Case No: EA-2019-001042-OO (previously UKEAT/0270/20/OO)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 15 November 2021

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

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Between :

MISS AC XIA	**Appellant**
- and -	
TAG EUROPE LIMITED	**Respondent**

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Miss AC Xia the **Appellant in Person**
Ms V Brown (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 2 September 2021

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JUDGMENT

SUMMARY

Practice and Procedure

An Employment Judge struck out the claimant's claims on the basis that the (i) that the manner in which the proceedings had been conducted by the claimant had been scandalous, unreasonable and vexatious and (ii) because the claims had no reasonable prospect of success**.** The claimant had claimed that a series of audio recordings revealed comments in English and Chinese demonstrated her colleagues using foul and obscene sexual, violent and other abusive language about her. The Judge listened to some of the tapes and concluded that none of the comments which were contained in the purported transcript were audible, and that, in so far as they were audible the tapes contained nothing of a sinister nature. Given the manner in which the claimant had brought and conducted her claims he struck them out.

Following a 3(10) hearing the appeal was limited to the single issue whether the Employment Judge had erred in failing to differentiate between the discrimination claims and the unfair dismissal claims. He had grouped the allegations into categories with a final category headed "the remaining allegations". There was nothing to suggest that Judge had had the Unfair Dismissal claim in mind as such an "allegation". Unfair Dismissal legislation requires an employer to demonstrate the reason for a dismissal, so any lack of credibility on the part of a claimant in relation to issues on which she bore the burden of proof would not necessarily be fatal to such a claim. The reasons failed to explain why the Unfair Dismissal claim had been struck out and the appeal was allowed. The issue was remitted to a differently constituted Tribunal

HIS HONOUR JUDGE MARTYN BARKLEM:

1. In this judgment I will refer to the parties as they were below.

2. The claimant has been permitted to advance a single ground of appeal following a hearing under EAT rule 3(10) before HHJ Auerbach on 25th November 2020. This was pared down from an original notice of appeal which was prepared by the claimant acting in person which contained 20 pages.

3. The claimant acted for herself before me, although relied on a skeleton argument which had been prepared by Ms Pennycook of counsel, who had acted under the auspices of the ELAAS scheme before HHJ Auerbach. Ms Pennycook attended the hearing as an observer. The respondent was represented, as it had been before the ET, by Ms Victoria Brown of counsel. I am grateful to both counsel for their skeleton arguments and, in the case of Ms Brown, for her oral submissions. I have had regard to the totality of their submissions, notwithstanding that I have necessarily truncated them in the judgment.

4. The appeal is concerned with the dismissal by an Employment Tribunal (EJ Baty sitting alone) following a hearing at London Central on 25th September 2019 at which all the claimant's claims were against the respondent were struck out. Written reasons were prepared and sent to the parties on 26th September 2019. I shall refer to that document as "the Judgment" and to Employment Judge Baty as "the Employment Judge".

5. Following the rule 3(10) hearing HHJ Auerbach's judgment was transcribed and eventually perfected earlier this week. He has been kind enough to forward it to me (as well as to the parties) in advance of the hearing, and I shall borrow from his judgment without further attribution in setting out the factual background to this unusual case.

6. The claimant had been dismissed by the respondent following a disciplinary process. The dismissal took place on 21 December 2018 and followed a written warning which had been given on 7 November. The written warning was in relation to an allegation that the claimant had verbally

abused a colleague. In the dismissal letter it was asserted that the claimant was being dismissed because of an irretrievable breakdown in the relationship between her and her colleagues. The dismissing officer concluded that she had refused to interact face-to-face with a number of colleagues including her manager, had refused to sit next to male colleagues, had refused to accept that her conduct in connection with the most recent alleged incident of an alleged outburst against one of her colleagues was unacceptable, had refused an offer of mediation, and had refused to meet to discuss a grievance that she had raised about alleged harassment of her. He also found that some colleagues now found it impossible to work with her and that there was no suitable alternative employment for her. He set out his reasons for that finding. She unsuccessfully appealed against both the written warning and the dismissal.

