# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Lazreg

**Respondent:** Veolia ES (UK) Limited

# RECORD OF A PRELIMINARY HEARING

**Heard at:** London Central (by Cloud Video Platform) **On:** 31 July 2023

**Before:** Employment Judge Joffe

**Appearances**
For the claimant: Mr L Robert-Ogilvy, representative
For the respondent: Mr J Feeny, counsel

# JUDGMENT

The claimant's claims are struck out.

# REASONS

1. This matter came back before me after I postponed the original public preliminary hearing on 6 June 2023. On that occasion, it became apparent that the claimant, who is illiterate and requires an Arabic interpreter to participate fully in the proceedings, had had no hand in the preparation of the witness statement presented on his behalf. It also appeared that there had been failures by the claimant's representative to disclose relevant documents.

2. On this occasion, an Arabic interpreter attended and I was satisfied that the claimant was able to understand the proceedings, although he faced other challenges. The claimant again told me he was taking a lot of medication and after the lunch break he was tired and clearly found it difficult to maintain concentration on the proceedings. At times he did not wish to have parts of the hearing interpreted and his wife and representative agreed that they would fill him in on those parts afterwards.

3. I had a witness statement from Ms Bnaya, the claimant's wife, and a revised bundle of documents for this hearing.

Disclosure issue

4. The hearing commenced with an enquiry into the adequacy of the disclosure given on behalf of the claimant after the last hearing.

5. On that occasion, it became clear that messages between the claimant's wife and the claimant's representative were likely to exist which would cast light on the issue of when the claimant's wife had read on his behalf the letter from the respondent dismissing the claimant. This in turn was relevant to the issue of when the effective date of termination was for the purposes of the claimant's unfair dismissal claim, which would determine whether the claims were presented outside of the primary time limit in the Employment Rights Act 1996.

6. On the last occasion, Mr Robert-Ogilvy had, on prompting, produced a screenshot of some WhatsApp messages between himself and the claimant's phone. He had also shown me his phone so I was able to see, although I did not make or receive copies of, earlier messages in the WhatsApp chain, and I explained to the respondent that there were earlier messages in the chain which were disclosable. My expectation therefore was that these would be disclosed to the respondent. As for relevant emails, Mr Robert-Ogilvy said that he was unable to access his emails on his phone so could not on that occasion produce emails between himself and the claimant.

7. I made the following order:

***Documents***

*By **20 June 2023** the claimant and the respondent must send each other a list of all documents they have relevant to the issue of jurisdiction, together with copy documents. This includes any emails, texts, WhatsApp messages and voicemails between the claimant and his representative between 6 and 19 July 2022.*

*Documents includes recordings, emails, text messages, social media and other electronic information. You must list all relevant documents you have in your possession or control even if they do not support your case.*

8. I note that the relevance of the date 6 July 2022 was that it was the date when the claimant was told he was provisionally dismissed. At the outset of the resumed hearing, Mr Feeny raised the issue of whether there had been compliance with the order for disclosure. He said that it appeared that Mr Robert-Ogilvy had deleted a message in a chain of messages disclosed.

9. The messages initially disclosed in response to the order were limited to a single screenshot of WhatsApp messages as follows:

[On a date later confirmed to be 18 July 2022] (at 9:37 – 9:38)
Claimant's phone: *Today is the last day*
*They send it on Thursday*
Mr Robert-Ogilvy: *It said 5 WORKING DAYS AND DOES NOT INCLUDE WEEKENDS*
It expires on Tuesday
Claimant's phone: Ok
19 July 2022, timed at 1202 – 12:03:
Claimant's phone: *It's over 1h now if they finished work they won't accept my appeal first time you said you will prepare it on Sunday and yesterday when I called you, you said you will send it later on Monday and now still I received nothing. I want to know why it's taking so long.*
*You putting me under more stress*
*You are not helping at all.*

10. I note that 18 July 2022 was a Monday and was the date when Ms Bnaya said that she read the letter of dismissal to her husband. The WhatsApp messages refer to Mr Robert-Ogilvy having said that he would prepare the appeal on Sunday (17 July 2022), prior to the date when Ms Bnaya said the claimant became aware of the dismissal.

