Neutral Citation Number: [2023] EAT 154

Case No: EA-2022-000569-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 November 2023

Before :

MRS JUSTICE ELLENBOGEN DBE

- -

Between :

REV DR JAMES GEORGE HARGREAVES **Appellant**

- and -

(1) EVOLVE HOUSING & SUPPORT

(2) MR SIMON McGRATH

Respondents

- -
- -

The Appellant acted in person
Miss Catherine Urquhart (instructed by **Keystone Law**) for the **Respondents**

Hearing date: 7 November 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Of the five grounds of appeal advanced, only one succeeded; the Tribunal had erred in finding that, as a result of the Claimant's conduct, a fair trial was not possible, and in striking out the claim. The claims would be reinstated and remitted for an open preliminary hearing at which all necessary directions enabling the matter to proceed to a substantive hearing would be considered.

MRS JUSTICE ELLENBOGEN DBE:

1. In this judgment, I refer to the parties by their respective statuses before the London Central Employment Tribunal. This is the Claimant's appeal from the order of Employment Judge Klimov, by which his claims were struck out on the basis that the manner in which he had conducted proceedings had been scandalous, unreasonable and vexatious. So far as permitted to go forward following the sift, the Claimant advances five grounds of appeal, by which he argues that the Tribunal:

    i) failed to recognise his constitutional right of access to the courts;

    ii) attributed motive to him which was both irrelevant and inaccurate;

    iii) erred in failing to have recognised the interplay between an open court process and access to the court;

    iv) erred in holding that a fair trial was not possible, or that a measure short of strike-out would not suffice to enable a fair trial; and

    v) (albeit in fact numbered ground six), erred in failing to have recognised that, in alleging discrimination, his case constituted a matter of high public interest which ought to have been struck out only in the plainest and most obvious case.

2. The First Respondent is a charitable housing organisation which supports homeless and vulnerable people in London by which the Claimant was employed as a Supported Housing Night Concierge Worker, from 22 October 2018 to 8 February 2021, on which date he was summarily dismissed for gross misconduct. At all material times the Second Respondent was a board member of the First Respondent, a role which is voluntary and unpaid.

3. Before me, as below, the Claimant represented himself and the Respondents were represented by Miss Urquhart of counsel.

The Tribunal's Judgment And Reasons

4. The material background to the Claimant's claims was meticulously set out in the Tribunal's reserved judgment and reasons, sent to the parties on 4 June 2022 [6] to [22]. Having set out Rule 37 of the Employment Tribunals Rules of Procedure 2013 ("the Rules"), under which the Respondents' application had been brought, the Tribunal summarised the legal principles applicable to such an application. It also set out the provisions of Articles 6 and 10 ECHR, on which the Claimant relied. So far as material to this appeal, it reached the following conclusions:

The Claimant's conduct of proceedings

a. The Claimant's conduct of proceedings had been scandalous, vexatious and unreasonable. Per paragraphs [57] and [58]:

> "57. Reading the Claimant's 29 March Email against the background of the 14 December Offer, I find that the Claimant's objective is to use these proceedings to, as he puts it in the 14 December Offer, '*create a damning narrative of a racist, abusive organisation: Evolve Housing + Support the unregulated housing organisation that leads young people into harm's way, including murder, whilst raking in millions from the taxpayer', 'unseat* [the Second Respondent] *and his colleague Anthony Fairclough (who has no connection with these proceedings) from their Dundonald Ward council seats*' (paragraph 12 of the 29 March Email), and *'plung[e]* [the Second Respondent's] *political party into a religious harassment scandal during the election time, which may lead to other political colleagues losing their seats and his party's general election ambitions being hindered'* (paragraph 13 of the 29 March Email).
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> 58. In the 14 December Offer the Claimant threatens the Respondents with a '*relentless'* campaign *'through protracted legal actions' continuing* '*for years'* and *'high profile media political campaigning in forthcoming local and national elections'* to change the *'narrative'* to what the Claimant wants it to be. He balefully warns: '*The damning narrative would be repeated and repeated until it is the only narrative that anyone registers*'".

b. The Tribunal set out various parts of the December Offer and of the Claimant's email dated 29 March 2022, citing his repeated threat of an *"unstoppable campaign to achieve [his] primary aim of setting the public narrative straight"* and *"brazen"*

claims that *"Evolve Housing + Support, an unregulated supported housing organisation (was recently found guilty of racism and religious harassment and associated with murder, suicide, the receipt of deadly weapons through the post, drug dealing and drug taking among those in its care"*. It found that:

> "61. The Claimant is not hiding his intentions. These proceedings for him are about damaging or destroying the business of the First Respondent and the political career of the Second Respondent, and generally inflicting as much damage as he possibly can on the Second Respondent's colleagues and the party. His intent is to vilify and publicly humiliate the Respondents.
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> 62. He goes further and says that he is not prepared to abandon his vindictive campaign against Mr Deakin of the First Respondent and essentially blackmails the Second Respondent to sacrifice Mr Deakin for the sake of the Second Respondent's political career and his party (paragraph 13 of the 29 March Email)."

c. The Tribunal further found [64] and [65]:

> "64. … that the Claimant seeks to weaponise these proceedings to achieve his vendetta against the Respondents and cause as much damage to them as he possibly can. It is no longer about his suspension and dismissal, it is all about the Respondents' business and political existence, which the Claimant is set to destroy or, at any rate, to inflict as much damage upon them as possible. He admits that '*[l]aw is not [his] strength – political campaigning, however, is. I specialised, not in winning seats myself, but rather causing others to lose theirs'* (paragraph 14 of the 29 March Email).
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> 65. The vindictive and highly personal nature of the Claimant's pursuit of these proceedings goes back to his Original Tribunal Claim. In February 2020, the Claimant submitted various grievances against six managers of the First Respondent seeking their dismissal. Of his 34 complaints only one, and relatively minor, against Mr Deakin was upheld. He, however, still decided to use those grievances in support of his compensation claims."

d. It then turned to consider the Claimant's response to the findings made in the Original Tribunal Claim and the Claimant's conduct in that connection, stating [66] to [71]:

> "66. At the remedy hearing of the Original Tribunal Claim, the Tribunal roundly rejected the Claimant's contention, observing that '*much of the upset that the Claimant feels and continues to feel is because of unreasonable perceptions about what happened at the liability hearing and since then*' (at paragraph 60).

67. The Tribunal went on to state: '*there is no reasonable basis on which the Respondent could sack any of those managers against whom the Claimant took out his grievance, following the liability hearing. We are sorry that the Claimant believes differently'* (at paragraph 65).

68. The Tribunal also found that the emails the Claimant sent to the councillors in September/October 2020 (see paragraph 7 above) '*do not tell the full story because it does not include a copy of the full Judgment and written reasons, just a very brief extract from it*' (at paragraph 66).

69 At paragraph 67 of the remedy judgment the Tribunal essentially rejected the Claimant's contention that he did not wish to harm the First Respondent (emphasis added)

> '67. The Claimant told us that he did not want to harm the Respondent. The Claimant stated however in his email to Ms Storry: 'We only need to find one contractor that says they will cancel or withhold a contract [worth] in [excess] of £50,000 and our argument is proven'. The Claimant clearly recognised that the sending of the email which was subsequently sent to councillors could adversely affect the Respondent's funding. That would inevitably harm the organisation. The Claimant's insistence that this was not his intention is, therefore, surprising.'

70. Finally, in deciding that the Claimant's case was '*at the lower end of the scale in relation to discrimination claim'* (at paragraph 77) and awarding the Claimant £5,000 for injury to feelings, the Tribunal concluded that '*the extent of his feelings of hurt, which continue to this day, are because of unreasonable perceptions about the Respondent's actions since then as well as about the other acts about which he complained in his Claim Form but which we did not uphold*' (at paragraph 70).

71. These Tribunal pronouncements, however, did not stop the Claimant from continuing in his personal campaign against Mr Deakin and other managers of the First Respondent."

e. The Tribunal went on to find [72] to [85]:

"72. His vindictive approach is also evident from his 14 December Offer, in which the Claimant states: '*I am not here today to argue about the rights and wrongs of how the latest narrative came about, this is not the time or place for that. I am, however, here to see that narrative changed – one way or another'*.

73. He says one way is '*to agree to rewrite the narrative of suspension and dismissal to one of sabbatical and return to work'* and *'Another way is for my community, my supports and I to create a damning narrative of a racist, abusive organisation: Evolve Housing + Support the unregulated housing organisation that leads young people into harm's way, including murder, whilst raking in millions from the taxpayer. This narrative would not only be created through protracted legal actions, including appeals to the European Court of Human Rights; but also*

through high profile media political campaigning in forthcoming local and national elections'.

74. His settlement demands in addition to reinstatement under the pretence of sabbatical and parental leave and a substantial financial compensation, specifically included that his legal action against Mr Deakin and Ms Footlight (the First Respondent's manager involved in the Original Tribunal Claim) must be excluded from the scope of the settlement and the settlement must not limit his '*accurate reporting of and fair comment regarding those cases or [the Original Tribunal Claim]'*.

75. He ends his 14 December Offer with a quote: '*Keep your friends close and your enemies closer'.*

76. Returning to the 29 March Email, I reject the Claimant's contention that he was genuinely looking to settle the claim. His 29 March Email is clear that the Respondents' offer must meet the Claimant's '*previously stated objectives'* which, as mentioned above, included reinstatement under the pretence that he was never suspended and dismissed and exclude his claims against Mr Deakin and Ms Footitt from the scope of the settlement, which the First Respondent had rejected in their 15 December email.

77. Moreover, his sending the damning email on 31 March to Sir Ed Dav[ey], and that is before the expiry of the arbitrary three days' deadline he had set for the Respondents to respond to his settlement offer, his leafleting in early April with the leaflets containing damaging and inflammatory remarks about both Respondents are clearly not actions of a person who is looking to find a mutually acceptable compromise and move on, even less so of a person who is prepared to accept a settlement offer '*whatever that might be*'.

78. In short, I find that the Claimant's primary purpose in these proceedings is to create a public and political scandal involving both Respondents and as many persons associated with them as possible, and to portray the Respondents as villains in the public eye. He sees these proceedings as a perfect tool for that and wants to use it to his full advantage.

79. In my judgment, this is a clear example of abuse of the tribunal process and therefore scandalous conduct.

80. I also find that the Claimant's conduct squarely falls within the meaning of 'vexatious' per **AG v Barker**. The Claimant's goal '*is to subject the [Respondents] to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant'* (see paragraph 27 above). His settlement demands go well beyond what he could reasonably expect to achieve even if he wins his claims 'hands down'. He seeks to force the Respondents to accede to those demands or else he will unleash his damning narrative campaign regardless of the outcome of the proceedings.

81. Acting in such a scandalous and vexatious manner is also plainly conducting the proceedings in an unreasonable manner.

82. I reject the Claimant's contention that he was purely pursuing his party's campaign 'Make racism unprofitable' and the Respondents

were legitimate targets for his campaign. The Claimant clearly links his campaign with these proceedings and seeks to use the proceedings to advance his political campaign and inflict maximum damage on both Respondents. These actions are not a pure coincidence. As stated above (see paragraphs 65-70 above) the Claimant's vindictive approach to these proceedings goes back to his Original Tribunal Claim and, therefore, pre-dates his political campaign.

83. To the extent the Claimant seeks to portra[y] himself as a principled politician pursuing his party's political goals and not acting in personal interests, this does not sit well with the Claimant being prepared '*to specifically avoid Evolve Housing + Support being the named corporate example for two campaigns by the Black Lives Matter Party during the forthcoming 2021 London local authority elections'* (the 14 December Offer), if they accepted his personal settlement demands.

84. I equally reject the Claimant's argument that because the Second Respondent happens to be a councillor and a politician, he is, using the Claimant's words, '*a fair game*' and, therefore, different standards of reasonable conduct of the proceedings with respect to the Second Respondent should apply.

85. It is of course the Claimant's right using all democratic means to oppose and agitate against the Second Respondent's candidature in the local elections or otherwise criticise him as a person occupying public office. This, however, does not give the Claimant 'carte blanche' to conduct these proceedings in whichever way he finds conducive to his goal to '*unseat*' the Second Respondent and his colleague, Mr Fairclough, from their council seats."

Possibility of a fair trial

f. The Tribunal noted that, were a date to be fixed, a trial would most likely take place in early/mid 2023. It found that [88] to [96]:

"88. Of course, a mere threat of negative publicity and unwanted attention to the Respondents and their witnesses will not be sufficient to conclude that a fair hearing will not be possible. However, the Claimant's conduct, which I found to be scandalous, vexatious and unreasonable, his openly declared intentions to continue to use the Tribunal proceedings to pursue his '*relentless*' and '*unstoppable campaign*' of creating the '*damning narrative*' against the Respondents and their witnesses, and considering the extent to which the Claimant is prepared to go to inflict damage on anyone he considers has done wrong to him and irrespective [of] how the matter is viewed by the Tribunal (e.g. his perjury claim against Mr Deakin) draws me to the conclusion that in the circumstances a fair trial is not possible.

89. Not only the Respondents' witnesses will feel understandably intimidated of what the Claimant might unleash upon them if he feels dissatisfied with their evidence at the trial, the Respondents themselves will be put in the impossible position where, win, lose or draw, they will end up being further attacked by the Claimant until he achieves his

stated goals of destroying or seriously damaging their business and political career, respectively.

90. Further and crucially, the Claimant's conduct and his declared intentions show that he seeks to usurp the trial and essentially use it as a means for his personal vendetta against the Respondents and as a platform to propagate his political views.

91. This, therefore, will no longer be a trial of the Claimant's complaints of discrimination, victimisation and unfair dismissal, but a set stage for the Claimant's political campaigning and his attempts to generate the damning narrative against the Respondents. The Claimant clearly seeks to have a show trial of the Respondents.

92. I reject the Claimant's submission that the Second Respondent and the Respondents' witnesses can withstand the pressure of this kind and the Tribunal is well equipped to calm witnesses and assist them with giving their evidence. The issue goes well beyond the witnesses feeling uncomfortable and needing the Tribunal to step in to give them time and space to recompose themselves. The fundamental issue is that the Claimant wants to assume the role of the prosecutor and the judge in relation to the Respondents and their witnesses and deal with them inside and outside the proceedings as he finds appropriate.

93. At the hearing he made various statements to the effect that he knows when the Respondents' witnesses will be lying on the stand, and they fear that because he will not let it go. He used phrases like '*let's bring it on*' and '*maybe you don't understand who you are dealing with*'. He also made it clear that he considers that different rules should apply to the Second Respondent because he is a politician and therefore '*a fair game*'. He described the election process as '*civil war without bloodshed*'.

94. His actions with respect of Mr Deakin and the Second Respondent speak volumes. He continues in his quest to prosecute Mr Deakin for perjury despite the clear pronouncement by the Tribunal that there is no basis for that.

95. The leaflets and further leaflets use emotive and misleading language and imag[ery], which clearly are aimed at casting strong negative light on the Respondents. The use of such words as *'guilty'*, '*aiding and abetting'*, a drawn up image of the Second Respondent apparently sitting in the dock of a criminal court, references to fictitious '*McGrath* law', the aim of which is [to] hinder the First Respondent's ability to raise funding for its work, apparent attempt to link the tragic murder of a resident in the First Respondent's facility to the natters in the proceedings (which events have no connection whatsoever), all that tells me that the Claimant['s] threats of creating the damning narrative and repeating it again and again '*until it is the only narrative that anyone* registers', are not simply threats, or the Claimant simply driving a 'hard bargain' in his settlement negotiations.

96. In these circumstances I do not see how a fair trial of the Claimant's claims can be achieved. In my view, by allowing the case to proceed to the trial, the Tribunal will be giving a platform to the Claimant to propagate his campaign against the Respondents under a veneer of the respectability of the judicial process and exposing the Respondents and

> their witnesses to further vindictive actions by the Claimant. This will not be a fair trial."

Is strike-out a proportionate sanction?

g. The Tribunal noted that strike-out is a Draconian sanction, to be exercised only in exceptional circumstances. Nevertheless, having concluded that a fair trial was not possible, it stated that it could not see what lesser sanction could turn it back into a fair trial. This was not a case in which an Unless Order (the conditions of which were said not to be obvious), or a costs warning would enable a fair hearing. Denial of the Claimant's right to give evidence or to cross-examine the Respondents' witnesses would also clearly make the trial unfair. There were no proper grounds for holding the hearing in camera or making it subject to reporting restrictions under rule 50 of the Rules. Thus, *"and with some regret"*, the Tribunal stated its conclusion that the only appropriate sanction was to strike out the claims. It went on to hold that striking out part of the claims would not be possible, given the extent to which all claims were intertwined, and that a fair trial of the so-called Suspension Claim would not be possible.

h. Acknowledging that the striking out of his claims would inevitably abridge the Claimant's rights under Article 6 ECHR, the Tribunal observed that those rights were not absolute. Rule 37(1) of the Rules, and related caselaw, provided appropriate safeguards having regard to Article 6 rights, to which, the Tribunal stated, it had had full regard. In the Tribunal's view, the Claimant's conduct of proceedings had made the exercise of those rights impossible.

i. The Tribunal further found that the Claimant's rights under Article 10 ECHR and Article 3, Protoco1 1 of the Human Rights Act 1998 had not been infringed, stating that the Claimant's submissions to the contrary had been misconceived:

"111. … First, it is not the contents of the leaflet or subsequent leaflets that led me to the conclusion that his conduct of the proceedings was scandalous, vexatious and unreasonable, but his past conduct and his stated intentions (as evidenced by the 29 March Email, the 14 December Offer) to use these proceedings to inflict the maximum damage on the Respondents and essentially usurp the proceedings to advance his narrative regardless of what the Tribunal may make out of his claims. The contents of the Leaflet and subsequent leaflets are only supporting evidence to show that the Claimant's threats are not empty words.

112. Secondly, the Article 10 right is '*subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests… for maintaining the authority and impartiality of the judiciary.*' Therefore, to the extent the Claimant argues that striking out his claims will prevent him from using these proceedings to propagate his Black Lives Matter political campaign or '*set the narrative* [against the Respondents] straight', I find, for the reasons explained above, that this will be an abuse of the employment tribunal process and, therefore, falls within the exception formulated in Article 10(2)…

…

118. …As explained above, (see paragraphs 55-56, 82-84 and 111) I am not judging the Claimant's political campaign methods, far less stopping him from pursuing his political goals. He is free to continue with his political campaign, and there is nothing in my judgment that stops him from doing that. (I, of course, make no findings or conclusions on the on-going defamation dispute between the parties.) However, for the reasons set out in paragraphs 111 and 112, I find that he cannot hide behind his Article 10 right to justify his scandalous, vexatious and unreasonable conduct of these proceedings.

119. I fail to see on what basis the Claimant contends that Article 3 of Protocol 1 is engaged in the consideration of the strike-out application. Protocol 1 records the agreement by the governments of the Council of Europe member states, and Article 3 contains the undertaking by the contracting parties '*to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*'

120. It does not create any separate free-standing right for citizens. To the extent the Claimant argues that striking out his employment tribunal claims somehow abridges his right to freely express his opinion about the Second Respondent as a person standing in local elections, I find that argument is misconceived for the same reasons as his Article 10 contentions."

The Sift

5. For allowing the appeal to proceed in part John Bowers KC, sitting as a Deputy Judge of the High Court, gave the following reasons:

> "1. I have no doubt that the tribunal are correct in the meticulously reasoned decision in respect of Rule 37(1)(b) being engaged. I am, however, troubled as to whether it can truly be said that a fair trial could not be held given rigorous case management by an EJ and whether strike-out is appropriate.
>
> 2. I have given leave on the bias allegation in the first bullet point of ground 2 but require full particulars if this is to be pursued. The Appellant needs to think carefully whether to pursue this, not least as it is not central to the points he can make.
>
> I do not give leave on Ground 5[1] as I see no realistic basis to attack the fact finding by the Tribunal."

The Parties' Submissions

The Claimant

6. In relation to ground one, the Claimant stresses the importance of access to the courts, noting its value, in particular, to cases which establish principles of general importance such as those alleging discrimination. The discretion to strike out a case ought not to be exercised punitively. The Tribunal had *"taken the subjective view that there is no deterrent effect of a judgment under Rule 37(1)(b) … It is not… the role of the Courts to perform the private service of advancing the… judge's view that discrimination is a "relatively minor matter" (para 65)."* The courts regularly heard cases on the merits and demerits of issues having a socio-political dimension and those which were clearly part of a campaign (for example, *In re: Pinochet* [1999] UKHL 1). The Tribunal had set the threshold at which to bar access to the courts too low, had failed to consider the wider constitutional issues and had adopted a subjective view of the merits of the Claimant's case.

[1] being an asserted failure by the Tribunal to have taken account of certain evidence

7. As to ground two, the Claimant submits that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased *"because EJ Klimov, for reasons unconnected with the merits of my case, gives the impression that he is predisposed to thinking that discrimination is not a serious matter. This impression reveals a possibility of bias even if no actual bias occurred."* That submission is founded solely upon the conclusions set out paragraph 65 of the reasons (see above), said to echo the approach adopted to discrimination by the First Respondent and to convey the impression of bias in its favour and an approach contrary to that of the judge who had decided the matter. The Claimant does not contend that there is no gradation of acts of discrimination, but that Mr Deakin's acts had *"way over-stepped the mark"* and had been serious. He relies upon the dicta of Lord Steyn in *Anyanwu v South Bank Student Union* [2001] UKHL 14 [24]:

> "Discrimination cases are generally fact-sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other, the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest".

That being so, the Claimant submits, the strike-out judgment ought to be "quashed". It is said that the Tribunal inaccurately attributed to the Claimant the motive of pursuit of vengeance, rather than pursuit of justice, based upon its subjective view of the matter and with a view to *"reading his ideas of good social policy into the law"*. Even if it had been right in that conclusion it did not justify the striking out of his claim. The Claimant submits that it is his right to disagree with the tribunal which determined the Original Claim, which had not itself characterised his conduct as vindictive, whilst respecting its decision. His intention had been to set the narrative straight, which he had done in the political sphere.

8. As to ground three, the Claimant submits that the Tribunal conflated two issues: first, the bringing of a legal dispute to the court in order to ventilate it and, thereafter, seek public

support with, second, the abusive use of the courts for the purpose of harassing an opponent. He contends that any element of campaigning within the case seeks to highlight the serious wrongdoings of those who seek public office and organisations which are in receipt of public funding. That is said to be an entirely legitimate use of democratic processes and, it is submitted, as a member of the federal board of a political party who seeks public office, the Second Respondent ought to be subject to greater scrutiny when seeking to represent himself positively. Article 10 ECHR protects both the imparting and the receipt of information.

9. By ground four, the Claimant contends that the Tribunal had been wrong to have concluded that the abusive conduct which it had found had resulted in the impossibility of a fair trial. Fear of democratic exposure does not make a fair trial impossible, he submits: *Force One Utilities Limited v Hatfield* [2009] IRLR 45. At [22], the Tribunal had noted that the Respondents had commenced defamation proceedings against the Claimant, presumably indicative of a willingness to go to court and give evidence. Its conclusion, in that context, that the Respondents could not withstand the pressure of cross-examination [92] had been irrational, wrong and contrary to its own findings. The right to remain silent under police questioning and the privilege against self-incrimination indicated that a trial could be fair in the absence of evidence from the Respondents. In earlier tribunal proceedings which he had brought, one of the parties, together with another relevant individual, had not been called as a witness. In these proceedings, one of the witnesses who could be called was a barrister and it would be extraordinary, he submits, if that individual could not give evidence in a manner which would make a fair trial possible, with the benefit of rigorous case management by an employment judge. The Claimant had done nothing wrong in seeking to ventilate his dispute in court and it was the Respondents who had sought to use the court to obstruct him. The Tribunal had erred in denying access to the courts on such a basis. It had concluded that the Respondents' witnesses dare not face him, yet, following the sending of the 29 March email,

the Second Respondent had walked up to him in the street and abused him. There had been no evidence of fear and such behaviour, coupled with the sending of the pre-action protocol letter relating to a prospective claim for defamation, spoke to the contrary. Per *Bolch v Chipman* [2004] IRLR 140, EAT [64], even if his behaviour had been reprehensible, the question was whether it would have prevented a fair trial and an order for strike-out was not to be deployed punitively: *Arrow Nominees Inc and Others v Blackledge & Ors* [1999] EWHC Ch. 198 [56], citing from an earlier case. An alternative available measure would have been an order that the Respondents need not call witnesses to give evidence.

10. In relation to the final ground of appeal which has been allowed to proceed (numbered six), the Claimant points to the dicta of Lord Steyn in *Anyanwu* [24], emphasising the fact-sensitive nature of discrimination cases; the fact that their proper determination is vital in a pluralistic society; and that the bias in favour of examination of their merit is a matter of high public interest, particularly given the involvement of a national politician and a charity in receipt of public money. The Respondents' pre-action protocol letter in connection with defamation proceedings had rendered it obvious that a fair trial involving the Claimant was possible, negating the need for a strike-out order, which would be particularly egregious in such circumstances and contrary to the public interest. It was clear that, as at the date of the hearing before Employment Judge Klimov, the Respondents had believed that a fair trial engaging the Claimant was still possible.

The Respondents

11. As her overarching submission, Miss Urquhart contends that the test to be applied on appeal sets a high threshold. The EAT must be satisfied that the Tribunal made an error of principle in its approach, or reached a perverse decision, and that the Tribunal's conclusion was

unreasonable in the *Wednesbury* sense (per *Emuemukoro v Croma Vigilant (Scotland) Limited and Others* [2022] ICR 335 [21]). It is said that the Claimant cannot meet that standard and that none of the grounds of appeal asserts perversity. The Tribunal had correctly identified and applied the three-stage test set out in *Bolch* and in *Abegaze v Shrewsbury College of Arts & Technology* [2009] EWCA Civ 96. The judge who had conducted the sift of the Claimant's appeal had stated that he had no doubt that the Tribunal had been correct in its meticulously reasoned decision that rule 37(1)(b) was engaged. Thus, the Tribunal's findings in that respect were not the focus of the appeal. The Tribunal had conducted a thorough and considered analysis in accordance with authority, from which irrelevant considerations had expressly been excluded. There was no error of principle which warranted it being overturned on appeal.

12. Turning to the individual grounds, Miss Urquhart submits that:

a. Ground one: The Tribunal had expressly recognised the Claimant's right of access to the courts [105] to [109]. In so doing, it had had regard to the Claimant's Article 6 ECHR right and to his common law right to access to justice. The Claimant had brought a private law claim personal to him, alleging that the manner in which he had been suspended and then dismissed from his employment had been discriminatory and unfair. The case did not raise broader socio-political issues — for example, no parties such as the EHRC had sought to be joined as intervenors. The Tribunal had not considered the matter to be a crusade for justice, rather had detected a darker and illegitimate motive. In its view, the way in which the Claimant had sought to raise wider issues had constituted an abuse of the Tribunal process. The Claimant's reference to the Tribunal's subjective view of the merits of the case was not understood; the judge had made no adjudication on the merits and the Claimant had identified no part of the judgment in which he had done so.

b. Ground two: The Tribunal had not imposed its subjective views of the Claimant's motivation, nor had those asserted views been identified by the Claimant. The strength of language criticised by the Claimant on appeal reflected the extraordinary nature of the statement and threats which he had made in his 29 March email, accepted on appeal to have been intemperate. The Tribunal had not accepted the Claimant's suggestion that his employment claim had a broader public purpose, noting [83] that the Claimant had been prepared to withdraw his claims if offered the compensation and settlement arrangements which he had sought. The Claimant had not explained his belief as to the nature of the Tribunal's "ideas of good social policy"; where they were to be found in the Tribunal's reasons or how (if they could be detected) they were in conflict with the Claimant's rights.

c. Ground three: The Claimant appeared to consider that he should be entitled to use his private employment law claim to score political points or to campaign against the Second Respondent, who, unrelated to his role as a voluntary board member of the First Respondent, was a Liberal Democrat councillor. Accepting that it was legitimate, in a democracy, "to campaign to highlight the serious wrongdoings of those who seek public office" and that those in such office should face greater scrutiny when seeking to represent themselves in a positive light, neither matter was the purpose of an employment tribunal claim. The Claimant's misuse of the Tribunal process was even clearer in light of the 29 March email, which, whilst ostensibly sent in an attempt to settle proceedings, had been akin to blackmail in its blatant endeavour to damage the First Respondent and to unseat the Second Respondent (and a fellow councillor unconnected with the Claimant's Tribunal claims) in local elections were the Respondents not to agree to his demands. The Tribunal had been entitled to conclude [111] that the Claimant's intention had been to *"usurp the proceedings to advance his narrative regardless of what the Tribunal may make out of his claims".* Moreover, it

had made a clear distinction between the political content of the Leaflet (which had not been the reason for striking out the claims) and the Claimant's use of the Leaflet and the 29 March email to seek to achieve ends which were not available to him as a remedy in Tribunal proceedings (see paragraphs 111 and 114).

d. Ground four: Following the sift, this was said to be the central ground of appeal. In relation to whether a fair trial was possible, the evidence and findings made by the Tribunal, as set out at paragraphs 7, 18, 57, 59, 61 to 64, 74, 88, 92, 95 and 96 of its reasons, had amply justified its conclusion that the Respondents and their witnesses had well-founded fears of retribution, should the hearing go ahead. Further, the Tribunal had had before it the Claimant's response to the Respondents' strike-out application, in which he had continued to make threats, suggesting that, if, in his opinion, the Second Respondent "lied" when cross-examined by the Claimant, "then I believe that the Respondents know that I will seek perjury charges to be brought against Mr McGrath…" In the Respondents' submission, a fair trial must be one in which witnesses are able and prepared to give their best evidence, untainted by fears as to what the Claimant might do with that evidence. That was not simply a question of ensuring that witnesses' fears could be allayed during the hearing itself and measures such as giving evidence in writing, limiting cross-examination, or the use of screens, which might assist in other cases involving fearful witnesses, would make little difference here, where the fears of the witnesses were not directed to the mechanics of the hearing itself. There was certainly no suggestion of physical violence by the Claimant, but the clear threat which he had made that, whatever was said in evidence, he would continue to campaign against, vilify and/or bring further claims against witnesses who gave it, and whose words would be used to pursue further attacks, was a position starkly illustrated by his approach to Mr Deakin whom

he had sought to have prosecuted for "perjury", bringing a complaint against the Police for failing to have dealt with his complaint against Mr Deakin. It is said that the Claimant also seeks to bring a claim for damages against Mr Deakin and against Ms Claire Footitt, who had been involved in the matters with which the Original Claim had been concerned, but had not given evidence. The Tribunal had found that the Claimant had shown himself prepared to go beyond whatever findings the Tribunal might make to pursue his own campaigns against the Respondents and their witnesses. The Respondents submit that witnesses will be concerned not to say anything which might be used against them in the future and that their willingness or otherwise to give frank evidence goes to the heart of the fairness of a trial. The ongoing pursuit of Mr Deakin for "perjury", in circumstances in which the Tribunal in the Original Claim had stated that *"none of the members of the Tribunal considers that there is any reasonable basis"* for that contention, indicated that it could not be said that a witness who tells the truth has nothing to fear. As Chadwick LJ had observed, in *Arrow Nominees* [54]:

> "Where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold, bound, to refuse to allow that litigant to take further part in the proceedings. It is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties, not to allow its process to be used as a means of achieving injustice… "

It is further submitted that the Tribunal had been entitled to have taken into account the aggressive language and posturing of the Claimant during the strike-out hearing itself, on 12 May 2022, as recorded at paragraph 93 of its reasons.

e. As to whether strike-out or a less Draconian sanction had been appropriate, the Tribunal had been obliged to consider the proportionality of striking out a Claim (per

Blockbuster Entertainment Ltd v Jones [2006] EWCA (Civ) 684). If there were other measures which could enable a fair trial to go ahead, they were to be preferred. The Claimant had not identified what *"lesser measure than a strike-out would suffice to ensure a fair trial"* and, in the Respondents' submission, there could be no such measure where witnesses were concerned that whatever they said might be used against them, not just in the hearing itself but in unknown future campaigns, or litigation, potentially stretching for years ahead, as Mr Deakin had experienced. The Tribunal had made careful findings, submitted Miss Urquhart, as to possible alternative measures, which it had rejected for sound reasons. The Respondents relied upon the careful findings which the Tribunal had made when considering those possible alternative measures which might enable a trial to go ahead [92] and [99], only to reject them. An appellate tribunal which considered a fair trial to remain possible would typically advance a practical solution which would enable that trial to go ahead. Here, it is submitted, there were no suitable alternative measures.

f. Ground six: Acknowledging the principles for which *Anyanwu* stands, Miss Urquhart submits that it is not concerned with an application under Rule 37 and that discrimination claims can be and have been struck out where the test under that rule is satisfied. The sending of a pre-action protocol letter in relation to a prospective claim for defamation is a necessary precursor to a claim, but does not itself indicate that a claim will be brought. No such claim had been brought in this case, in which the applicable limitation period had now expired, albeit that it had been extant at the time of the application before Employment Judge Klimov.

Discussion And Conclusions

13. Miss Urquhart is right to characterise ground four as the meat of the appeal and I, therefore, address the other grounds of appeal more briefly, having first addressed matters of overarching

relevance to them all.

14. Rule 37(1) of the Rules provides:

> "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 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;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

15. In *Bolch*, the EAT set out the test which a Tribunal should apply when considering whether a claim or response should be struck out under rule 37, a test which was affirmed in *Abegaze* and summarised by Elias LJ [15]:

> "In the case of a strike-out application brought under [rule 37(1)(b)] it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings, that the result of that conduct was that there could not be a fair trial and that the imposition of the strike-out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial then the strike-out should not be employed."

16. As was observed in *T v Royal Bank of Scotland* [2023] EAT 119 [40]:

> "There are examples in the authorities of cases where the specific nature of a litigant's impugned conduct means that the conduct has itself inherently made it impossible for there to be a fair trial. From time to time there will also be cases where, unfortunately, a litigant's conduct is, for example, so threatening abusive or disruptive that, whatever the cause, it ought not to be tolerated and they will be done no injustice by being treated as having thereby forfeited their right to have their claim or defence tried, but outside of such cases a claim should not otherwise be struck out on account of conduct unless the conduct means or has created a real risk that the claim cannot be fairly tried. See *De Keyser* at [24] citing the discussion of the earlier authorities in *Arrow Nominees*."

17. In *Emuemukoro* [21], Choudhury J, then the President of this tribunal, emphasised the high hurdle to be surmounted in an appeal against strike-out:

> "I bear in mind when considering whether or not to interfere with the Tribunal's decision here that the test for the EAT, as confirmed in *Riley v Crown Prosecution Service* [2013] IRLR 966, is a "*Wednesbury"* one; that is to say, in an appeal against striking out, the case will succeed only if there is an error of legal principle in the Tribunal's approach or perversity in the outcome (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223".

18. In *Blockbuster Entertainment Limited v Jones* [21], Sedley LJ emphasised the need to consider the proportionality of striking out a claim, against a backdrop of the right to a fair hearing:

> "It is not only by reason of the Convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr Jones has reminded us, has for a long time taken a similar stand (see *Re: Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H). What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. 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. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check in the overall interests of justice upon their consequences."

Ground One

19. There is nothing in this ground of appeal. Whilst allegations of discrimination are always to be treated as important, no wider point of principle, "constitutional issue" or "socio-political dimension" was engaged by the Claimant's claims and nothing in the Tribunal's reasons indicated that it considered the claims to lack intrinsic importance, or communicated any view of their substantive merit. The Claimant seeks to place greater weight on the wording to which he objects in paragraph 65 of the Tribunal's reasons concerning the Original Tribunal Claim and the number of further claims made which had been dismissed, than it will bear; wording which is consistent with the matters recorded at paragraph 70 of its reasons, summarising the findings made at the remedy hearing of that claim:

> "…in deciding that the Claimant's case was 'at the lower end of the scale in relation to discrimination claims' at paragraph 77 and awarding the Claimant £5,000 for injury to feelings, the Tribunal concluded that 'the extent of his feelings of hurt, which continue to this day, are because of unreasonable perceptions about the Respondents' actions since then as well as about the other acts about which he complained in his claim form but which we did not uphold' (at paragraph 70)."

If the contention is, in fact, that claims of discrimination fall outside rule 37 and/or the approach to be adopted to an application thereunder, as set out in related caselaw, it is untenable.

Ground Two

20. Nothing in the Tribunal's reasons is indicative of apparent bias, the well-known test for which is set out in *Porter v McGill* [2001] UKHK 67 [102]:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the Tribunal was biased."

The only circumstance upon which the Claimant places reliance is the wording of paragraph 65 of the Tribunal's reasons, to which the considerations set out when discussing ground one apply. That is unaffected by the dicta in *Anyanwu* upon which the Claimant places reliance, which do not assist on this point. The Tribunal carefully considered the evidence as to the Claimant's actions, and his motivation therefor, and formed a permissible view and construction of them. Whether or not a different judge might have viewed those matters differently is irrelevant. The question of whether they ought to have led to the strike-out order made is properly the subject of consideration under ground four.

Grounds Three and Four

21. It is convenient to consider these two grounds together. At the sift, no realistic basis upon which to attack the finding of the Tribunal was identified, such that permission to advance ground five was refused. Whilst sympathetic to the Claimant's position that a litigant's desire or intention to make political capital from litigation is not, without more, an abuse of process,

I share the view of the judge who conducted the sift that the bases upon which rule 37(1)(b) had been engaged were meticulously reasoned by the Tribunal. Having identified the matters upon which it relied for its conclusions, the Tribunal stated its overarching view at paragraphs 78 to 81, recited above. Those conclusions did not rely upon any desire, per se, to make political capital, but upon the Claimant's desire to create, in its language, *"a public and political scandal"*; *"to subject the [Respondents] to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant"*; and to seek to achieve settlement on terms which far exceeded that which *"he could reasonably expect to achieve were he to win "hands down""*, absent which he would *"unleash his damning narrative campaign regardless of the outcome of the proceedings"*. There is no basis upon which those findings may be impugned on appeal.

22. The real question is whether, the above notwithstanding, the Tribunal erred in concluding that the result of the Claimant's conduct was that there could not be a fair trial, and/or in striking out the claim. As Miss Urquhart acknowledged in the course of discussion, the Tribunal had received no evidence from any prospective witness for the Respondents to the effect that he or she was fearful of giving evidence, or of involvement in the claim, or intimidated by the Claimant. Indeed, so I was informed, at least one such witness, the barrister to whom the Claimant had alluded, had not been asked about such matters by, or on behalf of, the Respondents. The Tribunal's reasoning, at [89] and [90], proceeded on the basis of the assumed effect of the Claimant's conduct. Furthermore, at [92] it found the "fundamental issue" to be that the Claimant wanted to assume the role of prosecutor and judge in relation to the Respondents and their witnesses and to deal with them inside and outside the proceedings as he found appropriate, elaborating upon that conclusion at [93] to [95]. It is not clear how all of that can result in a conclusion that a fair trial is not possible and, as the Tribunal had separately observed, the Claimant had separately pursued a claim against Ms Footitt upon the

basis of her alleged involvement in the events giving rise to the Original Tribunal Claim, notwithstanding the fact that she had not been called as a witness in the proceedings. As is clear from paragraph 1 of the judgment, the ultimate basis for striking-out the claim was said to be the scandalous, unreasonable and vexatious manner in which proceedings had been conducted to that date; that is under rule 37(1)(b), said to have resulted in the impossibility of a fair trial. The Tribunal did not find that the Claimant would be done no injustice by being treated as having thereby forfeited his right to have his claims tried, nor were the claims themselves characterised as having fallen within rule 37(1)(a). As they did before me, the Respondents had disavowed any concern over improper behaviour towards witnesses by the Claimant in the course of the hearing. Indeed, before me, Miss Urquhart stated that the Claimant asked questions which were appropriate, with courtesy. Those towards whom any unlawful behaviour by the Claimant outside the proceedings was directed would have other remedies available to them.

23. I acknowledge the Tribunal's concern at what it termed the Claimant's weaponisation of proceedings. I bear in mind the high hurdle on appeal to which Miss Urquhart has, rightly, referred. Nevertheless, I conclude that the Claimant has surmounted that hurdle in demonstrating that the Tribunal's conclusion that a fair trial was not possible was an error of principle, or perverse on the material with which it had been provided. In those circumstances, the Tribunal also erred in principle in proceeding to strike out the claim, irrespective of its findings as to the Claimant's conduct. The alternative order proposed by the Claimant does not reflect the burden of proof provisions embodied in section 136 of the Equality Act 2010, but, in any event, had not been shown to be necessary on the available evidence. More fundamentally, the fact that no alternative order is merited or appropriate cannot itself serve to establish that the Draconian sanction of strike-out is warranted. Such a sanction then becomes simply a punitive measure. However justified the opprobrium which the Tribunal

attached to the Claimant's conduct, the Respondents' remedy for any repetition of it lies elsewhere. I record the Claimant's submission to me that his life has moved on since the hearing before Employment Judge Klimov; he is no longer in politics; he lives in the Isle of Man; and has a young child. He told me, *"All I want to do is have my day in court."*

Ground Six

24. I have noted that claims of discrimination do not fall outside the ambit of rule 37. In deciding whether a fair trial is possible, tribunals will, no doubt, have in mind the high public interest in the substantive determination of such claims. There is no indication that this Tribunal failed to do so and it had the applicable legal test well in mind. In the event, I have concluded that it erred in the application of that test, for the reasons discussed above.

Disposal

25. It follows that grounds one to three and six of the Claimant's appeal are dismissed. Ground four succeeds. The claims shall be reinstated and remitted to the Tribunal for an open preliminary hearing at which all necessary directions enabling the matter to proceed to a substantive hearing shall be considered. The Tribunal should be provided with a copy of this judgment. I shall hear briefly from the parties as to whether remission should be to the same, or a differently constituted, tribunal, in accordance with the well-known principles in *Sinclair Roche & Temperley v Heard and Fellows* [2004] IRLR 763, EAT.

LATER

26. Given the nature of my conclusions in this appeal, there is no principled reason why the matter should not be remitted to Employment Judge Klimov, or a tribunal of which he is a member, though there is no need for it to be so. I have rejected the Claimant's contention of apparent bias; he does not assert actual bias; and there is no basis for a conclusion that Employment

Judge Klimov will consider the claims in anything other than a professional manner.