Case Number: 3334669/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms R Kaur	v	(1) Sun Mark Limited (2) Raminder Singh Ranger (3) Sea, Air and Land Forwarding Limited (4) Harmeet Singh Ahuja

Heard at: Watford, in person **On**: 9 and 10 January 2023

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Ms S Chan, of counsel
For the Respondent: Ms S McKie, KC

RESERVED JUDGMENT

1. The claimant's claim for a remedy for the breaches of the Equality Act 2010 for which she has received a judgment on liability which was first given to the parties on 27 November 2020 and then sent in final form on 12 April 2021 (excluding the claims of victimisation, which were overturned on appeal to the Employment Appeal Tribunal by His Honour Judge Shanks in the judgment which was handed down on 25 February 2022, [2022] EAT 32, and which were withdrawn in writing by Mr Lawrence Davies, the solicitor who was at that time acting on the claimant's behalf, in an email sent on 19 July 2022) is struck out.

2. The claimant's claim of victimisation, having been withdrawn without having been compromised, is dismissed on its withdrawal.

REASONS

Introduction; the liability judgment and its partial reversal on appeal

1 The claims made in these proceedings were the subject of a judgment on liability in the claimant's favour. The tribunal which determined the liability issues relating to the claims was presided over by Employment Judge ("EJ") Smail, who sat with Mr P Hough and Mr C Surrey ("the original tribunal"). That tribunal's judgment with reasons was first sent to the parties on 27 November 2020. There was at that time a dispute over whether there should be a restricted reporting order in place. By 12 April 2021 the question whether there should be such an order in place had been determined and there was no such order in place. The judgment and reasons for it were then sent to the parties in unredacted form on 12 April 2021 and subsequently placed in such form on His Majesty's Courts and Tribunals Service's website. I refer below to that judgment and those reasons as "the liability judgment".

2 On 3 December 2020, the respondents appealed that judgment to the Employment Appeal Tribunal ("EAT"). At page 304 of the bundle which was before me for the hearing of 9 and 10 January 2023 (any reference below to a page is to a page of that bundle), there was a copy of an email from the respondents' then solicitor to the claimant's then solicitor, enclosing a copy of the documents "lodged with the EAT this afternoon in relation to ... the substantive judgment". The question of what remedy the claimant should receive was then left to be determined only after the outcome of the appeal was known. The claimant's schedule of loss was dated 5 November 2019 and claimed a total of £673,055.65. That figure was based on the proposition that the claimant would suffer future loss through having to return to live in India and would, if she were able to work, earn very much less than in the United Kingdom, where her basic salary had been £30,000 per year. It was her case that her mental health had been impaired by reason of the unlawful conduct of the respondents.

3 The liability judgment was in part overturned on appeal by His Honour Judge ("HHJ") Shanks sitting in the EAT in a judgment which was handed down on 25 February 2022. The part of the liability judgment which was overturned was a finding that the claimant had been victimised within the meaning of section 27 of the Equality Act 2010 ("EqA 2010"). That finding was made against the second and fourth respondents. HHJ Shanks found that the question whether the claimant had been so victimised had been determined erroneously and that issue was remitted by HHJ Shanks to be re-determined by the original tribunal.

The factual background to the hearing of 9 and 10 January 2023

Preliminary hearing of 24 April 2020

4 On 24 April 2020, there was a preliminary hearing by telephone. It was the second preliminary hearing in the case. It was conducted by me. The parties had agreed a list of issues and after careful consideration of it, I accepted that it was apt and said so. I recorded that fact in the first part of the written record of the hearing which was sent to the parties on 28 April 2020. One of the orders which I made at the hearing, as recorded at the end of that record, was this:

> "**Disclosure and inspection**
>
> 5 It is ordered that the parties will give simultaneous disclosure and inspection of any documents relevant to the issues identified as stated above by the provision of a list of documents and copies of the documents on the list, to arrive on or before 4.00 pm on Friday 12 June 2020. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they (1) assist the party who produces them or any other party, or (2) appear to be neutral.
>
> 6 The documents which the claimant will need to disclose will include copies of any relevant medical records which she has not so far disclosed.
>
> 7 The parties shall comply with the date for disclosure given above, but if despite their best endeavours, documents to come to light (or are created) after that date, then those documents must be disclosed as soon as practicable in accordance with the duty of continuing disclosure."

The claimant's covert recording of 5 October 2018

5 One of the parts of the evidence on which the claimant relied in support of her claim was a recording which she had made of a telephone conversation which she had had with the second respondent on 5 October 2018. That recording was made without the knowledge or consent of the second respondent. The conversation took place in the Punjabi language. The claimant's first language is Punjabi. One of the issues which arose at the hearing which I conducted on 24 April 2020 was whether the translation on which the claimant was proposing to rely was accurate. The translation on which the claimant at that time was relying was disputed, and I made orders relating to what was intended to be an impartial interpretation of the recorded conversation on which the claimant relied. The recording was at that time in the possession of the respondents. Two of the things which it was asserted by the claimant had been said by the second respondent were that (1) she was a prostitute and (2) he would kill her. In paragraph 5.35 of the liability judgment, the original tribunal found specifically that those things were not said by the second respondent:

> "We do not find that Lord Ranger threatened to kill the Claimant. ... He did not call her a prostitute."

6 The allegation that those things were said was based on the fact that they were included in a translation of the recording of the conversation of 5 October 2018 which was made by a company called Atlas Translations Limited ("Atlas"). I was told on 9 and 10 January 2023 by Ms McKie that she had put it to the claimant during cross-examination in the liability hearing that Atlas had been persuaded by the claimant or her then solicitors to include those things in the translation. It was not disputed by the claimant on 9 and 10 January 2023 that she had been cross-examined in that way. The translation provided by the impartial translator who was identified as a result of the orders which I had made on 24 April 2020 did not include the statements that the claimant was a prostitute and that Lord Ranger, the second respondent, would kill her.

The liability hearing

7 The hearing which led to the liability judgment took place on 7-11 and 14-18 September 2020. That hearing ("the liability hearing") was in person at the Watford Employment Tribunals hearing centre. During the claimant's cross-examination in that hearing, she referred to a notebook which she had, she said, kept during the period to which the claim related. During the liability hearing, in the circumstances recorded by the original tribunal in the liability judgment which I set out in paragraph 10 below, the claimant gave the tribunal that which she said was the notebook with all of its material pages, and that which she gave to the tribunal was copied and put in the hearing bundle. The claimant also said in cross-examination in the liability hearing for the first time that she recorded the conversation of 5 October 2018 with the second respondent to which I refer in the preceding paragraph above on a mobile telephone other than her usual, or main, mobile telephone.

8 It was the claimant's evidence at all material times that she had started to record that conversation some minutes after it had started. The original tribunal recorded that evidence in paragraph 4.35 of the liability judgment, which started with this opening section.

> "We have listened to the tone of this conversation on several occasions, reading at the same time the jointly instructed translator's translation. The Claimant started to record her conversation with Lord Ranger some minutes into the conversation. She recorded it on a second mobile phone, we understand. No point has been taken about admissibility. The Claimant was speaking in a very fast and loud fashion. Lord Ranger is plainly angered by what she is saying. They speak over one another. Bits of the translation were put to Lord Ranger. Where he disagreed with the translation, he gave his version."

9 At no stage before the liability hearing did the respondents seek to inspect the mobile telephone on which the claimant had made the recording of the conversation of 5 October 2018 on which she relied, in order to see whether or not she had in fact recorded the whole of the conversation and had deliberately not disclosed the first part of it.

10 It was, however, put to the claimant during her cross-examination in the liability hearing that the notebook the existence of which she first revealed in cross-examination was at least in part a fabrication and that she had deliberately removed relevant pages from it. The respondent did not, however, seek an adjournment to permit it to seek expert evidence in relation to those possibilities. The original tribunal referred to the notebook in the liability judgment in paragraphs 4.61 to 4.68. The start of that passage was in the following terms:

> "The personal notebook
>
> 4.61 On the first day of her evidence the Claimant was asked whether she kept a diary. No diary had been disclosed. The Claimant responded that she did keep personal notes. That was a matter of surprise to all in the Tribunal because nothing had been disclosed. The Claimant was resistant to the idea that she should produce it because as far as she was concerned it was personal to her and not meant for public consumption. The Tribunal finds as a fact that this was a genuine position on her part. She had no intention of producing what was in the notebook to anyone. Nonetheless, we ordered its production. She asked whether she could edit the amount disclosed by taking pages out. We made it clear that this was not possible and on day 2 of her evidence she produced the notebook, which is a 200 page Pukka Jotter Pad. Not all 200 pages remain but there were a number of pages written in Punjabi in different coloured inks suggesting they were written at different times containing material relevant to the allegations the Claimant makes.
>
> 4.62 As far as we can tell, the entries were not in chronological order. Some of the entries were irrelevant being shopping lists and the like but otherwise there was relevant material in it. We do not know precisely when the entries were made. It is not a diary, it is a notebook with observations made in it, but we are clear on the balance of probability that this document was not manipulated by the Claimant for the purposes of these Tribunal proceedings. It amounts to a genuine notebook in which she has recorded her thoughts. To that extent there is some evidential value in what she has said. Some of the entries are addressed to the Claimant's mother, not perhaps with the intention her mother reading them but in terms of the mode of dialogue adopted by the Claimant. Some passages are consistent with the Claimant's

> evidence that she considered suicide. The entries are frequently poetic in quality."

