EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Ukwu	**v**	**1. Tritax Management LLP** **2. Henry Franklin** **3. Colin Godfrey** **4. Petrina Porter** **5. Bjorn Hobart** **6. Mark Bridgman Shaw** **7. James Dunlop** **8. Ben Freeman** **9. Mehtab Rauf** **10. Catherine Fry** **11. Leena Myers** **12. Tritax Big Box Reit Plc** **13. Tritax Euro Box Plc** **14. DMJ Recruitment Limited**

Heard at: **Central London Employment Tribunal (By CVP videolink)**

On: **12 May 2021 (13 May 2021 In Chambers)**

Before: **Employment Judge Brown**

Appearances:

For the Claimant:	**In Person**	
For the Respondents:	**1-10 11, 13:**	**Mr T Welch, Counsel**
	11, 14:	**Ms E Walker, Counsel**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. **The Tribunal confirms its judgment that Claimant's claims against Respondents 11 and 14 were brought out of time and that the claims against Respondents 11 and 14 were therefore struck out.**

2. The Tribunal strikes out the Claimant's claims against Respondents 1 – 10 & 11 & 13 on the grounds that the Claimant's conduct of the proceedings has been vexatious and unreasonable and that the claims have no reasonable prospects of success.

REASONS

This Hearing

1. This Open Preliminary Hearing was listed instead of a 10 day Final Hearing in the Claimant's claims against Respondents 1 – 10 & 11 & 13 ("Rs 1 – 10 & 11 & 13").

2. I had previously struck out the Claimant's claims against Respondents 11 and 14 ("Rs 11 & 14"), by a judgment sent to the parties on 6 October 2019.

3. On 12 April 2021 the Tribunal wrote to the parties in the following terms:

   "EJ Brown has decided to postpone the 10 day final hearing listed in this case starting on 20 April. A 2 day Open Preliminary Hearing is listed for 12 & 13 May 2021, instead, to consider:

   - The Claimant's application for reconsideration of the judgment of 25 September 2020;
   - The Respondents' application for strike out and/or an unless order; and
   - Further appropriate case management directions to be set.

   The Judge's reasons are that there are numerous outstanding applications and items of correspondence from both parties which need to be dealt with, in order for the case to proceed fairly and in accordance with the overriding objective.

   The Respondent has renewed its application for a strike out / deposit order, on the grounds that the Claimant has not produced the evidence which he contends he has of the Respondent's knowledge of the relevant protected disclosures. It is in accordance with the overriding objective that this application is determined before the parties go to the expense of preparing for a 10 day final hearing.

   It also appears that EJ Brown's orders may not have been complied with. It is in accordance with the overriding objective that issues about compliance with case management orders are resolved, before a final hearing commences. Case management orders are intended to ensure that a final hearing takes place fairly, with proportionate allocation of expense and time.

   It would also be appropriate to consider the Claimant's application for reconsideration, before a final hearing takes place."

4. There was a bundle of documents for this Open Preliminary Hearing. Page references in these reasons are to pages in that bundle. The Claimant made submissions on the reconsideration application and the strike out/deposit/unless order application; R 11 & 14 made submissions on the reconsideration application and R 1-10, 12 & 13 made submissions on the strike out/ deposit order/ unless order applications. I reserved my decision.

Background

5. Respondent 14 is a recruitment agency which introduced the Claimant to Respondents 1-10, 12 & 13. Respondent 11 is an employee of Respondent 14, who had particular responsibility for recruiting the Claimant to his employment by R1.

6. The Claimant brings complaints of protected disclosure detriment against the Respondents, arising out of his recruitment and temporary employment as temporary company secretary. The detriments he alleges are as follows:

   a. His contract was not made permanent
   b. He was stereotyped as an illegal immigrant and told to apply for biometric documentation, and this was a smokescreen to conceal his dismissal for making protected disclosures
   c. He was put under continuous pressure
   d. Malicious falsehoods about his status were shared amongst his colleagues
   e. He was not provided with the same benefits package as comparable employees
   f. He was not provided with documentation on his SAR.

7. The Claimant also relies on b. and c. as race discrimination / race harassment.

8. The Claimant further brings a complaint of protected disclosure automatic unfair dismissal and complaints of failure to pay holiday pay and other pay. These are complaints against his employer.

9. The protected disclosures on which the Claimant relies under *s43B ERA 1996* are disclosures made in a former employment, that his former employer, Afren PLC, had committed criminal offences and/or had failed to comply with legal obligations.

10. The Respondents say that they had no knowledge of the Claimant's disclosures; and that, in any event, such disclosures played no part in his dismissal.

11. The Claimant says that the protected disclosures he made in the previous employment were indeed known by the Respondents, including Rs 11 and 14.

12. The Claimant alleges that R 11 and 14 acted as agents of the employer, R1.

13. At the start of this Open Preliminary Hearing, the Claimant made an application to record the proceedings because he said that he could not concentrate, because of his anxiety and depression, to take notes. He provided a GP fit note dated 11 May 2021, which recorded that the Claimant had "stress, anxiety and depression" and said, "Struggles to concentrate and has memory problems, states unable to take notes and participate fully in meetings. He has requested that he is able to record meetings."

