Neutral Citation Number: **[2024] EWHC 3168 (KB)**

Case No: KB-2023-002913

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 25 October 2024

BEFORE:

MS JUSTICE EADY

BETWEEN:

COMMERZBANK AG

Claimant

- and -

DAMILARE AJAO

Defendant

LOUIS BROWNE KC (instructed by **GQ Littler**) for the **CLAIMANT**
FIONA HORLICK KC (instructed by **Janes Solicitors**) for the **DEFENDANT**

JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

1.

Introduction

1. MS JUSTICE EADY: This is my judgment on the claimant's application, pursuant to **CPR** 81, to commence committal proceedings against the defendant for knowingly making a false statement in a document verified by a statement of truth and/or for interference with the administration of justice, in relation to proceedings brought and pursued by the defendant in the Employment Tribunal ("ET"). On this application, the claimant has been represented by Mr Browne KC, the defendant by Ms Horlick KC; neither appeared, or took any part in, the ET proceedings in issue, although those instructing Mr Browne have acted for the claimant (and the other respondents before the ET) throughout.

2. Having heard legal argument on the claimant's application on 22 and 23 October, I took the opportunity to reflect on the submissions made; giving this judgment in open court on 25 October 2024.

The background

3. The claimant is a major international bank; its headquarters are in Germany but it has a substantial presence in the City of London, with its London office in Gresham Street. The defendant is a black British man, of Nigerian descent, who is now in his mid-forties; from 1 May to 21 November 2019, he was employed by the claimant as a "Know Your Client" ("KYC") Analyst at its London office. The claimant summarily terminated the defendant's employment on 21 November 2019, with pay in lieu of notice.

4. For present purposes, I am concerned with two ET claims brought by the defendant subsequent to his dismissal: ET case number 220671/2019 (presented on 31 December 2019) and ET case number 2200216/2020 (presented on 21 January 2020). The claims were brought against the claimant and six individuals, and included allegations of race and sex discrimination, discrimination on the grounds of religion or belief; sexual harassment (including an allegation of an attempted sexual assault), racial harassment, victimisation, wrongful dismissal, bullying and harassment, failure to provide an itemised pay statement, breach of the working time regulations, unauthorised deduction

of wages, and breach of contract. The claims were expanded and elucidated in further and better particulars of claim dated 15 June 2020. The claims for unauthorised deductions of wages, wrongful dismissal and breach of contract were, however, withdrawn on 4 September 2020 (and dismissed by judgment of 2 October 2020), and the claims for direct religious discrimination and failure to provide an itemised pay slip were struck out by a judgment dated 27 January 2021, which also dismissed the case against the seventh respondent (Mr Kowalik) upon the defendant's withdrawal of that claim.

5. By his schedule of loss dated 1 June 2020, subsequently updated on 1 February 2021, the defendant claimed damages in excess of £160,000, with a claim for more than £50,000 per year on an on-going basis; the schedule also included damages for non-pecuniary losses, including injury to feelings (claimed in the sum of £17,500 plus 8 % interest) and personal injury (it was said the defendant had suffered post-traumatic stress disorder ("PTSD") arising from the acts of discrimination and the manner of his dismissal, a claim that it was said would be "*quantified with medical evidence regarding the psychiatric injury*"); a claim was also made for aggravated damages of £7,500 plus interest.

6. During the course of the proceedings, on 9 September 2021, the ET made an anonymity and restricted reporting order. That order was made under rule 50 Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, read together with the **Sexual Offences (Amendment) Act 1992**, and was based on the defendant's assertion that he was the victim of a sexual assault by Q (the sixth respondent to the proceedings). At the same time, the ET made an anonymity and restricted reporting order under rule 50 in respect of Q.

7. The full merits hearing of the ET claims took place before a three-member panel, Employment Judge Snelson sitting with Ms C Ihnatowicz and Mr D Clay commencing on 19 October 2021, lasting a total of nine days (two of which were spent by the ET in deliberations). The defendant was represented by counsel, acting on a direct access basis; the interests of the claimant and the individually named respondents were represented by one legal team, also appearing before the ET by counsel. The defendant had provided a witness statement in advance of the final hearing, with a signed

statement of truth, initially dated 4 October 2021, but updated on 17 October 2021; he also gave oral evidence on oath and relied on a statement signed by his wife, albeit she was not called to give oral evidence before the ET.

8. By its judgment promulgated on 14 February 2022, the ET unanimously dismissed all the claims. By a further judgment, promulgated on 5 July 2022, the ET ordered the defendant to pay the sum of £20,000 towards the claimant's costs; it also revoked the earlier anonymity and restricted reporting order relating to the defendant. The defendant sought to challenge the ET's decisions, but was unsuccessful on each of his appeals.

The ET's findings and the allegations pursued by the claimant

9. It is common ground before me that, should the claimant's application be allowed and this matter proceed to a committal hearing, the ET decisions on the claims in question will not be admissible: those decisions represent the conclusions reached by that tribunal on the claims before it, applying a civil standard of proof; the judge at the committal hearing will be required to reach their own views, to the criminal standard of proof, on the question of contempt. That said, it is equally not in dispute that at this hearing, in particular when determining whether the claimant has established a strong prima facie case, I am entitled to have regard to the findings made by the ET.