11 During the liability hearing, the respondents were able to inspect the notebook, but it was given back to the claimant by the end of the hearing.

The respondents' first request for the inspection of the mobile telephone on which the claimant recorded the conversation of 5 October 2018 and for the re-inspection of the notebook

12 As I say above, the liability judgment was promulgated in unredacted form on 12 April 2021. The respondents' then solicitors wrote by email at 3.45pm on 21 May 2021 to the claimant's then solicitor, Mr Lawrence Davies, in the following terms (the letter was at pages 110-111):

> "We write in relation to the above-named matter. We note that you have not responded to our letter dated 12 May 2021 in relation to the discrepancies and inconsistencies with the translation of the phone call which you provided and request a response as a matter of urgency.
>
> In addition to the matters set out in our letter dated 12 May 2021, we request that your client discloses and/or makes available for inspection the following:
>
> **1. Telephone records for all mobile phones between July 2018 and October 2018:**
>
> Ahead of the hearing in relation to the First Claim, we requested that your client disclose her telephone records for the period from July 2018 to October 2018. These records should have been disclosed by your client in accordance with her general duty of disclosure in any event. The phone records for one phone (07477554851) were provided for September and October 2018 however, despite your assurances that the remainder of the records would be provided, they were not disclosed by your client. It also came to light for the first time during the hearing of the First Claim that your client has a second mobile phone which had not been previously disclosed.
>
> The telephone records are highly relevant to the Second Claim in which our clients are contending that your client acted in bad faith. We also consider that the telephone records may be relevant to the Appeal and we consider that this evidence would meet the test set out at paragraph 9.3 of the Employment Appeals Tribunal Practice Direction.
>
> We therefore require your client to disclose her telephone records (for all her mobile phones) for the period 1 July 2018 to 31 October 2018. In the event that any such records are not provided by the network providers, we

require written confirmation from them as to the exact reason why such records have not been provided.

2. Your client's second phone:

As stated above, during cross-examination of your client during the hearing of the First Claim, it transpired that your client had a second mobile phone which was used to record the telephone conversation between your client and our client, Lord Ranger, on 5 October 2018. We request that this second phone be made available for inspection by our client so that a forensic examination can be carried out in relation to the original recording of the telephone conversation dated 5 October 2018. This is again relevant to the Second claim in relation to the contention that your client was acting in bad faith and may also be relevant to the Appeal and again, would meet the test set out in the Practice Direction.

3. Your client's handwritten notebook:

During the hearing of the First Claim, your client referred to a handwritten notebook. Again, this had not been previously disclosed in accordance with your client's obligations to disclose all relevant information and the first time we were made aware of this was at the Hearing itself.

We require a full copy of the notebook and also for the original to be made available for inspection by our client so that forensic examination can be carried out (the examination of the notebook was clearly not possible at the Hearing due to the limited time available). This evidence is relevant to the Second Claim as it goes to the issue of your client's bad faith and credibility. It is also relevant for the purposes of the remedy hearing in relation to the First Claim as the notebook contained entries relating to your client's alleged medical condition. Again, we contend that it may also be relevant for the Appeal and again, would meet the test set out in the Practice Direction.

We request that the evidence requested above is provided/made available for inspection by no later than 27 May 2021. Should your client not be willing to comply on a voluntary basis, we are instructed to make an application to the Employment Tribunal and the Employment Appeals Tribunal for an Order for specific disclosure alongside a wasted costs application (for the reasons set out in our letter dated 12 May 2021)."

13 The reference in that letter to a second claim was made because the claimant had made a further claim to the tribunal. She subsequently made a third claim to the tribunal. There was a preliminary hearing in relation to those two new claims on 16 November 2021. It was conducted by EJ Wyeth. His record of that hearing

(which was sent to the parties on 13 December 2021; I return to that hearing and EJ Wyeth's record of it below) included this paragraph:

> "It was apparent from the draft lists of issues prepared by each side that the claimant is seeking within these two claims to pursue the following complaints: 1) victimisation (contrary to s27); 2) harassment related to sex; and (in relation to claim 3302600/2021 only); unfair dismissal."

14 Mr Davies replied to the respondents' solicitors' emailed letter of 21 May 2021 which I have set out in paragraph 12 above 32 minutes after receiving that letter. The email was at page 112 and was so far as material in these terms:

> "We assume that your client has instructed you to go on a costs fishing expedition. We do not intend to engage with you on the same at this time. In our view, it is simply part of your client's attempt to rack up our client's costs before the remedy hearing, and part of his SLAPP tactics. As you will soon discover, given your client's continued unreasonable conduct, we are bringing the first UK case for SLAPP damages at the ET as a result.
>
> In any event, you appear to be asking us for information or documents which you should have sought orders for at or before the trial is [sic] they were matters of concern for you at the time. Indeed, if they were important to your client you will need to explain to them your potential liability in professional negligence in not seeking an order for the same at the relevant time. You cannot re-litigate the matter post-Decision.
>
> ...
>
> To deal with your client's unreasonable conduct a third ET claim has been issued and further ET claims will be issued each and every time she is further harassed or victimised by your client. I would prefer to do so as a job lot but there is the risk that there is no continuing act post-employment (although the case law is unclear on that), so each will have to be issued within 3 months of the act concerned. This no doubt will be served on your client in due course.
>
> If it assists, we are focusing on defeating the baseless appeals and then focusing on the remedy hearing. We are not interested in corresponding on matters your client is raising in what appears to be a malicious, wholly out of time, baseless fishing expedition for disclosure. No disrespect (or indeed agreement with your client's vexatious points) should be inferred from our radio silence before the EAT appeal on all matters save for those that genuinely relate to the appeal. In that regard, we are due to update the EAT on our Counsel's latest dates to avoid on Monday and will copy you in on that communication.

> Once your client has lost their appeals, we would hope that you would agree to the ET remedy hearing being expedited, whether or not your client then seeks PTA to the Court of Appeal, as regrettably seems woefully likely."

15 In fact, the claimant made only the two further employment tribunal claims to which Mr Davies referred in that email, that is to say she made no more such claims after that email was sent. During 2022, both of those further claims were withdrawn and dismissed on their withdrawal.

The application for inspection of the mobile telephone and reinspection of the notebook

16 On 16 June 2021 the respondents applied (in the letter at pages 114-117) to the employment tribunal for an order for inspection of the claimant's second mobile telephone and the notebook which was disclosed only during the liability hearing. In effect, that was an application for an order requiring the claimant to permit the respondents to inspect the telephone and again to inspect the notebook. The claimant gave evidence to me on 9 January 2023 via an interpreter and in cross-examination she accepted that at the latest by June 2021 she was aware that the respondents were seeking to inspect (using that term as it is used in Part 31 of the Civil Procedure Rules 1998) the mobile telephone on which she had (she said) recorded the conversation of 5 October 2018 in paragraphs 7-9 above and again to inspect the notebook which she had disclosed only during cross-examination in the liability hearing.

The preliminary hearing of 16 November 2021 conducted by EJ Wyeth

17 The hearing before EJ Wyeth of 16 November 2021 was conducted by telephone. Mr Davies appeared at it for the claimant. EJ Wyeth at that hearing (1) consolidated the two further claims to which I refer in paragraphs 13 and 15 above, and (2) listed (a) a full merits hearing to take place over six days starting on 31 October 2022 to determine those two further claims and (b) an open preliminary hearing to take place over 24 and 25 February 2022 at Watford Employment Tribunals. The things to be considered at that preliminary hearing were these (which I took from the document recording that hearing which was not in the bundle for the hearing of 9 and 10 January 2023, but which was in the tribunal's file for the case to which this document relates):

> "3.1 Whether the tribunal has jurisdiction to hear any of the complaints either because they are said to be 1) not closely connected to the claimant's employment relationship; 2) protected by judicial immunity; and/or out of time; and/or
> 3.2 Whether any claims should be struck out under Rule 37 of the Employment Tribunals Rules of Procedure 2013; and/or

3.3 Whether a deposit should be ordered to be paid by the claimant in accordance with Rule 39 of the 2013 Rules on the basis that any of the claims have little reasonable prospect of success;
3.4 Further case management matters which then arise."

