EMPLOYMENT TRIBUNALS

Claimant: **Mr C Forrest**

Respondents:
1. Amazon Web Services EMEASARL UK Branch
2. Jo Barry
3. Joe Carroll
4. Addy Charman
5. Gözde Demiral
6. Norm Driskell
7. Paddy Fitzpatrick
8. Kerry Jean Garcia-Deleito
9. Mark Andrew Brian Hammerton
10. Carolyn Marie Kenyon
11. Kathryn Rosen
12. Abigail Russell
13. Shahar Vigder
14. Wendy Ruth Collidge
15. Stacey Kelly
16. Kurt Walters

PUBLIC PRELIMINARY HEARING

Heard at: **London Central Employment Tribunal**

On: **3 – 6 June 2024**

Before: **Employment Judge Brown**

Appearances:

For the Claimant: **In person**
For the Respondents: **Mr M Humphreys, Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. **No Strike Out Judgment or Deposit Orders are made, on either the Claimant's, or the Respondents' applications.**

REASONS

1. The Claimant brings complaints of protected disclosure detriment; automatic unfair dismissal on the grounds of protected disclosure; ordinary unfair dismissal; disability discrimination (failure to make reasonable adjustments, discrimination arising from disability; direct discrimination; indirect discrimination; harassment); victimisation; and "personal injury", against the Respondents.

2. He presented his first claim, number 2210418/2023, on 20 June 2023 and his second claim, number 22150624/2023, on 15 September 2023.

3. At a previous private preliminary hearing on 26, 27, 29 February & 1 March 2024 I had established a List of Issues in the claims. I made orders for the parties to provide further information and responses in relation to the protected disclosures relied on by the Claimant. I gave the Respondents permission to file and serve amended grounds of resistance and ordered them to add their specific legal and factual defences to the claims into the List of Issues and send it to the Claimant.

4. This hearing was listed to consider the parties' strike out and/or deposit applications and to give further directions. It was conducted in person, although members of the public could view the public parts of the proceedings by remote video link.

5. The summary below is not intended to be a verbatim record of what each party said to me. It is simply a summary. I have paraphrased much of what was said, both by me and by the parties.

6. I had previously agreed that the Claimant should take breaks from the hearing when he needed to do so, on account of his disabilities. I had agreed that his wife, who attended to support him, might need to assist him in identifying when breaks were required.

The Claimant's Strike Out Applications

7. I did not strike out the Respondents' responses.

8. It is not proportionate for me to address every detail of the Claimant's application for strike out here, nor every document he has referred to in support. I have addressed what I understand to be the different categories of the Claimant's contentions.

9. It was, at times, challenging to follow the Claimant's written arguments, partly because he relied on extracts from documents, rather than the whole documents, which obscured the context of the extracts and the proper construction of the documents themselves.

10. The Claimant also referred, in considerable detail, to things which appeared to be irrelevant. In particular, the Claimant spent many paragraphs alleging that previous judges in the case had acted wrongly. The appropriate fora for challenging decisions of Employment Tribunal Judges are the Appeal Courts. Only a Judge of a Higher Court has the power to review another Employment Judge's decision.

11. What was relevant for the purpose of the strike out application was the Respondents' conduct and/or the merits of their Responses. Judges' conduct was not to be taken into account. I therefore disregarded the Claimants' submissions regarding other Judges' decisions and conduct.

12. I also did this partly because I considered that this would be fair to both parties. The Claimant had addressed his complaints and allegations about other Judges' decisions and actions with with such vigour – for example, suggesting that they would be guilty of misfeasance in public office and liable to be sent to prison for life – that an objective person might consider that there was some implied pressure on all Judges, including me, not to make decisions with which the Claimant disagreed, at risk of being themselves subjected to such allegations. This was particularly so when the conduct of other Judges was irrelevant to my decision, so an objective person might consider that these matters could only be being raised for tactical reasons. An objective person might therefore consider that there was a risk that I would be inappropriately influenced in my decision-making. For this reason too, it was sensible for me to make clear that I had disregarded the Claimant's submissions regarding other Judges.

Relevant Law

13. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds (see SI 2013/1237 Sch 1 r 37(1)):

(a) that it is scandalous or vexatious or has no reasonable prospect of success (r 37(1)(a));
(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 (r 37(1)(b));
(c) for non-compliance with any of the Rules or with an order of the tribunal (r 37(1)(c));
(d) that it has not been actively pursued (r 37(1)(d));
(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) (r37(1)(e).

Claimant's Grounds for seeking Strike Out: R's Approach to the Substantive List of Issues (a) that it is scandalous or vexatious or has no reasonable prospect of success (r 37(1)(a)); (c) for non-compliance with any of the Rules or with an order of the tribunal (r 37(1)(c))

14. The Claimant contended that the Respondents' Responses had no reasonable prospects of success because the Respondents did not provided any legal and factual responses to his detriment claims, contrary to my order paragraph 9, dated 6 March 2024.

15. The Claimant said that the Respondents' List of Issues, sent to the Tribunal on 29 April 2024, had not included the Respondents' legal and factual responses to his alleged detriments.

16. He pointed out that the Respondents had amended the List of Issues, for example to include, at paragraph [25], their admission that he was a disabled person at the relevant times by reason of his ADHD condition. Other amendments were made at paragraphs [26] regarding knowledge of disability and [34] regarding the legitimate aim relied on in the Indirect Discrimination and Discrimination Arising from Disability sections.

17. I noted that my relevant orders included the following:

"Amended Response and Complete List of Issues

8. By 22 April 2024 the Respondents have permission to file and serve amended Grounds of Resistance, responding to the claims as clarified in the list of issues and, as clarified by the Claimant, in respect of the Respondents against whom legal liability for detriment is alleged..

9. By 29 April 2024 the Respondents shall add their specific legal and factual defences to the Claimant's claims into the List of Issues and send it to the Claimant."

18. I also noted that, in the Respondents' Amended Grounds of Resistance dated 22 April 2024, they had provided a factual narrative response at paragraphs 3.2 – 3.42, to each one of the Claimant's alleged detriments as set out in the List of Issues.

19. At paragraph 5 of the Amended Grounds of Resistance, the Respondents had also pleaded:

"5. Paragraphs 7 – 9 of the List of Issues – the Protected Disclosure Detriment Claim

5.1 The Respondents have set out in paragraph 3 of these Amended Grounds of Resistance their position on each of the alleged unlawful acts relied on by the Claimant. That position is repeated. To the extent that those acts are admitted as having occurred or are so found by the Employment Tribunal, it is denied that they had anything whatsoever to do with any protected disclosures made by the Claimant.

5.2 It is denied that any of the alleged detrimental acts, as listed in paragraph 2 of the List of Issues, amount to a detriment within the meaning of section 47B of the Employment Rights Act 1996.

5.3 None of the alleged detrimental acts, as listed in paragraph 2 of the List of Issues, if found by the Tribunal to have been done, were done on the ground that the Claimant had made a protected disclosure(s).

5.4 To the extent that any act relied on by the Claimant was done more than 3 months prior to filing the ET1, as adjusted for the provisions of ACAS Early Conciliation, it is denied that the Tribunal has jurisdiction to hear the claim or allegation."

20. I concluded that the Respondents had pleaded both a legal and a factual defence to the Claimant's alleged protected disclosure detriments, in their amended Grounds of Resistance. They had denied causation of any of the alleged detriments, they had denied that the alleged detriments amounted in law to detriments, and they had pleaded a jurisdictional time bar.

21. They had pleaded the same defences in the victimisation claim, at paragraph 6 of the Amended Grounds of Resistance.

22. In *Moustache v Chelsea and Westminster Hospital NHS Foundation Trust* [2022] EAT 204 (15 June 2023, unreported) HHJ Tucker held that a list of issues could be an exceptionally

useful case management tool, bringing clarity and structure, but emphasised that a list of issues is no more than that. It is not a pleading. She reminded Employment Tribunals that they should avoid slavish adherence to a list of issues, or the elevation of it to a rigid and formal pleading, precluding a fair and just trial of the real issues in the case.

23. Following *Moustache*, I decided that the Respondents' pleading in the case, their Amended Grounds of Resistance, did plead a comprehensive defence to the Claimant's claims. This element of the Claimant's argument for strike out relied on elevating the List of Issues to the status of a pleading, which would prevent a fair trial of the defences in the Respondents' Grounds of Resistance.

24. I further decided, in any event, that the Respondents were not in breach of my order 9 of 6 March 2024. My order did not require the Respondents to include, in the List of Issues, every evidential nuance and detail on which the Respondents rely to defend the claim. A List of Issues is a summary document, setting out the legal claims and brief factual basis of them, and the legal defences and brief factual basis for those. If the Respondents had included the factual detail of their responses to the individual detriments, the list of issues would have become unwieldy and little more than a replication of the pleadings. It would not have been a useful document.

25. The Respondent had added its legal defences to the list of issues. The resulting final list of issues makes clear what is in dispute and what is not. It is not deficient.

26. Accordingly, strike out for breach of a Tribunal Order was not appropriate.

Claimant's Grounds for Seeking Strike Out: Court of Appeal Order. Grounds: (a) that it is scandalous or vexatious or has no reasonable prospect of success (r 37(1)(a)); (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 (r 37(1)(b));

27. The Claimant relied reasons given by Lady Justice Andrews for an Order she made on a 15 May 2024, refusing the Claimant leave to appeal to the Court of Appeal and also refusing the Claimant's application to amend his claim. He said that Andrews LJ had decided that, "Many of the documents upon which the Respondent relies (such as minutes of meetings) were not contemporaneous documents but can be shown to have been created after the event, often by the Respondent's lawyers." He argued that she had therefore found that the Respondents had falsified documents.

Decision: No Reasonable Prospect; Unreasonable Conduct: Court of Appeal Grounds

28. Put briefly, it did not accept that Andrews LJ had decided this.

29. The application before LJ Andrews was for leave to appeal against EAT Judge James Tayler's order dated 15 January 2024, refusing the Claimant's second application for reconsideration of a refusal to expedite his EAT rule 3(10) hearing.

30. LJ Andrews did say that she had read the documents in the core and supplementary bundles filed for the appeal, and also the many other documents that Claimant had sent to the Civil Appeals office.