14. The Respondents did not object to the Claimant recording the proceedings, provided that he used the recording only for his private notes in the proceedings and not for any other purpose. They also asked that copies of the recordings be sent to them.

15. I allowed the Claimant to record the hearing for the purpose only of taking notes of it, because he said that he was unable to take notes on medical grounds. I ordered the Claimant to provide a copy of the recordings to the Respondents immediately after hearing, or immediately after each recording had been made, if he made more than one recording.

16. During the hearing the Claimant and Respondents made oral submissions. Rs 1 – 10 & 11 & 13 also made written submissions. The hearing was concluded on 12 May 2021 and I reserved 13 May 2021 to make my decision in Chambers. There was a Bundle of 817 pages.

17. Subsequently, on 13 May 2021, by email at 04.11, the Claimant sent a list of documents from the Bundle for me to read, with an explanation of why he said these were relevant. He copied his correspondence to the Respondents. During the hearing on 12 May 2021, I had asked the Claimant to indicate the documents on which he relied. The Claimant has anxiety and depression. In his 13 May email, accompanying his list, the Claimant said,

    "The Claimant was unable to provide a comprehensive list of documents for the reasons which he specifically stated at the Preliminary Hearing including his medical condition, the delay by the respondents in providing the bundle for review, the disorganised and non compliant nature of the bundle which is not in a chronological order and has duplicates of several documents etc. In addition the respondents representative made a number submissions which the Claimant was not given prior notice of including the submission that there was no evidence to support the claims. The Claimant has highlighted some evidence which supports his claims. This is not an exhaustive list of documents the Claimant will be relying on."

18. I decided that I would consider the documents the Claimant had highlighted on his 13 May 2021 email, as I had asked him several times to point out the documents on which he relied. The Claimant's comments accompanying the list were consistent with his oral submissions. It was fair to allow the Claimant, who is a litigant in person, and has depression and anxiety, to highlight documents in the joint Bundle to support the submissions he had already made at length in the hearing on 12 May 2021, when the Respondents were present.

19. There was a dispute, at the start of the hearing, about whether the hearing should also consider R1-10, 12&13's application for a deposit order, as an alternative to strike out. I said that, because I would be considering the merits of the Claimant's claim in deciding whether to strike out, it was fair to consider deposit order, as that would also involve a consideration of the merits of the claim.

20. The Claimant also said that he had not been on notice that the Respondents would apply for strike out on any other grounds than the fact that he had not produced evidence which he contended he had of the Respondent's knowledge of the relevant protected disclosures. While I referred to those grounds in my letter on 12 May, I ordered the hearing to consider "the Respondent's application for strike out" (amongst other things). I said that there were outstanding applications which needed to be dealt with. I further said that it appeared that my orders may not have

been complied with. The Respondent's application for strike out, made on 3 March 2021, clearly sought strike out on grounds that: The claims had no reasonable prospect of success; The manner in which the proceedings was being conducted by the Claimant was unreasonable; The Claimant's non-compliance with Tribunal directions, and specifically the order of Employment Judge Brown made on 25 September 2020.

21. I was satisfied that the Claimant had been on notice, since 3 March 2021, of the Respondents' detailed application for strike out. He had been on notice that the Respondents would make arguments for strike out, not based only on the Claimant's failure to produce evidence, but other grounds, including lack of merit. The Claimant had ample opportunity at the Open Preliminary Hearing on 12 May 2021, which continued for the whole day, and during which the Claimant spoke for several hours, to answer the Respondent's applications.

22. I said that I would hear the Claimant's application for reconsideration first and the Respondents' applications for strike out/deposit order/unless order thereafter.

Claimant's Application for Reconsideration

23. By a judgment sent to the parties on 6 October 2020, I decided that the Claimant's claim against R11 and 14 had been presented out of time, that it was not just and equitable to extend time for it and, therefore, that the Tribunal had no jurisdiction to consider it. The judgment followed an Open Preliminary Hearing on 25 September 2021. In the judgment, I decided that the last act alleged against R11 and 14 took place on 15 October 2018 and that the Claimant should therefore have contacted ACAS by 14 January 2019. I decided that he had contacted ACAS on 28 February 2019 and had presented his claim on 14 April 2019; his complaints against R11 and R14 were therefore at least 6 weeks out of time

24. On 6 October 2020 and 8 October 2020, the Claimant made an application for reconsideration of my judgment, Bundle p161 – 165.

25. In his written applications, and at this hearing, the Claimant said that he had always contended that the unlawful acts against Rs 11 & 14 included his dismissal on 30 November 2018 and the repeated refusal by his employer to do something in relation to his benefits. The Claimant said that the failure to pay benefits continued after his dismissal when R1 did not pay the Claimant holiday pay after his dismissal. He said that his argument had always been that that these acts were part of a concerted effort, in which Rs 11 & 14 played an integral part. He said that he was relying on a continuing act against the Respondents, including Rs 11 & 14.

26. The Claimant said that I had failed to consider the law on agency, whereby any acts of discrimination by the agency that are carried out with the express or implied authority of the employer will result in both entities being jointly liable.

27. He referred to a number of cases on continuing acts, including *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17: and *Southern Cross Healthcare v Owolabi* UKEAT/0056/11. He also referred to *Timis v Osipov* [2018} ECA Civ 2321, saying that individuals can be personally liable for causing the

dismissal of an employee on the grounds the employee made a protected disclosure.

