Case No: 1301557/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr D Masih

Respondent: Mitie Ltd

Heard: By Cloud Video Platform – Midlands West

On: 28 September 2023

Before: Employment Judge Faulkner (sitting alone)

Representation: **Claimant** - in person
Respondent - Mr R O'Dair (Counsel)

PUBLIC PRELIMINARY HEARING - JUDGMENT

1. The Claim does not stand struck out for failure to comply with an Unless Order made by Employment Judge Maxwell dated 23 June 2023.

2. The Respondent applied to strike out the Claimant's Claim on the ground that the manner in which the proceedings have been conducted by the Claimant is unreasonable. That application is refused.

3. The Respondent's applications to strike out the Claimant's complaints on the basis that they have no reasonable prospect of success will be considered at a continuation of this Preliminary Hearing, details of which have been notified to the parties separately.

4. A Case Management Order has also been provided to the parties separately.

REASONS

This Hearing

1. The purpose of this Hearing was to consider the Respondent's application to strike out the Claim in its entirety for non-compliance with an Order of the Tribunal, alternatively on the grounds that the manner in which the proceedings have been conducted by the Claimant is unreasonable. I will refer to this as "the Conduct Application". The Claimant attended in person. I had not appreciated until just before the Hearing began that he would do so. I therefore attended remotely, by video, as did Mr O'Dair.

2. On the day prior to the Hearing, the Respondent's solicitors submitted a further application by email, which they said was supported by a 20-page skeleton argument. That application was to strike out certain parts of the Claimant's complaints on the basis that they have no reasonable prospect of success, the effect of which the Respondent says would be to dispose of the whole Claim, alternatively for deposit orders on the basis that the same parts of the Claimant's complaints have little reasonable prospect of success. I will refer to this as "the Merits Application".

3. To understand both the history of the case as important context to the Conduct Application (there have already been several Preliminary Hearings) and the substance of the case as important context to the Merits Application, I read prior to the Hearing most of the first 170 pages of the bundle of documents provided by the Respondent. This was as it happens the same bundle as would have been used for the Final Hearing. The Respondent's skeleton argument was not available to me (it is unclear why) until re-sent by Mr O'Dair after the Hearing had started. The Claimant had provided a document of his own to the Tribunal the day before the Hearing which he confirmed he wanted me to read. He also asked that I read a further document he had submitted on 12 June 2023 and his lengthy chronology. I read all of this material before hearing from the parties substantively, with the exception of the chronology – see below.

4. In addition to this reading, it was also necessary for me to clarify the basis and scope of the Merits Application in an initial discussion with the parties. As a result of the need to undertake this preparatory work, I was not able to start hearing the Applications until after lunch. I determined that we should proceed as follows:

4.1. I would hear the Conduct Application and the Claimant's response to it.

4.2. I would then hear the Merits Application and the Claimant's response to it, together with any evidence the Claimant wished to give in relation to his financial means in connection with the applications for deposit orders.

4.3. My decision on both Applications would have to be reserved.

4.4. I made clear that I had not read the Claimant's chronology, as to do so would have taken up yet more hearing time, but undertook to do so at the relevant time before making any decision to which it related.

5. I began therefore by hearing both parties' submissions on the Conduct Application. We then turned to the Merits Application. As it turned out, it was not possible to complete hearing the parties' submissions on that in the time available, addressing as it does eight separate issues, which (taking each in turn) I had first to discuss with Mr O'Dair, then explain to the Claimant and then elicit his response. I therefore arranged a further Public Preliminary Hearing and informed the parties that I would reach my decision on the Conduct Application before that further Hearing took place. If the Conduct Application succeeded, the Merits Application would be rendered unnecessary, and the further Hearing could be cancelled. If it did not, as has turned out to be the case, the Merits Application would continue to be heard at the further Hearing.

6. I am hopeful that the Merits Application can be dealt with to a conclusion comfortably within a further day, including time for me to deliberate and deliver oral judgment. Reflecting further on the Merits Application since this Hearing, I have of my own volition made some Case Management Orders requiring confirmation of certain matters by the Respondent before the further Hearing takes place. They are set out in a Case Management Order sent to the parties separately.

7. This Judgment therefore deals solely with the Conduct Application. Page references below relate to pages in the bundle.