7. The claim was brought against what is now the sole remaining respondent, her former employer, but also no fewer than 19 other named respondents. Her claims were of unfair dismissal, race, sexual orientation and sex discrimination, and victimisation. There was also reference to defamation, hate crimes and criminal offences in the ET1.

8. The ET1 form was accompanied by an 83 page single-spaced typed document including what were said to be transcripts of audio recordings made by her at work at various times, which she said demonstrated her colleagues using foul and obscene sexual, violent and other abusive language about her in English and/or in Chinese on numerous occasions. It is an extraordinary document from which it is difficult to tease out the strands of everything which is alleged.

9. A single ET3 with grounds was entered on behalf of all the Respondents. It maintained that the claimant had been fairly dismissed for the substantial reason of an irretrievable breakdown in the relationship. It submitted that the discrimination claims had not been properly or clearly set out and that all allegations of discrimination were denied with no further particulars given. However, the ET3 went into considerable detail regarding the unfair dismissal claim, setting out the relevant facts, as one would expect any respondent who has dismissed a claimant to be able to.

10. A preliminary hearing was held on 27 June 2019 at which the claimant appeared in person and the respondents were represented by counsel. It was noted that the particulars of the claim were not in a form that was possible to follow or engage with, and the while claimant had been directed to provide clearer summary particulars the claim was still not in a form that properly identified the claims the respondents faced.

11. Employment Judge Clark, who conducted the hearing set out a lengthy schedule of issues. This identified eight heads of claim, unfair dismissal being the first. Under the heading "The claimant's dismissal" was listed as "4.1.1 Unfair Dismissal against the First Respondent only, for which the Tribunal will have to decide whether the claimant's dismissal, alleged to be for some other substantial reason, was fair in accordance with section 98(4) of the **Employment Rights Act 1996**." Claims of Direct Discrimination and Victimisation listed at 4.1.2 and 4.1.3 were also identified, together with multiple other claims listed as 4.2 to 4.32, some of those having individual sub-paragraphs.

12. Employment Judge Clark gave the claimant 14 days to consider the draft list of issues and consider whether there were any additions to be made to it. An order was also made for disclosure of audio files and transcripts thereof on which she relied in relation to the claim as to the respondents having conducted a social media campaign against her.

13. The claimant responded to the invitation to add to the list by producing another lengthy single spaced document both adding to the list prepared by the judge as well as "tweaking", in her words, other parts of the list and the order.

14. Following that hearing, the respondents' solicitors made an application for a strike out or alternatively deposit orders, as well as for individual named respondents to be removed from the proceedings.

15. A further hearing took place on 5 September 2019 before Employment Judge Baty. In the Case Management Summary which was produced after the hearing the judge explained that he had listened to parts of the audio recordings after discussing with the claimant what she had produced and

what she described as "the transcripts" on which she relied and different versions of them. The judge listened to more than an hour's worth of the recordings, attempting, as he described it, at the same time to identify whether what was said was reflected in the claimant's transcripts. He observed that when he was about half-way through, he paused to note that he could not make out the content of the conversations apart from the odd word and phrase, and he asked whether the later recordings became clearer. Although the claimant assured him that they did, when he continued to listen, they became no clearer. He concluded that there was no likelihood that listening to any more of the recordings thereafter would prove helpful.

16. The judge noted that, having listened to more than an hour of recordings, only the occasional word or phrase could be made out in English, there was nothing to suggest that anything was said in Chinese, it was impossible to hear anything being said in which individuals were referencing social media comments or postings about the claimant, and there was very little similarity between what he had heard and what the claimant had put in her transcript document. He concluded that the disclosure request should be refused as there was no basis for it. It was a fishing expedition. He concluded that there was no necessity to listen to further recordings. He decided that the strike out applications and potentially other matters should be considered on a further occasion, in fairness to the claimant, to allow her more opportunity to prepare.

17. A further preliminary hearing then took place before the Employment Judge, on 25 September 2019 following which the Judge struck out the claims entirely on the basis (i) that the manner in which the proceedings had been conducted by the claimant had been scandalous, unreasonable and vexatious and (ii) because the claims had no reasonable prospect of success. He also made an award of costs in the sum of £2,000 payable by the claimant to the first respondent. The judgment runs to 22 pages.