28. The Claimant also said that it had been inappropriate for me to conduct a minitrial and that there was a "core of disputed facts". The Claimant said that it was a "disputed fact that they worked together and colluded"; He said that the employer's refusal to pay holiday pay after 30 November 2018 "was linked to DMJ (R11 & 14) who promised [the Claimant] would get benefits. They were involved in negotiating the benefits and therefore they are linked."

29. The Claimant also said that he had been interrupted by me during his presentation at the hearing on 25 September 2020, and that he had not been given an opportunity to make submissions on the existence of a continuing act at that hearing.

30. The Claimant said that he disputed that the recruitment process for his replacement ended on 15 October 2018. He said that it was not appropriate for me to make findings of fact in relation to the dates of alleged acts, without hearing all the evidence at a final hearing. He did not suggest, at this hearing on 12 May 2021, however, any other date when the recruitment process ended.

Reconsideration Application: Decision

31. I confirmed my judgment of 6 October 2021.

32. The Tribunal may determine preliminary issues at an Open Preliminary Hearing, including, where appropriate, whether the claim has been brought in time. In doing so, the Tribunal can make findings of fact relevant to that issue, including the dates of relevant events, for example, the date of dismissal and the date when the Claimant presented the claim. It was appropriate for me to ask the Claimant, when he gave evidence, about the dates of relevant events. My findings about the dates of events, including that the recruitment process for the permanent post ended on 15 October 2018, were from the evidence the Claimant gave.

33. I do not agree that findings of fact on matters of time limits can only ever be made having heard all the evidence, including the Respondents' evidence. Employment Tribunals can decide at a Pre-Hearing Review whether acts of discrimination are out of time and therefore not permitted to go to a full Hearing or, on the other hand, whether they could form part of a course of continuing acts and therefore should be allowed to proceed to a final Hearing where the question of whether they do form part of such a course of continuing acts will be determined. *Lyfar v Brighton & Sussex University Hospital Trust* [2006] EWCA Civ 1548 and *Aziz v FDA* [2010] EWCA Civ 304 considered the tests to be applied. In *Aziz* the Court of Appeal said that the test to be applied at a Pre-Hearing Review on continuing act time points was to consider whether the Claimant has established a prima facie case. The Employment Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. Another way of formulating the test to be applied at the Pre-Hearing Review is this: the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. One relevant, but not conclusive factor in deciding whether there is a prima facie case of a continuing

act, is whether the same, or different, individuals were responsible for the discriminatory acts.

34. I reject the Claimant's argument that the hearing on 25 September 2020 was unfair, or that he was not allowed to make relevant submissions. The Claimant knew that the hearing was being conducted to consider whether his claims had been brought in time. He gave evidence, including evidence in chief. He was free give any evidence and to make any submissions relevant to the time points, including submissions on continuing acts. The Claimant, indeed, made submissions on continuing acts.

35. In my judgment on 6 October I acknowledged that the Claimant was alleging continuing discrimination in relation to the benefits he did not receive when employed on his temporary contract. I also acknowledged that the Claimant was alleging that R11 and R14's conduct continued until 30 November 2018, when his temporary company secretary contract with R1 ended and he was not given the permanent company secretary position. In my judgment I found that, if his dismissal on 30 November 2018 had that been the last unlawful act by R11 and 14, his claim would have been presented in time.

36. It was not correct that I failed to consider agency in my 6 October judgment. I recorded that the Claimant was bringing his complaints of direct discrimination race, race harassment and protected disclosure detriment against R11 and R14 on the basis that they acted as agents of the other Respondents.

37. In my decision, I said that it was clear to me, however, that the Claimant was not saying that R11 and 14 did any act or omission, or made any decision, on 30 November 2018. It was R1, his employer, who dismissed the Claimant on 30 November 2018.

38. Insofar as R11 and R14 were involved in any decision not to offer the Claimant the permanent company secretary role, I found, as a fact in my decision, that the recruitment process for the permanent company secretary post ended on 15 October 2018. That was the last date when R11 and R14 could have been involved in the relevant decision not to employ the Claimant as the permanent employee. For the purposes of the protected disclosure detriment claims, R11 and R14 might be liable pursuant to *s43K(1) ERA 1996* in respect of that decision. However, I concluded that that was a decision with continuing consequences, rather than a continuing act by R11 and R14. The Claimant's dismissal by R1 on 30 November 2018 was a consequence of that earlier decision.

39. The case of to *Timis v Osipov* [2018] EWCA Civ 2321, on which the Claimant relied at this hearing, confirmed that a co-worker could be liable for subjecting an employee to the detriment of dismissal, that is, for being a party to the decision to dismiss. It also confirmed that a co-worker could be liable for a detrimental act which resulted in dismissal, and for the losses which flowed from the dismissal. *Timis v Osipov* [2018] EWCA Civ 2321 did not assist in the present issue regarding time limits, however; it might have provided the Claimant with two potential routes for claiming damages against a co-worker where a detrimental act resulted in dismissal. My original decision, however, was that the last of the detrimental acts alleged by the Claimant against R11 and 14 was on 15 October.

