EMPLOYMENT TRIBUNALS

Claimant: Mr D Akhigbe

Respondent:
(1) St Edward Homes Limited ('SEH')
(2) All Knight Safety Limited (in voluntary liquidation)
(3) Ms Julia Oldbury-Davies
(4) Mr Alan Edgar
(5) Mr Allan Michaels
(6) Niblock Electrical Services Limited ('NES')
(7) Mr Peter Burcow
(8) Berkeley Homes (Urban Renaissance) Ltd (Berkeley Homes)

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On:** 2 December 2022
Before: Employment Judge George

Appearances
For the claimant: in person
For the respondent: Mr J Williams, counsel (SEH, Mr Edgar, Mr Michaels, Berkeley Homes – collectively referred to as the SEH respondents)
All Knight Safety Limited – not present or represented
Ms Olbury-Davies, Mr Burcow, and NES – not present, attendance not required.

JUDGMENT

1. Case Nos: 2301105/2021, 3301405/2021 and 3310936/2022 are struck out under Rule 37 of the Employment Tribunals Rules of Procedure 2013 because they have no reasonable prospect of success.

2. Case Nos: 2301105/2021, 3301405/2022 and 3310936/2022 are certified to be totally without merit.

3. The claimant is to pay to St Edward Homes Ltd £20,000.00 in respect of legal costs.

4. A preparation time order is made in favour of Niblock Electrical Services Limited. The claimant is to pay to Niblock Electrical Services Limited £1,786.00 in respect of that order. This is a correction of the oral juddgment as set out in paragraph 72XX below.

5. The claimant is released from further compliance with paragraph 3 of Employment Judge R Lewis' order of 24 January 2020, sent to the parties on 12 February 2020.

REASONS

1. The issues to be considered at this preliminary hearing were set out in the notice sent to the parties on 26 April 2022 (Vol.1 page 104). At the time, those applied to the then five outstanding claims between the parties. By case management orders set to the parties on 14 August 2022, I directed that any applications for strike out or deposit orders in Case No: 3301405/2021 (which had by then been accepted) should also be listed to be considered at this hearing. On 18 November 2022, Case No: 3310936/2022 was listed to be heard at the same time.

2. In considering the various applications before me I had the benefit a three volume bundle of documents. There is an authorities bundle which included the SEH respondent's skeleton argument for this preliminary hearing (it is hereafter referred to as AB page 1 to 628). Volume 2 is a replica of the open preliminary hearing bundle which was before me in December 2020. Volume 1 contains the more recent orders, judgments, case papers (including in the 2021 claims and the 2022 claim) and up to date correspondence.

3. I have also had reference to and taken into account other relevant documents from the tribunal file: these were, specifically, the claimant's skeleton argument directed to the issue of whether paragraph 3 of Judge R Lewis' order should be set aside and the claimant's submissions in relation to the NES respondent's application for a preparation time order dated 19 April 2021. It also appears to be the case that one of the two applications for reconsideration of my refusal of case management orders (refusing asserted reasonable adjustments), is not in the preliminary hearing bundle but I took them both into account in full.

<u>The applications to strike out Case Nos: 3301405/2021, 2301105/2021 and 3310936/2022.</u>

4. Case No: 3301405/2021 was presented against St. Edward Homes Ltd only in reliance on an early conciliation certificate that disclosed Day A to be 26 July 2018 and Day B to be 26 August 2018.

5. The claim form is at Vol. 1 page 333 and was presented on 23 February 2021. The grounds of response are at Vol.1 page 354; they were received on 12 September 2022. The reason for the passage of time in between

presentation of the claim and receipt of the response is not material for the decision that I have to make but the response was received in time.

6. The claims are set out in Box 8 of the claim form (Vol.1 page 339). In summary, the claimant alleges that a letter sent by him to the respondent's in-house lawyer (Ms McClelland), which was copied to the external solicitor with conduct of the litigation (Ms Gilroy-Scott - then of Goodman Derek), dated 14 November 2020, was a protected disclosure. That document is within the preliminary hearing bundle for December 2020 (Vol. 2 page 905). I concluded that it was unreasonable conduct of the 2018 claims for the claimant to send that document – see paragraph 185 of my reserved judgment sent to the parties on 19 February 2021 (Vol.1 page 72).

7. By his email the claimant alleged that a document that had been sent to him by Julia Oldbury-Davies, the third respondent and an employee of the training provider, was fake and was known by Ms McClelland to be fake. The claimant went on to threaten to report Ms McClelland to the Solicitors Regulation Authority if Ms Oldbury-Davies did not confirm that the document was a fake by 28 November 2020. It is this which the claimant now seeks to argue was a protected disclosure.

8. The first alleged detrimental act within 3301405/2021 is based on the response sent to that email (Vol. 2 page 906). By her email, Ms Gilroy Scott, stated that she had previously asked the claimant to cease direct correspondence with their client and complained that, notwithstanding that request, he had contacted the client directly. She asked him not to do so. The final sentence in the email in response from the respondent's representatives is:

> "Any report to the SRA in respect of Ms McClelland would be both unfounded and inappropriate in the circumstances and appeared to be an attempt to intimidate her. We intend to draw the tribunal's attention to this correspondence".