18 EJ Wyeth's record of the hearing of 16 November 2021 contained the following material passage.

> "13. Notwithstanding the listing of the OPH in February 2022, Ms McKie QC on behalf of the respondents sought today to pursue an application that was said to have first been made in June this year relating to the inspection of a notebook that was apparently produced by the claimant on the third day of the trial chaired by EJ Smail (claim number 3334669/2018) at the tribunal's request following her reference to it in cross examination the day before. It was agreed that this notebook was produced for inspection at the tribunal in September 2020 and photocopies of its pages were supplied by the claimant's legal team to the respondents during the trial. I am told that the notebook contains entries that may relate to the claimant's mental health so as to be relevant to any remedy due in relation to her initial claim determined last year. It is also suggested that this may be relevant to any bad faith argument being asserted in defence of the complaints of victimisation in the existing two further claims currently before me.
>
> 14. I enquired as to why the respondent was seeking to have the application dealt with today rather than deferring it to the OPH when the tribunal will have had a proper opportunity to digest the relevant material. In response I was told that the respondents were concerned about the impact of the passage of time. I struggle to understand why the passage of time has only now become a concern given that the existence of the book has been known about since September 2020 and yet, I am told, the first application to further inspect it was not made until June 2021. I also cannot disguise my unease at a request to order further production of an item for forensic inspection when that item was produced at the previous trial and is being sought after the tribunal chaired by EJ Smail has made findings of fact about its content. I understand no such application was made to the tribunal at that time, although that in itself is not entirely surprising given the inevitable delay to the trial that would have been caused as a consequence.
>
> 15. I am told that the initial claim (more specifically remedy) has been stayed pending an appeal to the EAT that is due to be heard in full in mid-December this year. If the notebook is relevant to any award of remedy in respect of the initial claim, then it seems to me the

application is premature and should only be addressed once the stay is lifted or the outcome of the appeal against liability is known. I interpose here that I also have some concerns about whether this is an application that should be considered by any Employment Judge rather than one that is directed to be heard by EJ Smail who will be responsible for dealing with remedy if the stay is lifted.

16. Alternatively, if the notebook is relevant to the two subsequent claims that are before me today I am unsure why the matter should be dealt with outside of the usual process of disclosure that will inevitably be ordered to take place once the issues have been identified in final form in due course."

Email from Atlas to the first respondent of 6 January 2022

19 On 6 January 2022, Atlas wrote to the first respondent in the following terms (pages 128-129):

"On 16 January 2019 we were contacted by email by our client to provide a quotation to transcribe in Punjabi and translate into English a recording of four minutes for an employment tribunal

We emailed a quote on the same day and received a link to an audio file on the 24 January 2019.

We were given the go ahead to proceed on the 28 January 2019.

We drafted a copy of the transcription and the translation, and this was sent at the end of January 2019.

Queries were raised by the client and these were answered and a revised version was sent in February 2019.

This work was completed by a professional transcriber and translator (PK/MG) at a company who are ISO certified and members of the ATA.

We were then contacted again by our client in June 2019 to consider some amendments.

As our original transcriber/translator was unavailable, we asked a second transcriber/translator to consider these amendments.

This translator (PS) has worked for us for 10 years on over 50 projects. Qualifications include: Diploma in Public Service Interpreting (Local Government-1995) Diploma in Public Service Interpreting (English Law-2010) Diploma in Translation - 2003 Membership of Professional Bodies

National Register of Public Service Interpreters (NRPSI) (1997) Member of the Chartered Institute of Linguists (MCIOL) Association of Police and court Interpreters (APCI) Experience Interpreting: 18 years' experience of interpreting for the police, CPS, the courts, solicitors, hospitals, councils, DWP and language agencies. Translation: 18 years' experience of translating legal, medical and a variety of public sector documents.

We then provided a revised copy to our client."

The hearing of 24 February 2022

20 The barrister who represented the claimant at the liability hearing, Ms Aly, also represented the claimant at the preliminary hearing of 24 February 2022. Ms Aly put before the tribunal a written response to the applications which the respondents were pressing at that hearing. That response was sent to me by the respondents by email during the hearing day of 9 January 2023. It contained this material passage:

"**(4) Application for advance disclosure of Claimant's notebook & phone.**

17. It is averred that the Claimant's notebook and phone were only a relevant piece of evidence in relation to her first claim. This is a matter that has already been adjudicated, and is currently awaiting the outcome of appeal with respect to the Second and Fourth Respondents. They are of no evidential value whatsoever in the present claims. The Claimant relies on submissions made at paragraph 13 of these submissions in relation to the Respondents' repeated attempted arguments in relation to bad faith which are ill advised and misconceived. [Paragraph 13 of those submissions was in these terms: "The Respondents raised the arguments in relation to bad faith in relation to the first claim at Tribunal briefly, and these were rejected in their entirety. The appeal in relation to Mr. Sharma has been rejected in its entirety. It is averred that the Claimant cannot be said to have acted in bad faith where there are proven allegations of sexual harassment against Mr. Sharma, acting in the course of his employment with the First Respondent. It is averred that continuing to raise such arguments and reflections at this stage is completely misconceived, given the tribunal decision and subsequent appeals."]

18. If, which is denied, the notebook is of any relevance whatsoever in relation to the current claims, it is averred that these should be disclosed by way of ordinary disclosure, and an application for specific disclosure can be made following this if the Respondents still wish to pursue it. There is no value whatsoever in early disclosure of the same

and it amounts to nothing more than a fishing expedition for the Respondent to bolster their appeal in relation to the first claim.

19. The Respondents already made an application in relation to inspection of the notebook in relation to the First hearing. In response to the application, the notebook was given to the Respondents overnight to inspect. No application for a forensic expert was made at the time.

20. It is averred that a forensic analysis of the notebook at this stage would be of very limited, if any, evidential value. It is known that the notebook has already been handled by both Counsel, the Tribunal panel in the first claim, the solicitors for both the Claimant and Respondents and an unknown number of Respondent witnesses when the notebook was in the Respondent's possession.

21. The Respondents made no application for inspection of the phone in relation to the first claim, and none was therefore granted in relation to it. The Claimant repeats her arguments in relation to relevance of such disclosure at this stage. It is averred that the Respondents have made no compelling arguments for advance disclosure of the same."

21 The claimant accepted in cross-examination before me on 9 January 2023 that

21.1 she was present at the hearing of 24 February 2022, which was in person,

21.2 she saw the document containing that passage on that day, and

21.3 there was at the hearing a discussion between (1) Ms McKie (2) the judge who conducted the hearing and (3) Ms Aly about the applications to which that passage related.

22 The claimant also acknowledged to me on 9 January 2023 that she was able to understand what that discussion was about, because she (the claimant) had sufficient understanding of spoken English. She described her use of the English language as "basic", but the respondents referred me (without objection by Ms Chan on 9 and 10 January 2023) to an online recording of an interview which the claimant had with the television news programme Channel 4 News on 12 April 2021, and the claimant was plainly able to express herself reasonably clearly in the English language, and appeared to have a good understanding of that which was said to her by the interviewer in that language. However, in cross-examination before me the claimant denied knowing from paragraphs 18 and 21 of her counsel's skeleton argument (which I have set out in paragraph 20 above) that it was being said on her behalf that the telephone and notebook might subsequently be made available to be inspected.

23 The hearing of 24 February 2022 was conducted by EJ Tobin. He did not determine the application for a further inspection of the notebook and inspection of the mobile telephone. That was not recorded in any document which was before me, but it was clear from a document which was before me which, however, was inaccurate in the respects which I describe in the following paragraph below. That document was sent to the parties by email on 20 October 2022. The document was at pages 136-140. It was preceded by an email of 19 October 2022 from the respondents' solicitor of which there was a copy at pages 141-142. That email contained this passage:

> "[T]he Tribunal will be aware that the Respondents have made numerous applications for disclosure against the Claimant which largely focus on the issue of the Claimant's alleged bad faith and general lack of credibility. The Respondents strongly suspect that the Claimant has withdrawn her claims in an attempt to avoid having to provide evidence which would further damage her credibility."

The hearing of 9 August 2022

24 The document at pages 136-140 indicated but did not state in terms what had happened at the hearing of 24 February 2022. The document was a record of a telephone hearing which took place on 9 August 2022. That hearing was conducted by EJ Tobin. The document at pages 136-140 wrongly gave the date of the hearing as 8 August 2022 and it wrongly recorded that Mr Davies was present at that hearing.

25 In fact, the claimant did not attend that hearing either. It was attended on behalf of the respondents by Ms McKie KC.

Mr Davies' withdrawal as the claimant's solicitor

26 On 13 August 2022, Mr Davies informed the respondents' solicitors and the tribunal by email that he was no longer instructed to act for the claimant. The claimant then instructed new solicitors.

The listing of a further hearing to take place on 31 October 2022

27 In the document at pages 136-140 it was ordered that "The hearing of 31 October 2022 to 7 November 2022 of [sic] is replaced with a Preliminary hearing (Closed) on Monday 31 October 2022 and Tuesday 1 November 2022." Among other things, in paragraph 7 of the case management summary part of the document (at page 137), EJ Tobin said this:

> "The respondent still wants to pursue the disclosure applications. The respondent argues that these issues are relevant to remedy, especially as these enquiries may help clarify some ambiguity in the original decision and

> the EAT Judgment. The compensation sought is large and I am convinced that the respondent's application may be relevant and the substantive information is not otiose. I am persuaded by Ms McKay [sic] that there remains a credible argument as to why the claimant should allow inspection of the second mobile home [sic] and her notebook, in particular, and that this matter should be fully aired before and [sic] order is made or refused. If the order is made both parties accept the need for over [sic] a joint expert (or individual experts, if not agreed which is likely given the history of this claim) in respect of the authenticity of the notebooks [sic]."