40. The Claimant now disputes that the recruitment process ended on 15 October 2018, but provides no basis for doing so.

41. The Claimant says that R11 and 14 were "colluding" with R1, or were acting as agents for his employer thereafter, until at least 30 November 2018.

42. He correctly states that any acts of discrimination by the agency that are carried out with the express or implied authority of the employer will result in both entities being jointly liable.

43. However, at the original hearing, I specifically asked the Claimant what acts he was alleging against R11 and R14. It was important to establish the dates, so that the time point could be decided. At the original hearing, the Claimant did not allege any specific acts done by R11 and R14 as agents after 15 October, pursuant to this alleged collusion between the other Respondents and R11 and R14.

44. By contrast, R1, as employer, dismissed the Claimant on 30 November and the Claimant also alleges that R1 refused to pay holiday pay after 30 November.

45. The Claimant said that he was alleging that the failure to offer him the contractual benefits enjoyed by other employees of R1 was a continuing act. I decided, however, that while that may have been a continuing act by R1 during his employment by R1, the Claimant was not alleging that R11 and R14 were the employer. As I stated in my 6 October 2021 judgment, there was no ongoing employment relationship between the Claimant and R11 and R14.

46. Instead, the Claimant asks me to reconsider my decision because R11 and R14 had done various acts as agents up to and including the recruitment process for his replacement, and therefore he says that they continued to be liable as agents for the employer, thereafter, in relation to his dismissal, and in relation to his benefits. He therefore relies on a "continuing state of affairs", because R11 and R14 had previously acted as agents on a number of occasions before 15 October.

47. However, the Claimant asserts no factual, or contractual, basis for that contention; he asserts no specific acts or omissions by R11 and 14 as agents after 15 October 2018; whereas he does allege specific acts and omissions by R1, the principal, after 15 October 2018.

48. Under *ss109 & 110 EqA 2010*, a principal is liable for an agent's contravention of the *Equality Act*, done with the principal's authority, and the agent is also liable for their own act, where it amounts to a contravention of the *EqA* by the principal. However, the corollary is not the case – an agent is not liable for the act of a principal, where the agent has done no act.

49. For the reasons I gave in my original judgment, R11 and R14 were not the employer and there was no basis for concluding, on the facts alleged by the Claimant, that there was a continuing act by R11 and 14 after the permanent role recruitment process ended. The Claimant's argument is not based on a core of disputed facts: he does not allege any specific act or omission by R11 and R14, done as agents for a principal, after 15 October. He merely vaguely asserts

"collusion" by them thereafter, or a continuing liability as agents, with no factual basis for it.

50. Applying *Lyfar v Brighton & Sussex University Hospital Trust* [2006] EWCA Civ 1548 and *Aziz v FDA* [2010] EWCA Civ 304 the complaints against R11 and R14 were not capable of being part of an act extending over a period after 15 October. The Claimant does not have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts, or to constitute an ongoing state of affairs as against R11 and R14, after 15 October.

51. Time for bringing the Claimant's complaints against R11 and R14 therefore ran from 15 October 2018 and the Claimant presented the claim out of time.

52. There is no basis for setting aside my decision not to extend time. The Claimant gave evidence and made submissions and I made my decision on the basis of the evidence and submissions. The Claimant's reconsideration application is an attempt to reargue the matter.

R1 – 10, 12 & 13 Strike Out Application

53. At a Preliminary Hearing on 28 October 2019, Employment Judge Emery declined to list an Open Preliminary Hearing to consider the Respondents' applications for strike out. Paragraph 19 of Employment Judge Emery's written case management summary sent to the parties on 07 January 2020, said:

"*19. …… After careful consideration I declined to list a preliminary hearing in respect of respondents 1-10 and 12-13, for the following reasons:*
a. The claimant says that it has evidence including recordings which proves the respondents were aware of his public interest disclosures, contrary to what they now allege.
b. He can prove that the evidence he provided to his employer of his immigration status was satisfactory and should have been accepted.
c. There would be a significant amount of contested evidence to determine the applications, which was inappropriate for a preliminary hearing.

20. I concluded that if the claimant was correct on the assessment of his evidence, there would be contested oral and documentary evidence as to who knew what and whether this knowledge led to an alleged detriment. I did not consider it was appropriate to deal with a preliminary issue where there was a likely significant dispute on the evidence which would necessitate a lengthy hearing to determine the issue. If however after disclosure these respondents are of the reasonable opinion there is in fact little or no evidence in support of the claimant's allegations, they may renew this application."

54. The Claimant was ordered to provide further information about his claims by 11 November 2019 as set out in Orders 1.1, 1.2 and 1.3 of the Orders of Employment Judge Emery:

"1.1 By 11 November 2019 the Claimant is to write to the Respondents' representatives and to the Tribunal setting out which of the issues in his claim set out at paragraph 11 above amount to:

1.1.1Allegations of harassment related to his race, and against which Respondents are each allegation being made.
1.1.2.Allegations of discrimination because of his race (direct race discrimination) and against which respondent(s) are each allegation being made.

1.2 By 11 November 2019 the claimant is to write to the respondents' representatives and to the Tribunal setting out which allegations of public interest disclosure detriment he is making against which respondent including:
1.2.1. Which respondents he alleges knew of his alleged Afren plc whistleblowing, and
1.2.2. Which respondents subjected him to detriments.

