Case No: 1301557/2022

EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Masih**
Respondent:	**Mitie Ltd**
Heard:	**Midlands West (hybrid)**
On:	**1 July 2024**
Before:	**Employment Judge Power (sitting alone)**

Representation

Claimant: in person
Respondent: Mr Finn of Counsel (in attendance by Cloud Video Platform)

PUBLIC PRELIMINARY HEARING - JUDGMENT

1. The claimant applied to strike out the respondent's response on the grounds that it is scandalous, vexatious or has no reasonable prospects of success or that the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious, pursuant to Rule 37(1)(a) and/or (b) of the Employment Tribunal Rules of Procedure. That application is refused.
2. The respondent applied to strike out the claimant's claim on the grounds that the manner in which proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious, pursuant to Rule 37(1)(b) of the Employment Tribunal Rules of Procedure. That application is refused.
3. The respondent's application for an anonymity order under Rule 50(3)(b) of the Employment Tribunal Rules of Procedure is refused.
4. A Case Management Order is provided to the parties separately.

REASONS

Introduction

1. This was a hearing listed further to the case management Preliminary Hearing before Employment Judge Gaskell on 7 February 2024 to consider:

   (a) The claimant's application for the response to his remaining claims to be struck-out pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 on the grounds that it is scandalous, vexatious or has no reasonable prospect of success; and/or pursuant to Rule 37(1)(b) that the conduct of the response to the claim has been scandalous, unreasonable or vexatious.
   (b) The respondent's application pursuant to Rule 37(1)(b) for the strike-out of the remaining claims on the grounds that the claimant's conduct has been scandalous, unreasonable or vexatious.

2. The claimant represented himself at the hearing. The respondent was represented by Mr Finn of Counsel. The hearing was a hybrid hearing. The claimant and Judge were in Tribunal. The respondent's representative attended by CVP remote video technology.

Preliminary matters

3. At the start of the hearing at 9.45 today, I asked the parties if any reasonable adjustments were needed to enable them to participate in today's hearing. The claimant said that he had been told he was unfit for work because of anxiety and depression and that he had come to Tribunal because he had not heard back from the Tribunal in response to an email he had sent about his health.

4. In the hard copy of the Tribunal file, I located an email sent by the claimant to the Tribunal and respondent's representative dated 19 June 2024, which appeared not to have been actioned. The email reads:

   "*Hello*
   Be advised, owing to the enormous stress this case has caused over the last two years. I am now on (3 lots of) prescribed medication, and my GP has signed me off sick. The Universal credit, state benefits, have (today) assessed me with, Indefinite "limited capacity for work". See attached letter. Pursuant to the forthcoming hearing of 1 July 2024, I believe I have submitted all the evidence for a Judge to make a fair decision. But under the circumstances I await to be advised by the Tribunal if my attendance at the hearing is still required. As is already on the file, I do not have broadband at home to attend a remote hearing, Regards
   Dev Masih"

5. The attachment was not on the Tribunal file. The claimant said that the attachment was medical evidence. I adjourned the hearing in order to obtain and read a copy of the attachment. This is dated 19 June 2024 and states:

   "Y*our Universal Credit claim: Work Capability Assessment decision*

   Dear Dev

Following your Work Capability Assessment, we have decided that you have limited capability for work …

You will not have to look for work, but you will need to meet with your work coach to take steps to prepare for work in the future. We call these work-related activities. Work-related activities could include learning how to write your CV or going on training courses to learn new skills. These activities will help you to start thinking about the types of work you could do.

Your work coach will talk to you about the extra support that could be available to help you prepare for work .."

6. On resuming the hearing, I clarified with the claimant that what he had referred to as medical evidence as the attachment is a work assessment in the context of a claim for Universal Credit. It is not a letter from a doctor to say whether he is well enough to attend at Tribunal today. The claimant said that I should decide whether he was fit enough to attend Tribunal today. It not being apparent from the claimant's email of 19 June 2024 whether he was in fact seeking a postponement of today's hearing, I asked him to confirm whether he sought a postponement today, on the grounds of ill health. The claimant said that he was waiting for the Tribunal to decide whether he was fit enough to be at Tribunal. I explained that I am not medically qualified and can only assess his fitness to attend on the basis of information he provides, including any medical evidence. I explained to him the procedure which would be followed at hearing today, in order to allow him to explain whether he thought he was well enough to participate and if so any adjustments that might be required. He said that he was concerned that if he gave evidence he would not be able to explain himself properly because he is not legally qualified and that it would be turned against him which he said had happened at previous hearings. The claimant also said that he has a stammer and that in previous hearings he has felt assessed on his performance. He confirmed there was no specific adjustment he required in that regard and that he has written everything he wants to say for today's hearing which helps him express himself. I explained to the claimant that the purpose of today's hearing was for the Tribunal to hear the claimant's application for strike out of the response and the respondent's application for strike out of the claim. I reminded the claimant of the Case Management Order of 7 February 2024 of EJ Gaskell which had set out the procedure for today's hearing and that no evidence would be heard. I told him that I had details of the application he is making in the written submissions he had already provided and that he would have the opportunity to add to his written submissions if he wished to. If he has already said all that he wants to in writing, he is not required to add anything.

7. Having heard from the claimant and having reviewed the contents of the statement from Universal Credit which indicated that the claimant could participate in certain work-related activities, there was no evidence to indicate that the claimant was unfit to participate at the hearing today to the extent required. I explained to the claimant that the hearing would proceed, in line with the overriding objective. If he wished to add oral submissions to his written submissions, he would have the opportunity to do so, but was not required to do so. I explained that we would take a break once an hour and if the claimant felt unwell and required a break at any other stage, he should tell me at once.

8. The hearing proceeded and I am satisfied that the claimant was able to participate in proceedings effectively. He did not indicate to the contrary at any point during the hearing. The claimant added commentary to his written submissions and responded to points raised by the respondent's representative in the respondent's strike out application. There were several breaks during the hearing for various reasons, but none at the claimant's specific request.

9. Having determined that the hearing should proceed today, I then dealt with an application made by the respondent's representative orally that the Tribunal should consider making an order pursuant to s10-14 of the Employment Tribunals Act 1996 to anonymise the names of the two solicitors acting on behalf of the respondent, whose conduct forms the basis of allegations made by the claimant giving rise, in part, to his application for strike out. The respondent's representative asks that an interim order is considered to cover proceedings today which can be revoked or continued depending on the Tribunal's decision on today's applications. No particular section of s10-12 of the Employment Tribunals Act 1996 was asserted, nor a specific Convention reason. It was submitted that the claimant has made career-threatening allegations against two solicitors, which the respondent says are malicious falsehoods, and that the solicitors have been caused professional embarrassment. The respondent's representative confirmed that both of the individuals are now qualified solicitors - one had been a trainee solicitor at an earlier stage in proceedings – and had acted in their professional capacity at all relevant times. I provided the claimant with an opportunity to respond to the respondent's application. He objected to the application and said that the solicitors had misled the Tribunal and had fraudulently misrepresented the situation to Baroness McGregor-Smith and this was not a case where their names should be anonymised.