10. In support of this application, as set out in the affidavit of Mr Philip Cameron of 2 March 2023, the claimant relies on the ET's findings in relation to a number of matters raised by the defendant's claims. Mr Cameron details the allegations of contempt relied on by the claimant, identifying some 31 points, as set out in a schedule which references relevant findings made by the ET; two additional matters are also relied on by Mr Cameron, albeit that these were not specifically addressed by the ET. In oral submissions, Mr Browne grouped the various matters relied on by the claimant into eleven categories; for ease of reference, I have adopted the same approach (and order).

11. The first group of allegations relate to the defendant's claims that Q sexually harassed him by commenting on his underwear and saying she fancied him (points 2-4), and that she carried out a sexual assault by trying to reach for his crotch (points 5-6). Q was

also employed by the claimant in its London office, and she carried out a review function, which could include reviewing the defendant's work. In respect of these allegations (made by the defendant in his particulars of claim before the ET, in his witness statement (confirmed by a statement of truth) and in his sworn testimony), the ET (having also heard evidence from Q), found as follows (the references to "*the Claimant*" being to the defendant in the current proceedings):

> " Sexual harassment by Q ...
> 45 We are satisfied that the Claimant's case under this head is simply false. We accept the evidence of Q ...
> 46 We greatly regret to say that in our judgment the balance of the Claimant's case on sexual harassment, which included an exceedingly serious allegation of sexual assault, is, in its entirety, pure invention. The acts and events on which he relies did not happen. There was no treatment of him by Q which could conceivably have been seen as amounting to harassment of any kind."

In its subsequent costs decision, the ET further observed:

> "3. . ... Numerous claims had no factual basis whatsoever... The most serious inventions were directed at ... 'Q', whom he accused of sexual harassment including sexual assault. He had no possible ground to make any complaint against her, let alone allegations of such gravity. ..."

12. Relatedly, the claimant relies (points 24-26) on the ET's findings (set out in its liability decision at paragraphs 97-100) in respect of the defendant's explanation for why he had not complained about Q's conduct. In summary: the ET did not consider it likely the defendant would have shared a lift with Q immediately after she had sexually harassed him (as he had alleged), nor did it find it plausible that he (who was "*not one who was reluctant to complain*") had not wanted to cause upset to Q (who had recently suffered a bereavement), or that he was concerned that she might then engage in retaliatory action (something that the ET felt was particularly implausible given the defendant's "*fearless routine challenges to feedback*" by reviewers such as Q); the ET

further considered it improbable that the defendant would (as it found he had) have then maintained a "*relaxed, friendly work relationship*" with Q, specifically inviting himself to lunch with her and another colleague (and the ET rejected as "*fantastic*" and "*ludicrous*" the account the defendant gave to explain this, concluding this demonstrated "*he was a witness who saw the preparation of evidence as a means of presenting a narrative calculated to further his interests, entirely without regard to whether it was true or even bore any relation to the truth*.")

13. Secondly, the claimant relies (points 29-30) on the ET's finding that the defendant fabricated evidence in relation to entries in a work diary. The defendant had relied on this evidence as corroborating aspects of his case, referring to it in his witness statement (confirmed by a statement of truth) and in his oral evidence before the ET. The ET found, however, that the entries in question had been fabricated to bolster the defendant's case. To summarise its reasoning (set out in detail at paragraph 102 of the liability decision): not only had the existence of this evidence been disclosed late in the proceedings (and not referenced in the "*copious particulars of his case or in the voluminous correspondence*"), the entries relied on were not in the correct order (one entry appeared *before* a note relating to an earlier meeting, and referred to advice only being received the day *after*), and it was notable that the diary contained no reference to many of the events that were in issue. The ET concluded:

> "102. With regret, we conclude on a less than marginal balance of probabilities that the work diary evidence was in material part, manufactured in the course of these proceedings in an effort to bolster the claims, and that the claimant chose to take this disgraceful course because he recognised that without improvement, the original would not advance his case in the slightest degree."
>
> -

14. Third by point 15, the claimant draws attention to the finding made by the ET in rejecting the defendant's contention made in support of his claim for pay in lieu of outstanding holiday entitlement, that it had been agreed that three days of his annual leave should be converted to sick leave:

> "95. The Claimant took five days' leave plus the three bank holidays which fell between 1 May and 21 November 2019. He gave oral evidence to the effect that the three days of annual leave on 7, 8 and 11 November were, by agreement, converted to sick leave. That evidence, we find, was false."