9. So the first alleged detriment within 3301405/2021 is that statement of intention to draw the claimant's correspondence of 14 November 2020 to the Tribunal's attention. At that point in 2020 the parties were between the August 2020 hearing and the December 2020 hearing, both of which I conducted, and which included an application for costs. The second alleged detriment is said to be the act referring to the email of 14 November 2020 in support of the application for costs.

10. Those are the only two allegations of detriment complained of within the scope of 3301405/2021. It argued on the face of the claim form, by the claimant, that costs cannot be awarded against somebody for having made a protected disclosure.

11. The SEH respondents wrote to the Tribunal (copied to the other parties) on 17 November 2022 (Vol.1 page 631A). The relevant part of that letter for present purposes is that their arguments that 3301405/2021 should be struck out rely on and adopt their arguments for strike out of Case No:

2301105/2021 from the skeleton argument dated 6 June 2022 (see para.13 on Vol.1 page 631C).

12. The detriments in Case No: 3301405/2021 (the first 2021 claim) are identical to those alleged in Case No: 2301105/2021 which was presented at London South against both St Edward Homes Ltd. and Berkeley Homes following a period of conciliation between 23 February 2021 and 24 February 2021 (this is the second 2021 claim). The claim form was presented on 22 March (Vol.1 page 231). By it, the claimant alleges post-employment detriment on the grounds of protected disclosure. Box 8.2 (Vol.1 page 237) is in essentially the same terms as that of Case No: 3301405/2021 claim with one difference, namely that the claimant relies on an additional alleged protected disclosure.

13. He alleges that a protected disclosure was also made on 6 August 2018. The document in question is Vol.2 page 634 and is an email sent to the Tribunal (copied to Ms Gilroy-Scott) with the subject heading "Case Number: 3306927/2018 (FAILURE BY TRIBUNAL TO PROTECT ME)". By that email the claimant alleged that the respondents were lying in their ET3 response to that 2018 claim. Other than that, the alleged protected disclosure in the second 2021 claim is the same as that in the first 2021 claim, which I detail in para.XX6 above. The degree of overlap between the issues in these two claims mean that they can be dealt with together.

14. The first alleged detriment in both 2021 claims is the act of a solicitor responding to correspondence that had been sent directly to a client in the course of litigation. By it she requested the claimant not to communicate directly with her client and said that the correspondence she was responding to would be drawn to the attention of the judge. The other alleged detriment is relying upon that letter in support of a costs application. The claimant arguments (Vol.1 page 326) that he relies on the fact of the costs application (rather than the submissions), but that is not a fair reading of the claim form and, in any event, is immaterial to the incidence of judicial proceedings immunity.

15. To the extent that Case No: 2301105/2021 is brought against Berkeley Homes, it seems to me that it is completely unsustainable. There is no basis on which to assert that Ms Gilroy-Scott, in writing on 20 November 2020, was acting on behalf of Berkeley Homes since they were not a party to the litigation in relation to which the correspondence was sent. To the extent that Case No: 2301105/2021 relies on the alleged disclosure of 6 August 2018 it is highly unlikely that that response of 20 November 2020 would be found to have been on grounds of a communication to the Tribunal more than two years before, given the frequent correspondence between the parties in the meantime.

16. Furthermore, so far as one can tell from Vol.1 page 634, that communication was made to the Employment Tribunal and copied to SEH's solicitors. It seems doubtful, to say the least, that that communication would be made to a person falling within ss. 43C to 43G of the Employment Rights Act 1996 (hereafter the ERA). So, there are other reasons apart from the

alleged defence of judicial proceedings immunity to doubt the prospects of those particular arguments.

17. Case No: 3310936/2022 (hereafter referred to as the 2022 claim) was brought against St Edwards Homes Ltd. and Berkeley Homes following a period of conciliation that lasted between 17 and 19 August 2022. The claim form was presented on 23 August 2022 (Vol.1 page 379). By it, the claimant complains of protected disclosure detriment and victimisation. I accept that it is a reasonable conclusion to draw from box 8 and paragraph 14 and 15 of the particulars of claim (Vol.1 page 385) that it includes a complaint of race discrimination.

18. According to para. 1 of the particulars of claim, the claimant explains that he made a protected disclosure during his employment. Although those are not specified in the claim form, the claimant states in paragraphs 3 and 5 of his skeleton argument for the preliminary hearing on 1 and 2 December 2022 (Vol.1 page 914) that he made protected disclosures on 3 and 10 November 2014 to a contractor with SEH.

19. It appears from the particulars of claim in the 2022 claim that the claimant also relies on another alleged protected disclosure on 27 December 2018 consisting of telling the Tribunal that the respondent was lying (para.4 of the particulars at Vol.1 page 385). That appears to be a reference to Vol.2 page 218 to 224. This was an unsolicited response to the ET3 in Case No: 2303263/2018. The covering email for that letter is not in the bundle and it is therefore not clear whether it was copied to the respondents or their solicitors. So, again, there is some doubt about whether the claimant would establish that that was a communication to a person falling within ss.43C to 43G ERA.

