Case Number: 1301093/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr AM Gai		**Tesco Stores Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 21 March 2022

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Written Submissions**
For the Respondent: **Ms A Greenley (Counsel)**

JUDGMENT
(Issued to the Parties on 21 March 2022)

1 The claimant's application dated 27 September 2021 for permission to amend his claim to include a claim for automatic unfair dismissal (Section 99 of the Employment Rights Act 1996) is refused.
2 The claimant's application dated 20 October 2021 for permission to amend his claim to include a claim for victimisation is refused.
3 Pursuant to Rule 37(1)(b), (c) & (e) of the Employment Tribunals Rules of Procedure 2013, the claimant's claims are struck-out in their entirety.
4 The hearings currently listed for 12 September 2022 and 20 – 28 October 2022 are cancelled.

REASONS

1 Following the hearing on 21 March 2022 at which full reasons were given orally, written judgement in the above terms was issued to the parties. These written reasons are provided pursuant to a request received from the claimant later the same day. In a subsequent request, the claimant has also asked me to make a specific finding with reasons as to the admissibility of the document bundle provided by the respondent for the hearing on 21 March 2022. My findings in this regard have been incorporated into these reasons.

Introduction

2 The claimant in this case is Mr Alhagie Maliick Gai who was employed by the respondent, Tesco Stores Limited, as a Customer Service Assistant, from 16 October 2004 until 2 February 2019 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was gross misconduct.

3 By a claim form presented to the tribunal on 14 March 2019, the claimant brings claims for unfair dismissal, race discrimination, and arrears of pay.

4 By its response, the respondent denies all of the claims. It denies any element of race discrimination and maintains that all wages due to the claimant have been paid. So far as the dismissal is concerned, respondent admits that the claimant was dismissed but asserts that the dismissal was for a reason relating to his conduct and that it was fair. The respondent's case in its response form wasn't the claimant's claim for race discrimination was inadequately particularised such that it could not properly respond to it.

Procedural History

5 There have been a number of preliminary hearings to date:

(a) **14 October 2019 – Closed Preliminary Hearing (CPH) – EJ Camp**

EJ Camp determined that the case should be listed for an open preliminary hearing (OPH) to determine three issues:

(i) Whether the claimant should have permission to amend his claim.
(ii) Whether the claimant should be ordered to pay a deposit in respect of any part of the claim.
(iii) Whether any part of the claim should be struck out as having no reasonable prospects of success.

EJ Camp made case management orders including for the provision of further particulars of the claims.

(b) **6 February 2020 – OPH – EJ Meichen**

EJ Meichen determined that on a proper reading of the claimant's claim he had placed before the tribunal valid (subject to time issues) claims for:

(i) A failure to provide rest breaks pursuant to the Working Time Regulations 1998.
(ii) Unfair Dismissal.

(iii) Direct race discrimination and/or racial harassment.
(iv) Direct religious discrimination and/or harassment on religious Grounds.

EJ Meichen refused the claimant's application to amend the claim to include claims for age discrimination, breach of contract, and victimisation. EJ Meichen listed a further OPH to determine whether the claimant required, and if so should be permitted, to amend his claim to include all of the particulars he had provided relating to his claims for direct discrimination and harassment. The OPH would also consider the outstanding applications for strike out and/or deposit.

(c) **1 April 2020 – CPH (by telephone) – EJ Dean**

This was the listing of the further OPH directed by EJ Meichen on 6 February 2020. Unfortunately, the hearing could not proceed as intended because lockdown measures had recently been introduced. The hearing was therefore converted to a CPH (by telephone) to consider how best to proceed. EJ Dean rescheduled the OPH for September 2020 by which time it was hoped and expected that the normal face-to-face hearings would have resumed.

(d) **24 September 2020 – OPH – EJ Algazy QC**

Without dealing with the intended subject matter of the OPH, EJ Algazy, with the consent of the parties, determined that the best way forward would be to list the case for final hearing whilst preserving the parties rights to pursue the putative amended claims and objections thereto, and the strike out application. Accordingly, EJ Algazy listed the claim for final hearing before a full panel sitting in Birmingham to commence on 20 September 2021 with a time allocation of five days. At this hearing, the claimant withdrew his claim for unfair dismissal which was accordingly dismissed.