10. I informed the parties I would consider whether it was necessary in the interests of justice or in order to protect the Convention rights of any person to make an order under Rule 50(3)(b) of the Employment Tribunal Rules of Procedure, to restrict the public disclosure of the names of the individuals accused by the claimant. I reminded myself that I should give full weight to the principle of open justice and to the Convention right to freedom of expression under Article 10. I can only prohibit disclosure if cogent evidence demonstrates this is strictly necessary in the interests of justice. I would therefore need to be persuaded that there was good reason to depart from the normal position.

11. As the party seeking the anonymisation order, the burden lies on the respondent to provide clear and convincing grounds that anonymisation is warranted to protect the Convention rights of the individuals in respect of whom the order is sought. The respondent did not assert a specific Convention right was engaged although it was clear from the application made that the concerns expressed over professional embarrassment could amount to an assertion of harm to the Article 8 private life rights of the individuals. The general concerns expressed about professional embarrassment do not, I find, establish identifiable harm to the Article 8 private life rights of the individuals, sufficient to displace open justice. Anonymisation would interfere with the Article 10 right to freedom of expression and the public interest in open proceedings. There was no cogent

evidence put forward to justify this exception to the strong presumption in favour of open justice.

12. Having carefully considered and applied Rule 50, I determined that the respondent had not established sufficient grounds to depart from the principle of open justice and freedom of expression on the facts presented and I therefore refused the application for anonymity.

Documentation

13. Prior to the hearing, I had been provided with a bundle of documents of 353 pages put together by the respondent's representative. The bundle included copies of two cases referred to in submissions by the respondent's representative: *Rev Dr James George Hargreaves v (1) Evolve Housing & Support (2) Mr Simon McGrath* [2023] EAT 154 and *Mr A Ghosh v (1) Judicial Appointments Commission and (2) Martin Chamberlain*, a first instance decision of the Employment Tribunal dated 6 November 2023.

14. During initial discussions with the parties, the claimant said that he had not read the bundle of documents prepared by the respondent's solicitors and had sent an email to the Tribunal and the respondent's solicitors which attached eight documents he wished to rely on at today's hearing. He said he had not checked the hearing bundle to make sure that these documents had been included. I asked the respondent's representative if he could confirm all the documents sent by the claimant had been included. He did not have instruction on this point and was unable to reach his instructing solicitors during an adjournment.

15. Following that adjournment, during which the Clerk located and forwarded me a copy of the email and attachments referred to by the claimant, I confirmed in discussions with the parties that it was evident that six of the documents were already in the bundle. Two documents – an email from the respondent's representative Megan Carney to the Tribunal, going on record, dated 13 September 2022 and Instructions to respondent Counsel in respect of the 21 December 2022 hearing before EJ Webb - were not included. The Instructions to Counsel document – although a privileged document and not one which would normally be put before the Tribunal - appears to have already been produced by the respondent at a hearing before Employment Judge Faulkner on 2 November 2023 and referred to in EJ Faulkner's decision at that hearing. In the circumstances, it appeared that these documents may be of some relevance to the issues before me today and had already been provided to the Tribunal. There being no objection from the respondent's representative, I determined that these should form part of the bundle before me today.

16. It also became apparent in the course of the hearing that the first Public Preliminary Hearing Judgment of Employment Judge Faulkner had not been included in the hearing bundle. This Judgment is dated 13 October 2023 and relates to the part of the hearing which took place on 28 September 2023. As the parties both referred to matters which were discussed and determined during that hearing before me today, I determined that that Judgment should also be considered as part of the evidence before me today.

17. During the discussions about documentation, I also noted for clarity that the Case Management Orders of EJ Gaskell show the date of hearing as 7 February 2022, although it is evident from the dates of the Orders made, the signature date and the Tribunal record that the date of hearing was in fact 7 February 2024. Both parties agreed that this was the correct date although the claimant submitted that the incorrect date meant that EJ Gaskell's Order was not valid. I explained to the claimant that a minor typo on the first page does not invalidate the contents of those Case Management Orders. I proceeded accordingly.

18. The claimant asked me to take into account all of the documents which have previously been sent to the Tribunal. I explained to the claimant that as there is a significant procedural history to this case, the Tribunal in dealing with the applications before it today cannot consider everything that might have been sent to the Tribunal at some stage in the case history. The focus of today was on those documents the parties had provided to the Tribunal as relevant for the purposes of the applications before the Tribunal today. I confirmed that these are the documents contained in the 353-page bundle, the two additional documents we had identified that the claimant wished to rely on and the Judgment of EJ Faulkner dated 13 October 2023, relating to his first Preliminary Hearing on 28 September 2023, his second Judgment, dated 17 November 2023 and related to the continuation hearing on 2 November 2023, already being in the bundle.

19. The claimant asked me during today's hearing to order the respondent to disclose the Instructions to respondent Counsel for the Preliminary Hearing before EJ Camp on 28 September 2022. I declined to do so and explained to him that EJ Gaskell had already made a decision on this matter (Case Management Order 10, page 260) and explained his reasons for that decision to the claimant which were set out at the minute of hearing, (page 259 para 9). There was no new information before me to indicate any reason to vary that Case Management Order. Indeed, it would be most unusual for an order for disclosure to be made in respect of a privileged document.

Procedure

20. There being two applications before me today, I agreed with the parties at the outset that I would hear the claimant's application and the respondent's response to it. Following a short adjournment, I would then hear the respondent's application and the claimant's response to it.

21. By the time I had heard dealt with the preliminary issues and heard both applications, it was evident there would be insufficient time to make a decision on the applications today and I informed the parties my decision would be reserved. The claimant said that he would in any event ask for written reasons for any decision as it assists him to understand the decision.

22. Included in the bundle were the following documents in support and response to the respective applications:

    (a) "Claimant's Rule 37 Application" dated 21 January 2024, pages 241-248 of the bundle.

    (b) Respondent's response to that application dated 6 February 2024, pages 250-252.

(c) "Claimant's Response to Solicitors Lies" dated 7 February 2024, pages 253-254.

(d) "Claimant's Response to Judge Gaskell's Order of 7 February 2024" dated 6 March 2024, pages 262-265.

(e) Respondent's "Defence to Claimant's strike out application and Respondent's strike out application", dated April 2024, pages 346-353.

23. The claimant confirmed that the documents he had lodged, although related to his application to strike out the respondent's response, effectively also responded to the respondent's application to strike out his claims. The claimant however maintained that the outcome of the hearings before EJ Faulkner was that his claim could not be struck out by the respondent. I explained to the claimant that EJ Gaskell had already determined this issue and reminded the claimant of EJ Gaskell's Case Management Orders and minute of hearing of 7 February 2024, reading out the relevant sections, which listed the claimant's application for strike out and the respondent's application for strike out to be heard today [Case Management Order 11 and paragraphs 2-7 of the minute of hearing.]

Background

24. The applications before me today are not based on the background facts on which the claim and response depend, but rather steps taken by the claimant and respondent in the conduct of the Tribunal litigation. This has become procedurally protracted and there have been several previous Preliminary Hearings, Judgments and Case Management Orders which are relevant to the applications before me today. I summarise the chronology of hearings and relevant extracts from those Orders and Judgments below and refer to these in my conclusions:

Case Management Preliminary Hearing before EJ Camp – 28 September 2022

25. The record of this Preliminary Hearing is at pages 47-62 of the bundle. The relevant sections of that record for the purposes of the applications before me today are set out at paragraph 56 of the case summary [page 54] as follows:

"In light of various comments the claimant made in the document attached to the claim form giving details of the claimant's claim … I [the Employment Judge] have explained to the claimant that .. [56.1] making allegations of "institutional racism" against the respondent does not help his case, because what he is alleging is that specific individuals mistreated him because they personally were racially prejudiced …[56.4] similarly, expert evidence from Baroness McGregor-Smith (see paragraph 42 of the details of claim) about race and racism in the work place will not be allowed at the final hearing."