Background

8. It is not necessary for me to set out any of the background facts on which the Claim and Response depend, or indeed any detail of the substantive complaints. Accordingly, it has not yet been necessary for me to read the Claimant's chronology, though I will do so before the next Hearing. It is however necessary for me to set out some detail of the history of the case to date. As I say, there have already been several Preliminary Hearings.

Employment Judge Camp, 29 September 2022

9. The record of this Hearing is at pages 48 to 68. Amongst other things, Employment Judge Camp fixed the ten-day Final Hearing starting on 18 September 2023, an ADR Hearing (as it was then known) for 23 June 2023, and a Preliminary Hearing for 21 December 2022 to consider the Respondent's applications to strike out complaints on the basis that they had no reasonable prospects of success, alternatively for deposit orders.

10. At paragraph 56 of his Case Management Summary (see page 55), EJ Camp recorded that in view of various comments made in a document attached to the Claim Form, he had explained to the Claimant the following:

10.1. "*Making allegations of 'institutional racism' against the Respondent does not help his case, because what he is alleging is that specific individuals mistreated him because they personally were racially prejudiced*".

10.2. "*Evidence that the Claimant was good at his job is not relevant to his claim about dismissal, because he was not dismissed for being bad at his job in general terms but for specific alleged acts of misconduct*".

10.3. "*Evidence from other security companies about how they would have treated the Claimant in connection with his email of 30 November 2021 (see paragraphs 43 and 44 of the details of claim) is not relevant because the Tribunal has to decide whether the respondent acted as a reasonable employer might have done and is the expert in this area*".

10.4. "*Similarly, expert evidence from Baroness McGregor-Smith (see paragraph 42 of the details of claim) about race and racism in the workplace will not be allowed at the final hearing*".

10.5 "*What EMR [the Respondent's client for whom the Claimant was working] thought of the Claimant and of his email of 30 November 2021 is not relevant either. They are not his employer, and the Tribunal has to look at his employer's actions and judge them by the standards of the reasonable employer, not from the point of view of the employer's client*".

11. There was no general Order for disclosure of documents at this stage, given that EJ Camp's focus was on the preparations for the Preliminary Hearing on 21 December 2022 and the ADR Hearing on 23 June 2023.

Employment Judge Webb, 21 December 2022

12. At the Public Preliminary Hearing on 21 December 2022, Employment Judge Webb dismissed the Claimant's disability discrimination complaints, and his complaints of protected disclosure detriment, all related to events in 2016 and his grievance in 2020 – see pages 78 to 79. This was on the basis that they had been presented outside of the statutory time limit and EJ Webb's decision that time should not be extended.

13. The Case Management record is at pages 80 to 93. EJ Webb refused the Respondent's application for deposit orders in respect of the remaining complaints – of unfair dismissal and protected disclosure detriment – on the basis that at their highest they could not be said to have little reasonable prospect of success. As for the complaints of race discrimination related to events in December 2021, the Claimant was ordered to provide further information. EJ Webb produced a refined list of issues consequent on the strike-out decision (pages 88 to 92).

14. The Claimant sought to challenge the decisions of EJs Camp and Webb. EJ Camp refused to review his Case Management Orders; I have seen a copy of the letter setting out that decision. EJ Webb dismissed the Claimant's reconsideration application; I have not seen that decision.

Employment Judge Maxwell, 23 June 2023

15. On 2 February 2023 (page 106), the Respondent's solicitors made an application to strike out the whole of the Claim, because they said that the manner of the Claimant's conduct of the proceedings was scandalous, unreasonable, or vexatious and he had failed to comply with EJ Webb's Order to provide particulars of how he had been discriminated against in December 2021.

16. EJ Camp made an Unless Order in relation to provision of those particulars, which was set out in a letter sent to the parties on 22 March 2023 (that letter was

not in the bundle). The Claimant provided two further documents on 31 March 2023. As the Respondent asserted that he had still failed to produce what was required, the ADR Hearing was converted to a further Preliminary Hearing, dealt with by Employment Judge Maxwell.

17. EJ Maxwell's decision is at pages 109 to 125. He determined as follows:

17.1. The Claimant had partially complied with EJ Camp's Unless Order, and as a result his complaints of race discrimination were now as specified at paragraph 43 of EJ Maxwell's decision (page 121).

