EMPLOYMENT TRIBUNALS

Claimant: Mr C Jamison

Respondent: Rhino Design (Manchester) Limited

HELD AT: Manchester **ON:** 3 June 2021

BEFORE: Employment Judge Shotter (by CVP)

REPRESENTATION:

Claimant: In person
Respondent: Ms S Quinn, solicitor

RESERVED JUDGMENT ON RECONSIDERATION

JUDGMENT

The judgment of the Tribunal is that:

1. Upon reconsideration of judgment striking out the claimant's claim of constructive unfair dismissal promulgated on the 4 December 2020 the original decision is revoked under rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 and substituted by a deposit order in the sum of £350.00 (three hundred and fifty pounds).

2. The parties will be advised of the date for a one-hour telephone preliminary hearing in due course.

REASONS

1. This is a preliminary hearing to consider the claimant's application for a reconsideration. Following a preliminary hearing held on the 3 & 9 November 2020 reserved judgment was sent to the parties on 4 December 2020 ("the reserved judgment and reasons"). The judgment of the Tribunal was that the constructive unfair dismissal claim has no reasonable prospect of success and it was struck out under the Employment Tribunals Rules of Procedure 2013, rule 37(1).

2. In an email sent by the claimant on the 16 December 2020 he applied for a reconsideration. This hearing today is to consider the claimant's application only, as the respondent does not wish to proceed with its cost application against the claimant at this stage, although reserves the right to do so in the future.

3. I have before me a number of documents, which were checked with the parties, consisting of the following:

3.1 A bundle provided by the claimant marked "Updated bundle PH 9 Nov 20."

3.2 A bundle provided by the claimant numbered 74A, 66 to 73 and 338A in that order.

3.3 A document provided by the claimant titled "Reconsideration Request bundle Index 16.12.20 together with the 39 documents numbered Recon. 1 to Recon.39.

3.4 The claimant's application dated 16 December 2020.

3.5 The respondent's written submissions opposing the claimant's application for a reconsideration that includes a cost application dated 18 December 2020.

3.6 The claimant's response to the respondent's application undated.

3.7 Various copy party-to-party emails enclosed within a WORD format document.

4. I have below attempted to succinctly set out the background to the claimant's application and the grounds on which he relies, followed by the respondent's objections. The fact that I have not referenced all arguments and evidence put forward should not be taken as an indication that they have been ignored, rather I have attempted to extract the key points raised.

5. In addition to the written application and respondent's response to it, the parties made a number of oral submissions refencing the relevant documents referred to above which I have taken into account.

Background to the reconsideration application

6. At the preliminary hearing held on the 3 and 9 November 2020 the respondent applied to strike out the claimant's claim as an abuse of process, and / or as having no reasonable prospect of success and order the Claimant to pay a deposit in the event of the Tribunal determining that the claim has little reasonable prospect of success.

7. As recorded in the reserved judgment and reasons, no oral evidence was heard on the facts in this case, and these were still to be determined by an employment judge sitting alone at a final hearing had the claimant satisfied the Tribunal that his claim of constructive unfair dismissal should proceed to a final hearing.

8. At the first hearing held on 3 and 9 November 2020 the Tribunal had before it a bundle of documents plus additional documents introduced on both hearing dates following the adjournment. The Tribunal was referred to three bundles of documents in addition to additional documents produced by the claimant. After the hearing the claimant attempted to introduce additional documents not before the Tribunal or respondent previously which were not taken into account. I have heard a lot of argument today as to whether the claimant was not permitted to introduce contemporaneous documents dated between March 2017 and 29 January 2019, as the claimant was relying on the respondent's email sent to him on 5 November 2020 referring to that time frame. The answer lies in the Case Management Summary sent to the parties following the 3 November 2020 hearing which included a case management order from which it can be seen there was no limit (including no limit on dates dates) placed on the claimant as to what documents could be included in the bundle, as follows:

1.1 "The claimant will check and ensure that all documents he wishes to rely on have been included in the amended bundle referred to above. For the avoidance of doubt, unlike the problems encountered today which resulted in delay and confusion, the parties will come prepared with an agreed bundle and any additional documents will be added chronologically with numbers and letters. The Tribunal will not delay the adjourned hearing if the bundle is not in order."

