



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondent**

Mr M Higgins

University College London

**Heard at:** London Central Employment Tribunal

**On:** 28 April, 3 May 2023 (2, 5 May 2023 reading days)  
16, 17 May 2024

**Before:** Employment Judge Adkin  
Mr P Alleyne  
Mr T Harrington-Roberts

## Representations

**For the Claimant:** Claimant in person, supported by Ms M Cohen (2023)  
& Ms F Daffern (2024)

**For the Respondent:** Mr S Forshaw KC, Counsel

# JUDGMENT

(1) The following claims were dismissed upon withdrawal:

- a. Claim of victimisation pursuant to section 27 of the Equality Act 2010.
- b. Claim of harassment relating to Lorren Rea.

(2) The remaining claims are struck out pursuant to rule 37(1)(b) and 37(1)(e) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

# REASONS

## History of claim

1. The Claimant presented his claim on 25 September 2022, following an ACAS early conciliation period between 15 October 2021 – 25 November 2021.

## Case management

2. There was a Preliminary Hearing for case management on 30 May 2022 at which both parties were represented by special employment counsel. Employment Judge Grewal listed a final hearing was for 20 days to take place on dates between 28 April and 5 June 2023.
3. On 14 September 2022 there was a further Preliminary Hearing at which the parties were again both represented. Employment Judge Grewal noted that some allegations were withdrawn. There was a discussion of lists of issues and how to make documents accessible to the Claimant given that he is blind. An intermediary was appointed to provide an assessment of what was required to enable effective participation in the hearing.
4. Mr Dempsey Lambe of Communicourt produced a report dated 21 January 2023. This report stated in terms that the Claimant would not benefit from an intermediary (see paragraph 3.3 of the summary of recommendations). It is clear from that report that the Claimant's specific need was the support of a named individual who could assist him in court to read and navigate the court bundle.
5. There was a further Preliminary Hearing on 15 February 2023 at which the Claimant was in person. Employment Judge Grewal recorded some agreed adjustments for the final hearing.

## Final hearing - 2023

6. The final hearing originally commenced on 28 April 2023 and resumed on 3 May 2023 (with the Tribunal taking 2 and 5 May 2023 as reading days).
7. We reviewed the adjustments made and agreed with Employment Judge Grewal.
8. The hearing was converted to a hybrid hearing at the Claimant's request to enable his partner and witness Linda Laurie to observe and participate remotely.
9. The Claimant reported that not all of the documents that had been provided to him were easily accessible. We spent some time discussing whether some of the documents provided to the Claimant by the Respondent could be made more easily accessible for the Claimant. This was notwithstanding the Respondent's position that it had complied with Employment Judge Grewal's orders in relation to reasonable adjustments.

10. One of the preliminary matters discussed was whether the Claimant required an intermediary. For reasons provided in an email sent by the Tribunal on 5 May 2023 we decided against appointing an intermediary. We considered various options but eventually, in line with Mr Lambe's report, we identified a volunteer, Ms Maia Cohen who attended the hearing with the Claimant on 3 May 2023 as someone who could provide support for the Claimant, principally note-taking, navigating the bundle and attending before the hearing to help the Claimant prepare to be cross examined by pre-reading relevant documents. Ms Cohen was evidently able and in the process of training to be a lawyer. This sort of support would be far more useful to the Claimant than an intermediary and would fall outside the scope of an intermediary could properly provide.
11. At the written request of the Tribunal Ms Cohen, who is a volunteer for South West London Law Centres, agreed with her employer release from her part-time employer the Bingham Centre (BIICL). We were extremely grateful to Ms Cohen and both organisations for the flexibility they showed in agreeing to make her available. In the end her attendance was not required.

Respondent's strike out application

12. Part way through 3 May 2023 the Respondent made a written application to strike out the claim on the basis that the Claimant had dishonestly "doctored" the content of various documents. This application was developed orally by Mr Forshaw on the Respondent's behalf.
13. In order to give the Claimant a proper opportunity to digest the allegation being made by the Respondent and also to consider and prepare a response the Tribunal ordered that the Claimant provide a witness statement addressing these allegations by 11 May 2023 and directed that the hearing of the strike out application would take place on 15 May 2023. That date was within the period allocated to the substantive final hearing. This was in order to give the Claimant sufficient time, with the support of others, to properly respond and prepare for the strike out hearing.
14. On the morning of 15 May 2023 while an external contractor was attempting to get a hearing loop working for the Claimant and before the hearing proper had got underway, the Claimant was informed that his partner Linda Laurie, who had been generally unwell had been rushed to hospital with very grave concerns about her state of health. We adjourned the hearing to allow the Claimant to travel to hospital.
15. Very sadly Ms Laurie passed away on the following day, 16 May 2023.
16. The substantive hearing and the hearing of the Respondent's application for strike out was postponed.
17. The strike out application was originally relisted to take place 21-22 September 2023. That hearing was postponed at the Claimant's request because of ill-health to 25-26 January 2024. The hearing was postponed again (due to the Claimant's medical appointment) to the present hearing in May 2024.