20. The detriment that the claimant relies on in the 2022 claim is based on a set of written submissions dated 10 June 2022 (para.5 of the particulars in the 2022 claim at Vol.1 page 385). In para.5, the claimant complains that the respondent told the Tribunal that he was "in the habit of making spurious comments".

21. The reference is to a passage in the SEH respondents' written submissions for the recusal hearing on 17 June 2022. Those submissions start at Vol.1 page 570 and the paragraph in question is paragraph 21 at Vol.1 page 580.

22. The paragraph as a whole reads as follows:

> "Fourth, C has throughout these proceedings attempted to control the Tribunal process to his advantage, including by making spurious and often offensive allegations about those involved in the case. For example, C has already accused at least two Employment Judges of apparent bias on the basis on routine case management decisions made on the papers: EJ Lewis on 24 April 2016 (accompanied by a recusal application) and EJ Southam on 1 June 2016. Although not an issue on this application, C has also repeatedly accused SHE, its staff and/or representatives of lying. If EJ George were to recuse herself from this case. C could simply seek to apply the same tactic whenever he is faced with

a judgment, or even the possibility of a judgment, that he does not like. In that situation this already lengthy litigation would simply become endless."

23. I have quoted that full paragraph because it seems to me to make it plain that the sentence of the claimant is complaining about is clearly a part of submissions made on behalf of the respondent in support of their argument that I should not recuse myself from dealing with future hearings in this case or the linked cases that have been reserved to me. The claimant's suggestion that somehow the use of the phrase "not an issue on this application" means that the statement that the claimant has accused the respondent, its staff and representatives of lying is not made within the application is baseless and contrary to a natural reading of the paragraph. It is plain that the respondent relied on the claimant's conduct towards them as tending to support their submission that the claimant was likely to repeat spurious allegations against judges and therefore that an unfounded recusal application should not be granted. It is simply an acknowledgement that what follows is a factual matter that is relied on by analogy rather than something directly in issue.

24. The respondents to the 2022 claim rely on their ET3 (Vol.1 page 395) which sets out a number of defences in the grounds of resistance which start at Vol.1 page 409. Primarily is it argued that the claim is an abuse of process and violates the principle of judicial proceedings immunity. It is also argued that:

    24.1 the claimant cannot reasonably rely on communications he made within litigation as being protected disclosures within Part IVA ERA;

    24.2 the complaint should be raised within the existing litigation and not by new proceedings;

    24.3 that the submission cannot reasonably be regarded as being a detriment within s.44 ERA;

    24.4 there is no connection with the former employment relationship; and

    24.5 that there was no basis to claim against Berkeley Homes.

25. The claimant referred to two authorities in his claim form: Iqbal v Dean Manson Solicitors (No. 2) [2013] EWCA Civ 149 and the South West Police v Daniels [2015] EWCA Civ 680. He also refers to those authorities in his skeleton argument in support of his argument that these claims should be permitted to proceed and do not fall within the scope of judicial proceedings immunity (Vol.1 page 914 @ 915 paras.23 & 24). I take his skeleton argument into account in full.

26. The doctrine of judicial proceedings immunity originates from the principle that a suit of defamation may not be maintained against those giving evidence in Court and Tribunal proceedings. It extends to preclude reliance on all matters that are done "*coram judice*" or for the purposes of judicial proceedings. The respondents set out the applicable law in their skeleton

argument for this hearing (Authorities bundle page 44 @ 50 para.27 and following). I have been particularly assisted by the guidance given by Lewison LJ in the case of Singh v Governing Body of Moorlands Primary School [2013] IRLR 820 CA at para.66:

> "i) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;
> ii) The core immunity also comprises statements of case and other documents placed before the court;
> iii) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;
> iv) Whether something is necessary is to be decided by reference to what is practically necessary;
> v) Where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity;
> vi) In such cases the principle that a wrong should not be without a remedy prevails."

27. This guidance follows a careful discussion of the development of the principle in which Lewison LJ refers to Roy v Prior [1971] AC 470 HL (Singh para.25) and Taylor v Serious Fraud Office [1999] 2 AC 177 (Singh para. 26)The principle is not without limits. In paragraph 47 of the same judgment, Lewison LJ analysed the earlier decision of Lincoln v Daniels [1961] 1 QB 237 and summarised the guidance of Devlin LJ (as he then was) as follows:

> "In Lincoln v Daniels [1961] 1 QB 237 the question was whether the immunity attached to a letter written to the Bar Council making a complaint of professional misconduct against a QC. It was held that complete immunity did not apply. Devlin LJ said that there were three categories that needed to be considered: (a) all matters that are done in the face of the court, which included anything said in the course of the proceedings and the content of documents put in as evidence; (b) everything done from the inception of proceedings onwards, including pleadings and other documents brought into existence for the purpose of the proceedings and (c) a third category that was difficult to define. As I read his judgment (contrary to Mr Allen's reading of it) Devlin LJ considered that Watson v M'Ewan fell into the third category; and the question was how far it was to be taken. Mr Allen submitted that Devlin LJ's second category embraced everything that was necessary to bring a case to court. But if that were so, then the third category would have been redundant; and Devlin LJ would not have begun his discussion of the third category with an examination of Watson v M'Ewan . Devlin LJ concluded at 263:
>
>> 'I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for him to do so, as it is practically necessary for a litigant to engage a solicitor. The sense of Lord Halsbury's speech is that the extension of the privilege to proofs and