1.3 By 11 November 2019 the claimant is to provide further information regarding the 'continuous pressure' he alleges he was subjected to, in particular

1.3.1 The nature of the pressure he was put under, and
1.3.2 By which respondents.

55. The Claimant provided further particulars, in an email of 4 February 2020, as follows:

"The Claimant is able to confirm that his allegations as summarized in paragraph 11 of the case management order are made against all respondents and relate to race/nationality and whistleblowing detriments. The Claimant believes he was subjected to the detriments because he made protected Disclosures in previous employment and this was known by Henry Franklin and other employees and partners in the firm, Directors of Tritax Bigbox, Directors of Tritax Eurobox, the DMJ Respondents.

….. his claim form provided a summary account of the treatment he suffered including in relation to continuous pressure he suffered. The pressure was directly applied by Henry Franklin, Mehtab Rauf, leena Myers and Ben Freeman, however the claimant was explicity informed by Henry Franklin that the other partners of Tritax Management LLP and the Directors of Tritax Bigbox and Tritax Eurobox were behind the treatment. The corporate entities are clearly vicariously liable and have been included on that basis. The indivisuals are personally liable…

The Claimant was put under continuous pressure to leave the employment of the first respondent and an offensive environment was created by the constant public demands by Mehtab to provide the biometric resident card, the constant initiation of loud embarrassing discussions about the claimant's resident status by Ben Freeman in the open office where people sat closely. There was also the deliberate leak of the purported residence issues to the other members of staff …. The respondents created a hostile and degrading environment to drive the claimant to leave the employment. This ranged from being told directly by Leena Myers to go home until his purported situation could be sorted out to being promised by henry that he would get good references if he left. The claimant was distinctly informed by Henry Franklin that the other respondents were involved. The Claimant believes that all partners of the first respondent, Leena Myers and

the Directors of Tritax Bigbox and Directors of Tritax Eurobox were aware of the Afren disclosures made by the claimant. …"

56. On 14 August 2020 the Claimant sent the Respondent a list of documents which included reference to 13 audio recordings.

57. On 25 August 2020 the Claimant had provided copies of 8 of the 13 audio recordings to the Respondents. This consisted more than 13 hours of audio playtime. The Claimant did not say which parts of the recordings were relevant to which issue in the case and declined to do so: "I am not required to explain to you at this time why parts of the recordings are relevant to my case….I suggest you look at the order again before asking me to identify which part of the recordings are relevant to my claim". p141

58. At a hearing on 25 September 2020, I decided that the Claimant's 4 February 2020 particulars did comply with EJ Emery's order.

59. At the same hearing, 1-10 & 12, 13 Rs asked for further information about the recordings the Claimant had disclosed. The 1-10 & 12, 13 Rs' representative said that the Rs did not understand the relevance of the audiotapes disclosed and that it was unduly burdensome to try to identify from 13 hours of recording which might be the relevant passages.

60. I accepted 1-10 & 12, 13 Rs' submissions on this and told the Claimant that I considered that it was in accordance with the overriding objective for him to provide the following information to the Respondents by 16 October 2020:

    60.1. Of each of the audiotapes,

    60.2. a brief description of the nature of the conversation in it,

    60.3. which allegation, in EJ Emery's paragraph 11 and 12, the audio recording relates to;

    60.4. the time point within the recording at which the relevant statements occur.

61. EJ Emery's paragraph 11 and 12, to which I referred, were as follows:
    "11. The claimant alleges he was subject to the following detriments on ground of his public interest disclosures:
    a. His contract was not made permanent.
    b. He was stereotyped as an illegal immigrant and told to apply for biometric documentation, and this was a smokescreen to conceal his dismissal for making protected disclosures.
    c. He was put under continuous pressure.
    d. Malicious falsehoods about his status were shared amongst his colleagues.
    e. He was not provided with the same benefits package as comparable employees.
    f. He was not provided with documentation on his SAR.

12.The claimant alleges that some of this conduct also amounted to race discrimination and race harassment, in particular (b) and (c) above.

62. It was therefore clear that the Claimant was required to indicate: to which allegations the matters recorded in the audiotapes related; and the time point in the audiotape where the relevant passage occurred.

63. On 9 October 2020 the Claimant provided to Rs 1-10 & 12, 13 a list consisting of 13 audio recordings totalling approximately 20 hours of playtime p650.

64. The Claimant did not say to which allegations, in EJ Emery's paragraph 11 and 12, the audio recording related, nor did he identify the time point within the recording at which the relevant statements occurred.

65. On 17 February 2021 the Claimant wrote to Rs1-10 & 12, 13 saying,

"It should be clear from the transcripts which you have provided that the recorded discussions are relevant to the proceedings. I have repeatedly made it clear that the recordings are relevant to the claims, the purported reasons for the dismissal. The recording of the discussion with the taxi driver for example is a contemporaneous record showing the treatment I was suffering and the impact on me. It is unclear why you want me to state which parts of the recordings specifically are relevant to my claims when it should be clear to you that these recordings are relevant…" p661.

