EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100147/2017

Held in Glasgow on 2, 3, 4, 5 and 6, 16 and 20 October 2017

Employment Judge: F Jane Garvie
Members: Mr I C MacFarlane
Mr J Hughes

Mr Christopher Houston	**Claimant** **Represented by:** **Mrs H Hogben - Counsel** **Instructed by:** **Ms Donnelly - Solicitor**
GIST Ltd	**Respondent** **Represented by:** **Mrs Anne Bennie - Advocate** **Instructed by:** **Ms A F Cooney - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous decision of the Employment Tribunal that the application to strike out the respondent's response pursuant to Rule 37(1)(b) and (e) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused and the case will now proceed to the continued Hearing recommencing on Wednesday, 1 November 2017.

REASONS

Background to the application to strike out

1. This application was made by the claimant's Counsel part way through the Final Hearing (the Merits Hearing) of this case.

2. The case was originally listed to be heard in July 2017. The Tribunal sat on 18 and 19 July 2017 and on the 19th it issued directions. Further dates were arranged being 2, 3, 4, 5 and 6, followed by 16, 17, 18, 19 and 20 October 2017 and 1 and 2 November 2017. Detailed directions had previously been given at a case management Preliminary Hearing by Employment Judge Hosie in March 2017 which included the exchange of witness statements.

3. The case then re-commenced on 2 October 2017 when the respondent's first witness who was the Dismissing Officer gave evidence. It is appropriate to note that the Tribunal decided that he should not be mentioned by name at this stage in the proceedings since this is an interim judgment in relation to the application for strike out of the response, (see below). Similarly, the names of the respondent's employees are not provided. Instead they are referred to by initials, for example the HR advisors are Ms S and Ms W while the other managers mentioned are Mr C and Mr M and another driver/employee is referred to as Mr L.

4. Mrs Bennie was allowed the opportunity to ask some supplementary questions of him and thereafter the evidence proceeded by way of cross-examination. Cross-examination had been completed late on 4 October at which point the panel began its questions, commencing with the Employment Judge. Her questions were not able to be completed due to the lateness of the hour and so were continued to 5 October.

5. Mr MacFarlane and Mr Hughes then had questions and at about 10.40am when the panel's questions were completed the witness sought a comfort break. This was granted with the Tribunal then reconvening at 10.45am. At that point an issue arose from Ms Hogben on which Mrs Bennie sought an

opportunity to consider her notes and the Hearing then reconvened again at 10.56am.

6. Following consideration of the matters which had arisen while the witness was still out of the room the witness was recalled and it was agreed that some further points by way of cross-examination might be put to the witness. It was at this point that it became apparent the witness accepted that he had some discussions about his evidence with other employees of the respondent despite clear directions from the Judge that he should not discuss his evidence with anyone.

7. There was then an adjournment to allow the parties to take instructions. Mrs Hogben flagged that there might be an application which she would wish to make although at this point she was not making any such application in terms of Rule 37(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, (the 2013 Regulations).

8. There was then a further adjournment to allow the representatives to take instructions. When the Hearing was reconvened the Tribunal was informed that the witness was feeling unwell and, during the adjournment, he had explained to the Clerk that this was the position. It had been suggested to him he might want to go outside and take some fresh air. The witness then advised the Clerk that he had been physically sick and he felt like "just going" and he had "had enough" from which the Tribunal understood this to mean that he decided to leave the Tribunal building. He did not return. The Tribunal indicated that it was concerned that the witness was sufficiently unwell to have left the Tribunal building. There was an adjournment for lunch.

9. When the Hearing reconvened at 2.35pm Mrs Hogben indicated that it was her intention to pursue an application in terms of Rule 37(1) which would primarily focus on Rule 37(1)(e). The Tribunal indicated that it was concerned about the witness's health and discussion took place as to how contact might be made with him by the respondent.

10. It was agreed that the Hearing would be reconvened the next morning, 6 October. When it did Mrs Bennie confirmed that the witness was now in the course of arranging to see his G.P. She anticipated there would be a Fit Note provided for him. She accepted that Mrs Hogben was seeking a Soul and Conscience Certificate rather than a Fit Note.

11. Mrs Hogben accepted that it was regrettable that the witness's health had apparently been affected during the course of the Hearing on 5 October. Nevertheless, she wished to proceed with her application in terms of Rule 37(1).

12. The Hearing was again adjourned at approximately 12.05pm to enable the Tribunal and Mrs Bennie to consider the written skeleton argument provided by Mrs Hogben and the Hearing in order to reconvene at 2.15pm.

13. Mrs Bennie was not in a position to proceed as at 2.15pm and so the application from Mrs Hogben commenced at approximately 2.34pm on 6 October. Mrs Hogben made some additional points orally in relation to her written submission. This was completed at 3.25pm and Mrs Bennie then commenced her oral address in response.

14. It became apparent that it was not going to be possible to complete this on 6 October. Accordingly, the Tribunal adjourned at 4.35pm on the basis that Mrs Bennie was to provide her written submission by no later than 3pm on Tuesday 10 October and, if Mrs Hogben wanted to have the opportunity to reply to any of the points, she must do so in writing by no later than 3pm on Thursday 12 October. These directions were confirmed in letters to the representatives dated 9 October 201 7.

15. The parties were informed that it was the Tribunal's intention to meet on 16 October in order to consider the application and the respondent's opposition to it on the basis that the Tribunal hoped it would then be in a position to issue its judgment either at the end of the day on 16 October or, alternatively, at the start of the proceedings on 17 October but the parties would not be required to attend the following Monday, 16 October when the Tribunal would meet in private.

16. It was also noted that neither Counsel was seeking a further opportunity to address it orally but was content to proceed as set out above.