> precognition is practically necessary for the administration of justice; without it, in his view, no witness could be called. I do not think that the same degree of necessity can be said to attach to the functions of the Bar Council in relation to the Inns of Court. It is a convenience to the public to have a central body to deal with, but that is as high as it can be put. In my judgment the defence of absolute privilege fails.'"

28. I set this out in full because it appears that documents brought into existence for the purposes of the proceedings may include more than those which are directly ordered by the Court or Tribunal, namely, those which are practically necessary for the proceedings. However, since the effect of the doctrine would be to deny access to the courts without hearing a claim on its merits, the scope of the doctrine is limited by the requirement of necessity for the administration of justice. Hence the statement of Lewison LJ at para.66(iii) that the doctrine is only extended to the extent necessary to prevent the core immunity from being outflanked. Furthermore, the passage makes clear that, where the claimant prays para.60 of Singh v Moorlands Primary School in aid (see Vol.1 page 325), he is citing that paragraph out of context and the principal is not limited to the giving of evidence.

29. The alleged detriment set out in para.5 of the particulars of the 2022 claim is plainly part of a written submission made within all of the then extant proceedings. This is alleged to be race discrimination, victimisation and protected disclosure detriment. The claimant had the opportunity to argue in written submissions for the recusal hearing or at it that the submission was inaccurate or unfair. He also has the opportunity to appeal a decision made at a hearing if he considers that the employment judge reached a perverse decision by relying upon an inaccurate, offensive or irrelevant submission.

30. The claimant argues that this particular submission was not an issue in the application and therefore, relying on para.42 of Iqbal v Dean Manson, that the doctrine of judicial immunity from suit does not apply. That paragraph more properly applies to abuse of process by seeking to litigate matters that could and should have been raised within previous litigation. However, in para.40 of the judgment there is the suggestion that a letter sent for an irregular or improper purpose would not attract immunity. This is also an argument in the claimant's skeleton argument for this hearing at Vol.1 page 914, and in relevant submissions in response to the respondents' skeleton for the recusal hearing (Vol.1 page 325). Although that skeleton argument was prepared for a different purpose, it is right in the present circumstances that I take into account all of the arguments advanced by the claimant from time to time to support his claim that these claims should not be defeated by judicial immunity from suit.

31. He argues that the principal of judicial immunity from suit should not apply when the circumstances suggest an abuse of the court process by the respondent. He argued that the 2021 claims and, by extension, the 2022 claim were not about any statement by the respondent but about them

making a costs application. This was, in the circumstances, an abuse of process by the respondent, so should be regarded as an action akin to malicious prosecution.

32. I reject that argument. The respondents had made a perfectly reasonable application for costs within the proceedings. Indeed, prior to the claimant presenting these claims I had already decided that the claimant had behaved unreasonably; that finding triggered the discretion to award costs. I found that the claimant had behaved unreasonably in the sending of the particular letter of 14 November 2020 which is now relied on in both the 2021 claims as a protected disclosure. The claimant had the opportunity to argue against that conclusion at the December 2020 hearing. It seems to me that, so long as that conclusion has not been overturned on appeal, it would be wrong to conclude that a statement that the respondent intended to draw the 14 November 2020 letter to my attention or to rely on it in support of the costs application was an abuse. I reject the argument that any judicial proceedings immunity cannot be relied on for countervailing policy reasons.

33. The claimant also suggests that the policy is inapplicable in circumstances where the respondent is concealing or withholding evidence. In this he relies on South Wales Police v Daniels & ors [2015] EWCA Civ 680 with particular reference to para.47. That case involved an allegation that a chief constable had committed the tort of misfeasance in a public office by, among other things, concealing, destroying or withholding documentation from the Crown Prosecution Service such that the claimants could not have a fair trial. A distinction is drawn between immunity for police officers when they are participating in the judicial process as witnesses and their role as law enforcers or investigators (see para.36 of the judgment of Lloyd Jones LJ) . Para.47 holds that immunity does not extend to the fabrication of false evidence and the claimant argues that this is what the respondents have done by "fail[ing] and/or refus[ing] to disclosure the document which shows who paid for my Training" (Vol.1 page 325).

34. I need to focus on the nature of the act of the respondents which is the subject of the claimant's claims and decide whether that action was done in circumstances which attract judicial proceedings immunity as explained in Singh. Here the acts that are relied on by the claimant as detriments contrary to s.47B ERA (and, in the case of the 2022 claim detriments under s.39(2)(d) and 39(4)(d) EQA) are two sets of submissions prepared for hearings within Employment Tribunal proceedings and correspondence in the course of that litigation in which the respondents give warning of their intended submissions. At that time their strike out and costs applications were still pending. The claimant does not rely on the act of alleged concealment within the 2021 claims or the 2022 claim. Therefore, the submissions that he makes that the doctrine of judicial proceedings immunity does not defeat his claim because of the alleged concealment are not applicable to his pleaded case.