(e) **20 September 2021 – Final Hearing – EJ Meichen & Panel**

This was intended final hearing however on the first morning of the hearing it became apparent to the panel the parties simply were not ready for a final hearing it had not been possible for them to prepare whilst leaving open the interlocutory matters as had been envisaged by EJ Algazy. Accordingly, the panel determined to abandon the final hearing and the hearing continued as a preliminary hearing before EJ Meichen sitting alone. EJ Meichen attempted to further manage the case to ensure it would be ready for final hearing when relisted. In the event, even for

case management hearing lasted for four days.

6 EJ Meichen dealt with as many of the outstanding interlocutory matters as he could (including refusing an application made by the claimant on 18 September 2021 for EJ Meichen and EJ Algazy QC to be joined as additional respondents to the claim). EJ Meichen attempted to record a comprehensive list of issues. EJ Meichen re-listed the claim for final hearing before a full panel sitting in Birmingham with a time allocation of 7 days commencing on 20 October 2022. He also listed a CPH (by telephone) for 12 September 2022 the intention of which was to review compliance with case management orders and ensure the party's readiness for the final hearing in October. At the claimant's request, EJ Meichen prepared detailed written reasons for the decisions made at the hearing on 20 – 23 September 2021.

Subsequent Events

7 Subsequent to the hearing before EJ Meichen in September 2021, the claimant has made two further applications for permission to amend his claim:

(a) 27 September 2021: An amendment to include a claim for automatic unfair dismissal pursuant to Section 99 of the Employment Rights Act 1996 (ERA).
(b) 20 October 2021: An amendment to include a claim for post-employment victimisation.

It is these application which were originally listed for determination by me at today's OPH.

8 On 20 December 2021, EJ Meichen further considered the claims. He had been asked to reconsider some of the decisions made at his hearing in September 2021 (which he refused to do). He took the opportunity to make Case Management Orders in relation to the claimant's applications set out above. Significant for the purposes of today's hearing, are the Case Management Orders contained Paragraphs 9 and 10 of EJ Meichen's Order:

> **"9 The parties must agree the contents of a single bundle of documents for the Judge to refer to at the hearing. It should be no more than 200 pages in length.**
>
> **10 The respondent must produce a PDF version of the bundle. It must be paginated and indexed. It must be sent to the claimant and Tribunal no later than 14 days before the CVP hearing. The respondent has permission to file the bundle with the Tribunal using the Document Upload Centre and I will ask for some**

information to be sent about how to do that."

9 It is convenient at this point to record that in his Case Management Order relating to the substantive hearing made following the 20 - 23 September 2021 hearing, EJ Minchin also made an Order relating to the preparation of a bundle as follows:

> **"4.7 By 21 January 2022, the claimant and the respondent must agree which documents are going to be included within the final hearing bundle and the respondent must send the claimant a hard copy with an index and page numbers."**

10 The notice of today's hearing sent to the parties on 31 December 2021 contains an obvious administrative error. It refers to notice of "final hearing" rather than simply to the hearing of the claimant's amendment applications. Whilst clearly such an error is regrettable, the position has been clarified to the parties on at least three occasions by letters dated 4 February 2022, 22 February 2022 and 15 March 2022.

11 The claimant strongly objects to the orders made by EJ Meichen at the hearing on 20 - 23 September 2021 and 20 December 2021. I have to say I am quite unclear as to the basis of the claimant's objection.