17. The written submission from Mrs Bennie was duly received on 10 October at 14:59 hours with hard copies of the submission and the case law referred to in it being enclosed and delivered by hand on 10 October 2017.

18. This was acknowledged by letter dated 11 October, attached to an e-mail of that date.

19. Meanwhile, there was a further e-mail from the claimant's representative on 9 October 2017 clarifying certain points and this had been copied to the respondent.

20. By e-mail dated 11 October 2017 at 17:32 hours the claimant's representative attached the claimant's response to the written submissions. This was not seen by the Judge until the morning of 12 October 2017 when that e-mail was printed out by HMCTS staff and passed to her.

21. On receiving this further submission, the Judge noted that it contains a considerable amount of information. The Judge concluded that it was necessary to contact her colleagues which she did by telephone. This then resulted in the Judge issuing directions which are set out in letters of 12 October 2017 to each of the representatives' firms, explaining that the Tribunal did not consider it would now be feasible for it to hand down its written Judgment by the end of Monday or indeed on Tuesday, 17 October. The Tribunal was unanimous that it requires time to complete its deliberations on Monday and for the Judge then to complete the written Judgment which the members understandably would want to have sight of before it is issued to the parties.

22. Accordingly, the further dates of 17 through to 20 October 2017 were postponed on the basis that the Tribunal will reconvene on Wednesday, 1 November. In the meantime, the Tribunal panel would convene to consider the application, the written Judgment would be prepared and then issued to the parties which the Judge hoped would be achieved either by the end of

week commencing Monday, 16 October or alternatively early in the week commencing Monday, 23 October 2017.

The application for strike out of the response under Rule 37(1) (b) and (e)

23. The terms of these subsections are set out under the heading, Relevant Law, (see below).

Claimant's Submission

24. Mrs Hogben reminded the Tribunal that this is a discretionary power, it is not mandatory and is a two stage test.

25. She referred to ***Bolch v Chipman [2004] IRLR 140*** and the Court of Appeal in ***Blockbuster Entertainment Ltd v*** James [2006] IRLR 630.

26. There are four matters to be addressed by the Tribunal before it makes a Striking Out Order. Guidance is set out at paragraph 55 of ***Bolch*** as follows:-

(a) there must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but the proceedings have been conducted by or on his behalf in such a manner;

(b) if such conduct is found to exist, the Tribunal must reach a conclusion as to whether a fair trial is still possible;

(c) if a fair trial is not considered possible, the Tribunal must consider what remedy would be proportionate to its conclusion;

(d) if the Tribunal decides to make a Striking Out Order it must consider the consequences of the debarring Order, for example if the Order is to strike out the response, it is open to the Tribunal, pursuant to its case management powers and its power to regulate its own procedure in terms of Rule 41 to debar the respondent from taking part in any question of liability but permit it to participate in a remedy Hearing.

Has there been unreasonable conduct within the meaning of Rule 37(1)(b)?

27. Mrs Hogben addressed the issue of whether there had been scandalous abusive or unreasonable conduct within the meaning of Rule 37(1)(b). She made it clear that she is looking at the issue of unreasonable conduct rather than it being scandalous or abusive. She pointed out from ***Bolch*** that this is not confined to conduct within the curtilage of the Tribunal.

28. Next, she referred to ***Blockbuster*** (see above) and the two cardinal conditions for the use of this draconian power which are:-

    (a) that the unreasonable conduct is a deliberate and persistent disregard of the required procedural steps;

    (b) that the unreasonable conduct has made a fair trial impossible.

29. In this case she referred to the answers given by the Dismissing Officer in his evidence as a witness on 5 October when he was asked whether he had spoken to anyone about his evidence to which he initially replied, "No" but after being pressed he said that, following his cross-examination on 4 October regarding alleged disparity of treatment of the claimant and another driver employee of the respondent, a Mr L, he had contacted a member of the respondent's HR department, Ms S, to ask if she could find any record of what was described as Mr L's "defecting" vehicle in February 2016.

30. The witness accepted that he had also spoken to his Line Manager, Mr M as he required to contact him regarding work related matters. He told him that he had "received a grilling" and they had laughed about this but the witness denied having discussed his evidence with Mr M.

31. The witness also accepted that he had spoken to another of the respondent's witnesses, Mr C when he had gone to lunch with him and another HR adviser, Ms W who was present throughout the Hearing until 4 October. Ms W is not giving evidence before this Tribunal. Both Mr M and Mr C are due to give evidence on the respondent's behalf. Mr C was the senior manager who heard the claimant's appeal against his dismissal and it

appears that Mr C was asked to attend and speak at that appeal on behalf of the respondent.

32. The witness was also asked if he had spoken to Ms W. Initially, he said "not yesterday" but then accepted that she had "tried to coach him" through the proceedings. The witness had already accepted that he knew he had been directed on several occasions not to speak to anyone about his evidence.

33. As indicated above, the witness had apparently become unwell and did not return to the Tribunal Hearing on 5 October and this was referred to in Mrs Hogben's submission.

34. It was Mrs Hogben's submission that there was unreasonable conduct on the part of the respondent's principal witness, the Dismissing Officer. It was her submission that he had deliberately and, on several occasions, disregarded the Tribunal's clear instructions.

35. While the HR employee, Ms S to whom he spoke about the other driver/employee, Mr L is not giving evidence it was her submission that Ms S played a key part in events that led to the claimant's dismissal as she was the HR adviser present during the disciplinary hearing after which the claimant received a final written warning in January 2016. She had also given advice to another of the respondent's managers, a Mr I, who was involved during the investigation stage in the process which ultimately led to the claimant's dismissal later in 2016.