9. It is important to note that the preliminary hearing was adjourned part-heard from 3 to the 9 November 2020 with the agreement of both parties, in the interests of justice as there was an issue with the contents of the bundle. The respondent had sent an amended electronic bundle to the claimant and Tribunal late afternoon on 2 November 2010, the day before the hearing. The original bundle produced for an earlier hearing ran to approximately 400 pages, and the respondent had taken out a number of pages without consultation or agreement with the claimant. The claimant indicated at the hearing on the 3 November 2020 that he did not have the time to check through the bundle to ensure all his relevant documents had been included, and the respondent in the email heading had not put him on notice that documents had been taken out. The issue only came to light when the Tribunal took the parties to the bundle and checked with the claimant that documents he wished to rely upon had been included. It transpired that there were missing documents and the claimant was given the opportunity to include **all** the documents he wished to rely upon in anticipation of the

hearing going forward on the 9 November 2020, which to all intents and purposes he did. The claimant's documents were included in an updated bundle that ran to 304 pages, which was the second bundle sent to the Tribunal for the hearing on 9 November 2020.

10. The judgment and reason records that the claimant by reason of the adjournment had time to review the bundle and read the Skeleton Argument prepared on behalf of the respondent. In anticipation of the reconvened hearing the Tribunal in its case management order sent to the parties as a matter of urgency on 3 November 2020 to assist the parties properly prepare for the hearing, particularly the claimant given the fact that he was a litigant in person.

11. Following the adjournment Mr Jamison confirmed he was prepared for the reconvened hearing, provided his own written skeleton argument in response, a statement dealing with means and a bundle of additional documents duly marked. The claimant referred the Tribunal to a bundle of additional documents he has produced, including the 12 July 2017 appraisal and 6 July 2017 performance measure review. Despite having access to the original bundle and the documents produced for this reconsideration hearing today marked Recon.1 to Recon.39, the claimant did not produce all of the documents he wished to rely upon. At today's hearing he has attempted to lay the blame for this on Ms Quinn's email of 5 November 2020, despite the clear indication within the body of the email that the claimant could apply to introduce the original bundle used in an earlier preliminary hearing when the claimant's unlawful deductions and breach of contract claim was struck out. No such application was made, and Ms Quinn cannot be criticised for the claimant's mismanagement and default in preparing his own case.

12. At the outset of the hearing held on the 9 November 2020 I was satisfied all of the documents Mr Jamison wished to rely upon were contained in a third agreed bundle and the matter proceeded on that basis. The claimant now wishes to rely on 39 additional documents he could have produced but failed to do so, without providing a cogent satisfactory reason.

13. The claimant provided further and better particulars on 4 September 2020 setting out the reasons for his resignation and alleging he had "2 years of concerns that lead up to the decision…the Outcome Appeal was delayed and I felt that the gravity of the procedure and my deep concerns warranted the respect of a timely response. This delay was the straw that broke the camel's back…Over 2 years I had continued to work for the Respondent because: I could not afford to not have a job, the only choice I was given was to leave…I did not have the funds to get detailed legal advice and go to court. I and many others, including a Board Director expected the main protagonist, DS to leave and we could restore the culture and relationships."

14. The claimant submitted at the reconsideration application the documents he had provided made it plain he accepted the new contract under duress and frequently objected to it. Together, we went through all the documents the claimant wished to discuss in order that he had the opportunity to explain fully his case. and it clear to me there were no documents in existence referencing duress or working under objection. As was the case at the earlier hearing the problem for the claimant was that the contemporaneous evidence was against him, and no appears document exists to

support his case that he was working under protest/ duress as he alleged, quite the reverse, although there are hints of the claimant objecting which I referred to below as highlighted.

15. Putting the additional documents Recon.1 to Recon 39 into context, a reduction of the claimant's salary from £100,00.00 when he was the operations director to £50,000 plus bonus took place on 19 October 2017 when the Respondent terminated the claimant's employment and made an offer of re-engagement as a service director on a basic salary of £50,000 per annum with the potential to earn commission. As recorded in the reserved judgment and reasons the claimant's case was that he worked under protest from 29 January 2018 (when he signed the new contract) until he gave notice on 4 December 2019, and the last act which led to his resignation was the respondent's failure to provide him with an outcome of the formal grievance issued on 16 October 2019, by 30 November 2019 when he had been informed it would be given no later than 7 December 2019, if not earlier.

