EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Bye	**v**	Amey Services Limited

Heard at: Cambridge **On:** 5 and 6 October 2023

Before: Employment Judge Tynan

Appearances
For the Claimants: In person
For the Respondent: Mr G Graham, Counsel

PRELIMINARY HEARING IN PUBLIC
RESERVED JUDGMENT

1. The Claimant's claim is struck out pursuant to Rule 37(1)(b) of the Employment Tribunal Rules of Procedure 2013 because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.

REASONS

1. The Claimant claims that the Respondent discriminated against him on grounds of disability and that he was subjected to detriment and dismissed because he made protected disclosures. Whilst the claims are denied in their entirety by the Respondent, it is not now in dispute that, at the relevant times, the Claimant was disabled within the meaning of section 6 of the Equality Act 2010, by reason of attention deficit hyperactivity disorder ("ADHD"), bipolar effective disorder, anxiety and depression; the Respondent disputes that the Claimant meets the statutory definition of disability by reason of autism/autistic spectrum condition, post-traumatic stress disorder ("PTSD"), grief and/or deafness/hearing impairment. The Respondent's position in this regard is set out in its email to the Tribunal dated 22 December 2022.

2. The Respondent has applied for the Claimant's claim to be struck out pursuant to Rule 37(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013. The Rule provides:

> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (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 the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) …"

3. The grounds for the Respondent's application were originally set out in its letter to the Tribunal dated 15 March 2023 (pages 170 to 173 of the Respondent's Bundle), though supplemented by further grounds set out in its further letter to the Tribunal dated 3 October 2023 (pages 370 to 373). In summary, as regards Rule 37(1)(a), the Respondent refers to comments by the Claimant on 1, 2 and 3 March 2023, repeated in his initial written submissions in response to its application, which it contends are to the effect that he has no real interest in the outcome of the proceedings but instead has brought a claim for essentially scandalous and/or vexatious reasons. As regards Rule 37(1)(b), the Respondent relies upon the Claimant's allegedly threatening and intimidating conduct towards three of the Respondent's employees on 2 March 2023, two of whom are potential witnesses in these proceedings. Following an earlier hearing on 5 September 2023, the application under Rule 37(1)(b) is additionally pursued with reference to the Claimant's allegations of professional misconduct against Mr Graham and his instructing solicitor, Ms Watson.

4. The Claimant is unrepresented in these proceedings, though he instructed solicitors to advise him as to the merits of bringing the claim and to draft his Claim Form and Particulars of Claim. The Respondent has not challenged the Claimant's evidence, supported by disclosure of what would otherwise be legally privileged communications, that he only authorised the solicitors to issue the claim on his behalf once they had advised him that he had reasonable prospects of success; furthermore, that he specifically instructed them to proceed on the basis that nothing that could be considered vexatious should be included within the claim.

5. On 2 November 2022 the Claimant wrote to the Respondent's solicitors to advise that he was representing himself. He was responding to correspondence between solicitors in which the Respondent's solicitors had raised concerns with his solicitors that he had emailed the Respondent's Chief Executive about the case notwithstanding solicitors were instructed. In his email to the Chief Executive, the Claimant had urged her/the company not to rely on key parts of its defence, otherwise

she/the company could "expect a bump in the road or two" (page 382 of the Respondent's Bundle).

6. The Claimant was accompanied by his brother at both of the hearings before me. He described his brother as a moderating influence. I suspect that the Claimant's brother had some hand in his closing submissions, the tone of which were in marked contrast to how the Claimant otherwise conducted himself over the course of three days.

7. The Claimant, who gave evidence at the hearing, adopted his 86-page written submissions document, which he had prepared for the earlier hearing on 5 September 2023, as his evidence in connection with the strike out application. It is a well-structured document, albeit somewhat repetitive and often tendentious, which evidences that the Claimant is an intelligent individual who is capable of grappling with complex legal issues and setting out his arguments in a structured way.

8. I also heard evidence from the Claimant's former line manager, Kevin Coulthard, who had made a witness statement. It was necessary for Mr Coulthard to return to Tribunal and be recalled to give evidence when the Claimant called into question the timing of an abusive comment he had directed at Mr Coulthard outside the Tribunal hearing room on 5 October 2023. I return to this below.

9. There were effectively two Hearing Bundles available to me. The Respondent's Bundle runs to 505 pages. The Claimant's Bundle is not paginated, though likely runs to several hundred pages; it is neatly arranged in tabbed sections. I was not referred to the Claimant's Bundle by either party in the course of the hearing.

10. In addition to the statements and documents, the Claimant requested that we listen to a six minute recording of a conversation between himself and Mr Coulthard on 8 April 2022. The conversation followed on from a Teams meeting the previous day during which the Claimant had allegedly challenged a colleague in an aggressive and abrupt way. The recording forms a small part of what the Claimant says are over 100 hours of covert recordings he kept of conversations with Mr Coulthard. I did not explore with the Claimant when or why he first started recording their conversations, though given the number of hours involved, and the relatively short time he worked for the Respondent, it seems likely that he began to make recordings at an early stage in his employment with the Respondent.

11. In his submissions document, the Claimant makes extensive, repeated reference to the Respondent's alleged lies and "gerrymandering". I observe that the document is long on assertion and somewhat short on facts in this regard, a point I also made following the hearing on 5 September 2023 when, I drew the Claimant's attention to comments by Cockerill J in King and others v Stiefel and others [2021] EWHC 1045 (Comm), when she struck out an unlawful means conspiracy claim

against a law firm, four solicitors and a QC which was "structurally fatally flawed, abusive and lacking in pleadable substance". One of the limited specific matters relied upon by the Claimant in his submissions document in support of his contention that the Respondent is lying and has committed perjury is the audio recording just mentioned. He refers to it as "unequivocal evidence of the Respondent's lying, fabrication and persistent deceitfulness". In his witness statement in connection with the strike out application, Mr Coulthard describes his conversation with the Claimant on 8 April 2022 as "fairly disjointed and erratic". In a letter to the Claimant dated 22 June 2022, setting out her findings on the Claimant's grievance, Emma Anderson, Principal Technical Compliance Manager, said the conversation on 8 April 2022 had descended "into an emotional and heated discussion about personal issues". In his evidence at Tribunal, Mr Coulthard could not recall whether that was how he had described the conversation to Ms Anderson at the time. Her description of the conversation evidently informed the Respondent's Grounds of Response in these proceedings, which also refer to the call as having become heated and emotional (see paragraph 9 of the Particulars). In the Claimant's mind and in his submissions, this has become an allegation that he was heated and emotional on 8 April 2022 (paragraph 478 of his submissions document). He considers that the Respondent's lies are therefore exposed by the audio recording, a point he continued to press at Tribunal. When I pointed out to the Claimant, more than once, that the Respondent's pleaded case would seem to be more nuanced than he suggests, the point was lost on him.

12. In any event, for the same reasons Employment Judge Freeney gave at the preliminary hearing on 1 March 2023, the question of what was said on 8 April 2022, including any relevant context and whether the conversation could reasonably be said to have been "disjointed and erratic" and/or "emotional and heated", is not suitable for determination at a preliminary hearing. Whilst I make no findings in the matter, having listened to the recording, I do not think it can be said that Mr Coulthard's description or perception of the conversation is unarguable.

The medical evidence relied upon by the Claimant

13. At the hearing on 5 September 2023 I ordered that by 26 September 2023 the Claimant was to identify and disclose to the Respondent any additional medical evidence intended to be relied upon by him on the issue of why he may have acted as he did on 2 March 2023 when he emailed three of his former colleagues. Amongst other things, the Claimant had stated in paragraph 241 of his submissions document that his emails had been "affected by but not limited to the Claimant's: medication-induced confusion (Quetiapine, for bipolar), including making him feel "spaced out", with his anxiety causing him excessive day-time tiredness arising from sleeplessness, lack of concentration, anxiety, panic attacks, impulsiveness, anger and outbursts." The Claimant's subsequent disclosure was seemingly not limited to this issue. Nevertheless, the Respondent erred on the side of caution by including

much of the Claimant's disclosure within its updated Hearing Bundle. When I explored this issue further with the Claimant at Tribunal and asked him to identify any documents that he felt might shed further light on his conditions and their effects, he asked me to have regard to two letters from his GP dated 22 August and 13 September 2023 (pages 501 and 486 to 489 of the Respondent's Bundle), a short report from his counsellor, Roslyn Poole dated 21 August 2023 (Page 495) and a more detailed report prepared by Dr Fernandez-Egea of Cambridge Psychiatry dated 18 September 2023 (pages 503 to 505).

14. The Claimant's GP's letter of 13 September 2023 confirms that the Claimant's prescription of Quetiapine, which is to treat his bipolar effective disorder and anxiety, has increased over the past year from 175mgs daily to 350mgs daily. In closing, the Claimant said that his current medication regime is proving ineffective, but that he hopes to have a more effective regime in place in the coming months so that his conditions and their effects are better managed by next June when the Tribunal is due to hear the claim over 15 days. Although this issue was not raised or addressed in the Claimant's 86-page submissions or otherwise in the course of his evidence, I note the recommendation in Dr Fernandez-Egea's report that a more targeted treatment plan for the Claimant's anxiety would see his prescription of Quetiapine reducing to 300mg daily, whilst his Citalopram prescription would increase from 20mg to 30mg daily.

15. Ms Poole, who has seen the Claimant for twelve sessions of face to face counselling, identifies in her report that the presenting issue predominantly concerns the loss of the Claimant's son, who was tragically killed in a road traffic accident on 22 May 2022, and the impact which this has had upon the Claimant's personal and functional life. She notes in her report that the Claimant has reported "racing thoughts, confusion, anxiety, difficulties in sleeping and poor concentration". She also states that the Claimant has reported complex neurodiverse, mental and emotional health issues that add significant layers of challenge and concern to his grief issue. In his letter of 22 August 2023, the Claimant's GP likewise refers to the Claimant struggling with considerable emotional and psychological difficulties, though he does not elaborate further as to how these difficulties manifest.

16. The Claimant was referred to Cambridge Psychiatry, with the main goal of devising a treatment plan for his anxiety. In the background section of his report, Dr Fernandez-Egea confirms that the Claimant has been formally diagnosed with ADHD, anxiety and bipolar disorder, the latter diagnosis in 2021 apparently having come about due to episodes of poor energy, high impulsivity and anger outbursts. Dr Fernandez-Egea has questioned the diagnosis, something the Respondent would very likely not have anticipated when it conceded disability by reference, amongst other things, to his bipolar disorder. In his report, Dr Fernandez-Egea makes no mention of autism spectrum condition or PTSD.

17. It is unfortunate that the Claimant did not ask Dr Fernandez-Egea to address the question of why he might have acted as he did on 2 March 2023, or his behaviours more generally, particularly given they met just a few days after the hearing on 5 September 2023 during which I explained to the Claimant that I would want to consider whether any conduct of his may have been as a result of his disability. However, I appreciate that the Claimant's meeting with Dr Fernandez-Egea was with a view to identifying a treatment plan for his anxiety rather than for the purposes of securing a medico-legal report.

18. I have found it helpful to have regard to Appendix B of the Equal Treatment Bench Book, specifically the section regarding ADHD which notes that some experts believe the following symptoms are typical of ADHD in adults:

- Inability to focus.
- Difficulty keeping quiet and speaking out of turn.
- Blurting out responses.
- Often interrupting others.
- Quick temper.
- Inability to deal with stress.

This is not a full list of the typical symptoms detailed in Appendix B, rather they are consistent with certain behaviours I observed in the course of the hearings on 5 September and 5 and 6 October 2023. I also take note of the following observation in Appendix B:

> "The consequence of inability to focus can be, unless a person is listening to a Judge to explain procedure or focus on cross-examination questions, entirely different thoughts on an entirely different subject uncontrollably interpose".

19. Appendix B contains a relatively short section on mental ill-health which does not address specific mental health conditions, including those which are conceded in relation to the Claimant. There is also a section in Appendix B regarding autism spectrum condition which I am already familiar with, though have re-read. I have been unable to identify any section of the ETBB that deals with PTSD.

20. Whilst the Claimant did not refer to or rely upon any other medical evidence during the hearing, in re-reading his GP's letter of 13 September 2023 in coming to this judgment, I have come across a report from Richard Holborn, Consultant EDMR Psychotherapist and Counselling Psychologist dated 22 December 2022 (pages 490 and 491 of the Respondent's Bundle). Mr Holborn states in his report that the Claimant commenced therapy with him in February 2021, that he has attended approximately 70 therapy sessions and that he was progressing "exceptionally well" until he experienced the loss of his son. The Claimant was apparently referred to Mr Holborn for treatment of Complex Post Traumatic Stress Disorder relating to childhood trauma. Although

the Claimant did not refer to, or seek to rely upon, Mr Holborn's report during the hearings before me, and accordingly was not cross examined on it, nevertheless I think it important in the interests of justice that I note the following observations by Mr Holborn:

> "It is not uncommon for undiagnosed ADHD adults, such as Ian, to have experienced traumatic personal experiences in childhood as ADHD in children is often met with harsh or unfair retribution from adults and peers. These experiences in early years have created an intolerance for perceived "unfairness" resulting in an adult who can be bluntly honest, unswervingly fair in their perception of how things should run and may struggle to accommodate other people's perceptions. These effects are part of Ian's day to day life experience and have been long term impacts for him. During our work together, Ian has given a number of examples where he has seen or experienced dishonest or disingenuous behaviour and has suffered from his inability to not name these behaviours or call out the perpetrators. This has greatly affected his career.
>
> If someone with Ian's combination of presenting issues and previous life experience feels put upon or bullied they are likely to be outspoken about it and to struggle to not respond in a manner which could be reactive. If you combined an acute response to grief I feel that Ian could be experienced as both defensive and reactive."

The preliminary hearing on 1 March 2023 and the Claimant's subsequent actions

21. On 1 March 2023, Employment Judge Feeney conducted a case management preliminary hearing, the record of which is at pages 49-61 of the Respondent's Bundle"). Although the case management summary evidences that a number of issues arose during the hearing which required careful management, including a request by the Claimant for a hearing to consider striking out the response, there is nothing on the face of the summary to indicate that the Claimant's conduct of the hearing had given rise to any specific concerns. Under the heading of 'Reasonable Adjustments', Employment Judge Feeney noted that the Claimant would need regular breaks during any future hearings. The Judge also discussed with the Claimant whether it might be preferable for the case to be heard by CVP, albeit the Claimant's stated preference was for in-person hearings. Whilst this was seemingly the extent of any adjustments required for the Claimant, as I shall return to, the Claimant presented before me as someone with potentially more complex needs.