35. I consider that it is fairly arguable that the email of 14 November 2020 in

which the claimant criticises the statement made by Ms Oldbury-Davies was a protected disclosure for the reasons set out by the claimant on Vol.1 page 326. However, in the 2022 claim, if one reads the skeleton argument together with the claim form he appears to intend to refer to allege protected disclosures from November 2014 (see para.17 above) and another from December 2018 (see para.18 above). It is extremely unlikely that the claimant will succeed in proving that the communications that he is objecting to or the submissions that were ultimately made were done on grounds of earlier communications within his employment or a specific piece of correspondence, also within the litigation, from two years previously.

36. The claimant also argues (para.13 in the 2022 claim – Vol.1 page 385) that he should not suffer victimisation for raising an allegation of racial bias. It therefore appears that the protected act relied on for the victimisation claim in the 2022 claim is the complaint of racial bias against myself (see para.19 of his submissions Vol1.page 915). That merely underlines how clear it is that the alleged detriment in that claim (a comment in the recusal submissions) is covered by judicial proceedings immunity. If the case were otherwise, whenever the respondent made submissions at a recusal hearing, called because a claimant had made allegations of racial bias against the judge, then any submissions that were critical of that claimant could found a victimisation claim under s.27 EQA. In my view, that falls squarely within Devlin LJ's second category.

37. The claimant also alleges that any immunity is lost because Mr Williams, the SEH respondents' counsel, has misled that the tribunal. I disagree that the June 2022 written submissions either mislead or seek to mislead the Employment Tribunal. They put forward the respondents' position which is contrary to the claimant's own but which is fairly arguable. Were Mr Williams to do anything else he would fail in his duty to his own client. I reject the implication by the claimant in his skeleton argument that Mr Williams has failed in his duty of candour to the tribunal.

38. Furthermore, think it is important to take into account that the nature of the judicial immunity from suit doctrine is based on public policy. That public policy argument is set out, in particular, in paragraph 23 of Singh.

> "There are two strands of policy underlying the rule. First, that those engaged in litigation should be able to speak freely without fear of civil liability. The second is a wish to avoid a multiplicity of actions were one court would have to examine whether evidence given before another court was true or not."

39. Of course, in this case, and we are not concerned with subsequent proceedings based on witness evidence in the original proceedings, but on submissions. However, the public policy arguments to protect those who are necessarily and reasonably critical of the other party when acting in their own defence and against multiplicity of litigation and the desirability of achieving finality are applicable in this case as well.

40. I refer back to the very helpful analysis of the development of the privilege set out in the judgement of Lewison LJ (see para.26 above). I remind myself that the principle that is not without limits. In particular, as Devlin LJ said, there are three categories that need to be considered: all matters that are done the face of the court, which included the content of documents put in as evidence; everything from the inception of proceedings onwards, including pleadings and other documents brought into existence for the purpose of the proceedings and the third category that was difficult to define. On page 260 of Lincoln v Daniels (AB page 462), Devlin LJ gives, as an example of the third category, proofs of evidence saying they are covered by the principle to prevent a suit where the "absolute privilege granted for matters said and done *coram judice* might be rendered illusory".

41. Essentially, the claimant argued that these claims fall outside the scope of the policy because he does not rely on core parts of the court based activity and the allegations do not therefore fall within those three categories outlined by Devlin LJ.

42. My conclusions on this argument are first that when a solicitor says in open correspondence to the other party to litigation which she is conducting on behalf of her client that she will draw to the tribunal's attention an open letter from that party that cannot reasonably be regarded as a detriment. More to the point, the act was practically necessary within the scope of the proceedings. There was an outstanding costs application. It is clear, in the circumstances of this case, that when the respondent relied on the claimant's own letter in their submissions that act falls within the second category and is covered by judicial proceedings immunity. If warning the claimant that they would do so does not fall within the second category then it clearly falls within the third category; to allow otherwise would enable the claimant to outflank the protection in respect of the submissions themselves (as Lewison LJ put it) or render the protection illusory (as Devlin LJ put it). To the extent that it might be argued that Ms Gilroy Scott's letter itself is not covered by judicial proceedings immunity, I consider there are no reasonable prospects that it should would amount to a detriment.

43. For all of the above reasons, I consider that there are no reasonable prospects of the claims succeeding. All three alleged detriments relied on by the claimant are covered by judicial proceedings immunity and bound to fail for that reason. Two are written submissions within litigation and to the extent that it could be said that correspondence forewarning the claimant of the submissions was not within scope, there is no reasonable prospect of this being found to be a detriment.

Are Case Nos: 2301105/2021, 3301405/2022 and 3310936/2022 totally without merit?