16. I agreed with the oral submissions made by Ms Quinn that the documents to which I was taken to by both parties today supported the respondent's case and the strike out. The following is relevant:

16.1 Recon.2 is an email sent on 25 March 2018 refers to the claimant receiving his new basis salary seeking clarification on what he will be paid. By this stage the claimant had been in receipt of the reduced salary and commission taking his salary to £100,00 for a three-month period until it dropped down to £50,000 plus commission earned. The claimant stated this was the first email dealing with his salary sent to the respondent, followed by Recon.4 seeking an explanation for how the March salary was calculated.

16.2 .Recon.5 is an email from the claimant expressing his disappointment and concern with the March salary payment.

16.3 Recon.7 is an email sent on 11 June 2018 by the claimant as follows; "I am 6 months into the role (review was due in Jan) and we agreed to discuss this after 6 months" the claimant seeking clarification of how the last 3 salary payments had been calculated.

16.4 Recon. 8 is an email sent by the claimant on 25 September 2018 about the commission he earned stating "**JM and I have been speaking about my concerns for a number of months, ever since my contract was put to me. I strongly believe the pay structure does not work** for the business to incentivise growth and obviously myself…my commitment cannot be questioned but I hope you agree that my salary has to be commensurate with the effort…I appreciate we have hit upon a difficult period but my salary, on the current structure will be almost halved and this will be impossible for me to sustain" [the Tribunal's emphasis].

16.5 Recon.9 is an email sent by the claimant titled "commission structure" on 15 October 2018, and a key document as it encapsulates this case and the claimant's position at the outset; **"I accepted the new structure and the**

substantial basic pay reduction with concern that was explained in mails from me at the time…I am now one year into the new deal and my monthly pay is so low, it is difficult to sustain…I believe my current pay structure to be flawed. It should be designed to; with activity and hard work, enable to get my salary back to where it was before the signing" [the Tribunal's emphasis].

16.6 Recon.10 is an email sent by the claimant on the 23 October 2018 regarding the pay structure as follows; "the structure put to me last October has now proven to not allow me to get even close to earning anything like similar money to the previous years**. If you remember, you said I could even earn more, and to trust you if the structure did not work out**…" [the Tribunal's emphasis].

16.7 Recon.15 is an email from the claimant sent on 24 November 2018 about his salary asking the board to review it stating "my commitment and passion for you guys and Rhino, somehow remains…I am struggling beyond belief financially. **Which at best is probably what Dave wants to see of just another 'managing someone not' mechanism**"[the Tribunal's emphasis]. In oral submission the claimant argued that this was a constructive dismissal, however, the claimant continued to remain in employment even when it was made clear to him that whilst the commission calculation would change to his benefit, his basic salary would not be increased later on in the chronology.

16.8 Recon.16 is an email from the claimant sent on 8 December 2018 concerning the pay structure in which he stated "I have remained 100% committed to Rhino **whilst knowing that the pay structure and overall commission structure was unachievable. I have struggled throughout the year to fund the reduction in my basic pay** in the hope you will all see my worth to the business and address my concerns that were laid before you at the start of my new role…I am still incredibly driven and passionate about your business, I want to be part of the future growth, I want to help repair the business…" [the Tribunal's emphasis].

16.9 Recon.18 is an email is response from the respondent to the above to the effect that the claimant will earn commission of "everything you introduce at an agreed rate all-year-round an don't have the penalty of peak periods…you will earn a fixed rate with no earnings cap or commission barrier. Your potential earnings will ultimately be in your own hands…" The new commission structure was agreed with the claimant, who then proceeded to send emails about the change in his job title arguing for a different title.

16.10 Recon.25 is an email from the claimant sent on 29 April 2019 dealing with business matters, a request to the board for his greater involvement in the business "the main drive of this is to request the business considers my long-term position, standing in the company and of course, my salary. **I accepted the challenge of a new role with a changed pay structure.** Now I have 'walked in those shoes' I believe there is potential to grow but the personal financial strain is becoming unbearable" [the Tribunal's emphasis].