Respondents' Arguments

66. At this hearing, Rs 1-10 & 12, 13 argued that the Claimant's claim should be struck out because his claims had no reasonable prospects of success. They contended that the Claimant makes inherently implausible allegations: His case is that the Respondents dismissed him for disclosures he says he made 10 years earlier, to people the Respondents do not know, in different and unconnected employment, and then covered this up with a conspiracy involving 10 people, 3 companies and an outside recruitment agency.

67. Rs 1-10 & 12, 13 contended that, to succeed, the Claimant will need to show that the Respondents knew of the alleged 2009 disclosures. However, they argued that the Claimant has not even pleaded any facts which, if proven, would make out this part of his claim. The highest his claim is put is to say that the First Respondent and Afren plc have both been clients of Taylor Wessing LLP. The Respondents contended that this does not provide an arguable basis to say that the Respondents knew of his protected disclosures.

68. Rs 1-10 & 12, 13 said that disclosure has now taken place and there is a considerable volume of material in the bundle, but there is nothing to support the Claimant's contention that the Respondents knew about the Claimant's alleged 2009 disclosures. Insofar as the Claimant contends that the Respondents ever discussed his previous employer, to whom he had made protected disclosures, the Claimant had referred to his previous employment, by Afren, on his CV. The Respondents' discussion of his previous employment record, during the recruitment process, was clearly related to what he had said on his CV, p345.

69. The Respondents argued that the Claimant's position was weakened further by his assurance to EJ Emery at the 28 October 2019 PH that he had evidence, including recordings, which proved the Respondents were aware of his public interest disclosures. They said that parts of the recordings provided by the Claimant, which the Respondents had listened to, provided no such evidence.

70. With regard to the race discrimination and harassment claims, the Respondents argued that these were also breathtakingly fanciful. The Claimant's claim is that a campaign of harassment and racial discrimination was undertaken against him "in order to conceal the reason or principal reason for his dismissal" – which was allegedly his protected disclosures. The Respondents said that it was wholly implausible that the Respondents would conspire together to commit unlawful conduct in order to hide other equally serious unlawful conduct.

71. The Respondents contended that the race claims arose out of standard "right to work" checks, applicable to all new joiners and required by law. The Claimant provided proof of indefinite leave to remain status in an expired passport. The First Respondent suggested that the Claimant a biometric residence permit, which he did.

72. The Respondents also contended that the claims should be struck out because the manner in which the proceedings had been conducted was unreasonable and vexatious. They said that the Claimant was quite clearly in breach of my orders to provide information, because he did not state which allegation in EJ Emery's paragraph 11 and 12 the recordings related to and he did not provide the Respondents with the time point within the recordings at which the relevant statements occur. They said that this was in deliberate disregard of his disclosure obligations: The Claimant has made clear he will not comply with the order [p661].

73. The Respondents said this was also particularly serious because the Claimant had told EJ Emery that he had tape recordings which proved that the Respondents knew of his protected disclosures, but he was refusing to say where, in the recordings, the relevant evidence was.

74. The Respondents said that the recordings they had listened to thus far were irrelevant - or helped the Respondents' case. They included a recording of the Claimant going to the toilet and a conversation away from the workplace which the Claimant had had with a taxi driver. The transcripts of these parts of the recordings were in the bundle.

The Claimant's Submissions

75. The Claimant pointed out that EJ Emery had said that the Claimant relied on recordings "it" – meaning his employer R1 – had, to show that the employer knew about the protected disclosures. He said that he was referring meetings of partners and Board meetings, which are recorded by R1. The Claimant was not referring to any recordings he himself had. He therefore said that the Respondents' contention that he had failed to provide the evidence EJ Emery alluded to was misconceived.

76. The Claimant told me that the Respondents had failed to disclose recordings and minutes of staff and Board and partners meetings, which he had not himself attended, but at which he contends his protected disclosures were discussed. He cannot specify the relevant meetings, or the content of the discussion, however.

77. The Claimant said that the Respondents had destroyed the relevant recordings.

78. The Claimant did not tell me that he had any outstanding applications for disclosure of documents. He said that he intended to rely on cross examination at the Final Hearing to establish that the Respondents had knowledge of his protected disclosures.

79. With regard to the merits of his claims, the Claimant said that he relied on an email in which a Company director had discussed the Claimant's previous employment with Afren with the Claimant's line manager, p344- 347. The Claimant said that some of his claims were based on the oral evidence, which needed to be tested. In his email of 13 May 2021, he referred me to a number of pages in the Bundle which he said supported his claims.

80. The Claimant said that the Respondents had refused to provide disclosure relating to advice given by Taylor Wessing in relation to the recruitment of the permanent company secretary. He said that Taylor Wessing would have informed the Respondents of his protected disclosures.

81. Regarding the 20 hours of recordings the Claimant had disclosed to the Respondents, the Claimant insisted, at this hearing, that the whole of each recording was relevant. He said that he would provide a written transcript of the 20 hours of recordings, by the end of the month. The Claimant said that the recordings were similar to a company handbook, in that a tribunal would not require a party to specify which part of a handbook was relevant for the proceedings.

82. He said that it was impossible for him to point to different parts of the recordings and say that they were part of his whistleblowing claim, for example.

83. I observed to the Claimant that, even if he did provide transcripts, he would need specify where the relevant part of the transcript was. I said that it would be disproportionate and unfair for a Tribunal hearing to be expected to read the whole of a transcript of 20 hours' worth of sound recordings, on the basis that all of it was relevant to all of the claims.