31. However, I did not accept that, having read those documents, she had assumed the role of decision maker in relation to the central facts of the claim. Andrews LJ's role was simply to decide on whether to give leave to appeal an interlocutory decision on the timing of another appeal hearing in the EAT. Indeed, Andrews LJ made explicit the limited nature of her decision making role in paragraph 17 of her reasons, "… the question for me is whether he is able to establish a real prospect of successfully appealing against Judge Tayler's decision, which is a case management decision made by a specialist Tribunal judge, refusing a second application for reconsideration of his earlier decision to refuse expedition of the appeal."

32. If Andrews LJ had assumed any decision making role on the central facts of the case, I have no doubt that she would have made that clear to both parties and invited submissions from both. To have done otherwise would have been a breach of natural justice.

33. In any event, on a true reading of the reasons Andrews LJ gave for her order, her paragraph 9 simply set out what the Claimant's case is. She made that clear in the first two sentences of the paragraph, where she explained that she was essentially summarising the Claimant's Grounds of Complaint. "[§9] I consider it unnecessary for the purposes of this application to go into the details of the Nov 2023 Grounds or to catalogue each and every complaint made. Suffice it to say that Mr Forrest alleges that he made a protected disclosure on 5 January 2023 [see "PD3.3" in the index of protected disclosures for this present Case] and that this was the true reason for his dismissal."

34. For the remainder of the paragraph, Andrews LJ continued to summarise the Claimant's claim, " He claims that the metadata demonstrates that his employers (in particular, a Ms Stacey Kelly [R15 here]) took the decision to dismiss him long before any supposed investigation took place, and that the disciplinary process relied on by the Respondent was a charade/construct. Many of the documents upon which the Respondent relies (such as minutes of meetings) were not contemporaneous documents but can be shown to have been created after the event, often by the Respondent's lawyers. Mr Forrest says that the metadata also shows that the timing of the investigation was engineered to coincide with steps that were being taken in proceedings in the ET in which he was also the claimant against this Respondent, Case 2208865/2022, which have since been linked with this matter in the ET."

35. LJ Andrews also summarised the Claimant's claim in the immediately preceding and the following paragraphs, [8] and [10].

36. Accordingly, I found that LJ Andrews' reasons for refusing leave to appeal did not constitute a determination that the Respondents had falsified documents. They were not a basis for considering strike out of the Respondents' Responses.

Claimant's Grounds for Strike Out: The Manner in Which the Proceedings have been Conducted has been Scandalous, Unreasonable, or Vexatious, so that a Fair Hearing is no Longer Possible (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 (r 37(1)(b)); 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) (r37(1)(e)

37. The Claimant relied on the case of *Arrow Nominees v Blackledge* [2000] EWCA Civ 200 where the Court found that a litigant had destroyed documents and relied on forged documents in evidence. In that case, Chadwick LJ said,

"[§54] But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him... A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

"[§61]... I venture to suggest that a judge faced with an application to strike out in circumstances such as those in the present case ought to address the question whether the better course would not be to resolve the issue, before the trial begins (or, perhaps, as a preliminary issue at the start of the trial), whether full disclosure of the fraudulent conduct has been made. If, in the absence of cross-examination, the judge cannot resolve that issue at the interlocutory stage, then he is left in the position that he cannot be confident that there is no substantial risk that the trial (if it proceeds) will be a fair trial. Indeed, he can be reasonably confident that it will be unfair - in the sense that it will give rise to a detailed examination of issues which ought not, properly, to be occupying the time of the court at the trial... if he is not satisfied that there has been full and frank disclosure of the fraudulent conduct, then, for the reasons which I have already given, it seems to me that the correct response is to refuse to allow the party in default from taking any further part in the proceedings - with whatever consequences follow from that."

38. The Claimant contended that it could be demonstrated, partly through metadata analysis of the Respondents' (allegedly) contemporaneous documents, that the Respondents had indulged in forgery, perjury and deliberate destruction of evidence in this case. He said that the Tribunal could be satisfied that he had shown a prima facie case of this. As a result, he contended that the Tribunal should refuse to allow the Respondents to take any further part in the proceedings.

39. He contended that, if the Tribunal was against him on striking out, the Tribunal should instead order that the authenticity of the disputed documents and the truthfulness of the Respondents' statements be determined as a preliminary issue, per *Arrow Nominees* at [61].

40. The Claimant produced a large bundle of documents. Many of the documents had what he said were features of the metadata attached to them. He particularly drew the Tribunal's attention to the following:

Joe Carroll

41. The sworn witness statement of Joe Carroll, the Respondents' alleged dismissing officer, dated 25 July 2023, relied on in the interim relief hearing in this case. The Claimant contends that forensic analysis of the signature shows that the signature was written from left to right. He points out that date format "7/25/2023", written next to it, is US-style, rather than British, putting the number of the month before the number of the day. He also relies on the "unique metadata attributes of the scanned file". He contends that all this strongly suggests that the final 'signature' of "Mr Carroll's" 25 July 2023 witness statement was forged by a US-based Lawyer.

42. He also relies on these matters as part of his evidential argument that US lawyers and / or US Amazon employees were involved, both, at crucial stages of the disciplinary proceedings against him, and in the handling of his protected disclosures and this litigation.

43. He contends that there is overwhelming evidence that the true decision maker/s on his dismissal was not Mr Carroll, but others, including US lawyers and senior Amazon employees, in a *Royal Mail Group v Jhuti* [2019] UKSC 55, [2020] IRLR 129 – type case.