15. Fourth, the claimant relies on the finding made in respect of the defendant's contention (made in his witness statement) that he had sent an email to Mr Booth (the fourth respondent to the ET claims) at 17:10 on 20 November 2019 (point 20). As set out at paragraphs 89 and 101 of its liability decision, the ET rejected this contention, noting that the fourth respondent had produced a screen shot demonstrating that the defendant had only sent two emails to him that day, the last being timed at 14:46. Although the defendant denounced the screen shot evidence as a fabrication, the ET further noted that Mr Booth had himself sent an email to the defendant at 16:54, and that the turnstile records for 20 November 2019 had showed that the defendant had left the building at 16:57 that day. The significance of the alleged email for the defendant's case was that it was said to evince his intention to raise a grievance against Mr Kowalik (initially the seventh respondent to the ET claims). As the ET found, however, the other evidence relating to the defendant's movements on 20 November 2019 left him "*in the hopeless position of being forced to contend that, between "after 16:54" and 16:57 he had written an email to Mr Booth detailing his complaints about Mr Kowalik, closed down his computer and left the building*".

16. The fifth matter relied on by the claimant relates to a claim of race discrimination that the defendant had initially made against Mr Kowalik. In the further particulars provided in respect of this matter, the defendant had relied on an admitted comment made by Mr Kowalik in October 2019 to the effect that he would "*crush*" the defendant; this was said to relate to race because the defendant alleged that Mr Kowalik had earlier commented that the area where the defendant lived "*was full of black people and ... was plagued with crime*". This was not an allegation that the defendant pursued to trial: Mr Kowalik was removed as an individually named respondent and the claim in this respect was dismissed as withdrawn by the ET's judgment of 27 January 2021.

17. The sixth matter relied on by the claimant relates to the defendant's schedule of loss, and updated schedule, in the ET proceedings. The complaint in this regard is essentially contingent upon the allegations of contempt in respect of the substantive claims: it is complained that the defendant "*well knew that he had no lawful entitlement to claim the damages claimed in each schedule ... as he knew the alleged claims which allegedly gave rise to these claimed losses were false*" (see Cameron affidavit, paragraph 35).

18. The seventh group of allegations (points 7-14, 17 and 31) relates to various claims made by the defendant in respect of his dealings with his colleagues, Ms Mehta (the fifth respondent in the ET proceedings), Ms Ogunfowora, and Mr Kowalik.

19. It was part of the defendant's pleaded case before the ET (first detailed in his further particulars filed in June 2020) that, on two occasions in November 2019 (both when Ms Mehta was present), Ms Ogunfowora had yelled at him, had treated him in a demeaning way, and had referred to him as "*boy*". These were matters relied on by the defendant as acts of harassment related to sex and he stated that Ms Ogunfowora's language explained why he had referred to her as "*girl*" (something she had relied on in making a complaint about him). The defendant further contended that he had told Ms Mehta that he wanted to pursue a grievance in respect of Ms Ogunfowora and what he claimed to be her discriminatory conduct (both in relation to him and in respect of other men), and that Ms Mehta had failed to honour a promise that Ms Ogunfowora should not review his work.

20. The ET did not hear evidence from Ms Ogunfowora but heard testimony from both the claimant and Ms Mehta regarding these matters. It found the defendant's allegations relating to Ms Ogunfowora were "*false*" (paragraphs 55-56 of the liability decision); concluding that the suggestion that she had referred to him as "*boy*" was a "*late tactical adjustment designed to counter the inconvenient fact that she had raised an immediate, and truthful, complaint about his gratuitous and offensive reference to her as "this girl" and that her complaint would be substantiated by eye witnesses*" (ET paragraph 98). The ET further rejected the suggestion that the defendant had raised a formal grievance with Ms Mehta or made allegations of discrimination to her regarding Ms Ogunfowora, and found only that she had said she would try to avoid passing his

work to Ms Ogunfowora to review, not that she had promised not to do so (see the ET liability decision at paragraphs 51-52, 54, 106-107 and 112).

21. As for Mr Kowalik, in his witness statement (confirmed by a statement of truth) the defendant stated his belief that Mr Kowalik knew that the defendant had made an allegation of discrimination during a previous employment. It was his case that he had told Ms Mehta about this on 12 November 2019. The ET found, however, that this meeting did not happen and no such conversation took place (ET liability decision, paragraph 70).

22. The eighth group of allegations (points 16, 18, 19, 22 and 28) relate to various claims made by the defendant in respect of communications he said he had had with Mr Booth and Mr Vogelman (the second respondent in the ET proceedings). In his witness statement (confirmed by a statement of truth), the defendant had said he had sent emails to both Mr Booth and Mr Vogelman regarding his interactions with Mr Kowalik, that he had told Mr Booth about the harassment he had suffered from Q and Ms Ogunfowora, and about the fact that he had made a complaint of discrimination relating to a previous employer, and that on 21 November 2021, prior to the dismissal meeting, he had emailed Messrs Booth and Vogelman a grievance alleging race discrimination and sexual harassment. The ET rejected each of these allegations.

23. The ninth grouping comprises various meetings that the defendant had relied on in his ET claims, but which the ET had found had never in fact taken place.

24. The tenth matter relied on relates to the ET's questioning of the defendant's credibility in relation to covert recordings he had made (or said he had made) of various meetings or conversations (point 23). Finding that the defendant had indeed shown himself to be "*most adept at using his mobile phone to record conversations*", the ET did not find it credible that he had been unable to produce recordings of a number of the meetings that were in dispute, concluding that his explanations for these failings were "*false and entirely tactical, being designed to improve his case mainly by explaining the absence of material which he knew to be harmful to it*" (ET liability decision, paragraph 97).

