EMPLOYMENT TRIBUNALS

Claimant: **Ms I Rudzate**

Respondent: **Grove WP Limited**

Heard at: **Reading Employment Tribunal (by video)**

On: **23 May 2024**

Before: Employment Judge Annand

Representation
Claimant: Ms Rudzate, in person
Respondent: Mr O'Neill, solicitor

JUDGMENT

1. The Respondent's application to strike out the Claimant's remaining claims succeeds.

2. The Claimant's claims of harassment, direct sex discrimination and victimisation are struck out under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been unreasonable, and are struck out under Rule 37(1)(e) because it is no longer possible to have a fair hearing.

REASONS

The background

1. The Claimant was employed by the Respondent as a Senior Security Officer between 7 June 2021 and 3 February 2022. The Claimant commenced early conciliation on 19 April 2022 and an early conciliation certificate was issued on 21 April 2022. The Claimant submitted a claim on 8 May 2022.

2. At the time the Claim Form was submitted the Claimant was represented by Mr Dhliwayo, a Legal Consultant, from MSL Legal. The Claimant brought

claims of wrongful dismissal, detriments on grounds of having made a protected disclosure, automatic unfair dismissal on grounds of having made a protected disclosure, direct sex discrimination and victimisation, unauthorised deduction from wages, and holiday pay. The Particulars of Claim were 27 pages long and detailed a range of different allegations including serious allegations of sexual nature which were made against the Claimant's supervisor, NY. On 2 November 2022, the Respondent submitted a Response and Grounds of Resistance. The Respondent alleged the Claimant had been dismissed for gross misconduct because of significant damage which had been caused to a security buggy.

3. On 5 May 2023, a telephone preliminary hearing was held by Employment Judge Hawksworth. The Claimant was represented by Mr Dhliwayo and the Respondent was represented by Ms Clapham, a solicitor. The final hearing was listed for 6 days starting on 18 March 2024. The hearing was to take place in person at Reading Employment Tribunal.

4. At the Case Management Hearing, the Claimant was ordered to provide further information by 16 June 2023, regarding of the allegations of discrimination, the protected disclosures she was relying on, and the alleged detriments she claimed to have been subjected to as a result of those protected disclosures.

5. Following the hearing, the Respondent made an application for strike out and/or a deposit order. A hearing was listed for 24 October 2023 to finalise the List of Issues and determine the Respondent's application.

6. At the hearing on 24 October 2023, Employment Judge Gumbiti-Zimuto struck out the Claimant's claims for unauthorised deduction from wages, unfair dismissal because of a protected disclosure, and the claim she was subjected to detriments because she had made a protected disclosure on the grounds the claims had no reasonable prospects of success. A deposit order was also made for £25 in relation to the Claimant's claim for wrongful dismissal, which the Claimant subsequently paid.

7. Employment Judge Gumbiti-Zimuto also made an order that a third party, SB Security Solutions Limited, disclosed a range of documents referred to in the judgment of Employment Judge Abbott, sitting in London South Employment Tribunal, dated 10 November 2021.

8. Before the Claimant worked for the Respondent, she worked for SB Security Solutions Limited from April 2018 to February 2019. She issued claims in the London South Employment Tribunal against SB Security Solutions Limited in March 2019. The claims were for sex and race discrimination, breach of contract, constructive dismissal, possibly harassment or direct discrimination (but the complaints were unclear), whistle-blowing and victimisation. The judgment of Employment Judge Abbott, dated 25 November 2021, had struck out the Claimant's claims against SB Security Solutions Limited. In Employment Judge Abbott's judgment, he noted:

    a) SB Security Solutions Limited had requested the Claimant provide some further particulars of her case. The Claimant did not engage with that

request but instead wrote to the Tribunal saying that SB Security Solutions Limited had not filed a Response in time and sought judgment in default. SB Security Solutions Limited explained this was incorrect and that the Response had been submitted in time. The Claimant provided a Statement dated 30 June 2019. In August 2019 she applied for an order for the disclosure of a particular email and applied to strike out SB Security Solutions Limited's Response and for sanctions to be applied. She also sought a postponement of a scheduled case management hearing as she had "schedule medical appointments abroad". The application for a postponement was refused by EJ Wright.

b) On the morning of the telephone Case Management hearing, listed for 19 September 2019, the Claimant wrote to the Tribunal stating she would not be participating due to SB Security Solutions Limited's failure to provide the requested disclosure, alleging a breach of Article 6 of the Human Rights Act 1998, and again requesting SB Security Solutions Limited's response be struck out. The hearing was held by Employment Judge Hyams-Parish who listed an open preliminary hearing for 10 December 2019 to determine a jurisdictional issue that was raised in the Grounds of Resistance. The Claimant was ordered to provide further information by 17 October 2019. The Claimant provided a response to SB Security Solutions Limited by 16 October 2019. It was combined with requests that the response be struck out.

c) On 4 November 2019, SB Security Solutions Limited applied for an order that the Claimant comply with the Tribunal's previous order that she provide certain information by 17 October 2019 on the basis that the response she had provided on 16 October 2019 was inadequate.

d) On 9 December 2019, in the evening, the Claimant wrote to the Tribunal stating she would not be attending the hearing the following day due to "serious illness". She stated she was abroad and unable to board a plane. The hearing went ahead on 10 December 2019. Employment Judge Hyde issued a strike out warning on the basis that the Claimant's claims had no prospects of success, the manner in which the proceedings were being conducted was unreasonable, and the Claimant had not complied with the order to provide certain information by 17 October 2019. Employment Judge Hyde also ordered the Claimant to provide further information by 27 January 2020.

e) On 22 December 2019, the Claimant made further applications and asked for the Response to be struck out, sanctions and compensation.

f) On 10 February 2020, SB Security Solutions Limited applied for the claims to be struck out on the basis that the Claimant had not provided the information she was ordered to provide by 27 January 2022. The Claimant said she had not received Employment Judge Hyde's order. The Respondent sent her a copy the following day. Rather than complying with the order, the Claimant emailed the Tribunal on 10 and 15 February 2020, 2, 12 and 23 March 2020 demanding an explanation as to why she had not been sent Employment Judge Hyde's order. The Claimant then sent multiple emails in April 2020 to the Tribunal stating

her right to a fair trial had been violated because the request for a postponement in December 2019 had been refused. She requested another hearing.

g) The Claimant's request for a further hearing was refused by Employment Judge Balogun, who also noted the Claimant could apply for the orders to be varied. In July 2020, the Claimant continued to request another hearing date.

h) On 3 June 2020, SB Security Solutions Limited applied for the claims to be struck out. On 29 July 2020, Employment Judge Martin ordered that a public preliminary hearing would be held to decide the Respondent's application to strike out the claim. The Claimant sought to appeal that decision but Mrs Justice Stacey, sitting in the Employment Appeal Tribunal, ordered no further action be taken. The public preliminary hearing was listed for 20 November 2020.

i) Prior to the public preliminary hearing, the Claimant provided a statement to the Tribunal and SB Security Solutions Limited in which she alleged the previous judge's actions had disgraced and damaged the integrity and impartiality of the Tribunal and alleged SB Security Solutions Limited had been fornicating with the Tribunal behind the Claimant's back.

j) On 20 November 2020, the public preliminary hearing was held by EJ Truscott QC. The Claimant said she was not aware of what Employment Judge Hyde had ordered. EJ Truscott QC decided he could not determine the Respondent's application to strike out the claims. He ordered the Tribunal to re-send Employment Judge Hyde's Orders to the Claimant. EJ Truscott QC emphasised the Claimant had to actively participate in pursuing her claim. The final hearing was listed for May 2021.