16.11 The remaining documents were largely concerned with commission payments and the claimant's concern (Recon.27) and in Recon.34 an email sent by the claimant on 7 August 2019 the claimant wrote "when my new role was presented to me, I spent some time analysing the possibility of replacing my earnings with commissions laid out in my contract**. I shared my concerns with the business about how unrealistic, near impossible it would be to achieve the sales expected. The only option I had was to put everything into the role an hope I was wrong. It took some time but the business eventually accepted that the structure was flawed** and you delivered an improved package…we are now 18 months into the new package…" [the Tribunal's emphasis. The claimant suggested a number of proposals including change of title and targets., and he indicated that discussions regularly took place when he objected to the contract, and as reflected in the earlier reserved judgment and reasons, the claimant seeks to cross-examine the respondent's witnesses on this. It appears to me from the documents now presented by the claimant that there is a possibility some discussion had taken place.

17. The insurmountable problem for the claimant is that the threat of dismissal and offer of re-engagement was accepted verbally in October 2017 and he signed the "termination of your current contract and reengagement on new terms" offer letter dated 8 November 2017 which referred to discussions "ongoing since your review in March in respect of the changes to your terms and conditions of employment as of 13 November 2017". The letter set out the background to the changes and reference were made to the claimant's underperformance, why there was to be a reduction in salary and protection of his current earnings for a period of 4-months. The letter confirmed the claimant had been made aware of the decision in August 2017 and that a verbal agreement had been reached. The claimant acknowledged his re-engagement under the new contract, an indicative commission structure signed by the claimant indicating his agreement on the 11 November 2017, and a new job description as set out in the reserved judgment and reasons. The claimant has not produced any contemporaneous documents to show that he accepted the re-engagement of a new contract under duress, however the documents suggested he may have objected to it and oral evidence is necessary to determine the conflicts in the evidence. In short, whilst the documents reflect the claimant accepted the offer and continued to work under it for a period of two-years during which he renegotiated commission payments, oral evidence may possibly cast a different light on the written evidence.

18. Ms Quinn submitted the claimant sent numerous letters complaining about his salary when he was not earning enough commission as his aim was to make up in commission the reduction in salary earned when he was working in a different role, and yet not once did he mention the that he was working under duress. On the claimant's own contemporaneous evidence, he had accepted the contractual changes and the new role, and the fact that he was struggling to make up the pay differential does not given rise to a fundamental breach of contract. It is evident from the documents produced by the claimant; he emphasised his commitment and value to the business having "accepted the challenge of a new role with a new pay structure (Recon.25). the claimant's case is weak and he is likely to lose.

19. The documents and arguments produced by the claimant today have not undermined the fact that the claimant had agreed the contractual changes and was

concerned about commission payments which he then continued to negotiate hence the emails and communications that followed i.e. on the 17 January 2018, 24 January 2018 and 29 January 2018 leading to the claimant signing the new contract dated 29 January 2018 that included an amended commission structure and amended job description dated 26 January 2018 which he had agreed, then later on in the chronology the commission structure was changed by agreement again.

20. The claimant submitted that he did not have a choice at the time as it would have taken him 12-months to find alternative work. The claimant worked to his new terms from November 2017. The claimant submits he had no choice and needed a job, so he delayed signing the new contract in order to negotiate a better package. The problem for the claimant is that he did have a choice; he could have treated the respondent's unilateral breach as a fundamental express breach of contract and a breach of the implied term of trust and confidence and resigned and/or accepted that his contract had been terminated and claim unfair dismissal given he had the requisite two-years continuous employment. The claimant chose not to do so, and that remains fundamental weakness in his case as he continued to work for the respondent meeting his contractual obligations for a period of approximately two-years before raising a formal grievance on 16 October 2019. The claimant indicated today that it was not correct to state he had obtained alternative employment at a similar salary prior to resignation. Alternative employment was obtained a few days after he resigned, and this is clearly a disputed matter which does not go to the issue before me today.

The law

21. Under Rule 70 of the Employment Tribunal Rules of Procedure 2013 a judgement can be reconsidered where it is *necessary in the interests of justice* to do. Under Rule 72 if a judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.

22. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation and reconsiderations are a limited exception to the general rule that judgements should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry, and it is the Tribunal's view that this is precisely what the claimant is seeking to achieve.

23. In the well-known case of Stevenson v Golden Wonder Ltd [1977] *IRLR 474, EAT*, Lord McDonald said with reference to review provisions that they were 'not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before' and it was apparent during oral submissions, despite a clear indication being given to the claimant on a number of occasions, he wanted to take the reconsideration application as an opportunity to re-hearse and re-emphasise the evidence in the hope that the Tribunal would change its mind and find all claims in his favour.

