the claimant's written submissions.

Threatening to report Ms Sample to the SRA

118. As the claimant points out, it is not literally correct to say that the claimant "threatened" to report Ms Sample to the SRA. His e-mail notified the respondent that Ms Sample had already been reported.

119. That, of course, leaves open the question of whether the SRA referral was itself unreasonable. But the respondent has not developed that argument and I do not consider it necessary to delve into it any further.

<u>Breach of tribunal orders</u>

Transcripts

120. I have already considered the respondent's contention that the claimant breached paragraph 4.2 of the order sent to the parties on 10 February 2020 by failing to provide transcripts. For the reasons already given, although the claimant's conduct was unreasonable, I cannot be satisfied that the claimant was in breach of the literal wording of the order.

Letter of 22 February 2020

121. I have also dealt with the extent to which the claimant did and did not provide the information required in the tribunal's letter of 22 February 2020. In my view, it adds little to the analysis to consider whether or not the claimant breached an

order. I bear in mind here that, although the instructions in the letter were expressed in peremptory terms, the letter did not actually use the word, "order", or explain the potential consequences of non-compliance, as standard case management orders do.

Impact on fairness of the hearing

122. I have examined the impact of the claimant's unreasonable conduct on the ability of the tribunal to conduct a fair hearing.

123. Before looking at the specific impact of the claimant's conduct, I make some general observations:

123.1. I am concerned with the way in which the parties have behaved in a dispute about what the claimant did or did not make available to the media. This is satellite litigation. Tribunals should be expected to respond proportionately.

123.2. The claimant and respondent accuse each other of breaches of data protection legislation. It is not the function of an employment tribunal to police data protection law. This is a matter for the Information Commissioner and, ultimately, the courts. If tribunals are drawn into deciding whether offences have been committed, or data protection principles have been breached, they risk distracting themselves from the correct legal test in relation to the matters that actually are within their statutory jurisdiction.

124. I now turn to the impact of the claimant's conduct:

124.1. The sending of the 7 and 9 January e-mails has undoubtedly caused the parties and the tribunal to spend time and effort that would much more profitably have been spent in trying to make progress with the claims. Other than that, I do not see how the e-mails themselves would prevent the tribunal being able to determine the claim fairly. There is no evidence that any journalist did in fact contact the claimant or obtain any of the claimant's recordings. Still less is there any evidence of any story being published.

124.2. The claimant has given an explanation for the e-mails which I have rejected. That is not a reason for preventing the claimant from bringing his claim altogether. In my view the most proportionate way of dealing with that is to make a record of it, so that it may be taken into account if either party considers it relevant to the issues that the tribunal will need to determine at the final hearing. It is likely that many parts of the claim will depend on the reliability of the claimant's oral evidence. Others, however, may not. Where conversations have been recorded and transcribed, there may ultimately be little dispute about what was said or done.

124.3. The claimant acted unreasonably in failing to provide the information required by the tribunal's letter of 22 February 2020 in any structured or helpful way. I do not, however, consider that this prevents a fair hearing from taking place. I was able to piece together the claimant's answers to EJ Buzzard's questions from different sources. I was not able to establish whether or not all

those answers were *true.* But the time and evidence that would be required to make a finding about whether they are true or not would be disproportionate. Even if the claimant did upload some other files to a different storage location, what matters, so far as the fairness of a hearing is concerned, is whether or not he ultimately discloses the recordings to the respondent.

124.4. The claimant's unreasonable failure to provide any transcripts can be put right by making an order for him to provide those transcripts with a sanction for non-compliance.

In my view, from the point of view of ensuring a fair hearing, it is artificial to distinguish between those recordings which have been uploaded and those which have not. This is for three reasons:

(a)What matters most for the purposes of a fair hearing is that relevant evidence is preserved, disclosed and presented.

(b) The question of what has been disclosed to a third party is almost always a side issue. It may matter more if the disclosure might inhibit a party or witness from participating or giving evidence, but there is no evidence that this has occurred here.

(c) The claimant's own version is that *all* the screenshotted recordings were synched to and accessible from his DropBox account.

In due course, if there is to be a claimant will need to transcribe all parts of his recordings that have any relevance to his claims, wherever they are or have been stored. The claimant's unreasonable conduct has demonstrated to me that there is a real risk that the claimant will continue to frustrate the process of providing transcripts. That risk can be addressed by keeping the claimant to tight deadlines, and by making clear to him the consequences of missing those deadlines. With that level of intervention, I anticipate that the parties will be able to start making progress in identifying areas of agreement and dispute.

124.5. It was unreasonable of the claimant to accuse Ms Sample of lying without any real basis. Honesty is one of the basic standards required of solicitors. If they are accused of lying, they can be expected to take the accusation very seriously. It inevitably puts them to extra time and cost. Baseless accusations have a damaging effect the parties' ability to cooperate on matters that are essential to the preparation of a fair hearing. But this would only make a fair hearing impossible if there were no prospect of the claimant's behaviour improving. Whilst the claimant has repeatedly maintained his accusations that Ms Sample is lying, I am conscious that the claimant has not yet had an employment judge explain to him what the potential consequences might be. In my view, fairness can still be achieved by recording that his accusation was unreasonable and warning him clearly about the consequences of his behaviour. If conduct such as this persists in future, his claims may be liable to be struck out.