22. Although this is not documented within the case management summary, it seems that the Respondent indicated on 1 March 2023 that it would be calling the Claimant's former Line Manager, Kevin Coulthard to give evidence at the final hearing, as well as another former colleague, Paul Birch. Certainly in the case of Mr Coulthard, this would not have come as any particular surprise to the Claimant since he had alleged in his Particulars of Claim that Mr Coulthard had bullied him after he disclosed to Mr Coulthard on 7 April 2022 that he had PTSD. Mr Coulthard was

also the recipient of an email from the Claimant on 8 April 2022 entitled, "Peace or war? It's up to you", referred to by Mr Silvey in his letter terminating the Claimant's employment.

23. The Claimant emailed Mr Coulthard at 5.40 pm on 2 March 2023, namely the day after the case management preliminary hearing. The email was entitled 'Your turn'. The Claimant wrote as follows:

> "Kevin, you've caused my family incredible stress, anxiety and upset, for a year now. I cannot let you get away with that. As you know, I give back 10 x what I receive. Now it's your turn. I have a recording of everyone of our 1-2-1s, Tom's Teams call of 8th April, your call to me that evening of 8th April (you should hear yourself), and much, much more (of you, Philippa, Catherine etc), including you saying to me: your "more than happy" with the way I am conducting myself (attached); that Dale and Philippa are not good to work with; that Tom has a blind spot for Karen; and you're working on him to get rid of her and much, much more. I will be asking Amey's new owners to fire Tom and you for gross misconduct – lying in internal disciplinary proceedings and lying to an employment Tribunal, to try to save your own skins, throwing a direct report that you have a legal duty to care for under the bus whilst he was grieving, following child-loss… THAT IS GROSS MISCONDUCT. I don't care if I lose, so long as world knows what Tom and you are like. I have a journalist lined up to cover the 15 day hearing. Now, Tom and you you [sic] have a year to think on your lies, before justice finds you."

24. Later the same day, at 10.04pm, the Claimant forwarded his email to Mr Birch and another former colleague, Michael Burgess, with the following message:-

> "Fyi
> I'm coming for you all".

25. I am in no doubt whatever that the emails were perceived by the recipients as threatening and intimidating, further that it was entirely reasonable for them to be perceived by them in that way. The Claimant asserts that they simply feel unnerved because they have been caught lying and now have to explain their lies to the Tribunal (paragraph 390 of his submissions document). As I shall return to, throughout the hearing, the Claimant was unapologetic for having sent the emails. He said more than once during the hearing that he regards them as appropriate communications within a legal process. He says the Tribunal should be minded instead to think about the effect of the Respondent's lying upon his mental state. His views find various expression in his submissions document, including for example in paragraphs 248, 386, 468 and 512, in which he states:-

> "The Claimant felt explaining to the Respondent his intention to continue to hold the Respondent to account through due process was the only

> remaining option open to him, the Claimant needed to talk freely and explain points …"
>
> The Respondent had every opportunity to limit its costs, publicity and other consequences of legal action, but it wilfully chose not to do so."
>
> "The Claimant would not have sent the three e mails the Respondent claims are vexatious, had the Respondent's witnesses not lied about the Claimant's conduct."
>
> "In line with legal precedent, these six wilful liars should be found to have perverted the course of justice"

Other conduct of the Claimant

26. The Claimant's emails of 2 March 2023 are not the first time that the Claimant has written in inappropriate terms to the Respondent's employees. In an email to Mr Coulthard dated 18 April 2022, he wrote:

> "I have a plan, as you would expect from me. … I understand how things must be done for maximum effect and protection. So to be clear, I urge you to de-escalate the situation and confirm in writing we can get back on an even keel, doing so before 5pm Wednesday 20th April as my next actions will commence the following day and Friday this week. You said I "really went for it" in my note to Tom. This was nothing compared to what may come next. But this is up to you……" (page 298 of the Respondent's Bundle)

In my judgement, it is beside the point, as the Claimant has sought to emphasise in his submissions document and in the course of cross examination, that he urged a de-escalation; that does not detract from the overall tone and impact of what he wrote.

27. In an email to Stephanie Johnson, the Respondent's People Director, on 8 July 2022, the Claimant said of Mr Birch, that he should, "not think he is now off the hook". He referred to the Respondent's staff as "dimwit Amey colleagues" and, significantly in my view, wrote that it was his intention to "annoy, antagonise, disrupt and undermine". He followed this up with a direct email to Mr Birch on 12 July 2022 in which he wrote,

> "It seems you need to suffer far more pain before you come to your senses. If it's pain you want, then it's pain I'll give you".

28. The Claimant confirmed in the course of cross examination that he was arrested on New Year's Eve last year and detained overnight for what he described as "boisterous" behaviour. For the avoidance of doubt, this was not a work related incident. He further volunteered that he was spoken to by the Police in August this year following a road traffic incident when he became involved in an altercation with another driver. He also confirmed during cross examination that he has been "fired" from

previous jobs on at least five previous occasions, seemingly each time with a settlement agreement; in one case he was terminated just ten days into the job. The Claimant had redacted part of Dr Fernandez-Egea's report in a crude attempt, I find, to withhold this information regarding his work history from the Respondent and the Tribunal. His actions in that regard evidence to me that he is capable of acting in a calculated manner rather than always impulsively.

29. It is clear from my observations of, and interactions with, the Claimant, that he is someone who likely regularly finds himself in conflict with others. Mr Holborn's report certainly indicates as much. In what was a rare moment of reflection during the hearing, the Claimant volunteered that his vocal behaviour could be entertaining on a football terrace, less so in a public library.

<u>The Respondent's strike out application and the preliminary hearing on 5 September 2023</u>

30. I have noted already at paragraph 3 above the grounds upon which the application is made.

31. At the preliminary hearing on 1 March 2023, Employment Judge Feeney had listed the matter for a further preliminary hearing in private on 6 June 2023 to determine whether certain correspondence should be considered without prejudice and therefore inadmissible at the final hearing. However, In light of the Respondent's application, the Judge directed that the hearing should be converted to a hearing in public to consider the strike out application. The hearing was postponed as there was no Judge available to hear the case. Thereafter, it came before me on 5 September 2023. However, we could not go ahead as the Claimant produced a substantial lever arch file of documents and his 86-page submissions document, without however serving these on the Respondent in advance of the hearing.

32. The Claimant's conduct on 5 September 2023 was challenging at times. He was unfocused and often interrupted me or talked over me. These issues seemed to be compounded by difficulties that the Claimant reported that day with his hearing. Although I am not medically qualified, I observed towards the end of the hearing that the Claimant seemed to be exhibiting behaviours which could be consistent with mania, a common feature of bipolar disorder. His lack of focus and interruptions were certainly consistent with ADHD (as well as Mr Holborn's observations already referred to).

33. During the hearing on 5 September 2023, the Claimant repeated allegations in his written submissions that Mr Graham and his instructing solicitor, Ms Watson have been guilty of professional misconduct. As I noted in my case management summary, he accused Ms Watson of pursuing the strike out application in the knowledge that the Respondent was lying, knowingly submitting evidence to the Tribunal that she knew to

be false (and thereby being in contempt of Court), and doing all she could to trump up and exaggerate allegations in order to secure a strike out. He separately accused Mr Graham of knowingly and recklessly misleading the Tribunal, knowingly submitting false testimony and wilfully misleading the Tribunal. These are extremely serious allegations since, if upheld, they would at the very least call into question Mr Graham and Ms Watson's fitness to practise. Indeed, it seems to me that the conduct alleged by the Claimant potentially involves criminal wrongdoing in so far as it may be suggested that Mr Graham and Ms Watson are aiding and abetting perjury. The allegations have the real potential to prejudice the Respondent's relationship with its preferred advisors because of the risk that Mr Graham, Ms Watson and/or her firm may at some point conclude that they are professionally bound to either withdraw from acting for the Respondent or, at least, to advise the Respondent to consider appointing others to represent them. I cautioned the Claimant on 5 September 2023 that he might be at risk of adverse consequences should he persist with such allegations and they are found to be without merit. I allowed him a period of 21 days to reflect on the matter and to confirm in writing whether or not he was pursuing his allegations against Mr Graham and Ms Watson. I drew the Claimant's attention to Cockerill J's observations in King and others v Stiefel and others [2021] EWHC1045 (Comm) cited above. As I shall come back to, the Claimant subsequently provided an equivocal statement of his position and, since then, has gone on to make further allegations of professional misconduct against the Respondent's professional advisors.

34. Given the difficulties and issues that arose on 5 September 2023, I re-listed the Respondent's application for a two-day hearing. In light of the professional misconduct allegations, I also permitted the Respondent to put forward additional grounds for seeking to have the claim struck out.

The adjourned preliminary hearing on 5 and 6 October 2023

35. Notwithstanding I explained to the Claimant on 5 September 2023, and ordered, that the Respondent would be responsible for updating its Hearing Bundle to include any further medical evidence relied upon by the Claimant in respect of his actions on 2 March 2023, the Claimant filed a further four lever-arch files with the Tribunal for the adjourned hearing. Following further discussion, it was identified that we would proceed on the strength of the Respondents' updated Hearing Bundle and the single lever arch file submitted by the Claimant at the hearing on 5 September 2023. As I say, save that the Claimant adopted his 86-page submissions document as his evidence, neither party made reference to any documents in the Claimant's Bundle in the course of the hearing.

36. Once again, the Claimant's conduct on 5 and 6 October 2023 was challenging. As on 5 September 2023, he was unfocused and often interrupted me or talked over me.

37. At a relatively early point in the hearing the Claimant asserted that I was biased. When I sought to explore this further with the Claimant he stated that I had 'rounded' on him on 5 September 2023. No such complaint had been made at the time and I am not aware that any such complaint was made following the hearing through any of the normal channels available to the Claimant. He had arranged for a stenographer to attend the hearing on 5 September 2023 and I suggested therefore that he identify with reference to the stenographer's notes any issues of concern, including any comments of mine that might have led him to perceive that I had rounded on him or otherwise was biased or had given the appearance of bias. Following an adjournment the Claimant informed me that he was no longer asserting bias or the appearance of bias and, indeed, went on to say that he 'liked' me and admired my judgments in other cases.

38. As the Claimant cross examined Mr Coulthard on 5 October 2023, it became necessary for me to caution the Claimant that his questioning was becoming oppressive and could be perceived as bullying. I return below to his conduct towards Mr Coulthard outside the Tribunal hearing room, conduct that only came to light after Mr Coulthard had finished giving evidence.

39. The following day, 6 October 2023, it was necessary for me to warn the Claimant that his conduct was increasingly overbearing, including towards me. He constantly challenged my interventions aimed at managing the hearing and keeping it on track. He was unwilling to accept my decisions, directions, or even my gentle encouragement to focus on the issues at hand, asserting at times, without providing further details, that he was somehow being treated differently to the Respondent.

40. In summary, the Claimant's conduct over the course of two days was disruptive and, whether or not intended, had the effect of undermining my authority. The question that arises is whether his conduct was, or may have been, disability related and, if so, how that should inform my approach to the Respondent's application? I shall return to this.

<u>The Respondent's assertion that the claim is scandalous and vexatious</u>

41. Although this is not reflected in Employment Judge Feeney's case management summary from 1 March 2023, the Respondent pursues its strike out application on the grounds, amongst others, that the Claimant said during the hearing that he did not care if he lost the case and that the proceedings were a means of "channelling his anger". In his email to Mr Coulthard the following day, he also wrote that he did not care if he lost, and he expressed the same view in an email to Ms Watson later the same day, though clarified in a further email to her the following day that whilst he wished to win, it was not about the money. Given his comments to Mr Coulthard about wanting to secure his and Mr Silvey's dismissal and to give back 10 times what he had received, and his further

comments that he had a journalist lined up for the final hearing, the Respondent contends that the Claimant's sole purpose in pursuing the claim is to direct abuse at the Respondent and its witnesses, and that he is seeking revenge for having been dismissed.

The impact of the Claimant's emails of 2 March 2023

42. The Claimant submits that his actions on 2 March 2023 are to be seen in context. Whilst I agree with him in this regard, in my judgment the context is not, as he suggests in his written submissions, and said at Tribunal, that the Respondent has broken the law, lied and sought to get away with this. Instead, the relevant context is that on 1 March 2023, Employment Judge Feeney declined to accede to the Claimant's request that there should be a hearing to consider striking out the response on the grounds, amongst other things, that the Respondent was guilty of persistent lying. Employment Judge Feeney explained to the Claimant that this could not be established without a full hearing and indeed noted that witness statements had not been exchanged so that the Claimant did not definitively know what the Respondent's witnesses would say about the various matters in respect of which dishonesty is alleged. Employment Judge Feeney explained to the Claimant that a respondent may amend its pleading in light of the documents disclosed in the case and/or following exchange of witness statements on the basis of how the case then looks, much in the same way that the Claimant says his former solicitors kept his case under review as documents and evidence continued to emerge in the period before the proceedings were issued. Employment Judge Feeney informed the Claimant that, "Where there are inconsistencies [you] will be able to cross-examine about these and ask the Tribunal to make an inference in relation to them". The Judge was describing due process; the case management summary evidences to me the time and particular care that Employment Judge Feeney took to explain this to the Claimant. It is in this context, and with the benefit of Employment Judge Feeney's clear and helpful explanation in the matter, that the Claimant's actions on 2 March 2023 fall to be considered. In short, I find that he was unwilling or unable, as he now suggests, to respond constructively to, and learn from, any guidance from the Judge, or to follow due process where he does not agree with another person's decision. There are certain echoes of this in the Respondent's letter to the Claimant dated 14 July 2022, dismissing him from its employment:

> "Your immediate reaction to receiving a grievance outcome with which you did not agree, was to make serious and unfounded allegations to the company's Chief Executive Officer rather than follow the process requested of you through submitting further comments for a review or an appeal. That behaviour is simply not compatible with a functioning employment relationship".

43. In summary, in my judgement the Claimant's actions on 2 March 2023 amounted to a direct and immediate challenge to Employment Judge

Feeney's decision and authority in circumstances where the Claimant had failed to secure the outcome he wanted on 1 March 2023.