24. Where relevant fresh evidence comes to light after the hearing that was not available at the hearing is a potential ground on which it might be in the interests of justice to reconsider a judgment.

25. Ms Quinn referred the Tribunal to the well-known Court of Appeal decision in Ladd v Marshall [1954] 3 All ER 745, CA. The Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

- that the evidence could not have been obtained with reasonable diligence for use at the original hearing
- that the evidence is relevant and would probably have had an important influence on the hearing; and
- that the evidence is apparently credible.

Conclusion

26. In the 16 December 2020 written application for a reconsideration, the claimant's arguments are essentially as follows, which I will deal with in the same order that they appear:

My main concern is that you have not seen many emails therefore I do not think you have had a full picture of my claim… 10. My concern here lies with the ***over 30 emails*** *and documents that you have not seen that were not included. They were removed from the original bundle for this hearing by the Respondent and they told me on the 10th August 2020, they could not be admitted because they "were not relevant to the strike out proceedings".*

26.1 The claimant had a number of opportunities to introduce any document, and was aware that it was fundamental to the hearing for him to produce documents which showed he worked under duress and objected to the unilateral changes made to his contract until he raised the grievance in which he clearly objected. The first hearing was adjourned specifically for this purpose in order that the claimant could insert the emails and documents he said were missing, which he did before the reconvened preliminary hearing, and yet he was still unable to produce any documents that assisted him, for no good reason.

26.2 The claimant makes reference to the hearing on 9 November 2020 as follows: *"They were finally admitted for the 1st Preliminary Hearing after I pushed to have them admitted. They were then removed for the hearing with yourself. These are the emails that I mentioned in the Hearing of the 9th November when you asked if there were any other documents I could point to. I said there were a lot more of me complaining but the Respondent said they could not be admitted. I asked if I could send them and you said you did not want to see any more documents due to the already large bundle and would have added more confusion. I maintain that the content of these demonstrate clearly the pressure I was under from the change in terms and that I was working under protest."* The claimant's recollection of the hearing is incorrect; he was not prevented from producing any document on which he wished to rely. The objective of the adjourned hearing was to give the claimant to produce documents which he did, and the manner in which the claimant has dealt with the documents in this case has been confusing, which may be attributable to the fact that he is a litigant in

person.

The claimant's additional documents marked Recon.1 to Recon.39

26.3 Ms Quinn argues that it is not in the interests of justice for the Tribunal to consider the evidence now provided by the claimant as it was not new evidence that has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time. The claimant was aware of the evidence and should not be allowed to "re-argue" his case.

26.4 The claimant is a litigant in person, albeit a employee who previously had a great deal of responsibility originally earning £100,00 per annum and before that, ran his own business. Constructive dismissal claims are complex and knowing what documents may or may not be relevant can be difficult for a litigant in person to resolve. Having heard from the claimant today I took the view that given the draconian effects of striking out any document which he believes assists his case, should be taken into account. This has been my position from the first adjourned hearing through to today's reconsideration, and given the possibility that the evidence could influence the outcome, it was in the interest of justice to take it into account, which I did, despite the fact the claimant had not been diligent: Ladd V Marshall. I also took into account Recon.1 to Recon.39 consisted of contemporaneous documents that was not disputed by the respondent, although the claimant's allegation that he raised the issue of duress and objected at meetings with various people, is disputed and I take the view that the conflicts can only be resolved at a final hearing .

26.5 At this reconsideration hearing I have invited the claimant to direct me to the emails which, according to the application, will show he referenced working under protest. As recorded above these emails do not exist.

" There were many discussions within the company across all levels, including Directors that he (DS) was a consultant and he would eventually leave. Is it unreasonable for me to accept this change initially, in which I had no choice and then to try to reinstate the culture and specifically my situation, when he left?"

26.6 The claimant encapsulates the real issue in his case; which is that he did accept the contractual changes and remained in employment without objection, choosing to do so. The same point applies to the commission structure which the claimant re-negotiated. The Recon. 1 to 39 documents underline the fact that the claimant agreed to the contractual changes and this is one of the many reasons I believe the claimant is unlikely to succeed in his claim.

In your paragraph 12, you refer to documents that I was not aware of at the time. I urge you to consider that the tone and manner of communication toward me had deteriorated and the Formal Grievance procedure was a forgone conclusion. Finding this out after I resigned only strengthened my case that my suspicions were correct.