124.6. The respondent's written submissions make the point that the claimant's conduct "has been wasteful of court time and resources, and [the respondent]

has been put to unnecessary expense in having to respond to the issues raised by [the claimant's] conduct". That submission is undoubtedly correct. But the tribunal has other remedies available to compensate a party for the cost of dealing with another party's unreasonable conduct.

125. Overall, my assessment is that a fair hearing can still take place at this stage.

Proportionality

126. In my view it would be disproportionate to strike out the claim. The harmful effect of the claimant's unreasonable behaviour can be remedied in the ways I have outlined.

Conclusions – claimant's second strike-out application

127. I now address in turn the claimant's various grounds for striking out the responses.

"wilfully and deliberately not complied with every order the tribunal issued at the PH on 20 January 2020…";

128. The case management order sent to the parties on 10 February 2020 ordered the respondent to take three steps. I have already dealt with two of them, namely paragraphs 2.3(1) and 2.3(2) of the order.

129. So far as I can tell, the only other case management step that the respondent was required to take was to provide a cast list. But by the time the claimant made his second strike-out application, the deadline for the cast list had not yet expired.

"audio evidence that [the respondent] wilfully and deliberately lied in their defence of [the claimant's] discrimination claim to mislead the Tribunal";

130. At the preliminary hearing on 3 November 2020 the claimant expressly declined to play any audio footage and told me that this was a matter for the final hearing. I agree. There is, therefore, no finding at this stage as to whether the respondent has lied or not.

After the claimant presented his first claim, the respondent "engaged in verbally abusive and threatening behaviour to intimidate [the claimant]";

131. I have no evidence that there was any threatening or abusive behaviour from the respondent. The claimant has not given oral evidence. I have not been provided with any documentary evidence to support this assertion. There is no basis for me to make a finding of unreasonable conduct here.

In breach of section 55 of the Data Protection Act 1998, it "distributed" a password that the claimant had been ordered to provide

132. The respondent's solicitor disclosed the claimant's DropBox username and password to Mrs Wakefield, who was employed by a different Government Department.

133. For the reasons I have already given, it is not my function to decide whether or not there was any offence committed under section 55 of the Data Protection Act 1998 or under any section of its 2018 replacement.

134. Without knowing exactly what was said about confidentiality at the 20 January 2020 preliminary hearing, I cannot reach a conclusion about whether or not the passing of the information to Mrs Wakefield was a breach of confidentiality or not.

135. The implications for the claimant's confidentiality were minimal. Mrs Wakefield, though employed by the Ministry of Justice, had been cleared to receive information from the Home Office for the purpose of giving Human Resources support.

136. It would have been better practice of the respondent's solicitors to inform the claimant of its intention to disclose the claimant's login details to Mrs Wakefield and to seek his consent. By 29 January 2020, there was an atmosphere of mutual distrust. Transparency was all the more important. But I am not satisfied that the respondent acted unreasonably by giving the claimant's access details to its own Human Resources adviser.

"the respondents … started phoning [the claimant] on withheld number… breathing down the phone and intoxicated telling [the claimant] they're going to "fuck [the claimant] up" and to "fuck off you weirdo" forcing [the claimant] to change his phone number;

137. This appears to be a repetition of the earlier ground of threatening and abusive behaviour. For the reasons I have given, I was unable to make any finding of unreasonable conduct.

"willfully and deliberately started destroying evidence to prejudice [the claimant's] case";

138. I believed Mrs Wakefield's account of what she did whilst signed into the claimant's DropBox account. She did not destroy evidence. There is insufficient evidence to support a finding that anyone else did either.

Application to strike out the claimant's case "on the basis of fabricated documents" and refused to provide witness statements

139. In my view it would, frankly, have been better if the respondent had not applied to strike out the claimant's claim. This complicated piece of satellite litigation has caused delay and expense. But I cannot say that it was unreasonable of the respondent to take that course. By 1 April 2020, on my findings, the claimant had already behaved unreasonably in several respects and had failed to comply with the clear instructions in the tribunal's letter of 22 February 2020. That letter also demonstrated that EJ Buzzard was alive to the possibility of a strike-out application and telling the respondent how to go about it. (The claimant goes further and argues that EJ Buzzard was giving the respondent a subtle nod of encouragement. I do not go that far, but the letter helps me to

conclude that a strike-out application was by no means an extraordinary response to the claimant's conduct.)

140. As for the claimant's allegation that the respondent has "fabricated documents", I find that allegation to be baseless. The respondent has not fabricated any documents. Moreover, at the time of making his second strike-out application, the claimant knew that the documents were not fabricated. This is for the reasons set out at paragraph 61 above.

Fair hearing and proportionality

141. It follows from these conclusions that there is only one basis upon which I could strike out the responses. That is the respondent's failure to comply with paragraphs 2.3(1) and 2.3(2) of the case management order. For the reasons I have already given, it would be wholly disproportionate to strike out the responses for those breaches. To the extent that the breaches have any impact on the tribunal's ability to conduct a fair hearing, the matter can easily be put right by a new order with a tailored sanction for non-compliance.

Next steps

142. A further preliminary hearing has been listed to take place on 29 April 2021. The final hearing has been listed to take place between 13 June and 1 July 2022.

143. The parties will need to make sure that they have made progress by the date of the preliminary hearing, both in reducing the claimant's schedule of allegations to a manageable size and in beginning the process of transcribing the claimant's audio files.

Employment Judge Horne

13 January 2021

SENT TO THE PARTIES ON

18 February 2021

FOR THE TRIBUNAL OFFICE