Claim Numbers 1304457/2020
& 1306894/2020

# EMPLOYMENT TRIBUNALS

Claimant
**Professor Theodora Kostakopoulou** **v**

Respondents
**(1) The University of Warwick**
*(a body corporate)*
**(2) Professor Christine Ennew**
**(3) Professor Andrew Sanders**

# FINAL MERITS HEARING
**(CONDUCTED IN PUBLIC IN PERSON)**

Heard at: **Birmingham** On: **24-28, 31 July and 2 & 3 August 2023**

Before: **Employment Judge Perry, Dr B Von Maydell-Koch, & Mr T Liburd**

**Appearances**
For the Claimant: **In person**
For the Respondents: **Miss A Reindorf KC (counsel)**

# JUDGMENT

1. The respondents' application to strike out the claimant's claims is granted. The manner in which the claimant has conducted these proceedings has been scandalous, unreasonable or vexatious (Rule 37(1)(b)) and in the circumstances it is proportionate and in the interests of justice to strike out the claimant's claims in their entirety.

# REASONS

*References ( ) below are to the paragraph of these reasons. We address other references [ ] below.*

1. The claimant is a law professor. She was employed by the first respondent from 2012. She brings two conjoined claims, one begun on 25 February 2020 and the other begun on 5 August 2020. The later was commenced following her dismissal with immediate effect. We will refer to them as the parties have done as claims one and two.

2. The second respondent is the first respondent's Provost. The third respondent is the Head of the School of Law and the claimant's former line manager. The

claims include complaints of unfair dismissal, wrongful dismissal, victimisation and whistleblowing complaints. The claimant alleges that there have been violations of her human rights and failures to comply with EU law (we will refer to these collectively as we did during the hearing as the *European Jurisprudence*).

3. By way of context, the claimant brought an earlier claim against the first respondent in 2017; that claim is argued as a protected act and protected disclosure in these conjoined claims. The 2017 claim involved other individuals as well as the first respondent but not the second and third respondents to this claim.

4. As to the background to these two claims in her witness statement the claimant says this:-

> *"2. … in 2019 Professor Sanders made false accusations about me and subjected me to disciplinary proceedings which included a suspension of six months ordered by Professor Ennew, the Provost of the University of Warwick, on 16 January 2020 and dismissal by Professor Ennew's deputy, Professor Meyer, and Professor Steele who convened a disciplinary hearing in my absence on 20 July 2020. …"*

5. That disciplinary hearing proceeded in the claimant's absence. There is no dispute that the claimant was notified of her dismissal by email on 29 July 2020 to her husband (who was at that time the person she had asked the first respondent to send any correspondence to) [R/1311]

6. The claim has been the subject of extensive case management. We are told (but have not counted as this was not disputed) that this claim has involved eight hearings that have proceeded this one. This hearing was listed at a hearing conducted by Employment Judge Woffenden on 21 July 2022 where she made various orders including giving directions for trial.

7. There have been numerous applications by both parties that we will address below as well as a number of appeals.

8. Before us the claimant represented herself, although she has been assisted by her partner Dr E Dochery, and she has also been represented on at least one preliminary hearing by a consultant, Mr P Herbert OBE. The respondents have been represented by solicitors, Shakespeare Martineau, and leading counsel, Ms Reindorf KC.

9. At the start of the first day of the trial we had before us a bundle of documents from the respondents [R/ page] of 1700 pages and in addition a bundle of 2043 pages from the claimant [C/ page]. The claimant's bundle included what was referred to before us as the "DE" bundle [DE/ page] of 453 pages which were used by the claimant at an earlier interim relief hearing and was referenced by her in her witness statement. In addition the respondents provided a bundle of documents [SO/ page] in support of an application for strike out (628 pages) that it intended to pursue. Of that strike out bundle pages 1 to 487 represented a bundle used at a previous strike out application heard before Employment Judge Camp on 7 & 8 June 2023 [C/681-683] and the remainder (pages 488-628) correspondence and tribunal orders that followed thereafter.

10. We were concerned that the claimant had not had sight of the strike out bundle in advance of trial. We were assured by the respondents that this represented the bundle used before Employment Judge Camp at the earlier strike out application so the claimant was aware of them and had had ample opportunity to consider the same. Nevertheless on day 2 we gave the claimant an opportunity to indicate how long she wished to consider this and the other steps she was asked to undertake before adjourning for the day at lunchtime and reconvening at 11:00 am the next day.

11. Extra documents were provided by the claimant as the hearing progressed. These included (and we use these descriptions to describe the bundle not the entire contents):-

    11.1. a list of issues in relation to what appeared to be claim one,

    11.2. bundles C6-C8 (which we were told make up the "DE bundle"),

11.3. a document including an extract from *Dodd v UK Direct Solutions Business Ltd* [1] and Scicluna v Zippy Stitch Ltd [2] and various other extracts

11.4. several pages commencing with page 4 of Employment Judge Woffenden's order of the hearing on 21 January 2022 and correspondence between July and September 2022.

11.5. A bundle commencing with a letter of 26 July 2023 including a table in relation to the order we made concerning identifying documents to be included in the bundle (see (20 & 50)) and two letters of 25 & 26 July 2023, and

11.6. a marked up index as to the remainder of the documents the claimant wished to be in/excluded from the bundle

and from the respondents at the tribunal's request

11.7. Email correspondence passing between the parties between 12 & 16 April 2023.

12. The respondents provided a bundle of authorities that essentially duplicated the authorities provided for a strike out application before Employment Judge Camp. Essentially the only case we were taken to at length by the respondent was *Tesco* and we ensured the claimant was provided with that in advance alongside a copy of a case she referred us to *Blockbuster*:-