44. I have been asked by the SEH respondents to consider whether the Case Nos: 2301105/2021, 3301405/2022 and 3310936/2022 me are "totally without merit". This is something which Employment Tribunals have been asked to consider and make a finding on in appropriate cases: see Laing J

in NMC v Harrold (No.2) [2016] IRLR 497 QB and also Stacey J in London Underground Ltd v Mighton [2020] EWHC 3099 para.79. A court may only certify a claim or application as being totally without merit if it is bound to fail in the sense that there is no rational basis on which it could succeed. It need not be abusive, made in bad faith, or supported by false evidence or documents in order to be totally without merit: Sartipy v Tigris Industries Inc [2019] EWCA Civ 225 CA.

45. I refer back to my conclusion that these claims have no reasonable prospects of success. It seems to me that, for reasons which I have already explained, it is so clear that the claims are bound to fail that it can be said there is no rational basis on which the claims could succeed. For that reason, I declare Case Nos: 2301105/2021, 3301405/2022 and 3310936/2022 to be totally without merit.

Applications for costs order and preparation time orders.

46. The remaining issues on the SEH application for a costs order within the 2018 claims and the NES application for a preparation time order within the 2019 claims arise out of the judgement sent to the parties on 19 February 2021. By that judgement, I decided that the 2018 claims against the St Edward Homes respondents and Ms Oldbury-Davies had no reasonable prospects of success. I decided that the 2019 claims against NES and Mr Burcow had no reasonable prospects of success.

47. I also found that there was unreasonable conduct of the proceedings as set out in paras.183 to 185 of the judgment sent on 19 February 2021. I think it is important to comment on the claimant’s criticism of my conclusion that it was unreasonable conduct on his part to write in terms that he did at Vol.1 page 905. I was not criticising his pursuit of an allegation that there is a document in the case that shows that a company other than his employer paid for his training and that that is inconsistent with other evidence in the case. That is not the wording which gives the quality of unreasonableness to that letter: it is the threat to report Ms McClelland to her professional body if Ms Oldbury-Davies did not admit the invoice to be a fake.

48. The particulars of allegedly unreasonable conduct of the 2018 claims are set out in para.183.a. to f. I postponed a final decision on whether to award costs because my view was that the claimant had not then had what I regarded to be reasonable opportunity to make representations directed to whether I should exercise my discretion in favour of making an order or as to the amount. I stated (see para.186) that I should prefer to be in a position to take into account his means. Therefore appropriate case management orders were made (Vol.1 page 90) giving permission for further submissions – including submissions as to means. Those were received from all parties.

49. The claimant's written submission on the issue of costs are at Vol.1 page 219 and 227. The SEH respondent's submissions are at page 39 of the authorities bundle but they also refer back to their submissions made previously both in writing and orally (see para.2 at AB page 40). The

application is made by St Edwards Homes Ltd only and not the other SEH respondents.

50. At para.78 of that earlier skeleton argument from 27 March 2020 (AB page.27), SEH sets out information about the claims, applications and hearings which there had been up to that point. In all claims, as at March 2020, SEH stated that they had incurred legal costs of £139,087.50 plus VAT (excluding more than £7,000 which had not yet been invoiced) and counsel's fees of more than £54,000, excluding VAT. Despite that, they confine the award sought to £20,000 being the limits that the tribunal can award without a detailed assessment. It is clear that the sum that SEH seeks is by some margin a considerably smaller sum than the total it has expended in defence of these claims.

51. To judge by the multiplicity of allegations and application and by the complexity of the litigation, I'm not in the least bit surprised that defence of these claims has caused that level of cost to be incurred. There are many separate but overlapping claims which have to be compared with care in order to understand what the various allegations are so that they can been effectively defended.

52. The NES respondents seek a total of £1,786.00 by way of a preparation time order under rule 75(2) of the Rules of Procedure 2013. Their application is found as part of their overall submissions for the preliminary hearing which started in July 2020. The relevant part is at Vol.2 page 659 where the hours taken are set out in tabular form. In writing these written reasons, I realise that I mistakenly only considered the hours spent dealing with Case No: 2205013/2019 (8 hours) and therefore awarded £304.00. In fact, the total claim was for an additional 39 hours spent on Case No: 2300054/2019 for which £1,482.00 was claimed. This makes a total of £1,786.00.

53. It is urged on me by SEH that the fact that further claims were presented subsequently which themselves have been found to have no reasonable prospects is relevant to whether I should exercise my discretion as to whether to award costs or not. Ordinarily I should be wary of being influenced by an argument which seems to say that a costs order should be made as a deterrent. However, I do think it relevant that, since the conduct which triggered the power to award costs – and since it was adjudged unreasonable – the respondent has triggered yet further unrecoverable costs defending unmeritorious litigation brought by this claimant. The amount their claim is not disproportionate, given what their defence has cost them, and they should have the prospect of recovering a proportion of it.

54. The claimant's arguments are set out in two separate submissions that are at page 219 and 227 of the bundle. He argues first that it would be wrong in principle to award costs for him for having sent the letter at Vol.1 page 905 when that he argues was an alleged a protected disclosure. I found that the act of including the threat to report Ms McClelland to her professional body was unreasonable conduct. So long as that finding has not been overturned

on appeal, that remains an appropriate categorisation of that document.