The date when the claimant first saw that paragraph

28 The document at pages 136-140 was sent to the claimant's then solicitors (who had replaced Mr Davies). In cross-examination before me on 9 January 2023 the claimant accepted that she had received the document before 30 October 2022. In re-examination she said that she received it from the then-instructed solicitors on 25 or 27 October 2022.

The claimant's application for the postponement of the hearing of 31 October 2022

29 There was in the tribunal's file an email from the claimant of 28 October 2022, in which she had applied for the postponement of the hearing of 31 October 2022. That application had been opposed by the respondent for reasons stated in an email of the same date (i.e. 28 October 2022) from the respondents' solicitor. The claimant's reasons for applying for the postponement of the hearing of 31 October 2022 were these:

> "Unfortunately, my legal representative are no longer acting for me and I am in the process of looking for a new representative.
>
> In the circumstances, I would be grateful if the matter could be adjourned until the next open date is available."

30 The respondent's reasons for opposing that application were, principally, these:

> "1. This matter was listed for a PH on 9 August 2022. The Claimant's solicitor at the time (Lawrence Davies) emailed the ET at 9.44am very shortly before the PH was due to start (at 10.00am),stating that his wife was self isolating and his son was ill, and Mr Davies could not therefore attend the hearing. As a result of this, Employment Judge Tobin was not able to deal with all matters he intended to at that hearing;

2. Shortly thereafter (on 13 August 2022), Mr Davies informed the ET and ourselves that he was no longer instructed by the Claimant in this matter;

3. On 28 September 2022, we were informed that Mr Jeff Kong of Hunter Lawyers had now been instructed to represent the Claimant. However, for reasons which are not clear, Mr Kong informed us on Tuesday this week [i.e. 25 October 2022] that the Claimant had 'terminated' their retainer.

4. As such, it is clear that the Claimant did have every opportunity to have representation at the hearing on Monday however she has chosen not to avail herself of that representation. The Claimant has now had two different law firms acting for her and we submit on behalf of the Respondents, that this has now reached the stage where the matter must proceed rather than a further delay being incurred to allow the Claimant to instruct yet another firm of lawyers;

5. These proceedings have been ongoing now for almost 4 years. We submit that it is therefore critical that the matter goes ahead on Monday in order to make progress and case manage these proceedings towards some finality;

6. This particular hearing has been in the list for almost 12 months. If it is postponed, it is likely to be delayed again for a significant period. It would be a waste of the Tribunal's resources and there will [be] significant costs incurred by Respondents as a result of the hearing being postponed at this very late stage;

7. The Respondents are suffering ongoing reputational damage as a result of the victimisation findings in the original Judgment, claims which have now been withdrawn by the Claimant, and this is a further reason why, we submit, the matter needs to proceed on Monday to deal with directions on this point;

8. The Respondents submit that the Claimant should be more than capable of dealing with and addressing the issues which are to be determined on Monday. The applications for disclosure have been ongoing for over 15 months and she is, in fact, the best person to address these as she has the direct knowledge of the factual background. For example, she is able to deal directly with the position regarding the second mobile telephone; whether she retains her notebook; whether she has any good reason to not allow inspection of them. She is also best placed to deal with why the Atlas translations changed and under whose instruction".

31 The claimant replied on the same day, 28 October 2022, at 16:12:

> "The overriding principle and objective to uphold justice.
>
> I have suffered mentally a lot in last 4 years and fighting this case by my own. Due to lack of funds and time I couldn't find the new legal team and need few days to find a new representative.
>
> I have parted ways with my solicitors because they were not coming across professionally and not having the best interest at heart. It is not fair to expect me to find a solicitor with only a few days left to help me with a matter that is 4 years in length.
>
> I believe that I can find a solicitor in 7 days and if you can give me a new hearing date by end of November that will give a new solicitor the best chance to familiarize themselves with the case and therefore uphold justice by protecting and advancing my interest.
>
> I humbly request the Judge to consider my position by putting himself in my shoes as these circumstances are outside of my control and if for the sake of one month no adjournment can be given this will be a travesty of justice and Goliath will have beaten David."

The claimant's witness statement of 30 October 2022

32 At 18:59 on Sunday 30 October 2022, the claimant sent a witness statement to the respondent and the tribunal. So far as material, it was in these terms:

> "I Ramandeep Kaur (Claimant) make this statement in support of my claim to the employment tribunal.
>
> As you may be aware I kept a notebook as a journal as a therapeutic outpour of my feelings of the harassment and abuse I suffered at the hands of senior executives at Sun Mark and subsequently at the hands of Mr Ranger.
>
> It proved a great deal of help for me, as a practical tool as well as psychologically and emotionally to keep a track of what I had to go through.
>
> However, I was not made aware that I needed to retain the note book along with the second mobile phone. I was not made aware of the importance or implications of retaining both items, especially after winning case at tribunal in 2020.

Therefore, I was surprised to be told by the respondents to produce these two items after such a long time and why they didn't asked for it during and after the trial.

In relation to the journal, back in 2020 while it had been enormously helpful, it was also a daily reminder of what I had had to go through. In fact, events that had at one point led me to contemplate suicide. At the time my fiancé, Mr Raivinder Singh (we are now married and are expecting our first child) was deeply concerned about my mental and physical health.

But I had hidden the journal away because it contained information that was at once deeply sensitive and troubling. One day my husband happened to find it and read the contents of the journal and became so upset that he burnt it.

He was determined to help me move forward with my life and the journal was a huge impediment to that.

However, the court, my former legal representatives as well as the respondents have scanned copies of the notebook.

With regards the second mobile phone, it was a very old iPhone model which I also discarded because it contained intimate pictures and memories about me and my husband (boyfriend/fiancé at the time) because in our religion and culture we are not allowed to have physical relationships before marriage."

What happened at the hearing of 31 October 2022

33 The hearing of 31 October 2022 was not adjourned. I conducted it. As I recorded in my record of that hearing, of which there was a copy at pages 206-218 (that record was signed by me on 4 November 2022 and was sent to the parties by email on 7 November 2022), during the hearing the claimant withdrew her application for the postponement of the hearing. During the hearing, after I had said to the claimant that she did not need to answer my questions, but that it would be helpful to hear more about the circumstances in which she had (or her husband had) destroyed the mobile telephone and the notebook, she said these things, as recorded by me in paragraph 12 of my record of the hearing (at pages 211-212).

33.1 When she had "discarded" the "very old iPhone model", she had broken it up and thrown it into the river at Hayes. It had had a SIM card provided by Lyca Mobile in it, and she had left that SIM card in the telephone when she had thrown it in the river.

33.2 That SIM card was not registered to anyone, so that Lyca Mobile would not have any record of any mobile telephone number in her name.

33.3 She could not remember the (telephone) number of that Lyca Mobile SIM card.

33.4 She had used the mobile telephone with the Lyca Mobile SIM card in it only up to the point when she started to be absent from work on account of sickness, which was in October 2018, and she had used it only (or at least mainly) to speak to her mother in India. After then, she used the "calling over wifi" function on her (other, main) mobile telephone to speak to her mother in India.

33.5 Her husband had destroyed the notebook in her presence in December 2020, after the original ET's judgment had been promulgated. He said to her that he wanted to destroy it and she said: "Okay".

34 The only material orders which I made during the hearing of 31 October 2022 (which I recorded in the record of the hearing at pages 216-217) in addition to adjourning the hearing to Monday 9 January 2023 and stating the matters to be considered at the adjourned hearing (with an interpreter of the Punjabi language present) were these:

> "**Response to this document**
>
> 2 If any party believes that there is any material error or omission in paragraphs 1-20 of the above case management summary, then that party should write to the tribunal within 14 days of receiving this document, stating in what way it is believed by the party that the summary is deficient or incomplete, and stating a proposed correction and/or addition. Any other party wishing to respond to that communication should do so within a further 7 days.
>
> **Claimant's further information**
>
> 3 The claimant must, **by 4.00pm on Monday 14 November 2022,** inform the respondents of the number of the Lyca Mobile SIM card referred to in paragraphs 18 and 19 above.
>
> **Claimant's further witness statement**
>
> 4 The claimant must, **by 4.00pm on Friday 9 December 2022**, state in a further witness statement

4.1 whether she is claiming legal professional privilege and/or litigation privilege in regard to the communications with Atlas referred to in paragraphs 2.3 and 20 above and, if so,

4.2 whether she is willing to waive that privilege."

35 The matters which (in paragraph 16 on page 214) I stated which were to be considered at the resumed hearing on 9 and 10 January 2023 were these:

35.1 'whether the claimant had acted scandalously, unreasonably or vexatiously within the meaning of rule 37(1)(b) of the 2013 Rules, and, in any event,' and

35.2 'whether (applying rule 37(1)(e) it was "no longer possible to have a fair hearing in respect of the claim ... (or the part to be struck out)".'

36 The claimant did not write to the tribunal taking issue with my record of what she had said at the hearing of 31 October 2022.