- *Arrow Nominees v Blackledge [2001] BCC 591*
- *Bennett v London Borough of Southwark [2002] IRLR 407 CA*
- *HM Prison Service v Dolby [2003] IRLR 694 EAT*
- *Bolch v Chipman [2004] IRLR 140 EAT*
- *Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA*
- *Abegaze v Shrewsbury College of Arts & Technology [2010] IRLR 236 CA*
- *Osonnaya v South West Essex Primary Care Trust UKEAT/0629/11 (20 March 2012, unreported)*
- *Riley v Crown Prosecution Service [2013] IRLR 966 EAT*
- *Daly v Northumberland Tyne and Wear NHS Foundation Trust UKEAT/0109/16 (7 July 2016, unreported)*
- *Baber v Royal Bank of Scotland plc UKEAT/0301/15 (18 January 2018, unreported)*

[1] [2022] EAT 44
[2] [2018] EWCA Civ 1320

- *Chidzoy v British Broadcasting Corporation UKEAT/0097/17 (5 April 2018, unreported)*
- *Emuemukoro v Croma Vigilant (Scotland) Ltd [2022]* ICR 327 EAT
- *Smith v Tesco Stores Ltd [2023] EAT 11*

13. The claimant told us she intended that her bundle was to be used by the tribunal instead of that of the respondents. That was supplied to the respondents in hard copy only on the morning of Tuesday, 18 July 2023 three clear working days before the trial was due to start.

14. In addition we were provided with witness statements from a number of witnesses on behalf the respondent, Adele Ashford, Andrew Sanders, Andy Lavender, Caroline Meyer, Christine Ennew, Colin Sparrow, Louise Ledden-Rocks, Mike Shipman and Professor Simon Swain. The claimant provided a witness statement the first part of which 92 paragraphs and 28 pages and was dated 7 November 2020 and the second part was dated 20 March 2021 included paragraphs 93 to 145 and a further eight pages (that is 36 in total). In addition she supplied a number of witness statements from 9 individuals who were not directly privy to the events that concern us but were instead "character statements" and a "chronology".

15. In addition to needing to resolve the issues of bundles and lists of issues, the respondents' repeated their own earlier strike out application and the claimant told us she wished to make three applications relating to :-

    15.1. Providing particulars of the allegations that led to her dismissal (the "factualisation" issue),

    15.2. the provision of complete documents that had been redacted (the "redaction" issue), and

    15.3. an issue regarding to the weight to be ascribed to evidence that the respondents wished to rely upon that had formed the basis of the complaint that led to her dismissal (the "hearsay" issue).

16. The claimant widened and amended those applications as we relay below.

## Case Management

17. The tribunal spent a considerable time conducting a case management hearing on the first day and morning of the second day of the trial. Principally the purpose of that was to identify if the list of issues and bundle could be agreed and the trial could proceed.

18. The claimant's position was that neither were agreed and therefore she was entitled to prepare and adopt her own list of issues and bundle.

19. A lengthy discussion ensued. We sought to canvas if the issue concerning the claimant's complaints under EU law and the Convention (which we collectively refer to below as the "*European Jurisprudence")* was pursued as a standalone complaint as that is how it appeared in her list of issues. She maintained it was. We firstly sought to clarify how she asserted her rights under the *European Jurisprudence* were effected. She repeatedly referred us to her rights but appeared unable to detail how they were not protected under national law. Having put the question several times and referred her to *Turner v East Midlands Trains Ltd* [3] and we were bound by that she told us that the claims against her were fabricated and she had been defamed. Our understanding was that such complaints were protected and referred her to *Jhuti* [4] and having referred to the Human Rights Act we put the question in yet another way asking how she suggested national law needed to be read or amended so it did comply (referring her to *Coleman v Attridge Law* [5]). She was unable to do so and later sought to suggest we had misread *Turner* albeit it was apparent she had not considered that case prior to us referring her to it on day 1 despite her having referred us to *X v Y* [6]. We expressed our disappointment that she had persisted with her assertions that her rights were not protected in the light of repeated Tribunal explanations and determinations but that she had not reviewed the case law including *Turner*.

[3] [2012] EWCA Civ 1470
[4] Royal Mail Group Ltd v Jhuti [2019] UKSC 55
[5] EBR Attridge Law LLP Coleman [2009] UKEAT 0071/09
[6] [2004] ICR 1634

20. It was apparent no agreement could be reached and so we heard and determined questions about the lists of issues before going on to give instructions to the claimant to identify the documents in the respondents' bundle that she objected to and those from her own that were not included in that of the respondents so we could try to resolve the contents of this.

21. On days 2 & 3 we set out a timetable how events would proceed.

## List of issues

22. There were separate lists of issues prepared by both parties in relation to both of the claims. It is helpful to set out a brief summary which is not intended to be a complete summary of events in this regard.

23. The issues in relation to claims one and two were touched upon at the hearing before Employment Judge Woffenden [C/361-368] who gave directions (see paragraph 50) as to the agreement of the issues on the second claim and repeated a point made earlier in correspondence *"that although the tribunal must act compatibly with ECHR rights there is no freestanding jurisdiction to award damages for any breaches of such rights in the tribunal, nor for the avoidance of doubt, any freestanding rights for general breaches of European Union law. It must apply European Union law and disapply domestic law in so far as it is incompatible with European Union law."*

24. The issues were addressed again at a hearing before Employment Judge Broughton on 13 January 2023 [C/174-178]. Whilst that hearing was listed to address a number of matters as Employment Judge Broughton stated it only progressed as far as identifying the issues and even then with a caveat (see paragraph 2 of his order). That caveat related to the European Jurisprudence points which the claimant repeated before him. Employment Judge Broughton gave a clear determination on them (paragraphs 2 – 8 of his order).

25. Employment Judge Broughton also clarified at paragraphs 20, 21 & 26 that the two Scott schedules addressed the issues in the first claim albeit the respondents were to complete certain information in relation to one of the

schedules and he identified a timeframe for them to be agreed, namely 3 February 2023 (see paragraphs 23-25).

26. As to the issues in the second claim he identified the respondents' schedule would be used as a base and elements of the claimant's claim would be incorporated by the respondents within it. He explained that the omission from the lists of issues of a matter did not prevent the claimant from making allegations in evidence, putting such matters to witnesses or making submissions on them. That too was to be sent to the claimant by 3 February 2023 (see paragraphs 29-31).

27. Employment Judge Broughton clarified that provided those lists were agreed/augmented as provided they would stand as the definitive lists (paragraph 32).

28. The claims came back before Employment Judge Broughton on 27 February 2023 [C/592-597]. He recorded the claimant had confirmed she was not pursuing the European Jurisprudence points, heard and determined a point from the claimant in relation to claim one (paragraph 12) and then recorded the list of issues were definitive in relation to both claims. That was notwithstanding a misunderstanding the respondents had not as directed provided an amended list for the second claim and that they were to do so within 7 days (paragraph 13). He recorded that an application by the claimant to amend the list of issues was not required (paragraph 14).

29. He addressed a particularisation point ("*factualisation"*) sought by the claimant identifying that no further particularisation was necessary (paragraphs 15 – 25), (albeit those points were repeated by the claimant at a subsequent hearing in a slightly different form), addressed a number of other matters including specific disclosure of documents, a redaction issue that was repeated before us (paragraph 31- 33) and applications for witness orders. He then listed strike out applications both parties were making. He concluded:-

> *"58. The parties are again reminded*
>
> *a. Not to litigate by correspondence and of the*

*b. Need to cooperate and the*

*c. Overriding objective"*

30. Those applications for strike out and a number of other applications were eventually heard along with a host of other complaints by Employment Judge Camp on 7 & 8 June [C/681-683]. He refused both parties applications for strike out and a further 16 applications of the claimant (17 in total) were all refused, 10 on the basis they were entirely without merit, one of which was the application for *factualisation*. Employment Judge Camp indicated he would provide written reasons that had been sought in due course.

31. During that hearing the claimant suggested each party use its own list of issues in relation to the second claim but not the first. That was rejected having previously been determined.

32. In our considerable experience to have granted an application of that sort would have made the final hearing unworkable. In addition had the claimant had an issue with regard to the list of issue in the first claim she should have raised that prior to or during that hearing. We asked her repeatedly to take us to where she had done so and she could not.

33. Employment Judge Camp did however provide a mechanism for the parties respective points in relation to the agreement of the list of issues in the second claim to be addressed (see paragraphs 11 & 12). He also recorded (paragraph 20) the claimant had indicated she was not intending to make any further applications other than perhaps to seek permission to lodge a supplemental witness statement.

34. His order was sent to the parties on 13 June 2023. There followed a flurry of correspondence. It is the matters that followed his order that the respondents rely upon to support their application for strike out.

35. On 14 June 2023 Employment Judge Camp refused an application made by the claimant of 13 June to vary or set aside the orders he made [C/688-689]. He recorded that the claimant had not identified the particular respects in which she alleged the list of issues prepared by the respondents did not comply with Employment Judge Broughton's order and then continued :-

> *"5. It will be part of the reasons for my decision on the respondent's strike out decision that the claimant has behaved unreasonably and that her unreasonable behaviour continued during the hearing. Amongst other things, this has led to a disproportionate amount of judicial time and Tribunal administrative time and resources having to be devoted to her case, which is not fair on other litigants. It is also unfair to the respondents for them to have to spend time and incur costs dealing with that behaviour. The claimant's unreasonable behaviour has included repeatedly seeking to reargue things that the Tribunal has decided against her. Much of her letter of 13 June 2023 consists of her doing exactly that.* ***Further correspondence of that kind is likely to be dealt with summarily.***
>
> ***6. … I order that the respondents do not have to respond to any further applications or requests or demands that the claimant makes unless specifically directed to do so by the Tribunal."***
>
> ***[Our emphasis]***

36. The claimant complained before us that the final paragraph prevented her from liaising with the respondents' representative so she could prepare for trial. For the reasons that we give below (82 & 83) that is incorrect but in addition she continued despite Tribunal orders to make and repeat applications that had been determined.

37. A further letter was sent on behalf of both Employment Judges Camp and Broughton on 15 June 2023 [C/693 - 694]. The former responded to an issue the claimant raised regarding varying or setting aside orders where he reminded her that there was nothing wrong in her seeking to do that, but issue was taken with her repeatedly seeking to reargue matters that had already been decided (and although he did not say that there elsewhere he made the point) that was subject to a caveat where the circumstances underlying the applications had not materially changed. Employment Judge Broughton stated he was due to be going on leave, had reviewed the document, it accorded with his view of events save that rather than expressly refer to the events as he had directed, it cross referenced them in the claim form.

38. The claimant's email of 1:45 pm (or thereabouts) of 15 June was referred to Employment Judge Broughton who clarified the same day [C/696] that the list of protected acts should include all the matters identified in paragraphs 25 to

27 of her claim form and the detriments include all those identified in paragraphs 20, 24 and 25 of her claim form. He repeated that the relevance of the European Jurisprudence had been extensively addressed.

39. Further correspondence from the claimant followed. Again Employment Judge Broughton agreed with points she was making and directed the respondents to make changes via his order of 16 June 2023 and that subject to those amendments the list of issues would be as previously ordered [C/699].

40. The claimant's position before us on day 1 was that Employment Judge Broughton had merely *rubber stamped* what the respondents' had sought in their list of issues and he was siding with the respondents. Her subsequent email of 15 July 2023 (the year on the document appears incorrect as it refers to a letter of 7 July 2023) [SO/490-494] made similar assertions including that he had been discourteous, had made inappropriate comments and was biased against her without detailing what it was he had said or done. Having warned her of the seriousness of such an allegation she persisted with it. That email of 15 July also included an allegation of Mr Browne the respondents' solicitor obstructing justice and preventing a fair adjudication of her complaints.

41. We find that at least with regard to the orders he made on 27 February where he ordered that at least one document be disclosed, that one of the witnesses the claimant had sought to be called appeared to be relevant, that certain (parts) of the redacted documents should be unredacted and then on 15 & 16 June Employment Judge Broughton at least in part agreed with the claimant and not the respondents in relation to the contents of the list of issues and ordered as such. Accordingly, he was not as alleged "rubber stamping" or wholly siding with the respondent.

42. Following further correspondence on 16 June Employment Judge Camp directed a further letter be sent to the parties. It varied the timetable for the list of issues to be addressed and clarified what the claimant was expected to do [C/701-702] *"… she must specify what she wants added to or removed from it …".*

43. For the purposes of the record the documents she provided at trial [C/715-727] in relation to claim two were completely different from that provided by the respondents in relation to claim two [C/708-714] and did not set out the words she specifically wanted to be added or removed. In addition she provided a list of issues having alleged there was none in relation to claim one before us arguing that was a Scott schedule and not a list of issues as such.

44. On 7 July 2023 [C/737-738] Employment Judge Broughton directed the following be sent to the parties:-

> *"EJ Broughton is satisfied that the respondent's amended list of issues adequately reflects the discussions and agreements at the previous hearings before him and will stand as the definitive list of issues in claim 2.*
>
> *The claimant's proposed amendments to the document are completely contrary to the previous orders of EJ Broughton and appear to be little more than an attempt to subjectively destroy the purpose and usefulness of an appropriate neutral list to, instead, make the claimant's case and continue her approach of litigating by correspondence. EJ Broughton orders that, in the interests of the overriding objective, the claimant's list and proposed amendments are to be ignored and no further submissions in relation to the issues will be accepted, considered or responded to.*
>
> *EJ Broughton considers the claimant's latest response in this matter to continue to utterly disregard due process, previous agreements and tribunal orders. If it continues, even a little, it is likely to prejudice the possibility of a fair trial ever being possible and may already meet the threshold for a significant adverse costs award. For the avoidance of doubt, this is not determining the point or seeking to tie the hands of any future EJ or tribunal in the case. It is a warning in the sternest possible terms to try to assist the claimant to focus on the issues and*

*preparation for the hearing and turn away from her current strategy before the consequences mount up against her."*

## Our determinations

45. Having heard representations regarding the lists of issues the tribunal concluded

46. With regards to the issues in relation to claim two that there had been no material change in circumstances and absent a material change the matter had been determined as definitive on a number of occasions most recently on 7 July 2023 [C/737-738] (see (44)).

47. Having determined the issues in relation to claim two at the end of day 1 at the start of day 2 the claimant sought to reargue the matter again suggesting the tribunal had misinterpreted the question concerning "material difference" correctly and suggested the tribunal was targeting her. She gave no detail of how that was so other than by referring to determination the tribunal had made. Her application was refused.

48. The Tribunal then heard representations in relation to claim one; the claimant considered that there was no list of issues (see (43)) and did not accept the list of issues that the respondents believed represented the issues that were to be tried, namely two Scott schedules of detriments [R/99] and disclosures [R/147] respectively.

49. Having heard representations we concluded that on our reading of the order of 27 February 2023 Employment Judge Broughton had identified (paragraphs 12 – 14) that subject to the amendments the respondents were to make to it that represented the definitive list of issues and his confirmation the clarifications she sought were unnecessary in that claim and had the claimant not believed that to be the case she should have raised that with the Tribunal as indeed she did in relation to claim two after she received his order in relation to that hearing which was dated 7 March 2023. We canvassed with her several times where she had done so and she accepted that she had not. Given the time and emphasis the tribunal and indeed parties had placed on agreeing the issues we

find it was or should have been clear to her that that dispute should have been raised and her failure to do so was inconsistent with her approach in relation to disputing the issues in relation to claim two. Her application was refused.

50. As we say above we then gave directions in relation to the claimant identifying documents from the respondents' bundle she wished to have omitted and those from her bundle she wished to have included and then sought to identify how long she required to do that and to prepare any submissions/responses she wished to make in relation to the applications that we were to hear. She did not volunteer an estimate so we suggested we break until 11:00 am the following day (day 3) but asked her to provide the information regarding the bundle to the tribunal and the respondents by 10:00 am so both could consider them.

## The applications

51. We indicated (and no objections were made) we would hear the claimant's applications first, hear the respondents' response to the claimant's application, the respondents' strike out application and then the claimant's response to the strike out application (including her own application for strike out and refusal of the respondents' strike out application).

52. The claimant's applications initially compromised 3 elements

    52.1. *Factualisation* (albeit this had changed over time initially relating to the misconduct and dismissal but by the time of the hearing before Employment Judge Camp it related to particularisation of the allegations regarding the claimant's suspension)

    52.2. The issue of *redaction* (again this changed before us from an application for the claimant to view the documents to an application for only us to do so)

    *52.3. Hearsay evidence*

53. On the morning of Day 3 the claimant expanded these to include

    53.1. her objection to strike out and to seek costs against the respondents and

53.2. to pursue her own application for strike out of the respondents' case and costs

54. The respondents' application for strike out was premised on rule 37(1)(b) of the Employment Tribunal Rules of Procedure 2013 :-

> *"Striking out*
>
> *37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *…*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *…"*

55. It was argued on the following bases:-

55.1. Wholly unsubstantiated allegations of dishonesty against the Employment Tribunal and staff

55.2. Serious allegations of dishonesty against the respondents' solicitor

55.3. Obstructively conducting the proceedings

55.4. Litigating by correspondence and

55.5. refusing to accept directions (and the jurisdiction) of the Tribunal

56. We indicated that given some of the application flowed from our determination e.g. the costs applications from both sides we would conduct a case management to address them in due course.

57. On a final note at 4.00 pm on day 3 the claimant was due to start her response to the respondents' application for strike out. The claimant suggested she could

do that within an hour. The panel indicated we wished to view one of the documents we had be taken to first. That had been sent in, but had not been printed off for us in hard copy so we arranged for that be done. That took half an hour and upon the resumption whilst the claimant said she would finish by 5:00 pm the panel stated they did not want her to feel under any time pressure or rushed and so would reconvene the following day. When we reconvened the claimant's submissions took all day.

## The claimant's applications

58. As to ***Factualisation*** the claimant accepted this was again a repeat of the application heard By EJ Camp but that it differed to that before Judge Broughton. We explained that Judge Broughton had sought to address this, the claimant should have raised any additional points before him, they were only raised afterwards and then dealt with by Employment Judge Camp. The claimant ha not identified any material change since then. It is refused.

59. We find Employment Judge Broughton set out to clarify the issues so the claimant could not be ambushed at trial and had explained as indeed we did why at least for the unfair dismissal complaint that it was for the respondents to set out the reason for dismissal and the Tribunal would then consider the burden being a neutral one if the investigation was fair and there were reasonable grounds to come to the decisions that the respondents came to. We further explained the different tests and burdens for wrongful dismissal. We explained the practical effects of each. Despite those explanations and previous determinations the claimant persisted with the applications. We had explained to her before doing so that that was one of the reasons the respondents were seeking a strike out.

60. ***Redaction.*** This application was again addressed by Employment Judge Broughton. As we say above he had found in her favour in relation to parts but not others. Unlike the other decisions Employment Judge Broughton made we could find no trace in the EAT decision of 22 June 2023 concerning this. The claimant confirmed she had not appealed this aspect of the decision. Nor any material change in circumstances. Her explanation was that she intended to

pursue it before us at trial. We explained that the proper course absent a material change in circumstances was to appeal the decision, she could have done so having appealed other issues on that order, and did not. Nor did she indicate she had made the respondents aware that she would so. She was essentially ambushing the respondents by taking them by surprise at trial.

61. Both of those points in our judgment were unreasonable conduct of itself. Further, had the claimant considered the effect of her decision to raise this only at trial she would or ought reasonably to have identified in our judgment that if this application had been successful it would have necessitated the disclosure of those documents, that she be given time to consider them and the revision of the bundle, all of which would eat into the tribunal hearing. In our judgment that shows scant regard for not only the issues of fairness and a fair trial by the claimant but also practical issues as to the hearing of the claim within the trial window.

62. For those reasons that application was refused.

63. On a final practical note, albeit one we cannot criticise the claimant for, that would have necessitated another judge hearing the application rather than this panel (as Employment Judge Broughton had done) so the panel were not prejudiced by sight of the documents.

*64.* ***Hearsay evidence.*** This related to the claimant's query concerning the respondents' refusal to call the individuals who had made the allegations and thus the weight the tribunal would attach to any evidence in that regard. In case management the Tribunal had explained that one of the principal issues the Tribunal would need to engage with was the extent of the investigation carried out by the respondents and if it had reasonable grounds to come to the view that it came to. We referred her when discussing *Turner* to *Roldan* [7].

*65.* The claimant confirmed she was not pursuing this issue substantively given the Tribunal had already addressed this it in our case management discussion. The claimant however did ask as to the weight we would give to witness evidence.

[7] *Salford Royal NHS Foundation Trust v Roldan* [2010] ICR 1457

The panel indicated that was a matter the tribunal would consider having weighed all the relevant evidence.

66. Similarly, when discussing the claimant's witnesses at the outset it became clear they were not witnesses of fact but "character witnesses" and again the issue of her professional standing and performance would have needed to be considered by the respondents' decision maker(s).

67. ***The other applications.*** We indicated we would the other two complaints relating to strike out would addressed either with the respondents' application or in due course

## The law concerning strike out

68. It was agreed the law is set out in *Tesco* at paragraphs 33-44 so we do not repeat it here in full save in the following limited respects.

69. The Overriding Objective ***requires*** that *"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". **[our emphasis]***

70. So far as concerns us the test is threefold (per *Bolch* approved in *Blockbuster*):-

    70.1. Is the threshold in r.37(1)(b) met (as set out above at (54))?

    70.2. Is a fair trial possible?

    70.3. Is strike out a proportionate response?

    and that staged approach is how we intend to approach matters.

## The claimant's application

71. This was premised on the basis that the bundle was deficient and full of duplication.

72. Whilst the claimant was able to point out duplication to us she did not specifically refer us to relevant documents that were deficient and why they were relevant. One major problem is that her witness statement was produced before the bundle was agreed and despite indicating she might seek permission to lodge a supplemental statement she did not do so. Thus the only documents

she referenced in her statement were those in the DE bundle and we find that it was common ground that would be used as a supplemental bundle to any prepared by the respondents.

73. As to duplicates they are a regular issue at trials not least because of the need to include the full bundles passed to claimants at each stage. That can usually be addressed by duplicates being identified as the claim proceeds and their inclusion normally does not distract from the case. Sometimes they are necessary to identify changes as indeed the issue the claimant raised about the respondents' failure to disclose an attachment identified.

74. We find any matters could and should have been addressed had the claimant been willing to engage in agreeing with a bundle in April 2023 at the latest as she had been requested to do so that could and should have been addressed. The respondents' willingness to engage in that process was shown by its agreement to include the DE bundle likewise cannot be said of the claimant. As we say the lack of willingness to engage by the claimant is shown by her failure to provide the details when they were requested in April 2023 by the respondents.

75. As to the respondents' failure to agree the bundle and its failures to address the lists of issues as directed as we relay above this has been addressed in earlier orders.

76. In our judgment insofar as there has been a breach by the respondents they were relatively minor matters that should not have effected the trial or preparations, those matters were determined previously and accordingly we find the response should not be struck out.

## The respondents' application

77. The respondents made clear that the application pursued before us is on the basis of matters arising after Employment Judge Camp's order sent to parties on 13 June 2023.

*Scandalous, unreasonable or vexatious*

78. As to the context by which we should undertake any assessment we note that whilst the claimant is a layperson she is also a law professor and advances complex complaints pursuant to human rights and EU law. Whilst she acts in person she has at times been assisted by others and represented at hearings. The respondents' have repeatedly suggested she may wish to take advice and instruct lawyers. It is her right to decide if she represents herself or instructs others to do so.

79. Given the application related to the matters arising after Employment Judge Camp's order was sent to parties on 13 June 2023 we turn first to the issues we needed to address at the start of the trial.

80. The claimant accepted before us the respondents delivered a bundle to her in April in accordance with the directions as amended following the lifting of a stay to the claim. The claimant argues that bundle was not agreed. Prior to the stay of directions, on 31 August 2022 the claimant had asked the respondents where in its bundle the DE bundle would be. On 6 September 2022 the respondents' solicitors suggested the DE bundle be separated out but assured the claimant it would be included in full. Other correspondence followed and the stay of directions was made. On 12 April 2023 following the lifting of the stay, the claimant was asked by the respondent' solicitors to clarify what documents she wished to have included in the bundle. She replied the same day stating that as the respondents had decided to exclude the DE bundle there would be two bundles. The respondents' solicitors responded by email on 16 April 2023 stating that that they intended to proceed on the basis that there would be a bundle from the claimant comprising three pdf files that it attached to that email which the respondents' solicitors believed was the DE bundle and in addition a bundle from the respondents.

81. The respondents thereafter sent its bundle to the claimant of 1,700 pages in April in accordance with the directions for trial (as varied). On 18 July 2023 (three clear working days before the trial was due to start) the claimant hand

delivered her bundle of 2,043 pages in hard copy only to the respondents including the DE bundle (453 pages or so).

82. We canvassed with the claimant where she had warned the respondents that she intended to include in her bundle any documents over and above the DE bundle. She accepted she had not. She argued she could not be blamed as she had been ordered by Employment Judge Camp on 13 June 2023 not to contact Mr Browne. That order said :-

> *"Further to paragraph 5 above, I order that the respondents do not have to respond to any further applications or requests or demands that the claimant makes unless specifically directed by the Tribunal to do so."*

83. That is a clear misreading by her of that order. That order did not prevent her from liaising (in the sense of emailing or writing to) the respondents' solicitors or the Tribunal. Secondly she does not explain why she had not informed the respondents' solicitors of her intentions in the near two months between the email exchange we reference above concerning the bundles (see (80)) where the respondents' had made clear how they assumed she was proceeding and the date Employment Judge Camp's order was sent out.

84. The claimant suggested that her bundle be used in preference to that of the respondents and that it would have only taken the respondents a day to review her bundle.

85. The documents included in her bundle went way beyond the documents in the DE bundle as it's length alone demonstrates. The claimant accepted that certain documents were omitted from the respondents and others added in her bundle. The respondents' representatives would thus not only have needed to check the contents and undertake a cross referencing exercise, to also check and take instructions on any documents added but to also review and form a view on any documents excluded. To expect it to do so in the 3 clear days prior to trial, we consider to be wholly unrealistic and unreasonable conduct.

86. Had the claimant considered what her actions in seeking to use an entirely new bundle would have entailed for the respondents she should or ought reasonably to have concluded, not least given the time it took her to put her own bundle that together, which she told was a couple of weeks, that that was wholly unrealistic, even for a large firm and experienced leading counsel. The issue was not merely about the work involved but the proximity to trial and the claimant's failure to notify the respondents of that in advance.

87. We find that the claimant was endeavouring to take the respondent by surprise and ambushing them.

88. Thereafter the claimant suggested that the respondents should use their bundle and she hers, stating she could provide the cross references for any documents referred to. In our judgment that was impractical and did not address the issues we refer to above. The respondents' would still need to consider her bundle. Her continued insistence on using her bundle despite the difficulties this would entail for the respondents we find was unreasonable. That unreasonableness was further demonstrated by the claimant raising that our request for her to identify what should be omitted from the respondents' bundle and added from hers was unfair because of the additional work that put her to. That was of her own making because that could have been avoided had she provided that detail in April 2023 when she was asked for it.

89. We find the claimant behaved unreasonably by failing to notify the respondents when asked of the documents she wanted including in the bundle and providing her own bundle so late in the day. In doing so she was not engaging with her duties pursuant to the overriding objective.

90. We should add that when we were referred to claimant's bundle and documents we identified albeit minor differences between the copies of the claimant's bundle that were before the panel and as to documents handed up missing/additional pages.

91. In relation to the list of issues in relation to claim two, we find the claimant deliberately refused to follow the directions given by Employment Judge Camp in his order sent on 13 June despite the clarification he gave making what was

required as abundantly clear. Instead of providing the issues she wanted added and omitted she provided what was essentially a redraft of almost the entire document. That concern is yet further reinforced by the repeated reminders by the Tribunal to the claimant in relation to the European Jurisprudence (see (19, 23 & 24)), her failure to address the detail of how her rights were not protected by national law or what needed to be amended to reflect that but further her insistence that her rights were not protected despite having failed to consider elements of the caselaw until we pointed them out to her.

92. Her failure to raise the dispute over the issues in claim one at all after 7 March 2023 (see (49)) was also unreasonable and her raising that point only at the trial again was in our judgment an attempt to take the respondents by surprise and ambush them.

93. The claimant's stance in relation to both lists of issues was unreasonable and a failure to engage with her duties pursuant to the overriding objective.

94. The claimant's stance in relation to the bundle and lists of issues was also in our judgment a deliberate refusal to accept any instruction or determination she did not agree with. That view is reinforced by the voluminous applications the claimant has made during the course of this claim.

95. Towards the end of her submissions on the strike out applications the claimant was asked in the context of how the trial could be conducted going forward if she would accept and comply with the Tribunal's order in relation to the lists of issues. She did not give a direct answer stating she was the one who had complied with tribunal orders and that if she was prejudiced or a decision was without merit she would exercise her right to appeal. That in our view amply reinforces the point.

96. Those matters aside a yet further example of the claimant's unreasonable conduct and her seeking to take the respondents by surprise and ambush them at trial related to the question of redaction we address above (60 - 62). That too was unreasonable conduct on her behalf and again demonstrates her failure to engage with the process and her obligations under the overriding objective.

97. The claimant's behaviour before the tribunal at times was also unacceptable; when questions were asked of the claimant she repeatedly either failed or refused to answer questions, made submissions, sought to amend or challenge the premise behind the question, or sought to pose a question in return.

98. The claimant repeatedly talked over the judge, despite being repeatedly asked not to do so. On one occasion as soon as the judge had finished speaking the claimant asked if he had finished. On another when the judge having interjected to indicate that a line of argument that the claimant was raising had already been addressed and that that would not be considered again the claimant stated to the judge that she was talking first.

99. On numerous occasions the claimant gave the distinct impression she was not listening to what the respondents' counsel or judge had said. That was reinforced by a number of occasions when what leading counsel or the judge had said had to be repeated to her. Indeed on one occasion the claimant asked for the judge to repeat his reasons for a decision. Having taken a break and consulted with the panel members, the panel was in agreement that the claimant had not been paying attention whilst the judge had been delivering decision - she was rummaging through her papers and her bags to the side of the desk she was sitting at. That was notwithstanding the claimant having repeatedly been told that if she wished to make a note or seek time to consider and answer or ask questions that she wished to raise that she merely needed to ask us to pause so she could do so.

100. Furthermore, when the judge was talking at times she paid no attention to the judge. Having been repeatedly asked by the judge to look at him when she was being spoken to so that he knew that she was listening (in the light of concerns we set above), the claimant was asked why she was looking at the clock whilst the judge was speaking to her we find that her response *"I do not consider your question appropriate",* was rude and disrespectful.

101. That behaviour is akin to the conduct of the claimant in *Tesco v Smith*. At paragraph 20 of its decision the EAT repeated the following extract from the reasons given by the first instance Tribunal:-

*"17. … the claimant refused to look at the screen, he refused to address me directly and he persisted making representations to the clerk which he required the clerk to address to me. I told him to stop doing that. I told the claimant he must address me and, when the claimant kept talking, I told him to stop speaking over me. The claimant ignored me entirely. I told the claimant to stop seeking to co-opt the clerk into acting as his representative and to address me as the judge hearing the case. In particular I told him to stop talking over me so that I would explain to him how I proposed hearing this case in the circumstances and asked him to listen to me. I was entirely ignored, and the claimant continued to talk to the clerk, talking over me. The clerk asked him to stop addressing him and to speak to me. That request was ignored. It appeared that the claimant was making comments to the clerk about me and the respondent's representative. I consider that was wholly unreasonable conduct on his behalf which was discourteous to the tribunal and which placed the clerk in an unfair and insidious position. If the claimant had behaved in a proper manner and had addressed me to raise objections to the hearing going ahead I would have considered them, but that did not happen. I have no doubt the claimant is aware of the way that parties are expected to behave in tribunal hearings having attended four previous hearings."*

*[our emphasis]*

102. That behaviour expanded to the claimant calling the respondents' counsel a liar, making repeated complaints against Mr Browne (*the respondents' solicitor)* including in her letters to the Tribunal

102.1. of 1 July 2023 [C/736] accusing him of making false and misleading statements to the Tribunal, attempting to pervert and obstruct the course of justice by seeking to eliminate from the list of issues, questions the final panel has to decide and

102.2. of 26 July 2023 that he had been engaging in prohibited conduct and victimisation of the her throughout the proceedings and abusing the tribunal process

yet giving no detail.

103. In her letter of 19 June 2023 [SO/539] she alleged that Employment Judge Camp characterised her application as without merit as a concealment of the respondents' non compliance and a manifestation of real bias against her in that he sought to weave a false, negative narrative. She further alleged on 15 July 2023 [C/742a] that Employment Judge Broughton's letter of 7 July [C/737-738] was amongst other matters a manifestation of a judge bullying a party into submission and causing emotional destabilisation in order to aid the interests of the respondents.

104. Those matters postdate the refusal of Employment Judge Camp to strike out the claimant's claims. Whilst the respondent does not substantively rely on matters predating Employment Judge Camp's refusal to strike out, the respondents also refer us to the following matters as to the likely of repeat:-

104.1. a criminal complaint against Mr Browne's firm that predated 26 May 2022 under s.1(1) the Malicious Communications Act 1998 and s.127 Communications Act 2003 referencing the disclosure, or prohibition of withholding, of the above information as well as the SRA regulations [SO/41], and

104.2. defamation claims against a student who made the allegation and the third respondent (that were struck out).

105. We find the claimant's behaviour before the tribunal was therefore unreasonable and that extended to the respondents' counsel, its solicitor and a Judge. We find that based on her maintaining those allegations despite being warned as to the seriousness of the allegations, and need for evidence to substantiate them that again demonstrates her refusal to engage with her duties and we find that it is almost certain they would be repeated at any trial.

106. We are conscious that in ***Tesco*** the EAT said this:-

*"3. If a claim form, or response, is of excessive length, and is not set out in a logical format (generally chronological), effective early case management is extremely difficult, and the more likely it is that there will have to be some form of further particularisation and case management before a hearing can be fixed. Litigants in person may not know the law, but they should generally be able to set out a coherent history of the events and explain the claims they consider arise. Claims rarely succeed because of the quantity of the allegations, it is the quality that matters.*

*4. The longer case management goes on, the greater the risk that a litigant in person will become embattled and fail to engage properly with the employment tribunal. Good case management requires that the parties work with the employment tribunal and each other in a constructive manner. Even litigants in person must focus on their core claims and engage in clarifying the issues. It is not the fault of a litigant in person that she or he is not a lawyer, but neither is it the fault of the other party or the employment tribunal. While the employment tribunal should take reasonable steps to assist litigants in person, this must not be at the expense of fairness to the other parties to the claim, and to litigants in other proceedings who seek a fair determination of their disputes, having regard to the limited resources of the employment tribunal.*

*5. Regrettably, those who are confused by, or disagree with, proper case management decisions that are fair to both parties, sometimes jump to the conclusion that the employment judge is biased and that the employment tribunal and its staff are adversaries to be challenged and attacked. If such a mistaken view results in a withdrawal from the required co-operation with the employment tribunal and the other party, necessary to advance the overriding objective, it puts a fair trial at risk."*

107. We remind ourselves that any view a party may come to may also be reinforced by the litigation process itself for the reasons given in Gestmin SGPS SA v Credit Suisse (UK) Ltd [8].

108. We have concluded that the claimant has failed to engage in the claim as she was required to do by the overriding objective despite the considerable lengths a number of tribunal judges had gone to explain matters to the claimant to encourage her to engage with in the process and what her failure to do so might entail.

109. We find despite that there has been a repeated failure by the claimant to engage in the process and her conduct was *scandalous, unreasonable or vexatious*. Further there was a failure on her part to comprehend that was so. For instance she stated in correspondence *"The only reason as to why there is not an agreed bundle is Mr Browne's non co-operation." (claimant's letter 26 July 2023)* and she repeatedly stated before us that she was not at fault and should be congratulated for the way that she had conducted herself.

110. Given the way the claimant conducted the claims both prior to and at the trial, despite the warnings given by the tribunal, we find that there is a likelihood approaching certainty that the failures to engage would be repeated should the trial proceed.

Is a fair trial possible

111. Two questions arise, in the alternative:-

111.1. is a fair trial possible at all and/or

111.2. is a fair trial possible within the trial window.

112. In undertaking those assessments we note the object of any justice system is to get triable cases tried (*Blockbuster*), 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 (*Arrow*) and that requires regard to be had to the consequences of delay (and in turn whilst

[8] [2013] EWHC 3560 (Comm) at [19 & 20]. See also *Blue v Ashley* [2017] EWHC 1928 (Comm)

the memories of witnesses remain sufficiently intact to deal with the issues) and costs for the other parties (*Emuemukoro).*

113. We disregarded from our consideration of both questions whether there would be any impact on the basis that this panel will not be able to sit on two days of the 15 originally scheduled for this hearing.

114. By reason of the matters we refer to above (see (110)) we have no confidence that the claimant would cooperate or engage with any order that the tribunal were to give regarding the matters the tribunal are to decide or how the claim should be conducted.

115. The claimant has repeatedly sought to relitigate matters that have been determined resulting in an inordinate amount of tribunal time being wasted both prior to and at this hearing. In addition she has sought to change the basis before us of applications that were previously made relying upon slightly different facts or a slightly different basis such that she can argue that there is a material change in circumstances. As we say above she has also repeatedly sought to take the respondents by surprise and ambush the respondents by her conduct.

116. We find that conduct will continue should this hearing be allowed to proceed either during the trial window or at any point and if the claim did proceed the way the claimant would conduct it would render it impossible that the claim could be properly managed or managed at all by whichever judge and panel was scheduled to conduct it. For example if the panel was required to make a decision in relation to whether the claimant was entitled to ask a question (or not) of a witness or if the claimant was entitled to refer a witness to a document (or not) each and every such determination would be challenged.

117. There has been extensive case management of this claim. The amount of tribunal time that has been wasted in this claim repeatedly going over the same or similar issues (that should in relation to the later have been canvassed and determined previously) is enormous. As Employment Judge Broughton highlighted in his order as long ago as 13 January 2023 [C/174] that this should have been a relatively straight forward claim and it was astonishing how it had

generated so much correspondence detracting from the core issues. That warning was repeated in stronger and stronger terms as we state above (see (34 & 44) amongst others) It is clear that extensive attempts have been made by the Tribunal to engage ("roll up its sleeves") with identifying the issues. Yet despite the Tribunal time expended the claimant has not engaged with her duties or heeded those warnings.

118. Accordingly, we find it is not possible a fair trial can be conducted at all.

Proportionality

119. The appellate courts have repeatedly reminded Tribunals of the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may be appropriate. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious and/or that it is no longer possible to have a fair hearing (*Tesco*).

120. We have considered if a lesser sanction short of the draconian sanction of striking out the claimant's claims is appropriate.

121. The claimant was repeatedly warned by Employment Judges Camp and Broughton in relation to the way she was conducting these proceedings. We do not consider that further warnings would add anything to those given to date. In our judgment they have gone unheeded.

122. Nor do we consider an adjournment is appropriate. For the reasons we give above a fair trial either within or without the trial window was not possible all.

123. *Tesco* gave a further example of a lesser sanction; that the Tribunal limit the claim or strike out only those claims that are misconceived or cannot be tried fairly. To that end and whilst this alternative was not canvassed before us in order to ensure we had considered all possible avenues available to us we considered debarring the claimant from any direct involvement in the proceedings on the basis for at least some elements of the complaints the respondents has the initial burden of proof.

124. A way might be to allow the claimant to forward written questions for the panel to pose. In addition to any concerns that we might have generally with regards to the fairness of any trial that might ensue the immediate difficulty with that course that springs to mind is our determination that we have no confidence the claimant would adhere to any list of issues or bundle we have determined should be used when phrasing those questions because of the way the claimant has, and in our judgment will conduct proceedings. Absent the claimant's involvement in that way it is difficult to see how given the Tribunal as an independent judicial body could engage properly with the issues. Further, from the respondents' perspective we have to consider the additional costs the respondents would be put to and the use of scarce Tribunal resources.

125. In relation to other sanctions such as costs whilst these can be ordered if the threshold tests are met the respondents may argue that it is entitled to such an order in any event and thus it is inappropriate to see that as alternatives to strike out.

126. Strike out is a draconian step and a last resort; it deprives the claimant of her right to bring a claim. It is used only in exceptional circumstances. However we have to place that into the balance against the prejudice to the respondents. We have reluctantly come to the conclusion that a fair trial is impossible because of the claimant's unreasonable conduct, her failure to engage with her obligations and our conclusion that it was a certainty that would continue. Responsibility for those continued failures lie at her door. Having considered and rejected alternatives we have come to the conclusion that the circumstances here are exceptional and there is no alternative but to strike out the claimant's claims in their entirety.

## Case management

127. The respondents indicated that they did not intend to seek costs (save that they have reserved their position if costs are sought by the claimant). The claimant has indicated that she may seek costs. On that basis no further case management is currently required.

**Employment Judge Perry**
Dated: **2 August 2023**