36. It was further submitted that, despite being told not to do so the Dismissing Officer had contacted Ms S seeking further information about this other driver employee, Mr L. It cannot be ruled out that Ms S has not spoken to others, including witnesses who have yet to give evidence about the enquiry made to her by the witness.

37. The Tribunal cannot be certain that the evidence of Mr C and Mr M has not been tainted by the discussions which took place with the witness.

38. There was also emphasis placed on the pivotal role played by the HR adviser, Ms W who was present throughout the proceedings to 5 October

and the witness's admission that she had "coached him". His evidence was tainted and his credibility irreparably damaged.

39. Mrs Hogben referred to a first instance decision, ***Chidzoy v BBC [EAT Case No 3400341/2016]*** as an example of where a tribunal held that a claimant's decision to engage in discussion with a third party in relation to specific matters raised in cross-examination caused irreparable damage to the trust the Tribunal could have in her.

40. Accordingly, this Tribunal was invited to reach the same conclusion on the basis of the evidence before it in this case.

41. Next, in relation to whether a fair trial was possible the Tribunal's attention was directed to ***Chidzoy*** at paragraph 42 as follows:-

> "The flagrant disregard of clear and repeated instructions from the Tribunal not to discuss the case or her evidence given to the claimant on a number of occasions has been disregarded. Information passed between a third party and witness during that person's evidence runs the substantial risk of corrupting the evidence of the person concerned and that is why clear warnings are given. Here, there was a clear discussion about a matter which had been raised during cross-examination that very morning."

42. It was submitted that it would be a proportionate remedy for the Tribunal to strike out the response pursuant to Rule 37 and it would not be appropriate for a different Tribunal to hear the case for the reasons set out at paragraph 45 of ***Chidzoy.***

43. It was pointed out that the Tribunal could strike out the whole of the response or, alternatively, debar the respondent from taking any part in the question of liability but permit it to participate in a remedy Hearing and that would be a matter for the Tribunal exercising its discretion.

Respondent's Submission

44. As indicated above, the respondent provided a detailed submission. This is a lengthy document which runs to sixteen pages. It is set out under nine chapters. The background is set out with reference to the claim being that the claimant submits he has suffered a detriment, contrary to Section 146(1)(b) of the Trade Unions and Labour Relations Act 1992 (hereinafter referred to as the 1992 Act), an allegation that he was automatically unfairly dismissed contrary to Section 152 of that Act and that he has been unfairly dismissed contrary to Section 98 of the Employment Rights Act 1996, (referred to as the 1996 Act) all of which claims are denied by the respondent. There was then further information given as to the background and specifically detailed information was then set out as to what Mrs Bennie had recorded as being her notes of questions put to the witness by the Judge and Mrs Hogben.

45. It is relevant to note that, in relation to answers given by the witness one of the answers he gave was that he accepted he was under oath and that it was "complete naivety on his part" to have discussed his evidence in the manner outlined. Mrs Bennie then refers to Rule 37. She again sets out the two stage test. She made reference to ***Hasan v Tesco Stores Ltd [2016] IRLR 694*** at paragraphs 17 to 19 thereof. It was her submission that, even if a Tribunal was satisfied that either Rule 37(1)(b) or (e) of the 2013 Rules was made out, (which the respondent denies) then, at stage 2 the Tribunal has discretion to refuse to strike out the response.

46. Much had been made of the importance of the proceedings to the claimant but equally the proceedings were important to the respondent which stands accused of treating a former employee less favourably because of his trade union activities. The respondent's business is unionised and its relationship with the Union is a matter of importance. It is therefore right and proper that the facts of the case are fully explored and determined by the Tribunal. There are real disputes on the facts in this case.

47. Next, the claimant claims compensation as a result of a detriment and automatic unfair dismissal. The respondent contends that the detriment

claim is time barred and to strike out the application would result in a claim which the respondent says is time barred, at least in relation to those complaints without being allowed to proceed to a remedy Hearing and would not been in accordance with the reason, relevance, principle and justice.

48. Whilst this is not a discrimination case, as in a discrimination case, it is highly fact sensitive. The Tribunal has so far heard from one witness and only then in part since the witness's evidence was not completed as the matter of re-examination remains outstanding.

49. Mrs Bennie referred to ***Timbo v Greenwich Council for Racial Equality UKEAT/0160/12*** at paragraphs 27, 32, 33 and 50. This, in turn, referred to the well known judgments in ***Anyanwu v South Bank Student Union [2001] ICR 391*** and ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126,***

50. It was submitted that the exercise of strike out is a draconian power since it precludes any further hearing of evidence and so the threshold for strike out is high and rightly so.

51. In relation to the Stage 1 of the 2 stage test it was contended that the witness's conduct was unreasonable within the meaning of Rule 37(1)(b). Reference was made to ***Blockbuster*** (again see above) and to ***Bolch.***

52. Mrs Bennie accepted that the position set out in paragraph 55 of ***Bolch*** is relevant as explained by Mrs Hogben above.

53. It was Mrs Bennie's submission that the party to these proceedings would either be the claimant or the representative or the respondent or its representative. Support for this view can be found in ***Bennett v Southward London Borough Council [2002] ICR 881.*** The Court of Appeal at paragraph 24 indicated that consideration has to be given as to "how far it is right to attribute any misconduct of the proceedings to Mrs Bennett" (the claimant in that case where the conduct complained of was about the claimant's representative. The claimant was given the opportunity to

disassociate herself from that representative. She declined to do so and the claim was struck out.

54. Next, in ***F T Edmondson v BMI Healthcare EAT/0654/01*** the application was struck out because of the conduct of the claimant's representative while in ***Sud v The Mayor and Burgesses of the London Borough of Hounslow UKEAT/0156/14*** the claim was struck out because of the claimant's conduct. Similarly, in ***Chidzoy*** the claim was struck out because of the conduct of the claimant and her representative whereas in ***Bolch*** the notice of appearance was struck out because of the respondent's behaviour but there the employer was an individual whereas here the witness was neither a claimant nor a respondent nor, in her submission, is he a representative of the respondent.

