Neutral Citation Number: [2023] EAT 123

Case No: EA-2021-001006-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 September 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

LONDON UNITED BUSWAYS LIMITED	**Appellant**
- and -	
MR KAMAL HAMID DANKALI	**Respondent**

- -
- -

Edward Nuttman (solicitor, Ward Hadaway LLP) for the **Appellant**
No attendance or representation for the **Respondent**

Hearing date: 1 September 2023

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal was identified in the claim form as being represented by his trade union. The matter had been listed for a full merits hearing to take place in July 2021. In the run-up to that hearing, the claimant's representative wrote to the tribunal indicating that the last contact with the claimant, at which point he was overseas, had been in February 2021, and that all attempts to establish contact with him had failed. A judge directed that the full merits hearing be postponed, and, subsequently, that there be a preliminary hearing to consider whether the claim should be struck out.

During the course of the preliminary hearing the claimant's representative stated that he had blanket oral authority that enabled him to continue to conduct the claim on the claimant's behalf in his absence, including at trial. He confirmed that he had nothing in writing. He asked that the matter proceed to a full hearing on that basis, and on the basis that the only witness for the claimant would be his trade union representative. The respondent's representative queried whether there could be a valid oral authority to that effect, and invited the tribunal to direct that the claimant's representative give evidence which could be tested on oath or affirmation as to the terms of the agreement with the claimant. The tribunal did not adopt that course. In reliance on the representative's statement, it decided to refuse the strike out application and to direct that the matter be relisted for a merits hearing to proceed, whether or not in the continued absence of the claimant.

The respondent appealed.

Held: the tribunal had not erred by failing to consider whether the terms of the agreement between the claimant and the representative might be contrary to the common law doctrine of maintenance or champerty and hence unenforceable, with the consequence that there was no valid authority to represent. However, it did err by proceeding in the way that it did, without taking further steps to investigate and satisfy itself of the position. That was unfair to the respondent.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This is the appeal of the respondent in the employment tribunal, against the decision of the tribunal at a preliminary hearing held at London Central by CVP, declining its application to strike out the claim. I will refer to the parties as they were in the tribunal, as claimant and respondent.

2. The relevant background and chronology is as follows. The respondent is a bus company. The claimant worked as a driver, initially for its predecessor, but subsequently TUPE-transferred into its employment. Following a long period of sickness absence, he was dismissed at a meeting on 24 January 2020. In the internal sickness absence process he was accompanied at meetings by his PTSC trade-union representative, Mr Francis Neckles.

3. Following ACAS early conciliation, the tribunal claim was presented on 3 June 2020, identifying Mr Neckles of PTSC as the claimant's representative. Complaints were raised of unfair dismissal, including related to TUPE, of disability and race discrimination and for notice pay. The claim was resisted, the respondent being represented by solicitors. There was a case management hearing in November 2020, at which there was no attendance for the claimant. The minute recorded that the matter remained listed for a full merits hearing on 27 to 29 July 2021. So far as able, the judge summarised the claims and issues and gave directions.

4. There was a further hearing on 17 December 2020. This was attended by Mr Ibekwe of PTSC union for the claimant and a solicitor for the respondent. Some complaints had previously been struck out, but that decision had been revoked upon review, on the basis that the claimant's representative had not had a fair opportunity to make submissions. The strike-out application was renewed, but at that hearing, those particular complaints were in any event withdrawn. At that hearing Mr Ibekwe indicated that the complaints being pursued were of ordinary unfair dismissal, wrongful dismissal and failure to comply with the duty of reasonable adjustment. It was identified

that in respect of all three complaints reliance was placed upon guidelines relating to dealing with long-term sickness absence, dating from prior to the claimant's transfer into the respondent's employment, which were said to have transferred with him and to have been incorporated into his contract. Fresh directions were given, including for the claimant to provide medical records by 26 January 2021 and for a schedule of loss and disclosure in April.

5. In the period from March to June 2021, the respondent's solicitors chased for disclosure of the claimant's medical records. In the course of these exchanges they sought clarification of whether a freestanding complaint of failure to comply with the duty of reasonable adjustment was still being maintained. During this period the tribunal made a revised order for the claimant to provide medical evidence by 6 July 2021.