44. So, for example, he contends that metadata shows that an invitation letter sent in the name of Mr Joe Carroll it was "created" on "22 May 2023 at 14:38" by Ms Kathryn Rosen "RosenKA" ("Principal Employment Solicitor").

45. He also contends that metadata for a subsequent alleged 5 June 2023 interview "Investigation Meeting Minutes 8.6.2023.pdf" shows that this file was 'modified' just 27 minutes before the Claimant's dismissal and that the "Author" was "tinjodie"; Ms Jodie Tinsley (tinjodie@amazon.co.uk).

46. He also contends that Ms Tinsley, who apparently generated a "Policy: Disciplinary - UK" on 22 May 2023, did not herself do this, despite it stating "Welcome, Jodie Tinsley". The Claimant contends that the timestamps and metadata show that the Policy was, in fact, generated by Savannah Silver, a US based lawyer. He relies on documents being uniquely attributable to Ms Silver, because he says that she has used, at important stages, a typically US-based PDF Producer ("cairo 1.17.4") programme.

47. He contends that the file sent by Ms Tinsley, showing a GMT time, "Welcome, Jodie Tinsley" "22/05/2023, 15:05" (GMT) - when the time was 16:05 BST on 22 May 2023 - shows that, in fact, it was Ms Silver who had generated the document from the USA. He says that she did so using 'virtual machine' clock settings (GMT), causing the printed (by 'virtual machine' using GMT) time to lag BST by 1-hour, p410 of his documents.

48. He further contends that Ms Carolyn Kenyon and Ms Savannah Silver drafted a letter dated 8 March 2023 in response to the Claimant's 18 January 2023 protected disclosures. The report alleged that the Claimant violated Amazon's "Confidential Information Policy" by his protected disclosures in a letter dated 18 January 2023 to the Regional Secretary, of the London Central Employment Tribunal, p314 of his bundle.

49. He therefore contends that this shows a crucial link, illustrated by the involvement of US-based lawyers and Amazon decision makers at these times, between his protected disclosures and the later stages of the disciplinary proceedings against him.

50. More broadly on the merits of the case, the Claimant contends that Mr Carroll's witness statement asserts, at paragraph 9.2, that, on 22 May 2023, Ms Stacey Kelly gave Mr Carroll the reason for dismissal, so that Mr Carroll was not the decision maker. I considered that this was not a good argument. The relevant paragraph states that Ms Kelly advised that Mr Carroll that he should disregard, in his decision-making, the Claimant's claim against the First Respondent. The paragraph also states that Ms Kelly told Mr Carroll that he was being asked to make a decision on whether the Claimant had refused to work his contractual hours on particular dates.

Luke Waite

51. The Claimant also relies on documents allegedly created by Luke Waite, who was the Respondents' named grievance officer. He says that metadata shows that each of the three documents sent to the Claimant bearing Mr Waite's name was created by Ms Rosen, a solicitor at Eversheds Sutherland LLP, on 24 April 2023, 2 May 2023 & 18 May 2023, respectively. He says, for example, that the metadata of the 18 May 2023 outcome of grievance document shows RosenKA as the author, p162 his documents. He contends that this is significant because, on 18 May 2023, Luke Waite misrepresented to the Claimant that investigations been carried out independently, by different individuals within the business, when, in fact, documents in all those investigations had been drafted by Ms Rosen, so that the investigations were not conducted independently at all.

52. He contends that Mr Waite reports to Stacey Kelly HR, who also later briefed Mr Connolly regarding the Claimant's dismissal. He contends, therefore, that Ms Kelly was also coordinating the handling of his protected disclosures and his subsequent dismissal.

53. He also says that Mr Waite's signature on his statement for the Interim Relief hearing was not authentic in that it was not 'eIDAS'13 or s7 Electronic Communications Act 2000 Compliant (e.g. not DocuSigned). He says that it was added by Taylor Wessing. He notes UK Law Society Guidance on electronic signatures which states "The person alleging that the document was not authentic...would need to prove, on a balance of probabilities, that this was the case". He says that DocuSign integrates with the software14 used by "Taylor Wessing LLP"; but was not used.

ET3s Changed

54. The Claimant also relies on apparent, unexplained changes made to the ET3s after they had been filed on behalf of the Respondents in this case. He says that this was done using a pdf editor programme.

55. He contends that, for example, an original ET3 had included Eversheds Sutherland as the Respondent, giving an address of Eversheds in Salford. He contends that, when Taylor Wessing filed a bundle with the Tribunal for a December 2023 preliminary hearing, Taylor Wessing must have realised they made a mistake in revealing Eversheds' involvement and changed the name to Amazon in the formal sections of the ET3s. However, they forgot to change the original post code and the title, "Mrs", C Bundle p164. He says that similar changes were made to an ET3 for Joe Carroll, C Bundle p165.

56. He contends that the Respondents' representatives therefore changed formal Tribunal documents using PDF editor or photoshopping. He contended that that is scandalous conduct.

Falsified AWOL Policy

57. The Claimant contends that, during the disciplinary proceedings against him, Mr Hammerton, from Eversheds Sutherland falsified a 'PCP' to legitimise the Police having been sent to the Claimant's home on Saturday 11 February 2023.

58. He contends that the real "AWAL" policy states, C Bundle p591: "If Amazon is unable to contact you by telephone and if you are absent for three or more days without contacting Amazon, a letter will be sent". He contends that Mr Hammerton, wrote, 6 March 2023: "standard AWAL processes and contacting the police"; C Bundle p366 Mr Hammerton, 30 March 2023: "the standard AWAL process, to contact the local police".

Documents Backdated

59. The Claimant contends that the Respondent created documents on 25 May 2023, including minutes of meetings said to have taken place earlier, for example on 26 April 2023. He points to the metadata showing the creation date for these minutes as 25 May 2023, his bundle p188, 189, 190. He contends that these documents were backdated to create a false paper trail.

60. He makes similar contentions about meeting notes created on 1 March 2023, C Bundle p276, 280, 283, 286.

False Assertion that Disciplinary Processes were Independent

61. The Claimant also contends that the Respondent made false assertions about the independence of disciplinary hearings. He contends that, in a formal grievance outcome of 22 March 2023, Ms Kathryn Rosen, a Senior Associate at Eversheds Sutherland, said, "I have not seen evidence to support the stance in your grievance that the investigations outlined above have not been conducted independently of one another. Each investigation has been carried out by a different individual within the business. There is no indication that the outcomes of each disciplinary investigation and two of the disciplinary hearings have not been independent. The evidence that I have seen shows that they have all been determined on their unique set of facts as demonstrated within this letter."

62. However, he contends that metadata shows that 3 documents bearing Mr Luke Waite's name "Created" by Ms Rosen on 24 April 2023, 2 May 2023 & 18 May 2023, respectively. He says that documents related to Mr Carroll's investigation, for example, an invitation letter dated 22 May 2023 were also created by Ms Rosen, as was a 24 April 2023 letter bearing the name of Mr Norm Driskell.

63. He also contends that the metadata for a further grievance outcome dated 18 May 2023, C Bundle, p162, shows that the author was also Ms Rosen.

64. He therefore contends that Ms Rosen was, in fact, in the background, creating documents used in many different processes, despite her assertion of the independence of the processes.

Documents Drafted by Persons other than the Stated Authors

65. He says that, 8 March 2023, a report was sent by Mr Nayan Gulati, which was in fact drafted by Carolyn Kenyon. The Claimant acknowledged that Mr Gulati prefixed his cover email, "On behalf of Carolyn Kenyon".

Submissions Made by Lawyers

66. The Claimant contends that submissions made by barristers in these proceedings, both at the interim relief hearing and in applications for strike out were knowingly false.

Decision: Unreasonable Conduct of Proceedings / Fair Hearing no Longer Possible: Fraud Grounds

67. I acknowledge the guidance in *Arrow Nominees* that, where documents may be fraudulent, a Judge should determine before the trial "whether full disclosure of the fraudulent conduct has been made." And that "if he is not satisfied that there has been full and frank disclosure of the fraudulent conduct, then, for the reasons which I have already given, it seems to me that the correct response is to refuse to allow the party in default from taking any further part in the proceedings - with whatever consequences follow from that."

68. However, in this case, I do not accept, at this stage, that there is evidence that fraudulent documents were created by the Respondent. The requirement to make a determination as to whether there has been "full disclosure" of such fraudulent conduct does not arise.

69. Moreover, I do not consider that it is possible to make a fair determination of allegations of fraud regarding documents, at a preliminary hearing in this case. The contents of the documents and the circumstances of their creation are matters which are central to the substantive issues and can only fairly be established at a final hearing.

70. My observations on the allegations of fraud in relation to the current documents and evidence available, including the document metadata, are as follows:

71. *Joe Carroll:*

    a. Whether Mr Carroll's witness statement was signed by him, or authorised by him to be signed, will be a matter which can only be fairly decided having heard witness evidence from Mr Carroll. Further, even if the solicitors acting for the Respondents did not follow the correct process in attaching a signature to the statement, which may be improper, Mr Carroll may still have given instructions for the drafting of the witness statement and may have approved all of its contents. If that is the case, the witness statement may not have been misleading in any way, save as to the fact that it may not have been properly signed. The materiality of any breach of process (even if there was one), to the issues in the substantive case, is yet to be established.

    b. The fact that solicitors or members of HR departments may have been involved in creating or drafting documents in a disciplinary process is not necessarily improper or misleading. Solicitors and HR personnel may produce first drafts of documents, on instructions and in discussion with the decision maker. The document can still be the decision maker's document. So long as the person who signed the relevant document agreed with its contents, their signature on it is not necessarily misleading. Whether the purported decision maker did, in fact, make the relevant decision, when a document was first drafted by another person, will be a matter for evidence at the final hearing.

    c. The Claimant's contentions regarding the metadata and format of documents are properly a matter for both expert and non-expert witness evidence. The significance of the time zone and format of documents is likely to be a matter for expert evidence.

    d. There is no sufficient basis for me to conclude, at this stage, that there has even been a likelihood of fraud in relation to the Joe Carroll documents.

    e. The proper conclusions about who were the relevant decision makers is a central issue in the Claimant's automatic unfair dismissal case. The Claimant's contentions about the misleading nature of documents are so intertwined with the substantive issues in the case that I do not consider that it is possible, or appropriate, to make a decision about them at a preliminary stage, without hearing all the evidence.

72. *Luke Waite*

a. The Claimant contends that Ms Rosen, a solicitor, drafted many of the documents in supposedly independent grievance and disciplinary investigations. He contends that she was a controlling mind behind many of the decisions made in these processes. Again, his contentions in this regard are quintessentially matters to be determined at the final hearing. It is not possible at this stage, without full witness evidence and without examining the full course of correspondence, to decide to what extent Ms Rosen was involved in drafting the relevant documents (or provided templates), whether the documents were substantive documents or simply procedural steps, whether she drafted documents on instructions from the decision makers, and what inferences are to be drawn from all of this.

b. Further, regarding Ms Kelly, without hearing all the evidence, it is simply not possible to determine to what extent Ms Kelly was involved in any decision making.

c. As with Mr Carroll's statement, the significance of the form of Mr Waite's signature on his witness statement is something which cannot be determined without hearing evidence from him.

73. *ET3s Changed*

a. The names and addresses on some formal parts of the ET3 documents were changed by the Respondents before being included in documents for a preliminary hearing. The materiality of the changes is something which can only be fairly decided having heard the Respondents' (or their solicitors') explanations for the changes. These changes to the formal documents may, or may not, have any bearing on the case, in that they may not have been misleading in relation to any issue to be determined in the proceedings.

b. I do not accept that, at this stage, it is possible to say that there has been even any likelihood of fraudulent conduct on the part of the Respondents, or their solicitors, in this regard.

74. *Falsified AWAL Policy*

a. The Claimant confirmed that he was not contending that Mr Hammerton had falsified a document and pretended that it had been the relevant written policy at the time the Claimant was visited by the police. Essentially, the Claimant contends that Mr Hammerton misrepresented to him that the Respondent had a practice of sending police to an absent employee's address, when, in fact, the Respondent's written policy simply says a letter will be sent.

b. However, whether there was such a practice of sending police to check on an employee when they did not attend work, notwithstanding the terms of the written policy is, again, something which needs to be determined having heard witness evidence.

c. A company may well have a practice which is not fully reflected in written policies. I do not accept that there is evidence of fraudulent conduct because a different practice, compared to a written policy, has been described to the Claimant in correspondence.

75. *Documents Backdated*

a. Whether documents were backdated to create a false chronology of events, or whether the documents were created after relevant events, but accurately reflected the dates and events in question, is, again, something which needs to be decided having heard evidence from the person who created those documents.

b. Proof of backdating might simply show, for example, that a document, sent to the Claimant and containing meeting notes, was created at a later date than when the purported meeting took place.

c. I do not accept that the fact that a document, or documents, have been created after the event is evidence, in itself, of falsity.

76. *False Assertion that Processes were Independent*

a. I refer to my comments about Ms Rosen's involvement, above.

77. *Submissions Made by Lawyers*

a. I did not accept that there was any proper basis for asserting that barristers misled the Tribunal, without knowing what instructions the barristers had been given by their clients and what documents the barristers had seen.

78. In summary, at this preliminary stage, the Tribunal is not in a position to make a finding that there has been fraudulent or unreasonable conduct by the Respondents.

79. The evidential case regarding documents on which the Claimant relies is so intertwined with the merits of the claim that it would not be possible, at a preliminary hearing, to separate the issue of falsification of documents from the decision on the true reason for the Claimant's dismissal, or for the alleged detriments.

80. Without a finding of fraudulent or unreasonable conduct the application for strike out on that ground must fail.

81. Furthermore, a fair hearing is only possible if it is a full final hearing on the merits. Striking out the Respondents' responses would deprive all Respondents of the right, even, to meet the allegations made against them. That would clearly deprive the Respondents of any fair determination of the claims.

82. The Claimant's allegations of fraud can still be advanced by him, front and centre of his claim to the Tribunal, at the final hearing. The Tribunal at the final hearing is capable of identifying whether documents are misleading, or false, and making appropriate findings. It can disregard any false documents. It can reject evidence based on false documents. The Claimant can still have a fair hearing on the merits.

83. For completeness, in the absence of fraud, where there are central disputes of fact, it is not appropriate to strike out. I agreed with the Respondent that, in reality, the Claimant has set out his evidential case; he has made a series of allegations and assertions. He has identified documents on which he will rely and lines of cross examination. But all of those are disputed. There are central disputes which can only be resolved by a full Tribunal, having heard all the evidence.

The Respondents' Applications for Strike Out and Deposit Order

84. The Respondents sought strike out on the grounds of "no reasonable prospect of success". They sought deposit orders under r39 ET Rules of Procedure 2013, in the alternative. The test for making a deposit order in respect of an allegation is that it has '…little reasonable prospect of success…' Rule 39(1).

85. Their application had 2 aspects:

    a. ".The Named Respondents Application", which related to 4 named Respondents:

        i. Ms Garcia-Deleito, the Eighth Respondent. Ms Garcia-Deleito, is a lawyer, partner, and Head of Employment and Immigration at Stevens & Bolton LLP.
        ii. Mr Hammerton, the Ninth Respondent. Mr Hammerton, is a lawyer and partner at Eversheds Sutherland LLP.
        iii. Ms Rosen, the Eleventh Respondent. Ms Rosen, is a lawyer at Eversheds Sutherland LLP.
        iv. Mr. Walters, the Sixteenth Respondent. Mr Walters, is a senior employment lawyer based at Amazon's headquarters in Seattle. His role is AGC, Labor and Employment.

    The Respondents sought to strike out all claims against the four named Respondents, or alternatively, deposit orders for any claims or allegations pursued against those four.

    b. "The Issue 2(v) Application." This referred to issue 2(v) in the List of Issues: "Using Mr Nayan Gulati to send a letter on 9 March 2023 drafted by Carolyn Kenyon and Savannah Silver, to conceal their involvement." The allegation is of victimisation and protected disclosure detriment.

    Again, the Respondents seek a deposit order as an alternative to their strike out application.

86. The Respondents relied on *Ahir v British Airways plc* [2017] EWCA Civ 1392. They contended that, where the case advanced by a Claimant is so inherently implausible, it is open to the Tribunal to conclude it has no reasonable prospects of success: *Ahir*, paragraphs [23]-[24]. They relied particularly on *Ahir* at paragraph [16], where the Court of Appeal said that, "…Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context…." .

87. The Respondents contended that, "where there is a '…straightforward and well-documented innocent explanation…", a case cannot proceed on a Claimant's mere assertion that it is untrue, without being able to advance some basis for the Claimant's assertion, *Ahir* at paragraphs [19] and [24].

The Third Party Solicitors

88. In respect of Ms Garcia-Deleito, Mr Hammerton and Ms Rosen, all are lawyers at solicitors' firms, not in-house at the First Respondent. They have provided employment law advice to the First Respondent . The Respondents contend, however, that neither Ms Garcia-Deleito,

nor Stevens & Bolton LLP, where she is a partner, have acted for the First Respondent in relation to employment matters for over 10 years.

89. The Claimant served a table entitled 'Attribution of Alleged Detriment to Each Respondent'. In it, the Claimant set out the items of correspondence which he alleges against the Third Party Respondents were partly responsible for producing. He relies on metadata showing their authorship, in support of his allegations. The Respondents contend that the person who is responsible for sending the document is clear on the face of the documents. They say that there is nothing on the face of the documents to link the third party solicitors to them and that the metadata does not identify the solicitors as the legally relevant decision makers. The Respondents contend that there is no proper basis for doubting the straightforward explanation that the person who sent each letter was the person responsible for its contents.

90. Further, the Respondents say that it is normal commercial practice for employers to engage lawyers and other professionals to advise on preparing documents, including dismissal and invitation letters, so there is no adverse inference to be drawn from their involvement.

Decision – the Third Party Solicitors

91. I did not strike out the Claimant's complaints against the named solicitor Respondents.

92. The Claimant's case is a *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 - type case: if a person in the hierarchy of responsibility above the employee determines that he should be dismissed for a reason, but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason, rather than the invented reason.

93. The Claimant relies, not only on the metadata showing that certain individuals drafted documents, but on his contention that the metadata shows that Ms Rosen and Mr Hammerton, who both worked for Eversheds and were acting for the First Respondent in relation to the Claimant's employment matters, were involved in both:

    a. drafting documents over the whole course of the disciplinary and grievance processes; and
    b. supposedly independent processes.

94. He will ask the Tribunal to draw inferences, from the evidence, that there was a hidden plan to dismiss him because of his protected disclosures, and that the solicitors assisted the other Respondents to achieve this goal. For example, he says that, in his evidence bundle, metadata at p374 shows that the author of a letter regarding the disciplinary appeal is RosenKA. He says that the metadata for a 22 May 2023 invitation to disciplinary hearing to be held on 24 May was drafted by RosenKA too, p409. He says that the metadata for a 24 April 2023 letter inviting him to a grievance meeting shows that RosenKA drafted it, p379.

95. The Claimant also relies on the timing of the drafting of documents, to contend that the supposed decision makers could not, in fact, have made the relevant decisions because they did not have time to review the documents before sending them out.

96. He says that a grievance outcome email, for example, sent to him by Luke Waite at 18.25 on 18 May 2023, p395, was sent 17 minutes after metadata shows that Ms Rosen had completed the lengthy draft, p400. He notes that Mr Waite's letter says, "I have not seen evidence to support the stance in your grievance that the investigations outlined above have not been conducted independently of one another. Each investigation has been carried out by a different individual within the business", p404. The Claimant contends that Ms Rosen's

involvement in a number of different processes disproves this assertion. He relies on other invitations to grievance meetings drafted by Ms Rosen, with an apparently short editing time allowed to the manager from Amazon who, on the letter's face, sent it to the Claimant, pp96-99.

97. He relies on the whole course of the documentation to ask the Tribunal to draw inferences as to whether there was an invented reason to hide the true reason for his dismissal. He contends that a number of individuals coordinated to ensure his dismissal.

98. He also relies on these individuals' alleged responsibility for the detriment of dismissal -*Timis v Osipov* [2018] EWCA Civ 2321 – as the basis for his claim against the First Respondents that they are also responsible for the detriment of dismissal.

99. Just as in the Claimant's strike out application, I have decided that it is not possible, at a preliminary hearing, to determine who was actually responsible for the contents of the contemporaneous documents. Whether there was a concerted plan to dismiss the Claimant can only be decided having heard all the evidence. The metadata showing the involvement of solicitors "behind the scenes" is an important part of the Claimant's evidential case. The proper characterisation of their involvement will be a matter for the final hearing.

100. For the same reasons, I did not make a deposit order in relation to the claims against Ms Rosen and Mr Hammerton.

101. In relation to Ms Garcia-Deleito, I had considerably more pause for thought on the subject of a deposit order. It may be that her name appears on the metadata of documents, but there seems to be nothing else which links her to the case, at all. There seems little reason to doubt the Respondents' assertion that she has not been involved in advising the First Respondent on employment matters for years.

102. However, as the Claimant points out, the Respondents themselves rely only on assertions regarding Ms Garcia-Deleito. They have not themselves produced any contemporaneous evidence to show that Ms Garcia-Deletio was not involved. The parties make competing assertions regarding Ms Garcia-Deletio's involvement. The Claimant can at least point to metadata, apparently indicating her involvement in producing documents, C evidence bundle p360. It may be that, following full disclosure in the case and/or exchange of witness statements, that a deposit order in relation to the claims against Ms Garcia-Deleito is appropriate.

Strike Out Application: Mr Walters

103. The Respondents also seek to strike out all claims against Mr Walters, R16. Mr Walters, is a senior employment lawyer based at Amazon's headquarters in Seattle. His role is AGC, Labor and Employment.

104. The Claimant's case against Mr. Walters is set out in paragraphs 71-76 of the Claimant's second ET1 attachment. The Claimant alleges that Mr Walters co-ordinated the Claimant's dismissal.

105. The evidence on which the Claimant relies is an email dated 9 January 2023, forwarded to the Claimant on 13 January 2023,

106. The email records an ethics line report made by the Claimant. In his report, the Claimant gives the approximate time relevant to the report as being '…Since 22 November

2022 when AWS was notified of UK Employment Tribunal Case 2208865/2022: 'Forrest v Amazon Web Services EMEA SARL UK Branch'…'. The email forwarding the report instructs, "…Please coordinate the investigation of this matter with @kurtwalt, as the reporter alleges there is on-going litigation regarding these allegations…Please note this report names an AWS HR manager…".

107. The Respondents agree that the reference to @kurtwalt is a reference to Mr. Walters.

108. On the basis of this instruction, which was copied to the Claimant shortly afterwards, the Claimant asserts that Mr Walters '…co-ordinated sham processes with the objective of securing the Claimant's dismissal' List of Issues Part 2(f).

109. The Respondents contend that this assertion is speculative and fanciful. They say that there is no identified response from Mr Walters, nor anything to suggest he took an active role in the processes leading to the Claimant's dismissal.

Decision – Mr Walters

110. I did not strike out the claim against Mr Walters, nor make a deposit order. Disclosure of documents had not yet been provided. The Claimant alleges that there has his dismissal and the detriments were coordinated because of his protected disclosures. There is some evidence that Mr Walters was asked to coordinate the investigation into one of the Claimant's protected disclosures. The absence of further evidence of Mr Walters' involvement may be due to the early stage of the proceedings. It was premature to consider strike out, or deposit order, of the claim against him.

Strike Out Application: Issue 2(v) List of Issues

111. The Issue is "Using Mr Nayan Gulati to send a letter on 9 March 2023 drafted by Carolyn Kenyon and Savannah Silver, to conceal their involvement (& violation of s.27 EqA 2010 & s.43J ERA1996)".

112. The issue relates to a letter written by Mr Gulati, an HR Partner, to the Claimant dated 8 March 2023, inviting the Claimant to attend an investigatory meeting, with Ms Kenyon and Mr Gulati, on 15 March 2023. The letter is also expressly sent on her behalf

113. The Claimant conceded that Ms Kenyon should be removed from the allegation.

Decision – Issue 2(v)

114. I did not strike out the issue as concerning Ms Silver, nor did I make a deposit order. The Claimant drew my attention to the metadata of the letter itself, C evidence Bundle p300, which he said showed that it was created on 8 March, with the author being SilverS - Savannah Silver, a Texas attorney. He also said that the attached policy, p298, 299, 301, was created using an obfuscation software more commonly used in the US, where Ms Silver is based. I considered that the issue of whether Ms Silver's involvement was concealed by the Respondents was something which needed to be determined after having heard all the evidence.

Further Particulars of Detriment Table

115. The Respondents asked that the Tribunal make case management orders regarding the Claimant's Detriment Table, to ensure that the detriments reflect the Respondents already

identified in the List of Issues; and the Claimant's pleaded case. They said that the detriment table was inconsistent with the pleaded case and the List of Issues and appeared to be a scattergun approach, drawing excessive numbers of Respondents into the allegations.

116. Again, I did not require the Claimant to limit the Respondents he contends were responsible for detriments before disclosure of documents. It is not appropriate to require the Claimant to say that certain Respondents were not involved in certain decisions before he has seen full disclosure and when he alleges a concerted, hidden effort by a number of Respondents to dismiss him. The Claimant acknowledged that disclosure would help identify the issues and the relevant Respondents.

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Employment Judge **Brown**
Date: 16 July 2024

SENT to the PARTIES ON

16 July 2024
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FOR THE TRIBUNAL OFFICE