25. Finally, the claimant relies on two additional matters drawn from the defendant's witness statement: (i) his contention in his witness statement that he had made clear to Mr Booth that he wanted to pursue a formal grievance against Ms Ogunfowora (point 21), and (ii) the allegation that his dismissal was because of his race, "*the respondents having previously expressed a preference that they wanted to add a German or European to the team*" (point 1). The first of these contentions was rejected by the ET on the evidence; as for the second matter, the claimant relies on the fact that the highest this aspect of the case was put in cross-examination was to the effect that Mr Vogelman (who is German) had once remarked that the claimant's London business would benefit from having more German speakers.

The application for permission

26. In the application notice, the grounds for the committal proceedings are stated as follows:

> "4. ... [The defendant's] claims alleging sexual harassment were known by him to be and were found by the ET to be simply false and pure invention. His allegations of sexual harassment alleged against the Sixth Respondent were false, were known by him to be false and were found to be so by the ET. His claims of alleged discrimination and harassment by the Sixth Respondent were false, were known by him to be false and were found to be so by the ET.
> 5. [The defendant] knowingly lied in the evidence he gave to the ET. Furthermore, he sought to bolster his bogus claim, by the fabrication of events.
> 6. This included the manufacture by him of a "work diary" purporting to contain a contemporary record of some of his allegations. He repeatedly put forward assertions which were completely untrue and which he knew to be completely untrue. He advanced numerous claims which he knew had no factual basis whatsoever, the alleged events on which they were premised never happened.
> 7. He was prepared to lie and he did lie in making wholly baseless allegations of sexual harassment, including a sexual assault, allegations

> of great seriousness against the Sixth Respondent. The fact of and nature of these false allegations caused the Sixth Respondent to develop a serious psychiatric illness.
> 8. He was contemptuous of the duty to tell the truth.
> 9. In acting as aforesaid, [the defendant] has knowingly made false statements of truth and/or has interfered with the due administration of justice by giving evidence which he knew was false, which he knew would be likely to interfere with the due administration of justice and which had the clear and obvious potential to do so."

The detailed particulars of the matters relied on are then set out in the affidavit of Mr Cameron.

27. It is the claimant's case that the defendant has acted in contempt of court in making false statements in his witness statement (as verified by a statement of truth), and/or has committed a contempt by adducing evidence on oath that amounts to an interference with the due administration of justice. In support of that case, the claimant relies on the ET findings referenced above, and upon its more general conclusions as to the defendant's conduct of those proceedings, summarised at paragraph 96 of its liability decision, as follows:

> "This has been an exceptionally troubling case to hear. ... In the main, we are compelled to decide between completely irreconcilable accounts of events, one of which must be put forward by a witness (or more than one) who is knowingly and deliberately giving sworn evidence which is wholly untrue. The implications of this are not lost on us. On the Respondents' case, the Claimant has simply made up allegations and has even manufactured a document and tampered with audio recordings in order to substantiate claims and secure legal remedies upon them. We agree with Ms Chan [then counsel for Mr Ajao] that the Tribunal must reflect with extreme care before making findings of such serious wrongdoing against anyone, and particularly someone who makes his living in financial services. Having done so anxiously and at length, we have reluctantly been driven to the conclusion that the Respondents are

> right. In our view, the Claimant has shown himself to be a witness contemptuous of his duty to tell the truth and unworthy of belief." contentious of his duty to tell the truth and unworthy of belief."

It is the claimant's contention that, without straying into the merits, the ET's findings, reached applying the civil standard of proof, are sufficient to demonstrate the required strong prima facie case (and see per Marcus Smith J at paragraph 24 *Patel v Patel* [2017] EWHC 1588 (CH)).

28. The claimant further submits that the public interest in permitting this application to proceed is self-evident: there is a clear public interest in holding to account those who deliberately tell lies in court and during the course of the litigation process (paragraph 25 *Patel v Patel*). Addressing the questions of proportionality and the overriding interest, the claimant contends that the likely seven-day trial entailed is warranted given that the allegations, if proven, would strike at the heart of the ability of courts and tribunals to do justice, and would have the potential to lead to the imposition of an immediate custodial sentence of substantial length.

The defendant's position

29. At this stage of the proceedings, the defendant has not sought to adduce any evidence. That is his right, and I draw no adverse inference in this regard, not least as I bear in mind that his current legal team played no part in the ET proceedings and I am told that, save for the material provided by the claimant, they do not have access to the papers that were used in those proceedings. On behalf of the defendant, Ms Horlick KC emphasises the disparity in resources between the parties, both before the ET and now. She tells me that, at the time of the ET hearing, the defendant was married with small children, and that he suffered – and continues to suffer – from depression and PTSD; she says that, not only did the defendant lose his job and his ET claims, he was ordered to pay costs, remains unemployed, and is now separated from his wife: he has lost everything.