k) On 14 December 2020, SB Security Solutions Limited renewed the application to strike out the Claimant's claims. The Claimant's response included a number of allegations against SB Security Solutions Limited, the Tribunal staff and judges.

l) Employment Judge Freer vacated the final hearing listed for May 2021 and the hearing was converted to a one day hearing to consider the SB Security Solutions Limited's application to strike out the Claimant's claims.

m) On 10 November 2021, Employment Judge Abbott conducted the preliminary hearing. At the hearing, the Claimant alleged the Tribunal and SB Security Solutions Limited had negotiating with the Tribunal behind her back. In the hearing she maintained she had not seen emails which had been sent to her, containing the Orders of Employment Judge Hyde. When asked about an email of 8 January 2020, which appeared to show the Orders being sent to her by the Tribunal, she said she had not received it. When shown an email of 11 February 2020, which appeared to show the Orders being sent to her by SB Security Solutions

Limited's solicitors, she said she could not trust anything sent to her by SB Security Solutions Limited and would only regard what was sent by the Tribunal as being a true copy. When asked about a further email of 7 April 2020, which appeared to show the Orders being sent to her by the Tribunal, she initially said she had not received it. When it was pointed out she had responded to the email of the same day, her response what that the email no longer appeared in her records.

n) Employment Judge Abbott indicated at that point in the hearing, the Claimant became agitated, accused the judge of not allowing her to speak, and shortly thereafter deliberately disconnected from the hearing. After some delay, and technical difficulties, the Claimant re-joined. The Claimant was not willing to deal with the issues the judge was asking her to deal with and instead wanted a series of questions answered including arguing the Response was out of time and should not have been accepted by the Tribunal. She stated she wanted answers before she would proceed and then disconnected from the hearing again. Employment Judge Abbott concluded the Claimant's conduct at the hearing was wholly unreasonable and that she was only willing to engage if it was on her own terms.

o) Employment Judge Abbott struck out the Claimant's remaining claims. Employment Judge Abbott found the Claimant had failed to comply with the order of Employment Judge Hyde. He also found her conduct in the case had been unreasonable, vexatious and an abuse of the Tribunal's process. He concluded the sanction of strike out was proportionate and appropriate in the circumstances.

9. On 12 February 2024, the Respondent wrote to the Tribunal to apply for the Claimant's claims to be struck out on the basis that the proceedings were being conducted unreasonably, in particular in relation to the issue of disclosure. In the alternative, an unless order was sought. In the application it was set out that the Claimant had failed to provide any disclosure relating to mitigation.

10. On 21 February 2024, Mr Dhliwayo wrote to the Tribunal stating that all the orders had been complied with. In the Claimant's checklist it was noted the Claimant "will participate in the final hearing via video".

11. On 23 February 2024, the Respondent's solicitors wrote to the Tribunal disputing that all the Tribunal's orders had been complied with. It was noted the bundle for the final hearing (listed for 18-25 March 2024) had not yet been finalised and witness statements had not yet been exchanged. The Respondent's solicitors noted that the Claimant had not sought permission to attend the hearing by video and there had not been an application by the Claimant to have the hearing heard by CVP.

12. On 1 March 2024, Mr Dhliwayo wrote to the Tribunal to request that the in person hearing listed for 18-25 March 2024 be converted to a video hearing and for the hearing to be postponed. He wrote, "Unfortunately, Ms Rudzate now currently resides permanently outside of the UK is currently unable to return to the UK for the weeks of the hearing. Additionally, she has important

academic commitments, including lectures, assignments, and a thesis to write during that particular week. Furthermore, she has pre-planned meetings that cannot be postponed as they involve prior commitments and obligations. Therefore it may be prudent to postpone the hearing for a later date whilst the remaining issues and applications are considered by the Tribunal".

13. On the same day, the Respondent's solicitors wrote to the Tribunal highlighting the lack of co-operation from the Claimant. It was noted that despite the solicitor's attempts to progress the case in the last 7 days there was still a lack of action on the Claimant's part. The Claimant's representative had been sent a copy of the proposed final bundle. The link to the bundle had not been accessed by the Claimant's representative in the previous 7 days and they had not received a response at all. There were still documents on the Claimant's Disclosure List which had not been provided to the Respondent. The Respondent requested the claims be struck out on the basis of further unreasonable conduct regarding the proceedings and in particular the failure to take steps regarding disclosure when the hearing was only 10 working days away.

14. On 8 March 2024, Employment Judge Quill refused the Claimant's request for the hearing to be by video on the basis that the application had been made too late, was unsupported by evidence and there was no explanation as to why it was not made sooner.

15. On 13 March 2024, Mr Dhliwayo wrote an email to the Tribunal to inform them that he was no longer representing the Claimant. He noted, "Despite our efforts to provide appropriate legal assistance and guidance, I have not received reasonable instructions or communication from Ms Rudzate regarding the progression of her case. As a result, I am unable to effectively represent her interests in this matter. In light of this and considering Ms Rudzate's inability to attend the in-person hearing and her stated inability to afford representation for the 6-day hearing, I had advised her to withdraw her claim. However, we have not received confirmation of her intention to do so. Therefore, I hereby request to come off the record with immediate effect."

16. On 14 March 2024, the Claimant emailed the Tribunal asking for the final hearing to be postponed. She wrote that she had found out the day before that her solicitor had left without proper notice or an explanation. She said this had placed her in a critical situation, she was not a lawyer and could not represent herself as she lacked the necessary knowledge and legal experience. She stated it would be unreasonable to assume that within a few days, she could prepare for the hearing herself. She stated she needed time to find new legal representation.

17. On 14 March 2024, the Respondent objected to the Claimant's request that the final hearing be adjourned. It was noted the hearing was already scheduled to take place two years after the events. The Respondent's solicitor attached a copy of Employment Judge Abbott's judgment in the previous case against SB Security Solutions Limited. The email referred to the lack of cooperation preparing for the hearing. It was noted in that email

that the exchange of witness statements had only taken place on 12 March and that when the Claimant's representative had been sent the 9 witness statements for the Respondent, the following day the representative had withdrawn.

18. On 14 March 2024, Employment Judge Quill directed that the final hearing listed for the 18 to 25 March 2024 would be postponed. The reason given was that the Claimant was expecting to have legal representation and that representation ceased shortly before the hearing. Employment Judge Quill had taken into account the guidance in *Khan v BP Plc*. The letter from the Tribunal also noted "I do not ignore the Respondent's suggestion that the Claimant might have caused this state of affairs by unreasonable conduct, or the other comments made in the Respondent's objection." He listed the case of a public preliminary hearing on 23 May 2024 to decide whether the claim would be struck out, and if not, to schedule dates for a new hearing.

19. On 13 May 2023, the Respondent's solicitor wrote to the Claimant to make a costs warning. He asked her to send copies of her communications with Mr Dhliwayo (noting he was a lay representative and not a legal representative) from 1 February 2024 to 14 March 2024, and to provide evidence of her travel bookings for the final hearing which had been scheduled to take place in March 2024. This was requested as the Respondent's solicitor indicated that he thought it was likely the Claimant had never intended to attend the hearing. No documents were provided.

20. On 21 May 2023, the Respondent's solicitor wrote to the Tribunal submitting the grounds for a strike out. It was suggested the claims have no reasonable prospect of success, the proceedings had been conducted in a manner which was unreasonable, scandalous and vexatious, the Claimant had not complied with the order of a Tribunal, and it was no longer possible to have a fair hearing.

The Respondent's application to strike out the Claimant's claim

21. By the time of the hearing on 23 May 2024, the Claimant's remaining claims before the Tribunal were for harassment related to sex/of a sexual nature, direct sex discrimination, and victimisation. The allegations of harassment were mainly against the Claimant's former supervisor, NY, but also two other colleagues, AP and NB. The allegations of direct sex discrimination and victimisation were against NY and NB.