17.2. No part of the Claim should be struck out for non-compliance with Tribunal Orders.

17.3. It was appropriate to make several further Unless Orders, related to various preparatory steps for the Final Hearing.

18. The relevant Unless Order for my purposes was that at paragraphs 54 to 57, which read as follows (emphasis original):

"*54. By **21 July 2023** the Respondent must send the Claimant copies of all documents relevant to the issues listed in the order of EJ Webb of 21 December 2022, as amended by this order.*

*55. By **28 July 2023** the Claimant must send the Respondent copies of any other documents relevant to those issues. This includes documents relevant to financial losses. If the Claimant has no such documents, then he must inform the Respondent of this …*

57. If the Claimant fails to comply with this order for disclosure, then his claims will stand dismissed in their entirety in accordance with rule 38 of the Rules of Procedure".

19. The context in which EJ Maxwell made this Order is set out at paragraphs 49 to 51 thereof, which read:

"*49. Whilst it is not appropriate to strike out today, I do have real concerns about future compliance by the Claimant. The criticism made of the Claimant's conduct by Ms Akers [counsel for the Respondent] was fair. Much of his default appears to have been deliberate. The Claimant is an intelligent man. He has read the orders made and chosen not to comply because he does not agree with them. Rather than devoting time and effort to providing the particulars ordered, instead he sought to challenge previous rulings of the Tribunal's jurisdiction and the scope of his claims. When he did provide information, he did not address himself to that which had been ordered or limit this to the period he was permitted to pursue. Notwithstanding it has been made abundantly clear to the Claimant that he can only pursue his complaints about the process followed from December 2021 which resulted in his dismissal, he has sought to provide information about events going back to 2014. He does this, even though his applications for reconsideration and variation have been refused.*

50. If the Claimant continues in this fashion, then he risks being struck out in the future for non-compliance or unreasonable conduct. If the Claimant wishes to

pursue the claims he has been permitted to, then he must abide by rulings and comply with orders of the Tribunal.

51. Given my concerns about the Claimant's attitude and the risk of future noncompliance, it is appropriate that I make unless orders with respect to his case preparation obligations".

Correspondence after Hearing on 23 June

20. As pages 126 to 132 show, the Respondent's solicitors provided documents to the Claimant as ordered. The Claimant requested multiple links from them to upload his documents in return. He was asked how many documents he intended on disclosing, reminded that complaints prior to December 2020 had been struck out and directed to the live list of issues. He replied on 26 July 2023 (pages 127 to 128) referring to (if I have understood him correctly) having previously reported security guards to the Respondent in relation to matters for which (he said) they were not dismissed, whilst he was dismissed for something similar. He added that there were grave health and safety issues from the start of his employment which in his view were not time-barred.

21. On 26 July 2023, the Respondent's solicitors wrote to the Tribunal (page 126). It was said that the Claimant had provided 178 documents, many going back several years and including a school report. It was asserted that this represented a total disregard of EJ Maxwell's Order, because it had been clear that the Claimant was to disclose documents relevant to the issues that had been set out by EJs Maxwell and Webb. This was the Conduct Application, seeking to strike out the Claim in its entirety because of failure to comply with EJ Maxwell's Order and/or because of unreasonable conduct.

22. There was evidently further correspondence from the Respondent's solicitors on 24 and 25 August 2023, which I have not seen, though in part at least it sought a postponement of the ADR Hearing. This was refused by Regional Employment Judge Findlay, who directed that a letter be sent to the parties on 29 August 2023 (pages 150 to 151). In addition to refusing the postponement application, in part the letter read (emphasis original):

"*The claimant was directed to send the respondent, by 28 July 2023, copies of any additional documents (other than those already supplied to him by the respondent) which are relevant to the issues listed in the order of Employment Judge Webb dated 21 December 2022 … If the Claimant wishes to rely on the excluded documents, he would have to place them in date order in a file and page number them, provide an index and provide 5 copies to the tribunal hearing the case. The tribunal at the final hearing will decide if any of those documents are admissible, all other directions must be complied with as set out in Judge Maxwell's order*".

23. In response, on 7 September 2023 (page 152) the Respondent's solicitors wrote to the Tribunal as follows:

"*It's the Respondent's position that of the 178 documents lodged as part of the Claimant's disclosure, 127 of those are not relevant to the legal issues to be addressed at the final hearing. The remaining documents are either duplicates of*

what was already included in the Respondent's bundle, or new relevant documents and therefore, added to the final hearing bundle".