18. Having set out the history of the litigation and a detailed account of the conduct of the hearing that day the EJ set out the relevant law. He struck out the claims based on alleged social media activity (which was allegation 4.32 in the list of issues produced by EJ Clark) because, he held, the recordings

provided no support for the allegations. There being nothing else to support them they had no reasonable prospect of success.

19. The EJ then went on to find that the claimant's conduct of the litigation had been scandalous, in particular because she had made very serious allegations of international terrorism, attempted murder, threats of gang rape, and otherwise vilifying the respondents, on the basis of recordings which did not provide any support for her case. The judge went in some detail through examples relied upon in the claimant's transcript document, but which were not borne out by the recordings. The judge noted also that the allegation involved others, including passers-by in front of her house making comments, a suggestion he described as "bizarre". He concluded that this conduct met the legal definitions of scandalous and vexatious, both by reference to effect and by reference to purpose.

20. He also held that there was also unreasonable conduct of the litigation by the claimant persistently updating and seeking to add more to her claims, failing to comply with tribunal orders, and being unwilling to accept rulings against her. The judge considered that a fair trial was no longer possible because, in particular, the claimant's credibility had been destroyed by her reliance on recordings that did not support her, and because of what he described as her constantly moving the goalposts, so that proper proportionate case management would not be possible. He considered that it was proportionate in these circumstances to strike out on these grounds.

21. Given the loss of credibility which resulted from the nature of the allegations and how the material presented failed to support the judge concluded that he could have no faith in anything the claimant asserted which was not independently corroborated. For this reason, he concluded, other allegations also had no reasonable prospect of success.

22. A reconsideration application was unsuccessful.

23. The appeal was rejected on the sift by Soole J. He observed that the judge's decision to strike out appeared to him to be manifestly correct.

24. At the rule 3(10) hearing a very substantial volume of material was before HHJ Auerbach. The claimant made submissions on numerous matters pertaining to the claims other than unfair

dismissal, none of which persuaded him to permit the many grounds advanced to proceed to a full hearing, for the reasons which he set out in detail in his judgment and which I need not repeat.

25. However, the claimant had been fortunate enough to have had support from Ms Pennycook, in relation to draft amended grounds of appeal drafted by her relating specifically to the strike-out of the unfair dismissal claim. She persuaded HHJ Auerbach that it was reasonably arguable that the EJ had erred in law in failing to distinguish between the discrimination claims and the unfair dismissal.

26. Shortly before the hearing before me the claimant, who had received a copy of the transcript of HHJ Auerbach's judgment, sought to re-open the issue of the recordings, seeking to have a friend (who had been present online for part of the rule 3(10) hearing) to give evidence to correct what the claimant thought to have been a misunderstanding on HHJ Auerbach's part. I told her that that issue could not be re-opened at a hearing which was limited to the single ground before me.

27. Although the claimant added some submissions of her own, she relied principally on Ms Pennycook's skeleton argument so I will continue to refer to those submissions as being those of Ms Pennycook. She took me to a number of documents in the bundle, principally email exchanges between employees of the respondent concerning her and which, she says, shows a cynical approach by a number of senior managers which taken as a whole suggests a predetermination of her case and a desire to get rid of her. She also took me to material which suggested that she had, over the 8 years or so of her employment been highly regarded by colleagues, had received good appraisals and had enjoyed significant pay increases.

28. Ms Pennycook's starting point was that the unfair dismissal claim has been swept up with the discrimination claims without any consideration being given to it as a complaint in its own right. She refers in the skeleton argument to a number of factors in relation to the dismissal which, she says points to it having been rushed, following the written warning, and not conducted in a fair manner. There are other procedural issues which are raised. It is neither necessary nor appropriate for me to make any comments as to the merits of the claim. The Employment Judge certainly made no such findings in relation to this head of claim.

29. Ms Pennycook points out that there is no part of the Employment Judge's decision in which he specifically gives distinct consideration to the unfair dismissal claim and whether it had reasonable prospects of success, nor does he consider whether his findings about scandalous and vexatious conduct and the prospects of a fair trial hold good in relation to the unfair dismissal claim as opposed to the discrimination claims. She argues that, if he had considered this separately, the same conclusions would not necessarily have followed, given the narrow ambit of the unfair dismissal claim, and the fact that a tribunal would be, for the purposes of that claim, be looking primarily on the conduct of the respondents and the process that they followed, rather than on the conduct of the claimant. The burden of showing the reason for the dismissal under S.94(1) falls upon the respondent.