22. At the hearing, the Respondent applied to have the Claimant's remaining claims struck out on the ground that (1) the proceedings had been conducted in a manner which was unreasonable, scandalous and vexatious, and/or (2) it was no longer possible to have a fair hearing.

23. Mr O'Neill submitted that the Claimant had not co-operated with the preparation for the hearing which had made it unnecessarily difficult to produce a final hearing bundle. He submitted the Claimant had no intention of attending the final hearing in March 2024. She had been asked for, and had failed to provide, any evidence of flights booked. He said it had been unreasonable to request a postponement so close to the hearing, and then

when it was rejected by the Tribunal, the Claimant seized on the fact her representative withdrew to then apply again for a postponement, but in truth she had never intended to attend.

24. Mr O'Neill submitted that a fair trial was no longer possible. He provided the Tribunal with emails from 6 witnesses which said they were no longer willing to participate. Of those 6 witnesses 4 still worked for the Respondent but 2 had left, including two of the key witnesses (NY and AP). The dismissing officer, NB, who had also since left the company had not responded to Mr O'Neill's email. He accepted it was possible that those witnesses who still worked for the Respondent could probably be persuaded to give evidence if a further hearing was listed but said the key witnesses for the Respondent were those who had now left (NY, AP and NB) - two of them were no longer willing to participate and one had not responded to his email.

25. The Claimant initially said in her submissions to the Tribunal that in respect of the final hearing, which had been listed in March 2024, she had not been able to attend as she had a heart condition. She said the Respondent was fully aware she had a heart condition and that they had not asked her to provide any evidence. She said she was receiving treatment in Latvia where she lived. She also said she had a problem with her spine, and she had to prioritise her health. She would not have been able to get on a plane to travel to the hearing in the UK. She explained it was very difficult to get medical appointments, which were booked months ahead, and she said she had to make her health her priority.

26. The Claimant then explained she was residing in Latvia. When asked if she was studying in Latvia, she said she was not and that she was studying at a university in the Netherlands. She went on to explain that in the same week that the Tribunal hearing had been listed she had exams, and assignments and she had to be physically present at her university in the Netherlands.

27. I pointed out to the Claimant that she was saying to the Tribunal that she was not well enough to travel to the UK for her Tribunal hearing but was saying she was well enough to travel to the Netherlands to take part in her exams and assignments. She then said the problem was not the fact of having to travel but that she had a medical appointment in Latvia, and also she had to be in the Netherlands for her exams and a presentation which had to give in person in the classroom in the Netherlands.

28. When asked when she had known about the date of the exams, she said after the new year. She then said but that she had only found out about the dates for the classroom presentation in March.

29. When asked why the application to postpone had only referred to her university commitments and not her health issues, she said she was not in control of what Mr Dhliwayo had told the court. The Claimant had not provided the Tribunal with any medical evidence. She said in the hearing she could, but said they would be in Latvian.

30. I asked the Claimant if she had kept in touch regularly with Mr Dhliwayo

because it was not clear to me what he had meant when he wrote to the Tribunal on 13 March 2024, "I have not received reasonable instructions or communication from Ms Rudzate". The Claimant's response was to explain that she and Mr Dhliwayo had fallen out because she had wanted him to attend the hearing without her and represent her, and he had disagreed. She said she had different priorities, and her health was her priority and he had not agreed with her. She said, "We all have our own priorities". She said that her health was her priority and that the Tribunal proceedings would have to wait.

31. It was apparent from the submissions the Claimant made that she had never intended to attend the Tribunal hearing listed in March 2023, and that she had resolved instead to travel to the Netherlands for her studies. She made it plain she could not afford legal representation, she felt she had been unreasonably charged by Mr Dhliwayo, and she planned to represent herself. She provided no evidence to the Tribunal of steps taken to seek alternative representation.

32. After the Claimant had finished her submissions, Mr O'Neill stated that the Claimant had been disingenuous with the Tribunal. First, she had said she could not attend the final hearing due to difficulties travelling because of her health, but then her position had changed when it had been pointed out that was inconsistent with her saying she needed to travel to the Netherlands instead. She clearly simply had other priorities. It was not suggested she intended to get a new lawyer as she had said to the Tribunal in her email requesting a postponement.

The law

33. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides that the 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) 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).

34. The power may only be exercised if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing (Rule 37(2)).

35. When considering whether to strike out a claim, a tribunal must adopt a two-stage approach. First, it must consider whether any of the grounds set out in rule 37(1)(a)–(e) have been established, and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out (*Hasan v Tesco Stores Ltd* EAT 0098/16).

36. The power to strike out under rule 37(1)(b) expressly includes the manner in which proceedings have been conducted on behalf of the claimant and so a representative's conduct can be taken into account.

37. The Court of Appeal in *Bennett v Southwark London Borough Council* [2002] ICR 881, CA made a number of useful observations about the Tribunal's power to strike out under rule 37(1)(b):

    a) it is not simply the representative's conduct that needs to be characterised as scandalous but the way in which he or she is conducting the proceedings on behalf of his or her client.
    b) the tribunal must therefore consider: (a) the way in which the proceedings have been conducted, (b) how far that is attributable to the party the representative is acting for, and (c) the significance of the 'scandalous' conduct.
    c) what is done in a party's name is presumptively, but not irrefutably, done on his or her behalf. When the sanction is the drastic one of striking out the whole of a party's case, there must be room for the party to disassociate him or herself from what his or her representative has done.
    d) 'scandalous' in this context is not a synonym for 'shocking'; rather it means either the misuse of legal process in order to vilify others, or the giving of gratuitous insult to the tribunal in the course of such process.
    e) where the conduct of the proceedings is categorised as scandalous, a tribunal must go on to consider whether striking out is a proportionate response.

38. In *De Keyser Ltd v Wilson* [2001] IRLR 324, the EAT held that when considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must consider whether a fair trial is still possible.

39. In *Bayley v Whitbread Hotel Co Ltd t/a Marriott Worsley Park Hotel and anor EAT* 0046/07 it was held that where a party deliberately misleads the tribunal in circumstances that amount to unreasonable conduct for the purposes of rule 37(1)(b), it is still necessary to consider whether a fair trial remains possible.

40. In *Otehtubi v Friends in St Helier* EAT 0094/16 Mrs Justice Laing stressed that, because of the very severe consequences that flowed from a decision to strike out, the power should only be exercised on the clearest grounds and as a matter of last resort. It should never be exercised in a rush or be based on inadequate information.

Reasons for decision

1) The manner in which the proceedings have been conducted by or on behalf of

the claimant has been unreasonable

41. I started by considering the Respondent's application that the Claimant's claim should be struck out on the basis that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable.

42. The first step is to decide if the ground been established, or to put it another way, if I accepted the Respondent's submission that the manner in which the proceedings have been conducted by or on behalf of the Claimant has been unreasonable.

43. Although I have seen the judgment of Employment Judge Abbott from London South Employment Tribunal, I am only concerned at this stage with the issue of whether these proceedings have been conducted by or on behalf of the Claimant in an unreasonable manner. I am only making an assessment about the manner in which the Claimant has conducted her claim against the Respondent, and it is not relevant how the Claimant conducted the previous proceedings she had against SB Security Solutions Limited.

44. I found that the proceedings against the Respondent have been conducted in an unreasonable manner. I found the manner in which Mr Dhliwayo conducted the proceedings on the Claimant's behalf was unreasonable, and that the manner in which the Claimant has conducted the proceedings has also been unreasonable.