24. On the same day, in a separate email, the Respondent's solicitors informed the Tribunal that the case was not ready for the Final Hearing, attributing this to the Claimant's failure to comply with case management orders (pages 152 to 153).

Employment Judge Meichen, 8 September 2023

25. The next Hearing was to be for ADR (by then, DRA) on 8 September 2023, before Employment Judge Meichen and to be held by video. EJ Meichen's record of that Hearing is at pages 158 to 161. Unfortunately, he was not told until it was too late that the Claimant had attended in person. Neither the Claimant nor EJ Meichen can be criticised for that. Naturally, no dispute resolution discussions could take place, nor could EJ Meichen deal with the Respondent's strike out application of 26 July 2023.

26. He did however make several Case Management Orders for the Final Hearing which was now only ten days away. He noted:

"*The respondent's main concern as expressed to me today is that the claimant has disclosed a large number of documents which the respondent considers to be plainly irrelevant, but the claimant is apparently insisting on relying on them, despite guidance from the Tribunal. Helpfully however the respondent has already compiled a bundle of the documents which it disputes (headed "Excluded Documents"). Mrs Amir [for the Respondent] also helpfully explained that the final hearing bundle (i.e., the bundle containing the documents disclosed where relevance is not disputed) is ready to be sent to the claimant*".

27. EJ Meichen ordered that there would be two bundles for the Final Hearing, that the Tribunal hearing the case "*may decide what to do about the disputed documents bundle*" and stated that, "*The respondent may raise its application for strike out/non-compliance with unless orders made on 26 July 2023 at the start of the final hearing and the Tribunal hearing the case may decide what to do about that*". In an email to the Tribunal on 11 September 2023 the Claimant said that he had disclosed his school report to demonstrate that he has had a stammer for a long time, so that the Tribunal would not doubt his credibility if he stammered when giving oral evidence.

28. On 15 September 2023, the Final Hearing was postponed by the Tribunal at the direction of Employment Judge Flood. It had been due to last for ten days commencing on 18 September 2023. The correspondence on the Tribunal's file shows that there had been some concerns about whether a judge could be found for the Hearing, but the reason for postponement was stated in the letter to be that it was converted to a public preliminary hearing to deal with the Respondent's strike out application. Mr O'Dair accepted however that the postponement was not the responsibility of the Claimant. It does not appear that either party requested it.

Law

29. I make no apology for adopting parts of EJ Maxwell's summary of the relevant law in relation to unless orders and the striking out of claims for non-compliance with Tribunal orders or unreasonable conduct. I add other references to case law as relevant.

Unless orders

30. Rule 38 of the Employment Tribunal Rules provides, so far as material:

"*(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred*".

31. Where non-compliance is alleged, the task of the Tribunal is not to revisit the Order or to assess whether there should be relief from the sanction of dismissing the claim or response (or part). Its task is to look at the terms of the unless order itself, look at what has happened and decide whether that complied with the order or not – see **Uwhubetine v NHS Commission Board England [2019] UKEAT/0264/18** in which the Employment Appeal Tribunal ("EAT") said that the test to be applied is whether there has been material non-compliance, that being a qualitative rather than a quantitative test. The EAT added that there is no particular process that must be followed in the event of alleged non-compliance. What matters is whether the Order has been complied with or taken effect. Where there has been non-compliance a written notice must be issued under rule 38 and the party in question be given an opportunity to apply for relief from the sanction of their Claim (in this case) being struck out.

32. I would also note the judgment of the EAT in **Hamdoun v London General Transport Services Limited and another [2015] UKEAT/0414/14** in which the EAT stated that a "strict approach has to be taken to the automatic effect of a strike-out order. Because it requires no further consideration of a Tribunal before the effect is as stated it will be, in the event of non-compliance, there can be no such automatic termination of a claim for the failure to adhere to the spirit or the intention of an order: the failure is a failure to observe the letter of the order".

Striking out

33. So far as material, rule 37 of the Employment Tribunal Rules provides:

"*(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;

(c) for non-compliance with any of these Rules or with an order of the Tribunal …

(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing".