Resumed hearing 2024

18. The Claimant had the benefit of being accompanied to the resumed hearing in May 2024 by Ms Fiona Daffern.
19. Ms Daffern had provided a witness statement in support of the Claimant's claims for the substantive final hearing, although we did not hear evidence from her. Ms Daffern was Head of Employment Policy Development at the Respondent between June 2008 – December 2015. The Tribunal is very grateful to Ms Daffern for her role in accompanying the Claimant to facilitate his participation in the resumed Tribunal hearing.

**Adjustments for Claimant**

20. In preparation for cross examination in relation to strike out pages made were available in advance by Respondent's counsel in a separate clip of documents for ease of navigation. An extract from the bundle for the strike out bundle was made to the Claimant in advance.
21. A room next to the Tribunal room was made available to him for his exclusive use.
22. The Tribunal administration confirmed with a hearing aid user on the Tribunal administration staff that the hearing loop worked. This was notified to the parties by Employment Judge Adkin on 13 May 2024, with the proposal that a technical test be carried out shortly before the beginning of the hearing on 16 May 2024.
23. At the resumed hearing in 2024 the Claimant attended without the hearing aid that would have amplified the hearing loop. In correspondence he said that his hearing aids had been stolen, but expressly confirmed that he did not to seek a further adjournment.
24. The Tribunal was satisfied that the Claimant was able to hear what was said to him. The Claimant's responses to Tribunal and Respondent's counsel's questions and submissions were clear, cogent and made sense in the context. On several occasions the Claimant requested that Mr Forshaw speak a little louder, which he did. It was clear to us that the Claimant was able to follow what was being said to him and in the hearing generally and that he asked Mr Forshaw to speak louder if he was struggling to hear something.

**The Claim**

25. The complaints brought within the claim are as follows:
  - 25.1. Unfair dismissal (section 98(4) Employment Rights Act 1996
  - 25.2. Discriminatory dismissal (Section 39 Equality Act 2010);
  - 25.3. Discrimination arising from disability (section 15 EqA 2010);

- 25.4. Indirect disability discrimination (section 19 EqA 2010);
- 25.5. Failure to make reasonable adjustments (sections 20/21 EqA 2010);
- 25.6. Harassment because of disability (section 26 EqA 2010);
- 25.7. Victimisation (section 27 EqA 2010);
- 25.8. Unpaid holiday pay (breach of contract); and
- 25.9. Wrongful dismissal.

## **Evidence**

- 26. The Tribunal received witness statement of 15 paragraphs from the Claimant dated and signed by typing on 10 May 2023. He was subject to cross examination.
- 27. We also received a witness statement, 10 paragraphs in length from Linda Laurie, his partner. That was also signed by typing 10 May 2023.
- 28. From the respondent we received a 28 paragraph witness statement from Sarah Lawson, Chief Information Security Officer & Deputy Chief Information Officer, which was signed by her with an electronic signature but no date. She attended to give oral evidence and by cross examined by the Claimant and questioned by the Tribunal.
- 29. We received a supplementary bundle of documents in support of Ms Lawson's witness statement containing 48 pages, in addition to the bundles of documents provided to us for the substantive claim, including the Main Joint Hearing bundle.
- 30. Our decision on the substance of this strike out application was made by reference solely to this supplementary bundle and the three witness statements.

## **Disability**

### Claimant's disabilities

- 31. The Claimant's disabilities are explained in his witness statement as follows:

"I have total congenital blindness and other sensory physical impairments [4254]. I am unable to see at all. I have difficulty in hearing in both ears since childhood, which has deteriorated with age [4260]. I have otitis [1363] and tinnitus [1364] and have needed a hearing aid for my right ear since November 2020 [1364] and left ear since 2021 [4365]. I have had idiopathic epilepsy since childhood [4303]. In 2019 I was diagnosed with a

neurological condition causing me pain and discomfort to both my arms [4377]. I cannot walk for more than five minutes without needing to rest due to having bilateral congenital lymphoedema, a condition I have had since birth [4256]. I also have depression and anxiety [4739] as a result of the respondent's conduct towards me."

32. The numbers in square brackets are references to the substantive hearing bundle.
33. The Respondent concedes that blindness amounts to a disability.

### **Factual background**

34. The outline of the factual background below is taken from the pleadings and documentary evidence which the Tribunal received in April-May 2023 and is simply set out here for context. Having not received live evidence or submissions on the substantive claim we have not attempted to resolve disputes of fact or law in relation to the substantive claim.
35. For example the Claimant alleges that his dismissal was unfair and discriminatory, that he was harassed because of his disability and victimised among other claims. The Respondent denies these claims.
36. We have not decided any of these claims on the substantive merits.