26.7 This was not an argument put forward by the claimant at the time, he did not indicated the "tone and manner" of the respondent's communications was a "last straw" and there was no suggestion the claimant objected to the communications the preliminary hearing, or that the grievance procedure was a foregone conclusion. The claimant is attempting to introduce new arguments in order to deflect from the difficulty he has in his argument that the imposition of a new contract incorporating the wage reduction amounted to a breach of contract two years after affirming the agreement. The '*straw that broke the camel's back'* relied upon by the claimant was the "delay" in the grievance outcome, the final part of which was sent to him minutes after his resignation. I found there was no reasonable prospect of the claimant establishing the delay in providing him with the final part of the grievance outcome amounted to anything other than an "entirely innocuous act": Omilaju, and this is yet another weakness in his case.

26.8 The reserved judgment and reasons recorded that objectively assessed the grievance outcome date, whilst it does not need to amount to a breach of contract: Lewis –v- Motorworld Garages Limited cited above, does not contribute, "however slightly", to the breach of the implied term of trust and confidence. It was difficult to see how the claimant genuinely interpreted the delay as hurtful and destructive on his trust and confidence in the respondent. I found it was unlikely the claimant will be able to establish that this central fact could be resolved in his favour, entitling him to rely on the new contract which he had, according to the contemporaneous documentation before me today, entered freely and fully. Taking these two events together, and the claimant's case at its highest, I continue to take the view that when considering the issues in the case and the facts that can be disputed, the claimant would have an uphill struggle at a liability hearing given the contemporaneous documentation. The Recon.1 to Recon. 39 documents also reflect the fact the claimant was unhappy with the bargain he struck, which he sought to renegotiate successfully in relation to the commission payment structure.

4) In your paragraph 14, you refer to my first response dated 25th October 2017. A report that the Respondent states it never considered. You refer to the positive tone of the report. I would ask you to consider why it may have a positive slant, what were my motives? Please consider why in this report I question, but not openly criticise the Respondent around the new direction for the business and my change in role.

26.9 The fact the claimant did not "openly criticise" the unilateral change in his contract at the time, which he accepted without objection goes to the heart of my reasoning that the claimant had affirmed the contractual changes having agreed the bonus calculations and he continued to work without objection for two years. I do not intend to deal with the detail in the claimant's observations about sales targets, marketing plans and so on, as this is irrelevant given the fact the claimant remained in the business without raising any objections to the contractual changes at the time, his main concern being that the respondent alleged he was underperforming and renegotiating the commission payments.

Your paragraph 18 refers to the "negotiations". Again, I would like to investigate the depth and results of these one-sided discussions. You also state I had a choice to not sign. Given the Respondent held all the cards and the personal financial devastation of having no job whilst I pursued them with no representation, I respectfully ask, can that be considered a "choice"?

26.10 The claimant is repeating arguments made previously and dealt with in the reserved judgment and reasons. The same point applies in paragraph 9 save for the claimant's reference to his new salary, which I was given the impression was the same as the salary he earned at the time of resignation. If I am incorrect, the amount of the claimant's new salary is not central to the issue in this case. The point is that the claimant waited for over 2-years before he obtained alternative employment after his salary was unilaterally reduced in half with an introduction of a commission structure, and he did nothing about it at the time, accepting the changes apart from re-negotiating the commission structure.

27. Rule 37(1)(a) provides that all or any part of a claim or response may be struck out if it is 'scandalous or vexatious or has no reasonable prospect of success'. In *Mbuisa v Cygnet Healthcare Ltd EAT 0119/18* the EAT noted that strike-out is a draconian step that should be taken only in exceptional cases. The claimant's claim verges on being one of those exceptional cases; however, there some documentation in this case which points to discussions taking place about the claimant's contractual position, and I am concerned there would be a great injustice if the claimant was not given the opportunity to take forward his complaint of constructive unfair dismissal to a final hearing. He is a litigant in person and it is clear that he struggles with the legal concepts involved in a constructive dismissal claim and the evidence needed for him to succeed. At its highest, the claimant may be able to establish he raised oral objections to the contractual changes, and a hearing with witnesses being cross-examined is necessary in the interests of justice.