34. Guidance on strike out orders was given by the Court of Appeal in **James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA**. The Court said:

"*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 …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 takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing*".

35. The Court continued, "*It is common ground that … striking out must be a proportionate measure … It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 [of the European Convention on Human Rights] that striking out, even if otherwise warranted, must be a proportionate response … The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact, if it is a fact, that the tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination*".

36. Default with respect to Tribunal orders will not automatically result in a strike out therefore, and the Tribunal must consider whether there may still be a fair trial or whether the default in question means that the proceedings cannot be conducted satisfactorily – **De Keyser Ltd v Wilson [2001] UKEAT/1438/00**, in which the EAT noted the importance of considering the seriousness of the default.

37. Mr O'Dair cited two further authorities on these issues, both concerned with applications for relief from the sanction of striking out a claim for failure to comply with an unless order. In **Thind v Salvesen Logistics Ltd UKEAT/0487/09 (13 January 2010, unreported)** the EAT said in the course of its judgment that there is an important interest in employment tribunals enforcing compliance with unless orders, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible. In **Governing Body of St Albans**

Girls' School v Neary [2010] IRLR 124 the Court of Appeal said that it is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy.

Submissions

38. Mr O'Dair said in his written and oral submissions that the task before me was not to consider whether the Claim stands struck out for failure to comply with EJ Maxwell's Unless Order, but rather to consider whether it should be struck out for unreasonable conduct or because it is no longer possible to have a fair trial. I will return to that below, but note here that as a result his written submissions focused entirely on rule 37. He submitted that whilst it might be said that firm management by the Tribunal as to the relevance of the Claimant's additional documents and at the Final Hearing generally will allow the case to proceed fairly, the Claimant's conduct of the disclosure process is another example of unwillingness to accept the Tribunal's rulings.

39. He also submitted, by reference to the overriding objective at rule 2 of the Employment Tribunal Rules, that the Final Hearing is likely to be disproportionately long, that the only documents truly relevant are small in number (pages 218 to 289) and yet the case has been listed for ten days. He says it is likely to be extremely slow-moving and to include repeated attempts by the Claimant to litigate irrelevant matters, reminding me that a fair trial is one which can be fairly conducted without disproportionate expenditure of time and resources both on the part of the Tribunal and of the other party (here the Respondent). In oral submissions, Mr O'Dair drew attention to paragraph 7 of the document submitted by the Claimant just before this Hearing in which the Claimant said, that the Respondent "has no defence as to prevent [the] Tribunal's consideration of evidences relating to the full tenure of Claimants employment". He submitted that the firm hand taken by the Tribunal to date has not worked.

40. The Claimant gave his submissions by my putting to him each of Mr O'Dair's main points and seeking his response. He said that Baroness McGregor-Smith's report is relevant because, as the Respondent's former CEO, she is best able to give a view on its culture. As to documents related to the competence of some of his former colleagues, he said that they were relevant to his alleged protected disclosures. He also said they were relevant to the fairness of his dismissal in the way I have indicated above, namely that the Respondent had behaved inconsistently in dismissing him when it had not dismissed those colleagues and/or when he had repeatedly raised concerns about colleagues with the Respondent's client in the past without the Respondent taking any action against him. He did not think that ten days would be sufficient for the Final Hearing. He was prepared to accept, after being asked more than once, that it will be for the Tribunal panel at the Final Hearing to determine what is relevant documentary or other evidential material.

Conclusions

41. Notwithstanding the position taken by Mr O'Dair, it is right that I begin with the question of whether the Claimant has failed to comply with EJ Maxwell's Unless Order related to provision of documents, such that a notice should be issued under rule 38. If he has failed to do so, partially or otherwise, the Claim stands struck out. That is how unless orders work.

42. I can deal with this point briefly. What the letter of the Order required was that by the specified date the Claimant send to the Respondent any other documents (that is, other than those the Respondent had sent to him) relevant to the issues as set out by EJ Webb, or otherwise inform the Respondent that there were no such documents. Based on what I have been told, it is clear that the Claimant sent the Respondent what he had that was relevant. The Respondent itself accepts that, telling the Tribunal in terms on 7 September 2023 that the Claimant had sent it some new relevant documents which would be added to the bundle.

43. What I have to consider is whether, as the Respondent says, the Claimant failed to comply with the Order because he also sent some possibly irrelevant documents together with, it must be said, some obviously irrelevant documents, such as the Baroness McGregor-Smith review of racism in the workplace. For completeness, I should also consider whether sending the Respondent some documents it had already sent to him constituted non-compliance with the Order, though I add that this was not something contended for by Mr O'Dair.

44. I am in no doubt that, as unnecessary and unhelpful as it may have been (at least in part), the Claimant did not fail to comply with EJ Maxwell's Order by doing either of those things. What the Order required was for him to send the Respondent relevant documents and the warning part of what EJ Maxwell said was that if he "*failed to comply with this order for disclosure*" his Claim would be dismissed. The Order was therefore an order to make disclosure. It did not say – and I make clear that I would not have expected it to unless the matter had been specifically canvassed with EJ Maxwell by the Respondent – that if the Claimant sent irrelevant or duplicate documents his Claim would be stand dismissed, or any such wording. The Order was to send relevant documents. As I have said, the Claimant did not fail to do so. He did not fail therefore to comply with the letter of the Order. His Claim does not stand dismissed for failure to comply with it.

45. I turn to the separate question of whether the Claim should be struck out because by disclosing the additional documents, combined with his earlier conduct of the case, the Claimant has conducted the proceedings unreasonably. Essentially, I have to consider first whether he has conducted the proceedings unreasonably and if so, secondly, whether a fair trial is still possible, taking account of any prejudice occasioned to the Respondent by any such conduct.

46. I have recorded the history of the case to date above. What can be extracted from that is that the Claimant failed to comply with the Order for particularisation of his Claim (EJ Maxwell said he ignored it, so that this was in effect deliberate), then provided particulars beyond what was permitted. I do not go behind or beyond what EJ Maxwell said about this, namely that "*if the Claimant continues in this fashion, then he risks being struck out in the future for non-compliance or unreasonable conduct*". Clearly implicit in that comment was a conclusion that the Claimant had not yet reached that threshold. He has now provided to the Respondent documents over and above what is going to be relevant for the Tribunal to consider. The decision for me therefore is whether that takes the Claimant over that threshold into unreasonable conduct of the case.

47. Whilst like EJ Maxwell I have some concerns about the Claimant's conduct, which I will return to below, in my judgment the way in which he disclosed documents falls short of rendering his conduct of the case unreasonable up to

this point. The Court of Appeal in **Blockbuster** described unreasonable conduct as deliberate and persistent disregard of required procedural steps, which was also the wording used in **Neary**. I do not think we have reached that point. As I have said, the Claimant complied with EJ Maxwell's Unless Order. The Respondent's complaint is that he went beyond it. I do not think that the way in (and the extent to which) he did so can be described as deliberate disregard of the required procedural step, with the possible exception of his persistence in seeking to rely on Baroness McGregor-Smith's report.

48. I have noted what EJ Maxwell said about the Claimant being an intelligent man and that EJ Camp explained for the Claimant the irrelevance of some of the matters he referred to in the document attached to the Claim Form, including the McGregor-Smith report. I also have to take into account however the fact that he is not legally represented, the difficulty many litigants-in-person have in appreciating the difference between the task of pleading their case and the task of producing evidence to support it, and the misunderstanding that often arises as to what evidence will or will not be deemed relevant. Baroness McGregor-Smith's report is publicly available, but I have not seen the other disputed documents. I have however have been shown an index of them. Based on that index, some of the documents could relate to the way in which other security staff were treated in relation to matters similar to that which led to the Claimant's dismissal and/or they may relate to similar ways in which the Claimant had previously conducted himself which had not led to his own dismissal. In other words, they may be relevant to the question of consistency of treatment. As to the school report, whilst it is highly unlikely to be relevant, the Claimant has provided an explanation of why it was disclosed which is understandable coming from a litigant-in-person.

49. In this context, the disclosure of one obviously irrelevant document – the McGregor-Smith report – and the disclosure of some other documents which may not be relevant is not sufficient to take the Claimant over the threshold of what constitutes unreasonable conduct. It would in any event plainly be disproportionate to strike out the Claim, given that it is clear that it is still – at this stage – possible to have a fair trial. I note the following:

49.1. Whilst as I say, I have not seen the disputed documents themselves, I can see from the index that they run to 326 pages. Baroness McGregor-Smith's report takes up almost 100 of those pages. EJ Camp has already said that the report will not be considered at the Final Hearing, and so unless the Claimant can identify a material change in circumstances which means EJ Camp's decision in that regard should be reviewed, neither the Respondent nor the Tribunal will have to pay any attention to it. To avoid any doubt, I record that I agree wholeheartedly with EJ Camp. I cannot see how a report on workplace racism in the United Kingdom generally has anything of relevance to say in relation to this case, regardless of the author's previous association with the Respondent.

49.2. I do not say that the balance of the disputed documents is negligible, but I cannot see how it materially prejudices this large employer Respondent, professionally represented as it is, to have to review this material and reach a conclusion as to whether any of it needs to be addressed. In fact, it seems clear that it has already determined it can be ignored.

49.3. I cannot ignore either that how the documents should be dealt with has already been addressed by the Regional Employment Judge and EJ Meichen, namely by the compilation of a separate bundle. That is what has been done.

49.4. Preparations for the Final Hearing appear to be concluded, so that the case is ready to be heard. We are effectively therefore in an analogous position to that in **Blockbuster**, such that striking out would be an exceptional step at this stage. What is really put in issue by the Respondent is the conduct of that Final Hearing and its length.

49.5. It will be for the Tribunal panel at the Final Hearing to determine what is relevant evidence and what is not. If the Claimant refers to documents in the disputed material, the panel can make clear whether it will have any regard to it. In my estimation, that is not likely to add materially to the length of the Final Hearing.

49.5. In any event, as the Employment Tribunal Rules empower it to do, the panel can timetable how long parties will have to question witnesses, to give their own evidence and to make submissions. This will include directing the Claimant, or indeed any witness, away from points that the panel is not interested in hearing about.

49.6. If the Claimant refuses to co-operate with the panel in the ways indicated above, the power to warn him of the possibility of striking out his Claim, and then to do so if he persists, remains an option for the Tribunal throughout the Final Hearing, subject of course to proper consideration of lesser sanctions and alternative options.

49.7. The case is not yet re-listed for the Final Hearing. I will re-list it at the next Hearing for what I deem to be the required length, having heard both parties on the point, based on the material I have seen and in particular the list of issues as defined by EJs Webb and Maxwell.

50. The Respondent's application is therefore refused. In summary, I am not satisfied that up to this point, the Claimant's conduct of the case has crossed the line to become what could properly be regarded as unreasonable and even if it had, it would plainly be disproportionate to strike him out.

Next steps

51. Notwithstanding that conclusion, I repeat what EJ Maxwell stated to the Claimant, namely that he will be at risk of another such application, and at risk of it being granted, if in the lead-up to the Final Hearing (including at the next Hearing before me) and/or at the Final Hearing itself he refuses to properly consider and accept or otherwise disregards what he is directed or required to do by the Tribunal. In concluding this Judgment, I draw his attention to the following:

51.1. For the reasons already given, the report of Baroness McGregor-Smith will not be considered by the Tribunal at the Final Hearing. It is not relevant to the Claimant's complaints.

51.2. It will not be acceptable for him to insist on reciting parts of his employment history if the Tribunal panel at the Final Hearing makes clear that it is not relevant to the issues it has to decide.

50.3. It is not and will not be satisfactory for him to simply say that everything is in his chronology. He must understand what his complaints are and what issues (or questions) the Tribunal at the Final Hearing will have to decide. The list of issues in relation to unfair dismissal and protected disclosure detriment are at paragraph 58, sections 1.1 to 5.12 of EJ Webb's decision at pages 88 to 91, and in relation to his complaints of race discrimination they are at paragraph 43 of EJ Maxwell's decision at page 121. It is those issues to which all evidence given at the Final Hearing – including the Claimant's – must be directed.

52. The question of the Respondent's application to strike out the Claim in its entirety on the basis that key elements of it have no reasonable prospect of success will be considered at the resumption of this Hearing, as separately notified to the parties.

Note: This was in part a remote hearing. The Claimant attended at the Tribunal Hearing Centre and the Respondent remotely. The parties did not object to the case being heard in part remotely. The form of remote hearing was video.

Employment Judge Faulkner
Date: 13 October 2023

Note

All judgments and written reasons for the judgments (if provided), apart from those under rule 52, are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.