#### Background to employment

37. On 1 January 2014 the Claimant commenced employment for the Respondent.
38. He worked as a Policy Advisor, Executive Assistant and an Equality, Diversity and Inclusion Manager. At the time of the matters material to this claim the Claimant was the Policy Manager in the Respondent's Human Resources Division. His role involved contributing and leading on improving employment practice across UCL, undertaking development and review of employment policies, procedures and guidance across a broad range of subjects, leading on complex project work and deputising on occasion for the Head of Employment Policy.
39. In approximately April 2019 Ms Lorren Rea, Head of Employment Policy, became the Claimant's line manager.
40. It is not in dispute that in November 2019 Claimant admitted to lying to Ms Rea about the whereabouts of his support worker Ayla Jaggs.
41. In 2020 the Claimant's relationship with his manager significantly deteriorated.
42. Ms Rea's perspective is that the Claimant was using resources such as invoicing for taxis for matters which were not appropriately within the scope of his employment. The Claimant believes that Ms Rea's approach was bullying, inflexible and discriminatory. The Tribunal is not in a position to resolve these matters insofar as they are disputed.

43. On 15 March 2021 the Claimant submitted what he called an informal grievance to Chloe Milano, Director of Employee Relations, Policy and Planning.
44. An investigation report was produced dated 19 April 2021 by Mark Heffer, an external investigator working for Intersol Global Investigation. The investigation commenced on 13 October 2020 and completed on 12 April 2021.

#### UCU complaint of discrimination

45. In a letter dated 18 May 2021 the Claimant's union representative Dr Sean Wallis of the UCU wrote to Chloe Milano to complain about discriminatory treatment falling under section 15 of the Equality Act 2010.

#### Disciplinary hearing

46. On 30 July 2021 a disciplinary panel convened, to deal with seven different allegations including the Claimant's use of his support worker for non-UCL work, alleged bullying of the support worker, disclosure of his UCL credentials to non-authorized users and failing to follow a reasonable line manager instruction
47. All seven allegations were upheld.

#### Dismissal

48. A Teams meeting was convened on 11 August 2021 at which the Claimant was summarily dismissed.

#### Appeal

49. The Claimant appealed by an email dated 17 August 2021, appealing that the basis for the disciplinary action was discriminatory, the process had not been made accessible and that the investigation presumed his guilt. He raised concerns about how the evidence produced against him had been interpreted. He argued that summary dismissal was outside of the band of reasonable responses.

#### Appeal hearing

50. The Claimant was notified on 1 September 2021 of an appeal hearing on 24 September.
51. The appeal hearing took place on 24 September 2021.

#### Appeal outcome

52. By an outcome letter date 13 October 2021 the appeal against the decision to dismiss was dismissed.

## Respondent's application for strike out

53. By contrast with the matters set out above which are simply a summary of the background to the claims and not intended to amount to a resolution of points in dispute, the next section does represent findings made by the Tribunal on the balance of probabilities. In so doing we have had regard to documentary evidence, witness statement evidence prepared for the strike out application and response to it and the oral evidence of the Claimant and Ms Lawson on behalf of the Respondent. In order to resolve disputes of fact we have considered the extent to which we found explanations credible and what we found inherently plausible or implausible. We have focussed on the content of the additions and deletions from the five documents identified by the Respondent which are the basis for the strike out application.

### Discovery

54. On 2 May 2023 the Claimant's former line manager and Respondent witness Lorren Rea identified in preparation for the substantive hearing that there were discrepancies between documents that had been provided by the Claimant to the disciplinary and appeals panel and what she recalled those documents to say. The Respondent caused checks to be carried out which demonstrated that five documents in particular had been altered.
55. This was drawn to the Tribunal's attention on 3 May 2023.
56. The Respondent was able to investigate and access the Claimant's mail box which had been placed on "litigation hold" on 18 November 2020 which ensures that an immutable copy of the email account is preserved.
57. Each of these five emails had been forwarded by the Claimant to an external email account.

### Alternations of documents

58. The following five emails were altered at the Claimant's instruction.

#### Ms Shah's emails

##### (1) Email from Diva Shah on 27 June 2019

59. The context of the first email was the process of recruitment of a proposed new support worker to assist the Claimant in his work. The email was sent from Ms Shah to the Claimant on 27 June 2019 at 16:35. Ms Shah was the Claimant's suggested candidate for the role.
60. The version of this email provided by the Claimant to the Respondent as part of the internal disciplinary and appeals process contained the following (where the wording underlined has been inserted on the Claimant's instruction in substitution of the actual wording in [square brackets]);

"It was great to meet Lorren today. Hopefully we can catch up soon.



I just wanted to clarify a point raised in my discussion with Lorren. I spoke with Lorren about working 10am to 5pm (reduced hours on some days) and she mentioned that would involve a cut in pay. However, I was a bit confused about this as I would be making up the time when working from home as we discussed [Access to Work would be funding the salary, not UCL]. Is it possible to provide further details on this?"