30. For the respondent, Ms Brown argued first, that it was entirely within the Employment Judge's discretion whether or not to separate-out the various heads of claim. There is no requirement as a matter of law to do so and on the facts, there was no way sensibly to do so. The conduct which the Employment Judge found to be scandalous vexatious or unreasonable is, she says, relevant to the entirety of the claim. Moreover, she argues that there is no reasonable prospect of the unfair dismissal claim succeeding given the "incredibly serious" findings which the Employment Judge made as to the claimant's credibility. She also submits that it was the claimant's case that the dismissal itself was discriminatory and that allegations in relation to it were central to the altercation in respect of which she was dismissed. In the circumstances she argues, the Employment Judge was entitled if not bound to consider them together.

31. She argues that the claimant's case is that the dismissal was unfair because it was discriminatory, not that there were procedural irregularities, and that it therefore must stand or fall with the discrimination claims. Moreover, the Employment Judge having found that the purpose of the claim was to subject the respondents to inconvenience, harassment and expense, there would be no rational basis to exclude the unfair dismissal claim from that finding, and it would be an abuse to allow it to proceed.

32. Ms Brown accepts that there is no specific mention by the Employment Judge of the unfair dismissal claims but contends that this was encompassed under the heading "the remaining allegations" in the reasons. She says that the requirement in rule 62 that an ET give reasons for its findings does not, in the light of authority, require slavish adherence. She relies on dicta in the recent case of **Simpson v Cantor Fitzgerald Europe** [2021] ICR 695. She adds that the claimant had never submitted at the hearing that the different strands of the claim should be treated differently, and the ET should not be criticised for not explicitly dealing with a point which had not been raised.

33. At para 17 of the reasons the ET cited rule 37 of the **ET Rules of Procedure 2013**

> "37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; …"

34. The Employment Judge then set out the three-fold test required by well-established authority for a strike out based on rule 37(1)(b) at para 18 of its reasons. The steps are; (i) was the conduct scandalous, unreasonable or vexatious? (ii) is the result of that conduct that there could not be a fair trial? and (iii) is strike out proportionate?

35. The Judgment was structured as follows. From paras 26 to 30 the Employment Judge rejected as being without reasonable prospects the allegation at 4.32. This was based on his conclusion that the only evidence was said to be the recordings which he had found to contain nothing of relevance.

36. From paragraphs 31 to 72 the Employment Judge considered the three-fold test in relation to the claim taken as a whole. At paragraphs 33 to 36 he dealt with the term "scandalous". He found that the allegations against the respondent were "obscene", giving as examples the matters set out at paragraph 19 above. He held that the tribunal was being used to vilify the respondents without justification and was, accordingly being misused. The allegations were unnecessary allegations bearing cruelly upon the moral character of an individual.

37. This led him to conclude that the assertions made by the claimant about what the recordings revealed were extraordinarily and manifestly untrue. He said that he considered that what she says is not merely unreliable but utterly lacking in credibility and "I would find it difficult to accept anything she said unless it was backed up by other evidence; in short I have no trust and confidence in what the claimant tells me".

38. At paras 37 the Employment Judge found for similar reasons, plus the cost to the respondent in dealing with the case to date, that it was also vexatious.

39. At paras 38 to 59 the Employment Judge dealt with the "reasonableness" point under a number of heads, dealing with the way in which the claimant had sought to update and add to her claim at various stages, had failed to comply with tribunal orders and was unwilling to accept rulings made against her.

40. In dealing with the question of whether a fair trial was possible, the judgment largely repeated earlier findings to conclude that it was not, because the Employment Judge had "entirely lost confidence in the good faith and honesty of the claimant" and because the respondent could not be given a fair trial in the face of constantly moving goalposts.

41. As to proportionality the Employment Judge accepted Ms Brown's submission that there was no case management that would suffice to allow the litigation to be conducted sensibly and proportionately. He pointed to the costs which had been incurred to date and would be in the future making reference to the number of allegations and what would be a very lengthy hearing.

42. I turn to the Employment Judge's strikeout of the whole claim (as distinct that of merely allegation 4.32, which he had already dealt with) on the basis of a lack of reasonable prospects, that is under rule 37(1)(a).

43. In this regard the Employment Judge broke the allegations into three groups. First (paras 74 to 89 of the reasons) he dealt with 4 specific allegations said by the claimant to have been proved by the recordings. In relation to each he held that as there was nothing on the recordings which supported the allegations none of them had reasonable prospects of success.

44. Next (paras 90 to 93) he dealt with a further 9 specific allegations. These concerned the alleged use of language in the recordings. Again, as there was nothing audible on the recordings the judge held that none had reasonable prospects of success.

45. Finally, in paras 94 to 96, the EJ dealt with "the remaining allegations". As Ms Brown submitted that the unfair dismissal claim should be regarded as having been subsumed within these – there were 18 allegations not covered in the first two groups – it is helpful to set the reasons in full:

> "The remaining allegations
>
> 94. The covert recordings have been said by the claimant to be the principal evidence in support of the totality of the claimant's allegations. As noted, those recordings amount to inaudible noise or, in the few areas where anything can be made out, banal office-based conversation and they demonstrably do not support the claimant's allegations. They provide no evidence whatsoever to support any of the claimant's allegations.
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> 95. Again, I repeat my findings above regarding the claimant's assertions in her submissions that she had "other evidence". However, in the light of the fact that the recordings are her primary evidence, and reminding myself that the test is "no reasonable prospect of success", I find that, having heard this primary evidence myself at the 5 September PH and in the light of the bizarre nature of many of the claimant's allegations, and the fact that, in the light of what the claimant suggests about these recordings, one cannot have any faith in anything the claimant asserts, that whilst I do not consider that I could conclude that the remaining allegations had "no prospect of success" at all, I can and do conclude that they have "no reasonable prospect of success".
>
> 96. I therefore strike out the remaining allegations and, therefore, the totality of the claim as having no reasonable prospect of success." (Original emphasis)

46. I shall set out my conclusions first, as the judge did, in relation to the strike out under rule 37(1)(b). The only matter I am concerned with is whether the unfair dismissal claim can reasonably be regarded as having been within the Employment Judge's contemplation when reaching the conclusion that he did. The conclusions he reached regarding the other claims have not been permitted to progress to a full hearing and stand unchanged.

47. I start by commenting that it cannot be characterised as "obscene" to make an allegation that one had been unfairly dismissed. Indeed, the law places the burden on an employer to show the reason for the dismissal. Nor can the purpose of bringing an unfair dismissal claim necessarily be to cause expense to a respondent. An element of expense is inevitable in every case. I have every sympathy with the Employment Judge's frustration at having had to listen to tapes which the claimant insisted

contained material which he was simply unable to hear, no doubt because it was not there. However, just because there was nothing to back up the claimant's extraordinary allegations, which were fairly characterised as bizarre, does not automatically mean that an unfair dismissal claim - the issues arising from which were neatly encapsulated within the ET3 - can be similarly characterised. I was taken to documentation relating to the claimant's employment and its termination. It may be (and I say no more than that) that some of the comments in emails raise issues which could merit enquiry at a hearing as to the attitude some of the respondent's staff to the claimant at the material time.

48. Employment Judge Clark was able neatly to summarise the ambit of the claim as being "Unfair Dismissal against the First Respondent only, for which the Tribunal will have to decide whether the Claimant's dismissal, alleged to be for some other substantial reason, was fair in accordance with section 98(4) of the **Employment Rights Act 1996**". The two discrimination allegations which were said to have surrounded the dismissal have now fallen away.

49. Similarly, the claim of unfair dismissal was not something which the claimant had sought materially to expand upon. The goalposts had not moved. In so far as the additional material provided by the claimant in response to the list of issues promulgated by Employment Judge Clark was in relation to unfair dismissal it seems to me to have been largely evidential. Shorn of the discrimination claim I ask, rhetorically, whether a case management direction that none of the recordings could be relied on in evidence would have sufficed to ensure the goalposts remained in place? Given the trenchant findings of the Employment Judge as to the claimant's credibility it is inconceivable that he would be the judge hearing or presiding over the case and thus determining more prosaic matters such as her objective reasons for acting as she did to her colleagues in advance of her dismissal. Another ET could make its own mind up as to the matters it is required to consider on an "ordinary" unfair dismissal claim.

50. I turn next to the passage at paragraphs 94 to 96 of the judgment, set out in full above.

51. On a fair and liberal reading of this passage I can see no basis for concluding that the Employment Judge had in mind the unfair dismissal claim when reaching the conclusion that he did.

The focus is entirely on the recordings, and the fact that they provide no evidence to back up the claimant's allegations.

52. Based on my conclusions thus far, I accept Ms Brown's submission that an ET is not formally required to separate out individual heads of a claim. However, it is notable that, in the present case the Employment Judge did just that, dealing with three separate groups of claims so far as the 37(1)(a) claim is concerned. The first two groups had nothing to do with the unfair dismissal claim. If the third group, "the remaining allegations" was intended to encompass it, then there is nothing in the passage quoted which evens hints that it was included. Everything in the narrative relating to each of the groups focuses on the lack of any evidence to support the claimant's allegations. There is no reference to the entirely separate evidential obligation imposed by law on the respondent in the case of an unfair dismissal.

53. The findings as to credibility were based on the claimant's admittedly extraordinary insistence that the recordings contained material which they plainly did not. However, they do not necessarily carry over to other matters and even if they did, the judgment contemplates that it is possible that documentation could bear out some of the claimant's contentions.

54. I reject the submission that the discrimination and unfair dismissal claims stand or fall together. Plainly the making of the allegations was a factor in the respondent deciding to act as it did, but the fairness of that, both substantively and procedurally can be examined without reference to the claimant's allegations.

55. Rule 62 of the **ET Rules** requires an ET to give reasons for its decision on any disputed issue, whether substantive or procedural, such reasons being proportionate to the significance of the issue. A failure to do so is an error of law, although it is established that what is required is "substantial compliance" rather than slavish adherence to the rules.

56. As explained in **Simpson v Cantor Fitzgerald Europe**, the point of rule 62 is to enable the parties to know why they have won or lost. It brings into statutory form the requirement commonly known as "Meek" compliance (**Meek v City of Birmingham District Council** [1987] IRLR 250). I

simply cannot say from reading the judgment under appeal why the EJ struck out the unfair dismissal claim, regardless as to whether one looks at it from a "substantial" or "slavish" viewpoint.

57. The authorities cited by the Employment Judge in his judgment make clear the exceptional nature of the strike-out jurisdiction. In my judgment the very nature of the sanction requires a clear explanation tailored to the facts, and, here to the specific allegation of unfair dismissal. The judgment did so in the clearest possible way in relation to all the other allegations, which have withstood attempts to appeal them. The use of language which is not apt to characterise a claim of unfair dismissal is a further matter suggesting to me that the Employment Judge did not separate in his mind the unfair dismissal claim from the others. The fact that the claimant, a litigant in person, did not raise the point is not to be held against her. It is not possible to see from the judgment whether the respondent had, in its submissions, differentiated the different claims. In my judgment the failure by the Employment Judge to explain how the factors which he had had regard to in connection with the other claims bore on the unfair dismissal claim amounts to an error of law. The appeal is therefore allowed.

58. The question whether the unfair dismissal claim should be struck out under either limb of rule 37 is not binary, and it is not open to me to determine the matter. It must be remitted. Ms Brown submits that the case should be remitted to the same judge, Ms Pennycook that it should be remitted to a different judge. Having regard to the trenchant views expressed by the Employment Judge as to the claimant's credibility and in particular to the statement "I have entirely lost confidence in the good faith and honesty of the claimant" it would be impossible for any mythical outside observer to say that the claimant could have a fair re-determination of the matter by a judge who has expressed those views. I form that view without intending any criticism of the Employment Judge. The matter must be remitted for the re-hearing of a strike out application (if pursued by the respondent) by a differently constituted Employment Tribunal.