55. The claimant also argues that it is "too Draconian" to award costs on the basis that whether that there were no reasonable prospects of the claims succeeding and argues that is "contrary to current case law and the principles of the Employment Tribunal". He argues that to make the award would be excessive and unusual.

56. I do bear in mind all of the relevant caselaw. In particular the decision of Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 CA. I remind myself that making an award of costs is the exception rather than the rule in the employment tribunal. In paragraph 41, Mummery LJ said this,

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

57. I also consider guidance found in Herry v Dudley Metropolitan Borough Council [2017] ICR 610 EAT paras. 31 to 34 to the effect that the tribunal should identify the conduct which it has found to be unreasonable and explain the basis on which the discretion to award costs is made. In the same case the EAT gave guidance on how to take account of the paying party's ability to pay, if the Tribunal decides to do so.

58. Since it is plain from the words of rule 76 itself that one of the circumstances in which the power to make a costs award arises is where the claim has no reasonable prospects of success. It is therefore not too Draconian to make an award on that basis because it is provided for in the rules. However, I take the claimant to be also arguing that it would be a Draconian step in the present case. It is true that it is the exception rather than the rule to award costs however the claimant's costs submission includes numerous criticisms of the original decision that he was guilty of unreasonable conduct which is not now subject to review.

59. When reaching the conclusion that I did I took account of his status as a litigant in person and gave latitude to his strength of feeling about the issues in the case when considering the expressions that he used. The issues he raises are clearly matters of personal importance. I took account of all of that when concluding that, notwithstanding his status as a self-representing party, he was nonetheless guilty of unreasonable conduct.

60. Since the hearing in December 2020 further information has come to light about the claimant's state of mental health. I now take into account what we now know about his state of health. Some of the medical evidence suggests that the claimant has a tendency to express himself in a particular way because of his mental health. His life experiences, which are touched on in the medical evidence and have been touched on in some of his submissions in hearings, may provide some explanation as to why certain allegations are pursued with particular vigour. However those factors are only part of the matters that I need to take into account when deciding how to exercise my discretion. There is also the impact of the claimant's behaviour on the respondent to consider.

61. Even bearing in mind his health and the background information about his history, it seems to me that this claimant is pursuing these claims and specific allegations within in a way that is beyond reason.

62. The claimant argues that I should not decide this costs application on the basis that I have apparently failed to notice that the letter at page 905 was a protected disclosure – essentially arguing that I would make a ruling to cover up my professional misjudgment. That is a completely spurious allegation. He also puts forward arguments that my criticism of his tone is discriminatory. Essentially the same arguments were considered the recusal hearing and have been already dealt with.

63. He argues that an unreasonable quantity of costs have been disclosed and that it was unreasonable for the respondent to use external solicitors and an external barrister. He phrases this as being a lack of evidence that the respondent mitigated their loss. Despite that being a somewhat inappropriate use of the phrase, I understand him to argue that the costs that are claimed are not reasonable.

64. A case of this complexity needs the experience and seniority of the lawyers that the respondent has instructed. The letter at Vol.1 page 905 is not the only place where heightened language and threats are used by the claimant which explains why the respondent decided to use external solicitors. I accept that to do so was reasonably necessary in order to provide distance between the in-house legal team (who had incurred the ire of the claimant) and those who would dealing in correspondence with him. I think that the use of an external firm of solicitors and of counsel in case of this nature is entirely reasonable.

65. The respondent has only applied for approximately one seventh of the costs that they had incurred up to March 2020 in fees billed by the solicitor alone. That factor is a complete answer to the claimant's arguments that an unreasonable level of costs has been claimed.

66. I am asked by the respondent to take into account a without prejudice save as to costs letter (hereafter referred to as the WPSATC letter). The claimant deals with that in his submissions at page 227. He argues that the

respondent put in place conditions in earlier negotiations through ACAS which were unacceptable to him. It is not inappropriate to seek to rely upon correspondence marked without prejudice save as to costs at this stage, contrary to the claimant's alternate submission.

67. The WPSATC letter was sent on 20 March 2019. By it the respondents offered to settle the outstanding claims by means of a COT3 agreement in exchange for £5,000 in full and final settlement. The penultimate paragraph says that the offer must be accepted by completion of a signed COT 3 signed by all parties in advance of the preliminary hearing then scheduled for Tuesday 26th of March 2019. As a matter of fact, that hearing was postponed and ultimately took place before Employment Judge R Lewis in January 2020. It seems to me that the claimant might reasonably have thought that the offer had been withdrawn when that date passed. In those circumstances I can give it some but only little weight.

68. I have already set out a number of the matters that explain the amount of the expense that the respondent has been put to by these proceedings. I bear in mind that the purpose of the costs order is to compensate the respondent not to punish the claimant.

69. I consider whether or not to take into account the claimant's means. Part of the purpose for postponing this part of the costs decision was to give the claimant the opportunity to advance anything in relation to means that he wished to do. I must act judicially when deciding whether or not take into account of means. The claimant has not positively asked me to take into account his means. When he was asked to provide information he provided the written costs submissions that do not themselves refer to means. He also provided some payslips (Vol.1 pages 217 and 218).

70. In the circumstances where the claimant is in person it is not unreasonable to read into that an expectation on the claimant's part that I should take into account his means. In response to a question that I asked recently about whether the claimant would be assisted by a CVP hearing he said that he was homeless and living with the family. That perhaps leads to an inference that his present financial situation is not particularly secure.

71. On the other hand, and he comes across in writing as an articulate man and indeed an able person. The payslips that he provided are dated 5 April 2021 and 11 April 2021. They show that he was he earned £282 in each of those two weeks. The schedule of loss in Case No: 3306927/2018 (Vol2 page 58 – 62 set out some earnings that the claimant declared for the purposes of mitigation of loss in the tax years 2014/15 onwards. The last of the years declared was 2017/18. He declared that his earnings in that year had been affected by illness and were only in the just over £5000. The sums declared in the earlier years were greater.

72. I've decided that I should take into account such information as I have about the claimant's ability to pay. That information is limited and is not up to date. The most recent indicates he was in work in April 2021. The medical

evidence available does not suggest that he is unfit to work, nor does it suggest that his problems in attending at the tribunal affects all aspects of his life or affect his ability to work. The claimant has had the opportunity to say what his means are. There is evidence that he has been working since his employment by SEH. I am satisfied that the claimant is capable of finding work.

73. The sum claimed by SEH is £20,000.

74. The sum that is claimed by NES is relatively modest. At the time of the oral judgment I awarded the sum of £304 mistakenly believing that to be the sum claimed. However I realise when perfecting these reasons that that was an error and the full sum claimed is £1,482.00 + £304.00 = £1,786.00. The hours that NES have declared are proportionate and predate the hearings in July, August and December 2021 which Mr Burcow attended on behalf of NES so do not represent the total management time spent in defending these claims. Unlike with the 2018 claims, I did not conclude that there had been unreasonable conduct of the 2019 claims against NES (see para.245 of my reserved judgment Vol.1 page 86). However I was satisfied that rule 76(1)(b) was met and therefore the discretion to make a preparation time order arises. Like a costs order, a preparation time order is the exception rather than the rule. In the light of the attempts by NES to satisfy the claimant's demands for information by providing signed statements explaining their actions and the fact that the hours claimed for are only a proportion of the management time spent on this case, I consider it right that the preparation time order should be made. Even reviewing this now and considering whether to award £1,786.00, that sum seems to me certainly to be a sum that is within the capability of the claimant to pay, given time. I order the claimant to pay £1,786.00 to the NES respondents by way of preparation time order.

75. This is not such a large sum as it affects my judgement on whether to award the costs in favour of St. Edward Homes Ltd. The information that I have about the earnings the claimant has had in the past five or six years suggest that he may well presently be in work and it is probable that he will have a future earning capacity. Nevertheless £20,000 is a very significant sum for a person who was last known to be earning rather less than that in an entire year to cover all his outgoings.

76. That however is not the only matter that I need to take into account. I balance against that the fact that SEH has already substantially reduced the amount that is claimed. Their legal expenses far exceed the amount that they are claiming. Although it will be difficult for the claimant and although it will take time it is probable that he would be able to pay that within a reasonable period in the future. I order the claimant to pay St Edward Homes Ltd £20,000 in respect of their legal costs.

The order of Employment Judge R Lewis.

77. That leaves the question of whether the claimant should continue to be

bound by paragraph 3 of Employment Judge R Lewis's order sent to the parties on 12 February 2020. I strongly doubt that once the litigation within which the case management orders were made has ended that the order would continue to have effect. In any event, it is clear to me from reading the paragraph as a whole that the context in which the order was made was to ensure effective case management of all the issues between the same parties a time when several claims were being consolidated for a preliminary hearing. No one person present at that preliminary hearing knew whether all of the claims brought by the claimant against all of those parties had successfully been gathered together at Watford Employment Tribunal. The claimant had not been able to stay to the end of the hearing because he had become unwell and he had brought different claims in different employment tribunal venues.

78. With this judgement, the need for these respondents to be alerted to new claims brought by the claimant in order to achieve finality and efficient management of the claims is removed. That seems to me to be a material change in the circumstances which enables me to revisit the order that Judge Lewis made.

79. I do not think it is right that the claimant should continue to be under this restriction. It risks being seen as akin to a civil restraint order by the back door. Realistically, Mr Williams expressed doubts as to whether it would be enforceable in the future. There has been a change in circumstances. The context within which the order was made no longer applies and it is not right that the claimant should continue to be bound by the order. I release him from the obligation under it.

80. For the avoidance of doubt, Case No: 2300504/2018 was dismissed without further order on 26 October 2018 because the claimant did not pay the deposit which had been imposed as a condition of continuing to pursue that claim.

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Employment Judge George

Date: …27 March 2023 ……………..

Sent to the parties on: 28 March 2023

For the Tribunal Office