Public Preliminary Hearing before EJ Webb – 21 December 2022

26. On 21 December 2023, the claimant's claims of disability discrimination and whistleblowing detriment, relating to events in 2016 and a grievance in 2020 were dismissed by EJ Webb for lack of jurisdiction because they were presented outside of the statutory time limit.

27. EJ Webb's case management record repeats the order of EJ Camp in relation to relevant evidence.

"I say again what Judge Camp said in their order of 2 October 2022:

35.1 making allegations of "institutional racism" against the respondent does not help his case, because what he is alleging is that specific individuals mistreated him because they were personally racially prejudiced…

35.4 similarly, expert evidence from Baroness McGregor-Smith (see paragraph 42 of the details of claim) about race and racism in the workplace will not be allowed at the final hearing…

36 It is open to the claimant to disagree with this assessment, but if he wishes to bring evidence related to the above, he will need to make an application and provide clear reasons why the evidence is relevant and necessary for the Tribunal to deal with the outstanding issues in his case"

28. The claimant sent two documents to the Tribunal, both dated 5 January 2023, one entitled "Permission to Appeal out of time Judge Camp's Order dated 29 September 2022" and the other "Permission to Appeal out of time Reconsideration of Judge Webbs Order dated 21 December 2022." These are at pages 104-115 of the bundle.

29. A letter of 1 March 2023 was sent to the claimant upon the direction of EJ Camp, stating that any appeal was for the EAT, there could be no reconsideration by him as he had not given judgment and to the extent that variation of case management orders was sought, this was not granted because the claimant did not apply shortly thereafter and matters had been overtaken by the orders of EJ Webb.

30. By a judgment of 2 March 2023, EJ Webb refused the claimant's reconsideration application.

31. A further letter from the Tribunal sent to the claimant at the direction of EJ Camp dated 22 March 2023 states:

"1. The combined effect of the decisions made by Employment Judge Webb and me is that the claimant's claims are limited to those set out in the written record of the preliminary hearing that took place on 21 December 2022. Judge Webb and I have refused the claimant's applications for reconsideration and to vary or set aside the orders that we made. If the claimant wishes to appeal to the Employment Appeal Tribunal that is a matter for him."

Preliminary Hearing before EJ Maxwell – 23 June 2023

32. The Tribunal wrote to the claimant on 12 June 2023, stating that EJ Camp was considering striking out the claim because of the claimant's failure to comply with EJ Webb's Order made on 21 December 2022. A Preliminary Hearing took place before EJ Maxwell to consider whether there was compliance with an unless order dated 22 March 2023 and whether any part of the claimant's claim should be struck out for non-compliance with Tribunal

orders. The relevant sections of the record of that hearing for the purposes of the applications before me today state:

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

50. If the claimant continues in this fashion, then he risks being struck out in the future for non-compliance or unreasonable conduct. If the claimant wishes to pursue the claims he has been permitted to, then he must abide by rulings and comply with the orders of the Tribunal."

Preliminary Hearing before EJ Faulkner – 28 September and 2 November 2023

33. This hearing took place over two days – 28 September and 2 November 2023 to consider compliance with an Unless Order made by EJ Maxwell on 23 June 2023 and the respondent's strike out applications. A Judgment dated 13 October 2023, relating to the hearing on 28 September 2023, refers to Case Management Orders which had been made ten days prior to what was listed to be the full hearing on 8 September 2023 by EJ Meichen. Those Orders are not in the bundle although a summary of the sections relevant to today's applications is set out as part of the 13 October 2023 Judgment of EJ Faulkner at paragraphs 22 – 26 as follows:

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

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

all other directions must be complied with as set out in Judge Maxwell's order".

23. In response, on 7 September 2023 … the respondent's solicitors wrote to the Tribunal as follows:

"It's the respondent's position that of the 178 documents lodged as part of the claimant's disclosure, 127 of those are not relevant to the legal issues to be addressed at the final hearing. The remaining documents are either duplicates of what was already included in the respondent's bundle, or new relevant documents and therefore added to the hearing bundle".

24. On the same day, in a separate email, the respondent's solicitors informed the Tribunal that the case was not ready for the Final Hearing, attributing this to the claimant's failure to comply with the case management orders ...

Employment Judge Meichen, 8 September 2023

25. The next hearing was to be for ADR … on 8 September 2023, before Employment Judge Meichen and to be held by video. EJ Meichen's record of that Hearing is at pages 158 to 161. Unfortunately, he was not told until it was too late that the claimant had attended in person. Neither the claimant nor EJ Meichen can be criticised for that. Naturally, no dispute resolution discussions could take place, nor could EJ Meichen deal with the respondent's strike out application of 26 July 2021.

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

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

27. EJ Meichen ordered that there would be two bundles for the Final Hearing, that the Tribunal hearing the case *"may decide what to do about the disputed documents bundle" …*

28. On 15 September 2023, the Final Hearing was postponed by the Tribunal at the direction of Employment Judge Flood. It had been due to last for ten days commencing on 18 September 2023. The correspondence on the Tribunal's file shows that there had been some

concerns about whether a judge could be found for the hearing, but the reason for postponement was stated in the letter to be that it was converted to a public preliminary hearing to deal with the respondent's strike out application. Mr O'Dair [for the Respondent] accepted however that the postponement was not the responsibility of the claimant. It does not appear that either party requested it".

34. In considering whether the claimant's claim should be struck out for unreasonable conduct, the 13 October 2023 Judgment of EJ Faulkner also addresses the relevance of Baroness McGregor-Smith's report on workplace racism, as follows:

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

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

35. The second Judgment of EJ Faulkner, dated 17 November 2023, addresses whether the respondent can pursue an application for strike out on the grounds that the complaints have no reasonable prospects of success. The sections relevant to the applications before me today are at paragraphs 23-24.1, as follows:

"23. EJ Webb was not requested to provide written reasons for the decision rejecting the application. It was therefore crucial for me to know from the respondent the basis on which EJ Webb's decisions were reached – in other words, on what grounds the respondent made its application for deposit orders on that occasion and what materials were before EJ Webb when the application was rejected. In response to my Case Management Orders to that effect, the respondent provided a further skeleton argument from Mr O'Dair, Instructions to Counsel (not Mr O'Dair) for the hearing before EJ Webb in December 2022 and the bundle of documents submitted for that hearing. It also purported to provide Counsel's attendance note from that hearing but, as I indicated, I was unable to open it.

24. As I indicated at the outset of the resumption of this hearing on 2 November, I was satisfied based on this new material that it was in order

for me to hear the respondent's applications, though I made clear that this was subject to anything the claimant may wish to submit to the contrary. This was because:

24.1 Counsel attending on 21 December 2022 had confirmed that the basis of the respondent's application on that occasion was jurisdictional, related to time limits, and the additional point that the complaints were vague and poorly particularised…"

Case Management Preliminary hearing before EJ Gaskell – 7 February 2024

36. On 7 February 2024 a case management Preliminary Hearing took place before EJ Gaskell, at which today's hearing was listed to consider the claimant and the respondent's strike out applications. The Minute of Hearing states:

"5. It is evident from the claimant's application that he is hoping by this application that he can reopen the judgements made by Employment Judge Camp, Employment Judge Webb and Employment Judge Faulkner; have those judgements set-aside; and thus reinstate elements of his claim which have previously been struck-out. I have explained to the claimant that such an outcome is not possible. If he wishes to reopen those earlier judgements he can either apply to the relevant judges to reconsider their judgements pursuant to Rules 70-73 of the Employment Tribunals Rules of Procedure 2013, or he can appeal to the Employment Appeal Tribunal. It is likely that any application for reconsideration and any appeal is now out of time. But he can ask the Judge or the Appeal Tribunal to extend time if there are good grounds.

6. Accordingly, the public preliminary hearing which I have listed will deal only with whether or not the response to the remaining claims should be struck-out and/or whether the claims themselves should be struck-out.

7. I have explained to the claimant that Rule 37 is a summary procedure. The tribunal will not hear and evaluate witness evidence. If he is to succeed, he will have to satisfy the Employment Judge that there is <u>no</u> reasonable prospect of a successful defence of his claims for unfair dismissal and/or protected disclosure detriment. Alternatively, that the respondent's conduct is such that a fair trial is no longer possible. That is the test which will also be applied to the respondent's application for the strike-out of the remaining claims.

8. I have also repeated guidance provided previously by Employment Judges with regard to the evidence which will be regarded as relevant in this case. The Employment Tribunal is concerned with the particular facts of events relating to the claimant. It is not concerned with wider and more general matters such as allegations of "institutionalised racism". Accordingly, I repeat what the claimant has previously been told: that the proposed evidence from Baroness Ruby McGregor-Smith appears to have no relevance at all to the issues in the case. Further I have given the claimant certain guidance as to calling witnesses such as Mr Phil Bentley – the respondent's CEO who in reality he wishes to

challenge. The claimant cannot challenge the evidence given by witnesses who he calls.

9. Finally, at today's hearing the claimant asked me to make an order for the disclosure by the respondent of its solicitor's instructions to counsel in the hearing before Employment Judge Camp. The claimant advised me that a similar order had been made by Employment Judge Faulkner in respect of the hearing before Employment Judge Webb. I could find no record of such an order being made by Judge Faulker – and it would be highly unusual for a privileged document to be ordered for disclosure in such a way. The claimant has not persuaded me that there is any relevance in such disclosure to the issues which remain in this case or to the forthcoming preliminary hearing and accordingly his application is refused."

Law

37. A Tribunal is required when addressing matters such as those applications before me today to have regard to the overriding objective which is found in the Rules at Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Rule 2 which states as follows:

(*2) Overriding objective*

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as is practicable –

(a) Ensuring that the parties are on an equal footing;

(b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) Avoiding delay, so far as compatible with proper consideration of the issues; and

(e) Saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal.

38. The Tribunal power to strike out comes from Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

39. Rule 37 provides:

(1). At any stage in 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 prospects 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;*

40. There are further grounds R37(1)c-e. These are not relied on by either party in the applications before me today.

41. Rule 37(2) provides that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or at a hearing.

42. Where a response is struck out, the effect shall be as if no response has been presented.

43. There is in effect a two-stage test. First the Tribunal assesses whether one of the grounds in Rule 37 is made out and in particular in relation to Rule 37(1)(b) whether the unreasonable conduct is such that there can no longer be a fair hearing and then at the second stage the Tribunal considers whether or not to exercise its discretion to strike out, having regard to the overriding objective and proportionality. This will engage the Tribunal in considering what lesser action might be taken and in balancing the interests of the parties.

44. Elias LJ summarised the approach to be taken in **Abegaze v Shrewsbury College of Arts [2010] IRLR 236**: "*In the case of a strike out application … 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*".

45. This approach has been approved by the Court of Appeal in **Blockbuster Entertainment Ltd v James [2006] IRLR 630.**

46. With regard to whether there has been scandalous, unreasonable or vexatious conduct, there must be a conclusion by the Tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on their behalf in such a manner.

47. The conduct in question may be that of the party's representative as well as the party themselves, which is alleged by the claimant in this case. In **Harmony Healthcare plc v Drewery UK EAT/866/00** a party was held to be fixed with the conduct of their representative. In **Harris v Academies Enterprise Trust [2015] IRLR 208** the EAT upheld a Tribunal's ruling that the conduct of the representative and the party may be distinguished in an appropriate case. It was not argued by the respondent that the Tribunal should distinguish the conduct of the representatives from the respondent in this case.

48. In **Bennett v London Borough of Southwark (2002) IRLR 407** Sedley LJ considered the word "scandalous" stating that it was not to have the

"colloquial" meaning but rather "two somewhat narrow meanings; one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process".

49. The meaning of vexatious was considered in a family case in the High Court: **Attorney General v Barker (2002) 1 FLR 7559** when Bingham LJ (as he then was) stated "*vexatious is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis), that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*".

50. In **Bolch v Chipman [2004] IRLR 140** the EAT described the reasoning behind the "no fair trial" factor by stating that a strike out order is not, first and foremost, a tool to punish scandalous, unreasonable or vexatious conduct of proceedings. Rather, it is to protect the other party (and the integrity of the judicial system) from such behaviour which results in it no longer being possible to do justice.

51. The third factor which I must consider is that of proportionality. Simler P (as she then was) in **Arriva London North v Maseya UK EAT/0096/16** para 27 said "*There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles. Even is there has been scandalous, unreasonable or vexatious conduct of proceedings and a fair trial is not considered possible, the tribunal must still examine the proportionality of striking out the claim or response and must consider other, less seismic orders because, as Sedley LJ put it in Blockbuster the power to strike is "a draconic power not to be readily exercised*."

52. The proportionality consideration requires an assessment by the tribunal of any alternative, lesser sanctions, for the conduct in question and a balance requires to be struck.

53. I remind myself of the Presidential Guidance that has also been given in this regard.

Submissions and conclusions

54. The claimant had lodged three separate submissions in relation to his application today, running to some 80 paragraphs over 13 pages. He submitted that overall there are nine main reasons for his application which are contained in his document headed "Claimant's response to Judge Gaskells Order of 07-02-2024". Having discussed the apparent duplication between each of those reasons with him, it was identified that these can be categorised as follows:

    (a) An alleged failure by the respondent to provide the Tribunal with an accurate hearing bundle for the hearing on 13 October 2023 (reason 1).

(b) The respondent's solicitors allegedly instructing Counsel to mislead EJ Camp and EJ Webb that Baroness McGregor-Smith did not want to be linked to the claimant's case (reasons 2, 3 and 4).

(c) The respondent's solicitors allegedly barring the claimant from communicating with Baroness McGregor-Smith and lying to Baroness McGregor-Smith about this, and subsequently failing to clarify the situation with the claimant, which they had told Baroness McGregor-Smith that they would do (reasons 5, 6, 7, 8 and 9).

55. I then heard submissions from the respondent's representative in response to the claimant's application for strike out. Following a short adjournment, I then heard submissions from the respondent's representative in relation to the respondent's application to strike out the claimant's claim. I explained the grounds of the respondent's application to the claimant and provided him with an opportunity to respond. As the applications overlap - the respondent's application being predicated on what it says is the scandalous, unreasonable or vexatious manner in which the proceedings have been conducted by the claimant, since the hearing before EJ Faulkner in November 2023, which largely relates to the matters in the claimant's application for strike out - I deal with each point in turn below, summarising the parties' submissions and setting out my conclusions.

56. I considered firstly whether the response was scandalous, vexatious or has no reasonable prospects of success or whether the conduct stated by the claimant to exist had been established and whether it amounted to scandalous, unreasonable or vexatious conduct. I then considered whether the conduct stated by the respondent to exist had been established and whether it amounted to scandalous, unreasonable or vexatious conduct.

<u>Documentation – reason 1</u>

57. I deal with this issue (set out at 55(a) above) and the parties' submissions on it separately, this being factually distinct from the other matters raised, as follows:

58. In his document entitled "Claimants Response to Judge Gaskells Order of 07-02-2024", paragraph 5, the claimant submits that Judge Faulkner "found that the bundle of documents supplied by the respondent legal team did not match for all concerned" [page 262]. Although the claimant was unable to point me to specific documents in support of this ground of his application, he maintained in oral submissions that the respondent had failed to provide an accurate hearing bundle, which was unreasonable conduct.

59. The respondent submits [para 12, page 349] that this is a misstatement by the claimant at best and that the situation is that the final hearing listed to be heard before EJ Faulkner could not go ahead because the claimant did not comply with orders to reduce his disclosure to relevant documents only and this was why the joint bundle was not ready. The respondent was ready and witness evidence had been drafted. The respondent says that the claimant's submission is further evidence of the claimant's unreasonable conduct and his attempt to either mislead or misremember.

60. It was at this point in the hearing that it became apparent – and I raised with the parties - that the Judgment of EJ Faulkner dated 13 October 2023 had

not been provided by either the respondent or claimant in their documentation for hearing today and yet it appears it is this Judgment which records the issues concerning preparation of bundles. Having ensured that both parties had seen the Judgment and summarised what appeared to be the relevant sections of that Judgment, I told the parties that I would have regard to it in making my decision on their respective applications.

61. From paragraphs 20 – 28 of EJ Faulkner's Judgment dated 13 October 2023 set out in the background section above, it is clear that there were issues with preparation of the bundle of documents for final hearing and that the respondent made an application for strike out of the claimant's claims on the basis of the claimant's failure to comply with Case Management Orders in respect of disclosure of relevant material only. As to the postponement of the full hearing, it appears there were issues with whether a judge could be found for the hearing in any event and EJ Faulkner's conclusion on this point was "it does not appear that either party requested it". The respondent clearly had difficulties with being able to prepare a bundle of documents for use at the final hearing, due to its position that the claimant had disclosed irrelevant material. It was that issue which led in part to the Public Preliminary Hearing before EJ Faulkner and a consideration of strike out of the claimant's claims at that juncture. Prior to that, EJ Meichen and the Regional Employment Judge had issued directions about the bundle. Nowhere in the two Judgments or Case Management Orders of EJ Faulkner is it stated that EJ Faulkner found that the bundle of documents supplied by the respondent legal team did not match for all concerned.

62. I can find no evidence whatsoever to support the claimant's assertion before me today that the respondent's conduct in relation to the bundling of documents was unreasonable, scandalous or vexatious conduct and this assertion appears to be entirely without merit.

63. I turn now to consider the parties' submissions and my conclusions in relation to the remaining grounds for the claimant's application and the respondent's cross-application, as set out at 55(b) and 55(c) above:

64. The claimant makes a number of written submissions in relation to these grounds:

    (a) At paragraph 22 of the claimant's document "Claimants response to Judge Gaskells Order of 7 February 2024" [page 264] dated 6 March 2024, the claimant states that the respondent's solicitors lied on 19 January 2024 to Baroness McGregor-Smith "that the solicitors barred claimant from communicating with the Baroness after Judge Camp had ruled out the Baroness's link."

    (b) In the document "Claimant's Rule 37 Application", the claimant submits:

        (i) At paragraph 3: "*to a layperson, that email … effectively bans me from reaching out to the Baroness*".

        (ii) At paragraph 8: "*Judge Camp was influenced and relied upon the email of Megan Carney*".

        (iii) At paragraph 9: "*so if Megan Carney's email and Barristers oral persuasion regarding the Baroness, is disproved, then I am in*

within my right to claim recission (of Judge Camps order in its entirety) and damages for Megan Carneys fraudulent misrepresentation. I looked up "fraudulent misrepresentation" to be when the person making the representation knows it is false or incorrect and intended to deceive or mislead".

(iv) At paragraph 29: "*18-01-2024 I reached out to the Baroness, I quote from my email "At the start of my Tribunal journey, Mitie's solicitors wrote to me saying I cannot communicate with Baroness McGregor-Smith". The Baroness immediately wrote back as to who had said that I cannot get in touch with her. I sent the Baroness, Megan Carney's email of 13-09-2022. The one that was tactfully timed to deceived Judge Camp".*

(v) At paragraph 30 *"19-01-2021 the Baroness responded back and I quote "I have emailed this solicitor and asked her why she has said you cannot contact me as that has not been something she agreed with me*".

(vi) At paragraphs 31 – 38 the claimant sets out at length why he considers that the email sent by Qurra-Tulain Amir to Baroness McGregor-Smith on 19 January 2024 is not accurate, on the basis that at the time Megan Carney sent the email on 13 September 2022, the hearing before Employment Judge Camp had not at that stage taken place, and therefore the suggestion made by Qurra-Tulain Amir on 19 January 2024 that the respondent's solicitors had written to the claimant because of the decision of EJ Camp was incorrect. The claimant asserts that the email implied that it was the Judge who had said that he should not contact the Baroness [para 37]. The claimant describes the email sent by Qurra-Tulain Amir as "*Big whopper of a lie that is, and one that should aid to Amir, Qurra-Tulain's disbarment*" [para 35] and at paragraph 36 "*Oh dear but incorrect and blatant lie again*".

(c) In the claimant's document "Claimants Response to Solicitors Lies" the claimant repeats allegations about the conduct of the respondent's solicitors.

(i) At paragraph 5: "*So even after said Solicitor being told by the Baroness that Solicitor had no legal right to mention the Baroness, said solicitor is so deluded that she has done nothing wrong. And even after being told by her paying client, Mitie Chief Legal Officer – Peter Dickinson, said solicitor remains defiant enough to accuse me of deceiving the Tribunal for even trying to pursue this case*".

(ii) At paragraph 6 "*..my Rule 37 application which goes into great detail how solicitor chose to manipulate the timeline of events to try to deceive the Baroness that it was Judge Camp that had decided to exclude the Baronesses connection. That was after deceiving Judge Camp that the Baroness did not want to be connected to this case*".

65. In oral submissions the claimant added that the Tribunal will see that Baroness McGregor-Smith is "absolutely livid that I should have been

banned" and that "Peter Dickinson admits I shouldn't have been precluded from speaking with the Baroness".

66. In response to the respondent's application to strike out, the claimant maintains that the respondent has exhausted all of their Rule 37 applications already when EJ Faulkner made his decision, and EJ Faulkner said that this case was going to hearing.