12 The claimant has made it clear in correspondence that he will not comply with the Orders by EJ Meichen now or at any time in the future. Doing the best I can, it appears that the claimant first articulated his position on this by an email addressed to EJ Meichen and to Regional Employment Judge Findlay on 4 February 2022. The email reads:

> **"I am once again reiterating my position to the all the orders incorporated in the 20 – 23 September 2021 PH records, the 20 December 2021 orders and todays attached orders. I the Claimant once again puts it to the Tribunal that, I will not do or perform any of the orders made by EJ Meichen in the above mentioned documents. Not now and not at any point in the future. All the orders are illegal and are not supported by any rule of law. I defy the orders of EJ Meichen and will not do as ordered. I am waiting for the Tribunal's further action."**

13 In an email addressed to Judge Findlay dated 17 February 2022, the claimant stated:

> **"Dear REJ Findlay,**
> **Thank you for your email. I once again put it to you that I will never**

perform or do as ordered by EJ Meichen. Not now nor at any point in the future even after his reconsideration decision. You have already put me on notice on your 17th November 2021 email to me that my claims will be dismiss if I failed to cooperate with the Tribunal and the respondent under rule 37. I am informing you that, your threat is of no basis. Now that I defy all the orders made by EJ Meichen, I am waiting for your promised action of dismissing my claims. I want you to dismiss my claims which you are clearly avoiding to obstruct me from moving my case to the EAT because of you and your colleagues wrongdoing in this case.

I am also informing you that EJ Meichen has refused to correct the hearing listed on the 21 March 2022 as final hearing with its orders made on that basis. The 21 March 2022 hearing is meant to be a preliminary hearing to determine my amendment applications but EJ Meichen is deliberately listing it as a final hearing to justify the frivolous orders he made in preparation for the hearing to give Tesco control of the evidence put before the Tribunal. I once again seek your intervention for this issue to be corrected to avoid the 21 March 2022 hearing to be once again a waste of the Tribunal resources.

I once again tell you that I will not do any of the orders made by REJ Meichen and I wait for you to direct the dismissal of my claims. If you have the powers to dismiss my claims, you would have done it so soon this case came to your attention. REJ Findlay, you are not only a wrongdoer but you allow wrongdoing under your watch for which I now challenge you for.

Yours sincerely,

Alhagie Malick Gai
Claimant"

14 The claimant repeatedly restated his position in similarly strident terms including in emails dated 18 February 2022, 22 February 2022 and 28 February 2022. In one of his emails dated 22 February 2022 addressed to the tribunal the claimant stated:

"EJ Meichen, you and your colleagues are judges who cannot do justice in this case, you are morally corrupt and ethically empty. The Birmingham Employment Tribunal is no more than a Kangaroo court for BAME litigants. The Tribunal is run on a culture of wrongdoing and being dishonest is a norm for both judges and the administration staff. You in particular are relentless wrongdoer and

persistent abuser of the Tribunal process to obstruct me from pursuing my case in equity and fairness."

15 In her correspondence, Judge Findlay made clear to the claimant that, no matter how much he disagreed with the orders made by EJ Meichen, he was nevertheless obliged to comply with them. And if he failed to do so, his claim was liable to be struck-out pursuant to the provisions of Rule 37 of the Employment Tribunals Rules of Procedure 2013.

16 To her enormous credit, despite the claimant's intransigence and refusal to engage with the Case Management Orders made by EJ Meichen, Ms Amy Hextell, the solicitor with conduct of this matter on behalf of the respondent, has attempted consistently to comply with the Orders and move the case forward in readiness both for today's hearing and for the final hearing listed in October 2022.

17 After the hearing before EJ Meichen in September 2021, and in readiness for the final hearing listed in October 2022, Ms Hextell submitted to the claimant an updated bundle of documents and updated witness statements. She asked the claimant to agree the bundle or alternatively to suggest amendments. She has repeated this process on a number of occasions since, and has also submitted to the claimant for agreement her proposed bundle of documents for use in today's hearing. On each occasion, the claimant has refused to engage with her stating that he will not comply with orders made by EJ Meichen. Over the course of the proceedings, on a number of occasions, the claimant has accused Ms Hextell of unprofessional and even criminal misbehaviour. In my judgement, such accusations are groundless: they appear to be intended to intimidate.