28. With reference to the constructive unfair dismissal claim, the central facts are in dispute, and there may be substance in the factual assertions made by the claimant. These require determination by hearing and evaluating the evidence.' In the House of Lords decision in Anyanwu v South Bank Student's Union [2001] IRLR 305 which dealt with striking out discrimination claims, Lord Steyn referred to discrimination cases as being "generally fact-sensitive, and their proper determination is always vital on our pluralistic society. In this field, perhaps more than any other, the bias is in favour of a claim being examined on the merits or demerits of its particular facts are a matter of high public interest". This decision is applicable to the claimant's claims today, despite the fact he is not bringing a discrimination claim as some constructive dismissal claims can be complex and fact sensitive when deciding whether fundamental breaches of contract took place or not, depending on oral evidence and cross-examination before the facts can be found by a judge sitting alone. after the witnesses have given their evidence.

29. After I went through the documents with the claimant, a discussion took place about deposit orders, whether the claimant could afford to pay a £350.00 deposit, which he assured me was within his means, and the effect of a deposit order on costs. I suggested if a deposit order was made the claimant obtained legal advice, as he is concerned with a costs order being made against him and it is my view he has a very

weak case which he is likely to lose and costs could be an issue despite the IVA entered into by the claimant.

30. In the reserved judgment and reasons reference was made to the alternative of a deposit order, and having heard oral representations and taken into account the documents referred to above, I am satisfied that there is "little reasonable prospect of success" of the claimant's constructive dismissal claim succeeding, and a deposit order of £350 should be made as a less draconian alternative to a strike out in accordance with the overriding objective and principles of justice having regard to all the circumstances of the case, particularly the documents marked Recon.1 to Recon.39 produced today. It may be possible, although unlikely, that the claimant could establish a fundamental breach of contract had taken place given there are disputed facts as to whether "JM and I have been speaking about my concerns for a number of months, ever since my contract was put to me" – Recon 7, "I accepted the new structure and the substantial basic pay reduction with concern that was explained in mails from me at the time" Recon 8, "the structure put to me last October has now proven to not allow me to get even close to earning anything like similar money to the previous years. If you remember, you said I could even earn more, and to trust you if the structure did not work out…" Recon 10, and when my new role was presented to me, I spent some time analysing the possibility of replacing my earnings with commissions laid out in my contract. I shared my concerns with the business about how unrealistic, near impossible it would be to achieve the sales expected" Recon 34.

31. A Deposit Order has been made, which can be found in a separate document sent to the parties. At the hearing the cost consequences of failing to pay the deposit order was discussed. If, following the making of a deposit order, the tribunal decides the specific allegation or argument against the paying party for substantially the same reasons given in the order, the paying party will be treated as having acted unreasonably in pursuing that allegation or argument for the purpose of making a costs or preparation time order under rule 76, unless the contrary is shown — rule 39(5)(a). The deposit sum will be paid to the other party — rule 39(5)(b). In order words, unless the paying party successfully shows that it did not act unreasonably in pursuing the specific allegation or argument, a costs or preparation time order can be made against it. If the paying party successfully shows that it did not act unreasonably, the deposit will be refunded.

32. If the claimant (who indicated he could afford to pay £350) fails to pay by the date specified, the constructive unfair dismissal claim will be struck out under rule 39(4) of the Employment Tribunal Rules. A tribunal has no discretion on the matter: the strike-out occurs automatically on the failure to pay.

33. In conclusion, upon reconsideration of the judgment striking out the claimant's claim of constructive unfair dismissal promulgated on the 4 December 2020 the original decision is revoked under rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 and substituted for a deposit order in the sum of £350.00.

34. Both parties will provide dates of availability for a one-hour telephone case management hearing to take place before a judge sitting alone (not EJ Shotter who

should not longer have any part in this proceedings including case management and at the final hearing) within 14-days of receiving this judgment and reasons.

35. In the meantime, the claimant will produce a written document consisting of a list of all dates set out in a chronological order, detailing if possible each and every meeting he had regarding the new contract, the words used indicating duress and working under objection where relevant, people involved and any witnesses which he will send to the Tribunal and respondent within 14-days of receiving this reserved judgment and reasons.

36. The parties will agree the draft issues to be decided at the final hearing and obtain availability dates for the next 18-months.

37. The parties will be provided with an Agenda for completion prior to the preliminary hearing which will take place via CVP.

_____
11.6.21
Employment Judge Shotter

Judgment and reasons SENT TO THE PARTIES ON

22 June 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS