# EMPLOYMENT TRIBUNALS (SCOTLAND)

**Case No: 4100408/2017**
**Held in Glasgow on 7 June 2019 (Preliminary Hearing)**
**Employment Judge I McPherson**

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| **M** | **Claimant**<br>**In Person** |
| **F** | **Respondent**<br>**Represented by:**<br>**Mr W Lane -**<br>**Solicitor** |

# JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) Having heard the claimant in person, and the respondent's solicitor at this Preliminary Hearing, on the respondent's opposed application dated 28 May 2019 to amend the ET3 response in the grounds of resistance, the Tribunal **allowed** the amendment, to revise the wording of paragraph 32 (notice pay), for the reasons then given orally at the time and as recorded in writing in the Reasons below, it being in the interests of justice, and in accordance with the Tribunal's overriding objective under **Rule 2 of the Employment Tribunal Rules of Procedure 2013** to do so.

(2) Thereafter, having heard sworn evidence from the respondent in person, and having heard submissions from the claimant in person, and from the respondent's solicitor, at this Preliminary Hearing, on the respondent's opposed application dated 3 June 2019 to strike out the claim, in terms of **Rule 37(1 )(b) and / or (e) of the Employment Tribunal Rules of Procedure 2013,** the Tribunal has **struck out the claim only insofar as it seeks notice pay for the claimant, but** allows the claim to proceed on the remaining complaints of unlawful 5 deduction from wages, and failure to pay holiday pay.

(3) The Tribunal is satisfied that the claimant has acted scandalously, unreasonably and vexatiously by intimating witness statements on 31 May 2019 making serious allegations against the respondent's son (known as "S' 1), which have caused stress and embarrassment to the io respondent, and which make a fair trial of the breach of contract claim

(for failure to pay notice pay to the claimant) not possible, but it is disproportionate, and not in the interests of justice, to strike out all of the remaining parts of the claim, as sought by the respondent.

(4) Accordingly, the Tribunal **orders** that the unlawful deduction from **is** wages, and holiday pay parts of the claim only shall proceed to a **oneday Final Hearing on the merits for full disposal, including remedy, if appropriate,** before Employment Judge Ian McPherson, if available, which failing another Employment Judge sitting alone, on dates to be hereinafter assigned by the Tribunal, after the usual date 20 listing process, but in the proposed listing period of **September, October and November 2019.**

# REASONS

**Introduction**

1. This case, which has had a long procedural history since the claim was first presented to the Tribunal on 13 March 2017, called before me on Friday, 7 June 2019, for a public Preliminary Hearing.

2. The Preliminary Hearing was fixed by me to determine, as preliminary issues, the respondent's application to amend the ET3 response, and the respondent's application to strike out the claim, those applications, dated 28 May and 3 June 201 9, having been intimated in advance of what should have been a one day Final Hearing on Friday 7 June 201 9 for full disposal, including remedy, if appropriate, as regards outstanding claims for arrears of pay, holiday pay, and notice pay arising following termination of the claimant's employment by the respondent on 8 January 2017.

3. Following a Case Management Preliminary Hearing held on 29 March 2019, by Employment Judge Muriel Robison, her written note, and orders, dated 29 March 2019, were issued to both parties, under cover of a letter from the Tribunal dated 3 April 201 9. Thereafter, by Notice of Final Hearing, dated 10 April 2019, Friday, 7 June 2019, was set aside, for one full day, for the case's full disposal, including remedy if appropriate.

**Background**

4. Following ACAS early conciliation between 23 January and 1 3 February 201 7, the claimant's ET1, presented on 13 March 2017, complained that the claimant had been unfairly dismissed by the respondent, claimed a redundancy payment, and further claimed that he was owed notice pay, holiday pay, and arrears of pay. By ET3 response, intimated on 1 3 April 201 7, the claim was defended.

5. Following a Preliminary Hearing before Employment Judge Frances Eccles, on 23 and 24 October 2017, she refused the claimant's application for leave to amend, to add a claim of automatically unfair dismissal for making a protected disclosure, in terms of **Section 103A of the Employment Rights Act 1996,** and she struck out the claim for "ordinary" unfair dismissal, in terms of **Rules 37 (1) (b) and (e) of the Employment Tribunals Rules of Procedure 2013,** for the reasons more fully detailed in her original judgment, with Reasons, dated 5 December 2017, and entered into the register and

copied to parties on 1 1 December 2017.

6. As a result of Judge Eccles' judgment, the only complaints left live were those for unauthorised deduction from wages, outstanding holiday pay, and breach of contract (for failure to pay notice pay), the claimant's earlier claim for a redundancy payment having been withdrawn, and dismissed, in terms of a **Rule 52** judgment issued by me, and entered in the register, and copied to parties, on 4 August 201 7.

7. The claimant thereafter sought to appeal against Employment Judge Eccles' judgment, but he did so 15 days out of time, and his application for an extension of time was refused by the EAT registrar, in chambers, on 19 November 2018, following which the case returned to the Glasgow Employment Tribunal for further procedure.

8. That further procedure was discussed at, and documented in, Employment Judge Robison's written note and orders dated 29 March 2019 which fixed Friday, 7 June 2019, as the Final Hearing for the remaining complaints of unlawful deduction from wages, outstanding holiday pay, and breach of contract (failure to pay notice pay).

**Respondent's applications to amend ET3 response, and Strike Out the claim**

9. On 28 May 2019, Mr William Lane, solicitor with Peninsula, made application to the Tribunal seeking to amend the respondent's ET3 response. Thereafter, on 3 June 2019, Mr Lane made a further, urgent application to the Tribunal for a Strike Out of the claim, and to convert the one-day Final Hearing listed for 7 June 201 9 to a Preliminary Hearing to determine the Strike Out application.

10. Both these applications came before me, as the duty Employment Judge, on Wednesday 5 June 2019, when I gave instructions, which were then intimated to both parties by email from the Tribunal clerk that afternoon, to state that both applications would be dealt with at the outset of the Hearing on 7 June 201 9 and, for that reason, the Final Hearing listed for that date was converted into an open (public) Preliminary Hearing to consider the amendment and Strike Out applications, and any objections from the claimant.

11. It was further intimated that, if the case was not struck out, then it would be relisted for a Final Hearing at a later date. Notice of Preliminary Hearing (Preliminary Issue) was accordingly issued to both parties, by the Tribunal, on 5 June 2019, confirming the two preliminary issues to be determined at this public Preliminary Hearing.

**Preliminary Hearing before this Tribunal**

12. The claimant attended, unrepresented, as a party litigant. A former colleague, also previously employed by the respondent, whom I have anonymised here as "CW1", whom the claimant intended to lead as one of three witnesses at the listed Final Hearing, had I not converted it into a public Preliminary Hearing to determine the two listed preliminary issues, was in attendance, not as a witness for the claimant, but as a supporter to take notes, given the claimant advised me that he suffers from tinnitus, and hearing what is being said in the public hearing room, at the Tribunal, is sometimes problematic for him.

13. Witness statements had previously been exchanged, for use at the Final Hearing, from the claimant, and each of his three witnesses, whom I have anonymised as **CW1 to CW3.**

14. The respondent was in attendance, represented by her solicitor, Mr Lane, consultant with Peninsula. She was accompanied, for support, by her husband, whom I have identified here as “H”, and by her son "S", as he is known in these Tribunal proceedings, by virtue of a **Rule 50** Order granted previously. Witness statements had previously been exchanged, for use at the Final Hearing, from both the respondent, and her husband H, who is the father of S.

15. Mr Lane, solicitor for the respondents, lodged a Bundle of Documents, extending to some 127 pages, comprising Employment Tribunal pleadings and orders (at pages 1 to 53); emails between the parties, on 8 January 2017 (at pages 54 to 60); and documents in relation to payments, and the respondent’s calendars, at pages 61 to 1 25.

16. The claimant’s Schedule of Loss was produced, at pages 126 and 127, but while referred to there as undated, in clarification with both parties, at the start of this Preliminary Hearing, it was agreed that this was a copy of the Schedule of Loss intimated by the claimant to the Tribunal on 22 July 2017.

1 7. Although showing a total sum sought at £26,026, that was before Employment Judge Eccles had struck out the unfair dismissal part of the claim, by her written Judgment and Reasons issued on 11 December 2017, and so the claimant confirmed that the only sums in that Schedule of Loss relevant now, if the case progresses to a Final Hearing, are £2,132.62 for owed holiday pay in 2015/16 and 2016/2017, and £2,460.72 for owed notice pay.

18. In clarification of his position, at any Final Hearing in this case, the claimant further stated that he was still seeking each of those sums in respect of owed holiday pay, and notice pay. He also stated, and Mr Lane confirmed there was no objection from the respondent, that, as the claimant had advised Employment Judge Muriel Robison, at the Case Management Preliminary Hearing held before her on 29 March 2019, and as recorded at paragraph 5 of her written note, the claimant is also seeking arrears of pay of £260 which he claims was unlawfully deducted from his final wage, albeit this is denied by the respondent.

**Matters considered at this Preliminary Hearing**

19. For the avoidance of any doubt, I clarified that, in light of the fact that I had converted the listed Final Hearing into a public Preliminary Hearing, this Hearing would not be considering evidence from parties in relation to the merits or otherwise of the remaining matters of outstanding monetary claims, left outstanding following Employment Judge Eccles’ striking out of the unfair dismissal part of the claim. Further, parties having exchanged witness statements in relation to the listed Final Hearing, for that purpose, I stated that at this Hearing I would not be hearing evidence from any of the parties, or the witnesses, from whom they had provided witness statements to each other, copied to the Tribunal.

20. Further, given the Bundle of Documents lodged at the start of this Preliminary

Hearing, I enquired about the Bundle of Documents held by the Tribunal, following the previous Hearing before Employment Judge Eccles in October 2017. Both parties confirmed that that earlier Bundle could be destroyed, by the clerk to the Tribunal, through confidential waste, and that the only Bundle required going forward would be the Bundle lodged at the start of this Preliminary Hearing.

21 . While that Bundle did not include any of the six witness statements, they were available to me, on the case file, having been intimated to the Tribunal, by each party. Mr Lane advised that, in respect of his application for Strike Out of the remaining claim, he would be referring to the witness statements produced by the claimant (including proposed evidence from him, and his 3 witnesses) and, forthat purpose, he would be referring the Tribunal to specific parts of those witness statements about which the respondent was complaining, in support of her application for Strike Out.

22. Mr Lane explained that, while the Bundle of Documents, lodged at the beginning of this Preliminary Hearing, included the respondent's amendment application, of 28 May 2019, at pages 47 to 53, he was insisting on that amendment application, and he would also be insisting upon the application for Strike Out, as intimated to the Tribunal on 3 June 2019, but not included in this Bundle of Documents. As such, in that regard, I had access to the application for Strike Out, as per the copy held on the Tribunal's case file.

**Respondent's application to amend the ET3 response**

23. The first matter considered at this Preliminary Hearing was the amendment application, intimated on 28 May 2019 by Mr Lane, solicitor for the respondent.

24. A copy of this amendment application was included in the Bundle of Documents lodged at the start of this Preliminary Hearing, at pages 47 to 53. The covering application by Mr Lane read as follows: -
*We act for the Respondent in respect of the above claim.*
We *are writing to make an application to amend the Respondent's grounds of response, pursuant to rule 29 of the Employment Tribunals Rules of Procedure 2013 (the "Rules").*

***Proposed amendment***
We *attach the Respondent's grounds of response (which was presented to the Tribunal in the form of a paper apart to the ET3) with the proposed amendment marked in "track changes".*
*As the tracked changes show, the proposed amendment:*
*• applies solely to paragraph 32 of the grounds of response; and*
*• sets out that - with reference to the Claimant's complaint for notice pay - the Respondent contends that it terminated the contract of employment in response to the Claimant's repudiatory breach of contract.*

***Submissions in respect of the proposed amendment***
*We submit that it would be appropriate to grant the proposed amendment for the following reasons:*
*1) The proposed amendment is foreshadowed in the existing grounds of response. The existing wording of paragraph 32 sets out that the Respondent denies that any notice pay is owed. The proposed*

*amendment does not seek to insert any new alleged acts or omissions on the Claimant's part, and refers to acts of the Claimant that are already alleged in paragraphs 9, 12 and 16. Paragraph 28 already contains an assertion that, as a result of the Claimant's conduct, the Respondent was entitled to dismiss.*
*2) The proposed amendment does not give rise to any issues of time-bar.*
*3) Whilst the final hearing of the case is relatively close, the proposed amendment does not cause undue injustice or hardship. The Claimant's ET1 contained a complaint of unfair dismissal, and the Claimant intended to proceed with that complaint until it was struck out under rules 37(1 )(b) and (e) of the Rules. The Claimant therefore presented his claim with the expectation that his actions - and, specifically, whether his actions justified the Respondent's decision to terminate his employment - would be a matter in issue*

***Overriding objective***
We *submit that allowing the proposed amendment would be in keeping with the overriding objective of dealing with cases fairly and justly. In particular, we submit that:*
*• Permitting both parties to fully advance their arguments in respect of the matters in issue is consistent with ensuring they are on an equal footing.*
*• Allowing parties to amend their pleadings to clarify their arguments - particularly when such amendments are foreshadowed in the existing pleadings - is consistent with seeking flexibility in the proceedings.*
We *thank you for your assistance and look forward to hearing from you.* We *confirm that this application has been copied to the Claimant.* We *advise the Claimant that any objections to it should be sent to the Tribunal as soon as possible. ''*

25. The amended response was to change the original ET3 response, lodged on 13 April 2017, and the sole amendment was to paragraph 32 (notice pay), where the revised wording (shown underlined) proposed was as follows:
*"Notice Pay*
*32. The Respondent denies that the Claimants are owed any notice pay as alleged. The acts referred to in paragraphs 9, 12 and 16 both individually and cumulatively constituted repudiatory breach of the contract of employment. The Respondent accepted that repudiatory breach and terminated the contract of employment. The Respondent paid the Claimants their notice pay on dismissal but is however reviewing her accounts and as a reasonable employer, any sums owed which are outstanding will be paid in due course. ''*

26. At the start of this Preliminary Hearing, I noted that the claimant, in an email to the Tribunal, on 29 May 2019, at 1 1:53, had objected to this amendment, stating as follows:
*"As for the proposed amendments, I have to object to those at this late stage of proceedings. I wasn't allowed to include £2000 per/year: (tax free) £270 in wages not paid from a respite in 2015 or the 6 years of only 3 weeks paid holiday. I was informed that I could only claim for one year's holiday arrears. I am also waiting for your clients wittiness* [sic] *statements if they are available. "*

27. When I enquired further of the claimant about the basis of his objection to the

respondent's proposed amendment, the claimant stated that this was another ***"delaying tactic by the respondent',*** and that this Hearing was his fifth time trying to get this case to a Final Hearing.

28. When I asked him about the well-known guidance from the Employment Appeal Tribunal, in **Selkent Bus Company Limited v Moore 1996 ICR 836,** as referred to in Employment Judge Eccles' judgment refusing his own application for leave to amend the claim to add a whistleblowing claim, the claimant stated that he was familiar with the **Selkent** factors, and that timing of an application was one of them, and while his objection was based of the lateness of this application for amendment, the claimant added that he did not think that the amendment proposed was relevant.

29. It then being 10.35am, when parties' supporters were admitted to the public Preliminary Hearing, the prior discussion having been in private between myself and the claimant, together with Mr Lane, and the respondent, by way of a Case Management Preliminary Hearing, Mr Lane then addressed me on the terms of the respondent's written application of 28 May 2019.

30. In doing so, Mr Lane stated that the amendment proposed was largely foreshadowed in the existing grounds of response, and that the respondent's amendment was not proposing a radical new line of defence, and that there were no time bar issues arising from the proposed amendment, as it had been largely foreshadowed in fact, and he described his amendment application as an interpretation of the legal conclusion to be drawn from those facts, namely that there was an entitlement on the respondent's part to dismiss the claimant.

31 . As regards the timing and manner of the application, Mr Lane appreciated that it was close to what had been the listed Final Hearing, and may just be over a week or so before this Preliminary Hearing, but he submitted that there was no prejudice, and if allowed, it would not require any real change to be made in either parties' witness statements.

32. In particular, he submitted that, in their respective witness statements, both parties had already set out their evidence on what had happened, and all the amendment does is to allow the respondents to make submissions on what happened, and the respondent's legal conclusion on what had happened, and therefore it did not involve any change to timetabling for any Final Hearing, nor necessitate any addition to witness statements.

33. Further, Mr Lane added that he did not see how proposed amendment caused prejudice to either party. In closing, he adopted his written application, and stated that he did not depart from anything stated there.

34. In allowing the claimant to reply to Mr Lane's oral submissions, starting at around 10.41am, the claimant stated that he did object, as there was late timing of the amendment application, and he felt that it was irrelevant. He added that he did not understand what the amendment meant, but the fact it was being requested showed that it was obviously beneficial to the respondent, as otherwise why would Mr Lane be putting it forward.

35. Also, the claimant asked, why wait until about 1 0 days before the listed Final Hearing. He reiterated that he felt it was not beneficial to both parties, and he insisted in stating that he felt the proposed amendment was irrelevant, and that the Tribunal should refuse the respondent's application to amend.

36. Further, the claimant added, he did not accept that there had been any repudiatory breach of contract by him, and that was a matter for trial at the Final Hearing, and, in his opinion, it would be prejudicial to him, to allow this amendment, in that he does not have in-depth knowledge of the law to answer the proposed amendment to layman's terms.

37. When the claimant asked for my advice, I stated that it is not for an Employment Judge to act as advocate or representative for either party in Tribunal proceedings, and that each party has to take their own independent advice, from where they can, but that the Employment Tribunal is well used to dealing with situations where one party is acting on their own behalf, and the other party is represented, and indeed the Tribunal has a statutory duty to do so in terms of **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** which requires the Tribunal to ensure that cases are dealt with fairly and justly, including ensuring, so far as practicable, that both parties are on an equal footing.

38. Having heard my observation, the claimant stated that the amendment is not fair, and it is too late, but when I asked him if he could "show and tell" any specific prejudice to him, if the Tribunal were to allow the respondent's proposed amendment, the claimant stated that he could not, but he repeated that he felt the amendment application was not fair, and too late, and he did not understand why there needed to be any amendment.

39. Having carefully considered both the respondent's application to amend, and the claimant's objections, but without requiring to retire into chambers for private deliberation, I took a few minutes, whilst sitting on the bench, to write a short Note and Reasons, which I then read out *verbatim* to both parties, as follows: -

***"Having heard parties' competing submissions on the respondent's application to amend the ET3 response, intimated on 28 May 2019, the Tribunal agrees with the claimant that the application to amend Is in Its timing made late, given the length of procedure already In this case, but lateness of an application Is but one of the Selkent factors I have to take Into account***

***Having regard to the Tribunal's overriding objective under Rule 2, having considered the amendment, and the claimant's objections, I grant the respondent's application, and allow the amendment, which Is simply to amend and revise paragraph 32 (at page 52 of the Bundle) so as to give the claimant and Tribunal fair notice and proper specification of the respondent's defence to the notice pay part of the monetary claims before the Tribunal.***

***It Is In the Interests of justice, and consistent with the overriding objective for the Tribunal to allow the amendment on that basis and, subject to consideration of the respondent's opposed application for Strike Out of the claim, to which we will now proceed, the case can be relisted for Final Hearing on another date to hear evidence from witnesses, from both parties, as per their witness statements, and the claimant's Schedule of Loss, as clarified earlier at the start of this Preliminary Hearing.***

***There Is no prejudice caused to the claimant, as the claimant can still pursue his monetary claims at the Final Hearing, subject to the Strike Out application being determined."***

**Respondent's application of Strike Out of the Claim**

40. It then being 10.59am, my interlocutory ruling on the opposed amendment having been intimated to both parties orally, and as now confirmed in writing as per the preceding paragraph of these Reasons, the Preliminary Hearing proceeded to the second matter before this Tribunal for my judicial determination.

41. Mr Lane adopted the terms of his written submissions, seeking Strike Out, as per his email to the Tribunal of 3 June 2019, in the following terms (suitably redacted by me, to remove the names of the claimant's witnesses, and give them the identifiers **CW1 to CW3):**

*"We are writing to apply for:*
*• the Tribunal to strike out the Claimant's claim, pursuant to rules 37(1)(b) and (e) of the Employment Tribunals Rules of Procedure 2013 (the "Rules"); and*
*• the Tribunal to convert the one-day final hearing currently listed to take place on 7 June 201 9 to a preliminary hearing to determine this strike out application.*

***Background to application***
*The Claimant presented his claim on 13 March 2017, making complaints of unfair dismissal, unauthorised deductions from wages, outstanding holiday pay and breach of contract (notice pay). The Claimant also sought a redundancy payment (and withdrew that complaint at a preliminary hearing on 27 July 2017).*
*In its judgment dated 5 December 2017 (of which we attach a copy for the Tribunal's convenience) the Tribunal struck out the Claimant's unfair dismissal complaint pursuant to rules 37(1 )(b) and (e) of the Rules.*
*Whilst we have attached the strike out judgment in full, we respectfully draw the Tribunal's attention to paragraphs 13 and 16, which are as follows:*
***"13. It is the respondent 1s position that the cla manf a behaviour during the proceedings to date has been so unreasonable as to justify strike out of the claim. In particular the respondent refers to the claimant levelling unfounded and Irrelevant accusations against S (that he is a paedophile); the respondent (that she is mentally ill and worked as a prostitute) and a witness for the respondent (that her son is the Illegitimate child of a priest). The claimant has stated In writing to the Tribunal that he is " 100% labelling S as a paedophile because he has been filming young children (young boys) for me-time (masturbation) for several years now". This has been the claimant 1s position before the Tribunal. He has referred to the respondent being described as * an unfit mother" by other family members. He has referred to her mental health and of " beetles & bugs Infesting her kitchen as a result of her unhygienic lifestyle". He has accused neighbours of calling the respondent a prostitute. The relevance of such statements to the Issue of whether or not he was unfairly dismissed by the respondent has not been explained by the claimant other than to " give an insight into my former employer* s character".***
***•••***
***16. In all the circumstances, the Tribunal was satisfied that the manner In which the proceedings have been conducted by the claimant has been scandalous and unreasonable. He has persisted in making Irrelevant and abusive statements about the respondent. His conduct seeks to cause distress and embarrassment to the respondent. He has made very serious allegations against S who Is a vulnerable adult and has limited ability to defend himself. The claimant has intimidated a***

***witness for the respondent. He has written to the witness making scandalous remarks about her child. The witness Is now too frightened to attend the Tribunal."***

***Reason for application***

*Following the strike out of the unfair dismissal complaint, the Claimant was permitted to proceed with his monetary complaints (namely unauthorised deductions from wages, outstanding holiday pay and breach of contract (notice pay)). The case was sisted for a period pending the Claimants unsuccessful appeal to the EAT, and a final hearing is listed to take place on 7 June 2019.*

*In keeping with the Tribunal's directions, we exchanged witness statements with the Claimant by 31 May 2019. After reviewing the Claimant's witness statements, we are concerned that each one contains the same unfounded and irrelevant accusations against S (namely, that he is a paedophile) that the Tribunal referred to when striking out the unfair dismissal complaint.*

We *enclose copies of the Claimant's witness statements (which are from* ***CW1, CW2, CW3,*** *and the Claimant himself). The Claimant provided these statements to us within a single Word document, and it is this document (in pdf format) that we attach. To assist the Tribunal, we have highlighted the relevant passages in yellow.*

*Scandalous, unreasonable or vexatious manner in the conduct of the proceedings*

*We submit that the Claimant's decision to include the highlighted passages in his witness statements amounts to him conducting the proceedings in a manner that is scandalous, unreasonable and vexatious. Specifically, we submit that:*

*• by including the highlighted passages, the Claimant is persisting in making very serious allegations against S, who is a vulnerable adult and has limited ability to defend himself;*

*• in acting this way, the Claimant is seeking to cause the Respondent (who is S's mother) distress and embarrassment; and*



*• the Claimant's actions are particularly unacceptable as the Tribunal has already warned him against such conduct (and, in doing so, struck out his unfair dismissal complaint).*

*Whether it is possible to have a fair hearing*

*We further submit that as a result of the Claimant's actions, it is no longer possible to have a fair hearing. Specifically, we submit that:*

*• the content of the Claimant's witness statement has caused the Respondent distress and embarrassment (particularly because she reasonably assumed that, after the Tribunal struck out the Claimant's unfair dismissal complaint, such actions would not be repeated); and*

*• the Respondent's distress and embarrassment will negatively impact on her ability to give evidence in defence of the Claimant's remaining complaints (particularly as it appears that the Claimant intends to use the final hearing as a "platform" to publicly make very serious allegations against S, in order to cause distress and embarrassment to the Respondent).*

***Overriding objective***

*We further submit that striking out the claim would be in keeping with the overriding objective of dealing with cases fairly and justly. Specifically, we submit that:*

*• it is clear that the Claimant intends to conduct himself during the final*

*hearing in a manner that will cause the Respondent distress and embarrassment, and negatively impact on her ability to give evidence (thereby resulting in the parties not being on an equal footing); and*
*• it would neither be fair nor just to the Respondent or S to - by permitting the claim to continue*
*- provide the Claimant a "platform" to publicly make very serious allegations against S.*
*We thank you for your assistance and look forward to hearing from you. This application has been copied to the Claimant, and we advise him that any objections to it should be sent to the Tribunal as soon as possible."*
42. When I enquired of Mr Lane whether, as solicitor for the respondent, he intended to refer the Tribunal to any relevant caselaw on Strike Out, much to my surprise he stated that he was not going to do so, as caselaw had been cited to, and referred to, in Employment Judge Eccles' judgment dated 5 December 201 7, a copy of which was included in the Bundle before me at this Preliminary Hearing, at pages 29 to 39.
43. Mr Lane further stated that he would be referring the Tribunal to **Rules 37 (1) (b) and (e) of the Employment Tribunal Rules of Procedure 2013. He** further stated that he had noted the claimant's objections to the Strike Out application, as intimated to the Tribunal in the claimant's email of 3 June 201 9, at 19:29, as follows: -
*uMr Lane & Tribunal,*
*I received an email from Peninsula on the 3rd June. I had to read it several times as I was & still am absolutely astounded that they are asking for another strikeout regarding my case. I sent Peninsula my Witness statements over a month ago & they are just now asking for a strikeout. I believe I was harshly treated in my case for whistleblowing & unfair dismissal to say the least.*
*I also think I have complained to Peninsula & the Tribunal on five occasions against my former employer speaking freely and openly about this non disclosure case. I even asked the Judge at the last hearing to sensor* [sic] *my former employer for making unfounded allegations against Robert Anderson & I.*
*If anyone has a grievance about having a fair hearing then it is the Claimant not the former employer. I Can't believe that Peninsula would even try to go for another strikeout. I hope the Tribunal realizes that I have been pursuing this case since January 2017.*
*My witness statements are not meant to embarrass nor to be scandalous or vexatious but to put forward an honest account of what I am taking my former employer to Tribunal for. "*
44. Given the claimant was appearing at this Preliminary Hearing as an unrepresented, party litigant, against Mr Lane, as a solicitor instructed for the respondent, and so recognising that the claimant would not necessarily be familiar with the Tribunal's practices and procedures, including the relevant procedural Rules about Strike Out, I stated that, once I had heard from Mr Lane, with his oral submissions for the respondent, I would allow an adjournment of proceedings for the claimant to take stock, to consider his reply, and to look at the relevant **Rule 37** in **Butterworths Employment Law Handbook.**
45. It then being around 1 1 .03am, Mr Lane addressed the Tribunal with his oral submissions for the respondent. Before doing so, Mr Lane advised as the respondent's husband "H" would appear as a witness for the respondent at any future Final Hearing, he would prefer that H, and the respondent's son "S" did not know what he was about to say, and so he asked for them to be allowed to leave the Tribunal hearing room. I stated that it was a public Hearing, and they did not require leave to come and ***I*** or go.

46. After H and S had left, Mr Lane then started his oral submissions for the respondent. In doing so, he quoted from selected passages of Employment Judge Eccles' judgment dated 5 December 2017. He referred to how, at paragraph 5 of her Reasons, Judge Eccles had referred to how the claimant was then seeking to add by amendment a claim that the respondent decided to dismiss him after he and another support worker ***"had a discussion with F regarding S's filming of young boys for masturbation purposes".***

47. Further, he also referred to how, at paragraph 6, Judge Eccles had recorded the argument then made by a Mr Warnes, consultant with Peninsula, then acting for the respondent, that the claimant's application to amend to add a whistleblowing claim came too late; it had no reasonable prospects of success; it was unnecessary as the claimant already had a claim of unfair dismissal and ***"is motivated by a desire to "go public" with unfounded allegations against her son In the hope of pressurising the respondent to settle the claim".***

48. Next, referring to paragraph 13 of Judge Eccles' judgment, Mr Lane highlighted how the respondent, at that earlier Preliminary Hearing before Judge Eccles, had referred to the claimant then levelling ***"unfounded and Irrelevant accusations against S (that he is a paedophile); the respondent (that she Is mentally ill and worked as a prostitute) and a witness for the respondent (that her son is the illegitimate child as a priest)" .***

49. Mr Lane thereafter referred me to paragraphs 16 to 18 of Judge Eccles' judgment, explaining why she had struck out the claimant's claim for unfair dismissal in terms of **Rules 37 (1) (b) and 37 (1) (e),** she being satisfied that the manner in which the proceedings had been conducted by the claimant had been scandalous and unreasonable: ***"he has persisted In making irrelevant and abusive statements about the respondent. His conduct seeks to cause distress and embarrassment to the respondent. He has made very serious allegations against S who is a vulnerable adult and has limited ability to defend himself. The claimant has Intimated a witness for the respondent. He has written to the witness making scandalous remarks about her child. The witness is now too frightened to attend the Tribunal."***

50. Further, at paragraph 18, Mr Lane drew my attention to what Employment Judge Eccles stated there that: ***"the manner in which the proceedings have been conducted by the claimant has been scandalous and unreasonable. The Tribunal considers that it Is no longer possible to have a fair hearing in respect of the claim of unfair dismissal. "***

51 . In coming to her judgment, Mr Lane stated that Employment Judge Eccles did so considering the guidance in **De Keyser Limited v Wilson 2001 IRLR 324,** about whether or not a fair trial was still possible.

52. In developing his submissions, on behalf of the respondent, Mr Lane then stated that on reviewing the claimant's witness statements, on 31 May 2019, when he sent the claimant the respondent's witness statements, he noted that the claimant had provided four statements, in one document, rather than individual witness statements from each of the claimant, and his three proposed witnesses. In doing so, he was concerned by the same unfounded

and irrelevant accusations being made against S.

53. At this stage of his submissions, Mr Lane invited me to look at the specific terms of highlighted passages, in the witness statements from the claimant, and his three potential witnesses, a copy of which he had attached to his application of 3 June 201 9.

54. While, in his enclosures with that letter of 3 June 2019, and to assist the Tribunal, he had highlighted the relevant passages in yellow, unfortunately the copy on the Tribunal's casefile is only in black and white, and, as such, he required to identify to me the specific passages which he wished to highlight in support of his application by the respondent for Strike Out of the claim.

55. In the witness statements provided by the claimant, Mr Lane stated that the claimant had not anonymised the identity of the respondent, or himself, or her son S. Accordingly, in reciting here the relevant passages complained of by the respondent, I have done so, by substituting the appropriate anonymisations for the names given in the witness statements, so as to preserve the anonymity of those covered by Employment Judge Eccles' earlier **Rule 50** Order, and also to anonymise the identity of the claimant's three witnesses who have provided these statements, and in respect of whom I have decided to issue a fresh **Rule 50** Order covering their identities too.

56. For witness CW1, the highlighted passage, on page 1 of 7, appropriately redacted and anonymised, now reads as follows:
**"We *had told our previous employer that her son confessed to us that he was filming young boys for the purpose of masturbation. F asked us not to contact the Police or Social Work & stated that she would stop* S's *inappropriate filming immediately."***

57. For witness CW2, the highlighted passage, on page 3 of 7, appropriately redacted and anonymised, and also with place names redacted, now reads as follows: -
***7 first raised concerns of S filming young children at BLANK (August 201 1). M was on a week's holiday in BLANK, on his return I informed M; (supervisor) that S was getting sexually aroused while filming & touching himself (outside of his clothing)."***

58. Further, again for witness CW2, another highlighted passage, on page 5 of 7, appropriately redacted and anonymised, now reads as follows:
***"As they (M and CW1) were going to whistle blow on her son for filming young boys for the purpose of masturbation."***

59. For witness CW3, the highlighted passage, on page 5 of 7, appropriately redacted and anonymised, now reads as follows: -
***CW2 & I were on a respite (April 2015) with S and another service user when we caught S filming young children and getting sexually aroused. CW2 Informed F In my presence and she reassured us both that she would stop this practice immediately."***

60. Finally, in the claimant's own witness statement, on page 6 of 7, the highlighted passage, appropriately redacted and anonymised, now reads as follows: -
***"I believe both myself & CW1 had our employment terminated as we were going to whistle blow on my former employer's son for***

***Inappropriate filming of young boys for the purpose of masturbation."***

61 . By adding those passages in his and the other witness statements, Mr Lane argued that the claimant was persisting in making some very serious allegations against S, whom Employment Judge Eccles had noted is ***"a vulnerable adult with limited ability to defend himself"*** and, by so doing, Mr Lane further argued that the claimant was seeking to cause the respondent, as S's mother, distress and embarrassment.

62. Furthermore, submitted Mr Lane, the claimant's conduct is particularly inexcusable as the claimant has already been warned that such conduct is unacceptable, as Employment Judge Eccles had struck out his unfair dismissal complaint against the respondent. In Mr Lane's view, that should have made it patently clear to the claimant, and accordingly that, in Mr Lane's view, establishes that Strike Out under **Rule 37 (1) (b)** is made out in the manner in which the proceedings have been conducted by the claimant being scandalous and unreasonable.

63. Turning then to the question whether it is possible to have a fair hearing, Mr Lane then submitted, ***ex parte,*** that the content of the claimant's witness statements have caused the respondent distress and embarrassment, as S is her son, and in particular as the respondent reasonably expected, after Judge Eccles' judgment, such matters had ***"been put to bed"*** and their reemergence in these witness statements had been a shock for the respondent.
He added that this distress and embarrassment would negatively impact on the respondent's ability to give evidence in the defence of the claimant's remaining monetary claims at any Final Hearing before the Tribunal.

64. Further, submitted Mr Lane, it is open to this Tribunal to infer that the claimant, having been warned by Employment Judge Eccles* judgment, and it noting that such remarks are unacceptable, yet he has done so regardless, Mr Lane invited me to infer that the claimant is ***"Intent on using these proceedings for publicly venting these allegations, and that he Intends to do so, come what may".***

65. Further, even if we attempted to be creative about procedure to be adopted at any Final Hearing, for example by way of making adjustments to cross examination, or whatever, Mr Lane submitted it is still the case that the claimant will seek, and in all likelihood find a way, of making these statements which he clearly intends to do.

66. On that basis, Mr Lane submitted, the Tribunal should find that it is not possible to have a fair hearing under **Rule 37 (l)(e).** Then, with leave of the Tribunal, Mr Lane stated that he would like to ask for the respondent to be allowed to give evidence at this Preliminary Hearing, to add to his own oral submissions on her behalf.

**Evidence led from the Respondent**

67. It then being around 1 1 :26am, I stated that as the respondent was present, and she had indicated her willingness to give evidence, and so would be open to cross examination by the claimant in person, and questions of clarification from myself as presiding Judge, I would allow Mr Lane's application for leave to let the respondent give evidence, but in making that ruling, I stated that there would need to be rules of engagement, which I then detailed for the

avoidance of any doubt by either party.

68. The respondent's evidence in chief, taken by questions asked by her solicitor, Mr Lane, lasted from around 11.28am until 11.43am, followed by an adjournment to allow the claimant to prepare for his cross examination of the respondent, and review his note taker's notes of the respondent's evidence before he cross examined the respondent. When we resumed, at 1 2.02pm, the claimant then cross examined the respondent, for around 25 minutes, followed by questions of clarification from myself as Judge from around 12.27pm until 12:32pm, following which Mr Lane did not seek to re-examine the respondent.

**Findings in Fact**

69. Based on the sworn evidence of the respondent, as cross examined by the claimant, and clarified by me as presiding Employment Judge, I have found the following material facts to be established: -
(1) The respondent, who is aged 72, is a pensioner, and she is the mother and legal guardian of S. She is married to H, the father of S.
(2) S, who is aged 32, is the respondents son, and she is his legal guardian, reviewed annually by the Office of the Public Guardian.
(3) S is a vulnerable adult who has limited ability to defend himself. He lives in supported accommodation, in a flat next door to the flat which is the residence of F and H.
(4) Having read, on more than one occasion, the highlighted passages in the witness statements produced to the Tribunal by the claimant and his three potential witnesses, the respondent spoke of them making her feel ill, ***"and just sick to my stomach. All four of these men are making scurrilous and untrue statements."***
(5) The respondent stated that, if this case proceeds to a Final Hearing, with evidence as given in these witness statements for the claimant, and that evidence is canvassed there, she does not think it will be a fair hearing, and she stated that ***"This Court Is being used as a platform to cause pain and injury to me on behalf of my son. "***
(6) The respondent insisted that ***"these allegations are not true - the police, social work and health professionals all know that they are not true. It is a miasma of salacious nonsense. My son Is not a paedophile, yet the claimant writes that he Is 100% sure. He is repeating untrue things."***
(7) The respondent accepted, under cross examination, that she had previously employed the claimant, and two of the three other witnesses (CW1 and CW2) but not CW3. She stated that she believes these witnesses would lie, because they are friends of the claimant, and part of his ***"coterie".***
(8) She stated that the witness statements are scurrilous, and that there are lies within them, but not all lies, but that the statements are untrue, and she insisted that she knows for fact that they are untrue, as does, she submitted, social work and the Police.
(9) Further, the respondent stated that the reputations of the claimant, and his witnesses, were already at risk, as she stated that she believed they were being investigated by the Scottish Social Services Commission ("SSSC"), and that she had sent these witness statements to the SSSC, as soon as she received them, and provided copies to social work.
(10) The respondent insisted that the highlighted passages are untrue, and

that they have been proven to be untrue, as social work and the police would tell this court, and that no action had been taken by the police, or social work, after these revelations first came out in January 201 7.
(11) The respondent further stated that she had never been diagnosed or treated for any mental health disorder, and she described herself as ***"a very strong woman",*** and that reading these witness statements had caused her great distress on behalf of herself, and most importantly, her son S, who is unable to defend himself, when these statements are lies.
(12) Further, added the respondent, she had not required to be placed on any medication, or have any GP medical appointments, on account of reading these witness statements, as she has been aware of these allegations since January 2017, and she described the witness statements as ***"just the same old, same old",*** and she insisted that it should have stopped, as Employment Judge Eccles had said, as also the police.
(1 3) The respondent further stated that she had informed her GP, and her son's medical professionals, about these witness statements, to alert them that they might be needed to give evidence, to which she said they had all agreed.
(14) In answer to a question of clarification from the Judge, about what she meant by describing herself as a ***"strong woman"***, the respondent stated that she came from a long line of Presbyterian ministers, and those principles run in her veins, and she is proud of them. Also, she added, ***"evil thrives when good men do nothing",*** and she stated that she had that strength.
(15) Further, added the respondent, she had sought advice about a legal remedy against the claimant, but she described herself as a pensioner, and that a large amount of money would be required for any defamation suit against the claimant, which she stated she had contemplated, but that no such proceedings were ongoing.
(16) During the respondent's cross examination, the Judge enquired of both parties whether they were aware of any ongoing, police, criminal or regulatory enquiry or proceedings that would impact on a final hearing in this Tribunal case.
(17) In reply, the respondent stated that she understood there had been a complaint by social work in February / March 201 7 to the SSSC, which she understood was still ongoing, and that complaint related to the claimant, and his three witnesses. She stated that social work had informed her about it to keep her aware for the safety of herself and her son, and she stated that she did not complain to the SSSC as she was afraid of what repercussions would happen.
(18) Under cross examination by the claimant, the respondent sought to give evidence about incidents at her flat, and damage caused, but that line of evidence was closed down by the Judge, as inadmissible, as being outwith the scope of the restricted scope of evidence about the distress and embarrassment caused to her by the witness statements from the claimant and his potential witnesses.
(19) During that cross examination, the claimant stated that his understanding was that he had been contacted, sometime last year, by the SSSC, when he was informed that it was his former employer, i.e. the respondent, who had contacted them, but the SSSC had advised him that the matter was closed.

**Tribunal's assessment of the Respondent's evidence**

70. While I allowed the respondent to give evidence restricted to the distress and embarrassment caused to her by the contents of the highlighted passages in the witness statements from the claimant, and his three potential witnesses, I have to note and record that both the claimant and respondent failed to have proper regard to the agreed rules of engagement.

71 . In giving her evidence to the Tribunal, the respondent started out answering questions from Mr Lane, within the rules of engagement, but she soon departed from those rules of engagement, which I had set out clearly and unequivocally to both parties, before the start of her evidence in chief, namely that the respondent would be allowed to give evidence restricted to the alleged distress and embarrassment to her, and not anything wider, then cross examined by the claimant (again so restricted), and any clarification by the Judge.

72. Early on into her evidence in chief, the respondent sought to refer to documents not before this Hearing, and not the subject of her evidence about distress and embarrassment from these witness statements from the claimant and others. She also sought to refer to some document in March 201 9, being a complaint by the claimant to the Tribunal, stating that she had broken reporting restrictions, and anonymity orders, which she denied that she had done. She referred to where she stays, and that rumours can cause physical harm to people, and that two of her flat's windows had been ***"done in"*** in December 2017.

73. At this point, the claimant sought to intervene, stating that he could not hear what the respondent was saying, and I required to advise him not to interject, and speak over the respondent, as I could not hear what she was seeking to say, if he was interrupting.

74. I reminded the claimant that his colleague (CW1) was in attendance, taking notes, and that the claimant would get an adjournment, before I invited him to speak, in reply, to Mr Lane's submissions on behalf of the respondent.

75. When proceedings resumed, the respondent referred again to windows being done in, and to body work damage to her son's Motability car, plus windscreen damage, and to herself being the ***"doyenne of the close".***

76. I had to remind her, firmly, but politely, that such evidence was not relevant to the restricted matter before this Preliminary Hearing, and that she should desist, and restrict her evidence to the limited scope allowed by me. She thereafter complied, and then proceeded to address her evidence as to why if these witness statements were to be canvassed at a Final Hearing, that would not, in her view, be a fair hearing.

77. When the respondent came to be cross examined by the claimant, in person, he started off by asking why he and his other witnesses would give evidence causing her distress, given their experience in the care sector. He did not, however, put it to her what their relevant experience and knowledge of the care sector was, so his questions had to be rephrased for her to answer.

78. The respondent appeared reluctant to answer the question as redrafted, and I had to remind her to do her best to answer the question asked, and to do so courteously, and without passion, but to do so in a calm and measured way,

given that her answers to the claimant showed a lack of respect to him as an individual, and a lack of attention, on her part, to the questions she was being asked by him.

79. At this point in the proceedings, around 1 2.1 3pm, while I was seeking to note and record the evidence being taken from the respondent, I heard her shout **“don't do *thaf .*** When I enquired what had happened, as I had not seen anything, as I was writing up the evidence being given in my notebook, the respondent, who was clearly upset, stated that the claimant had put his hand up to his mouth, as if to silence her.

80. The claimant denied that, saying that he had held his hands up, but with his full hand, as if to stop her. I advised both the claimant and respondent that it is not appropriate for any party to intimidate a witness giving evidence, and that I would not allow that, and that they should both ensure a calm and measured approach to the taking of evidence, on both sides, and that witnesses should listen carefully to the questions being asked of them, which should be on the restricted basis agreed only.

81 . When cross examination resumed, and the claimant asked the respondent why she had described him, and his witnesses, as what he referred to as a ***'clique",*** the respondent stated that their reputations were at risk anyway, as they were being investigated by the SSSC and, then in a very loud voice, she stated to the claimant that social work and the police would tell this court that the allegations were unproven and untrue, and that the police had laughed at the claimant.

82. It was at this point in the proceedings, at around 12.20pm, that I sought to clarify with both parties whether there were any ongoing police, criminal, or regulatory enquiry or proceedings that would impact on a Final Hearing in this case. I have noted their answers, in the findings in fact earlier in these Reasons, and refer back to them for ease of reference.

**Case Law cited by the Tribunal**

83. When the respondent’s evidence closed, at around 12.33pm, I stated that as submissions and evidence from the respondent had concluded, I proposed that the Tribunal adjourn early for lunch, so as to allow the claimant the opportunity to reflect on Mr Lane’s oral submissions, and the respondent’s sworn evidence to the Tribunal, and for him to address the Tribunal, in reply to the respondent’s application for Strike Out of the claim, and that the Hearing would therefore resume at 2.00pm for that purpose.

84. Further, I stated that there were well known case law authorities regularly cited to Employment Judges in Strike Out applications, such as the present, and while Mr Lane had stated that he was not citing any cases to the T ribunal, it was appropriate for me, as presiding Judge, to alert both parties to the cases that I was aware of, so that they could consider whether or not to make any submissions to me about the relevant law, and how I might apply the relevant caselaw to the facts and circumstances of the present case, in this opposed application for Strike Out of the claim.

85. In that regard, I drew parties attention to three specific Employment Appeal Tribunal judgments, and I had the clerk to the Tribunal supply copy judgments to both the claimant, and Mr Lane for the respondents, to read over the

extended lunchtime adjournment. These case law authorities, identified by me from my own judicial experience of cases regularly cited to Judges in Strike Out applications, were as follows: -

**(1) Hasan v Tesco Stores Limited [201 6] U KE AT/0098/1 6;**
**(2) Morgan v Royal Mencap Society [2016] UKEAT/0272/15; [2016] 1RLR428; and**
**(3) H.M. Prison Service v Dolby [2003] UKEAT/0368/02; [2003] IRLR 694.**

**Claimant's reply to Respondent's application for Strike Out**

86. When proceedings resumed, at 2.02pm that afternoon, I invited the claimant to reply to Mr Lane's submissions, and the respondent's evidence, as presented to the Tribunal that morning. The claimant stated that Employment Judge Eccles' judgment was factual and that he wanted to establish, as fact, at a Final Hearing, the things referred to in Employment Judge Eccles' judgment, namely that, in a nutshell, he wants the opportunity to bring witnesses to a Final Hearing to establish facts that say that S is a paedophile.

87. Contrary to Employment Judge Eccles' judgment, where she had stated that she was satisfied that the manner in which the proceedings in 2017 had been conducted by the claimant had been scandalous and unreasonable, the claimant insisted that his testimony was not scandalous, as he was only repeating information that both the respondent or her son S had told him, and other witnesses.

88. The claimant added that what he was saying was true and that he saw the respondent's current application for Strike Out of the claim as being ***"almost an autopilot request for a repeat"*** of what Employment Judge Eccles did in December 2017.

89. Further, the claimant stated, he thought that we should go to a full trial and get it done, as this case has been ongoing since January 201 7, and he stated that he wanted a greenlight to a Final Hearing, as Employment Judge Robison had ordered, in March 2019, and ***"If you have nothing to hide, then you would just go to trial".***

90. Acknowledging that the respondent's evidence had quite clearly stated she was upset and distressed, by the contents of the claimant's witness statements, the claimant stated that yet she had no doctor's appointment, or medication, to relieve the stress she spoke of, and while he was not saying that did not mean that she had not suffered stress upset and distress, he thought it would have helped her case, if she had brought medical evidence, but he accepted that people do have different stress levels, and ways to cope.

91 . The claimant further stated that the respondent had not said that his witness statements were all lies, and while she had referred to him and his witnesses, as being just a clique, he posed the question why would people risk their reputation, and management experience, to tell lies at the Tribunal? He further stated that he had nothing to say about what was in Mr Lane's written submission to the Tribunal, and while he had read the three cases cited by me, as presiding Judge, he said that he found them difficult to follow as a layman.

92. In reply, I stated that there was no need for a response from him, as an unrepresented, party litigant, but **Rule 2,** and the Tribunal's overriding objective, required me to try and ensure that parties were on an equal footing,

albeit addressing the relevant law is ultimately a matter for the Judge, subject to any submissions that parties might choose to make.

93. In concluding his submissions to the Tribunal, the claimant invited me to refuse the respondent's application for Strike Out, and to allow his monetary claims to proceed to a Final Hearing.

**Reply for the Respondent**

94. Having heard from the claimant, and it then being 2.15pm, I enquired of Mr Lane, solicitor for the respondent, about whether or not he wished to respond. He did, and in opening his further submissions to the Tribunal, he stated that he objected to the claimant's objection to the respondent's application for Strike Out, and he did not have anything further to say about the specifics of what the claimant had just stated in his submissions to the Tribunal.

95. As regards the three cases cited by the Employment Judge, and how the Judge should exercise discretion, Mr Lane accepted that the Strike Out application was a discretionary decision at the second stage and he submitted, when deciding how to exercise that discretion, the Tribunal should have regard to its overriding objective.
96. He highlighted how the claimant had just said twice that he intended to use the Final Hearing as a forum to establish that S is a paedophile, and that left us in no doubt that is what he wishes to do. That is plainly inappropriate use of the Final Hearing, submitted Mr Lane, and he respectfully suggested that I should take that into account when exercising my discretion, and that would properly lead to the application that Strike Out should be granted.

**Clarification sought by the Tribunal**

97. Having heard from Mr Lane, with his further submissions for the respondents, and noting that he had said nothing specific about the three cases cited to him by the Judge, I enquired what Mr Lane felt I should do having regard to the **"red *card / yellow card"*** analogy adopted by the Employment Appeal Tribunal in **HM Prison Service v Dolby.**

98. In reply, Mr Lane stated that he sought a **"red *card",*** and in support of that submission, he stated that this was not a "first offence" by the claimant, and therefore the gravity of this manner of unreasonable conduct is weighty as regards its culpability, and its effect on the respondent, the more pertinent issue as he saw things.

99. Mr Lane further stated that Strike Out is not a punishment, but it is appropriate to get a further and fair hearing, and that we can infer, in the present case, is that if a Final Hearing takes place, the claimant had an explicit objective of exposing or smearing S as a paedophile, and that is a misuse of the privilege of going to litigation, and ***"swings the pendulum Into the "red card"*** category.

100. If not with him on a ***"red card",*** then Mr Lane submitted that adjustments to the Final Hearing would be necessary, based on the respondent's evidence at this Preliminary Hearing that the claimant's conduct has, and continues to, cause her distress, embarrassment, and perhaps understandable anger.

101. In Mr Lane's submission, this restricts the respondent's ability to participate in

the Final Hearing if no adjustments are made. Witness statements have been ordered already, and, given the exchanges at this Hearing, by both the claimant, and respondent, Mr Lane suggested that adjustments to cross examination may be necessary too. He stated that was not a levelling of blame, ***"it's just the actuality".***

102. In response to Mr Lane's submissions, I enquired of him about the use of other remedies open to the respondent, about what she clearly regards as intimidation and harassment by the claimant, but Mr Lane stated that while the police had previously been involved, there were no criminal proceedings instituted, and he did not believe that the claimant could get any private prosecution off the ground.

103. Further, as regards to any civil Court action against the claimant, Mr Lane stated that his firm could not help the respondent with that. Waiving any privilege, he then stated that he had given the respondent certain advice, and it would be difficult to take civil proceedings, without the funding to do so, and even with a contingency (no win, no fee), it appeared not to be available, and accordingly the respondent cannot straightforwardly avail herself of any other legal remedy in another forum, as that would be difficult, expensive, and no guarantee of being successful, and even if successful, the claimant could still breach any order from a civil court, albeit with consequences arising.

104. In these circumstances, submitted Mr Lane, Strike Out of the claim is an effective and swift remedy for the respondent, and a practical step taken in a short timescale, compared to recourse to the civil Courts, and it is appropriate to withhold the Employment Tribunal from the claimant to use to ventilate and establish allegations that S is a paedophile.

105. It then being 2.31pm, I stated that, during the lunchtime adjournment, I had recalled a further unreported judgment, from the Employment Appeal Tribunal last year, in **Chidzoy v British Broadcasting Corporation [2018] UKEAT/0097/17,** a judgment by Her Honour Judge Eady QC, in an appeal about Strike Out of a claim for unreasonable conduct of proceedings.

106. I provided a hard copy of the EAT judgment to both the claimant, and Mr Lane for the respondents, and stated that I would adjourn this Preliminary Hearing until 2.50pm, for parties to read paragraphs 23 and 24 of Her Honour Judge Eady's judgment in **Chidzoy,** and to consider, in light of the case law authorities discussed in that judgment, whether there was anything further either party might wish to say to me about how I should apply the relevant law as regards the respondent's application for Strike Out of the claim.

**Reply by the Respondents representative**

107. It then being about 2.50pm, I invited Mr Lane to reply on behalf of the respondent. He stated that paragraphs 23 and 24 of Her Honour Judge Eady's judgment in **Chidzoy** were an accurate statement of the law, and he submitted that the four subparagraphs set forth by her in paragraph 23 of her judgment were all made out in this case by the respondent, and that there was clearly a course of conduct by the claimant, and across time in this case's proceedings that could not be viewed as an isolated incident.

108. While appreciating that the Tribunal must consider if a lesser remedy is more proportionate, rather than Strike Out, Mr Lane submitted that the claimant has

made it clear that at a Final Hearing, come what may, he will seek to establish his allegation that S is a paedophile.

109. Mr Lane then added that, even if the Tribunal is creative, and makes adjustments to the Final Hearing, the fact is the claimant has admitted to seeking to establish that, which means that a lesser remedy is not feasible, given what the claimant is setting out at this Preliminary Hearing, and the consequences of Strike Out would be dismissal of his remaining complaints, and that is what is appropriate in this case.

1 1 0. Next, when the claimant came to respond, he referred to paragraphs 23 and 24 of Her Honour Judge Eady's judgment in **Chidzoy,** and stated that he had not conducted proceedings unreasonably, scandalously, or vexatiously, and that he had submitted that in his appeal to the Employment Appeal Tribunal against Judge Eccles' judgment.

111. The claimant further submitted that he had not conducted proceedings unreasonably, nor were his witness statements unreasonable, because he submitted that they are factual. He stated that a fair trial of the case is still possible, and that this Preliminary Hearing had been a ***"tit for tat",*** where both sides had been heard, and maybe at any Final Hearing, he could get the Judge taking the Final Hearing to ask his questions, as he thought that would be a creative adjustment to prevent any conflict.

1 1 2. Describing himself as a footballer, the claimant further stated that the Strike Out of his unfair dismissal complaint by Employment Judge Eccles was ***straight to the red card",*** and he had not even been given a caution. If it was to be a Strike Out of his claim, as sought by Mr Lane on behalf of the respondent, the claimant stated that would be ***"the final whistle",*** and he felt that both parties should go to trial with their best case, and he wanted a fair crack of the whip, and to get this trial done, as it had not previously happened, as he had appealed to the Employment Appeal Tribunal late.

1 1 3. Further, the claimant then enquired whether he could appeal against whatever might be my judgment. In reply, I advised him, and Mr Lane for the respondent, that, once my judgment was issued, either party could, as per standard practice, apply for a reconsideration of the judgment, or an appeal to the Employment Appeal Tribunal.

114. At that stage, the claimant stated that he was willing to go with anything to get his case to trial, even if that meant he had to go out of the Tribunal hearing room, and the judge asked any questions. Further, he added, he did not consider that there would be any irreparable damage if the respondent had to give evidence.

**Reserved Judgment**

115. It then being 2.57pm, I enquired whether Mr Lane had anything further to say by way of final reply. In response, after he stated that he had nothing further to add, and that the respondent still sought Strike Out of the claim, I stated that I was reserving judgment, which would be issued in writing, with reasons, in due course, and I thanked both parties for their attendance and contribution at this Preliminary Hearing.

**Relevant Law**

1 1 6. While I had no expectation of the claimant, as an unrepresented party litigant, addressing the Tribunal on the relevant law as regards Strike Out, I was disappointed that Mr Lane, the solicitor for the respondents, did not do so, other than to refer to the **De Keyser** judgment within Employment Judge Eccles* judgment of December 201 7.

117. In the circumstances, I have required to give myself a self-direction on the relevant law, which, so far as material, for present purposes, is to be found in the **Employment Tribunals Rules of Procedure 2013,** in particular, **Rule 37** (Striking Out), and the other Rule that is relevant is **Rule 2,** the Tribunal's ***overriding objective",*** to deal with the case fairly and justly.

118. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances. In the present case, Mr Lane, solicitor for the respondent, founds his Strike Out application of **Rules 37(1) (b) and *I* or (e),** relating to scandalous, unreasonable or vexatious conduct of the proceedings, and / or whether it is possible to have a fair hearing.

1 1 9. ***'Unreasonable'*** has its ordinary English meaning and is not to be interpreted as if it means something similar to ***'vexatious*** [1] **— Dyer v Secretary of State for Employment EAT 183/83.** It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable.

120. The term ***'vexatious'*** was defined by the National Industrial Relations Court in **ET Marler Ltd** v **Robertson 1974 ICR 72, NIRC.** In considering the present Strike Out application, I have referred to the judgment of Sir Hugh Griffiths in **Marler,** and in particular the paragraph, at page **76E/F,** where the learned Judge of the NIRC had stated:

***"If the employee knows that there is no substance in his claim and that It is bound to fall, or If the claim Is on the face of it so manifestly misconceived that It can have no prospect of success, It may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other Improper motive, he acts vexatlously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee."***

1 21 . Further, it is helpful to note, at page 76H, the learned Judge also stated:

***"It Is for the tribunal to decide If the applicant has been frivolous or vexatious and thus abused the procedure, it is a serious finding to make against an applicant, for it will generally Involve bad faith on his part and one would expect a discretion to be sparingly exercised".***

122. In the final paragraph of his judgment in **Marler,** at page 77B, Sir Hugh Griffiths stated:

***"Ordinary experience of life frequently teaches us that that which Is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms".***

1 23. Accordingly, for conduct to be vexatious there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive. Simply being ***'misguided'*** is not sufficient to establish vexatious

conduct — **AQ Ltd v Holden 2012 IRLR 648, EAT.**

1 24. However, the Court of Appeal in **Scott v Russell 2013 EWCA Civ 1432, CA** (a case concerning costs awarded by an Employment Tribunal), cited with approval the definition of ***'vexatious'*** given by Lord Bingham in **Attorney General v Barker 2000 1 FLR 759, QBD (DlvCt).**
125. According to Lord Bingham, ***'the hallmark of a vexatious proceeding is... that it has little or no basis In law (or at least no discernible basis); that whatever the Intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or In a way which is significantly different from the ordinary and proper use of the court process'.***

1 26. Even if the Tribunal so determines, it retains a discretion not to strike out the claim. As the Court of Session held, in **Tayslde Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755,** the power to strike out should only be exercised in rare circumstances.

127. A Tribunal can exercise its power to strike out a claim (or part of a claim) 'at ***any stage of the proceedings'*** **- Rule 37(1).** However, the power must be 5 exercised in accordance with ***"reason, relevance, principle and justice":*** **Williams v Real Care Agency Ltd [2012] UKEATS/0051/11** (13 March 201 2), **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

128. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13,** 24 April 2013, **[2014] I.R.L.R. 14,** the learned EAT io President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike out may save time, expense and anxiety.

129. However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in 15 which a claim will be struck out are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

130. Special considerations arise if a Tribunal is asked to strike out a claim of 20 discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students* Union and anor 2001 ICR** 391, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

131. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

132. Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezslas** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, 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 prospect of success.

133. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that 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 assertions regarding disputed matters are likely to be established as facts. It is a high test.

134. In **Balls,** at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:
***"to state the obvious, if a Claimant's claim is struck out, that is an end of it He cannot take It any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, It might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It Is for such reasons that 'strlke-out' is often referred to as a draconian power. It Is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals Justify the use of this Important weapon in an Employment Judge's available armoury but Its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision Is reached. "***

135. Although not cited to me by either party at this Preliminary Hearing, I did refer them both to the reported EAT judgment by Mrs. Justice Simler DBE, the then President of the Employment Appeal Tribunal, in **Morgan** v **Royal Mencap Society [2016] IRLR 428,** where she helpfully analyses the principles laid down in the case law, and their application, at paragraphs 13 and 14 of her judgment.

136. At paragraph 13, the learned EAT President stated that: ***"The threshold Is high, as has been emphasised repeatedly and It Is an unusual discrimination case where it Is appropriate to strike out such a claim without hearing the evidence. Courts at all levels have stressed the draconian power represented by an Order striking out a claim before the merits have been determined.*** while , at paragraph 1 4, she stated : ***There are, of course, cases where taking the central facts at their highest In favour of a Claimant, as they would have to be in circumstances where no evidence Is heard, the claim cannot succeed on the legal basis on which It has been advanced. In such a case the power to strike out a claim can properly be exercised without hearing evidence. However, where there is a dispute of fact, unless there are very strong reasons for concluding that the Claimants view of the facts is simply unsustainable, a resolution of that conflict of fact is likely to be required before the case can be dismissed without a hearing. "***

137. Again, while not cited to me, by either party, and although I did not raise it at the Preliminary Hearing, I am aware that in **Lambrou v Cyprus Airways Ltd [2005] UKEAT/0417/05,** an unreported Judgment on 8 November 2005 fromJ His Honour Judge Richardson, the learned EAT Judge stated, at paragraph 28 of his judgment, as follows:
***"Even if a threshold ground for striking out the proceedings is made out, It does not necessarily follow that an order to strike out should be made. There are other remedies. In this case the other remedies may Include the ordering of specific Particulars and, If appropriate when Particulars are ordered, further provision for a report which, In furtherance of the overriding objective, will usually be by a single expert jointly Instructed. A Tribunal should always consider alternatives to striking out: see HM Prison Service v Dolby [2003] IRLR 694. "***

138. I did, however, at the Preliminary Hearing, refer both parties to the EAT's judgment in **Dolby,** where, at paragraphs 14 and 15 of the judgment, Mr Recorder Bowers QC, reviewed the options for the Employment Tribunal, as follows:
***"14.* We *thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that Is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put It, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.***
***15. Clearly the approach to be taken in a particular case depends on the stage at which the matter Is raised and the proper material to take Into account. We think that the Tribunal must adopt a twostage approach; firstly, to decide whether the application Is misconceived and, secondly, if the answer to that question Is yes,. to decide whether as a matter of discretion to order the application be struck out, amended or, if there Is an application for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision In each case, although of course they only need go as far as to say why one side won and one side lost on this point."***

139. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan** v **Tesco Stores Ltd [2016] UKEAT/0098/16,** an unreported Judgment of 22 June 2016, which I again referred both parties to at this Preliminary Hearing, where at paragraph 19, the learned EAT Judge refers to **"a *fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

140. The other string to Mr Lane's bow, in presenting his Strike Out application, on 3 June 2019, was that it was not possible to have a fair hearing: **Rule 37(1)(e).** Other than refer me to **De Keyser,** he cited no other case law authorities.

Again, I had to refer both parties to the EAT's judgment in **Chldzoy v British Broadcasting Corporation [2018] UKEAT/0097/17.**

141. In **Chidzoy,** the EAT held, dismissing the appeal, that the ET had correctly addressed the four questions identified in **Bolch v Chipman [2004] IRLR 140 EAT.** Adopting an entirely fair process, it had been entitled to make the findings it did as to what had taken place and had permissibly concluded that the claimant had thereby unreasonably conducted the proceedings. The ET had gone on to consider whether it could still conduct a fair trial of the claimant's case but, having concluded that trust had broken down, had correctly concluded it was not. Asking itself whether it was proportionate to strike out the claim, the ET had considered whether there were any alternatives but had concluded there were none. In the circumstances, that was a conclusion that was open to it and the challenge to its decision to strike out the claim was dismissed by the EAT.
142. As, at this Preliminary Hearing, there was agreement by both parties that Judge Eady QC in **Chidzoy** has set out the relevant law, it will be sufficient, for present purposes, to note what she stated at paragraphs 23 and 24 of her judgment, as follows:
*23. It is common ground between the parties that the striking out of a claim is a draconian measure that should not be imposed lightly, see **Blockbuster Entertainment Ltd v James** [20061IRLR 630 **CA.** More specifically, in **Bolch** v Chipman [2004] IRLR 140 the EAT (Burton P presiding) held that, where the ET is considering the possibility of striking out a claim or response due to the way in which the proceedings have been conducted, there were four matters it would need to address (I paraphrase):*
*(1) There must first be a conclusion by the ET not simply that a party has behaved unreasonably but that the proceedings have been conducted unreasonably by her or on her behalf.*
*(2) Assuming there is such a finding, in ordinary circumstances the ET will still need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a Debarring Order (see De Keyser Ltd v Wilson [2001] IRLR 324 EAT (Lindsay P presiding)). That might be, for example where there has been "wilful, deliberate or contumelious disobedience" of an ET Order, otherwise it might be where the conduct in issue is so serious it would be an affront to the ET to permit the party in question to continue to prosecute their case (see Arrow Nominees Inc v Blackledqe [2000] EWCA Civ 200).*
*(3) Even if a fair trial is not considered possible, the ET must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate.*
*(4) And even if it determines that a Debarring Order is the appropriate response, the ET should consider the consequences of that Order (allowing that, for example, where a response has been struck out at the liability stage, it might still be appropriate to allow the Respondent to participate in any remedy hearing).*
*See also observations to similar effect made by the EAT (Simler P presiding) in Arriva London North Ltd v Maseya UKEAT/0096/16 (12 July 2016, unreported).*
*24. When an ET is satisfied that a Claimant has conducted the proceedings unreasonably (or scandalously or vexatiously), it should not move to strike out the claim when firm case management might still afford a solution - in some cases, the objectionable conduct may not be irreversible, see Bennett **v Southwark London Borough Council** [2002] **IRLR** 407 CA (a case in which the claim had ultimately been struck out by a second ET, the first having*

*considered it was bound to recuse itself given the nature of the conduct in question). In order to determine whether irreparable damage has been done, the ET would need to assess the nature and impact of the wrongdoing in issue, to consider whether there was, in truth, any real risk of injustice or to the fair disposal of the case, see Bayley v Whitbread Hotels UKEAT/0046/07 (16 August 2007, unreported). It will, for example, be a very rare case in which it would be appropriate to strike out a case at the end of a trial; in such circumstances, it would, in almost all cases, be more appropriate for the Tribunal to dismiss the claim in a judgment on the merits, which could take account of the wrongdoing in issue, in the usual way (and see the observations to this effect in* ***Zahoor and Ors v Masood and Ors*** *[2009] EWCACiv650).*

143. Finally, I refer to Lord Justice Sedley, in giving the Court of Appeal's judgement, in **Blockbuster Entertainment Ltd v James [2006] IRLR 630,** at paragraph 5, who stated that:
*5.This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed.*

**Discussion and Deliberation**

1 44. There is no doubt that both parties in this case come to it with fairly entrenched positions. Mr Lane, solicitor for the respondent, stated that his client was concerned that the claimant was using these Tribunal proceedings as a ***"platform"*** to, as his Strike Out application of 3 June 2019 says, ***"publicly make very serious allegations against S, In order to cause distress and embarrassment to the Respondent."***

145. It is of note to me that, at this Preliminary Hearing, the claimant's companion, whom I have identified as CW1, was himself a claimant against the respondent, having been dismissed along with the claimant here, but he withdrew his claim.

146. Nonetheless, it is clear from CW1 's witness statement, at page 3 of 7, of the collective witness statements provided by the claimant, that he was a former employee of the respondent, until he was dismissed by her in January 2016, at the same time as the claimant was dismissed.

1 47. In his witness statement for the Tribunal, suitably redacted, this person CW1 has expressed ***"concern that the case of whistleblowing & unfair dismissal didn't proceed. I believe if the Employment Tribunal heard the overwhelming evidence of*** (the claimant, CW2, CW3) ***& I then this case would have been found In the favour If the Claimant. "***

1 48. Further, witness CW2, at page 5 of 7, states (suitably redacted) that : 7 ***hope this gives The Employment Tribunal an Insight Into the lack of morals, Integrity & lengths our former employer will go to hide the fact that she decide to cease the employment of*** (the claimant and CW1) ***as they were going to whistle blow on her son for filming young boys for the purpose of masturbation. "***

149. Witness CW3, who states he was never employed by the respondent, looks ***"forward to giving evidence Into Whistleblowing / Unfair Dismissal but I wasn't giving*** (sic) ***the opportunity to do so".*** He seems to be under the impression that the case before the Tribunal still includes unfair dismissal, despite Judge Eccles' Strike Out of that part of the claim, and her refusal to allow an amendment to add in a whistleblowing complaint.

150. Finally, the claimant's own witness statement, at page 7 of 7, states: '7 ***also have to state my disappointment on not being allowed to proceed with my whistleblowing & unfair dismissal case. I am willing to give evidence if needed to .... the Tribunal in the future."***

151. Given Judge Eccles' clear and unequivocal Judgment against him, and that his appeal was dismissed by the EAT for being out of time, it is extraordinary that the claimant somehow still thinks evidence on whistleblowing and / or unfair dismissal might be required by the Tribunal. There are no such live heads of complaint before the Tribunal.

152. I detail these other parts of the witness statements for the claimant because, in context, they give the bigger picture of the background to this case, and perhaps explain, but do not excuse, why parties have come to have such entrenched positions.

153. As referred to earlier, at paragraph 64 of these Reasons, Mr Lane invited me to infer that the claimant is " ***intent on using these proceedings for publicly venting these allegations, and that he Intends to do so, come what may".***

154. In his email to the Tribunal, on 3 June 2019, full text as per paragraph 43 earlier in these Reasons, the claimant stated: ***"My witness statements are not meant to embarrass nor to be scandalous or vexatious but to put forward an honest account of what I am taking my former employer to Tribunal for"***

155. While the claimant says that was not his intention to embarrass or be scandalous or vexatious, I am satisfied, having heard the respondent's evidence, that she has been distressed and embarrassed by these witness statements, and even if I were to accept the claimant at his word that that was not his intention, which I do not accept, because I consider the words used to have been deliberately designed to harass and upset the respondent in particular, out of spite to get back at her for what he clearly still sees as his unfair dismissal by her all these years ago now, it is crystal clear to me from the respondent's evidence at the Preliminary Hearing that that has been the effect on the respondent.

1 56. I think that not only the sections from those witness statements highlighted by Mr Lane at the Preliminary Hearing, but also the others that I have just recited, lend weight to his view, and that of the respondent herself, that the claimant, come what may, is intent on using these Tribunal proceedings to public vent

his allegations about the respondent's son S.

1 57. While, having carefully reflected on parties' submissions and the respondent's evidence, as given at this Preliminary Hearing, I am satisfied that the claimant has acted scandalously, unreasonably and vexatiously by intimating witness statements on 31 May 2019 making serious allegations against the respondent's son (known as "S"), and that the highlighted passages from those statements have caused stress and embarrassment to the respondent, I have decided that it is disproportionate, and not in the interests of justice, to strike out all of the remaining parts of the claim, as sought by the respondent.

158. In my view, the respondent in the present case has established that, in conducting these Tribunal proceedings, in particular by intimating his witness statements on 31 May 2019, in the terms in which they were written, the claimant has acted scandalously, vexatiously, and / or otherwise unreasonably towards the respondent.

159. In my view, the appropriate and proportionate response to the claimant's scandalous, unreasonable and vexatious conduct of these proceedings, by him intimating witness statements on 31 May 2019 making serious allegations against the respondent's son, and, seeking to have, in effect, a second bite of the cherry by repeating allegations of unfair dismissal and whistleblowing, which are not live complaints before this Tribunal, is not a blanket Strike Out of all that remains.

1 60. I consider the claimant's conduct is likely to be repeated at any Final Hearing, and so make a fair trial of the breach of contract claim (for failure to pay notice pay to the claimant) not possible. However, I believe that it is still possible to have a fair trial on his two other live complaints of unlawful deduction from wages, and failure to pay holiday pay.

161 . Evidence on those matters does not relate to what S may, or may not, have done, and so it will be a much more narrowly focused factual enquiry than would be required if the notice pay part of the claim was still there, because that would require the Tribunal to take into evidence whether or not the claimant was guilty of gross misconduct, and so evidence about S might be brought into play.

162. While, in his written submissions to the Tribunal, Mr Lane stated that: ***"the Respondent's distress and embarrassment will negatively impact on her ability to give evidence in defence of the Claimant's remaining complaints",*** I do not accept that that is so given the now restricted scope of that Final Hearing, and the fact that the respondent told me, in her own evidence, that she is a ***"very strong woman".***

163. It is frequently the experience of life that, where parties fall out, and particularly where litigation between them is ongoing, they may see in that which the other does toward them a real or, it may be, perceived slight in circumstances which others, not being aware of the background, nor feeling as deeply as to the parties do, given their personal interest in a long-running and deeply held sense of injustice one towards the other, would regard as unexceptional and anodyne.

164. Recognising that the respondent may nonetheless still be concerned about giving evidence, particularly if she is to be cross-examined by the claimant in

person, the Tribunal reminds both parties that the Tribunal has available to it its whole range of case management powers under the Rules, including the ultimate power to Strike Out if circumstances merit that as a proportionate sanction.

165. Finally, and in terms of **Rule 3** (alternative dispute resolution), I encourage both parties to consider using the services available via ACAS, or some other mediation service, as a means of resolving the remaining parts of the claim now before this Tribunal. Given the limited scope of the remaining parts of the Tribunal claim, this is not a case where Judicial Mediation would be appropriate.

**Arrangements for Final Hearing**

166. As recorded earlier, at paragraph 111 of these Reasons, the claimant suggested that the Employment Judge taking the Final Hearing might get to ask the claimant's questions, as he thought that would be ***a "creative adjustment to prevent any conflict".***

167. In my experience, conflict in any litigation is best avoided by both parties treating the other, and the Tribunal, with respect, and seeking to further the overriding objective of **Rule 2** to have the case dealt with fairly and justly. Scandalous, vexatious and unreasonable conduct of the proceedings, by either party, can of course result in the Tribunal, on its own initiative, or on application by either party, considering Strike Out of the claim, and / or response, as the case may be, under **Rule 37.**

1 68. The claimant's statement to me, as recorded at paragraph 114 above, that he was willing to go with anything to get his case to trial, even if that meant he had to go out of the Tribunal hearing room, and the judge asked any questions, is noted, but it is, in our adversarial Tribunal system, not for the presiding Judge to act as inquisitor, nor as advocate or representative for either party. Each party should seek, as best they can, to obtain their own, independent and objective advice, if not representation.

169. While the claimant is, of course, entitled to act on his own behalf, I take this opportunity to suggest to him that he might wish to consider taking independent advice, whether from a solicitor, CAB, trade union, or voluntary legal agency, such as, e.g., the ***pro bono*** Strathclyde University Law Clinic who regularly represented otherwise unrepresented party litigants before this Tribunal who might otherwise have no access to advice and representation to pursue their Tribunal claim.

1 70. In terms of my powers under **Rule 29 of the Employment Tribunal Rules of Procedure 2013,** 1 have made appropriate case management orders for the efficient and effective conduct of the Final Hearing, which I estimate should take one day, and which, if I am available, I will take, so as to ensure some degree of judicial continuity going forward.

171. Fresh case management orders will not be issued for that Final Hearing, there being an updated Schedule of Loss for the claimant in the single, joint Bundle presented to the Tribunal at this Preliminary Hearing, at pages 126 and 127, and it also containing, at pages 61 to 125, documents in relation to the claimant's payslips and F's accounting records, bank statements, and calendars, as referred to in her witness statement intimated on 5 June 2019.

172. It is noted and recorded that the case management orders previously issued on 27 April 2017 by Employment Judge Susan Walker, and 3 April 2019 by Employment Judge Muriel Robinson, are superceded, there purpose having been served by procedure already completed.

173. However, for the avoidance of any doubt, I make it clear that the **Rule 50** Anonymity and Restricted Reporting Orders previously made by Employment Judge Frances Eccles on 5 and 14 December 2017, in terms of **Rules 50(3)(b) and (d),** anonymising the claimant, respondent, and respondent's son, as M, F and S, remain in full force and effect.

174. Further, there is enclosed, under separate cover, accompanying this Judgment, **date listing stencils** for the proposed new listing period, as also a fresh **Rule 50** Anonymity Order in terms of **Rule 50(3)(b)** granted by me to anonymise the respondent's husband H, and the 3 witnesses for the claimant, **CW1, CW2** and **CW3.**

1 75. For the purposes of the Final Hearing, on the remaining complaints of unlawful deduction from wages, and failure to pay holiday pay, I have decided to order that the witness statements from the claimant and his three proposed witnesses, as intimated on 31 May 2019, are **not allowed** to be used at the rescheduled Final Hearing, nor are the witness statements from the respondent, and her husband, as intimated on 5 June 2019.

1 76. I have furthered decided to order that the claimant shall submit fresh witness statements, restricted solely to the matters of unlawful deduction of wages, and failure to pay holiday pay, and nothing further, and any such witness statement, whether from him or a supporting witness, shall be an individual witness statement, by each witness.

1 77. By way of further direction, I order that witness statements shall be typed, with numbered paragraphs, and appropriate cross-reference to any relevant documents as per the single Joint Bundle lodged at this Preliminary Hearing, such witness statements to be dated and signed, and with a statement of truth at the end that it contains information known to the witness to be true to the best of their knowledge and belief, and the claimant shall lodge the witness statements he intends to rely upon **within no more than 14 days of issue of this Judgment.**

178. Further, I have also ordered that the respondent shall have **14 days** thereafter, starting from the date of receipt of the claimant's fresh witness statements, to reply, and submit fresh witness statements for herself and her husband to replace those previously intimated to the Tribunal, again restricted solely to the matters of unlawful deduction of wages, and failure to pay holiday pay, and nothing further, and any such witness statements by or on behalf of the respondent shall be submitted in the same format as those ordered from the claimant.

**Employment Judge: I McPherson**
**Date of Judgment: 26 July 2019**
**Entered in register: 30 July 2019**
**and copied to parties**