30. It is the defendant's position that the application for committal fails to set out with sufficient particularity what breaches are alleged; that, it is contended, should be

apparent from within the four corners of the notice of application itself. Acknowledging the guidance provided by Cockerill J in *Deutsche Bank AG v Sebastian Holdings Inc and anor* [2020] EWHC 3536 (Comm) (as approved by the Court of Appeal in *Ocado Group plc v McKeeve* [2021] EWCA Civ 145), Ms Horlick contends that, having regard to the very different factual context of the present case, the particulars provided were inadequate to protect the rights of the defendant. Noting that consideration of the application for permission requires the application of a five-stage test ((i) strong prima facie case; (ii) not straying into the merits; (iii) public interest; (iv) proportionality; (v) the overriding objective) to *each* ground, it is said that the generalised and repetitive nature of the particulars provided meant that exercise could not properly be undertaken. Further, to the extent that reliance was placed on findings made by the ET applying the civils burden of proof, the defendant makes the point that the ET decisions would not be admissible at any committal hearing. Looking at each of the matters relied on (absent the ETs finding), it is contended that the claimant's case at most simply sets out the parties opposing accounts.

31. Further, to the extent that reliance was placed on findings made by the ET (applying the civil burden of proof), the defendant makes the point that the ET decisions would not be admissible at any committal hearing; looking at each of the matters relied on, absent the ET's finding, it is contended that the claimant's case, at most, simply sets out the parties' opposing accounts. Moreover, to the extent the reliance was placed on notes of evidence taken by the claimant's legal team during the ET hearing, that placed the defendant as a disadvantage. He did not have his own notes from the hearing and could not be expected to simply accept the record provided by the claimant.

32. These points were also relied on by the defendant on the questions of public interest, proportionality and the application of the overriding objective: this was a case requiring an assessment of witness credibility and evidence would need to be called on each and every issue and proved to the criminal standard; the matters relied on related back to what was said to have happened in 2019, which would inevitably impact on the quality of the evidence available. Moreover, there were particular issues relating to Q, who was said to have suffered psychiatric harm as a result of the allegations against her (a matter that was itself in issue, and would need to be established by medical evidence), and to the defendant himself, who continued to suffer ill health (although there was no

medical evidence before the court in this regard, Ms Horlick urged me to accept that this would not have been asserted in the schedule of loss had the defendant's counsel at that stage not been satisfied that this was the case).

My approach

33. The claimant seeks to bring proceedings for contempt of court in respect of conduct said to amount to interference with the due administration of proceedings before the ET, and in knowingly making a false statement in a witness statement verified by a statement of truth. There is no dispute that a contempt of court can arise in respect of ET proceedings (*Peach Grey and Co v Sommers* [1995] ICR 549), although it is equally common ground that permission to make a contempt application is required in these circumstances (**CPR** 81.3), and must be considered separately in respect of each ground of committal.

34. As for what is required in any application for committal, the nature of such proceedings requires particular attention to be given to the protection of the rights of the alleged contemnor (see the observations of Vos LJ at paragraphs 73-75 *Re L (A Child)* [2016] EWCA Civ 173); the test is whether "*such a person, having regard to the background against which the committal application is launched, be in any doubt as to the substance of the breaches alleged?*" (per *Re L*, and see per Cockerill J at paragraph 77 *Deutsche Bank AG v Sebastian Holdings Inc and anor* [2020] EWHC 3536 (Comm)). In essence, the procedural rules laid down by **CPR** 81 set out what is required to comply with this test; thus, by **CPR** 81.4 it is required (relevantly) that the application must be supported by written evidence given by affidavit or affirmation, and must include a statement of the nature of the alleged contempt (here: interference with the due administration of proceedings and knowingly making a false statement in a witness statement verified by a statement of truth), and a brief summary of the facts alleged to constitute the contempt. While it is not sufficient for the application notice to merely refer to the accompanying evidence (see the observations of Nicklin J at paragraphs 24-34 *QRT v JBE* [2022] EWHC 2902 (KB)), it need only set out a succinct summary of the claimant's case, to be read in the light of the background known to the parties, with the detail being set out in the evidence; see *Deutsche Bank* at paragraph 80, as endorsed by the Court of Appeal at paragraph 89 *Ocado Group plc v McKeeve* [2021] EWCA Civ 145.

35. Moreover, as the case-law makes clear, the discretion to grant permission should be exercised with considerable caution, and requires that there must be a strong prima facie case shown by the claimant, albeit that I should be careful at this stage not to stray into the merits of that case: the question for the court is not whether a contempt of court has in fact been committed but whether proceedings should be brought to establish whether it has or not; in this regard, there must be shown to be a public interest in the committal proceedings being brought; and I must be satisfied that the proceedings would be proportionate and in accordance with the overriding interest (see *Kirk v Walton* [2008] EWHC 1780 (QB) per Cox J at paragraph 29; *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280 at paragraphs 16-17; *Cavendish Square Holdings BV v Makdessi* [2013] EWCA Civ 1540 at paragraph 79; and *Patel v Patel* [2017] EWHC 1588 (Ch) per Marcus Smith J at paragraphs 29-30 and 31).