11. As originally disclosed in correspondence after the previous hearing, at the top of the screenshot there was visible the bottom of a message from Mr Robert Ogilvy timed at 9:37. The text of the message itself was cut off. The respondent asked in correspondence for the earlier messages to be disclosed. Mr Robert-Ogilvy said on 22 June 2023:
'There is nothing relating between myself and the Claimant, as it just happened the way and manner in which it was screenshot it cut and pasted into the photo section and when then resending it overlapped with a private text which is totally private and not at all work related.'

12. On 4 July 2023, Mr Robert-Ogilvy sent a new screenshot which showed several messages prior to the message 'today is the last day' . There was no message from Mr Robert-Ogilvy to the claimant timed at 9:37 on 18 July 2022 in that screenshot.

13. In respect of emails, Mr Robert-Ogilvy's position on the last occasion was that he would search for relevant emails but none were then produced.

14. Mr Robert-Ogilvy told me at the hearing that he was only obliged to disclose documents which were relevant to the jurisdiction issue. In any event he said that communications between himself and the claimant were privileged. Mr Robert-Ogilvy said that he was not a lawyer but he was 'any other person' within the meaning of section 6(1)(c) of the Employment Tribunals Act 1996. He said that a Lord Justice of Appeal had said that documents involving such a non-lawyer representative were privileged in proceedings he, Mr Robert-Ogilvy, had been involved in as a litigant. He said that that case was not reported and so I could not be taken to the judgment. Insofar as any messages had been disclosed at all, that was because privilege had been waived in respect of those messages.

15. Mr Robert-Ogilvy went on to say that there were no further documents relevant to the issue of jurisdiction and he could not provide what he did not have.

16. Mr Robert-Ogilvy accepted that he had deleted an earlier message in the WhatsApp chain (ie the message from himself to the claimant timed at 9:37 on 18 July 2022). He said that that message was private and not disclosable. He said that the claimant had been threatening him about the fact that there was only one day left to put in an appeal against dismissal and he had told the claimant he might withdraw from the case. This was a different account from that given to the respondent in Mr Robert-Ogilvy's email on the subject of 22 June 2023.

17. In terms of emails, it appeared that Mr Robert-Ogilvy must at some point have had relevant emails, in particular an email sent by the claimant's wife on his behalf forwarding the letter of dismissal. The date of that email would have been highly relevant as either supporting or impugning the evidence of Ms Bnaya as to when she read the dismissal letter to her husband.

18. Mr Robert-Ogilvy told me he had searched for this email but could not find it. He recalled that it had ended up in his junk folder. He said that he worked as a consultant for five firms of solicitors and had lots of emails coming in. He had to delete his junk folder every three or four months and must have deleted this email. He said he could not find any earlier emails either. However, later in the hearing he produced copies of an email between himself and the claimant which was relevant to the issue of whether he had held himself out as being a lawyer.

19. So far as the claimant's copies of relevant emails were concerned, the claimant's wife said that the claimant regularly deleted messages from his phone and so the emails were not available on the claimant's phone. The claimant did not have the WhatsApp messages either.

20. Mr Feeny did not make any application at this point in the hearing and I went on to hear the evidence of the claimant and his wife.

## Issues

21. The claimant brought claims of unfair dismissal and various types of disability discrimination arising from his dismissal after a significant period of absence due to ill health. He had been employed by the respondent as a road sweeper from 16 September 2003.The issues identified by Employment Judge E Burns for determination at a public preliminary hearing were:
    - Whether the claimant's claim of unfair dismissal was presented in time;
    - Whether the claimant's discrimination claims were presented in time;
    - An amendment application made by the claimant.

## Evidence and findings of fact

22. On 6 July 2022, Mr Mannion, Operations Manager at the respondent, sent the claimant a letter about a sickness review meeting which the claimant had not

attended. Mr Mannion said that he had made a preliminary decision to dismiss the claimant:
'Please note that this decision has been made but will be left pending until Friday 8th July 2022 at 5 pm to allow you the opportunity to provide me with any written representation you may wish me to take into account in light of the above decision. If you do provide any submission then I may reconvene the meeting on Monday 11th July 2022 to discuss what you have provided, and you will be able to attend. Alternatively if you fail to respond, or you do not provide any written representation, or you provide something that is unsatisfactory, the dismissal decision will be confirmed early next week and all appropriate correspondence will be sent to you.'

23. On 12 July 2022, the respondent sent the claimant a letter of dismissal by email. The letter somewhat confusingly said: 'Your last day of service will therefore be today, Tuesday 9th July. You are entitled to 12 weeks notice of the termination of your employment. There is no requirement to serve your notice; you will therefore receive pay in lieu of notice together with any outstanding holiday pay up to the termination date; this will be paid to you on 12th August.' The letter also provided that the claimant had five working days to appeal the decision.

24. On 19 July 2022 the claimant's grounds of appeal against dismissal were submitted by the claimant. They had been drafted by Mr Robert-Ogilvy.

25. The claimant commenced Early Conciliation on 12 October 2022 and received his Early Conciliation certificate on 14 October 2022.

26. In the claim form submitted on 14 November 2022, the claimant's employment was said to have ended on 12 July 2022. There was no reference in the text to the claimant not having read the letter on that date.

27. On 3 April 2023, there was a case management preliminary hearing in front of Employment Judge E Burns. At that hearing, the Judge listed a hearing to consider the time issues. She recorded that the dismissal took place on 12 July 2022. On that occasion, it appears that Mr Robert-Ogilvy submitted that the effective date of termination was 12 August 2022, as that was when the claimant was paid holiday pay.

28. The claimant gave evidence in chief at this hearing without a witness statement. He very frankly told me that, because of the treatment he is on for physical and mental health issues, his memory is poor and he does not remember dates. He said that his wife created his email account and that she had the password for it. His wife would check his email on his phone. He had had two phones at one point but had lost one. The one he had lost was the one with WhatsApp messages on it.

29. My understanding of the claimant's evidence as to how he came to be aware of the letter of dismissal was that he thought Mr Robert-Ogilvy called him one Sunday; his wife came home late from work and he spoke to her. She read the email and then contacted Mr Robert-Ogilvy on a Monday. He did not know whether that contact was by phone or text.

30. Mr Feeny asked the claimant if he was paying Mr Robert-Ogilvy. The claimant said that he had made a payment to Mr Robert-Ogilvy at the outset and that, if the claimant won his case, Mr Robert-Ogilvy would receive 15 – 20% of his compensation. He had transferred some money to his wife for the initial payment; he was not sure how much. He believed that Mr Robert-Ogilvy was a lawyer. Mr Robert-Ogilvy had been recommended by a solicitor or solicitor's assistant whom his wife has spoken to.

31. Ms Bnaya's witness statement contained a great deal of commentary on the merits of the jurisdiction point and the advice Mr Robert-Ogilvy had given on that issue. To a large extent it mirrored the statement previously produced for her husband. She set out what were in effect submissions about whether the effective date of termination should be the point when notice would have expired / the date when her husband was paid for his notice, and further submissions about why it would be just and equitable to extend time for the discrimination claims if the claims were out of time. The critical paragraph of evidence was:

*I was aware that my husband had not in fact opened or read his email until Monday 18 July 2022 because given the severity of his illness I am well aware he does not frequently check his email and sometimes for days. In this case, I remember my husband telling me that his Representative had called him the day before, which I recall was a Sunday advising him to check his emails to look to see if the employer had written and that he knows things are difficult for him but that my husband should try and check. My husband then told me in the morning of 18 July 2022 that he checked the email on the same day (18 July 2022) and found in his email box that a letter dated 12 July 2022 had been emailed to him and that I should read it to him. I then translated the contents of the letter dated 12 July 2022 confirming that he had been sacked. At which point he called his Representative in my presence and they spoke and he told him he still had up until the following day 19 July 2022 to forward his appeal and that he would have it ready on 19 July 2022 and which he did*.

32. Ms Bnaya gave oral evidence that when she returned from work on the Sunday night (17 July 2022), she was tired. Her husband only told her the following morning that Mr Robert-Ogilvy had told him the previous day to check his email. She decided to check his emails and found the email with the letter of dismissal attached. She said that the claimant was wrong to think that it had been the evening before; he was on a high dose of antidepressants and did not remember things.

33. Mr Feeny cross examined Ms Bnaya on the WhatsApp messages passing between her (on her husband's phone) and Mr Robert-Ogilvy.

34. Ms Bnaya said that Mr Robert-Ogilvy had spoken to her about deleting the message which he had deleted prior to disclosure. Mr Robert-Ogilvy had told her that it was personal and did not need to be shown to the Tribunal.

35. Ms Bnaya was asked about the earlier letter from the respondent (on 6 July 2022) and whether she should have been expecting the letter of dismissal and

would therefore have been checking her husband's emails on 11 and 12 July 2022.

36. There was no clear answer to this question. Ms Bnaya said that sometimes she needs to read communications several times to extract all of the information. She said that she forwarded the email of 6 July 2022 to Mr Robert-Ogilvy.

37. Ms Bnaya said in answer to a question I asked that it had not occurred to her to forward her husband's emails to herself to ensure that important emails were not lost when he deleted emails.

38. Ms Bnaya said that Mr Robert-Ogilvy had told her husband and herself that he was not a lawyer. He had been recommended by a family friend. She did not know why her husband thought he had been recommended by a solicitor. She had paid Mr Robert-Ogilvy £200 for expenses such as photocopying and transport and time to write emails and this was for everything until the end of the case. She did not know where her husband got the information about Mr Robert-Ogilvy charging a percentage of the compensation.

39. Mr Robert-Ogilvy produced a letter of authority signed by or on behalf of the claimant on 11 February 2022 in which he instructed an organisation Mr Robert-Ogilvy is involved with named Justice Calls to conduct his employment dispute. This letter said: 'I have met Leonard of Messrs Justice Calls in conference and he has advised that he is neither a Solicitor nor Barrister and that he is a Legal Consultant / Employment Law Specialist with 25 years' experience in the employment law field."

## Submissions

Strike out

40. After the evidence was heard, Mr Feeny made an application to strike out the claims. Although he made some reference to rule 37(1)(c) and (e), his application centred on rule 37(1) (b). He submitted that the manner in which the proceedings had been conducted on behalf of the claimant was unreasonable.

41. Mr Feeny said that the deletion of the message, which Mr Robert-Ogilvy admitted, was unreasonable, as was the failure to disclose all of the messages which had been briefly shown to me at the previous hearing. The deletion in particular occurred after discussion with the claimant's wife.

42. Mr Feeny said that I should also draw inferences from those acts that there were other relevant WhatsApp messages and emails which had not been disclosed.

43. Mr Feeny submitted that a fair trial was not possible. There had not been a fair trial of the jurisdiction issue because of the withheld documents. Given the behaviour of Mr Robert-Ogilvy and the attitude towards disclosure, the Tribunal could have no faith that there would be a fair trial of the substantive issues.

44. Mr Robert-Ogilvy urged me to take a proportionate approach and not drive the claimant from the seat of justice. He denied that there was any breach of the disclosure order I had made, which he said was in any event not an unless order. He repeated his assertion that the documents were privileged. The messages deleted or not produced were private and not relevant to the issues. A far trial was still possible.

45. Both representatives went on to make submissions about the jurisdictional issue which I do not set out here, given my conclusions on the strike out application.

## Law

Strike out

Rule 37(1)(b)

46. This subrule provides that a claim or response (or part) may be struck out if 'the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent… has been scandalous, unreasonable or vexatious'.

47. In order to strike out for unreasonable conduct, the tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible; in either case, striking out must be a proportionate response — Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA:
*The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true ,merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him – though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.*

48. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must generally consider whether a fair trial is still possible: De Keyser Ltd v Wilson [ 2001] IRLR 324, EAT. Conduct such as deliberate flouting of a tribunal order can lead directly to the question of a striking-out order, however in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

49. In Bolch v Chipman 2004 IRLR 140, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

- before making a striking-out order under what is now rule 37(1)(b), an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings;
- once such a finding has been made, he or she must consider, in accordance with *De Keyser Ltd v Wilson* whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed;
- even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

50. In Emuemukoro v Croma Vigilant (Scotland) Ltd and ors [2022] ICR 327, EAT, Choudhury P said:
*I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzadis proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.*

*It was a highly relevant factor, as confirmed by the Court of Appeal in Blockbuster, that the strike-out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the respondents more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the respondents), then that leaves only the strike-out. The tribunal did not err in considering the prejudice to the respondents; indeed, it was bound to take that into account in reaching its decision.*

51. The EAT in Bayley v Whitbread Hotel Co Ltd t/a Marriott Worsley Park Hotel and anor EAT 0046/07 emphasised the importance of a tribunal clearly analysing whether a fair trial is possible. That was a case in which the

claimant's father, representing him, withheld portions of expert reports on the claimant's dyslexia. This had come to light during the full merits hearing:

*20. We are content to assume for present purposes that the Tribunal was entitled to find that Mr. Bayley senior's conduct in producing only "edited highlights" of Mrs. Pilkington's reports was not only wrong-headed (which Mr. Mulholland was very willing to accept) but constituted a deliberate decision to do something which he appreciated was wrong. We have some concerns about whether that finding may be too harsh, particularly in view of the factual errors identified at para. 13 above: cf. Mr. Mulholland's "point (c)". But we appreciate that the Tribunal had the advantage, which we have not had, of seeing Mr. Bayley senior in action over several days and of hearing him cross-examined. However, there is clear authority that even in a case of deliberate failures of disclosure the fundamental question for the Tribunal is whether a party's admitted conduct has rendered a fair trial impossible: see Bolch v Chipman [2004] IRLR 140, per Burton P. at para 55 (2) citing De Keyser Limited v Wilson [2001] IRLR 324 and Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167. A further authority to similar effect which was not cited to the Tribunal (it had been decided but not at that point reported) is Blockbuster Entertainment Ltd. v James [2006] IRLR 630: see per Sedley LJ at para. 5 (p. 633).*

*21. The Tribunal did indeed address that fundamental question, at para. 11.4 (see para. 17 above), and it held that a fair trial was not possible because of the impact of the withholdings on both the hearing which had already taken place on the issue whether the Claimant was disabled and on the hearing then in progress (though as we read it, it was the former on which it placed the greater weight). We do not believe that its conclusion in either respect is sustainable. We consider them in turn.*

*22.As regards the preliminary issue, we can identify nothing in the withheld portions of P and Q which could have had a significant bearing on the experts' assessment on the questions of whether the Claimant suffered from dyslexia to such a degree as to constitute a disability. That is entirely to be expected. Mrs. Pilkington believed that the Claimant was severely dyslexic. That appeared from her technical appendix, and unsurprisingly the omitted sections of P and Q were entirely consistent with that view. It is hard therefore to see how they could have affected the views of either expert – whether Mr. Snodgrass, who relied on Mrs. Pilkington's findings as stated in P1 and Q1, or (still less) Dr. Wilson, who had conducted his own assessment. Mr. Peacock was unable to point to anything in the full P or Q that tended to undermine the conclusions in P1 and Q1 that the Claimant was severely dyslexic. Nor, more importantly, could the Tribunal: it went no further than saying that it was "a matter of conjecture" (see para. 10.2.8 quoted at para. 18 (3) above) and that the omissions must have had "some impact" though it could not say how much (para. 10.2.12, loc. cit.). That is insufficient While we fully accept that it was unnecessary for the Respondents to show that the outcome would certainly have been different if the withheld passages had been available, it was necessary to show at least that there was a real chance that it might have been. Otherwise there is no injustice and no risk to a fair disposal of the issues between the parties.*

*23. As regards the reasonable adjustments issue, we have already expressed our view – in agreement with the Tribunal – that the withheld passages were potentially relevant, particularly because of the references to the Claimant's reluctance to accept that he needed help. But those passages were now before the Tribunal. They could be deployed in evidence and used as the basis of cross-examination. The only prejudice to a fair trial which Mr. Peacock was able to suggest was that the Respondents had decided not to seek evidence from Dr Wilson for the purpose of the reasonable adjustments hearing and that they might have taken a different decision if they had seen P and Q earlier. (This also seems to have been the point being made in the Tribunal in the garbled passage from para. 10.2.11 of the Reasons quoted at para. 18 (3) above.) We are unimpressed by this point. It is hard to see what Dr Wilson, from a specifically medical expertise, could have added to the points that could be made from P and Q themselves. But in any event the Respondents had had Q since June and had appreciated its significance since early September. If they had wanted to call Dr Wilson they had ample opportunity to do so.*

*24. Accordingly we believe that both the bases for the Tribunal's view that a fair trial was impossible are flawed. Even granted that Mr. Bayley senior had behaved deplorably, no irreparable damage had been done. We fear that the Tribunal allowed its strong (arguably over-strong) disapproval of the way that Mr. Bayley senior had conducted himself to obscure a clear assessment of what actual harm had been done*.

52. The Court of Appeal in Bennett v London Borough of Southwark [2002] EWCA Civ 223, dealing with a strike out for scandalous conduct, said that the Tribunal must consider: (a) the way in which the proceedings have been conducted, (b) how far that is attributable to the party the representative is acting for, and (c) the significance of the 'scandalous' conduct. Lord Justice Sedley said at para 31:

*…Secondly, what is done in a party's name is presumptively, but not irrebuttably, done on her behalf. When the sanction is the drastic one of being driven from the judgment seat, there must be room for the party concerned to dissociate herself from what her representative has done. A principal can always prove a want of actual authority, and I do not believe that the advocate's ostensible or implied authority, large as it is, extends (at least in the absence of ratification) to abusing the judicial process.*

And at para 41:

*There are plenty of lay representatives who afford real help to their clients and to employment tribunals, sometimes with the advantage of more and better practical knowledge than lawyers possess. But a further look may need to be taken at the power (or impotence as it at present seems to be) of employment tribunals to shut out representatives whose behaviour jeopardises both their own clients' cases and the proper functioning of this important segment of our system of justice. It is not satisfactory that the only sanction is to wait until the representative crosses the high threshold set by Rule 13(2)(e) and then to penalise not him but his client by striking out the case.*

Privilege

53. The Supreme Court has confirmed that legal advice privilege applies only to advice given by qualified lawyers; this includes barristers, solicitors, legal executives and foreign lawyers. Privilege also extends to employees such as secretaries, barrister clerks, trainees, pupil barristers and paralegals if they are properly supervised by a lawyer: R (on the application of Prudential plc and anor) v Special Commissioner of Income Tax and anor 2013 2 All ER 247, SC.

54. The Employment Appeal Tribunal has considered the position of legal advice given by employment consultants who are not lawyers. Such advice does not attract legal advice privilege: Trentside Manor Care Ltd and ors v Raphael 2022 EAT 37.

**Conclusions**

55. At the outset of my deliberations, I was very concerned that the claimant, who is a highly vulnerable litigant, was facing strike out of his claims essentially because of the way in which Mr Robert-Ogilvy was conducting the proceedings on his behalf. I had no reason to doubt that the claimant himself was being truthful with the Tribunal, insofar as he was able to remember matters or had been involved in them. However, I had significant concerns about his wife's evidence.

56. I allowed questions on the nature of the relationship between the claimant and Mr Robert-Ogilvy as that evidence might have been relevant to issues such as whether it had been reasonably practicable for the unfair dismissal claim to be presented in time and whether it was just and equitable to extend time for the discrimination claims. The evidence given and the discrepancies between the evidence of the claimant and that of his wife raised concerns. Having heard the evidence of the claimant and Ms Bnaya, it seemed to me that it was most unlikely that the claimant had plucked the notion that Mr Robert-Ogilvy was acting on some kind of conditional fee agreement out of thin air; yet his wife denied there was such an arrangement.

57. My understanding is that Mr Robert-Ogilvy does not fall within a category of individual entitled to charge fees for representation in the Employment Tribunal. Whilst Mr Robert-Ogilvy is not a lawyer, he has often represented parties in the Employment Tribunal and is familiar with at least much of the relevant law. He makes extensive reference to authorities and legal principles in written and oral submissions and no doubt conveys to his clients an impression of competence and experience. If there was some charging arrangement between Mr Robert-Ogilvy and a claimant, that is no doubt something he would not wish to be publicised.

58. The position I reached was this:
- I concluded that Mr Robert-Ogilvy deleted a WhatsApp message and suppressed other messages and emails in order to continue to pursue a case that the claimant had not become aware of the contents of the letter of dismissal until 18 July 2022. The deleted and suppressed documents would

have supported a conclusion that the dismissal letter had been read at an earlier date, a conclusion which even the messages which had been disclosed tended to support in any event. I did not accept that Mr Robert-Ogilvy believed these documents to be privileged (they were not) or that he genuinely thought they were irrelevant. I concluded that he deleted and suppressed them precisely because they were relevant but not helpful to the claimant's case.

- I concluded that the claimant's wife, Ms Bnaya, has given evidence in accordance with that case which she knows or ought to know to be incorrect.

59. This conduct is manifestly unreasonable. It is conduct of the proceedings on the claimant's behalf by both Mr Robert-Ogilvy and Ms Bnaya. It is impossible for me to tell to what extent the claimant is aware that the behaviour is inappropriate. The practical difficulty is that Ms Bnaya is the source of much of the evidence in the claimant's case and she appears to play a crucial role in his ability to participate in the proceedings, given his lack of literacy and his lack of fluency in English. It would appear to be wholly impractical for the claimant to distance himself from his wife's participation in the proceedings and there was no indication at the hearing that he was seeking to do so.

60. I had to ask myself whether it is possible to have a fair trial in circumstances where one party's representative does not have the confidence of the Tribunal in the sense that the Tribunal cannot have any faith that he will conduct a fair disclosure exercise or will otherwise deal properly with the Tribunal. On the last occasion, Mr Robert-Ogilvy had presented as the claimant's evidence a witness statement the claimant had played no part in producing. I have no confidence that Ms Bnaya's statement represents her honest evidence. It is possible that such a situation could be rescued in circumstances where a litigant distanced himself from these actions of his representative and ceased to use his services or where the Tribunal could be confident that the failure to disclose or other unreasonable conduct would not be repeated. Depending on the exact circumstances, it might be appropriate for the Tribunal to conclude that the conduct of the proceedings was not unreasonable since the claimant had not ratified the conduct of the representative or that a fair trial was still possible, since the claimant had dispensed with the services of the representative or indeed that strike out was not proportionate because there was some other step which could be taken to ensure a fair trial.

61. In this case, I had taken care to assure Ms Bnaya that there would be no adverse consequences to her or her husband of giving truthful evidence about the nature of the relationship with Mr Robert-Ogilvy. She nonetheless proceeded to give evidence which I considered was not truthful. This was an opportunity for Ms Bnaya to distance herself from the way in which Mr Robert-Ogilvy was conducting the proceedings but she did not avail herself of the opportunity.

62. In addition to the fact that I would have had to make a decision on the jurisdiction points on the basis of selective and unreliable evidence, I have no confidence that Mr Robert-Ogilvy will behave fairly in respect of future disclosure exercises. I considered whether the fact that it seems likely that the majority of the relevant documents on the substantive issues were in the hands of the respondent meant that it would be possible to have a fair trial in spite of

concerns about the handling of disclosure. It seemed to me that the concerns about the nature of the witness evidence could not be circumvented. I concluded that a Tribunal could have no confidence in witness statements prepared by Mr Robert-Ogilvy or the evidence of witnesses who had been advised by Mr Robert-Ogilvy.

63. I cannot see how there can be a fair hearing in these circumstances. I cannot see any order short of strike out which I could make which would enable there to be a fair hearing or which would be proportionate in the circumstances.

64. I have made the decision to strike out with extreme reluctance, fully conscious that it is a draconian step and acutely aware that in this case a very vulnerable litigant is being deprived of a hearing of his claims on the merits. Had the claimant come before the Tribunal without representation, he would have been assisted by the Tribunal hearing his claims to be so far as possible on an equal footing with the respondent, despite his lack of representation and his vulnerability. It is a matter of the utmost regret that his claims, whatever their merits may be, cannot be heard because of the conduct of the proceedings on his behalf. Over 20 years after Bennett, it does not appear that the Tribunal has any better sanction than strike out for cases like these.

Employment Judge Joffe
15/09/2023

Sent to the parties on:

15/09/2023

For the Tribunal Office: