EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms M Saveka	**v**	General Mills UK Limited

Heard at:	Reading	**On:** 26 & (in chambers) 27 September 2023
Before:	Employment Judge Anstis Mrs A E Brown Ms H T Edwards	

Appearances
For the Claimant: In person
For the Respondent: Mr O Lawrence (counsel)

RESERVED JUDGMENT

The claimant's claims are struck out.

REASONS

A. INTRODUCTION

1. In December 2021 and January 2022 the claimant was either (on her case) employed by the respondent or (on the respondent's case) engaged in negotiations to be employed by them.

2. Amongst other things, the claimant says that her dismissal in January 2022 (if that is what it was) was a result of her having made protected disclosures to the respondent in respect of the actions of her previous employer. There are related claims of whistleblowing detriment, victimisation and race discrimination in respect of the respondent's actions, along with money claims.

3. This is not intended as a complete description of the claimant's claims, which have been subject to amendment since her claim was first lodged.

4. Unfortunately whatever the underlying merits of the claim are, they have long been superseded by arguments between the parties concerning preparation for the hearing and the conduct of the claim and defence.

5. The tribunal was due to start a five day final hearing on 25 September 2023. This was put back by the tribunal to start on 26 September 2023.

6. On 22 August 2023 the respondent made an application to strike out the claimant's claim or for an unless order on the basis that she had failed to provide her witness statement by a revised deadline for statements (we understand the claimant had asked for an extension to 26 August 2023 which was granted to 21 August 2023). This was followed up by them on 14 & 21 September 2023. The regional employment judge directed that the respondent's application to strike out the claim should be heard at the start of the final hearing.

7. On the morning of the first day of the hearing (26 September 2023) the claimant submitted a lengthy application of her own (with supporting documents) which was, amongst other things, to strike out the respondent's response.

8. We took time before starting the hearing to read through the papers and to consider in what order we ought to approach matters. The claimant's application had included an application to adjourn the hearing and medical evidence she had provided (which was disputed by the respondent) suggested that she may not be fit to attend the hearing. In fact she did attend the hearing. She said this was against doctor's orders but was to avoid any suggestion from the respondent that she was not actively pursuing her claim.

9. We were concerned as to whether we could actually progress matters at all or whether we would have to adjourn the hearing and/or stay proceedings. This was particularly so given the claimant's health and our view that the respondent may require time to respond to the allegations made by the claimant in her application to strike out their response. However, both parties told us that they wanted us to consider both strike out applications on the day, and that is what we did. In the afternoon of 26 September 2023 both parties took us through their applications and their response to the other parties' application. By that time the respondent's application had been extended to include what they said was unreasonable or vexatious behaviour by the claimant, with her strike-out application said to be the most prominent example of that unreasonable and vexatious behaviour.

10. As well as agreeing that we should proceed to consider the strike out applications that day, perhaps the only other thing the parties agreed on was that a fair trial was no longer possible. However, the circumstances that had led to that, and the question of whose fault it was, were hotly disputed.

11. While applications to strike-out a claim or response could technically be dealt with by an employment judge sitting alone, a full tribunal had convened in

anticipation of the final hearing, and this is a unanimous decision of the full tribunal.

B. THE CLAIMANT'S STATUS AS A VULNERABLE LITIGANT

12. Medical evidence submitted by the claimant suggested that she had a number of serious mental health conditions. This evidence was not accepted by the respondent, but the respondent did concede that there had been earlier mention of at least one of these conditions. We have undertaken this hearing and made our decision on the basis that the claimant is a vulnerable party by reason of ill-health.

13. The question of any necessary adjustments was dealt with by EJ Skehan in the order resulting from the first preliminary hearing, where four adjustments are mentioned.

14. As at the hearing before EJ Skehan the claimant made an application to record the hearing. That is the subject of a separate order.

15. EJ Skehan mentioned breaks, and breaks were allowed where necessary in our hearing – particularly in the afternoon where much of the argument took place. With the benefit of these breaks the claimant was able to make her own notes during Mr Lawrence's submissions, and replied to his submissions.

C. THE RESPONDENT'S ORIGINAL APPLICATION

16. Since we were now at the point of a final hearing, the respondent's unless order application had fallen away, and we were left with their alternative application to strike out the claimant's claim. This was on the basis of the claimant's non-compliance with an order of the tribunal and on the basis that the claim was not being actively pursued. It was also said that it was no longer possible to have a fair hearing of the case. This was on the basis of the claimant's persistent failure to provide a witness statement. Even by the time of the hearing the claimant had not produced any witness statement.

17. It is correct that the claimant has not produced any witness statement, but there is nothing in a failure to provide a witness statement or witness evidence that means that a fair trial is no longer possible. In most cases the answer to this will be that the hearing proceeds in the absence of any evidence from the claimant. That is not necessarily an obstacle to justice. If the claimant has had a proper opportunity to produce evidence, but has not done so, a fair trial remains possible even if witness evidence is only heard from the respondent's side. Depending on the outcome of that hearing it may be that further sanctions are appropriate if, for example, it appears that a claimant has brought a claim with no intention of seeing it through to the end – but that does not mean a fair trial cannot be conducted and we do not grant the respondent's application to strike out the claimant's claim in its original form.

D. THE CLAIMANT'S APPLICATION AND THE DEVELOPMENT OF THE RESPONDENT'S APPLICATION

Introduction

18. On the morning of 26 September 2023 the tribunal was poised to hold a fair trial of the claimant's claim, albeit that this may have been without any witness evidence from the claimant.

19. Around 08:30 on the morning of 26 September 2023 the claimant submitted her application by email. As with other recent correspondence from the claimant it was from her email address but said to be "for and on behalf of" her, rather than prepared directly by her. The claimant said that she had had some assistance from friends with this (and other) preparation for the hearing.

20. The claimant's application runs to 165 paragraphs, supported by nine attachments.

21. There are three elements to the application: variation of case management orders, adjournment of the hearing and strike out of the response. In practice the focus of the hearing has been on the final application – to strike out the response. The claimant said that we should consider both her and the respondent's application to strike out the response and claim at this hearing. Variation of case management orders could only be relevant to the extent that either the claim or response survived the application to strike out.

22. In her application to strike out the response the claimant makes various startling allegations against the respondent and its solicitor.

23. This is not the first time that the claimant has mentioned such matters. It has been a theme of her dealings with the tribunal that the respondent or its legal representative had been making it difficult for her to pursue her claim. The point had been raised at an earlier preliminary hearing before me in March 2023 where I had said, in my written reasons:

> *"I invited the claimant to point me to what she was thinking of in saying that the respondent had bullied her since the hearing in February, but there was nothing in what she referred to that seemed to me to amount to bullying or undue pressure."*

24. It is, however, the clearest and most direct way in which the claimant has made her accusations.

25. In the introduction to her application the claimant talks of the respondent's "*tyrannical conduct*" and "*aggressive solicitor*". The claimant seeks "*immediate removal of the respondent and their abusive solicitor from the process in order to protect claimant's health and wellbeing from further harm*". Under the heading "*Respondent's Scandalous Conduct*" she says, "*the claimant's sudden loss of*

home in April 2023 was not just an unfortunately concatenation of circumstances, but in fact the fruits of the respondent's malicious interference in a bid to frustrate the claimant's ability to progress her claims". She says "*the respondent cunningly lured unsuspecting claimant to Ukraine right before the start of the war in 2022 and entrapped trusting claimant in a dangerous location in Ukraine in hopes of getting rid of the claimant forever*". She speaks of the respondent's solicitor having a "*clear goal to bludgeon poor claimant to death with excessive stress*", "*persistently and deliberately targeting claimant's mental health vulnerabilities*" and making "*incessant oppressive demands … with clear goal to lead vulnerable claimant to complete nervous breakdown*".

26. There is more to the application than that, but the basis of the application is clear: in an attempt to frustrate her legal rights, the respondent and its solicitor, in full knowledge of her health difficulties, have deliberately sought to harm her, including through having her evicted from her home. Rather than conduct litigation in a proper manner, the respondent's solicitor is accused of adopting tactics to frustrate the claimant's legal rights and deliberately to cause her mental and physical harm.

27. We do not think it can be disputed that if the claimant can make out these accusations such conduct by the respondent or its lawyers would amount to unreasonable, vexatious or scandalous conduct. It was also likely to mean that a fair trial was not possible and may well justify striking out the response.

28. Equally, it seems to us that if those accusations are not made with a proper basis, the making of such accusations by the claimant amounts to unreasonable, vexatious or scandalous conduct by her. If the respondent and its solicitors have conducted themselves properly they should be free to defend the claim without having to face such outrageous allegations. This is particularly the case with the respondent's solicitor, who faces an attack on her personal and professional integrity. There may be a middle ground, or an interpretation of matters that means that this is not required, but it seemed to us at the conclusion of the hearing that if the claimant's accusations were made out then we would be very likely to strike out the response, and if her accusations were without foundation we would be very likely to strike out the claim on the basis of her unreasonable, scandalous and vexatious conduct of proceedings. That was the basis on which the respondent's application developed during the hearing so that it was no longer just about non-provision of witness statements, but about the claimant's unreasonable, scandalous and vexatious conduct of the proceedings, of which, the respondent said, the current application was the best example.

29. Our task is now to determine whether the claimant's allegations are true and, if not, whether there is any basis for the claimant to make these allegations and, following that, what the consequences of the application should be. For these purposes we will look at the claimant's allegations under the headings she uses in her application.

Respondent's scandalous conduct

30. The claimant says (or it is said on her behalf):

> *"… it came to our attention that the claimant's sudden loss of home in April 2023 was not just an unfortunate concatenation of circumstances, but in fact the fruits of the respondent's malicious interference in a bid to frustrate the claimant's ability to progress her claims.*
>
> *As it has transpired, the respondent tracked down the claimant's physical location/residential address, found out the contact details of the property owner … and exerted influence on the claimant's … landlord to achieve claimant's sudden eviction in order to make her unable to continue with her claims altogether ...*
>
> *The Respondent intentionally tracked down and orchestrated Claimant's sudden eviction in order to upend the Claimant's entire life and make it impossible for her to provide her witness statement or continue with litigation at all …"*

31. If that is the case, it would be scandalous. However, we must say that we regard this suggestion by the claimant as being highly improbable. We have never heard of such a thing happening before, and while it is clear that any eviction would be unsettling and very difficult for the claimant we don't see how the respondent could have concluded that it was a way to make her unable to continue with her claims or to prevent her producing a witness statement.

32. The claimant says she has evidence showing this to be the case:

> *"We supply the notice of eviction from the claimant's former landlord on 25 April 2023 and the screenshot of the message from the landlord's Personal Assistant (Kath) with confirmation of the actual reason for the Claimant's eviction in evidence of the above."*

33. The claimant has produced a heavily redacted email from "Graham", dated 25 April 2023 saying:

> *"Dear Marina*
>
> *I am sorry to confirm that our accommodation at … will not be available to you with immediate effect …*
>
> *Tomorrow we will …*
>
> *This note has been copied, as you can see, to … so that the the Council is aware of this eviction."*

34. Alongside that is a WhatsApp message from "Kath" dated 17 July 2023 saying:

> *"I am sorry Marina, but I can't do that.*
>
> *I have told you in confidence what I knew about your eviction, but I am not getting involved in this matter...*
>
> *As I told you, as far as I know it was your former employer, General Mills, who influenced Graham to evict you. I am afraid I can't help you with this any further. This is between you and your former employer.*
>
> *I am sorry you lost your home. I truly do and sympathise with your situation, but I work for Graham and I don't want to lose my job as a result of this matter too. I have a family and I need to provide for them.*
>
> *I won't be testifying in respect of this. I have already put my job on the line only by telling you this information. Can't do more, sorry. I hope you will understand and treat this as confidential. Please don't tell Graham or anyone that it was me, who disclosed you about the reason of your eviction."*

35. The respondent denies any involvement in this. It is difficult to see what more they could do to counter it given that the first they knew of this allegation was the morning of the hearing.

36. We have considered this point carefully.

37. The claimant is making an improbable allegation against the respondent. It is both improbable that they intervened to secure her eviction, and improbable that any respondent could see this as an effective way of avoiding or ending the employment tribunal claim.

38. We have to consider what evidence there is that this occurred. It does not seem to be in dispute that the claimant was evicted, but no-one has given first-hand oral evidence about her eviction or the reasons for it. The claimant has produced a redacted email from someone for whom only the first name is given. While we could understand, for instance, the redaction of the email address of other recipients of the email, it is not at all clear why it is so heavily redacted. We also have a WhatsApp message from "Kath" of whom no details are given, and we have no other WhatsApp messages in the chain, though it appears clear that Kath is replying to a message from the claimant.

39. On the balance of probability, that is not sufficient to establish the improbable scenario the claimant seeks to establish – that a year into this litigation the respondent has taken steps to secure her eviction as a means of ensuring she is unable to continue with the litigation.

Harassment by unreasonably excessive correspondence

40. Between paras 50 and 51 of her application the claimant uses the heading "*harassment by unreasonably excessive correspondence*". The claimant

focusses on the period since May 2023, saying "*the respondent's solicitor has been constantly pestering and terrorising the claimant with excessive and unwarranted correspondence*" and "*the respondent's solicitor continued relentlessly bombarding the claimant with her unwelcome correspondence*". The claimant includes a screenshot of her email inbox with five emails across June and July highlighted. This extract shows twelve emails from the respondent's solicitor in the period 16 May – 14 September – approximately four months.

41. In litigation such as this we do not see any basis on which twelve emails in the four months leading up to a final hearing could be considered an excessive or oppressive volume of correspondence. On average it is less than one a week, with gaps of almost a month from mid-May to mid-June and late July to late August with no emails at all. We do not see any basis on which this could be said to be excessive in the context of litigation such as this. The claimant's suggestion that the volume of correspondence was "*clearly intentionally designed to put more stress and pressure on defenceless claimant already in distress in order to bludgeon her into dropping her claims or simply make her unable to pursue her claims because of ill-health*" is completely incorrect.

42. The claimant goes on to say that "*in the application of 3 June 2023 the claimant very clearly indicated that the earliest* [she] *might be able to provide her witness statement would be 26 August 2023*" and "*Hence, it was abundantly clear that the claimant was unavailable and would not be ready to supply a witness statement before 26 August 2023.*" The claimant is not in charge of the timetable for preparation for the hearing. The tribunal is, and the tribunal expects its orders to be followed unless or until varied. We do not consider that the claimant is any position to impose some sort of unilateral moratorium on correspondence from the respondent. This may well have been a difficult time for the claimant, but there is no justification for her suggestion that the respondent's solicitor has deliberately sought to damage her or her claim through excessive correspondence in this period.

43. It is not just the volume of correspondence that the claimant objects to, but the tone of the correspondence. However, there are no examples of improper tone cited by the claimant at paras 51-61 where she addresses the question of harassment by correspondence.

44. An exchange of correspondence that the claimant has objected to within this period is that from 15-16 May 2023, which she has included with her application. This concerns preparation of the tribunal bundle. The claimant takes the respondent's solicitor to task for failing to provide a bundle by 15 May 2023. She demands the inclusion of particular documents in the bundle and redaction of particular documents. In response, the respondent's solicitor refers to the order providing for (if necessary) a supplementary bundle, saying that she will include any disputed documents in the supplementary bundle. The claimant replies saying, amongst other things "*I do not understand why it is such a*

problem for you to include all the relevant documents in the final hearing bundle …". The solicitor replies by referring back to the case management order. We do not see anything improper in the solicitor's tone. It is, at least in this exchange, the claimant who writes at length and with accusations, not the solicitor, who responds with professional restraint.

45. We do not accept that there has been harassment of the claimant by correspondence – either in terms of volume or tone. There is no basis to this accusation by the claimant.

Harassment and personal data breaches

46. The claimant goes on to talk about the "*respondent's solicitor's penchant to persistently include immaterial random facts from claimant's biography and spitefully expose claimant's highly sensitive data and confidential documents in breach of its data protection obligations for the sake of causing claimant harassment, discomfort and embarrassment*".

47. This is about redaction of documents for the tribunal bundle, as referred to in the claimant's email of 15 May 2023. The claimant says that "*the respondent's solicitor still included unredacted documents exposing claimant's sensitive personal data, entirely irrelevant to the issues of the case, in the hearing bundle the sole purpose of spiting the claimant*". She says this is "*egregious and unreasonable defence*".

48. Unfortunately the claimant does not provide examples of this that we can refer to in the final bundle. Without that we cannot really take the point further, except to note that it is possible that there are unredacted documents in the bundle that may contain personal data in relation to the claimant. That is not unusual. Redaction of documents for employment tribunal hearing is a relatively new practice which has yet to gain universal adoption or a common understanding of what should and should not be redacted. However, even if this is the case the claimant has given no basis from which we (or the claimant) could conclude this was done "*with the sole purpose of spiting the claimant*".

Harassment – cyberstalking and breaches of privacy

49. The claimant says that "*in the next move to intimidate the claimant, the respondent hacked in claimant's social media profile and used that unauthorised access to claimant's private data to covertly monitor and stalk the claimant through her LinkedIn profile.*" This is described as "*scandalous and absolutely unacceptable conduct … a disturbing case of cyberstalking and … pure harassment … a breach of … human and privacy rights under the article 8 of ECHR.*"

50. Hacking into a social media profile seems to suggest that the respondent has obtained unauthorised access to log onto the system as if it was the claimant. However, later in her application is seems it is intended as a reference to the

respondent's reliance on a LinkedIn post or posts as showing that she was able to conduct business via LinkedIn at a time when she said she was unable to produce a witness statement. Other comments go on to explain how that post or posts came to be made, which is not necessarily relevant to the accusation of hacking. The claimant says "*as a result of the respondent's campaign of aggression, the claimant no longer feels safe to testify and continue the proceedings unless the respondent is removed entirely from the process*".

51. It is not really clear what has happened in this situation. The claimant points out that the respondent's solicitor is not a "1st degree" connection so would not see the relevant post. This suggests that the post was visible to "1st degree" connections but not beyond that. The most obvious implication of this is that someone who is a "1st degree" connection has passed on the material to the respondent. "Hacking", in the sense of impersonating the claimant or her access credentials, would not have been necessary to access these materials.

52. Reference to posts on LinkedIn or similar social media sites is commonplace by parties in employment tribunal proceedings, and it is common that this will be passed on from another connection rather than being seen first hand by one or other party. We see nothing in this to justify the claimant's accusation that there has been "hacking" or anything of that nature.

Persistent and flagrant non-compliance with the ET rules and orders

53. The claimant says "*it is impossible to have a fair hearing in September 2023 because of the respondent's persistent and flagrant noncompliance with … order and rules*". Each of the alleged failures is the subject of analysis by the claimant under individual headings, and we will do the same.

Concealment of relevant evidence

54. The claimant's point here is that there were relevant emails revealed in her DSAR (albeit possibly in an illegible form) that had not been disclosed by the respondent in the proceedings. She says that even in the DSAR response they had not been disclosed in full or in fully legible form, and they are not presently included in the tribunal bundle. Helpfully, the claimant gives an example of the one of the most significant of these – an email between two of the respondent's employees on 20 - 21 January 2022 with the subject line "*Offer Rescind – details Marina Saveka*". It is said that this showed that the claimant had accepted the respondent's offer, contrary to the respondent's assertions in its response. She includes a scanned copy of the relevant email and explains what she sees as its significance. She says (we think) that the reply to that has never been properly disclosed.

55. The respondent offered no explanation of why (if it was the case) these emails had not originally been disclosed. However, it was Mr Lawrence's case that on being made aware of the point by the claimant the respondent immediately offered to put the relevant material in the bundle or supplemental bundle. In

saying this, he points to the exchange of emails on 15-16 May 2023 where the claimant identifies the relevant materials, and the respondent appears not to object to their inclusion. Correspondence follows. The last email in that sequence if from the respondent's solicitor saying:

> *"Relevant documents which you have copies of*
>
> *As mentioned in our email below, if you identify any documents which you consider relevant to the legal issues in dispute (i.e. the issues to be determined at the Final Hearing) which are not already in the hearing bundles please supply a copy of the documentation and we shall include it.*
>
> *Relevant documents which you have no copies of*
>
> *If there are any documents which are not in your possession but which you consider relevant, please itemise the exact correspondence (i.e. Email from X to Y sent on [date] at [time]). I will then take instructions and supply a copy, if relevant and subject to disclosure.*
>
> *We note you have mentioned specific emails below, however please confirm your final list of items once you have reviewed the bundles."*

56. We take this to be a proper invitation to the claimant to identify any documents that she wishes to add to the bundle (supplemental or otherwise) or any documents she did considered necessary but did not hold. As appears from the respondent's letter of 14 July 2023 the claimant did not reply to that. We do not consider that any question of concealment of relevant evidence by the respondent arises.

Destruction of relevant evidence

57. The claimant's complaint in respect of this starts with the respondent not providing its witness statements as ordered on 21 August 2023. They were, in fact, provided on 21 September 2023, the Thursday before this hearing was due to start. The question of destruction of relevant evidence appears to relate to an email of 20 December 2021. This email was alluded to during Mr Lawrence's application, and it appears to be the respondent's case that the email was never sent and has been fabricated by the claimant. The claimant's position is that this email was sent to, and received by the respondent. She suggests that they have destroyed the received copy in aid of their argument that it was never sent and received.

58. Such a dispute is one which may have had to be resolved at the final hearing having heard proper evidence from both sides. We cannot conclude at this stage that the respondent has destroyed this document.

Failure to prepare agreed bundle and exclusion of relevant evidence

59. This relates back to the 15/16 May 2023 exchange, and (it seems) more.

60. Disputes between parties about what should and should not be in the bundle are commonplace. That can particularly be the case when one side is unrepresented and the other (represented) party has the responsibility for production of the bundle. The represented party may, rightly or wrongly, take the view that some documentation is not material or necessary for inclusion in the bundle. The unrepresented party may not share that view. We note that it is the claimant's position that the respondent "*is required to include all correspondence that has passed between the parties and the tribunal until the hearing date*". We do not accept that as a general proposition of law. In most cases such correspondence should not be included, or should be included only where a particular point arises from it. Similarly, the claimant is wrong to say that "*if a request for a particular document is made as part of SAR, that too must be included in the bundle alongside with the response*". A DSAR and tribunal litigation are completely separate processes. The claimant says that as a result of the exclusion of particular materials she "*was put at an extreme disadvantage and could not produce her witness statement*". We do not accept that.

Failure to supply witness statements on 21 August 2023

61. It is true that the respondent failed to comply with the order to supply witness statements on 21 August 2023, but it is equally true that the claimant did not produce a witness statement on that date. Witness statements are typically supposed to be "exchanged", but what happens when such mutual exchange is not possible is not the subject of any established law or practice. Sometimes a party will provide their witness statement on that date anyway, without exchange. Sometimes they will not provide it at all. Sometimes they will provide it later subject to certain conditions. We do not think the respondent can be criticised for not providing its witness statement on a date when the claimant did not provide a witness statement either.

Failure to prepare chronology and cast list on 4 September 2023

62. There is nothing to this. The respondent did not provide the chronology and cast list on the appropriate date, but that is utterly trivial and of no significance compared to the broader problems with the claim.

The medical evidence

63. In support of her application, the claimant has submitted four pieces of medical evidence. As we understand it, all or almost all of these would not have been seen by the respondent before the morning of the hearing.

64. That medical evidence is the most remarkable medical evidence any member of the tribunal had ever seen in the context of tribunal litigation.

65. This is not because of the diagnoses given, but because of the extent to which the various medical practitioners are prepared to criticise the respondent's conduct.

66. The earliest document is from a SHO, dated 15 May 2023, is the most moderately phrased evidence.

67. A "fit note" dated 26 July 2023 contains the following in the narrative section under "comments, including functional effects of your condition(s)":

> *"We are extremely concerned about the detrimental impact of Marina's former employer's oppressive conduct on her mental and physical health. Due to the reported bullying; Marina's health has rapidly declined in the past months and she is in a very poor state. The recent incidents of employer's solicitor's harassment have been particularly damaging. Marina is very upset and feels threatened by respondent's cyber-stalking. She is objectively and subjectively very depressed, very tearful, she cannot concentrate and cope with situation.*
>
> *We request to urgently introduce "no contact" rule with the other party and/or remove them entirely from the process to protect Marina's health. Following recent incidents, we also do not think Marina would be able to recover and feel sufficiently well to be able to participate in the hearing in September 2023."*

68. A letter from the claimant's GP dated 13 September 2023 contains the following:

> *"We are extremely concerned about Marina's health and the impact her employer's violent conduct is having on her … no amount of medication or therapy is going to help if she is being constantly subjected to such unreasonable amount of pressure and stress on a daily basis ...*
>
> *The impact of her former employer's abusive conduct and persistent harassment by the employer's solicitor are highly injurious to her health and dangerous to her life. The situation has reached a critical point and it is no longer tenable to continue like that. It is quite literally killing Marina. Therefore, we are writing to request support from the tribunal with regard to complete contact ceasing from the previous employer and their entire removal from the process, if possible, in order to protect Marina's health.*
>
> *We would also like to request to the tribunal to debar the employer from cross-examining Marina. We believe this would inevitably only cause severe harm to her health."*

69. A further letter dated 15 September 2023 includes the following:

> *"Due to the nature and severity of her current symptoms that are triggered and perpetuated by the other party, we are kindly requesting to make an adjustment during the court proceedings to remove them from the process, to avoid any form of contact with her employer's solicitor and to forbid the other party from being able to cross-examine Marina in order to protect her health. In our opinion, if these protective measures are not implemented, it is going to cause further harm to her health. We think any further contact with the other party is going only to exacerbate Marina's health conditions."*

70. We have already indicated that the letters suggested that the claimant was not fit to participate in the hearing today, but (again as previously noted) having attended today the claimant wanted us to go ahead and consider the strike-out applications.

71. Suggestions from medical professionals about adjustments to be made to facilitate an individual's participation in tribunal proceedings are, of course, very welcome – but what is remarkable in this case is the terms in which the medical professionals express themselves. The GP speaks of "*her former employer's abusive conduct and persistent harassment*" being "*dangerous to her life*" and "*quite literally killing Marina*". The fit note talks of "*employer's solicitor's harassment*" and "*cyberstalking*". It is not at all clear what the medical professionals were told by the claimant had been happening because, as set out above, the claimant's account of harassment and cyberstalking has not been made out at this hearing.

72. Mr Lawrence challenged this medical evidence, with it being the respondent's position that it had been at least altered if not entirely created by the claimant.

73. General references by Mr Lawrence to typos in the documents or formatting inconsistencies were not persuasive, but his references to consistent grammar difficulties across letters written by apparently different people ("*due to employer's unreasonable behaviour*" or similar phrases, rather than "*due to her* [or the] *employer's unreasonable behaviour*") and the use of similar or identical unusual language ("*remove them from the process*") were more successful in casting doubt on the medical evidence. As stated above, we have considered these letters also in the light of our experience of never having seen such direct accusations being made against an employer in any medical evidence.

74. To the extent that this medical evidence is relied upon by the claimant as showing that the respondent (or its legal representatives) have been harassing or otherwise misbehaving towards her, we do not accept it. The doctors give no source of their information, and no explanation as to exactly what behaviour on the part of the respondent or their solicitor has given rise to these difficulties. As set out above, having been through the underlying evidence relied upon by the claimant, we do not see that there has been any improper behaviour by the respondent or its solicitor.

DISCUSSION AND CONCLUSIONS

The law

75. Rule 37(1) provides that:

> *"At any stage of the proceedings … a tribunal may strike out all or part of a claim or response on any of the following grounds:*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of* [a party] *has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these rules or with an order of the tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*

76. While both parties' applications ranged across the full spectrum of points (a)-(e) the points which are most significant in both parties' applications are (b) and (e), and it is those we will consider.

77. Neither party made any particular submissions on the law. It seems likely that both considered the plain wording of rule 37 to be sufficient to determine their applications, and, of course, Mr Lawrence had had to revise his application during the hearing on the basis of the claimant's application. We have, however, taken some time to remind ourselves of the correct approach to the question of striking out a claim or response.

78. Although arising in a somewhat different context, the jurisdiction to strike out a claim or response has recently been considered by HHJ Tayler in Smith v Tesco Stores Limited [2023] EAT 11. In that case the argument was only that the claim (not the response) should be struck out, but any references to the behaviour of a claimant in the extracts quoted below must be taken to equally apply to the behaviour of a respondent (or their representative).

79. At para 33 he refers back to the overriding objective, and the requirement for the parties to further the overriding objective and to co-operate with each other and the tribunal. He continues:

> *"36. The EAT and Court of Appeal have repeatedly emphasised 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, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.

37. *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.*

38. *In Bolch Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.*

39. *This approach was adopted by the Court of Appeal in Blockbuster Entertainment Ltd v James, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated:*

"This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."

40. *In considering proportionality the Court of Appeal noted:*

18. 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.

41. In Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167 it was held:

55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court.

42. Choudhury J (President) made a very important point about what constitutes a fair trial in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327:

19 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] 2 BCLC 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 Kohanzad's 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."

80. We must first consider whether the conditions for striking out the claim or response have been established, and in considering this it is likely that r37(1)(b) and (e) should be considered together. If the conditions have been established, striking out remains a matter of discretion to be exercised as, effectively, a last resort if no other remedy or sanction is appropriate. It may be in some cases that the appropriate response is to strike out part, not the whole, of a claim or response.

The claimant's application

81. For the claimant's application to succeed requires her to show that the respondent (and/or its representative) has behaved scandalously, vexatiously or unreasonably, and that that has rendered it no longer possible to have a fair trial.

82. It is clear from our findings of fact that the claimant has not done that. Despite the strength of her feelings on the point, the allegations she makes against the respondent and/or its representatives are largely if not entirely baseless. Where there may be something to them (for instance as in redaction of documents for the bundle) the claimant has sought to draw unwarranted and grossly exaggerated conclusions from that.

The respondent's application as developed in the hearing

83. We have set out above why the respondent's original application could not succeed – but the application as developed during the hearing is a different matter altogether. It relies almost entirely on the claimant's strike out application. The respondent's argument is that making the serious allegations the claimant has made without any proper basis is the latest and most serious example of unreasonable (perhaps scandalous and vexatious) conduct of the litigation by the claimant. It has made a fair trial impossible and should lead to the striking out of the claimant's claim.

84. The first point to make is that we do not accept any general proposition (nor do with think it was argued by the respondent) that a failure by a claimant to justify allegations of improper behaviour by a respondent should automatically lead to some sort of reverse strike-out. It is not inherently unreasonable, scandalous or vexatious to make allegations that are ultimately found by the tribunal to be not made out.

85. But we are in very different territory here. Even making allowance for a degree of rhetorical hyperbole the claimant has expressed herself in the most extreme terms. The essence of her strike out application was that the respondent and its representative were actively seeking to harm her physical and mental health, going so far as to ensure her eviction from her home and (to take wording from the medical evidence she submitted) endangering her life. On analysis we have found no proper basis for such accusations. An unrepresented claimant may not know of the norms and typical practices encountered in preparing an employment tribunal claim, but even making allowances for that we can see no justification for the claimant's accusations.

86. This is not the first time that accusations of this nature have been made without any proper basis. The claimant has stuck to her accusations after hearing the explanations and counter-arguments made by Mr Lawrence.

87. We have no doubt that the claimant's behaviour in making such unwarranted and unjustified accusations against the respondent and its representative is unreasonable, scandalous and vexatious.

88. Where, then, does that leave the prospect of a fair trial?

89. The respondent and its solicitor are now faced with continuing to defend a claim from a claimant who has made the most extreme accusations against them, without any justification. Even given the duty of co-operation it is often the case that parties (and their representatives) have to accept a degree of conflict and difficulty in preparing for a hearing – but what has occurred here is of an entirely different magnitude to the normal friction of litigation. The respondent's solicitor has faced extensive unwarranted accusations affecting her personal and professional integrity, including that she had a "*clear goal to bludgeon poor claimant to death with excessive stress*". The respondent has faced accusations that it has gone so far at to secure the claimant's eviction.

90. We do not consider that a fair trial can take place in the aftermath of such extraordinary and unjustified accusations. There has been no suggestion that the claimant's behaviour will change. The strike out application is simply the culmination of lesser accusations previously made by the claimant. The respondent's legal representatives will be conducting the litigation in the shadow of and under threat of what further accusations they may be subject to by the claimant. Witnesses called by the respondent at any final hearing are liable to be subject to questions from the claimant about, for instance, her eviction. We do not consider that any party should be expected to litigate under these conditions. The claimant's baseless accusations amount to unreasonable, vexatious and scandalous conduct that have rendered a fair trial no longer possible.

91. In those circumstances it seems to us that a strike out of the claim must follow. We do not see any realistic alternatives. This is not a case in which failure to prepare for a hearing could be dealt with by, for instance, an unless order. There is no part of the claimant's claim that could be struck out by itself without the respondent still having to face the claimant at a final hearing. Costs sanctions would not address the underlying problem. We have decided that this is an appropriate case in which to strike out the whole of the claimant's claim.

Employment Judge Anstis
Date: 29 September 2023

Sent to the parties on: 11 October 2023.

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For the Tribunals Office