Claimant's email to Lyca Mobile of 9 November 2022

37 On 9 November 2022 the claimant wrote to Lyca Mobile by email (page 220):

> "Dear Lyca Mobile,
>
> My name is Ramandeep Kaur, DOB: 26th March 1985 address [and she gave her home address].
> I would like to request any data held and number by Lyca mobile about me against a phone number I don't remember but may have been registered under above details.
> This is for a legal battle I am fighting in the court against a member of the a House of Lords. Therefore it's crucial for me to get this information.
> I used to have a Lyca mobile number between 2018 and 2022 although I don't remember registering it with Lyca but just in case I did, it would be really helpful if you can share the details with me along with the data of calls during that period."

38 On 14 November 2022, the claimant signed a further witness statement. It was at page 221. It started in this way:

> "I, Ramandeep Kaur (Claimant) make this statement in support of my claim to the employment tribunal.
>
> I used a mobile phone sim card from a company called Lyca Mobile which is used mainly by migrants to make cheaper calls back home. It's a number that can be purchased over the counter for £0.99 or sometimes even for

free and can be topped by using a top up card widely available in high street shops including Tesco and Sainsbury's.

There is no requirement for the number to be registered under someone's name and can be used simply using a scratch card. I used this sim to call my mother in India between 2018 till September 2018. When I discarded my old phone, I discarded the sim with it.

I find it curious that the respondents want to have my mobile phone sim records in order to see whether I used the phone after I discarded my sim and phone both or not when it's a widely known fact that if someone loses their phone a duplicate sim card can be easily requested from the provider. However, I have not made any effort to do that as I didn't remember my sim card number.

I have in the last 2 weeks tried my level best to find out the number of that Lyca number by contacting my mother who has provided a sworn affidavit that she never kept a record of my Lyca sim, the only number she has written down is the 02 number I was using in the UK."

39 On 9 December 2022, the claimant signed a further statement. It was at pages 234-236. In paragraphs 4 and 5, on page 235, she said this:

> '4. Any suggestion by the Respondents that I or my former legal representative instructed Atlas to change the translation of the above recording is simply untrue. Atlas is an independent translation company and were provided with the original recording to translate. The Respondents disagreed with the translation of the recording that was produced by Atlas. As a result, the parties were ordered to instruct a joint translator by the Tribunal and Aplomb translations ("Aplomb") were instructed prior to the hearing of my claims to translate the recording. The Tribunal had the benefit of the translation from Aplomb at the hearing of my claims. A translator from Aplomb also gave witness evidence via video at the hearing of my claims regarding the translation.
>
> 5. It is wholly unreasonable and unfair of the Respondents to suggest that there were any attempts to have the Atlas translation changed so that it was less favourable to the Respondents when the Tribunal had the benefit of the Aplomb translation. Furthermore, no such suggestion was made by the Respondents at the hearing. I am therefore not prepared to waive privilege in relation to the communications between my former legal representative and Atlas."

40 In paragraphs 7-9 of that statement, the claimant said this:

"7. The Tribunal is in receipt of two separate witness statements dated 30 October 2022 and 14 November 2022 relating to the request for specific disclosure of a notebook and telephone. I have explained in those statements why I am no longer in possession of these original items. However, I would like to add that both the Tribunal and the Respondents have copies of the notebook. I was instructed to produce the original notebook by the Judge during the hearing of my claims. The Judge ordered that the entire notebook was translated and Aplomb produced a transcript of the entire notebook for all parties including the Tribunal.

8. The Respondents also appear to be suggesting that I produced only part of a recording during the original Tribunal hearing. Again, this is incorrect. The entire recording was produced for the hearing of my claims. It was some significant time after the conclusion of the hearing that the Respondents made any request to inspect the phone on which I had made the recording. I believe the Respondents are merely seeking a re-trial of the issues that have already been determined by the original Tribunal on liability. I have in no way concealed or destroyed evidence that was relevant to the proceedings. The Respondents had the opportunity to inspect my original notebook and the phone on which the recording was made at the original hearing but failed to do so.

9. Since all parties had copies of the note book and recording, I did not think I would need to keep the original notebook which contained very sensitive and traumatic material relating to the events that took place during my employment with the Respondent, nor did I think that I needed to keep the phone. In any event, I do not see how either the phone or original notebook will assist the Tribunal deal with the issue of remedies. The Respondents' strike out and/or costs application for failure to produce these items is simply unjust and unfair. The constant threat of costs and strike out is adding to the stress and mental illness that I am suffering."

41 On 4 January 2023, the claimant made a fourth witness statement in which she referred to what had happened to her second mobile telephone and the notebook. In paragraphs 5 and 6 of that statement, she said this:

"5. With regards to the original notebook and phone that the Respondents are seeking disclosure of, I disposed of these items in December 2020 following the conclusion of the liability hearing and oral judgment that was delivered in October 2020. I was engaged during this period and the case was putting pressure on my relationship (with my now husband) to such an extent that I had thought of taking my own life. The circumstances of the case were particularly difficult for my partner

to deal with as they involved harassment by another male. After succeeding with my claims in October 2020, I wanted to progress with my personal life and get married. The notebook was a constant reminder of the events and suffering that I had endured at the hands of the Respondents. My husband therefore destroyed the notebook (with my agreement) by burning it as he thought it would help me forget the difficult events that I had endured and that it would help us both move on with our lives.

6. I also discarded the phone in December 2020 as the phone itself was old and had a cracked screen. There were also intimate pictures on the phone of my now husband and I. I did not wish anyone to see those images prior to our marriage as in Indian culture, intimacy prior to marriage is forbidden and can result in being cast out from the community. The community is extremely close knit and I was worried that the images may have been discovered before I was married. I therefore discarded the phone by throwing it in the river whilst I was in Hayes."

The claimant's oral evidence under oath given on 9 January 2023

42 The claimant's home address was stated in the ET1 claim form for this case and it was the same in 2018 as it was in January 2023. During the hearing before me in January 2023, the claimant's oral evidence suggested that she had been living with her now husband for some years, including from 2018 onwards. My notes of her cross-examination (which, like all of my notes quoted below, I have tidied up for present purposes) included the following passage.

"Q: When did you get married?
A: September 2021.

Q: So why did you destroy your mobile phone in December 2020?
A: Because I wanted to get married to my fiancé.

Q: But if the only photographs on the phone were of you and your fiancé what was the problem?
A: As we were not married at that time.

Q: But if the only photos were of you and your fiancé what was the embarrassment?
A: In the Sikh religion it is not a good thing to have photographs and stuff with anyone; and love photographs before getting married is a huge thing.

Q: When did you get engaged?
A: 2014.

Q: So you retained intimate photos for 6 years?
A: Yes.

Q: And you were expecting to get married from 2014 onwards?
A: At that time I did not have indefinite leave to remain; it would take 10 years.

Q: At the last hearing you said that it was redundancy that prompted you to destroy the evidence; is that not the case now?
A: That happened after I destroyed the phone.

Q: You said it last time?
A: No. You have misunderstood."

43 In fact, my notes of the hearing of 31 October 2022 recorded this (and I drew this to the parties' attention during the hearing day on 9 January 2023):

"The claimant said that she discarded the phone after the hearing in 2020.

She said that she did so as she was distressed and suicidal. That was after she had received the judgment and she was made redundant.

She said that she did not know that the phone was material evidence.

She said that she was dismissed on 14 December 2020 for redundancy.

She said that she told her solicitor in May 2021 that she had destroyed the phone.

The claimant said that she did not understand fully what I was saying."

44 My notes of the cross-examination of the claimant on 9 January 2023 continued:

"Q: You accept that the date you give for destruction occurred before you were made redundant?
A: I would like to say I had said that I had destroyed the phone when there was a discussion around my redundancy as you asked me when I had destroyed the phone; and those were the dates I could remember.

Q: Who did you expect to be able to find these photographs?
A: The photos on the phone; if my fiancé had withdrawn from getting married or I had, he could have leaked those photos.

Q: The phone was password protected?
A: No.

Q: Did you use your thumb or finger to access it?
A: It was a very old phone; you could just press a button and open it.

Q: Did your then fiancé have access to the phone or not?
A: I never put the phone in front of him.

Q: Did he know of the existence of the phone?
A: Yes

Q: Was he the one who took the photos?
A: I do not want to answer this very private question.

Q: How would he have access to the phone?
A: As he could find it with any search of my stuff.

Q: But he had taken the pictures?
A: I do not want to answer this question as it is part of my private life.

Q: You used the possibility of him finding the photos as a justification for destroying the phone?
A: I have not come here to discuss the matter of the sexual affairs of me and my husband.

I said that only because of the phone's destruction.

Q: Why not destroy the pictures?
A: I chose to destroy the phone.

Q: Did your fiancé send these photos to himself?
A: I did not come here to discuss my private life.

Q: Did he sent them to his phone?
A: I was the only one who had access to the phone.

Q: You said earlier that he had access to it too.
A: We had a very small house.

He could search for anything in it.

Q: You say you destroyed it by smashing it to pieces?
A: The screen was already broken so I destroyed the rest.

Q: Did you drive to the river?
A: One second. I walked.

Q: How badly did you destroy the phone; was it in pieces?

A: I broke it and then threw it in the river.

Q: Why was it necessary to throw it in the river if you had already destroyed it?
A: I have been suggested by someone [I think that the claimant there was saying that it had been suggested to her during the hearing] that an iPhone can be backed up but I do not know what that means so I broke it down and threw it into the river. [It was indeed suggested during the hearing that the contents of an iPhone can easily be backed up to iCloud: I myself referred to that possibility during the claimant's evidence.]

Q: Did you ever give the phone to your solicitor?
A: No.

45 During the hearing of 9 and 10 January 2023, the claimant accepted that her husband had been present at the liability hearing which took place (as I record in paragraph 7 above) in September 2020. She said that he had stormed out during the cross-examination of her about the contents of that notebook, but it was put to her that he was present for about half of that part of her cross-examination, and she did not disagree with that proposition.

A discussion about the claimant's evidence about the destruction of the mobile telephone and the notebook

46 I have set out the claimant's first stated justification for destroying the notebook in paragraph 32 above. It was made on 30 October 2022 and was this:

> "I had hidden the journal away because it contained information that was at once deeply sensitive and troubling. One day my husband happened to find it and read the contents of the journal and became so upset that he burnt it.
>
> He was determined to help me move forward with my life and the journal was a huge impediment to that."

47 That justification did not bear scrutiny for the following reasons.

47.1 As I record in paragraphs 33.5 and 41 above, the claimant now says that her husband destroyed the notebook in December 2020.

47.2 The notebook had been disclosed by the claimant to the tribunal and the respondent only two months before then.

47.3 The claimant's husband had plainly been well aware of the notebook and its contents at the very least by September 2020.

47.4 The suggestion that the claimant had hidden the notebook away "because it contained information that was at once deeply sensitive and troubling" and that her husband had "One day ... happened to find it and read the contents of the journal and became so upset that he burnt it" appeared to be a fabrication given the factors to which I refer in the three preceding subparagraphs above.

47.5 Whether or not it was such a fabrication, if the claimant did indeed destroy the notebook at that time, then she did so either just before the respondents appealed the liability judgment and her solicitor was informed about that fact (those things having occurred on 3 December 2020: see paragraph 2 above) or just after that appeal had been filed.

47.6 It was highly unlikely that the claimant's solicitor had not told the claimant on or shortly after 3 December 2020 that the respondents had appealed the liability judgment.

47.7 In any event, whether or not the claimant was aware that the notebook was material evidence which the interests of justice required her to preserve fully until the case had been finally determined, destroying it would plainly be (and if it actually occurred, was) unreasonable conduct within the meaning of rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules").

47.8 In fact, the claimant's evidence about the manner in which the notebook was destroyed had the following inconsistencies in it.

47.8.1 Initially, as I record in paragraph 46 above, the responsibility for destroying the notebook was put at the door of the claimant's husband. However, as I record in paragraph 33.5 above, the claimant then told me only one day after making the statement from which I have set out an extract in paragraph 46 above, that she had been involved in the decision to destroy the notebook.

47.8.2 On 4 January 2023, as I record in paragraph 41 above, the claimant's stated justification for destroying the notebook was this:

> "After succeeding with my claims in October 2020, I wanted to progress with my personal life and get married. The notebook was a constant reminder of the events and suffering that I had endured at the hands of the Respondents. My husband therefore destroyed the notebook (with my agreement) by burning it as he thought it would help me forget the difficult events that I had endured and that it would help us both move on with our lives."

47.8.3 That too was inconsistent with the claimant's first description of the reason why her husband destroyed the notebook: see paragraph 46 above.

48 In any event, the claimant had either said nothing at all about the destruction of the notebook during the whole of the period from the time when she first knew that the respondents were seeking again to inspect the notebook, which was (see paragraph 16 above) at the latest June 2021, until 30 October 2022, or she had told her solicitor that she had destroyed it and he had then knowingly failed to inform the respondents and/or her counsel of that fact. The claimant then (as I record in paragraph 21 above) heard Ms Aly, her counsel, advance the arguments set out in paragraph 20 above at the hearing of 24 February 2022 and did not inform either Ms Aly or the tribunal (or anyone else, it appeared) that there was no point in anyone spending any further time on the question whether the notebook should be made available again, as it was no longer in existence.

49 As for the claimed destruction of the claimant's seconds mobile telephone, the claimant's first stated justification for that destruction (which I have set out in paragraph 32 above), made on 30 October 2022, was this:

> "With regards the second mobile phone, it was a very old iPhone model which I also discarded because it contained intimate pictures and memories about me and my husband (boyfriend/fiancé at the time) because in our religion and culture we are not allowed to have physical relationships before marriage."

50 Paragraph 6 of the claimant's witness statement of 4 January 2023, which I have set out in paragraph 41 above, was to a similar effect, but in addition it contained the assertion that the claimant discarded the mobile telephone because it was old and its screen was cracked, and that assertion was given as the primary reason for discarding the telephone.

51 In considering that explanation I took into account the following factors.

51.1 The photographs were necessarily taken by or with the knowledge of the claimant's now husband. The claimant's refusal to answer the question whether or not he had taken them (see paragraph 44 above) was based on the proposition that she did want to answer questions about her private life. However, the fact that she had the photographs on her mobile telephone (assuming that she was telling the truth in that regard) meant that that aspect of her private life was now, at her own volition, firmly in the public domain. Her refusal to answer that question was in my view evasive and objectively unjustified.

51.2 The claimant and her fiancé had by December 2020 (see paragraph 42 above) been engaged for at least six years.

51.3 They had (it appeared clear from the claimant's evidence: see paragraph 42 above) been living with each other at least from 2018 onwards. They were therefore living together openly without being married for several years before their marriage: they were married (see also paragraph 42 above) in September 2021.

51.4 The claimant's oral evidence was (see paragraph 42 above) that she had retained intimate photographs of herself and her fiancé for 6 years and then (see also that paragraph) destroyed them in December 2020 because she "wanted to get married to [her] fiancé".

52 The latter explanation was a nonsense: the photographs were in the possession of the claimant only, and even if they were taken without her fiancé knowing that they were being taken, they showed only what the fiancé already knew about the claimant, which was that she had had pre-marital sex with him.

53 Thus, her having the photographs was not going to deter him from marrying her.

54 It was possible that the nonsensical claimed justification set out in paragraph 51.4 above for destroying the mobile telephone was the cause of the assertion made for the first time in oral evidence given to me on 9 January 2023 (which I have recorded in paragraph 44 above) that the claimant had destroyed the telephone because "if my fiancé had withdrawn from getting married or I had, he could have leaked those photos". That, however, contradicted the claimed justification set out in paragraph 51.4 above.

55 In addition, the claimant at first said (see paragraphs 42 and 43 above) that she had destroyed the telephone after she was made redundant, and then said that it was before she was made redundant.

56 The claimant's evidence about her use of her second mobile telephone (namely that she had stopped using it after October 2018, as I record in paragraph 33.4 above) was contradicted by what she wrote to Lyca on 9 November 2022 as set out in paragraph 37 above, namely:

> "I used to have a Lyca mobile number between 2018 and 2022".

57 Similarly, if the claimant had in fact thrown the mobile telephone into the river at Hayes in December 2020 with the SIM card in it (as she said to me on 31 October 2022 as recorded in paragraph 33.1 above) then it was at the very least surprising that she said on 9 November 2022 in that email to Lyca that she had "a Lyca mobile number between 2018 and 2022".

58 On 9 December 2022, the claimant said (see paragraph 9 set out in paragraph 40 above) that "Since all parties had copies of the note book and recording, I did

not think I would need to keep the original notebook which contained very sensitive and traumatic material relating to the events that took place during my employment with the Respondent, nor did I think that I needed to keep the phone." That was the first time that the claimant gave any indication that she had given any thought to the possibility that the telephone might be material evidence which might need to be retained.

My factual findings relating to the claimant's notebook and mobile telephone

59 I concluded that the claimant did not destroy the notebook or the telephone in December 2020. In coming to that conclusion I took into account the factor to which I refer in paragraphs 74 and 75 below, but that factor was, as I say there, of only marginal relevance. The above inconsistencies in the claimant's evidence and its objective implausibility were in themselves a sufficient basis for concluding, as I did, that (1) whatever were the claimant's abilities in regard to understanding and speaking the English language, she understood fully what was being sought by the respondents by way of inspection from June 2021 onwards and that the respondents were pressing for such inspection, and (2) if she had destroyed those things in December 2020 then she would not have stood by and let the respondents press their applications for the inspection of those things and her counsel respond to those applications on the basis that those things were still available. I therefore concluded on the balance of probabilities (despite the gravity of the factual issue) that she did not say that they were bound to be fruitless because they were not bound to be. Those applications were not bound to be fruitless because (I concluded as a factual finding) the notebook and telephone were still in existence at least until October 2022.

60 If, however, that was not the case, then the claimant consciously permitted the respondents to press for the inspection of the mobile telephone and the notebook, and to spend much time and money in doing so, despite knowing that the applications were bound to be fruitless. That, if it had occurred, would have been unreasonable and vexatious conduct on the claimant's part.

61 However, I concluded that if the claimant had actually destroyed the notebook and the mobile telephone, then she did so only after receiving the record of EJ Tobin at pages 136-140 to which I refer in paragraphs 27 and 28 above, which was (see paragraph 28 above) at the latest on 27 October 2022. That, I concluded, was the first time that the claimant realised that there was a real chance that the tribunal might order the re-inspection of the notebook and the inspection of the mobile telephone. Therefore, I concluded, the claimant told a deliberate untruth either about the date of their destruction, or about the fact of their destruction. Thus, either the claimant destroyed the notebook and the mobile telephone in October 2022 in the knowledge that there was a real chance that their inspection might be ordered, or she lied about the fact of their destruction. Whichever of those two things she did, it was designed to prevent

an order for the inspection of the mobile telephone or the notebook being made or, if it was made, having any effect.

62 The fact that at the time of the telling of that deliberate untruth or that destruction, the claimant knew that the notebook and the telephone might be disclosed, suggested strongly that the claimant knew that if the respondents obtained the expert evidence about those things then the respondents would find something which (1) would justify an application to the original tribunal to reconsider its findings on liability and (2) would at the very least undermine the claimant's evidence about the effects on her of the acts of the respondents which the original tribunal had concluded had occurred and which had not been overturned on appeal.

The applicable case law

63 In paragraphs 4 and 5 of his judgment in *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, Sedley LJ said this.

> "4 Rule 18(7) in Schedule 1 to the Employment Tribunals (Constitution and Rules etc) Regulations 2004 provides:
>
> > 'Subject to para. (6) [which requires notice to be given], a chairman or tribunal may make a judgment or order –
> > ...
> > (c) striking out any claim ... on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant ... has been scandalous, unreasonable or vexatious.'
>
> 5 This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."

64 In *Emuemukoro v 1) Croma Vigilant (Scotland) Ltd* [2022] ICR 327, Choudhury P referred to that passage and, in paragraph 10, said this:

> "It is quite clear from that passage, and is not in dispute before me, that the two conditions for the exercise of the power are in the alternative, such that either condition being satisfied would trigger the exercise of the power to strike out. At paras 18-21 the Court of Appeal dealt with proportionality".

65 Choudhury P then set out paragraphs 18-21 of the judgment in *Blockbuster Entertainment Limited v James*. Those paragraphs were directed at the situation of that case, which was rather different from that which was in issue here. In *James* the case of the claimant was struck out for failures to comply with orders and attendance at the start of the 6-day trial with (as it was said in the headnote) "some 50 to 60 pages of documents which he wished to rely on but which had not been copied for use by the tribunal or served on the employers [and] one copy of his and his witnesses' signed statements which included amendments to the statements previously provided to the employers".

66 In *Arrow Nominees v Blackledge* [2001] BCC 591, a party who was petitioning the court for an order winding up a company under section 459 of the Companies Act 1985 on the basis that there had been unfair prejudice within the meaning of that section, deliberately forged some documents. In the headnote, at 591H, the situation was described very pithily thus:

> "On discovery [the party, Mr Nigel Tobias] disclosed certain documents which turned out to have been forged by him. On that ground the respondents to the petition applied to strike it out as an abuse of process."

67 In the High Court, Evans-Lombe J declined to strike out the claim. The report at [2000] CP Rep 59 was in the authorities bundle before me on 9 and 10 January 2023, and that contained in its headnote this further pithy description of what happened in the High Court:

> "The judge, dismissing the application, found that, while T had been fraudulent in respect of the forged evidence, a fair trial was still possible. At the trial of the action, further evidence was submitted as to T's fraudulent conduct and a renewed application was made to strike out the petition. The judge dismissed this second application on the basis that the petitioners had still made out a case for relief under the petition, and there was no substantial risk that a fair trial could not be held. The respondents appealed."

68 The Court of Appeal allowed an appeal against that refusal to strike out the petition. The appeal was heard by Roch, Ward and Chadwick LJJ. Reasoned judgments were given only by Ward and Chadwick LJJ. Roch LJ agreed with both of those judgments.

69 In paragraphs 24-29 of his judgment, at 630C-632C, Chadwick LJ described rather more fully the manner in which Mr Tobias had falsified documents. In paragraphs 54-56 of his judgment, at 640E-641D, Chadwick LJ said this.

> "54. ... I adopt, as a general principle, the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Limited* (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was 'hijacked' by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the

petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.

56. In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents – and in the interests of the administration of justice generally – to allow the trial to continue. If he had considered that question, then – as it seems to me – he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

70 The judgment of Ward LJ was to the same effect. However, what Ward LJ said in paragraphs 72-75 at [2001] BCC 591, at 645H-647C, added to that analysis of Chadwick LJ.

"72. When exercising any power under the [Civil Procedure Rules], the court must, by virtue of r. 1.2 , seek to give effect to the overriding objective. The overriding objective in its rightful place at the forefront of the rules is in these terms:

'1.1(1) These Rules are a new procedural code with the overriding objective of enabling the courts to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable–

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate–

(I) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issue;

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.'

It is not at all clear to me to what extent, if at all, the judge had the overriding objective in mind as setting out the parameters for the exercise of his discretion. He correctly saw at the beginning of his judgment that the source of his power to strike out lay in r. 3.4 but he did not trace back through the case management rules to r. 1.1. Even though this was a reserved judgment it may still be unfair to the judge to engage in too close a textual analysis of his judgment and infer from the omission of express reference to the overriding objective that he did not direct himself to it. Consequently I prefer to assume he had it in mind. Nevertheless, there is still every indication that he regarded the risk of a fair trial not being possible as the factor of crucial, even overriding, weight. It undoubtedly is a factor of very considerable weight. It may often be determinative. If the court is satisfied that the failure to disclose a document or the effect of a tampered document can no longer corrupt the course of the trial, then it would be a factor of much less and perhaps even little weight in considering a strike out. Where, in my judgment, Evans-Lombe J erred, was to treat the question of a fair trial as the only material factor. It was not: other matters have now to be put in the scales and weighed.

73. The attempted perversion of justice is the very antithesis of parties coming before the court on an equal footing. The matter has become hugely more expensive (to an extent we did not appreciate until we were told when application was made for a freezing order that the amount of the appellant's costs overall and on a solicitor and own client basis may be in the region of £1.5 million.) The judge commented at the beginning of his judgment that 'the hearing has run for twenty nine days greatly exceeding the parties' estimate.' The original estimate was three weeks and we were told another week to ten days would be required to conclude the matter even on the limited basis that the judge would still permit. The judge did not, however, treat cost and time as elements of the overriding objective. He did not appear to allot to the case an appropriate share of the court's resources while taking into account the need to allot resources to other cases. In this day and age they are elements of case management which must not only be seen to have been placed in the scales but also given due and proper weight when assessing how justice is to be done to the parties and to other litigants. The balance must be struck so that the case is dealt with in a way which is proportionate to the amount of money involved in the case, its importance and complexity and the financial position of the parties. Mr

Tobias stood to gain much had his fraud gone undetected. He was seeking on behalf of the minority shareholders to wrest control of the company from the majority and he persisted in that claim even to the point of his cross appeal. He bolstered his claim by what the judge found to be a 'campaign of forgery' and, more importantly, the judge was not satisfied with the explanation given for it. He found (para. 51):

> 'In his evidence Nigel sought to give the impression that his forgeries came about as a result of an impulsive moment of madness flowing from his disappointment that his case was not adequately supported by the documents. In my judgment, so far from that being the case, it is apparent that the process of forgery, which Nigel admitted to, was sophisticated and must have taken some time to complete including the special manufacture of headed note paper of the defunct Tobias family company. But for the slip up with relation to the telephone number shown on the headings it would, in all probability, not have been discovered.'

Any notion that this was a petitioner coming to the Court of Equity with clean hands is utterly dispelled by the devastating conclusion in para. 44:

> 'I am not satisfied that I have received from Nigel a truthful picture of the circumstances of the forgeries which he admits.'

74. This was, therefore, a flagrant and continuing affront to the court. Striking out is not a disproportionate remedy for such an abuse, even when the petitioners lose so much of the fruits of their labour.

75. Even if the judge were correct in his analysis that all effect of the 1994 agreement could be excised from the petition and a prima facie case could be made out of what remained, I am quite clear that, if the CPR [i.e. the Civil Procedure Rules] are to receive a correct start, then this court must make the clear statement that deception of this scale and magnitude will result in a party's forfeiting his right to continue to be heard."

71 The overriding objective in rule 2 of the 2013 Rules is in slightly different terms from those of rule 1.1 of the Civil Procedure Rules as they stood at the time of the determination of the *Arrow Nominees* case. Rule 2 is in these terms.

> "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."

72 Ms McKie in oral submissions suggested that it was open to me under rule 37 of the 2013 Rules to strike out the whole of the claim, thereby in effect revoking the liability judgment. As I said at the time, that was a novel proposition, but one which I was willing to consider carefully. Having done so, I concluded that rule 37 does not permit the striking out of a judgment which has already been given. In my judgment, the revocation of such a judgment could be done only on a reconsideration under rules 70-73 of the 2013 Rules.

73 When reviewing the law after the hearing had ended, I searched the White Book for references to the *Arrow Nominees* case, and for any cases in which it had been relied on in striking out a claim or a defence. I could find nothing of any significance in that regard. If nothing else, that showed that the outcome in *Arrow Nominees* was exceptional.

A discussion about the impact on the fairness of the proceedings of the claimant's conduct

74 One thing about which I have said relatively little so far in these reasons is the email from Atlas of 6 January 2022 which I have set out in paragraph 19 above. In paragraph 12(d) of Ms Chan's skeleton argument, she said this:

'Insofar as R may be suggesting that C or her advisers tried to alter the translations provided by Atlas in its instructions, this is completely denied and an irrelevant issue, for the reasons set out in paras 4-5 of C's 3rd statement dated 9.12.22 (235). Importantly, when a dispute arose over the translation produced by translation company Atlas, the ET instructed the parties to jointly instruct a translator which was duly done with "Aplomb" providing jointly agreed translations prior to the liability hearing. The Aplomb translator also gave witness evidence regarding the translation. The Atlas

> translations were therefore ultimately not used by the ET, so it is difficult to see what the Respondents seek to achieve by seeking the privileged instructions between C and Atlas.'

75 I could not accept that submission. The email of 6 January 2022 records in terms that (1) Atlas was asked by or on behalf of the claimant to consider amendments to the translation and (2) the original translation was revised in the light of the claimant's requests. The fact that the original translation included some highly damaging things which the independent translator concluded were not said, was relevant, if only by way of background. It was certainly not correct to say that it was untrue "that C or her advisers tried to alter the translations provided by Atlas in its instructions". The fact that the independent expert concluded that the statements asserted by the claimant to have been made by the second respondent that (1) the claimant was a prostitute and (2) he (the second respondent) would kill her were not made, did not in any way detract from, or diminish the importance of, the fact that those things were originally asserted to have been said, and that they were asserted on the basis of a translation which had been amended after requests had been made by or on behalf of the claimant. However, that conduct of the claimant was relevant here only if and to the extent that I could lawfully take it into account. In my view, that conduct was only relevant at this stage to the claimant's credibility. It was in my view of only marginal relevance.

76 In paragraph 12(e) of her skeleton argument, Ms Chan said this:

> "Neither the notebook or mobile phone recording of Lord Ranger has any obvious relevance to the issues of remedy."

77 However, there is at least a possibility that things said by or on behalf of a respondent which were harassing within the meaning of section 26(1) of the Equality Act 2010 could properly (i.e. lawfully) be held to have had less of an impact on the claimant's feelings if they were said in response to deliberate provocation by the claimant than if they were not said in response to such provocation. There is some, limited, authority for that proposition. I referred the parties to it during the hearing on 10 January 2023. That is the decision of the EAT in *Snowball v Gardner Merchant Ltd* [1987] ICR 719. That factor was relevant to an analysis of the impact of the claimant's refusal to make available, or her deliberate destruction of, the mobile telephone.

78 In addition, and more importantly, if there was anything which had been (1) written in the notebook and then removed from it, or (2) written in it after the event with a view to bolstering the claimant's case about the impact on her feelings and/or her mental health of the things that the original tribunal concluded had in fact been said or done by the relevant respondents, then that would be of considerable importance in determining the level of the compensation which the claimant should receive.

79 However, the fact that the recording of the telephone conversation of 5 October 2018 was made on a second mobile telephone was not at all material. In addition, the fact that the recording was not a complete recording was known by the respondents long before the liability hearing, and the respondents could have asked to inspect the mobile telephone (whichever one it was) on which the claimant had recorded the conversation long before that hearing, but did not do so. However, there was no ostensibly good practical or legal reason why the respondents should not have had an opportunity to inspect the telephone, i.e. now, for the first time.

80 Similarly, it could be said that (as I indicated during the hearing of 9 and 10 January 2023 by saying that one might say that "the ship had sailed") it would not be fair to the claimant to raise again the issue of the provenance of the notebook and to look into the possibilities that (1) it had been tampered with and (2) entries in it were falsified. Against that, however, it could be said (as I also pointed out during that hearing) that (1) the claimant's failure to disclose the notebook before the liability hearing was in breach of the orders which (see paragraph 4 above) I had made on 24 April 2020, and (2) the fact that the respondents did not seek to adjourn the hearing in order to obtain expert evidence in relation to the notebook had to be seen against the background of the fact that they had not had a fair opportunity at that time (since they were not informed until the middle of the claimant's evidence of the existence of the notebook) to find out whether or not there was such evidence available. In addition, all that was sought in regard to the notebook was another opportunity to inspect it. In the circumstances to which I refer in paragraph 78 above, it was difficult to see on what basis an order for the further inspection of the notebook could reasonably be opposed.

My conclusions

81 My factual findings set out in paragraph 61 above were of conduct which was in my judgment plainly scandalous, unreasonable, and vexatious within the meaning of rule 37(1)(b) of the 2013 Rules. That is to say, that conduct was not just one or more of those things: it was all of them.

82 The circumstances of this case were exceptional. Striking out the remedy claim would be a draconian step, especially since the claimant had partially succeeded on liability. Plainly, I had what one might be called a discretion here, but (a) if there was such a discretion then it had to be exercised judicially, and (b) it was probably better to say that I had to determine as a matter of judgment what the just result was.

83 In making that determination or applying that discretion, I had to decide whether it was "no longer possible to have a fair hearing in respect of the" claim to a

remedy, although that was not itself a conclusive factor. I came to the conclusion that it was not so possible. That was for the following reasons.

83.1 It was by no means a fanciful possibility that the claimant had in fact recorded the whole of the conversation of 5 October 2018 and deliberately disclosed only part of it. Thus her refusal to permit inspection of the device on which the recording was made so that the possibility could be assessed by an expert, stood in the way of the doing of justice to the respondents in that it meant that the tribunal could make no meaningful order for the inspection by the respondents of the telephone.

83.2 Even though the respondents had failed to take the opportunity to seek an adjournment of the liability hearing in order to obtain an expert examination of the notebook, the claimant's late disclosure of the notebook had put the respondents in a difficult position and the notebook was now going to be of significant evidential weight in the determination of the impact on the claimant's feelings and mental health of the unlawful conduct which the original tribunal had concluded had occurred. Precluding an inspection of the notebook so that the copies of it which were in existence had to be taken by the respondents (and therefore the tribunal) at face value had the result in my judgment that a fair hearing of the remedy claim was no longer possible. That was for the following reasons.

83.2.1 Even though the respondents had already had an opportunity to inspect the notebook, that was under the enormous pressure of time in the liability hearing.

83.2.2 The claimant should have disclosed the notebook before the liability hearing.

83.2.3 There was no practical reason why the claimant should not have made it available again.

83.2.4 Even though it was by no means clear that an expert examination of the notebook would have revealed something of value to the respondents, they had now been precluded from obtaining such an examination when, for the reasons recorded in paragraph 4.61 of the liability judgment (set out in paragraph 10 above), there was good reason to think that such an examination might well have been fruitful as far as the respondents were concerned.

83.2.5 The suspicion that it would have been so fruitful was enhanced by the factor to which I refer in paragraph 62 above.

84 When standing back and asking myself against the background of those findings and determinations whether it was proportionate and appropriate to strike out the

remedy claim, I took into account the fact that the respondents had had an opportunity before the liability hearing to inspect the mobile telephone and during the liability hearing could have asked for an adjournment to ask an expert to inspect the notebook but chose not to do either of those things. In addition, the original tribunal had already come to a conclusion on the reliability of the entries in the notebook. Those were powerful factors which weighed quite heavily against the striking out of the remedy claim. However, those factors were in my judgment significantly outweighed by the claimant's conduct as described in paragraph 61 above.

85 That conduct was in my judgment inimical to the doing of justice in that it was designed to frustrate the doing of justice. Even if the claimant panicked and there was nothing which an inspection of the notebook or the mobile telephone could have revealed which would have weakened her case in regard to remedy or justified a reconsideration of the liability judgment (and whether or not that was the case was of course not capable of being known now), her deliberate destruction of those things, or lying in saying that she had destroyed them, was intended to prevent the respondents and the tribunal from considering further material which could have affected the outcome of the proceedings in a significant way.

86 In all of the above circumstances, I concluded that it was at least possible that I was bound by reason of that conduct to do something similar to that which the Court of Appeal did in the *Arrow Nominees* case, and, for the reasons stated in the judgments of Chadwick and Ward LJJ, which I have set out in paragraphs 69 and 70 above, strike out the claimant's claim to a remedy. However, if and to the extent that I was not so bound, I came to the clear conclusion that the only just result would be that the claimant's claim for a remedy was struck out on the basis that her conduct described in paragraph 61 above was scandalous, unreasonable and vexatious within the meaning of rule 37(1)(b), not least because it was plainly designed to stop any further inquiry by the respondents into the reliability of evidence which was relevant to the claimant's claim for a remedy.

87 In addition, and separately, for the reasons stated in paragraph 83 above, I was of the view that it was no longer possible to have a fair hearing of the claim for a remedy.

88 For those reasons, the claimant's claim to a remedy is struck out.

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Employment Judge Hyams

Date: 3 February 2023

Sent to the parties on:

8 February 2023

NG

For Secretary of the Tribunals