67. The claimant maintains that the Instructions to Counsel for the hearing before EJ Camp are the crux of the matter as the Case Management Order of EJ Camp was made with heavy reliance on what the respondent's barrister had put to him at that hearing.

68. The respondent's submissions are set out in two documents dated 6 February 2024 and April 2024 which the respondent's representative summarised in oral submissions, as follows:

    (a) The respondent's representative says that the application made by the claimant is factually incorrect, an attempt to mislead the Tribunal, defamatory and an attempt to continue with those parts of the claimant's claim that had been struck out by previous Employment Judges.

    (b) The respondent's solicitors were correct in asking the claimant that all correspondence in relation to the claimant's claim should be sent to them, in line with the overriding objective in order that they know what the current position is of the claim.

    (c) The email sent by Megan Carney "kindly asks" the claimant not to copy certain persons into correspondence. It does not say do not contact the Baroness. It does not "effectively ban" the claimant from reaching out to the Baroness. It is asserted that the claimant has put a different effect on the email and attempted to mislead.

    (d) There is no evidence produced to say that EJ Camp saw an email from Megan Carney upon which the claimant bases his assertion that EJ Camp was influenced and relied upon the email of Megan Carney. This is the claimant trying to mislead the Tribunal.

    (e) The claimant's application appears to be an attempt to have EJ Camp's Order rescinded. This appears not to be possible. No appeal seems to have been received by the Tribunal.

    (f) The allegation made by the claimant about the contents of the email sent by Qurra-Tulain Amir is not correct as both EJ Camp and EJ Webb had ordered that Baroness McGregor-Smith is not to be called as an expert witness as her evidence is not relevant. This is asserted to be evidence of the claimant acting scandalously, unreasonably and vexatiously whilst trying to mislead the Tribunal.

    (g) In the claimant's document "Claimants response to Judge Gaskells Order of 07-02-2024" dated 7 March 2024, the claimant states [para 3] that EJ Faulkner stated that Baroness McGregor can be called as a witness, without any evidence to that effect.

(h) The claimant puts his case in the highest possible way in order to deceive and his claims should be struck out. It is submitted that there is no chance of a fair hearing.

(i) The claimant has made baseless and outrageous accusations, which show scandalous, unreasonable and vexatious conduct, calling into question the integrity and honesty of the respondent's representatives and trying to manipulate the situation to his own ends.

<u>The exclusion of evidence from Baroness McGregor-Smith– reasons 2, 3, 4</u>

69. Turning first to the claimant's submission that the respondent's response should be struck out because the respondent misled the Tribunal which led the Tribunal to determining that the evidence of Baroness McGregor-Smith was not relevant to the case. Previous Employment Judges have dealt with the issue of whether Baroness McGregor-Smith is a relevant witness and concluded that she is not, as set out in the procedural history above. I shall not be revisiting that issue today, which has already been determined, and the reason for which has been explained to the claimant on multiple occasions by other Employment Judges.

70. In the context of the claimant's application today, the claimant maintains that Baroness McGregor-Smith is a relevant witness and that the Employment Tribunal decision making process in relation to whether she is in fact a relevant witness has been tainted by the actions of the respondent, who misled the Tribunal about the relevance of her evidence.

71. I have carefully considered all of the documentation before me and the submissions of both parties and conclude that there is no evidence whatsoever to support the claimant's assertion, for the following reasons:

(a) It is evident from the summary of the case management Preliminary hearing before EJ Camp on 28 September 2022 that the reason the evidence of Baroness McGregor-Smith was being discussed was because the claimant had stated in his claim form at paragraph 42: "*I will be approaching Baroness McGregor-Smith to either attend or at least be available over the phone on Tribunal dates, as to her expert opinion on key issues in this case. The Baroness wrote a 95-page review for the Government in 2017 titled "Race in the workplace – the time for taking is over. Now is the time to act*".

At paragraph 56 of his case summary, EJ Camp records:

In light of various comments the claimant made in the document attached to the claim form giving details of the claimant's claim … I [the Employment Judge] have explained to the claimant that .. [56.1] making allegations of "institutional racism" against the respondent does not help his case, because what he is alleging is that specific individuals mistreated him because they personally were racially prejudiced …[56.4] similarly, expert evidence from Baroness McGregor-Smith (see paragraph 42 of the details of claim) about race and racism in the work place will not be allowed at the final hearing"

(b) There is no indication in the case summary that EJ Camp received or had regard to any email from Megan Carney about this matter, nor that he made those comments because of representations made to him by the respondent's representative. The case summary clearly states that the explanation was provided to the claimant because of comments made in the claim form.

(c) The claimant sent two documents to the Tribunal, both dated 5 January 2023, one entitled "Permission to Appeal out of time Judge Camp's Order dated 29 September 2022" and the other "Permission to Appeal out of time Reconsideration of Judge Webbs Order dated 21 December 2022." These are at pages 104-115 of the bundle. On the claimant's own account on 5 January 2023 – in the first document at paragraph 22 and in the second at paragraph 33 – there is no indication that it was the respondent's representative who persuaded the Tribunal to make that Case Management Order. He states (in both documents): "*At the hearing there was no objection from the respondents legal team as to restricting expert witnesses. Judge Camp went out of his way to exclude Baroness McGregor-Smith who was ex CEO of Mitie, and she has expert knowledge of the company and how a CEO should conduct themselves"*. In fact, both documents produced by the claimant attribute the exclusion of that evidence entirely to the Tribunal, at that juncture simply indicating that there was no objection from the respondent's representative.

(d) There is further correspondence from the Tribunal and a Reconsideration Judgment by EJ Webb, as set out above, which demonstrate that the claimant was well aware of the avenues open to him to challenge those decisions at the relevant time, and indeed attempted to do so. The options were repeated to him by EJ Gaskell on 7 February 2024. It was only after the claimant was unsuccessful in challenging the prior Tribunal decisions, that the claimant alleged that the reason those decisions were made by the Tribunal was because the respondent's representative misled the Tribunal at the hearings of EJ Camp and EJ Webb.

(e) At paragraph 3 of his document "Claimants response to Judge Gaskells Order of 07-02-2024" the claimant states "*Claimants Rule 37 application was made whilst pursuing matters to this case in accordance with Judge Faulkner's order of 13-10-2023. Namely Judge Faulkner was specifically asked if Baroness McGregor-Smith can be called as a witness. The Judge said the Baroness can be called as a witness*". Before me today the claimant asserted that he had copied Baroness McGregor-Smith into whistleblowing emails in 2016 and submits that this was a relevant matter at the hearings before EJ Faulkner on 28 September 2023 and 7 November 2023. To the extent that Baroness McGregor-Smith might have had any relevant information to provide about alleged whistleblowing in 2016, that element of the claimant's claim had already been dismissed on 21 December 2022 by EJ Webb as it had been presented out of time. There is therefore no evidence whatsoever to support the claimant's assertion that EJ Faulkner said the Baroness could be called as a witness. Indeed, EJ Faulkner's 13 October 2023 Judgment deals extensively with why a report from

Baroness McGregor-Smith is not relevant to the issues before the Tribunal at paragraphs 48-49.1 and 51.1, as set out above.

(f) Although EJ Gaskell had already explained to the claimant why no order for disclosure of Instructions to Counsel would be made, the claimant reiterated today his belief in the necessity of a disclosure order for the Instructions to Counsel for the hearing before EJ Camp in September 2022. He maintained that EJ Faulkner had ordered the respondent's representative to disclose the Instructions for the hearing before EJ Webb. Whilst it appears that the respondent's representative had disclosed those Instructions voluntarily in an effort to address a query about the scope of the strike out application being considered by EJ Webb, it is evident from the Judgments of EJ Faulkner that no such disclosure order for Instructions to Counsel was made by the Tribunal.

Correspondence between respondent's representative and claimant in relation to contact with Baroness McGregor-Smith – reason 5, 6, 7, 8 and 9

72. The claimant submits that the correspondence sent by the respondent's solicitors to the claimant (on 13 September 2022) and by the respondent's solicitors to Baroness McGregor-Smith (19 January 2024) is evidence of unreasonable, scandalous or vexatious conduct. That correspondence is set out below:

73. On 13 September 2022 Megan Carney, Employment Specialist at Dentons, solicitors acting for the respondent, notified the Tribunal that she had taken over conduct of the file from her colleague Qurra-Tulain Amir and requested that future correspondence be directed to her as the respondent's representative. This email was copied to the claimant.

74. On the same date, 13 September 2022, Megan Carney wrote to the claimant. The email explains that she is the representative of the respondent. It reads:

> "*Our client has kindly sent me your email of 9 September 2022, containing your list of issues. I write to confirm safe receipt. Please be advised, that as the respondent's representative,* ***all*** *correspondence in relation to your Tribunal claim is to be sent to me and not to members of the respondent's business or Baroness McGregor-Smith. I also kindly ask that you do not copy in members of the respondent's business or Baroness McGregor-Smith into correspondence. Likewise, correspondence between parties should not copy in the Tribunal, unless you are making an application for an Order, or ACAS, unless we are engaging in settlement discussions. Doing so causes the Tribunal and ACAS unnecessary additional work for staff and creates delays in dealing with case work. We will be in touch shortly with a draft Agenda and list of issues for the preliminary hearing*."

75. Some 16 months later, on 19 January 2024 an email is sent from Baroness McGregor-Smith to Megan Carney at Dentons, which reads:

> "*Dear Megan*
>
> *I have been sent this email yesterday from Dev Masih who I believe has a claim against Mitie. This email states he is to make no contact me with me. Could you please explain why you have put my name in this email and*

instructed an ex-employee of Mitie not to make contact with me? I have copied in the Chair of Mitie Group plc so he is aware of this. Best wishes Ruby"

76. The attachment Baroness McGregor-Smith refers to in her email had not been supplied by the claimant in his documents for today's hearing. In his written submission labelled "Claimant's Rule 37 Application" [pages 241-247] at paragraph 29, the claimant states: "*18-01-2024 I reached out to the Baroness, I quote from my email "At the start of my Tribunal journey, Mitie's solicitors wrote to me saying I cannot communicate with Baroness McGregor-Smith.*"

77. On 19 January 2024, a response is sent to Baroness McGregor-Smith from Qurra-Tulain Amir, Senior Lawyer, Helix at Dentons. That email reads:

"*Dear Baroness McGregor-Smith*

I have been advised to respond to your message below to my colleague Megan, after it was forwarded on to the Mitie team. I am a senior lawyer in the team at Dentons who advises Mitie in connection with employment tribunal matters.

You are correct that Mr Masih is pursuing an Employment tribunal claim against Mitie. As a preliminary issue the questions of witnesses arose, as is standard. Mr Masih informed the Tribunal that he would seek to bring you as a witness. This was considered by the Judge and he confirmed that your evidence would not be relevant to Mr Masih's allegations/claims and that you should not be brought as a witness. Following on from this we sent Mr Masih an email which confirmed that, as the Judge had determined your evidence was not relevant, he should not contact you or others in connection with this matter save for going through the official channels. This was part of other steps we were taking to ensure that Mr Masih conducted the proceedings in line with the employment tribunal's overriding objective. I hope this clarifies the matter. If you wish to discuss this any further then please let me know. Kind regards Qurra-Tulain Amir, Senior Lawyer, Helix"

78. There is a further email from Baroness McGregor-Smith to Dentons also on 19 January 2024:

"*Many thanks Amir, this is really helpful. However, I am not comfortable at the language used in the email you sent as this context was not make clear. The wording should have been agreed with me if you intended to mention me at all. I am disappointed at the wording which implies Mr Masih cannot contact me when you have no legal right to do so. Could you please write to Mr Masih and explain the context more clearly please. Best wishes Ruby*"

79. Peter Dickinson, Chief Legal Officer of the respondent sends an email to Baroness McGregor-Smith later on 19 January 2024:

"Ruby, Many thanks. I will ensure that we write to Mr Masih, clarifying the situation and making absolutely clear that he is not precluded from reaching out to you. Best regards Peter"

80. The claimant received an email from Baroness McGregor-Smith on 20 January 2024, copying him into the chain of emails set out above and stating,

"*you are entitled to write to me if you wish to and the lawyers are not allowed to tell you not to*".

81. Having carefully considered the chain of correspondence to which the claimant refers, I reach the following conclusions:

    (a) The email of the respondent's representative dated 13 September 2022 does not ban the claimant from contact with Baroness McGregor-Smith. The respondent's representative had quite properly written to the claimant to ask that correspondence related to the case be directed to the representative, rather than other individuals, and that members of the respondent's business and Baroness McGregor-Smith should not be copied into that correspondence. The request was made politely and professionally. It also followed sequentially an email that Megan Carney had sent to the Tribunal stating that she was taking over conduct of the file from her colleague, asking the Tribunal to update contact details.

    (b) As to the more recent correspondence of 19 January 2024, between Baroness McGregor-Smith and Mitie, it is apparent that that chain of correspondence and the concerns raised by Baroness McGregor-Smith are generated by an email the claimant himself sent to Baroness McGregor-Smith on 18 January 2024. That email has not been provided to me. However, the claimant's own submission is that he wrote to Baroness McGregor-Smith and that the email said: *"At the start of my Tribunal journey, Mitie's solicitors wrote to me saying I cannot communicate with Baroness McGregor-Smith*". For the reasons I have already set out, this misrepresents the content of the email sent by Megan Carney on 13 September 2022 and the chain of correspondence between Baroness McGregor-Smith, Dentons and Mitie which follows is therefore unsurprising.

    (c) The claimant makes a number of assertions of misrepresentation by the respondent's representative Qurra-Tulain Amir to Baroness McGregor-Smith in the email of 19 January 2024 and conversely the respondent's representative submits that for the claimant to make such an allegation is scandalous, vexatious and unreasonable behaviour. The email reads "*Following on from this we sent Mr Masih an email which confirmed that, as the Judge had determined your evidence was not relevant, he should not contact you or others in connection with this matter save for going through the official channels*". The email sent to the claimant on 13 September 2022 was sent before the hearing of EJ Camp at which the Case Management Order was made which had determined that evidence from Baroness McGregor-Smith was not relevant. The 19 January 2024 email contains an inaccuracy as Megan Carney's email had not in fact stated that the Judge had determined that Baroness McGregor-Carney's evidence was not relevant as, by 13 September 2022, EJ Camp had not yet considered that matter. That did not happen until 28 September 2022. Nor – as I have already determined above - did Megan Carney's email in fact state that the claimant should not contact Baroness McGregor-Smith or others save for going through the official channels. The chain of correspondence must be read in context: it began because the claimant himself wrote to Baroness McGregor-Smith saying that Mitie had written to him saying that he could not communicate with her, which was not in fact correct. The 19 January

2024 email is sent some 16 months after the original email by Megan Carney. At the point it is sent it was by then correct to state that the Tribunal had determined that evidence from Baroness McGregor-Smith was not relevant. It was not an email which was addressed to the claimant, nor to the Tribunal. It was not correspondence which has any bearing on the conduct of his litigation or the respondent's defence to it before this Tribunal. It was in effect satellite correspondence, to an individual whose evidence had been determined by the Tribunal not to be of relevance to the matters before it. For those reasons, I do not find the slight inaccuracy in the respondent's representative's email of 19 January 2024 to Baroness McGregor-Smith is of any significance to the applications before me today.

(d) The claimant says that the respondent's solicitor has not written to him to say he can contact Baroness McGregor-Smith as had been stated in the email of 19 January 2024 from Peter Dickinson to Baroness McGregor-Smith. The claimant is evidently aware that he can contact Baroness McGregor-Smith, as he has received a copy of the chain of emails from Baroness McGregor-Smith and she has told him this herself. In any event, I do not find that this is of relevance to the issues before me today. The email was not addressed to the Tribunal or to the claimant, nor was it correspondence which has any bearing on the conduct of the claimant's litigation or the respondent's defence to it before this Tribunal.

82. In light of my conclusions above, I turn to the specific applications:

Claimant's application for strike out of the respondent's response

83. Turning firstly to the claimant's application to strike out, I have considered the claimant's application carefully in light of the authorities and have considered whether the conduct stated by the claimant to exist has been established. I cannot find that the response or any part of it is scandalous, vexatious or has no reasonable prospects of success. I cannot find that the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious. This application therefore fails.

Respondent's application for strike out of the claimant's claim

84. As to the respondent's application to strike out, I do find that the conduct stated by the respondent to exist has been established. I find that the manner in which the claimant has conducted these proceedings since the hearings before EJ Faulkner which concluded on 7 November 2023 has been unreasonable and vexatious, for the reasons set out below. I do not find that the claimant's conduct meets the definition of scandalous:

(a) As set out above, the claimant has made allegations of serious wrongdoing against the respondent's solicitors. There is no evidence whatsoever to support the allegations made.

(b) The claimant's application to strike out the respondent's response was vexatious and unreasonable, being founded upon a misrepresentation of the procedural facts in this case, set out extensively in the previous Case Management Orders and Judgments of the Tribunal. Whilst I take into account that the claimant is a litigant in person and this is a case

which has a procedurally complex history, it was evident through the claimant's written submissions and oral submissions before me today that he was well able to put forward his application to strike out the respondent's response, and to respond to the respondent's application for strike out of his claim: his understanding and grasp of the issues in the case is extensive. I am not satisfied that any aspect of the claimant's application was founded on a misunderstanding of Tribunal procedures because he is a litigant in person. Rather, I conclude that he has deliberately misinterpreted rulings and documents in order to support his narrative that the respondent's representatives had misled the Tribunal and misled Baroness McGregor-Smith, after his previous attempts to re-open previous decisions of the Tribunal in relation to the claims he brings and the evidence he wishes to call failed.

85. Having found that grounds in Rule 37(1)(b) are made out, I have to consider whether strike out is proportionate and whether a fair trial is still possible.

86. I give consideration to the overriding objective and the need to approach matters flexibly, and take account of the fact that the claimant is a litigant in person, although for the reasons I have set out above I conclude that this is not a case where the claimant does not understand what is required of him procedurally and he is capable of complying. I take full account of the draconian nature of strike out and all the circumstances, taking into consideration the authorities and cases highlighted to me today. The respondent submits that there cannot be a fair trial and that no lesser sanction than strike out is available "as it is impossible for any tribunal to be able to find [the claimant] a witness upon whom they can rely". I have carefully considered that submission. Although I find that the manner in which the claimant has conducted proceedings in relation to his application to strike out the respondent's response was vexatious and unreasonable, that does not inevitably mean that he will continue to conduct proceedings in this way. The respondent will have the opportunity to cross-examine the claimant and make submissions about the reliability and credibility of his evidence at the final hearing, in the same way that the claimant will have the opportunity to cross-examine the respondent's witnesses and make submissions about their reliability and credibility. Ultimately, it will be for the Tribunal at final hearing to determine the evidence which is reliable and credible.

87. The claimant's repetition of matters which have already been dealt with, and his inaccurate assertions, is misleading, vexatious and unreasonable, wasteful of Tribunal time and not in line with the overriding objective. The claimant made a number of incorrect assertions about procedural matters which have already been determined by the Tribunal, as follows:

    (i) He maintained that the respondent's representatives had provided an incorrect bundle which prevented the full hearing listed for September 2023 going ahead.

    (ii) He maintained that EJ Faulkner had said that the respondent could not proceed with the strike out application before me today. EJ Gaskell had clarified this point for the claimant, and explained that the respondent's application would proceed today, yet the claimant repeated his incorrect assertion during proceedings today.

(iii) He maintained that EJ Faulkner had ordered the disclosure of the respondent's Instructions to Counsel in respect of the hearing before EJ Webb.

(iv) He maintained that EJ Faulkner had said that Baroness McGregor-Smith could be called as a witness.

(v) He asserted before me today that Baroness McGregor-Smith would attend the full hearing in order to give evidence about how the claimant had been banned from speaking to her. I reminded the claimant again that that would not be relevant evidence at the full hearing, as those issues are being addressed in his application today. As to evidence from Baroness McGregor-Smith more generally, this point has been dealt with extensively by previous Employment Judges.

88. I draw the claimant's attention to the fact that I have found these assertions to be incorrect and that accordingly they should not be repeated.

89. I remind the claimant that the parties and their representatives are required to assist the Tribunal to further the overriding objective and in particular are required to cooperate generally with each other and with the Tribunal. The claimant told me today that he is intending to seek legal advice for the final hearing. That is a matter for the claimant. Whether or not he does, I record here that it is essential that he now abides by the rulings made by previous Employment Judges in his case and cooperates generally with the respondent and the Tribunal to bring this case forward to full hearing. Further conduct of this nature is very likely to result in his claims being struck out.

90. It was unreasonable of the claimant to accuse the respondent's solicitors of lying. Honesty is a basic standard required of solicitors. If they are accused of lying, which the claimant has done throughout his written submissions, including in a document specifically titled "Claimants Response to Solicitors Lies" it is to be expected that they will take that accusation seriously. Baseless accusations have a damaging effect on the ability of the parties to cooperate, in line with the overriding objective, on matters that are essential to the preparation of a fair hearing. However, this would only make a fair hearing impossible if there was no prospect that the claimant's conduct will improve. I record here that the claimant's accusation of the respondent's solicitors in these circumstances was unreasonable and that persisting with conduct such as this in the future is very likely to result in his claims being struck out.

91. This is effectively a final warning for the claimant. With that measure in place, I conclude that it would be disproportionate to strike out the claim and a fair hearing can still take place at this stage.

92. This case was originally listed for full hearing in September 2023. The parties indicated that witness evidence and documentation has been exchanged and that the case is largely now ready for hearing. Separate case management orders will follow.

Employment Judge Power

Date: 17 July 2024

Note

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