18 On 19 January 2022, the respondent made an application for the claims to be struck-out pursuant to Rules 37(b), (c) & (e) of the Employment Tribunals Rules of Procedure 2013. The respondent had made such applications earlier in the proceedings: one such application had been withdrawn; and on another occasion Judge Findlay had ruled it disproportionate for it to be listed for hearing. The 19 January 2022 application was made on the basis of the claimant's continuing conduct: essentially, that by reason of such conduct a fair trial was no longer possible.

19 In response to the application, by email dated 20 January 2022, the claimant agreed that a fair trial was no longer possible (although his reasoning for such conclusion differed from that of the respondent).

20 On 8 March 2022, the claimant wrote to the tribunal giving notice that he would not be attending today's hearing but that he would be submitting written submissions. The written submissions were in fact sent by an earlier email dated 3 March 2022. I confirm that I have read and considered them.

21 The respondent has helpfully provided a hearing bundle for use in today's hearing. The claimant challenges the legality of the tribunal making reference to the bundle, claiming that it is inadmissible by reference to EJ Meichen's Orders as it has not been agreed.

22 On 15 March 2022, the tribunal office wrote to the claimant in the following terms:

> **"The hearing on 21/03/2022 by CVP is a Preliminary hearing to determine the claimant's application to amend and the respondent's application for a strike out, not necessarily in that order. If the claimant does not co-operate with the respondent to agree the bundle, then the respondent's bundle will be admitted as it stands."**

23 On 17 March 2022, on the direction of EJ Broughton, the tribunal wrote two letters to the claimant in the terms set out below:

> **"Having read the claimants e-mail of 15 March 2022 Employment Judge Broughton has directed me to state that in accordance with the overriding objective and interests of justice a bundle is required.**
>
> **If one party refuses to cooperate, the other has no alternative but to act unilaterally.**
>
> **Deliberate refusal to comply with tribunal orders may well amount to Unreasonable conduct, which could result in strike out of some or all of a claim or response, costs awards or other penalties.**
>
> **The case remains fixed to be heard on Monday, 21 March 2022 @ 10:00am."**

And

> **"Employment Judge Broughton directs me to inform you that if a party fails to cooperate in the production of the bundle, the other party's version will stand, subject to any applications made or variations determined by the tribunal at the hearing. No such determination can be made in advance in this case.**

If a party does not attend a hearing without just cause, the tribunal may proceed in their absence and/or strike out the claim or response and / or order costs or other penalties."

24 The claimant has requested me to make a specific ruling with regard to the admissibility of the bundle.

The Law

Amendment Applications

25 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a Case Management Order: Rule 29 Employment Tribunals Rules of Procedure 2013. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

26 ***Harvey v Port of Tilbury (London) Limited*** **[1999] ICR 1030 (EAT)**

Where an amendment is sought, it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks.

27 ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836 (EAT)**

The EAT gave the following general guidance as to the exercise of the Employment Tribunal's discretion and the factors which might be taken into account: -

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.
(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no

> time limits laid down … for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

28 The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

29 Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail. However, this does not mean that the mere fact that a claim would be out of time should automatically prevent it being added by amendment. The relevant time limits are an important factor in the exercise of discretion, but they are not decisive.

30 ***Vaughan v Modality Partnership*** **UKEAT/0147/20/BA (EAT)**
The practical consequences of allowing an amendment which should underpin the balancing exercise a tribunal needs to conduct in weighing the prejudice to each party.

31 In considering whether or not to permit an amendment, the tribunal may take into account the merits of a claim. There is no point in allowing an amendment to add an utterly hopeless case. (***Woodhouse v Hampshire Hospitals NHS Trust*** **UKEAT/0132.12/DM (EAT)** Similarly: "nothing is lost in not being able to pursue a claim which cannot succeed on the merits". (***Herry -v- Dudley MBC and anor*** **EAT 0170/17**)

Strike-Out

32 **The Employment Tribunals Rules of Procedure 2013**

Rule 2: Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:

(a) ensuring that the parties are on an equal footing.
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues.
(c) avoiding unnecessary formality and seeking flexibility in the proceedings.
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Rule 37: Striking-Out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or Vexatious.
(c) for non-compliance with any of these Rules or with an order of the Tribunal.
(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).

33 ***Bolch v Chipman*** **UKEAT/1149/02 (EAT)**

The EAT set out the steps a tribunal must usually consider when deciding whether to strike out under Rule 37(1)(b):

(a) Before striking out under this ground, an Employment Judge must find that a party or their representative has behaved scandalously, unreasonably, or vexatiously when conducting the proceedings.
(b) Once that finding has been made, the Employment Judge must consider, whether a fair trial is still possible because, unless there are exceptional circumstances, a striking-out order is not regarded as a punishment. If it is possible, the case should continue.

(c) Even if a fair trial cannot be achieved, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, such as a costs or preparation time order against the party, rather than striking out their claim or response.

34 ***Weir Valves & Control (UK) Limited v Armitage*** **[2004] ICR 371 (EAT)**

The EAT set out the principles for tribunals to apply when considering Rule 37(c) noting that when an Order has been breached, the tribunal must be able to apply a sanction in response to wilful disobedience of an Order. The guiding consideration is the overriding objective to do justice between the parties. A tribunal should therefore consider all the circumstances when deciding whether to strike out or whether a lesser remedy would be an appropriate sanction. Relevant factors will include:

(a) The magnitude of default.
(b) Whether the default is that of a party or their representative.
(c) What disruption, unfairness or prejudice has been caused; and
(d) Whether a fair hearing is still possible.

The Claimant's Applications & Written Submissions

35 The claimant's first application, made by email on 27 September 2021, is to amend his claim to include a claim for automatic unfair dismissal pursuant to Section 99 ERA. That provision renders it automatically unfair to dismiss an employee if the principal reason for the dismissal relates to pregnancy, childbirth, maternity, or the taking of time off for family reasons in prescribed circumstances. There is nothing in the claimant's claim form or in further particulars which he has provided which has ever suggested that he alleges his dismissal was related to any of these prescribed reasons. His application suggests that he believes it is appropriate to bring a claim for automatic unfair dismissal on the basis of his allegation that the dismissal was a racially motivated sham.

36 The second application, made by email dated 20 October 2021, is to add a claim for post-employment victimisation said to be pursuant to Section 108 of the Equality Act 2010 (EqA). The alleged acts/omissions of victimisation relate to the disclosure of CCTV footage alleged by the claimant to exist relating to the incident for which you was dismissed. This has been the subject of extensive consideration relating to disclosure within these proceedings. It has also been the subject of a formal complaint to the Information Commissioner and the subject of civil proceedings which were dismissed by the County Court with an Order for Costs against the claimant. The claimant has not specified the protected act upon which he relies. But absent any other indication I have considered the application on the basis that this may be alleged to be the presentation of his

current claim of 14 March 2019. The date specified by the claimant over alleged failures to provide the footage are August 2019, 28 April 2020, 15 July 2020, 3 December 2020, various dates in September 2021, and 13 October 2021. The application is confused because Section 108 EqA prohibits post-employment discrimination; but specifically excludes victimisation. Whilst expressed as an application to include a victimisation claim, the text of the application alleges that the reason for the respondent's conduct regarding the disclosure of CCTV footage was because of the claimant's race (direct discrimination).

37 The claimant written submissions do not address his own applications. He concentrates again on asserting the illegality and invalidity of Case Management Orders made by EJ Meichen. With regard to the application for strike-out, his suggestion is that the tribunal has been avoiding making such an Order, or even considering such an application, for fear of being exposed as corrupt on appeal.

The Respondent's Application & Submissions

38 The respondent's application is to strike-out the claims on the basis of the claimant's conduct in failing to comply with the Orders made by EJ Meichen, in his stated intention never to comply with such Orders, in his abusive attacks on the integrity of the Employment Tribunal and Ms Hextell, the claimant is clearly in breach of the provisions of Rule 37(b) & (c). Further the claimant's conduct is such that a fair trial is no longer possible (the claimant agrees with this proposition). Nothing is to be gained by the respondent fully preparing for an expensive trial at which the claimant has indicated repeatedly he has no intention of participating.