44. I note here that having failed to persuade Employment Judge Feeney to list a hearing to consider whether the response should be struck out, the Claimant effectively renewed his application just three days later on 4 March 2023. In his submissions document he complains of 'Unfair Tribunal Process' in respect of the Tribunal's failure to rule on whether his strike out application should to be heard (see paragraphs 102 to 106 of the submissions). His position is misconceived, indeed I think it is disingenuous. Having failed to secure the outcome he wanted from Employment Judge Feeney, he has not only sought a second bite of the cherry but seeks to criticise the Tribunal for the fact he has done so. For the avoidance of doubt, his application of 4 March 2023 adds nothing to the arguments advanced on 1 March 2023.

45. As regards the Claimant's emails of 2 March 2023, the further context, albeit this would not then have been known to the Claimant, was that Mr Coulthard's wife was then pregnant with her third child. Mr Coulthard saw and read the Claimant's email on the morning of 3 March 2023 when he was at home with his wife and two young children; he shared the contents of the email with his wife. I do not blame him in any way for having done so. I accept his evidence that it caused his wife considerable stress and anxiety. Even if the Claimant did know of her pregnancy, his stated intention was, of course, to cause stress, anxiety and upset; in his own words, it was Mr Coulthard's family's "turn".

46. Although Mr Coulthard attended Tribunal on 5 October 2023 to give evidence in connection with the strike out application, it is uncertain whether he will give evidence at the final hearing. Firstly, his stress and discomfort were all too evident on 5 October 2023; he was visibly tense when he gave his evidence and largely avoided direct eye contact with the Claimant. Secondly, and more significantly, he and his wife have been sufficiently unsettled by what has happened that it is uncertain whether he will still be in the Respondent's employment next year and, accordingly, willing to voluntarily attend Tribunal as a witness.

47. For the avoidance of doubt, I found Mr Coulthard to be a straightforward and credible witness, readily acknowledging issues in respect of which he could not be certain in his recollection, for example, how many emails he may have received from the Claimant after their last conversation on 8 April 2022. I accept Mr Coulthard's evidence that his wife was sufficiently alarmed by the 2 March 2023 email that she asked him whether the Claimant knew where they lived and whether they should move. Mr Coulthard explains in his witness statement that he did not know how the Claimant's son's death may have affected him. Whilst I have no reason to believe, in spite of his threats to cause Mr Coulthard and his family incredible stress, anxiety and upset, that the Claimant might harm them in other ways, I can understand why the Claimant's email introduced some element of doubt in the minds of Mr and Mrs Coulthard as to what

he intended. I do not consider that they have overreacted to what has happened and I certainly do not hold them in any way responsible for the uncertainty and anxiety that the Claimant's email has caused them. I am satisfied that Mr Coulthard has not sought to exaggerate the impact of the Claimant's actions. I found him to be measured in his comments and to have reflected carefully on the matter. Having discussed it at the time with his wife, and no doubt mindful of the risk of inflaming the situation, the Claimant reported the matter to the Police some days later. The Claimant attaches some significance to the fact that Mr Coulthard delayed before taking this step. In my view, its significance lies in the fact that Mr Coulthard and his wife evidently reflected carefully before taking action and did not act impulsively in the matter.

The Claimant's further abusive conduct towards Mr Coulthard

48. Towards the end of his testimony on 5 October 2023, Mr Coulthard said that he would need to reflect and "decompress" following his experience of attending Tribunal and giving evidence. I did not then know that he had been approached outside the Tribunal hearing room by the Claimant. As I have said already, it was necessary for me to caution the Claimant that his questioning of Mr Coulthard was becoming oppressive and could be perceived as bullying. I encouraged the Claimant a number of times in the course of the hearing to moderate his behaviour and explained to him more than once that if I determined that his conduct during the hearing had been disruptive, this might inform my views both as to how he had behaved on other occasions and also lead me to conclude that he was likely to behave in a similar way in the future. In spite of my clear guidance and warnings in the matter, the Claimant called Mr Coulthard a liar during one of the regular breaks in the proceedings that were intended as an adjustment for the Claimant. Mr Coulthard was still giving evidence at the time and was under oath. He was sitting alone outside the Tribunal hearing room, having been reminded by me in the presence of the Claimant that he must not discuss his evidence with anyone. The Claimant verbally abused Mr Coulthard out of sight and hearing of others. He initially sought to down play the significance of what had happened by asserting, incorrectly as he subsequently accepted, but only after Mr Coulthard had been recalled at my request to give evidence about the matter, that Mr Coulthard had finished giving evidence when the comment was made. As I say, Mr Coulthard was in fact still under oath. As with his email of 2 March 2023, the Claimant then sought to justify his conduct, stating that his comments outside the Tribunal hearing room were part of legal due process. He said that he was merely expressing outside Tribunal what he had put to Mr Coulthard in cross examination, namely that he was lying. I disagree. In my judgement there is a material difference between challenging a person's veracity in a Court or Tribunal hearing room and calling them a liar when they are alone, in the course of giving their evidence and effectively unable to seek advice or guidance. In my judgement, it was unwarranted and abusive behaviour. Even if the Claimant could be said to have acted impulsively in the matter (which is not obviously the case, since his actions in speaking to Mr

Coulthard when no-one else was present to witness what he said evidences to me a degree of calculation on his part), I consider that this was further intimidation of Mr Coulthard, in disregard of my clear direction that the Claimant should moderate his cross examination. As I see it, once again the Claimant was unwilling to follow due process when he was not getting his way.

The professional misconduct allegations

49. The application to strike out is pursued not just with reference to the Claimant's conduct in March 2023 but also on the basis that he is said to have made serious and unfounded allegations of professional misconduct against Mr Graham and Miss Watson.

50. Notwithstanding my order that the Claimant confirm by 26 September 2023 whether he continued to assert professional misconduct against Mr Graham and Ms Watson, as set out in paragraphs 116, 119, 218, 416-421 and 570 of his written submissions, he readily admits that he has sought to reserve his position. In so doing, he has left the proverbial sword of Damocles hanging over Mr Graham and Ms Watson's heads and over their professional relationship with the Respondent. Writing on 22 September 2023 that he would not pursue the allegations "AT THIS TIME", the Claimant went on to make a "plea" to the Respondent "and its Counsel to withdraw its lies and evidence it otherwise knows to be false". He threatened that he may reassess his allegations of lying and professional misconduct in the face, he said, of having provided them with evidence of lying and having warned them about those lies and false evidence. Moreover, having offered this qualified, indeed potentially meaningless, retraction of his allegations, and further, having had time to reflect on the matter, particularly with the benefit of the observations I made in paragraphs 9 to 11 of my 5 September 2023 case management summary, he went on to allege on 5 October 2023 that Mr Graham had coached Mr Coulthard to give false testimony that the Claimant had resigned during their conversation on 8 April 2022. When I pressed him to explain the factual basis for his very serious allegation, the Claimant equivocated; at first he suggested that he may have been directing his comments at Ms Watson and then suggested they may have been intended for the Respondent's in-house Counsel or a member of the Respondent's HR team. Pressed again, he further qualified his comments, stating that he merely suspected coaching, but even then could not articulate the basis for any suspicion. Cautioned once more by me as to the very serious nature of the allegation he had made, and the potentially adverse implications should it not be well founded, the Claimant withdrew the allegation though, having done so, went on to assert in the course of his evidence that Counsel was "sustaining lies".