55. The point was made that a respondent should not be liable for the acts of its witnesses in ***Force One Utilities Ltd v Mr K Hatfield UKEAT/0048/08.*** The Tribunal found that the witness who was an Executive Director of a sister company of the respondent was "plainly directing matters on behalf of the company" and that he "in practice exercised control of the proceedings and had been conducting negotiations with Mr Hatfield personally."

56. This could not be said of the witness here who is not a party to the proceedings nor conducting proceedings in a representative capacity. Accordingly, Mrs Bennie's submission was that the first principle set out in ***Bolch*** had not been made out and so a strike out under rule 37(1)(b) ought to be refused.

57. Should the Tribunal not be with the respondent, then the Tribunal still has to consider whether a fair trial is possible in terms of Rule 37(1)(e).

58. Mrs Bennie set out her submission in relation to a fair Hearing. It was accepted by her that the witness in speaking to the HR adviser, Ms S had acted unreasonably but a fair Hearing was still possible.

59. It was conceded that his actions were foolish and borne out of naivety as opposed to a deliberate and wilful disregard of the Judge's direction. It was

suggested that this was an attempt, albeit ill-conceived, to help the Tribunal in establishing facts in relation to the other driver, Mr L about a matter which had come to light immediately prior to the beginning of the Hearing in October 2017. Mrs Bennie submitted that this was not a case where it can be said that confidence had been entirely lost in the good faith and honesty of the witness or the respondent.

60. Next, Mrs Bennie set out the position in relation to what is a Fair Hearing.

61. It is the right to be heard before an impartial Judge. The right of the claimant to be heard was not in any way by affected by the exchange. The claimant's case was in the process of being heard and tested and the witness had been subjected to lengthy and detailed and probing cross-examination. The claimant will still be able to cross-examine other witnesses on any relevant matter in exactly the same way.

62. Findings of fact are properly matters for the Tribunal as is the assessment of credibility and reliability. The Tribunal was highly experienced in those assessments. This is not a case like a criminal jury with inexperienced lay people. The primary findings of fact the Tribunal has to make in relation to unfair dismissal is the reason for the dismissal and would be wholly unaffected by the exchange or any evidence in relation to the other driver, Mr L.

63. In relation to detriment the respondent maintains that that claim is time barred.

64. In relation to the other driver and the discussion with the HR Manager this was not in the mind of the witness at the time he made the decision to dismiss the claimant. There was then further consideration set out as to what had happened in relation to the investigation process.

65. It was Mrs Bennie's submission that the witness's evidence and the others was not tainted and this assertion lacks a factual basis.

66. Reference was made to the fact that witness statements had been ordered in this case as well as supplementary statements provided.

67. The matters that are to be determined are matters that occurred in the past. Reference was made to there being 500 pages of documentary productions in the joint bundle and these documents are not tainted by the discussions on 4 October.

68. The witnesses have been directed not to discuss their evidence but there was no evidence to the Tribunal that the witness had discussed the contents of his witness evidence with either his line manager, Mr M or the other HR manager, Ms W who had been present during the Hearing. The claimant was conflating speaking to a witness and discussing the content of evidence.

69. The respondent accepts that the position with Ms S and Ms W is different. However, they were not responsible for the decision taken to dismiss the claimant.

70. Indeed, the witness's position is that he did not have any discussion about his evidence but rather the discussion he had was in relation to welfare support and that is why the witness used the word, "coached". There is also reference to a letter written by Ms W in August 201 3 but that was 3 years before the decision to dismiss. It was the respondent's position that a fair Hearing was still possible and the Tribunal should not accept the approach suggested by the claimant as this would result in a sanction that was punitive, draconian and disproportionate. A fair trial remains possible and the case should proceed and the sanction of strike out should not be regarded as simply punitive.

71. Mrs Bennie went on to refer to the ***Chidzoy*** decision which involved discussion during the currency of evidence but the circumstances were considerably different to this case.

72. Further, the Tribunal should consider the issue of proportionality. Were the Tribunal to conclude that a fair Hearing was impossible then the Tribunal could direct that the case proceed in relation to the respondent on the basis of firm case management orders such as the witness statements already lodged, with supplementary questions not being permitted.

73. On the issue of remedy, if the Tribunal concluded that either Rule 37(1)(b) or (e) is established, that a fair Hearing is not possible, a proportionate response would be to grant the strike out but allow the respondent to participate in the remedy Hearing, including being able to lead evidence regarding submissions on ***Polkey*** and contributory fault.

74. It would be relevant for the respondent to be able to refer to the fact of there being a final written warning because, to fail to do so, would unfairly and prejudicially restrict the ability of the respondent to participate in the Hearing. The issues of ***Polkey*** and contributory conduct are still very much live issues in the event the claimant is successful in his claim.

75. It is accepted the claimant had received a final written warning but he did not bring a complaint in relation to that and the respondent's position is that any such application would be time barred.

76. There was also reference to the vehicle driven by the claimant in August 2016 and the discussion about this at the disciplinary hearing. The claimant accepted at that hearing that he had driven a defective vehicle.

77. In summary, Mrs Bennie's position was that the witness's conduct did not fall within Rule 37(1)(b) and so strike out should be refused. A fair Hearing would still be possible and so strike out should be refused.