39 In her most helpful submissions on behalf of the respondent, Ms Greenley points out that whether assessed by reference to Section 98 ERA (ordinary unfair dismissal) or to one of the various provisions which render a dismissal automatically unfair, the cause of action remains the right not to be unfairly dismissed pursuant to Section 94 ERA. In this case, and in relation to this dismissal, the claimant presented a claim for unfair dismissal: he subsequently withdrew it; and on the basis of such withdrawal it has been dismissed. Accordingly, Ms Greenley submits that it would be legally impermissible now to add such a claim by amendment.

40 The bringing of a claim for automatic unfair dismissal is now very much out of time. The claimant has presented no basis upon which the tribunal could conclude it was not reasonably practicable to present such a claim within the prescribed time limits. Further, the claimant has never at any stage asserted the possibility that his dismissal was related to family reasons. Accordingly, the application to amend to include a claim for automatic unfair dismissal pursuant to Section 99 ERA is wholly misconceived.

41 Regarding the application to amend to include a claim for victimisation, this Ms Greenley relies on the fact that no protected act has been identified; and that the claimant himself states that the conduct about which he complains was because of "*the colour of his skin*"; appearing therefore to assert further acts of direct discrimination. The claimant's dissatisfaction with the disclosure of the CCTV evidence has been a live issue since even before the presentation of his claim. Accordingly, if the claimant has any basis to argue that CCTV evidence had been suppressed as an act of discrimination, he has provided no explanation as to what he could not have included this claim when the proceedings were commenced or it as one of several amendments application he has made at the interlocutory stages. He has provided no explanation for waiting until after what was clearly intended to be the final case management hearing before making the application.

42 At the hearing on 20 - 23 September 2021, EJ Meichen had this to say about the CCTV:

> **"..in relation to the CCTV I should record that on instructions Ms. Greenley has informed me today that all of the CCTV footage which is available to the respondent has already been disclosed to the claimant. There is therefore nothing further by way of CCTV evidence which the respondent can disclose. If the claimant wishes to challenge that and if he wishes to show the tribunal the CCTV footage to demonstrate something then he can raise those points to the Tribunal at the final hearing and they can consider them if they believe it to be relevant."**

Ms Greenley therefore submits that the question of the disclosure of CCTV footage has been fully aired and could be further at the final hearing that it would not be in the interests of justice or compliant with the overriding objective to permit an amendment at this late stage to allow a claim for discrimination arising no such claim having been intimated earlier.

43 Regarding the strike out application, Ms Greenley effectively repeats what is contained in the written application and set out at Paragraph 39 above.

Discussion & Conclusions

Hearing Bundle

44 As specifically requested by the claimant, I will set out my findings with regard to the use of the hearing bundle prepared by the respondent for the purposes of today's hearing.

45 The claimant is correct that EJ Meichen's Order required the parties to agree the contents of the bundle for use of the hearing (see Paragraph 8 above). The Order does not state that any documents which are not in an agreed bundle will not be considered by the tribunal. (In my experience, such an Order would rarely be made as the question of the admission of additional documents is a matter for the Judge or Panel with conduct of the hearing.) In this case, in deliberate contravention of Judge Meichen's Order, the claimant has refused to agree a bundle. If the claimant's assertion that his deliberate non-cooperation renders all documentation inadmissible, he is effectively taking upon himself authority to thwart the tribunal in the discharge of its duty. This clearly could not be consistent with the interests of justice or with the overriding objective.

46 It was made clear to the claimant in correspondence from the tribunal office and from EJ Broughton, that, if he refused to cooperate in the agreement of a bundle, then the bundle submitted by the respondent would stand. The claimant has had every opportunity to make principled objections to the inclusion of any particular documents or to request the addition of others.