61. The Respondent's case is that this alteration must have been made deliberately and retrospectively by the Claimant to support his side in a matter which had become contentious with his manager Ms Rea.
62. In the course of these recruitment discussions, the Claimant represented to Ms Rea that Ms Shah had offered to make up additional working hours in the evenings from home. However, as noted by Ms Rea in her email to the Claimant of 3 July 2019 [1314-5] Ms Shah had never made such an offer to her:

"You seem to be skimming over the fact again, that neither you nor Diva seem to appreciate that working less than 36.5 hours attracts a pro-rata salary. Again, Diva mentions below not wanting to take a pay cut for working only 31.5 hours per week.

Again, she does not mention anything about making up the hours to 36.5 hours which you had suggested. In fact quite the opposite ..."

(2) Email from Diva Shah on 30 June 2019 at 19:52

63. The next email, again from Ms Shah had been amended by or on behalf of the Claimant as follows (inserted wording underlined):

"Secondly, as I am currently working 30 hours at a rate of £17, I would be financially worse off accepting any reduction in salary if I worked reduced hours as proposed by you Lorren rather than the hours working from home I suggested. Furthermore with health being my priority, this role wouldn't be suitable if I had to travel at peak times and work all the same hours in the office as you Mike. Therefore I must decline this or any other offer regarding this role."

64. The point about working from home has again been inserted to an apparently contemporaneous document from Ms Shah.

(3) Email from Diva Shah on 2 July 2019 at 18:59

65. The next email, again from Ms Shah had been amended by or on behalf of the Claimant as follows (inserted wording underlined):

"Bearing this in mind together with the fact that UCL is fairly big, I was confused as to why a salary reduction was mentioned when I had made it clear that I was able to make up the time working at home in the evenings."

66. The Tribunal finds that the purpose of these amendments to the emails was to make it seem that as part of discussions about being the Claimant's assistant Ms Shah had indicated that she could make up time working in the evening. It would follow in these circumstances that Ms Rea's reference to a salary reduction for reduced hours might be thought unreasonable. In fact the emails which were contemporaneously sent did not contain statements agreeing or suggesting that she should work in the evening.
67. The Respondent submits that this narrative was deployed by the Claimant as part of the Respondent's disciplinary and suggests that this "doctored" evidence was to support the case at paragraph 23 of the Claimant's witness statement that "Ms Rea had no interest in accommodating disabled people."

Claimant's own emails

(4) Email on from Mike Higgins to Fay Kennedy on 18 March 2020 at 11.23

68. The next email, this time from the Claimant himself to Fay Kennedy (an access to work employee) sent on 28 March 2020 at 11:23 had been amended by or on behalf of the Claimant as follows (insertions underlined):

"I get paid as Section leader for the Basses so this trip could, if necessary, be claimed as self-employed travel to work. I have recently been advised by my line manager at UCL that I should claim from AtW the cost of a taxi from my work to the choir practice (which would be £5 minimum fare) and pay myself the cost of my taxi home from choir practice.

...

I would need to use a different firm [phone] to do this if I really wanted to get a cab from my workplace to choir practice.

69. Another addition has been added to the email:

"I am now however being told by my manager that journeys must be between my home and my office"

and

"I am however now being told by my manager that as all journeys must be either from my home to Bidborough House or from Bidborough House to home, I need to pay myself for all journeys which end or begin elsewhere".

(5) Email on from Mike Higgins to Fay Kennedy on 30 April 2020 at 11:01

70. Another email from the Claimant himself to Fay Kennedy had been amended by or on behalf of the Claimant as follows (additions underlined):

"I wondered whether or not you have as yet had a chance to look at the issues we discussed and the sample addresses I provided in the below email at your suggestion? I am aware that you have confirmed via telephone that you believe all of the below examples are commensurate with my AtW funding agreement, but it would be helpful if you could put something in writing which I can share with my manager please."

"Of the 70 plus other people at UCL who receive AtW funding, I am not aware of a anyone for whom employer's NIC or other specified on-costs are met."

"please can you provide a response I can share with my manager concerning:

\* Whether a review by you could consider funding employer on-costs without requiring a whole new application including all of my currently funded AtW support

\* Whether, were such a review possible, it could be progressed without reducing or removing altogether any of my existing AtW funding

\* Whether, if necessary, you can increase the overall amount of funding provided through AtW in relation to my UCL role, to pay for additional top-up for UCL to cover their employer on-costs incurred in relation to employing my support worker."

71. The following are deletions only (~~struck through~~):

~~"To be clear, I am still able to do some of my consultancy work and I am expecting/planning to revive those aspects of my self-employed work which have become dormant, as soon as lock-down ends. There will be a whole new set of challenges around equality and access which will require working through and I will be marketing my consultancy and training to help organisations to address some of these difficult issues. I don't therefore need my package for my self-employed work to change. It is meeting my needs so far as it can at present and I am certainly not asking for it to be reviewed."~~

"My UCL line manager has ~~however~~ the belief that, as we haven't used the taxy funding available over the past 5 or so weeks in my UCL role, she would like to divert any 'available funding to cover on-costs of employing my UCL support worker!"

"Of the 50 plus other people at UCL who receive AtW funding, I am not aware of a single person for whom employer's NIC or other specified on-costs are met."

~~"In any event, as we are currently at the maximum amount of funding available due to the cap, I can't honestly see how a review would achieve the goals being specified by my manager. I am of course more than happy to be corrected on this point however if you can see a way of meeting her expectations."~~

"please can you provide a response I can share with my manager concerning:

~~\*Whether a review by you could consider funding employer on-costs in addition to those already funded without cutting other elements of my UCL AtW funding and"~~

### Claimant's explanation

72. The Claimant does not deny that the five documents above were modified at his instruction.
73. The Respondent submits that the Claimant has given materially differing explanations.

### 3 May 2023 unaware and "draft" explanations

74. The Claimant stated in his email to the Tribunal of 3 May 2023 in relation to one of Ms Shah's email

"the only copy I can locate in my emails is that which I included in the bundle. The alternative version provided by the respondent is not one I have seen until today"

75. In relation to the AtW emails (i.e. (4) and (5) above), the Claimant suggested that the emails at [1338-1343] were draft versions of the emails actually sent.
76. The Claimant subsequently accepted that both of these explanations cannot be right. He must have been aware of Ms Shah's amended email. Further, draft emails do not have sent times on them. The Claimant says that in a very short timeframe on 3 May he was trying to come up with an explanation. He says that although the explanation turned out to be wrong he advanced it to assist the tribunal rather than being deliberately misleading.

### 5 May 2023 – aide memoire explanation

77. By an email of 5 May 2023 the Claimant gave a different explanation, which was consistent with the position adopted in his subsequent witness statement and oral evidence a year later in the strike out application hearing in May 2024.

78. In short his explanation is that the additions are by way of “aide memoire” and other modifications are no more than tidying up. He says that he deleted some unnecessary text to make documents easier to navigate.
79. He explains that he cannot annotated documents as a sighted person would. He describes using JAWS software which reads text out to the user. He says that he developed a practice of using tracked changes in word as a way of enabling to him to annotate documents with notes for his future reference. For internal purposes requested his partner Linda Laurie to annotate various documents. Contrary to her statement which suggests that she was amending Outlook documents, in fact what she did was to copy those documents and paste them into Microsoft Word before then making changes using tracked changes.
80. We accepted the Claimant's evidence that the result of this approach was that he was able to listen to the JAWS software which would read the wording of a document together with annotations which were inserted into the text. It was clear to him from the way that JAWS read the text to him which part had been added.
81. The Claimant suggests a chain of events which he says inadvertently led to the Respondent being provided with documents which had been changed. He says that Ms Laurie must have accepted various changes that were made in track changes. The document thereafter was converted to a PDF and supplied to the Respondent in preparation for internal processes. In his witness statement at paragraph 5 the Claimant says that the internal processes were the grievance and disciplinary processes in 2021. In the hearing before us contended that these documents were purely for the grievance process only and were not referred to at the disciplinary process.
82. The Claimant maintains that he did not know that the documents in the modified form were provided to the Respondent. He says that the modifications were mere annotations described in his statement at paragraph 7 as an "aide memoire" for his benefit for no one else.

#### Death of Ms Laurie

83. Ms Laurie sadly died on 16 May 2023. She was ill in the run-up to the hearing in May 2023. It was for this reason that access to the hearing by video had been supplied.

#### **LAW**

84. Rules:

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

...

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been **scandalous, unreasonable or vexatious**;

...

(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).

85. The Tribunal may strike out a claim if it concludes that the conduct of party either:
- 85.1. rendered a fair trial impossible; or
  - 85.2. was so serious that strike out is appropriate irrespective of whether a fair trial remains possible.
86. As to what amount to serious conduct leading to strike out irrespective of whether a fair trial remains possible, that may be the case where the conduct was "wilful, deliberate or contumelious" (see **Bolch v. Chipman** [2004] IRLR 140) or where the conduct was so serious that it would be an affront to the Tribunal to permit the party to continue to prosecute their case (**Arrow Nominees Inc v. Blackledge** [2001] BCC 591);
87. The Tribunal should consider whether strike out is a proportionate sanction in all the circumstances: see **Blockbuster Entertainment Limited v. James** [2006] IRLR 630. In that case it was noted that strike out is a Draconian power not to be readily exercised.
88. In **Chidzoy v. BBC** UKEAT/0097/17 the EAT (HHJ Eady QC presiding) upheld a strike out order made by an employment tribunal where the claimant had spoken to a journalist during a break contrary to the employment tribunal's direction that the claimant should not speak to anybody while she was in the process of giving her evidence. The employment tribunal had determined that in the face of such behaviour, it could "no longer necessary trust in the Claimant's veracity to enable it to continue to hear the case".
89. In **Sud v. London Borough of Hounslow** UKEAT/0516/14/DA the EAT (Elisabeth Laing J presiding) upheld the decision of an employment tribunal to strike out a claimant's claim, where that claimant had deliberately lied to the employment tribunal. The Claimant Ms Sud told a lie about her medical condition and altered the date on a relevant document, effectively tampering with evidence. The employment tribunal considered that the Claimant's conduct "had fatally undermined the trust that the Tribunal could have in her veracity" (see paragraph 33).

## CONCLUSIONS

### Did the Claimant request that documents were modified with an intent to deceive?

90. It is not in dispute that the documents were modified at the Claimant's instruction.
91. As to whether there an intent to deceive, we have considered the points on each side.

### Points in the Claimant's favour

92. Some of the insertions made by the Claimant conceivably could be an aide memoire for him. These were points that he could make relevant to that document as part of a meeting in the internal process.
93. We have noted that the Claimant has changed typographic errors, for example the word "phone" in the email of 18 March 2020 is changed to "firm". This is no more than the correction of an error. It is difficult to see what advantage that gave to the Claimant. Similarly on page 21, an email dated 30 June 2019 an attached image has been deleted (which we assume is simply to aid accessibility) and a typographic error "ir" is corrected to "or". None of those changes confer any advantage on the Claimant nor do they change the meaning of the document. This is, we accept, no more than tidying up. These points in isolation might support a conclusion that the Claimant regarded this as his own document which he could edit as he wished, which was not necessarily intended for a wider audience.

### Dishonesty in employment

94. The Respondent has placed some emphasis on the Claimant's admitted dishonesty in relation to the underlying matters which led to his dismissal. Some questions were put to the Claimant in cross examination in relation to this. He accepted that he had been dishonest, but clearly qualified that by saying that he was being bullied by his manager and was attempting to avoid her unfair scrutiny by giving misleading answers.
95. The Respondent invites the Tribunal to draw an inference from the Claimant's propensity to be dishonest that this supports a conclusion of dishonesty in relation to the five emails which are the substance of the Respondent's application for strike out. Mr Forshaw, properly and appropriately flagged to the Tribunal and the Claimant something akin to "Lucas" direction, specifically that dishonesty in one context does not necessarily prove dishonesty in others. There are different reasons why individuals are less than truthful.
96. In line with an indication given by the Tribunal during the course of hearing the strike out application, we doubted that we should delve deeply into the content of the substantive claim within the constraints of a two day hearing to deal with strike out. The final hearing had been listed for a 20 day hearing. There was a real risk of drawing an inference from a few points highlighted by the Respondent without considering the context in detail.

97. We have not drawn an inference that admitted dishonesty in the circumstances leading to the Claimant's dismissal ought to be read across to add weight to the arguments in favour of dishonesty in relation to the five altered emails. The Tribunal has made a decision about the five altered emails and the Claimant's conduct into it without reference to any other matters, but purely based on the content of the emails and the witness evidence directly relevant to it.

Conclusion on intent to deceive

98. Purely by reference to the content of the five altered emails, the correspondence which relates to them and the evidence we have heard in this hearing, the Tribunal does not accept the Claimant's case that in each case the modifications to the documents were no more than an *aide memoire* and the modified documents were only provided to the Respondent inadvertently. Our conclusion is that the Claimant deliberately caused five contemporaneous emails to be modified with the intention of changing their meaning and passing these off to the Respondent. We have reached this conclusion for the following reasons.
99. First, there were clear instances where the Claimant rewrote the content of a contemporaneous document in a way that materially changed its meaning, and deleted part of it. The first three emails had been modified to support the Claimant's case that Diva Shah had told the Claimant's manager Lorren Rea that she could make up hours by working from home. The fourth and fifth emails have been modified in a way to introduce matters not in the original documents. On balance we accept, as the Respondent submits, that this has been done to present the Claimant's attendance at a choir as a work rather than simply recreational activity, such that taxis fell within AtW funding. The precise motivation is not crucial for our reasoning. The content has been materially changed.
100. Second, the Claimant added wording in the first person to emails written by other people. For example in an email dated 27 June 2019 [14] the Claimant acknowledges that the "I" relates to Diva Shah not himself, but says that this was his prompt to himself to remind himself that this was her position at the time. His case is that in essence it was a quirk of the way he wrote his notes that he wrote comments that Ms Shah had said to him in the first person in the email as a prompt to remind him what she said at the time. After consideration we reject that explanation. It would be a convoluted method of writing an aide memoire to write them into an email as if they were part of that contemporaneous document written by a third party. We find it would have been far more likely had she made comments which the Claimant wanted to capture that he would have simply instructed Ms Laurie to write "Ms Shah said XYZ at the time". On the balance of probabilities we find it more likely that the Claimant was deliberately modifying the document to present these as the contemporaneous words used by the author rather than as an aide memoire to himself.
101. Third, in the second email the Claimant has referred to himself in the second person. The addition, purportedly written by Ms Shah says "...work all the same hours in the office as **you Mike**" (emphasis added). For an individual to



add wording refer to themselves in the second or third person is odd and calls for an explanation. While this point is not conclusive in itself, we find that it supports our conclusion that the Claimant was trying to modify the content of the original documents to appear to have been actually written by the author rather than simply create an aide memoire.

102. Fourth, the additions are not in note form, but have been written so that the reader would form the impression that the wording used was contained within the original document. Again we find that this supports a conclusion that the Claimant was trying to modify the documents rather than simply create an aide memoire for himself. This is not the electronic equivalent to a comment written in a margin, but rather additional text which has been crafted to appear to form part of the original document.
103. The effect of this was to create a document that was materially different to the original and it was done so in a systematic way to support the Claimant's narrative in the internal process.
104. We do not accept that deletions were purely to aid the Claimant's ability to read documents. The effect of the deletion in the fifth document was to hide information that he had provided to the DWP about his self-employed work in the form that the email was provided to the Respondent. Given our other findings above, we have not needed to determine whether this was a deliberate attempt to conceal or simply removal of matters that he did not think were relevant to the Respondent. In either event the effect was to misleadingly present to the Respondent a document that was materially different to the original.
105. We conclude therefore that these changes did represent an intent by the Claimant to deceive the Respondent.

Are these altered documents irrelevant to the claim?

106. The Claimant argues that these documents were related to a grievance process which never ultimately took place, the documents were not referred to as part of the disciplinary and ultimately these documents are of no relevance or alternatively marginal relevance to the claims before the Tribunal.
107. The Claimant at different times has suggested that the documents were submitted as part of the disciplinary which necessarily led to the dismissal.
108. The Tribunal has considered the list of issues. Broadly speaking the Claimant's case is that his manager Loren Rea was inflexible and did not make adjustments for disabilities as such should. The additions to the first three documents play into that narrative. Ms Rea's involvement in an access to work funding application is part of the substance of the Claimant's claim of disability discrimination. It follows that these documents are relevant to parts of the Claimant's claim and would fall to be considered as part of a substantive hearing of that claim. It cannot be said that these documents have no relevance to the claim.

Was the Claimant's evidence to the Tribunal about the altered documents dishonest?

109. The Claimant provided his initial explanation for the documents in an email from him sent on 3 May 2023 at 11:58. In that email he said he had not seen these alternative versions until that day and suggested that one version of the document was a draft and the other one was a final version.
110. Mr Foreshaw challenged this explanation at the hearing on 3 May 2023 when he pointed out that the draft/final version explanation could not stand since the documents in question were sent items in Outlook with a date and time stamp.
111. By Friday 5 May 2023 it appears that the Claimant reflected and provided a different and fuller explanation:
- "I accept that the emails you have produced have been edited. This was done immediately prior to the disciplinary hearing by my partner, Linda Laurie. Her purpose in doing so was to provide for my personal use emails which not only set out the original text but which would trigger for me points that I would wish to make to the disciplinary panel. The purpose of Linda producing these notes was, therefore, that I would retain those edited versions for myself and not insert them into the panel's bundle. Unfortunately, in preparing that bundle for me to submit, Linda then accidentally inserted the edited versions of these messages as she will explain in her statement."
112. Save that the Claimant maintained in the hearing before us in May 2024 that in fact these documents were relevant to the grievance not the disciplinary, broadly speaking the explanation given in the email of 5 May 2023 was consistent with what the Claimant told us in this hearing.
113. The Claimant says that she was wrong on one point which is she suggests that track changes could be made in Outlook. It seems to be common ground that that cannot be done. The Claimant explained in his evidence to the Tribunal that in fact she was cut and pasting wording from Outlook into Microsoft Word and it was at this stage she was modifying the words using track changes. We accept on balance that change were made in Microsoft Word rather than Outlook.
114. We acknowledge that there are some circumstances in which an explanation or recollection given after some reflection is better than an explanation given "on the spot". Human memory is imperfect. Sometimes a period of recollection or consideration of evidence "brings back" a memory which could not be accessed immediately. It does not follow in every case that inconsistencies in an account or explanation necessarily mean that a witness or party is being dishonest.
115. We have considered whether the inconsistencies in the explanation put forward by the Claimant on 3 and 5 May might have been such an example. I.e. the first explanation was conjecture, easily offered, and the explanation given two days later on lengthier consideration was a better reflection of reality.

116. On the balance of probabilities we have rejected that interpretation. Our finding is that the documents were deliberately modified, at least in part, to change or misrepresent what contemporaneous communications had said at the time. This was done deliberately we find by the Claimant, for use in the Respondent's internal processes.
117. We find that the Claimant knew that these documents had been amended.
118. We accept that this inconsistency supports the Respondent's argument that there is a lack of candour on the part of the Claimant about the reason for the modification to these documents.

Was that conduct wilful, deliberate or contumelious?

119. The Tribunal takes account of the fact that the documents were altered at a time when the Claimant was facing disciplinary proceedings. He was at that stage no doubt feeling under a significant amount of pressure, with his career with the Respondent at risk. His account is that he felt bullied by his line manager. That is an explanation that he put forward for misleading her in relation to different matters. It would be open to a tribunal at a final hearing to accept that explanation. That does not fall within the scope of this application however.
120. In this application the Claimant is not saying that he deliberately altered documents because he was being bullied. He says that the alterations were no more than an aide memoire or tidying up and that the fact that this was provided to the Respondent which might have been misleading was inadvertent. That is the explanation we have rejected for the reasons given above. It follows that we do not accept that he has given the Tribunal an honest explanation.
121. The conduct that the Tribunal finds is unreasonable and "contumelious" (in the slightly archaic wording of some of the reported cases) is that the Claimant, now confronted with the altered emails, has in our assessment failed to give an honest explanation of his conduct in the matter.
122. Had the Claimant been contrite at the hearing in May 2024 and conceded that he had altered these documents to support his case in internal process, that may have presented him some difficulty with credibility in the substantive claim, but it would at least have given the Tribunal some confidence that he was belatedly attempting to present an honest explanation and acknowledge how these documents had been created.
123. In fact we have a situation in which the Claimant has dishonestly amended contemporaneous documents in a deliberately misleading way but when confronted with this conduct he has continued to maintain the deception, under oath, in the face of the Tribunal. This ultimately leads us to the conclusion following **Sud**, that we cannot have confidence in his veracity as a witness.

Is it no longer possible to have a fair hearing?

124. The Respondent says that in line with authorities there cannot be a fair hearing.
125. It is argued that the Tribunal cannot accept the veracity of what the Claimant says and accordingly, following *Sud v London Borough of Hounslow*, a fair trial is not possible. We accept this.

Is it proportionate to strike out the claim?

126. The Claimant accepts that if the Tribunal finds that he did set out to deceive then it would be appropriate to strike out the claim. We bear in mind that he is a litigant in person, albeit somewhat with significant expertise in Human Resources.
127. Notwithstanding that concession, the Tribunal has considered whether striking out the claim that this proportionate. We have considered whether there were any actions short of strike out which would be appropriate.
128. Could the Claimant be asked to review the documents and identify any others which have been modified in a similar way? Given that the Claimant does not appear to the Tribunal to have been honest in his explanation of how the modified documents came about, we are not satisfied that we could rely on him to identify any other documents where modifications had been made.
129. Could the Respondent be asked to identify the modified document themselves? The Respondent says they should not be expected to go through the documents in the bundle checking the veracity of documents. There are in the region of 3,500 pages in the substantive hearing bundle. We accept this submission and do not find that it would be fair or appropriate for there to be substantial further delay and the Respondent to incur a very substantial cost checking to see if there is any further dishonesty on the part of the Claimant. We are alive to the fact that even where costs orders are made, for various reasons the receiving party may not receive the entirety of cost actually incurred.
130. The Tribunal has found this a difficult decision. We are alive to the fact that the circumstances in which the Claimant was causing documents to amended were connected to his disability. He did not have the option as sighted person would of making annotations in margin with a pen, or perhaps adding comments himself electronically to an electronic document. He was reliant on asking someone else to modify the document. He did not have full control of the process by which those modified documents were then provided to Respondent. This did at least set the stage for documents to be modified in this way. For this reason and because of the seriousness of the allegations made by the Respondent we have taken this decision with particular care.
131. The Claimant is not alleging that these changes were made by Ms Laurie without his knowledge. The changes were made at his instruction.

- 132. There is a clear distinction between the method by which the documents were modified and the intent behind the modification. Our finding is that the intent was to deliberately mislead the Respondent in the internal process and further that the Claimant did not “come clean” about this motivation as he might have done at the hearing in May 2024. We find that these circumstances are quite apart from the Claimant’s disability.
- 133. The Claimant is not urging on us a lesser sanction a different method of proceeding. Indeed he accepts that if we find that he did set out to deceive then we should strike out the claim. We find in the circumstances that it is proportionate to strike out the claim.
- 134. This represents the unanimous decision of the Tribunal.

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Employment Judge

Date 18 July 2024

WRITTEN REASONS SENT TO THE PARTIES ON  
18 July 2024

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.