78. If the Tribunal concluded that either Rule 37(1)(b) or (e) was established and a fair Hearing was not possible, the proportionate response would be to refuse to strike out it in whole and to allow the Hearing to proceed on the basis of the witness statements already produced. Alternatively, another proportionate response would be for the respondent to be permitted to participate in the remedy Hearing, including leading evidence in support of and making submissions in ***Polkey*** and contributory fault

Claimant's response to Respondent's Submission

79. Reference was again made to the test set out in ***Bolch*** and ***Blockbuster.***

80. The claimant's position is that, with reference to the reliance placed on ***Hasan v Tesco Stores Ltd ,*** that was an application under Rule 37(1)(a) for strike out on the basis the claim had no reasonable prospects of success. The test set out in ***Botch*** should therefore prevail.

81. Reference was made to the claimant's solicitor's notes of evidence during further cross-examination, a copy of which was attached.

82. In relation to ***Timbo*** and the respondent's contention that discrimination cases such as this are highly fact sensitive and where there are outstanding disputes of fact an application for strike out should not be granted before all the evidence has been heard with reliance being placed by Mrs Bennie in particular to paragraphs 27, 32 and 33 there was no reference to the fact that ***Timbo*** was an application under the 2004 Rules being the predecessor to the current Rule and was on the ground of no reasonable prospect of success. Mrs Hogben agreed that if the application were made under that Rule it would be inappropriate to strike out, except in the most obvious and plainest cases. It was for this reason that the claimant makes the application in terms of Rule 37(1)(b) and (e). Therefore, ***Timbo*** has no relevance.

83. In relation to the detriment claim it is accepted there are three claims, namely automatic unfair dismissal under the 1992 Act Section 152, ordinary unfair dismissal under Section 98 of the 1996 Act and detriment in terms of Section 146(1)(b) of the 1992 Act.

84. While the two matters pleaded in the detriment claim are the final written warning and denial of paternity leave they provide relevant evidence in relation to the unfair dismissal but are also a stand alone claim. While the respondent contends that these are time barred, then regardless of whether it was raised as such by the respondent, time bar is a jurisdictional matter conferred by Section 147 of the 1992 Act and will have to be considered by the Tribunal.

85. In those circumstances and while there is a live jurisdiction issue the claimant is content to restrict his application for strike out under Rule 37(1)(b) and (e) to the automatic and unfair dismissal claims.

86. On the issue of conduct by or on behalf of the respondent, Mrs Bennie had accepted on 6 October that the witness's conduct was unreasonable but that it was not conduct by or on behalf of the respondent in that the respondent was not behaving unreasonably. There was then reference to the notes of the exchange with Mrs Bennie and the Judge.

87. It was Mrs Bennie's submission that the Tribunal should conclude that the witness's conduct cannot be taken to amount to "conduct by or on behalf of the respondent" within the meaning of Rule 37(1)(b) and in doing so she relies in part on ***Bennett*** and also other examples of strike out which it was submitted were of little relevance except for ***Chidzoy.***

88. In ***Bennett*** the conduct complained of was scandalous conduct in that a lay representative accusing the Tribunal of racism. The original Tribunal recused itself and a new Tribunal struck out the claim on the basis of scandalous conduct.

89. In terms of whether conduct was by or on behalf of the claimant Lord Justice Sedley said at paragraph 26 that:-

> *"what is done in a party's name is presumptively, but not irrebutably, done on her behalf. When the sanction is the drastic one of being driven from the judgment seat, there must be room for the party concerned to disassociate herself from what her representative has done"*

90. Here, the respondent seeks to disassociate itself from its principal witness - the dismissing officer. Mrs Hogben submitted that the respondent does not in fact wish to disassociate itself from that witness but wants him to continue to give evidence and rely on his evidence.

91. With reference to ***Force One*** there the respondent sought to challenge the Tribunal's decision to strike out a response on the basis of intimidatory

conduct of one of their witnesses towards the claimant. That individual was only witness and the respondent was not liable for his actions and the respondent had disassociated itself from his conduct by indicating that it did not intend to call him as a witness.

92. This was rejected by the Employment Appeal Tribunal and reference was made by Mrs Hogben to paragraph 50 in that judgment

93. Here, there has been no action taken to mitigate the effects of the unreasonable conduct. Instead, the respondent is actively seeking to rely on the witness's evidence going forward. The respondent cannot have this both ways. Otherwise, the effect of this would be for the Tribunal to allow any witness to behave as unreasonably and dishonestly as (s)he pleases without any adverse consequences for the party concerned, provided they stated it was nothing to do with them.

94. In the relation to the respondent's other witnesses this witness had made contact with two witnesses, (Mr M and Mr C) who have still to give evidence and two individuals, (Ms W and Ms S) who would not be giving evidence. However, one of those two witnesses, Ms W was the person who had been giving instructions on behalf of the respondent and both these witnesses are experienced HR managers who had been involved in the claimant's case at various stages.

95. Accordingly, as Mrs Bennie had conceded to the Tribunal in her oral submission, the Tribunal must take into account not just the witness's conduct but also the respondent's conduct as a whole in determining whether the respondent has behaved unreasonably. The claimant's position is that there was unreasonable behaviour. It appears that the witness's Line Manager has described himself as being "well-versed" in Tribunal proceedings while the two HR managers are said to be experienced managers. It was stated for the claimant that they knew or must have known that what they were doing was wrong.

96. In relation to whether a fair Hearing was still possible reference was made to ***Bennett*** and Lord Justice Sedley recognising that the conduct in question in that case was "improper" but was also "reversible".

97. Here, it was submitted the circumstances were completely different and the damage to the prospect of a fair hearing was completely irreversible. This it was submitted was true regardless of whether the Tribunal were to find the witness acted in bad faith or was simply foolish. The claimant's position is that the witness acted dishonestly.

98. In relation to the contact made with the HR manager, Ms S this went specifically to evidence given by the witness about an individual who was involved in the decision to suspend the claimant and which ultimately led to his dismissal.

99. It was suggested that there was subsequently a considerable change in the approach adopted by the witness in relation to the suspension process and also as to enquiries made by him about the other driver, Mr L.

100. It was suggested that what the witness was saying was that the decision to suspend was taken as a precautionary measure which was not something that he had said when questioned under cross-examination.

101. Whilst accepting that the witness had not given evidence before and was unfamiliar with Tribunal surroundings, were the Tribunal to accept this, then it was highly unlikely that he would have been made alert to the practical effect of the admission he made under cross-examination on the issue of suspension.

102. This then raises the question of why there was such a change taken by the witness. It was submitted that, the only material change between the end of his cross-examination on Wednesday and his answers to the questions on Thursday morning, was that he had had a conversation the previous evening about the evidence with Ms S, the other HR manager.

103. It was submitted that the fact that the witness had discussed his evidence was "deeply troubling and goes beyond the type of conversation which the witness had with the journalist in ***Chidzotf'.***

104. It was therefore again submitted that the witness's evidence was tainted and the Tribunal cannot be satisfied a fair trial is possible on this basis.

105. It was submitted the Tribunal would be concerned about whether the other HR manager, Ms S had spoken to anyone else about the witness's request to find out more information about the other driver, Mr L and that the Tribunal could not be satisfied that she had not. It also raised the question as to whom she might have spoken to, possibly the witness's Line Manager, Mr M or another individual, Mr W both of whom are still to give evidence to the Tribunal.

106. It was submitted for the respondent that making reference to this other driver, Mr L was not relevant but it was in Mrs Hogben's submission highly relevant since that other driver was not disciplined, let alone dismissed whereas the claimant was.

107. In relation to an alternative to strike out it was suggested that the witness statements are not tainted since they were prepared before the witness gave evidence but that submission is devoid of merit. There is no legal authority or rule of law which permits a Tribunal to determine a case without the evidence being tested in cross-examination. It would be the answers from cross-examination of the remaining witnesses that would be tainted.

108. Should the Tribunal find that there has been unreasonable conduct by and on behalf of the respondent and a fair trial is no longer possible, it must then go on to consider whether strike out is proportionate and the extent of any debarring order.

109. It was submitted that the only real option available is to strike out the defence of automatic unfair dismissal and unfair dismissal but that also leaves the question of the extent of strike out.

110. If a fair Hearing is no longer possible then the respondent's witnesses should be debarred from participating and the only element of claim that would be left would be mitigation of loss.

111. It was submitted that the respondent should not be permitted to challenge in the issues of ***Polkey*** or contribution as that would rely on the discredited evidence of the respondent's own witness.

112. In relation to the claimant having driven a defective vehicle it was the claimant's submission that he thought it was safe to do so and because he thought he was following the correct procedure. The question of whether or not this was right or wrong would be a question for the Tribunal only if they determine a fair trial is still possible and to proceed with the Hearing.

113. There was reference to whether the claimant might have been dismissed because he had been using a mobile phone but the position as set out was factually incorrect and there was no evidence that records produced to the final appeal board suggested that the claimant had them doing so.

114. A ***Polkey*** submission would have to rely on witnesses who had been discredited or tainted and would be an entirely self serving exercise designed to shut the stable door after the horse has bolted.

115. Finally, it was never advanced in any pleading or witness statement or record of any disciplinary appeal meeting as an alternative reason for dismissal that the claimant would have been dismissed as a consequence of allegedly having used a mobile phone.

116. The attempt to introduce it now, without fair notice and without any evidence was "a last throw of the dice in a desperate attempt to further attack the claimant and his credibility" and was an abuse of the Tribunal process and the Tribunal was invited to refuse it.

117. It will be clear from the above very detailed submission and the case law to which the Tribunal was referred that the Tribunal required to take time to consider all the submissions which were made in light of the evidence before it during the course of the proceedings, especially on 4 and 5

October 2017. In any event, the Tribunal was grateful to the representatives for their detailed submissions to it. However, the written submissions do not end there.

Respondent's response to Claimant's Submission

118. By e-mail dated 12 October 2017 times at 14:20 hours the respondent's Counsel provided an additional reply which Ms Cooney asked be referred to the Employment Judge and Members in time for the meeting which she noted was scheduled for Monday 16 October 2017.

119. Unfortunately, this e-mail was not downloaded and the attachment provided to the Employment Judge until Monday 16 October. Accordingly, it had not been seen by the Judge or the Members ahead of the meeting on 16 October. For completeness the Tribunal in considering the issues before it did take into account this supplementary note, albeit the respondent had not been invited to provide a further response on the basis that their submission had already been received. As indicated above, Mrs Hogben had been informed that she could provide a written reply to the respondent's submission which she duly did.

120. In essence, looking at the supplementary note there is reference again to ***Hasan*** and a further Judgment in ***HM Prison Service v Dolby [2003] IRLR 694*** where the decision was reached in terms of the 2001 Regulations and it was noted that a tribunal has wide powers under the then relevant Rule to strike out a claim and the approach should be in two stages the second stage being whether to exercise the discretion held by Tribunal to decide whether to strike out a claim.

121. There was also further reference to ***Timbo,*** specifically in relation to paragraphs 27, 32, 33 and 50.

122. This, the Tribunal noted was with reference to the position in ***Anyanwu*** and ***Ezsias*** which has already been referred to by Mrs Bennie in her earlier submission.

123. Mrs Bennie noted that the claimant was now content to restrict its application to the automatic and unfair dismissal claims but asked how this could be dealt with on the basis that, if the claimant was correct and the section 146(1)(b) TIILCRA claim was in time, how would the Tribunal dealt with that claim. Again, Mrs Bennie's position was that the issue should be dealt with at the end of the case after all the evidence had been probed and tested in cross-examination.

124. Next, Mrs Bennie referred to her submission that the witness was not "the party" referred to in Rule 37 with reference in ***Bennett*** and to "how far it is right to attribute any misconduct of the proceedings to Mrs Bennett herself Mrs Bennett being in that case the claimant.

125. Here, it was suggested the question was "how far is it right to attribute any misconduct of the proceedings to ***Gist Ltd".***

126. While the respondent accepted that the witness's conduct in contacting Ms S was unreasonable conduct on ***his part,*** that was as an individual but not on the part of the respondent.

127. Mrs Bennie referred to Section 6 of the Employment Tribunals Act 1996 and the right to representation. Here, the respondent is represented by Counsel and a solicitor.

128. Next, there was again emphasis on the argument that the conduct complained of was not that of the respondent company and that the cases which had been cited were ones involving misconduct on the part of the claimant or a respondent him or herself or a respective representative. Therefore the respondent's submission at chapter E of their principal submission, in particular, paragraphs 29-35 should be preferred.

129. Mrs Bennie suggested that the claimant's submission at paragraph 17 of its further submission supported this contention by the respondent.

130. Mrs Bennie again indicated that the respondent is disassociating itself from the witness's conduct in speaking to Ms S but the respondent adheres to all that is set out at chapter F of its principal submission. It was submitted that

the weight to be attached to the evidence of the witness or indeed any of the witnesses was a matter for the Tribunal.

131. Next it was submitted there was no evidence before the Tribunal that the witness had told lies or was dishonest. The assessment of witnesses is a matter for the Tribunal as is the weight to be attached to any witnesses' evidence.

132. The sanction of strike out should not be regarded as punishment for conduct.

133. Next, it was submitted that the claimant was conflating speaking to a witness and discussing evidence. It was suggested that there was nothing to indicate that colleagues could not exchange pleasantries but they could not discuss evidence given or to be given. There was no evidence before the Tribunal that there was a discussion of evidence by the witness with Mr M or MsW.

134. In relation to the weight to be given to evidence this was a matter for the Tribunal. In Mrs Bennie's submission, it was wholly immaterial and irrelevant what the witness understood was Mr I's reason for deciding to suspend the claimant. The witness's evidence was that he did not take that decision to suspend and it was of no relevant as to what he thought was Mr I's reasons for doing so. The witness can only give evidence about matters which he knows as a matter of fact. The witness did not investigate the allegation he conducted the disciplinary hearing.

135. Next, it was suggested that the claimant was conflating "(i) the decision to suspend, (ii) the decision to proceed to a disciplinary hearing and (iii) the outcome of a disciplinary hearing." Mr I was not involved in the decision to dismiss. It should be borne in mind that this case was set against a background of the claimant having admitted that he drove a defective vehicle from Newark to Bellshill. In relation to the claimant's submission at paragraph 40 this would be dealt with by leading evidence and the witnesses being subjected to cross-examination with the weight to be attached to evidence being a matter for the Tribunal.

136. The respondent disagreed with what was said at paragraph 41 of Mrs Hogben's submission. Mr L was not mentioned during the investigation or disciplinary hearing and so was not a factor in the mind of the witness as dismissing office in reaching his decisions. While the claimant may say he ought to have done that does not alter that he did not do so. It did not therefore follow, as a necessary consequence, that the reason for the claimants dismissal was trade union activities. Next, Mrs Bennie indicated that she was not entirely clear on the point made at paragraph 43 of the claimant's further submission. The witness statements were lodged in July 2017 and are treated as evidence-in-chief. While the claimant should have the opportunity to probe and test the evidence-in-chief that opportunity is available in cross-examination. Thereafter, assessment of witnesses is a matter for the Tribunal.

137. Finally, in relation to the issue of driving and records provided to the final appeal board that could leave open a conclusion that the claimant was driving when he telephoned the respondent but that would be a matter for cross-examination with the claimant. It did not, in her submission, arise out of the events of the preceding week but arose as an issue from Counsel's analysis of the case.

138. Again, Mrs Bennie submitted that this should be considered by the Tribunal when discussing loss in ***Polkey*** and contributory conduct.

Relevant Law

139. As indicated above, the relevant law is found at Rule 37 as follows:-

> (1) At any stage of the proceedings either on its own initiative or on the application of a party, a Tribunal may strike out all or part of the claim or response on any of the following grounds-
>
> (a) .....
>
> (b) that the manner in which the proceedings had been conducted by or on behalf of the claimant or the

respondent (as the case may be) has been scandalous, unreasonable or vexatious

(c) .....

(d) .....

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Deliberation and Determination

140. As the parties will appreciate, the Tribunal was provided with extremely detailed written submissions. Mrs Bennie had not been asked by the Tribunal to provide a reply to the claimant's response to her submission but given it was provided, the Tribunal took it into consideration in its deliberations.

141. It is also appropriate to indicate that, as set out above, the Tribunal met on 16 October following which arrangements were made for the Tribunal to meet again on 20 October 201 7 in order to consider the judgment which had been drafted in part prior to 16 October on the basis that the Judge endeavoured to encapsulate the various submissions with the exception of that provided by the respondent in terms of the attachment to the e-mail of 12 October 2017 since that was not available to the Judge until 16 October 2017.

142. The Tribunal then gave careful consideration to all that was provided by the parties in their respective submissions on 16 October.

143. There are two issues for determination by the Tribunal.

Was there unreasonable conduct?

144. The first issue is whether the manner in which the proceedings have been conducted by or on behalf of the respondent has been unreasonable. The Tribunal noted all that is said in relation to whether the proceedings had

been so conducted by or on behalf of the respondent. The Tribunal noted all that was suggested in relation to unreasonable conduct, particularly Mrs Bennie's suggestion that the conduct of the witness could not be said to be by or on behalf of the respondent. The Tribunal was not persuaded that that can be right because, if it were so, then taking this to its logical conclusion this would mean that strike out of a response could only ever occur where the respondent was an individual rather than, as here, where the respondent is a limited company. A limited company cannot act on its own behalf. It can only act through its directors, officers and individuals acting on its behalf. The Tribunal was therefore not persuaded that the argument by Mrs Bennie was tenable that the respondent can disassociate itself from the witness. The Tribunal can understand that the respondent may want to put some distance between it and the witness but the witness was giving evidence in his capacity as an employee of the respondent who had been given the role of conducting the disciplinary hearing. In any event, it is conceded by the respondent that the witness's conduct in contacting Ms S was unreasonable conduct. The Tribunal was satisfied that this was indeed unreasonable conduct.

145. In relation to the witness having indicated that he had been "coached" by Ms Wilson, this does not explain why Ms W whom the Tribunal understood to be an experienced HR advisor thought it appropriate to do so. However, there was no indication before the Tribunal that anything that was said between the witness and Ms W impacted on the evidence being given by the witness.

146. In relation to the witness's discussion with Mr M, the Tribunal could understand that the witness required to be in touch with his Line Manager in relation to day to day work issues. There was no indication before the Tribunal that there had been actual discussion of the witness's evidence.

147. There was no information before the Tribunal as to what if anything was said when the witness was at lunch with Ms W and Mr C. As indicated above, the Tribunal is unclear as to why Ms W and her colleague Ms S thought it appropriate to be having any discussions with a witness who was in the course of giving evidence. That is a matter which no doubt the respondent

can consider in due course They should realise now, if they did not already do so, that going forward it is not appropriate for any witness who is giving evidence to be having any form of discussions with HR advisors, other managers or indeed any other witnesses about their evidence.

148. The Tribunal noted that, according to the witness, his Line Manager, Mr M, is "well versed" in attending Employment Tribunals so he would presumably have had some understanding of the requirement not to discuss evidence.

149. In relation to the first issue of whether there was unreasonable conduct the Tribunal was satisfied that there was unreasonable conduct by this witness who is an employee of the respondent and who was giving evidence to the Tribunal about his involvement as the Dismissing Officer.

150. In reaching its decision the Tribunal gave careful consideration to whether it could strike out the response, in part, but the difficulty it was faced with is that, in this case, there is more than one ground of complaint. The Tribunal could not see how it could strike out the response in relation to the ordinary unfair dismissal but allow it to continue in relation to the automatic unfair dismissal and/or the detriment/victimisation complaints in terms of Section 152 TULCRA and Section 146(1)(b) of the same Act.

151. The Tribunal considered whether the alternative suggested by Mrs Hogben of debarring the respondent from taking any part in the question of liability but permitting it to participate in a remedy Hearing (see Bolch at paragraph 55) above would be feasible. The Tribunal concluded that it would not be feasible to do this since the complaints of (ordinary) unfair dismissal, automatic unfair dismissal and detriment are all inextricably linked.

152. The Tribunal was also alert to the fact that, as has been repeatedly pointed out, striking out whether of a claim or response or part thereof is a draconian measure and it can only be done where a Tribunal is satisfied that a fair trial is no longer possible.

Is a Fair Trial still possible?

153. The second issue for determination is whether a fair trial is still possible. The Tribunal gave careful consideration to all that it has been said to it regarding the issue of discussion of evidence. It also took into account the notes from Ms Bennie of what was said during the Tribunal Hearing as well as Mrs Hogben's notes attached to her response to the respondent's submission which are set out as being the claimant's solicitor's notes of 5 October 2017.

154. After very careful consideration of all that is said on behalf of the claimant and the respondent, the Tribunal reached the conclusion that, while it is finely balanced, it is satisfied that a fair trial is still possible.

155. As has been indicated repeatedly by Mrs Bennie, it is for the Tribunal to assess the credibility and reliability of witnesses. The Dismissing Officer who was giving his evidence has not yet completed his evidence as his re-examination is still outstanding. The Tribunal concluded that it can still hear from him in re-examination and then from the respondent's remaining witnesses, it will do so by moving directly to cross examination of those witnesses who have all provided witness statements.

156. The Tribunal will then hear from the claimant who has given part of his evidence already in July 2017 as well as his witnesses who have all again provided witness statements which will be taken as read as they are each, in turn, called to give evidence.

157. While the Tribunal was referred to a number of authorities none of them are directly in point. These are cases where a claimant or an individual respondent have behaved in a way that made a fair trial impossible, for example, ***Bennett*** **and** ***Chidzoy.***

158. In this case the witness did not speak to a third party. He accepted that he had been naive and the Tribunal concluded that he was foolish to have contacted Ms S and made enquiries about the other driver, Mr L. Ms S is not one of the respondent's witnesses who is to give evidence at this

Hearing. Had she been then the Tribunal would be likely to have reached a different conclusion as to whether a fair trial is still possible.

159. Since the Tribunal has concluded that a fair trial is still possible it is essential that the case now moves forward with the completion of the hearing of evidence.

160. The Tribunal Judge intends to issue a letter setting out further directions for consideration by the agents prior to the Hearing resuming on 1 November 2017. This will be discussed with her colleagues before it is issued.

161. It is most unfortunate that this case has had to be adjourned at an early stage of the Final Hearing but the Tribunal required to take time to consider the application for strike out.

162. It therefore follows for the reasons set out above that the application to strike out the response is refused and the case will now proceed to a continued Final Hearing which will resume on 1 November 2017.

Employment Judge: Jane Garvie
Date of Judgment: 20 October 2017
Entered in register: 20 October 2017
and copied to parties