36. In considering these questions, I accept that the wider public interest requires that the court must guard carefully against the risk of allowing litigants to use committal proceedings to harass those against whom they have a grievance, or simply to re-litigate matters that have been determined elsewhere: I must exercise great caution before giving permission, and should not do so unless there is a strong prima facie case. I also recognise, however, that there is a legitimate public interest in drawing attention to the dangers of making false statements: if the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as a mere formality (see *KJM Superbikes* at paragraphs 17 and 24). As Marcus Smith J observed in *Patel v Patel*:

> "25. ... As is self-evident, and as cases make clear, evidence given to a court, whether it be in a pleading supported by a statement of truth, by witness statement, affidavit, or in oral testimony, this evidence should be true. Such evidence absolutely should not be deliberately false. There is an obvious and clear public interest in holding to account those who deliberately tell lies in court and during the course of the litigation process."

37. In determining which side of the line a particular case falls, it will always be necessary to consider matters in context. Thus I will need to consider: (i) the strength of the

evidence tending to show not only that the statement was false but that it was known at the time to be false; (ii) the circumstances in which the statement was made and its significance in the context of the case; (iii) any evidence as to the maker's state of mind, including his understanding of the likely effect of the statement; (iv) the use to which the statement was put in the proceedings and the length of time over which, and the circumstances in which, it was maintained (regardless of whether the court or tribunal in question would have reached the same decision even if that statement had not been adduced or maintained; see *Coghlan v Bailey* [2017] EWHC 570 (QB)); *KJM Superbikes* at paragraph 16; *Cavendish Square* at paragraph 79. In addition, I must consider whether the proceedings would be likely to justify the resources devoted to them and whether they will further the overriding objective of the **CPR**, that is: to deal with the case justly and at proportionate cost, having regard to the factors set out at **CPR** 1.1(2).

My decision

38. Addressing first the complaints made regarding the notice of application, I am satisfied that this is not a case where the defendant can legitimately complain of the particularisation of the case against him. Allowing for the potential disadvantage arising from the fact that those who now act for him were not involved in the ET proceedings, the defendant does not come to this matter as a stranger: he is fully aware of the claims he pursued before the ET, and knows the detail and significance of the evidence he gave, and of the findings that the ET made. Against this background, I do not consider that the defendant can be in any doubt as to the substance of the contempt alleged.

39. Moreover, the nature of the contempt (interference with the due administration of proceedings and knowingly making a false statement in a witness statement verified by a statement of truth) is clearly stated within the application notice, along with a brief summary of the facts relied on: that the defendant knowingly made false allegations of sexual harassment and discrimination against Q; that he knowingly lied in the evidence he gave to the ET and sought to bolster his claim by fabricating events, including by the manufacture of a work diary; that he repeatedly put forward assertions that were completely untrue, and advanced numerous claims which he knew had no factual basis as the alleged events on which they were premised never happened; that he was

prepared to lie, and did lie, in making baseless allegations of sexual harassment, including an allegation of sexual assault against Q.

40. The detail of the matters relied on is then set out within the affidavit evidence of Mr Cameron. While I accept that aspects of the particulars provided are repetitious, that seems to me to arise from an overabundance of caution on the part of the claimant: separating out points relating to individual meetings (for example), notwithstanding that the allegation made by the defendant as to what was said was essentially the same.

41. The fact that the application is adequately particularised does not, however, mean, that it should be allowed. Proceeding with great caution, I first need to be satisfied that the claimant has established a strong prima facie case. In this regard, I must reach my conclusion without straying into the merits: at this stage, the question I have to answer is not whether the defendant has in fact committed any contempt, but whether the case brought by the claimant, on each ground, is sufficiently strong such that proceedings should be brought to establish whether a contempt has been committed.

42. In respect of the statements made by the defendant – in his pleaded case, his witness statement, and in his oral evidence – whereby he made allegations of sexual harassment and an attempted sexual assault against Q (points 2-6 of the claimant's schedule), I am clear that a strong prima facie case has been established. This further extends to the defendant's evidence as to why he had not made a contemporaneous complaint about Q's conduct and had otherwise continued friendly relations with her (points 24-26). I am not making any finding as to the merits in this regard (I recognise, for example, that, as Ms Horlick emphasised, different people may respond to sexual harassment or to a sexual assault in very different ways), but I consider the fact of the ET's findings on these matters to be sufficient to demonstrate the strong prima facie case required.

43. Equally, I am clear that a strong prima facie case has been shown in respect of the charge concerning the entries in the work diary (points 29-30). I again reach this conclusion without descending into the merits; although Ms Horlick sought to emphasise the possible expert evidence that might be adduced in this regard, it would be wrong for me to speculate in this respect. In my judgement it is sufficient at this stage that the ET, aware of the significance of the work diary entries relied on and

having heard the defendant's evidence on the point, formed the conclusion that it was more likely than not that the relevant parts of the work diary had been "*manufactured*".

44. I reach a similar view in respect of the ET findings as to the defendant's explanation in relation to covert recordings he had made (or said he had made) of various meetings or conversations (point 23). The conclusions reached in this regard arise from the defendant's testimony before the ET, which was found to be "*false and entirely tactical*". Without descending into the merits of this issue, I am satisfied at this stage that the ET's findings demonstrate a strong prima facie case of contempt in this regard.

45. I also consider a strong prima facie case of a contempt arising from the defendant's evidence is established by the ET's findings: (i) in respect of the email alleged to have been sent to Mr Booth at 17:10 on 20 November 2019 (point 20), and (ii) in relation to the emails allegedly sent to Messrs Booth and Vogelman before the dismissal meeting on 21 November 2019 (point 22). Acknowledging that the ET was applying a civil burden of proof, it made clear findings on the evidence that the defendant was not telling the truth in relation to these emails (which were of some significance to the defendant's case of victimisation); I am satisfied that this is sufficient to meet the required standard at this stage.

46. Turning then to the separate allegations of harassment related to sex that the defendant made (in his further particulars, and then in his witness statement and oral evidence) against Ms Ogunfowora (points 10, 11 and 31), I consider that a strong prima facie case of contempt is made out. In reaching this view, I acknowledge that the ET did not hear directly from Ms Ogunfowora; it did, however, hear evidence in relation to the incidents in question from both the defendant and Ms Mehta (who was present on both occasions); doing so, the ET found it more probable than not that the defendant's allegations against Ms Ogunfowora were false and that he had made a "*tactical adjustment*" in advancing this case. Without straying into the merits, I am satisfied that a strong prima facie case of contempt has been established in this respect.

47. Having set out the matters on which I have found a strong prima facie case to have been established, I turn to the other side of the balance, to explain why I have not been satisfied to that standard in other respects.

48. In relation to the ET's finding on the question whether it had been agreed that three days of annual leave should be taken as sick leave (point 15), I am not persuaded that this is sufficient to demonstrate a strong prima facie case that the defendant *knowingly* made a false statement. Accepting that the ET found that the defendant's evidence in this regard was "*false*", the decision does not provide me with sufficient detail to be satisfied that a strong prima facie case has been established that the defendant *knowingly* gave false evidence.

49. As for the claim of race discrimination initially made against Mr Kowalik, but withdrawn before the full merits hearing, I am not persuaded that I can reach any conclusion as to the defendant's likely state of mind in this regard, and as to whether his apparent willingness to withdraw a particular allegation demonstrates a prima facie case of contempt. Similarly, given that no adjudication has ever been made on the defendant's schedule of loss (and updated schedule), other than providing potentially relevant context for other aspects of the case, I cannot see that there would be a proper basis on which I could conclude that this would establish a prima facie case of contempt.

50. I am also not persuaded that a strong prima facie case of contempt has been established in relation to the defendant's various allegations that he raised oral complaints in meetings or conversations with Ms Mehta relating to Ms Ogunfowora's conduct or about her reviewing his work (points 7-9, 13-14, 17 and 27), or about Mr Kowalik (points 12 and 27). Accepting that the ET rejected the defendant's evidence as to particular meetings (finding that they had never taken place), and found that he was wrong to assert that he had raised formal grievances, or that Ms Mehta had actually promised that Ms Ogunfowora would not review his work, I am not persuaded that the reasoning set out within the ET's decisions provides sufficient basis for me to be satisfied that a strong prima facie case is made out that the defendant *knowingly* gave false evidence in these respects. As Ms Horlick has observed, whether the raising of concerns amounts to a *formal* grievance may be a matter of nuance and interpretation; similarly, an agreement to try to pass work to a different reviewer may wrongly be perceived as a promise, and an erroneous assumption (even if informed by self-interest) need not equate to a dishonest falsehood. These are not matters on which I consider the claimant has been able to demonstrate the required standard.

51. I take the same view in respect of the various allegations relating to meetings and conversations the claimant said he had had with Messrs Booth and Vogelman, at which he contended he had identified issues (at times raised as formal grievances) in relation to Q, Ms Ogunfowora, and/or Mr Kowalik (points 16, 18, 19, 21, and 28). I acknowledge the clear findings made by the ET, to the effect that particular meetings never took place, and that the concerns alleged were never raised, but I consider these are more nuanced points that, on the material before me, do not meet the required standard to form the basis of committal proceedings.

52. Finally, on the allegation relating to whether Mr Vogelman had expressed a preference for more German or European team members in the London office (point 1), it seems to me that the application in this respect relies more on what was put to Mr Vogelman in cross-examination than on any particular finding by the ET. I am not persuaded that this provides a sufficient basis to establish the requisite strong prima facie case.

53. Having carried out an assessment of the bases on which the case for committal is put, I turn to the further matters of which I must be satisfied before I can allow these proceedings to be brought. In this case, it seems to me that the questions whether such proceedings are in the public interest, whether they are proportionate, and whether they would accord with the overriding objective, are interwoven. Accepting (as I do) that there is a strong public interest in demonstrating the dangers of making false statements in court and tribunal proceedings, I also acknowledge the wider concerns as to the need for the court's resources to be allocated in a proportionate way. Moreover, I am conscious of the need to ensure that the defendant is fairly able to address the charges made against him, ensuring that the parties are on an equal footing and can participate fully in the proceedings and that they, and their witnesses, can give their best evidence.

54. Having regard to these matters, I am satisfied that, even if I was wrong in my assessment of the strength of the case demonstrated in respect of points 1, 7-9, 12-19, 21, 27 and 28 (and the additional points identified in respect of the (withdrawn) claim against Mr Kowalik and the schedule of loss), these are not grounds that would satisfy the requirements of public interest, or proportionality, or that would advance the overriding objective. I do not, for example, consider it would be in the public interest to require the court to effectively oversee the litigation of a claim that had previously

been withdrawn. As for the various meetings and conversations at which concerns or grievances were alleged to have been raised, these are matters that have been litigated before a specialist tribunal; it would simply not be proportionate to re-open these points for the purpose of committal proceedings. Similarly, I do not consider it would be proportionate to permit the claimant to pursue a case for committal in respect of the question whether the defendant knowingly made a false statement in saying it had been agreed that he was to take three days of annual leave as sick leave, or in relation to how an allegation was put in cross-examination in respect of a one-off comment.

55. As for the matters on which I *have* found a prima facie case to have been demonstrated to the required standard, I do not consider it would be proportionate, or in accordance with the overriding objective, to permit committal proceedings to be pursued in respect of the ET's findings relating to the defendant's explanation about covert recordings of meetings (point 23). The case in this regard would be likely to require some form of agreed record of what precisely the defendant had said in evidence, but that gives rise to the difficulty that the ET hearing will not have been recorded and it would be difficult, at this stage, to obtain the Employment Judge's notes. Although I do not consider that such difficulties are necessarily fatal to committal proceedings, in this instance I am satisfied that this would be a disproportionate exercise and would be counter to the overriding objective.

56. I have reached a similar conclusion in respect of the allegations relating to emails said to have been sent on 20 and 21 November 2019 (points 20 and 22). Accepting that a strong prima facie case has been demonstrated that the defendant was dishonest in his account before the ET in this regard, I am not persuaded that it would be proportionate for these allegations to be the subject of trial in proceedings for committal, not least given the likely forensic exercise that would be required to investigate these matters at such a hearing.

57. I take a different view, however, in relation to the charge relating to the falsification of entries in the defendant's work diary (points 29-30). Accepting, as Ms Horlick submitted, that this is a matter that might require expert analysis and evidence (albeit that this would be highly focused, given that the disputed entries are limited), I am satisfied that there is a strong public interest in determining whether the defendant did

indeed commit a contempt of court in manufacturing evidence in this regard and that it would be proportionate, and in accordance with the overriding objective, to allow this matter to proceed.

58. I am also clear that there is a strong public interest in permitting the application in respect of the allegations of sexual harassment and attempted sexual assault made against Q (points 2-6). Although the related points - arising from the defendant's explanation for why he had not made a contemporaneous complaint but had maintained friendly relations with Q (points 24-26) – are less clear-cut in this regard, I see these as all part of the evidential matrix that will need to be considered on points 2-6; as such it is both in the public interest and proportionate to permit all these points to proceed. In so ruling, I take account of the points made by Ms Horlick as to the potential difficulties facing witnesses giving evidence about these events after so many years, and as to how this might impact on Q and/or the defendant if they are suffering health issues (as is alleged). Recognising such possible difficulties, I also bear in mind the serious nature of allegations of discrimination of this form; just as it is right to recognise the need for such complaints to be the subject of public adjudication, it is also important that an allegation of making a false complaint of this nature is similarly the subject of public judicial determination. Balancing the different interests in this regard, I am satisfied that it is in accordance with the overriding objective, and is both proportionate and in the public interest for these matters to proceed.

59. I take the same view in respect of the allegations of harassment that were made against Ms Ogunfowora (points 10, 11, and 31). Although I understand that these were pursued as allegations of harassment related to sex, I can appreciate the serious nature of the case pursued by the defendant, given that he was saying that, as a black man, he had been referred to as "boy". If that was in fact an entirely false allegation, made purely to counter a valid complaint that the defendant had referred to a female colleague as a "girl" – and I have found that the ET's decision demonstrates a strong prima facie case in this regard - then I consider there would be a strong public interest in permitting the current proceedings to be pursued on these points. Accepting that these points relate to events in 2019, it seems to me that the very specific nature of the allegation should mean that this is not something that will have been entirely forgotten. Moreover, the limited nature of the evidence relevant to these points (the three

individuals present on the two occasions in question would seem to be the defendant, Ms Ogunfowora and Ms Mehta) gives me further reassurance as to the proportionality of permitting this to proceed.

60. I therefore permit the claimant's application in relation to points 2-6, 10-11, 24-26, 29-30 and 31 identified in the schedule. As previously agreed, the parties are now directed to seek to agree directions, to be filed by 4pm 6 November 2024, with any points of dispute identified.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk