Case No: 6000070/2025

EMPLOYMENT TRIBUNALS

Claimant: Ms J Burrell

Respondent: Sinclair Pharmaceuticals Ltd (1)
Mr M Blanco (2)
Ms A Edwards (3)
Ms T Xing (4)
Ms G Li (5)

Heard at: Cardiff (by video) **On:** 1 and 2 June 2026

Before: Employment Judge Leith

Representation
Claimant: Mr Gorton KC
Respondent: Mr Sethi KC

JUDGMENT

1. The Respondent's application for the claim to be struck out is dismissed.
2. The complaint of breach of contract is dismissed upon withdrawal.

REASONS

1. This hearing was listed by Employment Judge Sharp to deal with various matters of case management. After the hearing was listed, the First Respondent applied to have the claim struck out on based on the continued involvement of Mr Gorton on behalf of the Claimant. Regional Employment Judge Davies directed that that point also be dealt with at the hearing. Because of the nature of the application, I dealt with it first.

2. I had before me a hearing bundle of 643 pages, and a submissions bundle of 925 pages (which contained skeleton arguments on behalf of the Claimant and the First Respondent, and various authorities referred to). I heard submissions from both parties on the application on the first day of the hearing. I then deliberated and delivered my oral judgment on the second day of the hearing. The Frist Respondent requested written reasons for my judgment, which I now provide along with my judgment.

3. Within these reasons, I do not recite every submission made, or every authority to which I was referred. I mean no disrespect to both Counsel's endeavours in not doing so. I have had regard to the totality of the submission in coming to my judgment.

Background

4. The background to the application is as follows. In recounting the background, I am not making any findings of fact which will bind a future Tribunal regarding the substantive issues in the claim.

5. The Claimant was employed by the First Respondent as Chief Legal Officer. On 19 November 2024, the First Respondent gave the Claimant notice of dismissal (giving one month's notice). On 2 December 2024, the Claimant made a Subject Access Request.

6. The Claimant presented the claim on 2 January 2025.

7. The Claimant's position is that on 1 May 2025 her husband received, via the post, an envelope containing documents from the First Respondent. The envelope apparently did not contain any note or indicate who had sent the documents. During the hearing before me those documents were referred to as the 1 May Materials, and I adopt that naming convention in this judgment.

8. The Claimant's position is that her husband read some of the documents, which it is common ground include correspondence between the First Respondent and its (then) solicitors. The Claimant's position is that the documents underlined her case that the real reason for the Claimant's dismissal was not what the First Respondent had presented to her. The Claimant then took legal advice and was apparently advised not to read the documents. Her position is that she therefore did not read them.

9. The Claimant's solicitors, who had also not read the documents, wrote to the First Respondent's solicitors indicating that the Claimant had received materials which strengthened her case. The First Respondent's solicitors asked the Claimant's solicitors to send them all copies of the 1 May Materials, to give an undertaking that no copies had been kept or disseminated, and requiring the Claimant to give them full details of the source and a full account of how she had obtained the materials.

10. The Claimant's solicitors responded that they did not know the identity of the person who had supplied the 1 May Materials to the Claimant, and they would send the documents to the Tribunal in a sealed envelope and advise the Claimant to destroy any remaining copies. The First Respondent then responded noting that they had not waived privilege or confidentiality and requiring the Claimant not to destroy any evidence.

11. In the interim, on 5 May 2025, the Claimant applied to amend her claim.

12. Correspondence continued between the parties, which culminated in the First Respondent's solicitors issuing proceedings in the High Court on 22 May 2025 for an injunction restraining use of the 1 May Materials. An injunction was granted by Goose J on an interim basis at a without notice hearing, restraining the Claimant's use of the documents and requiring her to deliver them up.

13. The matter returned to the high Court on notice and was heard by Deputy High Court Judge Rory Dunlop KC. Mr Gorton KC was instructed (with junior Counsel) to represent the Claimant at that hearing. In preparation for the hearing, he read the 1 May Materials.

14. Goose J's Order was discharged by DHCJ Dunlop KC. He noted that that there was nothing to justify the application having been made without notice, and that the First Respondent had failed in its duty of full and frank disclosure. The Claimant and her Solicitors gave undertakings to the Court not to use the 1 May Materials unless directed to do so by the Employment Tribunal. DHCJ Dunlop KC therefore did not make a further interim order regarding the use of the documents. The High Court proceedings were stayed. The question of making any ruling regarding the future use of the 1 May Materials was left to this Tribunal. The First Respondent was ordered to pay 75% of the Claimant's costs on the indemnity basis. The High Court proceedings have subsequently been dismissed.

15. Following the High Court proceedings being stayed, the Respondent objected to the Claimant instructing Mr Gorton KC in these proceedings, and made those objections known to the Claimant. The Claimant has continued to instruct Mr Gorton KC notwithstanding those objections.

<u>The Law</u>

16. Rule 38 of the Employment Tribunal Rules of Procedure 2024 deals with striking out claims. It provides as follows:

> "38.— (1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).
>
> (2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).
>
> (4) Where a reply is struck out, the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer's contract claim)."

17. It is trite to say that strike out is a draconian step that should be taken only in exceptional cases.

18. The EAT held, in *HM Prison Service v. Dolby* [2003] IRLR 694 EAT, at para 15, that the striking out process requires a two-stage test. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. *Dolby* was decided under a previous version of the Employment Tribunal Rules, but the important part of the wording of the relevant rule was the same, in that it provided that the Tribunal <u>may</u> strike the claim out.

19. The conduct of a representative may lead to a claim being struck out. In *Bennett v Southwark LBC* [2002] ICR 881, Sedley LJ noted that "what is done in a party's name is presumptively, but not irrebuttably, done on her behalf".

20. *Edmondson v BMI Healthcare* [2002] All ER (D) 387 is an example of a claim being struck out because of the way that the Claimant's (lay) representative conducted a final hearing on her behalf, albeit that the facts in that case were somewhat extreme.

21. When considering whether a fair trial is still possible in the context of rule 37(1)(b), the requirement the Tribunal must consider whether there is a "significant risk" that fair trial could not take place. (*Leek v University College London Hospitals NHS Foundation Trust* [2024] EAT 134).

22. The EAT in *Boateng v Moss Bros Group Limited* [2026] EAT 50 gave the following guidance regarding when it is appropriate to strike out a claim under limb (e):

> "15. The broad context is the Article 6(1) Convention right. Two general features may be noted. The first is that the right is one, of all parties, to a fair hearing within a "reasonable time". The second is that, as the ECtHR has expounded, each party should have a reasonable opportunity to present their evidence "under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" (*Dombo-Beheer B.V. v The Netherlands* (A/274-A) (1984) 18 EHRR 213 at [33].)…
>
> […]
>
> 22. There may be some such cases in which the tribunal can properly be sure that a fair trial, at any future time, is simply no longer possible, as, for example, in *Chidzoy v BBC*, UKEAT/0097/17. But, perhaps more usually, the tribunal will have to assess whether the risk, or probability, that the ability of the tribunal to try the matter fairly, or of there being material prejudice to the other party's ability fairly to present their case, is sufficiently high or serious to warrant a strike-out. In *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200, for example, it was alleged that the possibility of a fair trial had been put in to question by one party having tabled documents that were in fact forged. In that context

Chadwick LJ spoke of the need to consider whether there was a “real risk” that that would render the further conduct of the proceedings unsatisfactory or a “significant risk” that the effect of the conduct was that a fair trial could not take place.”

23. In considering whether to strike out a claim, the Tribunal must bear in mind the overriding objective set out in Rule 3 of the Employment Tribunal Rules of Procedure 2014:

> “3.–(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing,
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings,
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues, and
>
> (e) saving expense.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules, or
>
> (b) interprets any rule or practice direction.
>
> (4) The parties and their representatives must—
>
> (a) assist the Tribunal to further the overriding objective, and
>
> (b) co-operate generally with each other and with the Tribunal.”

24. Section 6 of the Employment Tribunals Act 1996 provides that a person has the right to be represented by any person whom he desires to represent him. That was confirmed by the Court of Appeal in the case of *Bache v Essex County Council* [2000] ICR 313 (CA).

25. Documents which are covered by legal professional privilege are privileged from inspection in litigation.

26. Legal professional privilege is a fundamental human right – per *R (Morgan Grenfell) v Special Comr of Income Taxes* [2003] 1 AC 563:

> First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled legal advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the advisor without fear that they may afterwards be disclosed and used to his prejudice. The

cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (*Campbell v United Kingdom* (1992) 15 EHRR 137, *Foxley v United Kingdom* (2000) 31 EHRR 637) and held by the European Court of Justice to be part of Community law: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878."

27. There are two categories of legal professional privilege – legal advice privilege and litigation privilege. Legal advice privilege applies where a document is:
    a. Confidential
    b. Written to or by the solicitor in his or her professional capacity for the purposes of obtaining legal advice or assistance.

28. "Confidential" means that the person asserting privilege must have had a reasonable expectation of confidentiality in relation to the document.

29. The privilege does not apply where the document reveals conduct or advice which breaches the iniquity principle. The iniquity principle is described in Matthews and Malek on Disclosure as follows:

> "11-85
> Privilege may be claimed for communications with or from lawyers on how to stay on the right side of the law or constituting warnings against the results of contemplated acts. However:
>
> "Legal professional privilege does not exist in respect of documents which are in themselves part of a criminal or fraudulent proceeding or, if it be different, communications made in order to get advice for the purpose of carrying out fraud, and…this is so whether or not the solicitor was or was not ignorant of the fact that he was being used for that purpose."
>
> The rule also covers communications which are criminal in themselves. Despite earlier doubts, it is now clear that the exception applies equally to litigation privilege as to legal advice privilege.
>
> 11-86
> Where the principle applies, it does not deprive the client of all legal professional privilege, but only that in respect of documents which are part or in furtherance of the fraud; all other legal privilege (e.g. in the conduct of subsequent litigation) remains unaffected.
>
> 11-87
> The relevant intention (i.e. to further the fraud) need not be held by the client either; it is enough if a third party intends the lawyer/client communications to be made with that purpose (e.g. where the client is an intermediary or innocent tool), and this is so both at common law and under s.10(2) of the Police and Criminal Evidence Act 1984. Where the wrongdoer and the client have had a relationship separate from the dealings with a solicitor, and that separate relationship was used by the wrongdoer to advance the wrongdoing the innocent client loses the

protection of privilege. On the other hand, where the only "fraud" alleged is that of the lawyer, the client's privilege is unaffected. To fall within the scope of this rule, the lawyer must have been instructed before the commission of the fraud or illegality, not afterwards for the purpose of being defended. The rule applies to those who further the fraud, not those who are victims of it. A lawyer who realises or comes to suspect that he has been unwittingly involved in a fraud is entitled to raise the question with the court and seek an order that he be at liberty to disclose the facts to the victim.

11-88
There must be a definite charge of fraud or illegality, supported by prima facie evidence, and not a mere allegation. There must also be a prima facie case that the document came into existence as part of the fraud. Indeed, it may be that there needs to be a "strong prima facie case". In Australia the evidence to show fraud must be admissible evidence. The court will be astute to prevent such allegations being made in order to enable discovery "fishing" applications to be mounted and "very slow" to deprive a defendant of legal privilege on an interlocutory application. It is not however necessary that the word "fraud" be used, if the facts alleged enable the court to recognise it. The "fraud" need not amount to a criminal offence: civil fraud (such as deliberate misrepresentation by a borrower to obtain a loan) is sufficient. Nor need it be the foundation of the plaintiff's claim; relevance to an issue in the action is enough. Indeed, the court is more likely to apply the rule if the (alleged) fraud said to justify applying the rule is "free-standing and independent". To put it another way, the evidence will need to be stronger in a case where the fraud relied on is itself part of the substantive case.

11-89
For the purposes of the rule, fraud includes "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances", but not mere inducement to breach of contract. Nor does it include entering into an improper contingency fee agreement, interference with goods, or breaches of fundamental human rights. On the other hand it includes deliberate misrepresentation for the purposes of obtaining a mortgage loan, fraud on creditors within s.423 of the Insolvency Act 1986 (even if all parties wrongly believe the actions concerned to fall outside the scope of the section), and directors' breaches of duty involving fraud, dishonesty, bad faith or sharp practice or deliberate preference of own interests. In Ireland the principle has been extended to malicious prosecution and abuse of process. In Australia the principle has been held to extend to a case of deliberate (though not inadvertent) abuse by a governmental authority of statutory power intended to prevent others from exercising their rights under the law, to making false claims for tax deductions, and to "fraud on justice". But the wrongdoer has to go beyond mere civil wrong, to sharp practice or underhand conduct.

11-90
Steps taken subsequently to the alleged fraud can be "in furtherance of" that fraud, for example, if taken to conceal and render profits irrecoverable to which the plaintiff asserts a proprietary claim. They can

also amount to a fraud in themselves, if, for example, a bogus defence is put forward, false evidence is created, criminal acts are used to obtain evidence, or other steps are taken to cover up the original fraud. In New Zealand, advice from a solicitor to a client that he should delete records has been held not privileged.

30. Etherton MR in the case of *Curless v Shell International Limited* [2019] EWCA Civ 1719 summarised the principle as follows – "there is no confidence in an iniquity".

31. The Court of Appeal in *Nigeria v Process and International Developments Limited* [2025] EWCA Civ 715 said this, at paragraph 166.

> "Where a solicitor obtains from his client the other side's privileged documents which he knows or suspects have been illicitly obtained without the consent of the other side, he cannot simply do nothing, let alone, as here, continue to use the documents. His duty is to ensure that these documents are returned to the party to whom they belong or, if his client refuses to return them, to cease to act."

32. More broadly regarding the situations where a duty of confidence exists, I was referred to the speech of Lord Goff of Chieveley in the case of Attorney General v Guardian Newspapers [1988] UKHL 6:

> "I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection."

33. I was also referred to the judgment of the Court of Appeal in the case of *Travel Counsellors Limited v Trailfinders Limited* [2021] EWCA Civ 38:

> "28. Accordingly, in my judgment, if the circumstances are such as to bring it to the notice of a reasonable person in the position of the recipient that the information, or some of it, may be confidential to another, then the reasonable person's response may be to make enquiries. Whether the reasonable person would make enquiries, and if so what enquiries, is inevitably context- and fact-dependent. If the reasonable person would make enquiries, but the recipient abstains from doing so, then an obligation of confidentiality will arise."

34. I was additionally referred to the case of *F v M* [2024] EWHC 3190. In that case, Counsel who acted for M had previously engaged in discussions with F about being instructed by them (albeit that the instruction did not proceed. It was contended that because fo the discussions, Counsel owed a duty of confidence to F, and her decision to represent M was prejudicial to F receiving a fair trial. The judgment of Hayden J surveyed the authorities, and noted that:

> "A duty of confidence will arise:
>
> > "whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected."
>
> (paragraph 11(ix) A v B plc [2003] QB 195)"

35. The EAT in the case of *Trentside Manor Care Ltd and others v Mrs M Raphael* [2022] EAT 37 dealt with the way Tribunals should deal with the case where there was a dispute regarding whether legal professional privilege applied to documents. In that case, the Claimant sought disclosure of correspondence between the Respondent and their advisers, Citation (a consultancy business). The Tribunal had originally ordered the Respondent to disclose the documents to the Tribunal and to the Claimant's legal team (but not to the Claimant herself), following which a hearing would take place to determine discloseability. That order was apparently made by consent. The Respondent failed to comply with it.

36. HHJ Auerbach said this regarding that order:

> "40. Whether or not this order was made by consent, in my judgment it was not a proper exercise of the tribunal's case management discretion to make it at all. That is for two reasons. Firstly, I agree with Mr Ellison that the effect of such an order, if complied with, would have been to compromise the very privilege that was being asserted, by requiring the respondents to share the contents of the documents in question with the claimant's representatives. That would not be affected by the fact that, according to the terms of the order, they would not be entitled in turn to share the contents with the claimant herself. Privilege, if it applies, protects the party whose privilege it is, from being required to disclose the contents of such documents to anyone at all.
>
> 41. Secondly, a point I raised with Mr Sheppard during the course of oral submissions is that it seems to me that the effect of such an order, had it been complied with, and had the documents been then read by the claimant's solicitors or counsel, would have been almost certainly then to place them in a position of immediate and irreconcilable conflict; or certainly there would have been a high risk of it doing so. Mr Sheppard fairly acknowledged the validity of that point. He did not withdraw his opposition to this ground of appeal but submitted that, even it was well-founded, it did not matter to the ultimate application or way forward in this case."

37. HHJ Auerbach then went on to say this regarding the process the Tribunal ought to follow where a dispute arises over privilege:

> "45. It is well-established that employment tribunals do not necessarily follow the approach taken in the Civil Procedure Rules to all matters of procedure, but there are some matters where it is appropriate that they do so. This is an instance where it seems to me the CPR approach should in principle in substance be followed. There are a number of authorities, in particular *West London Pipeline Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm), which indicate that, whilst there is a power to order disclosure of disputed documents for the eyes of the court only, the use of this power should be treated as a last resort.
>
> 46. The appropriate starting point is for the party asserting privilege to be required to provide a sworn statement explaining on what basis it is asserted and including, with as much specificity as can be provided without compromising the privilege, information about the nature of the documents at issue. Such a statement will not necessarily always be determinative, but it should be treated as such unless, on its face, or from other evidence or material before the court or tribunal, it is reasonably apparent that privilege has been or may have been claimed on a legally incorrect basis, the nature of the documents has been incorrectly represented or the statement is materially incomplete. In a case where the tribunal considers that the statement should not or not yet be treated as conclusive, there are a number of further steps it may take to address that issue. These might include, as appropriate, requiring the party asserting privilege to provide a further statement with more information or clarification, inviting representations and/or requiring the party asserting privilege to provide copies of the documents to the tribunal itself to assist in determining the issue. But the starting point should be the provision of a sworn statement."

38. The reference to the Civil Procedure Rules is to CPR 31.19. The application of CPR 31.19 was considered by the High Court in the case of *West London Pipeline and Storage Ltd and anor v Total UK Ltd and ors* [2008] EWHC 1729. The background was that the issue related to litigation privilege. The High Court summarised the applicable principles in paragraph 86. Importantly, iniquity was not at issue in that case – that is, it was not the basis on which it was argued that privilege did not apply.

39. I was referred to a number of extracts from the BSB Handbook. I was also referred to the judgment of the Court of Appeal in the case of *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 para 42:

> "Where a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from acting based on the Code of Conduct as the content and enforcement of that Code are not a matter for the court. However, the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal."

Discussion and conclusions

40. I must first consider whether either of the gateway tests in rule 38(1) are satisfied.

41. The conduct relied upon for the limb (b) allegation is put in two ways by the First Respondent:
    a. That Mr Gorton KC acted in a manner that was scandalous, unreasonable or vexatious by reading the 1 May Materials, and the Claimant is (effectively) fixed with that conduct; and/or
    b. That the Claimant acted in that way by continuing to instruct Mr Gorton KC in these proceedings notwithstanding the fact that he had read the 1 May Materials.

42. The starting point is to consider the nature of the 1 May Materials. The First Respondent's position is that they are covered by legal professional privilege. It appears to be common ground that at least some of the 1 May Materials are correspondence between lawyer and client. At an early stage in the High Court proceedings the Claimant took a point that the lawyers in question were not acting in that capacity at the time the correspondence was sent, and but that is no longer being pursued.

43. The foundation of the First Respondent's position is therefore that I cannot look beyond that and that Mr Gorton KC should not have read the documents unless and until a Tribunal rules that they are not covered by the privilege. Essentially, their position is that he must necessarily have acted improperly by doing so.

44. The Claimant's position is that it was appropriate for Mr Gorton KC to read the documents in preparation for the High Court proceedings, and there was nothing improper in him doing so. The Claimant's position is further that the question of iniquity has been put at large, and that therefore (and here I am paraphrasing somewhat) it cannot and should not be assumed that the privilege will hold.

45. This is, of course, an unusual situation. Privilege has been asserted; the burden of showing it is on the Respondent and the issue remains at large.

46. I do not consider that this is the sort of situation that HHJ Auerbach had in mind in *Trentside Manor*. In *Trentside Manor*, the issue in respect of privilege related to the status of the adviser. That is something on which the Claimant in that case could sensibly make submissions, and the Tribunal could sensibly make a decision, without having seen the documents in question. It seems to me that HHJ Auerbach's cautionary words about the Tribunal looking at the documents being only appropriate as a last resort could not be intended to apply to a case where iniquity was being relied upon. That is because it seems to me that in many such cases, the only evidence that would exist of the alleged iniquity would be in the disputed documents themselves.

47. That being said, it cannot be right that a party can simply assert iniquity and then be freed of any of the normal requirements to act as they would when coming into contact with a privileged document. So I do not consider that

the status of the 1 May Material, whether that is framed as “documents in which privilege is asserted” or “documents in which privilege is disputed”, can be determinative either way.

48. The Claimant’s position is that Mr Gorton KC was required to look at the documents in order to advise and represent the Claimant in respect of the High Court proceedings. The First Respondent disagrees. I do not consider that I am in a position to reach a determination on that technical point. But it seems to me also that it is something of a red herring. The High Court litigation is litigation which was initiated by the First Respondent. The First Respondent applied for an interim order on a without notice basis. That order was granted. The Claimant therefore had to engage with the litigation in short order, and having already been made the subject of a wide-ranging interim injunction (following a hearing which DHCJ Dunlop KC concluded should never have been held without notice). I do not consider that the way that Mr Gorton KC went about his task within that litigation and in that context could be capable of constituting scandalous, unreasonable or vexatious conduct of this Tribunal litigation.

49. I therefore turn to consider whether Mr Gorton KC continuing to act (and continuing to be instructed) having read the 1 May Materials places him in a position of conflict which renders his continued involvement scandalous, unreasonable or vexatious.

50. The First Respondent suggested that having read the documents, Mr Gorton KC owed a duty of confidence to it. Mr Gorton KC denied that any such obligation existed.

51. I asked Mr Sethi KC about the basis of that obligation. He referred to:

    a. *F v M* – a case where Counsel who acted for one party had previously met with the other party with a view to being instructed by them (albeit that the instruction did not proceed). The comments made regarding confidence in that case have to be seen through that lens.
    b. *Attorney-General v Guardian Newspapers* – the Spycatcher case, in which Lord Goff set out a broad assertion about the circumstances where a duty of confidence would arise, but said nothing that would assist with the present set of circumstances.
    c. *Travel Counsellors* – which was about the circumstances in which a party would be expected to look into whether information was confidential.

52. I see nothing in any of those authorities which suggests that a specific duty is owed by Mr Gorton KC to the First Respondent in this case.

53. The closest was the remark of HHJ Auerbach in *Trentside Manor* about there being a risk of conflict for the claimant’s Counsel had the respondent complied with the order to disclose the disputed documents to them. Again, I do not read that as going so far as to suggest a specific duty of confidence owed by Mr Gorton KC to a party which was not his client, and against whom his client was engaged in adversarial litigation. I consider that some clear authority would be required for me to conclude that a specific duty was owed in such a scenario. I prefer the analysis of Mr Gorton KC, which was that the duty he owed was to the Court.

54. In the circumstances, I do not consider that the gateway test is made out. The Claimant has an unfettered right to instruct the Counsel of her choice. She and her solicitors have given undertakings to the High Court. Mr Gorton KC will no doubt remain mindful of those undertakings. He cannot act on what he knows. He cannot unknow what he knows; but in the circumstances as I have outlined, that does not mean his continued instruction can properly be descried as either unreasonable or scandalous or vexatious in the sense meant in the rules.

55. The limb (b) gateway test is therefore not made out.

56. I turn then to consider limb (e). I start by noting that I do not consider that limb (e) only applies to a trial. The relevant rule says “hearing”, so I see no reason in principle why it could not also apply to a preliminary hearing.

57. Mr Gorton KC is bound by his professional duties not to advance points he cannot properly advance. He cannot use (or take instructions on) the 1 May Materials without a decision having been taken by the Tribunal that they are admissible. I would be slow to accede to any suggestion that Mr Gorton KC would act improperly, without clear evidence to support it.

58. Mr Sethi KC suggested that Mr Gorton KC had been using the 1 May Materials within the litigation. He made reference in particular to the 6 May amendment application, which he said must be informed by the 1 May Materials. But of course that application was made before the High Court proceedings were even issued. It was therefore also made before Mr Gorton KC was instructed in the High Court proceedings, and consequently before he had read the 1 May Materials. So the contents of the 6 May amendment application cannot have been influenced by Mr Gorton KC’s perusal of the 1 May Materials. Mr Sethi KC appeared to be conflating an unspoken concern that the Claimant herself had read the 1 May Materials, with the knowledge that Mr Gorton KC had read them. There is of course no application before me based on the Claimant having read the 1 May Materials, and the hearing before me proceeded on the premise that she had not done so.

59. It follows therefore that I see no tenable suggestion that Mr Gorton KC would improperly use any knowledge he has gleaned from the 1 May Materials. In the circumstances, I therefore conclude that the continuing instruction of Mr Gorton KC does not affect the possibility of a fair hearing in his preliminary hearing. Nor, as it stands at present, do I consider that it affect the possibility of a fair trial at final hearing.

60. I test my conclusion by considering the situation of an litigant in person without legal training in the Claimant’s position. Such a litigant would almost certainly have read 1 May Materials. They would not have taken the care that the Claimant did not to read them. Thereafter, the Tribunal may have engaged with the question of whether the privilege held. If so, the hypothetical litigant in person would have had to have been present at that hearing. If the Tribunal in that hypothetical case had concluded that the documents in question were not admissible, the claimant would have had to continue to advance their case without the benefit of them. I cannot see any sensible argument that it would then have been proportionate to strike

out the hypothetical claimant's claim in that case. And of course that hypothetical claimant is a litigant in person, who would not be bound by the professional code of conduct that Mr Gorton KC is.

61. It follows that I conclude that the gateway test in limb (e) is not met.

62. For completeness, I should say that even if I had considered that the gateway test in limb (b) was made out, I would not have struck the claim out. That is because I would have concluded, for the reasons set out above in respect of limb (e), that it would be disproportionate to do so given that a fair hearing remains eminently possible.

Approved by:

Employment Judge Leith

Date: 30 June 2026

JUDGMENT & REASONS SENT TO THE PARTIES ON
07 July 2026

Kacey O'Brien
FOR THE TRIBUNAL OFFICE