Law and Conclusions

51. As I have noted already, the Respondent's application to strike out the claim is pursued on two grounds, namely, that the claim is scandalous or

vexatious (Rule 37(1)(a)), further or alternatively that the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious (Rule 37(1)(b)).

52. 'Scandalous' in the context of Rule 37(1)(a) has been said to mean the abuse of the privilege of legal process in order to vilify others or give gratuitous insult to the Court – Venice v Southwark London Borough Council 2002 ICR 881 CA. A 'vexatious' claim has been described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive – ET Marler Ltd v Robertson [1974] ICR 72 NIRC – though includes anything that is an abuse of process. In Attorney General v Barker [2001] FLR 759 QBD (Civ Div), Bingham LCJ said that the hallmark of vexatious proceedings are that they have little or no basis in law, and the effect of which is to subject a defendant to inconvenience, harassment and expense out of proportion to any gain to be derived to the Claimant. The expressions effectively have the same meaning under Rule 37(1)(b), though a claim may additionally be struck out pursuant to Rule 37(1)(b) where the proceedings have been conducted unreasonably, even if there are arguable issues to be determined by the Tribunal.

53. Regardless of whether a party's conduct is scandalous, unreasonable or vexatious, save in very limited circumstances, the Tribunal must additionally ask itself whether a fair trial is no longer possible and, if so, whether strike out would be a proportionate response to the conduct in question – Bolch v Chipman [2004] IRLR 140, adopted by the Court of Appeal in Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684 in which Sedley LJ described the power as a draconic one, not to be readily exercised. He described Mr James as "difficult, querulous and uncooperative in many respects" – a description that can equally be applied to the Claimant in these proceedings – before going on to observe,

> "The Courts and Tribunals of this Country are open to the difficult as well as compliant, so long as they do not conduct their case unreasonably".

54. The Claimant is familiar with the EAT's judgment in Cox v Addeco and Others UKEAT/0339/19/AT since he has cited it in his written submissions. In the course of the hearing I encouraged him to also familiarise himself with the EAT's subsequent judgment this year in Smith v Tesco Stores Ltd [2023] EAT 11, since it is written in particularly accessible language and contains a helpful summary of the law.

Whether the claims and/or the Claimant's conduct are/has been scandalous etc

55. In coming to a decision on the Respondent's application I have had to grapple with two related issues in respect of which there are no legal authorities of which I am aware to directly guide my approach. The Respondent does not concede that the Claimant is disabled by reason of autism/autistic spectrum condition, post-traumatic stress disorder

("PTSD"), grief and/or deafness/hearing impairment. If the case proceeds, it will be for the Tribunal at the final hearing to determine whether the Claimant had those conditions/impairments at the relevant times and, if so, whether they had a substantial long term adverse effect on his normal day to day activities. These are not matters with which I am seized or in respect of which I have heard evidence. Similarly, I am not seized of the issue of whether and, if so, how, the Claimant may have been disadvantaged by reason of the PCPs he alleges were applied by the Respondent, including for example whether he was summarily dismissed because he was unable to control his emotions/anger leading to outburst in emails (conduct which also forms the basis of his claim pursuant to s.15 of the Equality Act 2010). In Adecco, in the context of a strike out pursuant to the second limb of Rule 37(1)(a), namely where a claim was said to have no reasonable prospect of success and the facts were in dispute, HHJ Taylor identified that a claimant's case must ordinarily be taken at its highest. I am also mindful that in those rare cases where a grounds rules hearing is required because a party or witness has been identified as vulnerable, the Tribunal will usually proceed on the basis that any vulnerability is as stated. I conclude that this reflects how I should also proceed here, particularly so that I do not impinge upon the findings and conclusions of any later Tribunal. In other words, I should assume that the Claimant will establish he is disabled for all the reasons he asserts, and that the effects of his disability are as stated by him, as identified in any medical evidence relied upon by him, and as indicated by Mr Holborn and in the ETBB. Accordingly, I proceed for these purposes on the basis that the Claimant's disability: causes him to act impulsively and to be quick tempered; means that he is unable to keep quiet and has a propensity to interrupt; impairs his ability to deal with stress; means that he struggles to accommodate other people's perceptions; and leads him to be outspoken and to respond reactively where he feels put upon or bullied.

56. Whilst this might certainly explain much of the Claimant's conduct I observed and have described above, no person can or ever should be defined solely by their disability. A person with a disability is as capable as a non-disabled person of behaving unreasonably. Even though he may be prone to act impulsively, none of the evidence to which I have been referred or identified for myself within the Hearing Bundles suggests that the Claimant's health issues mean that he is incapable of reflecting on his conduct. I am struck by certain of the Claimant's comments, particularly where these were made after the Claimant had time and space to reflect, and when he was not under immediate pressure. For example, some 10 days on from his conversation with Mr Coulthard on 8 April 2022, which in any event he denies was emotional or tense, he emailed Mr Coulthard stating that he had a plan and understood "how things must be done for maximum effect". This was prior to his son's death so that any grief reaction identified by Mr Holborn would not have been a factor in terms of any defensive and reactive behaviour of his. I also have regard to the Claimant's statement on 18 July 2022 that it was his intention to "annoy, antagonise, disrupt and undermine". In combination with

his statement that he understands how things can be done for maximum effect, it reinforces my firm impression that the Claimant is capable of acting in a calculated way, rather than always impulsively. The Claimant has not given evidence that these various comments of his may have been made during periods of mania associated with his bipolar disorder or that they were the expression of grandiose thinking and behaviour on his part.

57. There is also the Claimant's email of 2 March 2023 to Mr Coulthard. Emphasising, again, that I make no findings on any of the matters that might otherwise fall to be determined at the final hearing, I conclude that the Claimant's conduct following the hearing on 1 March 2023, as well as certain of the conduct which I directly observed and experienced during the hearings before me, did not arise solely from his disability, rather at times it reflected the Claimant's determination to have his way and to "annoy, antagonise, disrupt and undermine" as part of a conscious strategy on his part to secure his goals, namely a favourable financial settlement with the Respondent. I reject the Claimant's suggestion that his email to Mr Coulthard simply served to highlight to Mr Coulthard that there was a legal process to which he would be required to submit. Instead, I conclude that he was bringing unconscionable pressure to bear and seeking to gain a tactical advantage as part of the strategy to which I have just referred. On any reasonable view it was a threatening and intimidating communication, indeed unpleasant and disturbing, though consistent with his comments to Mr Coulthard the previous year that, "This was nothing compared to what may come next …". He has not said that he acted impulsively in the matter. In any event, I consider that his email to Mr Coulthard was a calculated and carefully crafted email on his part, sent with the intention of deterring Mr Coulthard from giving evidence. He has partly succeeded in his aims in that regard.

58. I also have regard to the fact that the Claimant acted in disregard, even defiance, of Employment Judge Feeney's directions, guidance and decision on his request to consider striking out the response, and that his conduct before me and outside the Tribunal hearing room was also in disregard of my directions and guidance. I consider that at times he has demonstrated an unwillingness, rather than merely an inability, to submit to due process and the authority of the Tribunal, even if in moments of stress he may be more liable to be outspoken.

59. Regardless of the Claimant's motives and intentions in the matter, and regardless of the extent to which his disability has been a factor in his behaviour, I cannot disregard the impact of his actions, including upon Mrs Coulthard. A pregnant woman's paramount concern will always be for the welfare of her unborn child. Understandably, the Claimant made reference in the course of the hearing to the profound and debilitating grief reaction he has experienced following the untimely death of his son. There is seemingly no recognition on his part of Mrs Coulthard's vulnerability and her concern for her family, including her unborn child, or the wider repercussions in terms of this case. In my judgement, it is

understandable, and certainly not an overreaction on Mrs Coulthard's part, that she was sufficiently concerned as to what the Claimant intended that she questioned whether her family was safe. Even with the benefit of time, distance and further perspective, I can appreciate why it has planted doubts in Mr Coulthard's mind as to what the Claimant might be capable of and why Mrs Coulthard is sufficiently concerned about her husband's ongoing exposure to this litigation, and the potential for further contact with the Claimant, that she has been encouraging him to try and find another job.

60. In his closing submissions, the Claimant said that his conduct may have been clunky on occasion and that he needed to take accountability where he caused offence, though he did not relate these comments to any specific conduct of his. His comments sit uneasily with his refusal, during cross-examination to accept any responsibility in the matter and his further assertions in closing that the Respondent was "weaponising" disability related conduct and pursuing its strike out application in response to his exercise of his right to use due process. I have regard to the fact that lack of emotional reciprocity, the inability to see things from another's perspective, is a common trait of autism. On the other hand, as I have said already, the Claimant was otherwise unapologetic regarding his actions following the hearing on 1 March 2023, as well as overbearing and oppressive at times in his questioning of Mr Coulthard. Even if he lacks empathy to be able to see the matter from Mr and Mrs Coulthard's point of view, in my view that still does not explain why he persists in asserting that he acted in accordance with due process, including when Mr Coulthard was alone, under oath and isolated outside the Tribunal hearing room. I cannot identify how the position he has taken in this regard might be explicable by reference to something arising from his disability.

61. The Claimant continues to deny that he threatened or intimidated Mr Coulthard or his other two former colleagues, or that he otherwise acted inappropriately in the matter, and continues to maintain that his email was polite in so far as he said he would merely be "asking" the Respondent's new owners to dismiss Mr Coulthard and Mr Birch for gross misconduct. Regardless of any impairments of his and their effects, the plain, natural meaning of what he wrote in his emails defies his efforts to justify them. I am concerned that his position in this regard has remained unchanged notwithstanding he has had ample time to reflect and to take his brother's counsel. He is an intelligent individual. Rather than continue, as he has done, to deflect attention from his actions and to project the blame onto others, the Claimant might instead reflect on the fact that the situation that now confronts the Tribunal has come about because of the chilling effect which threats, abuse and intimidation can have on others, and thereby on the effective administration of justice. Further, if, as he claims, he is committed to due process, he might also reflect upon his failure to heed Employment Judge Feeney's comments on 1 March 2023 or to respect her decision not to list the matter for a strike out hearing (or at least to have pursued

his appeal rights in the normal way if he believed that she was in error in the matter).

62. In my judgement, the Claimant's conduct of the proceedings has been scandalous, unreasonable and vexatious. It is appropriate to describe his conduct in those terms even though it is plainly arguable that his conduct may have arisen from or been exacerbated by his disability, potentially to a material extent. A litigant who threatens, intimidates and abuses potential witnesses, and whose stated strategy is to "annoy, antagonise, disrupt and undermine" is abusing the privilege of legal process.

63. Whilst the Claimant's conduct of the proceedings may be described as scandalous, unreasonable and vexatious, I am not satisfied that the Claimant has embarked upon the proceedings with the sole or primary aim of vilifying the Respondent or giving gratuitous offence to the Tribunal, even if in fact he has vilified the Respondent and given offence, and notwithstanding, as I have concluded, his strategy is partly to annoy, antagonise, disrupt and undermine. The Respondent's application is not pursued on the basis that the claim has no reasonable prospect of success. On the face of the claim, and taking the Claimant's case at its highest, it is plainly arguable. Indeed, having waived privilege in the matter, correspondence with his solicitor evidences that he was advised that his claim had reasonable prospects before the claim was begun. In my judgement, in the context of a claim which has been assessed by an experienced employment law specialist as having reasonable prospects of success, and which the Claimant evidently believes he has a good chance of winning, his stated strategy to annoy, antagonise, disrupt and undermine does not render the claim scandalous or vexatious, rather it goes to the issue above of whether he has conducted the proceedings scandalously, unreasonably or vexatiously.

Whether a fair trial is no longer possible

64. In coming to a decision in this matter, I have returned a number of times to Sedley LJ's observations in Blockbuster, including whether I can be optimistic as to the future insofar as the Claimant demonstrated some greater degree of moderation in his closing submissions. I speculate that the Claimant's brother may have provided a guiding hand in those submissions. Be that as it may, I am not optimistic in the matter of the Claimant's likely future conduct. Putting aside that he may be difficult, querulous and, at times, uncooperative, I have significant concerns as to whether the Claimant is capable of conducting these proceedings in a reasonable manner. The hearings before me were to determine whether he had conducted himself scandalously, unreasonably or vexatiously, yet even with his brother present, as he said to give him a kick under the table, and notwithstanding my directions and reminders to him that I might have regard to how he behaved in coming to a decision, he was significantly unwilling or unable to moderate his behaviour. It does not bode well in terms of his future conduct of the proceedings or the

Tribunal's ability to effectively manage a 15-day hearing, amongst other things in a way that ensures that witnesses are not threatened, abused or intimidated, and that the Tribunal's authority is respected and upheld. In my judgement, the Claimant will continue to be outspoken and to struggle to not respond in a manner which could be reactive. He is highly likely to perceive that he is being put upon or bullied by the Tribunal and the Respondent's representatives, even where, objectively, there is no cause for him to perceive the situation in that way. He will also continue to be quick tempered and to act impulsively, be unable to keep quiet and have a propensity to interrupt, and struggle to accommodate other people's perceptions. And I think it highly likely that these challenges will be exacerbated by the Claimant's ongoing tendency to annoy, antagonise, disrupt and undermine as part of a conscious strategy to secure his aims, as well as by ongoing unfounded attacks upon Mr Graham and Ms Watson's professional integrity which will continue to have a corrosive impact upon their ability to represent the Respondent's best interests in these proceedings.

65. As matters stand, the Claimant's conduct to date and likely future conduct mean that in my judgement a fair trial will not be possible. The Claimant will continue to be defensive and reactive in his dealings with the Tribunal, the Respondent's representatives and any witnesses, and I think there is a real risk that he will seek to contact individuals at the Respondent, including witnesses, regardless of the fact that solicitors have been instructed and whatever requests are made of him to desist from such conduct. He has demonstrated a propensity to act in a similar way on at least four previous occasions that I can identify. His communications have been shown to be abusive and even threatening and intimidating on occasion. I believe he will continue to communicate with others in this way and that there is a real risk that he will abuse, threaten or intimate the Respondent's witnesses either between now and the final hearing or in the course of the final hearing itself. The cumulative effect upon the Respondent is potentially significant as the Claimant's conduct amounts to an unwarranted interference in its legitimate defence of these proceedings, including its fundamental right to seek legal advice from advisors of its choosing. I am also concerned that the Claimant will continue to disregard the directions, warnings, encouragement, exhortations etc of this Tribunal. He said in closing that I should consider giving him a warning regarding his future conduct, overlooking that I 'warned' him numerous time during the hearing about his conduct and that he abused Mr Coulthard outside the Tribunal hearing room within a short time of me warning him that his questioning of Mr Coulthard was oppressive and could be perceived as bullying. As with Employment Judge Feeney, my guidance and decisions went unheeded.

<u>Is it proportionate to strike out the claim?</u>

66. Given my valiant efforts to effectively manage the proceedings, including by making adjustments for the Claimant, I cannot readily identify further

adjustments that might obviously address the issues identified immediately above to enable a fair trial to take place. I have had regard to the adjustments identified in the ETBB for ADHD. For example, notwithstanding Employment Judge Feeney and my careful summaries and written directions and orders, my calm (and repeated) repetition of instructions and questions, my patient efforts to steer the Claimant back to the relevant issues, my use of regular breaks to enable the Claimant to refocus, and my efforts to encourage the Claimant to pause and process what was being said, the Claimant's conduct was still significantly disruptive and frequently diverted the Tribunal's time and attention away from the issues at hand. The point is well illustrated by his abusive comment to Mr Coulthard outside the Tribunal hearing room; he was initially defensive and argumentative when the matter was first raised, disputed the timing, but did not then challenge Mr Coulthard's account when he was asked to come back to Cambridge County Court and recalled to give evidence. Unnecessary time and energy was expended on the issue. There were numerous other needless detours and distractions during both hearings, of which the withdrawn bias and professional misconduct allegations are but two examples.

67. Regrettably, I cannot identify a less draconian alternative to striking out the claim. In my judgment, no orders I can make will address the impact of the Claimant's actions to date upon the Respondent's right to a fair trial. I cannot offer the Respondent or, more specifically, Mr and Mrs Coulthard any assurances in respect of the Claimant's future conduct. On the contrary, he will almost certainly continue to act impulsively and unpredictably, as he demonstrated at Tribunal. Mr Coulthard's experience of attending Tribunal is that he was subjected to disproportionately hostile questioning by the Claimant and then verbally abused outside the Tribunal hearing room in circumstances where he had every right to feel safe and to believe that he would be permitted to give evidence free from abuse and intimidation. I think there is a real risk, even likelihood, given Mr Coulthard's experience at Tribunal that his wife will continue to encourage him to try and find another job. There is certainly no reason why she might now be encouraging him to stay with the Respondent. In any event, it is not necessary for me to speculate in the matter since, in my judgment, the issue is that Mr Coulthard's ongoing commitment to the Respondent and to this process have been thrown into doubt. The Respondent's uncertainty in the matter will now likely inform its ongoing appetite for litigation and weigh heavily on its approach to settlement. It finds itself in this invidious position because of the Claimant's actions.

68. I have given thought to whether Mr Coulthard and, indeed, the Respondent's other witnesses, might give their evidence remotely by CVP. That might protect them against threats or intimidation at Tribunal when they give their evidence, but it will not protect them against oppressive, outspoken cross examination of the sort I observed on 5 October 2023. And it will not prevent the Claimant from contacting them directly, something he has shown a propensity to do when, in the words

of Mr Holborn, he feels put upon or bullied and struggles not to respond in a reactive manner.

69. I have considered whether it would be proportionate to prevent the Claimant from cross examining Mr Coulthard and possibly also Mr Birch, or to limit him to asking them questions that have been submitted in writing in advance. Whilst cross examination provides a party with the opportunity to test the evidence of a witness, it is equally an opportunity for that witness to establish their credibility and veracity in the eyes of the Tribunal. Limiting cross examination in the way I have described might serve to undermine both parties' fair trial rights. In any event, such an approach will still not prevent the Claimant from acting impulsively at the final hearing, nor will it deter him from the sort of reactive behaviour described above.

70. My efforts to get the Claimant to state clearly and unambiguously whether he continues to assert misconduct on the part of Mr Graham and Ms Watson were essentially unsuccessful. Even if his email of 22 September 2023 could be regarded as having retracted his allegations, he went on to accuse Mr Graham on 5 October 2023 of coaching Mr Coulthard and, even when he subsequently withdrew that allegation, he made a further allegation of professional misconduct a short time later. Since such allegations do not involve claims against the Respondent, short of striking out the claim on the grounds that the Claimant's conduct is scandalous, unreasonable or vexatious, the only other power obviously available to me would be to make a deposit order with a view to deterring the Claimant from pursuing such allegations and arguments. However, given his bipolar effective disorder and its effects, as well as the impulsive behaviours associated with ADHD, I think it likely that a deposit order will not act as a deterrent in this case and that the Claimant will continue to pursue such allegations and arguments regardless of the fact they have little reasonable prospect of success; the Claimant boasted at the hearing that he was a man of some means who could meet any costs liability in the case. In any event, my concerns are well illustrated by the ease with which allegations were asserted and withdrawn in the course of the hearings before me. In my judgement, a deposit order will not prevent or deter similar conduct in the future, any more than my case management order of 5 September 2023 succeeded in persuading the Claimant to reflect on how he was conducting the proceedings. I regret to say that he gives the impression of being a law unto himself.

71. Finally, I have also considered whether I might delay any decision on the Respondent's application whilst the Claimant's medication is reviewed and to allow an opportunity for any revised medications to take effect. The Claimant first referred to the matter in the course of his closing submissions. In providing a detailed overview of the Claimant's medications over a twelve month period, the Claimant's GP does not state that his medications have proved ineffective at managing his conditions. In his report of 16 September 2023, Dr Fernandez-Egea confirmed that the main goal for his meeting with the Claimant on 11

September 2023 was a treatment plan for his anxiety. Dr Fernandez-Egea said that he "struggled" with the bipolar disorder diagnosis. He questioned the choice of ADHD medication and suggested an alternative medication to that then being prescribed. However, he does not state that the proposed change in medication might bring about a material, or any specific, change in the Claimant's condition or behaviours. I do not attach significant weight to the Claimant's submissions in this regard which are not supported by clear evidence. In any event, Dr Fernandez-Egea's report confirms a long standing history of mental health issues and workplace disputes dating back over many years, seemingly unrelated to the Claimant's current medication regime.

72. I consider that I would simply be 'kicking the can down the road' if, for example, I was to defer any decision on the Respondent's application until next year. Witness statements are due to be exchanged by 4 March 2024, meaning that the work required to prepare those statements will likely need to begin early in the New Year. The question is whether a fair trial is impossible within the existing trial window - Emuemukoro v (1) Croma Vigilant (Scotland) and (2) Huggins EA-2020-000006-JOJ. I am satisfied that I should grasp the issue now rather than put off making a decision in the hope that 'something might turn up'. As matters stand, having regard to the Claimant's conduct to date and likely future conduct, notwithstanding he has an arguable claim, I conclude that it would be just and proportionate to strike out the claim on the grounds of the Claimant's scandalous, unreasonable and vexatious conduct of the proceedings, on the basis that a fair trial has been rendered impossible regardless of any reasonable adjustments that the Tribunal might seek to make for the Claimant.

73. The Claimant requested, as an adjustment, that the Tribunal provide its decision on the Respondent's strike out application without delay. I shall provide my decision on the Respondent's costs application in due course, though this may not be until I have returned from my imminent planned leave of which the parties are aware.

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Employment Judge Tynan

Date: 26 October 2023

Sent to the parties on: 8 December 2023

For the Tribunal Office.