45. In respect of Mr Dhliwayo, I found it was unreasonable that he failed to co-operate with the Respondent's solicitor in the preparation of the final hearing bundle. Mr O'Neill submitted, and I accepted, that he had to repeatedly chase Mr Dhliwayo and that he had in effect to prepare the final hearing bundle without any input from the Claimant's side. I am unable to conclude if this was conduct which can be solely attributed to Mr Dhliwayo or to both Mr Dhliwayo and the Claimant, as I have not heard any explanation about why this occurred from Mr Dhliwayo.

46. I also found that the Claimant had conducted the proceedings unreasonably in that she waited until very close to the start of the final hearing to apply to convert the final hearing to a video hearing. The Claimant said she was aware from after new year that she had exams, but she did not apply for the hearing to be by video until 1 March 2024 when the final hearing was listed for 6 days to start on 18 March 2024.

47. I also found that the Claimant had conducted the proceedings unreasonably when she applied for a postponement on 14 March 2024 on the basis that as her legal representative had withdrawn, she did not have time to prepare the hearing herself and she needed time to find a new solicitor. I found this was unreasonable because it was misleading in two respects.

48. Firstly, the Claimant had not intended to attend at the final hearing in person. This was clear from the email sent by Mr Dhliwayo on 13 March 2024, when he wrote "In light of this and considering Ms Rudzate's inability to attend the

in-person hearing and her stated inability to afford representation for the 6-day hearing, I had advised her to withdraw her claim." It was also apparent from what the Claimant said at the preliminary hearing on 23 May 2024. She made it plain "we all have different priorities" and that her health and attending the exams and assignments at her university were her priority. She said she told Mr Dhliwayo that her health was her priority and "the Tribunal would need to wait". Since the Claimant had no intention of attending the final hearing, I considered it was unreasonable for the Claimant to have given an incomplete picture to the Tribunal when she applied to postpone the hearing on 14 March 2024.

49. Secondly, the Claimant's email to the Tribunal on 14 March 2024 stated that she needed time to seek a new solicitor. However, I concluded that this was also misleading. As noted above, Mr Dhliwayo's email of 13 March 2024, referred to the Claimant's "inability to afford representation for the 6-day hearing". At the hearing on 23 May 2024 the Claimant said she did not have money for a solicitor and so was representing herself. I was not provided any evidence that the Claimant had taken any steps to seek any alternative representation.

50. I also found that the Claimant had conducted the proceedings unreasonably when she made misleading submissions at the preliminary hearing on 23 May 2024. The Claimant intended initially to persuade me she had been unable to travel to the final hearing due to health problems. It was only when it was pointed out that this was not a credible assertion, as she was also saying she was required to be in the Netherlands, that she changed her position and said the issue was not the travelling, but the fact she had medical appointments in Latvia and also had to attend her exams in the Netherlands. This was not a misunderstanding. The Claimant attempted to mislead the Tribunal.

51. For these reasons, I found the manner in which the Claimant had conducted the proceedings was unreasonable.

52. Following the guidance in *De Keyser Ltd v Wilson* and *Bayley v Whitbread Hotel Co Ltd t/a Marriott Worsley Park Hotel and anor EAT* 0046/07 I then went on to consider if a fair hearing was still possible. This involved consideration of two separate issues. Firstly, whether in light of my findings about the Claimant's dishonesty it would still be possible to have a fair hearing and secondly, whether it was possible to have a fair hearing in light of the fact that 6 of the 9 witnesses for the Respondent have indicated they no longer intended to co-operate and given the passage of time between the events and a further delayed final hearing.

53. I have very considerable concerns about whether a fair trial is still possible in light of the conclusions I have reached about the Claimant's honesty. However, I accept that if the matter were to proceed to a final hearing, then the Tribunal hearing the case would be well placed to make an assessment of the Claimant's credibility and would be able to reach its own conclusion about whether they accepted her account of the various matters in dispute. Therefore, I do not find that a fair hearing is no longer possible because of the dishonest approach taken by the Claimant in her attempt to have the

hearing postponed and her attempt to mislead me at the preliminary hearing regarding why she could not attend in person in March 2024.

54. I do however accept that as a result of the Claimant's misleading application to the Tribunal to postpone the hearing, the Respondent has been prejudiced. Employment Judge Quill postponed the final hearing on the basis that he accepted the Claimant's explanation that she needed time to secure new legal representation. I accept that the consequence of this is that while the Respondent had 9 witnesses lined up to attend the hearing in March 2024, they now are in considerable difficulties with their witnesses. I was provided with copies of emails sent by 6 of the 9 witnesses saying they were no longer willing to participate for a range of different reasons.

55. Mr O'Neill quite rightly accepted that those who still worked for the Respondent would be likely to be persuaded to give evidence at a future hearing. However, he said that the Respondent's 3 key witnesses (NY, AP and NB) had now left, and that NY and AP had emailed to say they would no longer be willing to attend a final hearing. He not heard back from NB who had not responded to his email. I accepted that the refusal of NY and AP to cooperate caused the Respondent very substantial difficulties in circumstances where the main allegations were made against these witnesses. I considered if the situation could be remedied with a witness order. However, I accept that is difficult for parties to seek a witness order for a witness they want to give evidence on their behalf, as witnesses are usually unhappy about being ordered to attend proceedings at which they have already indicated they were not willing to attend. I also took into account that a witness order can only secure a witness' attendance at the hearing, but it cannot mandate that they participate in the same way they would have done if they attended voluntarily. For these reasons, I concluded a fair hearing was no longer possible in this case.

56. I also had considerable concerns about the further delay on the fairness of the proceedings. The Claimant submitted her claim in May 2022. It was listed in May 2023 for a final hearing in March 2024. If listed again for 6 days, the final hearing would not be heard until 2025. The claims mainly related to events which took place between June and November 2021. I accepted that the further to these proceedings did cause the Respondent further prejudice. Some of the allegations relate to events where there was no witnesses and would be one person's word against another's. In those circumstances often the small details matter a great deal, and the more time passes the more memories fade.

57. Finally I considered if I should exercise my discretion to strike out the Claimant's claims. In considering whether or not to exercise my discretion I considered it was appropriate to take into account all the information I had been given which included the information set out in Employment Judge Abbott's judgment of 25 November 2021, when he had struck out the Claimant's claims against SB Security Solutions Limited.

58. I decided it was appropriate to exercise my discretion to strike out the Claimant's remaining claims. In addition to the findings that I have set out above about the Claimant's conduct, and the fact that I have concluded that

a fair hearing is no longer possible, I have also taken into account the fact that the Claimant has shown a pattern of behaviour regarding her attendance at the Tribunal hearings. In the previous proceedings, the Claimant did not attend the hearings that had been listed on 19 September 2019 and 10 December 2019 and she only notified the Tribunal the night before or the morning of those hearing that she would not be attending. I am therefore not confident that even if this matter were listed for a further hearing that the Claimant would attend. She made it plain to me that she had other priorities. Employment Judge Abbott commented in his judgment that the Claimant had only been willing to participate in the hearing before him on "her own terms". That is consistent with how the Claimant has conducted herself in these proceedings. These proceedings have taken up a considerable amount of the Tribunal's resources, and a six day hearing was vacated close to the start of the hearing at a time.

59. In light of the conclusions that I have reached, which are set out above, and in particular the conclusion that the Respondent can no longer have a fair trial, I have decided that the Claimant's claims remaining claims are to be struck out.

2) It is no longer possible to have a fair hearing

60. The Respondent's application to strike out the Claimant's claims was also made on the basis that it was no longer possible to have a fair hearing.

61. For the same reasons set out above, I have concluded that it is no longer possible to have a fair hearing. Further, for the same reasons given above, I exercise my discretion to strike out the Claimant's remaining claims on that basis.