84. The Claimant said that he could not be ordered to do something which was impossible. He said that he had complied with my order of 25 September 2020, in that the transcripts were related to all aspects of his claim; he relied on all matters for determination, including liability and the impact the Respondents' conduct had on him.

85. I told the Claimant that, in those circumstances, it was impossible for the Respondent to what the case is that they are to meet. The Respondent would be put in the impossible position of having to produce witness statements responding

to 20 hours' worth of dialogue, and guessing at what the relevance of the recordings might be.

86. The Claimant insisted, nevertheless, that he was relying on all the recordings as relevant to all his claims. He said that it would be proportionate for the Tribunal and the Respondent to consider the 20 hours' worth of recordings, considering the value of his claims. He said he would deal with this further in his witness statement.

Relevant Law – Strike Out: Vexatious or Unreasonable Behaviour

87. An Employment Judge has power to strike out a claim on the ground that the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious; under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(b).*

88. In *Bolch v Chipman* [2004] IRLR 140, *EAT*, Burton J said that there were four matters to be addressed in deciding whether to strike out a claim because the Claimant has behaved scandalously, unreasonably or vexatiously. First, there must be a conclusion by the tribunal, not simply that a party has behaved scandalously, unreasonably or vexatiously, but that the proceedings have been conducted by or on his behalf in such a manner: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation, but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order. For example, if the order is to strike out a response, it is open to the tribunal, pursuant to its case management powers under [r 29] or its regulatory powers under [r 41], to debar the respondent from taking any further part on the question of liability but to permit him to participate in any hearing on remedy.

Strike Out for Vexatious and Unreasonable Behaviour

89. I decided that the Claimant had breached my order of 25 September 2021. He had failed to state which allegation, in EJ Emery's paragraph 11 and 12, the recordings related to and he did not provide the Respondents with the time point within the recordings at which the relevant statements occurred. He had simply said that all 20 hours' worth of recordings were relevant to all aspects of all his claims.

90. At this hearing, the Claimant continued to insist that he could not and would not comply with my order, other than to repeat that the whole recordings were relevant to all claims.

91. I did not accept what the Claimant said. If there were relevant parts to the recordings, I considered he should be able to identify them, by time point in the recording, and specify to what claim they were relevant. He could do this, even if he relied on numerous parts of the recordings. Furthermore, even if this would have been a lengthy task for him, I had given him until 16 October 2020 to comply with my order, at his request. It was now more than 7 months since the order had been made. The Claimant had had more than ample time to undertake the relevant exercise. He was still refusing to do so.

92. It was clear to me that the Claimant had deliberately disobeyed my order. He was also insisting that he would not comply with the order in the future. His offer to provide transcripts would not remedy the breach, because he would still not identify the relevant parts of the transcript.

93. I did not accept that his disclosure of recordings, without specifying the relevant parts, was akin to disclosure of a large company handbook. The relevant parts of a company handbook are usually easily identified from the nature of the claims – the disciplinary procedure in a misconduct unfair dismissal case, or, for example, the sickness procedures in a disability discrimination dismissal case.

94. In any event, where the relevance of a large tranche of disclosure is not clear, it is open to a party to apply for an order, requiring identification of the relevant part of a document and the allegation to which it relates. I had decided that such an order was necessary in this case.

95. The recordings to which the Respondents have already listened include a recording of the Claimant going to the toilet and of him having a conversation with a taxi driver who was wholly unrelated to the claims. I considered that the Claimant requiring the Respondent to listen to such matters was vexatious. Requiring the Respondent's solicitor to listen to a toilet visit is, frankly, offensive. The Claimant's refusal to identify a single specific part of a transcript, or the relevant cause of action, also led me to believe that it was likely that there were, in fact, no relevant statements in the 20 hours of recordings. Requiring the Respondent to listen to 20 hours of irrelevant evidence was also, plainly, vexatious.

96. The Claimant's conduct of the proceedings, in failing to comply with my order, is vexatious and unreasonable. It is clearly fair to the Respondent for the Claimant to identify the relevance of the audio recorded evidence. As I explained to the Claimant, if he does not, the Respondent would have the impossible task of guessing the relevance of 20 hours' worth of recordings and trying to obtain instructions from witnesses about any potentially relevant comments on them. The Respondent would have to draft witness statements addressing all manner of potential arguments arising from the recordings.

97. This would put the Respondent to wholly unreasonable expense and would waste inordinate time.

98. The Tribunal would also be faced with an enormous tranche of evidence from the Claimant whose relevance was unclear. This would waste public time and money.

99. Even if a fair hearing were possible, I considered that this was one of the rare cases in which strike out for deliberate disobedience of my order was appropriate. The Claimant's conduct in requiring the Respondent to listen to 20 hours of audiotape, including wholly irrelevant and, in some parts, offensive material, is egregious. It appears designed to confuse and frustrate the Respondents, and to put them to considerable, pointless expense. The Claimant has misused the Tribunal process.

100. Nevertheless, I also considered that the Claimant's unreasonable and vexatious conduct of the proceedings meant that a fair hearing was impossible.

101. The Claimant relies on the recordings and contends that all the recordings are relevant to all of his claims. The Respondent cannot prepare for a hearing fairly on that basis. If it fails to guess the relevance of a part of the recording, it may not adduce its own evidence in rebuttal. The Respondent would be going into the hearing "blind" and could be ambushed by the Claimant. Tribunal would also have to guess at the relevance of the evidence and would have great difficulty in managing the proceedings fairly.

102. Strike out is the appropriate course – an unless order would be pointless because the Claimant was clear that he had no intention of complying with the order. The Claimant suggested no alternative course, other than providing a transcript of the recordings on which he relies. He insists that the evidence is relevant for all his claims. As I have explained, provision of a transcript would not remedy the problem because he still refuses to identify the relevant parts of the transcript.

Law - Strike Out – No Reasonable Prospects of Success

103. An Employment Judge also has power to strike out a claim on the ground that it is scandalous, vexatious or has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a).*

104. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

105. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B [2011]* EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46. On a

striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a mini-trial. Only in an exceptional case will it be appropriate to strike out a claim for having no reasonable prospect of success where the issue to be decided is dependent on conflicting evidence. Such an exceptional case might arise where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472*,* or, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation', *Ezsias* para 29, per Maurice Kay LJ.

106. Discrimination cases should only be struck out in the very clearest circumstances, *Anyanwu v Southbank Student's Union* [2001] IRLR 305 House of Lords.

Decision – No Reasonable Prospects of Success

107. The Claimant's protected disclosure claim relies on protected disclosures he says he made 10 years earlier, in different and unconnected employment, at Afren plc. His claim against 12 remaining Respondents, alleges a conspiracy involving 10 people, 3 companies and an outside recruitment agency. I agreed with the Respondents that is inherently unlikely that these Respondents subjected the Claimant to detriments and dismissed him because of such historic disclosures in unrelated employment.

108. In order to succeed in his protected disclosure claims, the Claimant will need to show that the Respondents knew of the alleged 2009 disclosures at Afren.

109. The Claimant says that the First Respondent and Afren plc have both been clients of Taylor Wessing LLP. He also points to documents which show some of the Respondents discussing his CV at the time of his recruitment and mentioning his previous employment by Afren. He says that his disclosures were discussed at meetings which he did not attend.

110. Disclosure has taken place. The Claimant did not tell me that there are any outstanding applications for specific disclosure. He says that the Respondents have destroyed tapes of meetings where his disclosures were discussed. He did not go to those meetings himself, so cannot give his own evidence of what was discussed. He cannot give the date of the meetings or an account of what was said. He says that he will rely on cross examination of the witnesses to establish that his disclosures were discussed at the meetings. None of his 20 hours worth of audio recordings contain any evidence that the Respondents knew of his disclosures. There is therefore no supporting evidence at present that the Claimant's disclosures were discussed by the Respondents in any meetings.

111. The Claimant asked me to look at the documents in the bundle. I considered that the emails wherein his employment by Afren plc was discussed do not indicate that the Respondents had any knowledge of his protected disclosures. The relevant discussion relates to his CV and the chronology of his previous employment. The fact that Afren is mentioned is incidental – it is simply mentioned as a previous employer with whom the Claimant had long service. The emails do not provide evidence that the Respondents knew of his disclosures. None of the

other pages to which the Claimant referred me, in his email of 13 May 2021, showed that the Respondents knew of the disclosures.

112. I agreed with the Respondents that the fact that Afren and the Respondents had both been clients of Taylor Wessing provides no evidence that knowledge of the alleged disclosures passed to the Respondent.

113. The Claimant cannot point, therefore, to any positive evidence that any of the Respondents knew of his disclosures made 10 years previously. He intends to rely on cross examination to extract evidence that they discussed his disclosures in meetings. His cross examination, however, will necessarily be unspecific, because he cannot give the dates of the meetings or any details of the alleged discussions.

114. I considered that it could properly be said that there was no reasonable prospect of the Claimant succeeding in his protected disclosure claims. The basis of the claims is highly improbable. The Respondents' knowledge of disclosures is crucial to the claims. There is currently no evidence to support the Claimant's contention that the Respondents knew of the protected disclosures. There is no reasonable prospect that he will extract such evidence from cross examination, when he has no positive, specific case to put to witnesses.

115. The Claimant's race discrimination and harassment claims are put on the basis that he was subjected to such discrimination and harassment "in order to conceal the reason or principal reason for his dismissal" – which was allegedly his protected disclosures. If the Respondents did not know of the protected disclosures, the basis for the alleged discrimination and harassment claims also falls away. There is no reasonable prospect of them succeeding in the way they have been put by the Claimant.

116. Looking back, now, at the totality of the Claimant's protected disclosure claim, including the way in which he has answered requests for particulars, it is apparent that it is vague and generalized in the extreme. It relies on a vast conspiracy. That is not alone a basis for strikeout, but it reinforces my decisions.

117. The Claimant's claims against Respondents 1 – 10 & 11 & 13 are struck out on the grounds that the Claimant's conduct of the proceedings has been vexatious and unreasonable and that the claims have no reasonable prospects of success.

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Employment Judge **Brown**
Date: 27 May 2021

SENT to the PARTIES ON

27/05/2021.....

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FOR THE TRIBUNAL OFFICE