47 I have read all of the previous judicial decisions in the case, together with the party's pleadings. And I am satisfied that the bundle which Ms Hextell has produced appears to be complete and proportionate. There is no basis to suggest that any document has been improperly included or any has been deliberately suppressed or excluded. To the contrary, Ms Hextell, in compliance with the overriding objective, has done her best to discharge her duty to the tribunal and ensure that a meaningful hearing can take place.

48 To the extent that the exercise of my discretion is required, I have no hesitation in exercising it in favour of receiving the bundle of documents; considering its contents; and making use of it in this hearing.

Amendment Applications

49 The claimant's applications have been made at a very late stage in the proceedings (some 30 months after the presentation of the claim form); and following several preliminary hearings at which clarification of his claims including some amendment applications have been considered and after one of aborted attempt at the final hearing. The claimant has provided no explanation for making these applications so late. All of the relevant facts have been known to him throughout.

50 The applications are defective: the claimant has not set out verbatim the terms of the amendments sought and thus does not comply with the requirement identified in ***Harvey***.

51 The applications are confused and quite possibly misconceived. There has never been any suggestion from the claimant that his dismissal was related to family reasons and yet he suddenly and belatedly seeks to include a claim for automatic unfair dismissal pursuant to Section 99 ERA. The question of CCTV footage has been extensively explored but the claimant has never previously suggested that the respondent's approach to the disclosure of the footage were acts of race discrimination. And if it was the claimant's intention to pursue a victimisation claim, he has singularly and conspicuously failed to identify the protected act relied upon.

52 On analysis, the claims are out of time: and whilst this is not of itself a bar to an amendment being permitted the claimant has presented no explanation for the delay; and no basis upon which the tribunal could conclude either that it had not been reasonably practicable to make the claim in time or that it was just equitable to extend time.

53 The claimant brought a valid claim for unfair dismissal which he then withdrew and which was accordingly dismissed by EJ Algazy QC. I accept the respondent's proposition that it is not now legally permissible to reintroduce such a claim by amendment.

54 Applying the ***Selkent*** principles, having considered the benefit to the claimant in allowing the late amendments compared with the injustice to the respondent is now having to deal with additional claims at a very late stage especially as such claims appear to be quite misconceived, I have concluded that the claimant's application for permission to amend his claims should be refused.

Strike-Out Application

55 I am satisfied that the claimant's abusive conduct towards tribunal staff, its judges (including the Regional Employment Judge) and towards Ms Hextell is scandalous, unreasonable, and vexatious (Rule 37(b)). That conduct of itself however does not necessarily render it impossible for there to be a fair trial. And I remind myself that the tribunal should not use its power to strike-out as a punishment for such behaviour. However, the conduct falls to be considered as part of the overall picture.

56 Of greater concern, is the claimant's failure to comply with the Case Management Orders made by EJ Meichen. This non-compliance does not arise through oversight or misunderstanding. The claimant, despite being urged by the tribunal and the respondent to cooperate, has deliberately refused to do so and has clearly expressed on numerous occasions that he has no intention of ever doing so. The tribunal has allocated seven days of hearing time for the final

hearing of this claim in October 2022 - which will be 3½ years after the claim form was presented. Because of the claimant's current and intended future conduct, the tribunal is faced with the proposition that the respondent will incur cost and expense in preparing for the hearing and engaging counsel in order to respond to claims which the claimant has no intention of attending the tribunal to make good. In my judgement, it would be a perversion of the overriding objective to oblige the respondent to proceed in such a way.

57 Accordingly, my judgement is that the claimant's conduct clearly falls within that envisaged by Rule 37(c). And, by this conduct, the claimant does make a fair trial of these issues impossible.

58 So far as the freestanding ground in Rule 37(e) is concerned, both parties now seem to accept that a fair trial is impossible. I am satisfied that this situation has arisen because of quite unreasonable conduct by the claimant.

59 In my judgment therefore, it is appropriate and proportionate to bring an end to these proceedings by the strike-out of the claims.

Employment Judge Gaskell
16 June 2022