Employment Judge Annand
Date: 23 June 2024

JUDGMENT SENT TO THE PARTIES ON

8 July 2024

.....
J Moossavi

.....
FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

EMPLOYMENT TRIBUNALS

Claimant: **Ms I Rudzate**

Respondent: **Grove WP Limited**

Heard at: **Reading Employment Tribunal (by video)**

On: **23 May 2024**

Before: Employment Judge Annand

Representation
Claimant: Ms Rudzate, in person
Respondent: Mr O'Neill, solicitor

JUDGMENT

1. The Respondent's application to strike out the Claimant's remaining claims succeeds.

2. The Claimant's claims of harassment, direct sex discrimination and victimisation are struck out under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been unreasonable, and are struck out under Rule 37(1)(e) because it is no longer possible to have a fair hearing.

REASONS

The background

1. The Claimant was employed by the Respondent as a Senior Security Officer between 7 June 2021 and 3 February 2022. The Claimant commenced early conciliation on 19 April 2022 and an early conciliation certificate was issued on 21 April 2022. The Claimant submitted a claim on 8 May 2022.

2. At the time the Claim Form was submitted the Claimant was represented by Mr Dhliwayo, a Legal Consultant, from MSL Legal. The Claimant brought

claims of wrongful dismissal, detriments on grounds of having made a protected disclosure, automatic unfair dismissal on grounds of having made a protected disclosure, direct sex discrimination and victimisation, unauthorised deduction from wages, and holiday pay. The Particulars of Claim were 27 pages long and detailed a range of different allegations including serious allegations of sexual nature which were made against the Claimant's supervisor, NY. On 2 November 2022, the Respondent submitted a Response and Grounds of Resistance. The Respondent alleged the Claimant had been dismissed for gross misconduct because of significant damage which had been caused to a security buggy.

3. On 5 May 2023, a telephone preliminary hearing was held by Employment Judge Hawksworth. The Claimant was represented by Mr Dhliwayo and the Respondent was represented by Ms Clapham, a solicitor. The final hearing was listed for 6 days starting on 18 March 2024. The hearing was to take place in person at Reading Employment Tribunal.

4. At the Case Management Hearing, the Claimant was ordered to provide further information by 16 June 2023, regarding of the allegations of discrimination, the protected disclosures she was relying on, and the alleged detriments she claimed to have been subjected to as a result of those protected disclosures.

5. Following the hearing, the Respondent made an application for strike out and/or a deposit order. A hearing was listed for 24 October 2023 to finalise the List of Issues and determine the Respondent's application.

6. At the hearing on 24 October 2023, Employment Judge Gumbiti-Zimuto struck out the Claimant's claims for unauthorised deduction from wages, unfair dismissal because of a protected disclosure, and the claim she was subjected to detriments because she had made a protected disclosure on the grounds the claims had no reasonable prospects of success. A deposit order was also made for £25 in relation to the Claimant's claim for wrongful dismissal, which the Claimant subsequently paid.

7. Employment Judge Gumbiti-Zimuto also made an order that a third party, SB Security Solutions Limited, disclosed a range of documents referred to in the judgment of Employment Judge Abbott, sitting in London South Employment Tribunal, dated 10 November 2021.

8. Before the Claimant worked for the Respondent, she worked for SB Security Solutions Limited from April 2018 to February 2019. She issued claims in the London South Employment Tribunal against SB Security Solutions Limited in March 2019. The claims were for sex and race discrimination, breach of contract, constructive dismissal, possibly harassment or direct discrimination (but the complaints were unclear), whistle-blowing and victimisation. The judgment of Employment Judge Abbott, dated 25 November 2021, had struck out the Claimant's claims against SB Security Solutions Limited. In Employment Judge Abbott's judgment, he noted:

    a) SB Security Solutions Limited had requested the Claimant provide some further particulars of her case. The Claimant did not engage with that

request but instead wrote to the Tribunal saying that SB Security Solutions Limited had not filed a Response in time and sought judgment in default. SB Security Solutions Limited explained this was incorrect and that the Response had been submitted in time. The Claimant provided a Statement dated 30 June 2019. In August 2019 she applied for an order for the disclosure of a particular email and applied to strike out SB Security Solutions Limited's Response and for sanctions to be applied. She also sought a postponement of a scheduled case management hearing as she had "schedule medical appointments abroad". The application for a postponement was refused by EJ Wright.

b) On the morning of the telephone Case Management hearing, listed for 19 September 2019, the Claimant wrote to the Tribunal stating she would not be participating due to SB Security Solutions Limited's failure to provide the requested disclosure, alleging a breach of Article 6 of the Human Rights Act 1998, and again requesting SB Security Solutions Limited's response be struck out. The hearing was held by Employment Judge Hyams-Parish who listed an open preliminary hearing for 10 December 2019 to determine a jurisdictional issue that was raised in the Grounds of Resistance. The Claimant was ordered to provide further information by 17 October 2019. The Claimant provided a response to SB Security Solutions Limited by 16 October 2019. It was combined with requests that the response be struck out.

c) On 4 November 2019, SB Security Solutions Limited applied for an order that the Claimant comply with the Tribunal's previous order that she provide certain information by 17 October 2019 on the basis that the response she had provided on 16 October 2019 was inadequate.

d) On 9 December 2019, in the evening, the Claimant wrote to the Tribunal stating she would not be attending the hearing the following day due to "serious illness". She stated she was abroad and unable to board a plane. The hearing went ahead on 10 December 2019. Employment Judge Hyde issued a strike out warning on the basis that the Claimant's claims had no prospects of success, the manner in which the proceedings were being conducted was unreasonable, and the Claimant had not complied with the order to provide certain information by 17 October 2019. Employment Judge Hyde also ordered the Claimant to provide further information by 27 January 2020.

e) On 22 December 2019, the Claimant made further applications and asked for the Response to be struck out, sanctions and compensation.

f) On 10 February 2020, SB Security Solutions Limited applied for the claims to be struck out on the basis that the Claimant had not provided the information she was ordered to provide by 27 January 2022. The Claimant said she had not received Employment Judge Hyde's order. The Respondent sent her a copy the following day. Rather than complying with the order, the Claimant emailed the Tribunal on 10 and 15 February 2020, 2, 12 and 23 March 2020 demanding an explanation as to why she had not been sent Employment Judge Hyde's order. The Claimant then sent multiple emails in April 2020 to the Tribunal stating

her right to a fair trial had been violated because the request for a postponement in December 2019 had been refused. She requested another hearing.

g) The Claimant's request for a further hearing was refused by Employment Judge Balogun, who also noted the Claimant could apply for the orders to be varied. In July 2020, the Claimant continued to request another hearing date.

h) On 3 June 2020, SB Security Solutions Limited applied for the claims to be struck out. On 29 July 2020, Employment Judge Martin ordered that a public preliminary hearing would be held to decide the Respondent's application to strike out the claim. The Claimant sought to appeal that decision but Mrs Justice Stacey, sitting in the Employment Appeal Tribunal, ordered no further action be taken. The public preliminary hearing was listed for 20 November 2020.

i) Prior to the public preliminary hearing, the Claimant provided a statement to the Tribunal and SB Security Solutions Limited in which she alleged the previous judge's actions had disgraced and damaged the integrity and impartiality of the Tribunal and alleged SB Security Solutions Limited had been fornicating with the Tribunal behind the Claimant's back.

j) On 20 November 2020, the public preliminary hearing was held by EJ Truscott QC. The Claimant said she was not aware of what Employment Judge Hyde had ordered. EJ Truscott QC decided he could not determine the Respondent's application to strike out the claims. He ordered the Tribunal to re-send Employment Judge Hyde's Orders to the Claimant. EJ Truscott QC emphasised the Claimant had to actively participate in pursuing her claim. The final hearing was listed for May 2021.

k) On 14 December 2020, SB Security Solutions Limited renewed the application to strike out the Claimant's claims. The Claimant's response included a number of allegations against SB Security Solutions Limited, the Tribunal staff and judges.

l) Employment Judge Freer vacated the final hearing listed for May 2021 and the hearing was converted to a one day hearing to consider the SB Security Solutions Limited's application to strike out the Claimant's claims.

m) On 10 November 2021, Employment Judge Abbott conducted the preliminary hearing. At the hearing, the Claimant alleged the Tribunal and SB Security Solutions Limited had negotiating with the Tribunal behind her back. In the hearing she maintained she had not seen emails which had been sent to her, containing the Orders of Employment Judge Hyde. When asked about an email of 8 January 2020, which appeared to show the Orders being sent to her by the Tribunal, she said she had not received it. When shown an email of 11 February 2020, which appeared to show the Orders being sent to her by SB Security Solutions

Limited's solicitors, she said she could not trust anything sent to her by SB Security Solutions Limited and would only regard what was sent by the Tribunal as being a true copy. When asked about a further email of 7 April 2020, which appeared to show the Orders being sent to her by the Tribunal, she initially said she had not received it. When it was pointed out she had responded to the email of the same day, her response what that the email no longer appeared in her records.

n) Employment Judge Abbott indicated at that point in the hearing, the Claimant became agitated, accused the judge of not allowing her to speak, and shortly thereafter deliberately disconnected from the hearing. After some delay, and technical difficulties, the Claimant re-joined. The Claimant was not willing to deal with the issues the judge was asking her to deal with and instead wanted a series of questions answered including arguing the Response was out of time and should not have been accepted by the Tribunal. She stated she wanted answers before she would proceed and then disconnected from the hearing again. Employment Judge Abbott concluded the Claimant's conduct at the hearing was wholly unreasonable and that she was only willing to engage if it was on her own terms.

o) Employment Judge Abbott struck out the Claimant's remaining claims. Employment Judge Abbott found the Claimant had failed to comply with the order of Employment Judge Hyde. He also found her conduct in the case had been unreasonable, vexatious and an abuse of the Tribunal's process. He concluded the sanction of strike out was proportionate and appropriate in the circumstances.

9. On 12 February 2024, the Respondent wrote to the Tribunal to apply for the Claimant's claims to be struck out on the basis that the proceedings were being conducted unreasonably, in particular in relation to the issue of disclosure. In the alternative, an unless order was sought. In the application it was set out that the Claimant had failed to provide any disclosure relating to mitigation.

10. On 21 February 2024, Mr Dhliwayo wrote to the Tribunal stating that all the orders had been complied with. In the Claimant's checklist it was noted the Claimant "will participate in the final hearing via video".

11. On 23 February 2024, the Respondent's solicitors wrote to the Tribunal disputing that all the Tribunal's orders had been complied with. It was noted the bundle for the final hearing (listed for 18-25 March 2024) had not yet been finalised and witness statements had not yet been exchanged. The Respondent's solicitors noted that the Claimant had not sought permission to attend the hearing by video and there had not been an application by the Claimant to have the hearing heard by CVP.

12. On 1 March 2024, Mr Dhliwayo wrote to the Tribunal to request that the in person hearing listed for 18-25 March 2024 be converted to a video hearing and for the hearing to be postponed. He wrote, "Unfortunately, Ms Rudzate now currently resides permanently outside of the UK is currently unable to return to the UK for the weeks of the hearing. Additionally, she has important

academic commitments, including lectures, assignments, and a thesis to write during that particular week. Furthermore, she has pre-planned meetings that cannot be postponed as they involve prior commitments and obligations. Therefore it may be prudent to postpone the hearing for a later date whilst the remaining issues and applications are considered by the Tribunal".

13. On the same day, the Respondent's solicitors wrote to the Tribunal highlighting the lack of co-operation from the Claimant. It was noted that despite the solicitor's attempts to progress the case in the last 7 days there was still a lack of action on the Claimant's part. The Claimant's representative had been sent a copy of the proposed final bundle. The link to the bundle had not been accessed by the Claimant's representative in the previous 7 days and they had not received a response at all. There were still documents on the Claimant's Disclosure List which had not been provided to the Respondent. The Respondent requested the claims be struck out on the basis of further unreasonable conduct regarding the proceedings and in particular the failure to take steps regarding disclosure when the hearing was only 10 working days away.

14. On 8 March 2024, Employment Judge Quill refused the Claimant's request for the hearing to be by video on the basis that the application had been made too late, was unsupported by evidence and there was no explanation as to why it was not made sooner.

15. On 13 March 2024, Mr Dhliwayo wrote an email to the Tribunal to inform them that he was no longer representing the Claimant. He noted, "Despite our efforts to provide appropriate legal assistance and guidance, I have not received reasonable instructions or communication from Ms Rudzate regarding the progression of her case. As a result, I am unable to effectively represent her interests in this matter. In light of this and considering Ms Rudzate's inability to attend the in-person hearing and her stated inability to afford representation for the 6-day hearing, I had advised her to withdraw her claim. However, we have not received confirmation of her intention to do so. Therefore, I hereby request to come off the record with immediate effect."

16. On 14 March 2024, the Claimant emailed the Tribunal asking for the final hearing to be postponed. She wrote that she had found out the day before that her solicitor had left without proper notice or an explanation. She said this had placed her in a critical situation, she was not a lawyer and could not represent herself as she lacked the necessary knowledge and legal experience. She stated it would be unreasonable to assume that within a few days, she could prepare for the hearing herself. She stated she needed time to find new legal representation.

17. On 14 March 2024, the Respondent objected to the Claimant's request that the final hearing be adjourned. It was noted the hearing was already scheduled to take place two years after the events. The Respondent's solicitor attached a copy of Employment Judge Abbott's judgment in the previous case against SB Security Solutions Limited. The email referred to the lack of cooperation preparing for the hearing. It was noted in that email

that the exchange of witness statements had only taken place on 12 March and that when the Claimant's representative had been sent the 9 witness statements for the Respondent, the following day the representative had withdrawn.

18. On 14 March 2024, Employment Judge Quill directed that the final hearing listed for the 18 to 25 March 2024 would be postponed. The reason given was that the Claimant was expecting to have legal representation and that representation ceased shortly before the hearing. Employment Judge Quill had taken into account the guidance in *Khan v BP Plc*. The letter from the Tribunal also noted "I do not ignore the Respondent's suggestion that the Claimant might have caused this state of affairs by unreasonable conduct, or the other comments made in the Respondent's objection." He listed the case of a public preliminary hearing on 23 May 2024 to decide whether the claim would be struck out, and if not, to schedule dates for a new hearing.

19. On 13 May 2023, the Respondent's solicitor wrote to the Claimant to make a costs warning. He asked her to send copies of her communications with Mr Dhliwayo (noting he was a lay representative and not a legal representative) from 1 February 2024 to 14 March 2024, and to provide evidence of her travel bookings for the final hearing which had been scheduled to take place in March 2024. This was requested as the Respondent's solicitor indicated that he thought it was likely the Claimant had never intended to attend the hearing. No documents were provided.

20. On 21 May 2023, the Respondent's solicitor wrote to the Tribunal submitting the grounds for a strike out. It was suggested the claims have no reasonable prospect of success, the proceedings had been conducted in a manner which was unreasonable, scandalous and vexatious, the Claimant had not complied with the order of a Tribunal, and it was no longer possible to have a fair hearing.

The Respondent's application to strike out the Claimant's claim

21. By the time of the hearing on 23 May 2024, the Claimant's remaining claims before the Tribunal were for harassment related to sex/of a sexual nature, direct sex discrimination, and victimisation. The allegations of harassment were mainly against the Claimant's former supervisor, NY, but also two other colleagues, AP and NB. The allegations of direct sex discrimination and victimisation were against NY and NB.

22. At the hearing, the Respondent applied to have the Claimant's remaining claims struck out on the ground that (1) the proceedings had been conducted in a manner which was unreasonable, scandalous and vexatious, and/or (2) it was no longer possible to have a fair hearing.

23. Mr O'Neill submitted that the Claimant had not co-operated with the preparation for the hearing which had made it unnecessarily difficult to produce a final hearing bundle. He submitted the Claimant had no intention of attending the final hearing in March 2024. She had been asked for, and had failed to provide, any evidence of flights booked. He said it had been unreasonable to request a postponement so close to the hearing, and then

when it was rejected by the Tribunal, the Claimant seized on the fact her representative withdrew to then apply again for a postponement, but in truth she had never intended to attend.

24. Mr O'Neill submitted that a fair trial was no longer possible. He provided the Tribunal with emails from 6 witnesses which said they were no longer willing to participate. Of those 6 witnesses 4 still worked for the Respondent but 2 had left, including two of the key witnesses (NY and AP). The dismissing officer, NB, who had also since left the company had not responded to Mr O'Neill's email. He accepted it was possible that those witnesses who still worked for the Respondent could probably be persuaded to give evidence if a further hearing was listed but said the key witnesses for the Respondent were those who had now left (NY, AP and NB) - two of them were no longer willing to participate and one had not responded to his email.

25. The Claimant initially said in her submissions to the Tribunal that in respect of the final hearing, which had been listed in March 2024, she had not been able to attend as she had a heart condition. She said the Respondent was fully aware she had a heart condition and that they had not asked her to provide any evidence. She said she was receiving treatment in Latvia where she lived. She also said she had a problem with her spine, and she had to prioritise her health. She would not have been able to get on a plane to travel to the hearing in the UK. She explained it was very difficult to get medical appointments, which were booked months ahead, and she said she had to make her health her priority.

26. The Claimant then explained she was residing in Latvia. When asked if she was studying in Latvia, she said she was not and that she was studying at a university in the Netherlands. She went on to explain that in the same week that the Tribunal hearing had been listed she had exams, and assignments and she had to be physically present at her university in the Netherlands.

27. I pointed out to the Claimant that she was saying to the Tribunal that she was not well enough to travel to the UK for her Tribunal hearing but was saying she was well enough to travel to the Netherlands to take part in her exams and assignments. She then said the problem was not the fact of having to travel but that she had a medical appointment in Latvia, and also she had to be in the Netherlands for her exams and a presentation which had to give in person in the classroom in the Netherlands.

28. When asked when she had known about the date of the exams, she said after the new year. She then said but that she had only found out about the dates for the classroom presentation in March.

29. When asked why the application to postpone had only referred to her university commitments and not her health issues, she said she was not in control of what Mr Dhliwayo had told the court. The Claimant had not provided the Tribunal with any medical evidence. She said in the hearing she could, but said they would be in Latvian.

30. I asked the Claimant if she had kept in touch regularly with Mr Dhliwayo

because it was not clear to me what he had meant when he wrote to the Tribunal on 13 March 2024, "I have not received reasonable instructions or communication from Ms Rudzate". The Claimant's response was to explain that she and Mr Dhliwayo had fallen out because she had wanted him to attend the hearing without her and represent her, and he had disagreed. She said she had different priorities, and her health was her priority and he had not agreed with her. She said, "We all have our own priorities". She said that her health was her priority and that the Tribunal proceedings would have to wait.

31. It was apparent from the submissions the Claimant made that she had never intended to attend the Tribunal hearing listed in March 2023, and that she had resolved instead to travel to the Netherlands for her studies. She made it plain she could not afford legal representation, she felt she had been unreasonably charged by Mr Dhliwayo, and she planned to represent herself. She provided no evidence to the Tribunal of steps taken to seek alternative representation.

32. After the Claimant had finished her submissions, Mr O'Neill stated that the Claimant had been disingenuous with the Tribunal. First, she had said she could not attend the final hearing due to difficulties travelling because of her health, but then her position had changed when it had been pointed out that was inconsistent with her saying she needed to travel to the Netherlands instead. She clearly simply had other priorities. It was not suggested she intended to get a new lawyer as she had said to the Tribunal in her email requesting a postponement.

The law

33. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides that the 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) 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).

34. The power may only be exercised if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing (Rule 37(2)).

35. When considering whether to strike out a claim, a tribunal must adopt a two-stage approach. First, it must consider whether any of the grounds set out in rule 37(1)(a)–(e) have been established, and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out (*Hasan v Tesco Stores Ltd* EAT 0098/16).

36. The power to strike out under rule 37(1)(b) expressly includes the manner in which proceedings have been conducted on behalf of the claimant and so a representative's conduct can be taken into account.

37. The Court of Appeal in *Bennett v Southwark London Borough Council* [2002] ICR 881, CA made a number of useful observations about the Tribunal's power to strike out under rule 37(1)(b):

    a) it is not simply the representative's conduct that needs to be characterised as scandalous but the way in which he or she is conducting the proceedings on behalf of his or her client.
    b) the tribunal must therefore consider: (a) the way in which the proceedings have been conducted, (b) how far that is attributable to the party the representative is acting for, and (c) the significance of the 'scandalous' conduct.
    c) what is done in a party's name is presumptively, but not irrefutably, done on his or her behalf. When the sanction is the drastic one of striking out the whole of a party's case, there must be room for the party to disassociate him or herself from what his or her representative has done.
    d) 'scandalous' in this context is not a synonym for 'shocking'; rather it means either the misuse of legal process in order to vilify others, or the giving of gratuitous insult to the tribunal in the course of such process.
    e) where the conduct of the proceedings is categorised as scandalous, a tribunal must go on to consider whether striking out is a proportionate response.

38. In *De Keyser Ltd v Wilson* [2001] IRLR 324, the EAT held that when considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must consider whether a fair trial is still possible.

39. In *Bayley v Whitbread Hotel Co Ltd t/a Marriott Worsley Park Hotel and anor EAT* 0046/07 it was held that where a party deliberately misleads the tribunal in circumstances that amount to unreasonable conduct for the purposes of rule 37(1)(b), it is still necessary to consider whether a fair trial remains possible.

40. In *Otehtubi v Friends in St Helier* EAT 0094/16 Mrs Justice Laing stressed that, because of the very severe consequences that flowed from a decision to strike out, the power should only be exercised on the clearest grounds and as a matter of last resort. It should never be exercised in a rush or be based on inadequate information.

Reasons for decision

1) The manner in which the proceedings have been conducted by or on behalf of

the claimant has been unreasonable

41. I started by considering the Respondent's application that the Claimant's claim should be struck out on the basis that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable.

42. The first step is to decide if the ground been established, or to put it another way, if I accepted the Respondent's submission that the manner in which the proceedings have been conducted by or on behalf of the Claimant has been unreasonable.

43. Although I have seen the judgment of Employment Judge Abbott from London South Employment Tribunal, I am only concerned at this stage with the issue of whether these proceedings have been conducted by or on behalf of the Claimant in an unreasonable manner. I am only making an assessment about the manner in which the Claimant has conducted her claim against the Respondent, and it is not relevant how the Claimant conducted the previous proceedings she had against SB Security Solutions Limited.

44. I found that the proceedings against the Respondent have been conducted in an unreasonable manner. I found the manner in which Mr Dhliwayo conducted the proceedings on the Claimant's behalf was unreasonable, and that the manner in which the Claimant has conducted the proceedings has also been unreasonable.

45. In respect of Mr Dhliwayo, I found it was unreasonable that he failed to co-operate with the Respondent's solicitor in the preparation of the final hearing bundle. Mr O'Neill submitted, and I accepted, that he had to repeatedly chase Mr Dhliwayo and that he had in effect to prepare the final hearing bundle without any input from the Claimant's side. I am unable to conclude if this was conduct which can be solely attributed to Mr Dhliwayo or to both Mr Dhliwayo and the Claimant, as I have not heard any explanation about why this occurred from Mr Dhliwayo.

46. I also found that the Claimant had conducted the proceedings unreasonably in that she waited until very close to the start of the final hearing to apply to convert the final hearing to a video hearing. The Claimant said she was aware from after new year that she had exams, but she did not apply for the hearing to be by video until 1 March 2024 when the final hearing was listed for 6 days to start on 18 March 2024.

47. I also found that the Claimant had conducted the proceedings unreasonably when she applied for a postponement on 14 March 2024 on the basis that as her legal representative had withdrawn, she did not have time to prepare the hearing herself and she needed time to find a new solicitor. I found this was unreasonable because it was misleading in two respects.

48. Firstly, the Claimant had not intended to attend at the final hearing in person. This was clear from the email sent by Mr Dhliwayo on 13 March 2024, when he wrote "In light of this and considering Ms Rudzate's inability to attend the

in-person hearing and her stated inability to afford representation for the 6-day hearing, I had advised her to withdraw her claim." It was also apparent from what the Claimant said at the preliminary hearing on 23 May 2024. She made it plain "we all have different priorities" and that her health and attending the exams and assignments at her university were her priority. She said she told Mr Dhliwayo that her health was her priority and "the Tribunal would need to wait". Since the Claimant had no intention of attending the final hearing, I considered it was unreasonable for the Claimant to have given an incomplete picture to the Tribunal when she applied to postpone the hearing on 14 March 2024.

49. Secondly, the Claimant's email to the Tribunal on 14 March 2024 stated that she needed time to seek a new solicitor. However, I concluded that this was also misleading. As noted above, Mr Dhliwayo's email of 13 March 2024, referred to the Claimant's "inability to afford representation for the 6-day hearing". At the hearing on 23 May 2024 the Claimant said she did not have money for a solicitor and so was representing herself. I was not provided any evidence that the Claimant had taken any steps to seek any alternative representation.

50. I also found that the Claimant had conducted the proceedings unreasonably when she made misleading submissions at the preliminary hearing on 23 May 2024. The Claimant intended initially to persuade me she had been unable to travel to the final hearing due to health problems. It was only when it was pointed out that this was not a credible assertion, as she was also saying she was required to be in the Netherlands, that she changed her position and said the issue was not the travelling, but the fact she had medical appointments in Latvia and also had to attend her exams in the Netherlands. This was not a misunderstanding. The Claimant attempted to mislead the Tribunal.

51. For these reasons, I found the manner in which the Claimant had conducted the proceedings was unreasonable.

52. Following the guidance in *De Keyser Ltd v Wilson* and *Bayley v Whitbread Hotel Co Ltd t/a Marriott Worsley Park Hotel and anor EAT* 0046/07 I then went on to consider if a fair hearing was still possible. This involved consideration of two separate issues. Firstly, whether in light of my findings about the Claimant's dishonesty it would still be possible to have a fair hearing and secondly, whether it was possible to have a fair hearing in light of the fact that 6 of the 9 witnesses for the Respondent have indicated they no longer intended to co-operate and given the passage of time between the events and a further delayed final hearing.

53. I have very considerable concerns about whether a fair trial is still possible in light of the conclusions I have reached about the Claimant's honesty. However, I accept that if the matter were to proceed to a final hearing, then the Tribunal hearing the case would be well placed to make an assessment of the Claimant's credibility and would be able to reach its own conclusion about whether they accepted her account of the various matters in dispute. Therefore, I do not find that a fair hearing is no longer possible because of the dishonest approach taken by the Claimant in her attempt to have the

hearing postponed and her attempt to mislead me at the preliminary hearing regarding why she could not attend in person in March 2024.

54. I do however accept that as a result of the Claimant's misleading application to the Tribunal to postpone the hearing, the Respondent has been prejudiced. Employment Judge Quill postponed the final hearing on the basis that he accepted the Claimant's explanation that she needed time to secure new legal representation. I accept that the consequence of this is that while the Respondent had 9 witnesses lined up to attend the hearing in March 2024, they now are in considerable difficulties with their witnesses. I was provided with copies of emails sent by 6 of the 9 witnesses saying they were no longer willing to participate for a range of different reasons.

55. Mr O'Neill quite rightly accepted that those who still worked for the Respondent would be likely to be persuaded to give evidence at a future hearing. However, he said that the Respondent's 3 key witnesses (NY, AP and NB) had now left, and that NY and AP had emailed to say they would no longer be willing to attend a final hearing. He not heard back from NB who had not responded to his email. I accepted that the refusal of NY and AP to cooperate caused the Respondent very substantial difficulties in circumstances where the main allegations were made against these witnesses. I considered if the situation could be remedied with a witness order. However, I accept that is difficult for parties to seek a witness order for a witness they want to give evidence on their behalf, as witnesses are usually unhappy about being ordered to attend proceedings at which they have already indicated they were not willing to attend. I also took into account that a witness order can only secure a witness' attendance at the hearing, but it cannot mandate that they participate in the same way they would have done if they attended voluntarily. For these reasons, I concluded a fair hearing was no longer possible in this case.

56. I also had considerable concerns about the further delay on the fairness of the proceedings. The Claimant submitted her claim in May 2022. It was listed in May 2023 for a final hearing in March 2024. If listed again for 6 days, the final hearing would not be heard until 2025. The claims mainly related to events which took place between June and November 2021. I accepted that the further to these proceedings did cause the Respondent further prejudice. Some of the allegations relate to events where there was no witnesses and would be one person's word against another's. In those circumstances often the small details matter a great deal, and the more time passes the more memories fade.

57. Finally I considered if I should exercise my discretion to strike out the Claimant's claims. In considering whether or not to exercise my discretion I considered it was appropriate to take into account all the information I had been given which included the information set out in Employment Judge Abbott's judgment of 25 November 2021, when he had struck out the Claimant's claims against SB Security Solutions Limited.

58. I decided it was appropriate to exercise my discretion to strike out the Claimant's remaining claims. In addition to the findings that I have set out above about the Claimant's conduct, and the fact that I have concluded that

a fair hearing is no longer possible, I have also taken into account the fact that the Claimant has shown a pattern of behaviour regarding her attendance at the Tribunal hearings. In the previous proceedings, the Claimant did not attend the hearings that had been listed on 19 September 2019 and 10 December 2019 and she only notified the Tribunal the night before or the morning of those hearing that she would not be attending. I am therefore not confident that even if this matter were listed for a further hearing that the Claimant would attend. She made it plain to me that she had other priorities. Employment Judge Abbott commented in his judgment that the Claimant had only been willing to participate in the hearing before him on "her own terms". That is consistent with how the Claimant has conducted herself in these proceedings. These proceedings have taken up a considerable amount of the Tribunal's resources, and a six day hearing was vacated close to the start of the hearing at a time.

59. In light of the conclusions that I have reached, which are set out above, and in particular the conclusion that the Respondent can no longer have a fair trial, I have decided that the Claimant's claims remaining claims are to be struck out.

2) It is no longer possible to have a fair hearing

60. The Respondent's application to strike out the Claimant's claims was also made on the basis that it was no longer possible to have a fair hearing.

61. For the same reasons set out above, I have concluded that it is no longer possible to have a fair hearing. Further, for the same reasons given above, I exercise my discretion to strike out the Claimant's remaining claims on that basis.

Employment Judge Annand
Date: 23 June 2024

JUDGMENT SENT TO THE PARTIES ON

8 July 2024

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J Moossavi

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FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/