6. On 11 July 2021 Mr Neckles wrote to the tribunal. In summary, he stated that the claimant had travelled to his home country of Eritrea in November 2020. He wrote: "We have spoken to him in February 2021 but since then we have not heard from him." He wrote that they had been trying to contact the claimant by various means that he set out, but without success. He wrote that they were very concerned that some kind of emergency was preventing the claimant from making contact, and for his well-being. However, they considered that the hearing in July could proceed, as they put it, "even if the claimant is considered or designated as missing". Mr Neckles asserted that that was because the burden of proof rested with the respondent, the claimant's side would be calling only his trade union representative as a witness and there would be little prejudice to the respondent, as the primary evidence would be documentary.

7. On 22 July 2021 the tribunal wrote that Employment Judge F. Spencer had directed that the hearing opening on 27 July be vacated as "it would appear that the claimant is not actively pursuing his claim and his representative is unable to take instructions. [The judge] is therefore considering striking out the claim because it is not being actively pursued." The letter indicated that if the

claimant's representative objected to that course, he should write to the tribunal within 14 days stating what instructions he had received from the claimant: (1) indicating that he wishes to proceed and (2) that he had withdrawn his disability discrimination claim. It appears that there was no further communication from the claimant's representative in response, to that effect or otherwise. However, on 8 September 2021 the tribunal wrote again that EJ Spencer had now directed that there be a preliminary hearing to determine whether to strike out the claim "on the basis that the matter cannot proceed in the absence of the claimant and a lack of recent instructions."

8. That preliminary hearing took place on 6 October 2021, before EJ Nicolle. Mr Neckles appeared for the claimant and Ms Blythe, a solicitor, for the respondent. The tribunal declined to strike out the claim. The judge directed that the matter should proceed to be listed for a hearing at the earliest available date, to take place regardless of the claimant's attendance. Written reasons were subsequently provided. In its reasons, the tribunal referred to there having been previous case management hearings. It noted that Mr Neckles had confirmed that the only complaints being pursued were for unfair dismissal and breach of contract; and a freestanding complaint of disability discrimination was no longer pursued. The tribunal referred to Mr Neckles' letter of 11 July 2021 and noted that he had said that he had had no communication with the claimant directly or indirectly since February. The tribunal then summarised the parties' submissions.

9. The basis of the respondent's case, said the tribunal, was that the matter could not proceed in the absence of the claimant and as a result of lack of recent instructions from him to his union representative. They relied on all five limbs of rule 37. Particular issues highlighted were said to be the claimant's non-attendance and that continuing with a hearing where there would be no reasonable prospect of success would be a waste of time. Further issues related to the ability of the claimant to demonstrate a disability for the purposes of the provisions he relied upon, if applicable, and how remedy and mitigation would be assessed if he succeeded.

10. Submissions made by Mr Neckles, identified by the tribunal, included that it was the claimant's prerogative to choose whether to give evidence, that the respondent had already had an unsuccessful attempt at securing a strike-out on the basis that complaints had no reasonable prospect of success, and that the claimant had given full disclosure. He also asserted that the burden was on the respondent to show the fairness of the dismissal and there was no need for the claimant to give evidence. At paragraph 12, the tribunal said this of Mr Neckles:

> **"He says the claimant gave instructions at the outset of the claim to do what is ever necessary, without the need to revert and therefore says the lack of instructions is not an issue. Mr Neckles is not able to provide any written evidence as to the scope of his instructions and the unconditional authority he says has been bestowed upon him to take all actions necessary in the conduct of the claim. He says that is not how the union works. Things are much more informal."**

11. The tribunal also referred to the claimant having previously presented a schedule of loss which involved seeking compensation over a period of 78 weeks. The tribunal added: "Mr Neckles confirmed that as far as he was aware, the claimant had not been able to mitigate his loss and had not received any benefits to which the recoupment regulations would apply."

12. In the remainder of the decision the tribunal set out its conclusions. I will set out this part of the decision in full.

> **"15. The starting point is to consider Rule 37 and the discretion which a tribunal has to strike out a claim. It is important that I do not revisit a decision previously made by Employment Judge Russell based on whether the underlying claims have a reasonable prospect of success. I have avoided doing so. My sole consideration is whether given the lack of communication from the Claimant this is a case where it would be appropriate to strike out the claim given the basis upon which Mr Neckles says it would continue to be conducted.**
>
> **16. Looking in turn at each of the various limbs of Rule 37(1).**
>
> **(a) <u>That it is scandalous or vexatious or has no reasonable prospect of success.</u>**
>
> **17. I do not consider the conduct to be scandalous or vexatious. Whilst I consider that there may be a limited prospect of success absent the Claimant's attendance to give witness evidence I do not consider that it follows automatically that the claim has no reasonable prospect of success. It may well be that the claim is potentially weak but that is not in itself sufficient for it to be struck out.**

(b) That the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.

18. It is not suggested that Mr Neckles in his conduct of the proceedings has been in any way scandalous, unreasonable or vexatious. Given that his position is that he has unconditional authority to take all actions necessary in the claim I do not consider any basis exists for this limb to be made out.

(c) A party has not complied with any of these Rules or with an order of the Tribunal.

19. I find this more difficult as there have been various elements of the claim where arguably the Claimant has not provided full disclosure of evidence. Nevertheless, the position as now stated by Mr Neckles is that the Claimant has made full disclosure, he is not going to be providing any medical evidence as to the existence of disability, but rather relying on what he says is the Respondent's failure to give consideration to whether disability potentially applied and the enhanced benefits which may therefore have arisen under a collective agreement should it be enforceable, and that failure to provide evidence of mitigation would be to the Claimant's disadvantage. I am therefore not sufficiently satisfied that there has been a sufficiently serious failure to comply with Tribunal Orders that it would be justified to strike the claim out on this basis.

(d) The claim has not been actively pursued.

20. At the outset I considered this to have been the most of likely ground for strike out given the acknowledged position that the Claimant has been incommunicado since February 2021. Nevertheless, based on Mr Neckles' unequivocal confirmation that he has unconditional authority to take all steps in the claim, that the intention was to pursue the claim, that he was a participant in today's hearing and has been involved in correspondence throughout I do not consider that it can be said the claim is not being actively pursued. It is true that it is being pursued in a highly unusual manner. That in itself gives rise to issues but to say the claim was not being actively pursued because it was being done on behalf of, rather than with the direct involvement of a claimant, would in my view be wrong. There will be occasions, for example, a claimant with a mental health incapacity who is not capable of giving instructions where the claim would be pursued absent their direct instructions. It may also be pursued by a deceased claimant's estate. So, whilst unusual it is not wholly unprecedented and does not in itself provide an automatic reason why there should be a strike out.

(e) That the tribunal considers it is no longer possible to have a fair hearing.

21. Whilst I accept the hearing will have unusual elements they will inevitably be to the Claimant's disadvantage. The Tribunal will have to make findings of fact and conclusions and if necessary assess mitigation. Absent the Claimant that can only be to the his disadvantage but it does not mean that the hearing is not a fair hearing. Certainly as far as the Respondent is concerned it has the cards stacked firmly in its favour but it does not mean that it is not receiving a fair hearing.

22. The Claimant has the prerogative, as Mr Neckles argues, whether to give witness evidence or not, normally this is a right exercised or not in criminal proceedings rather than civil proceedings but nevertheless there is no absolute obligation on a party to give evidence. The fundamental principle is that each party has a discretion

> **as to which witnesses it chooses to call, of course that normally would include the claimant, but there is no automatic obligation for it to do so.**
>
> **Final conclusion**
>
> **23. Therefore, having carefully weighed up factors on what is in my view a marginal situation I have nevertheless found the balance of prejudice, after weighing all of the relevant factors, that it would not be appropriate to strike out the claim and therefore the claim should proceed and be listed for a hearing at the earliest available date to take place regardless of the Claimant's attendance. In other words the non-attendance of the Claimant would not be a reason for a further postponement."**

13. The original grounds of appeal raised a range of points of challenge to this decision. HHJ Shanks considered the notice of appeal on paper and was of the view that it did not raise any arguable grounds. In relation to a reference to maintenance and champerty, he observed that it was not clear what the point being raised was, although I note that the copy of the notice of appeal that was before him had a few words cut off in the photocopying process. HHJ Shanks also observed that there was no evidence that any such point was raised with the employment judge.

14. The respondent asked for a rule 3(10) hearing. That came before HHJ Wayne Beard. Mr Nuttman, a solicitor, appeared for it. Paragraphs 9, 11 and 14 of the grounds of appeal were permitted to proceed. All other grounds were dismissed. As drafted, those three paragraphs between them raise, in substance, the following points of challenge. First, the tribunal is said to have erred, because, in order to be entitled to conduct the proceedings in the claimant's absence, his representative should have been required to produce some written evidence of his authority to pursue the claim. He had confirmed that there was no such written document; and therefore there could also be no power of attorney or assignment. Secondly, the tribunal erred because it "did not consider, or misapplied, the common law rule against maintenance and champerty. The claimant's representative's pursuit of the case in circumstances where he has no vested interest is an abuse of process."

15. In his reasons for permitting those grounds to proceed, HHJ Wayne Beard noted that it was

not suggested that, at the tribunal hearing, reference had been made to maintenance or champerty, specifically by using those words, but that submissions were made on facts said to underpin such a contention, being that PTSC union relied on financial receipts from pursuing claims on behalf of parties before employment tribunals, and also that Mr Neckles had been previously found in another case to have interfered with evidence, being meta-data. He considered it arguable that, in those circumstances, it was a procedural failing not to require evidence on oath or affirmation to be given by the representative and cross-examination of him upon it. He also observed that there may be a wider point of interest, given the provisions as to rights of audience of trade union representatives in section 6 **Employment Tribunals Act 1996**.

16. As I have noted, at the hearing before the tribunal, the respondent was represented by Ms Blythe. It is represented today, as at the rule 3(10) hearing, by Mr Nuttman. He clarified to me that at the rule 3(10) hearing he had sought to convey what he understood from Ms Blythe that she had said to the employment tribunal. The context was that, prior to the tribunal hearing, there had been no indication that Mr Neckles' position might be that he had carte blanche oral authority which enabled him to continue conducting the claim in the claimant's absence. Upon his making that assertion during the hearing, Ms Blythe responded to the effect that there was an issue as to whether it was possible to assign, or give to a representative, such a blanket authority in an effective way; and she indicated in so many words that she wished to be permitted to cross-examine Mr Neckles as to what he said precisely was the nature and terms of his union's agreement with the claimant.

17. Mr Nuttman clarified that, at the rule 3(10) hearing, two particular matters were identified, that he, Mr Nuttman, understood from Ms Blythe that she was aware of at the time of the tribunal hearing, and would have intended to question Mr Neckles about, had she been permitted to cross-examine him. The first was that there was a provision in PTSC's annual return for 2020, which

referred to it having received some £59,251 income from court actions. The second was that in a previous case an employment tribunal had found that Mr Neckles had manipulated the meta-data of a witness statement with the intention of misleading the tribunal as to when that statement was produced. Mr Nuttman clarified that it was not suggested to HHJ Wayne Beard, nor being said now, that Mr Blythe had identified to the tribunal that these were particular points that she wished to raise in cross-examination. Rather, the EAT was being told that this was what she had in mind.

18. Following the rule 3(10) hearing, which was evidently attended as an observer by either Mr Ibekwe, or possibly a PTSC union colleague, Mr Ibekwe wrote to the EAT applying for a review. He asserted, in summary, that the maintenance/champerty point had not been run before the employment tribunal, which had not had the opportunity to consider it. He also asserted that it had not hitherto been run before the EAT, and so permission to amend was required. He also asserted that it was unfair that the respondent had not been required itself to provide sworn evidence to support its allegation that the doctrine of maintenance or champerty applied. He sought various further directions from the EAT. HHJ Wayne Beard declined that application, indicating that these matters were suitable to be argued and considered at the full appeal hearing.

19. The claimant's Answer to this appeal, also prepared by Mr Ibekwe, relied on the reasons given by the employment tribunal for its decision and also, in summary, upon the following matters. It is said that the tribunal properly exercised its discretion to refuse to strike out, having had regard to all essential matters. These included that PTSC had been properly entered on the record and had had conduct of the proceedings from the outset, and that the tribunal had had regard to what the Answer called the spirit of section 206, which gave PTSC the power or obligation to protect the interests of its member. I assume this was intended to be a reference to that section of the **Employment Rights Act 1996**, and from what I have read my understanding is that the underlying point that PTSC seeks to make is that, in circumstances where it had been unable to make contact

with its member, it felt that it had a duty to him, so far as possible, nevertheless to, as it were, keep the show on the road.

20. The Answer also maintains that the respondent (now the appellant) raises matters in this appeal that were not raised before the tribunal, being, as the Answer puts it; "extremely serious and frivolous allegations about the integrity, honesty and credibility" of the union, Mr Ibekwe and/or Mr Neckles, without being required to do so on oath. The Answer asserted that, in any event, the relationship with the claimant was not one of champerty, and PTSC did not act for profit in these proceedings. It made further observations about the flexible modern nature of the doctrine of maintenance and champerty in any event. That Answer, which was filed in December 2022, also stated that in any event the claimant "has returned back to the UK and is therefore in a position to oversee the giving of instructions or directions" to PTSC in the conduct of the proceedings.

21. On 8 August 2023 Mr Neckles emailed the EAT indicating that the claimant had informed the union that he wished to apply for ELAAS representation. The EAT's administration replied noting that Mr Neckles was on record as representing the claimant and that, in any event, ELAAS representation is not provided to respondents to appeals, but only to qualifying appellants at rule 3(10) or preliminary hearings. He was asked to notify the EAT if he was coming off the record.

22. Skeleton arguments were due for today's appeal hearing on 18 August 2023. None has been provided for the claimant before or since that date. Yesterday Mr Neckles applied for a postponement of today's hearing on the grounds of his own ill health. That was opposed by the respondent's solicitors. I refused that application for reasons that were emailed yesterday to the parties.

23. Today there was no attendance by, or representation for, the claimant. Just prior to the hearing, the EAT's administration telephoned Mr Neckles, who confirmed that he was aware that

his application yesterday had been refused, and indicated that he would not be attending, as he was not well enough. I note that no fresh application or submission with regard to postponement was made. In the circumstances I have thought it appropriate to proceed with this hearing. I have taken into account everything I have read in support of the substantive basis upon which this appeal is resisted by the claimant including, in particular, the contents of the application for a review of HHJ Wayne Beard's decision and the contents of the Answer, to which I have already referred. Further, I have put to Mr Nuttman for his response, a number of further points which it occurred to me might well have been raised by a representative for the claimant, had anyone attended.

24. I have before me bundles of documents and authorities prepared by the respondent, to which some further documents arising from the litigation were added at my direction. I have a short skeleton argument from Mr Nuttman and have heard extensive oral argument from him this morning. As I have already noted, he referred to an extract from PTSC's annual return for 2020, showing income received from court actions. He also referred to a number of examples of decisions of employment tribunals which have made various findings adverse to Mr Neckles, PTSC union and/or other PTSC union representatives over the years. Copies of these decisions were included in the authorities bundle, although they are being relied upon, I observe, not as authorities in support of the legal argument today, as such, but effectively as evidence.

25. As Mr Nuttman confirmed, these materials were not referred to before the tribunal. That is not a criticism of Ms Blythe, given, as Mr Nuttman has described, that the respondent's solicitors had no reason to suppose that Mr Neckles was going to assert that he had blanket oral authority to continue to represent the claimant, until he did so during the course of the hearing itself. Nevertheless, the fact that these materials were not before, or referred to, the employment tribunal, is potentially relevant to my assessment of whether it erred in law as advanced by the live grounds of appeal.

26. Mr Nuttman made submissions about what he described as the long-established common law duty of maintenance and champerty. He submits, in summary, that maintenance can be defined as the improper support of litigation in which the supporter has no legitimate concern. This is usually by way of third party funding, although it has been said that assignments of causes of action may "savour of maintenance". Champerty occurs where the third party pays some or all of the costs of a litigant, in return for being given a share of the proceeds, if any, of the litigation.

27. Mr Nuttman traced the evolution of these doctrines, and the exceptions that have been created to them, since the 1960s, by reference to various authorities and statutory provisions. The modern position, he concluded, is that maintenance and champerty are no longer either a tort or a crime, but that a contract which amounts to entailing maintenance or champerty is unenforceable. There are statutory exceptions for conditional fee agreements (CFAs) and damages-based agreements (DBAs) which meet certain conditions, including that they must be in writing.

28. Mr Nuttman acknowledged that, so far as he is aware, there is no authority specifically addressing whether, or, if so, how, these doctrines apply to the conduct of litigation or provision of advocacy services in employment tribunals. But he submitted, by reference to provisions of the **Legal Services Act 2007** and the discussion in the decision in **Factortame v Secretary of State for Transport** [2002] EWCA Civ 932, that the principles underlying these doctrines should be taken to apply in employment tribunals, and indeed that the policy of public protection underpinning them should apply with particular force in that context. He also submitted that the discussion in the authorities shows that the principles exist to protect both parties to the litigation, not just the party to the agreement with the representative which is impugned in the given case.

29. Mr Nuttman's submission was therefore that a CFA or DBA in respect of employment tribunal proceedings would be unenforceable unless it was in writing and met the other statutory

conditions. If it was unenforceable, then it could not validly confer authority on the putative representative. Were that the position in the present case, that would have had a direct bearing on whether the claim should have been struck out on the basis that the claimant himself was not actively pursuing it, and that PTSC could not assert that it had a valid authority to continue to pursue it on his behalf in his absence.

30. Mr Nuttman submits that the tribunal was therefore required to consider whether the doctrine of maintenance and champerty applied in that way in this case, on the footing that there was a potential issue as to whether there may have been an agreement whereby the union or Mr Neckles would be entitled to some share of, or payment from, any compensation awarded, if the claimant succeeded. What Mr Neckles said at the hearing was sufficient to put the tribunal on enquiry, such that it needed to investigate whether this might be the case.

31. Mr Nuttman submitted that this would have been so even if nothing at all had been said by Ms Blythe. But the fact that she flagged up the issue, and applied to cross-examine, reinforced the submission that the tribunal erred by not at least requiring Mr Neckles to give sworn evidence and to submit to cross-examination as a condition of being possibly permitted to continue to conduct the claim. Mr Nuttman stressed that, as emphasised in various passages in **Factortame**, the application of the doctrines of maintenance or champerty is an important matter of public policy.

32. I should note that Mr Nuttman confirmed that it was *not* suggested to the tribunal by Ms Blythe, nor was it part of his case today, that this is a case where it may be, in fact, that proceedings have been instituted from the outset by PTSC without the claimant's knowledge or authority at all.

33. The second limb of the appeal is to the effect that, even if there was not sufficient to put the tribunal on enquiry as to the possibility that there might be a representation agreement that involved maintenance or champerty, the tribunal still erred by accepting what Mr Neckles told it about the

oral blanket authority that he had, in the absence of written evidence of that authority, and without at the very least requiring him to submit to cross-examination as a condition of being possibly permitted to continue to represent the claimant. Mr Nuttman relies upon a number of features of the facts and circumstances as they stood at the time of the employment tribunal hearing in support.

34. The first is that it was positively asserted that the claimant had not been in touch with Mr Neckles, and that all efforts to contact him had failed since February of that year. Mr Neckles had not, following Judge Spencer's first order, put forward any evidence of instructions or resumed contact. The second is that the claimant remained absent. The third is that Mr Neckles was asserting that he had a blanket authority, but confirmed that there was nothing in writing. These facts alone, submitted Mr Nuttman, meant the tribunal should not have allowed the matter to proceed merely on the basis of what Mr Neckles had told it.

35. In his oral submissions today, Mr Nuttman clarified and confirmed that he was not saying that anything specifically turned on the fact that Mr Neckles is not a solicitor or barrister. He submitted that the approach of the tribunal should have been the same, if it had been a solicitor or barrister representing the claimant on this occasion, and all the other circumstances had been the same.

36. Rule 37(1) **Employment Tribunals Rules of Procedure 2013** provides as follows:

> **"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—**
>
> **(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 or response (or the part to be struck out)."**

37. **Employment Tribunals Act 1996** section 6(1) provides:

> **"A person may appear before an employment tribunal in person or be represented by—**
>
> **(a) counsel or a solicitor,**
>
> **(b) a representative of a trade union or an employers' association, or**
>
> **(c) any other person whom he desires to represent him."**

38. I am content that Mr Nuttman's submissions which I have described are a fair brief summary of the general state of the law on maintenance and champerty. In the very recent decision of the Supreme Court in **R (PACCAR Inc) v Competition Appeal Tribunal** [2023] UKSC 28, to which I also drew Mr Nuttman's attention, Lord Sales JSC encapsulated it in this way:

> "**The common law was historically hostile to arrangements for third parties to finance litigation between others. According to the doctrines of champerty and maintenance, such arrangements were generally regarded as unenforceable as being contrary to public policy according to the test identified in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006: see the discussion in *Giles v Thompson* [1994] 1 AC 142 and *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 ("*Factortame (No 8)*"). But over the last 30 years there have been substantial changes to litigation funding in England and Wales. Legislation has been passed which has affected the courts' assessment of the extent to which public policy supports the conclusion that particular funding arrangements are unenforceable: see *Factortame (No 8)*. As Henderson LJ observed, funding of litigation by third parties is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice. The old common law restrictions on the enforceability of third party funding arrangements have been relaxed in various ways, with the result that this industry has developed."**

39. As I will explain, whether or how the doctrines of maintenance or champerty apply to the provision of litigation or advocacy services in-house, by a trade union to a member, in the employment tribunal context, is not something that I have to determine in order to decide this appeal.

40. I turn to my conclusions. As I have noted, there are two specific general grounds of challenge before me. It is convenient, first, to consider the challenge relating to the law of

maintenance and champerty. It is important to note that it is plain that the union and Mr Neckles deny that there was or is, factually, any arrangement with the claimant in this case that would fall foul of the doctrine, if indeed it could apply in this context. Mr Nuttman confirmed to me that the respondent is not looking to the EAT to resolve that factual issue, and indeed I would not be in a position to do so.

41. As to whether the tribunal erred by not taking more steps than it did to investigate the factual position and to consider whether it might fall foul of the law of maintenance or champerty, my starting point is that an employment tribunal generally cannot be criticised for not considering a possible issue which is not, or not sufficiently, raised before it, unless it so obviously jumps out from the material before the tribunal, that it is incumbent upon the tribunal to look into it on its own initiative.

42. Mr Nuttman forcibly submitted that this is a doctrine of public policy that exists to provide protection to potentially vulnerable litigants and indeed to their opponents, so that there is a proactive duty of enquiry. But he nevertheless accepted, as he was bound to do, that there has to be something sufficient in the particular case, at least to put the tribunal on enquiry; or the matter has to have been sufficiently raised by a party and, I would add, by advancing some sufficient arguable basis or potential basis for doing so. A tribunal would not be obliged to investigate such a matter even if invited to do so by a party, if they could not put forward any reasonable basis for having done so.

43. As I have said, I appreciate that Ms Blythe did not consider, until Mr Neckles said what he did during the hearing, that there might be a potential issue. I accept that that also explains why it was not raised in the respondent's own skeleton argument for the purposes of the tribunal hearing. But the fact remains that in these circumstances Ms Blythe raised the matter only in the very limited way that she did, without referring in terms to maintenance or champerty nor expounding upon

them in the manner that Mr Nuttman has today before me. Nor did she refer to other matters that she might seek to rely on, and in particular the significance that she might seek to attach to the accounts in the union's 2020 annual return, were she permitted to cross examine.

44. In all the circumstances I do not think that the tribunal can be criticised for not having sought further to investigate whether the union's agreement with its member might be affected by the doctrine of maintenance or champerty, and the associated questions of law as to whether or how it might apply to litigation and representation in employment tribunals. This is not the type of matter which routinely arises before employment tribunals. It more commonly arises in personal injury, group litigation and other forms of civil litigation. It is a specialist area where the authorities and legislation are by no means straightforward to navigate. It is not part of tribunals' daily diet.

45. In all the circumstances, I do not think that Mr Neckles' remark, and Ms Blythe's brief reaction, and application, no doubt thinking on her feet, were sufficient to put the tribunal on enquiry specifically as to this issue relating to the doctrine of maintenance or champerty, such that it erred, for *that* reason, by not doing more than it did, in response to what Mr Neckles said, and directing the matter to proceed to trial. For this reason, I conclude that this ground fails, and that the tribunal did not err in not considering, or by misapplying, the common law rule against maintenance or champerty.

46. That being so, I do not need to consider whether, in principle, the law of maintenance and champerty applies in this context, or, if so, how. It is not in the event necessary for me to decide that in order to dispose of this appeal, and bearing in mind the potentially wider ramifications and that I have not heard full contested argument on the issue of law today I will refrain from doing so.

47. Mr Nuttman invited me, nevertheless, to give some further guidance as to what set of factual circumstances ought to be considered in future as sufficient to put an employment tribunal on

enquiry as to whether a party might be represented under an arrangement which would infringe the rules against maintenance and champerty, assuming, as is his case, that they apply in the same way in the employment tribunal context as in other civil litigation. However, I decline to give such guidance in the abstract, as the factual permutations that may arise are too many and too varied, and I have not had to form a view as to the underlying legal question.

48. I turn to the second strand of the live grounds of appeal, being that in all the circumstances of this case, and regardless of whether the tribunal erred by not considering that there was a potential issue to do with maintenance or champerty, the tribunal erred by not requiring the union or Mr Neckles to produce some evidence of the blanket authority which he claimed to have, rather than relying upon what it described as paragraph 20 as his "unequivocal confirmation that he has unconditional authority to take all steps in the claim."

49. As to this, employment tribunals may sometimes be confronted with circumstances or developments in the course of an ongoing case, which give cause for concern as to whether a representative is acting with sufficient or proper authority or instruction from the party concerned. Such concerns can arise in a very wide variety and range of different scenarios, and how appropriately to manage them where they do arise can be a particularly delicate and challenging matter.

50. Mr Nuttman draws a principled distinction between assertions or submissions made by a representative as to their authority, and the presentation of evidence, whether written or oral. However, the starting point is that there is a presumption that tribunal representatives are generally acting with the authority and on the instructions of the party concerned. Tribunals do not routinely in every case require evidence of written authority to be produced. Parties are also discouraged from communicating with the tribunal simultaneously with their representatives, so as to ensure clear and consistent lines of communication.

51. However, that does not mean that, where developments may be said to give rise to a potential cause for concern as to whether a representative does have the authority or instructions that they claim to have, the tribunal can or should do nothing, though it may need to proceed with some care. For example, sometimes one party may raise with the tribunal an issue about another party's representative, or representation arrangements, which is not properly the concern of the tribunal.

52. In this case, however, I agree with Mr Nuttman that there was a potential cause for concern that the circumstances were, as the judge himself put it, highly unusual. The claimant's own representative had informed the tribunal that he had received no proactive contact from the claimant, who was overseas when last heard from months ago, and all his efforts to contact the claimant had failed. Ordinarily litigation of this sort, whether as to ongoing case management, or at the trial itself, cannot properly be conducted by a representative unless they have a current line of communication with their client, whether or not the client attends hearings.

53. EJ Spencer was plainly right, in light of Mr Neckles' July 2021 letter, to raise a serious concern as to whether the claimant was actively pursuing his claim, serious enough to postpone the trial while further information was sought. That strong cause for concern was bound to have been reinforced by the fact that Mr Neckles did not provide any response to her initial direction, although it is not hard to understand why, rather than then proceeding, as she might have, to make a strike out order, Judge Spencer decided to proceed to list the matter to be considered at a preliminary hearing.

54. At that hearing, for the first time Mr Neckles then asserted that he had informal oral authority to continue to conduct the litigation on behalf of the claimant, effectively as he saw fit. On his own account, he had already to some extent been doing so in the correspondence that had taken place between March and June, as he had had no further contact with the claimant since

February. Further, there had, during that period, been a failure to comply with certain directions. While the tribunal in its decision on the strike-out application considered that that non-compliance was not *in itself* so serious or pervasive as to warrant a strike-out, in this case it was being relied upon also, for a different purpose, being in support of the contention that the litigation could not be, and was not being, fairly conducted, given Mr Neckles' lack of contact with his client ever since February.

55. In general, when a tribunal is presented with a situation in which there may be some concern as to whether a representative has sufficient current instructions or authority, it will be a matter for the judgement of the judge concerned as to how to manage that concern. There are a range of tools available to the judge confronted by such a situation, who considers that some further steps need to be taken to investigate it. These might include requiring written or other forms of evidence to support assertions that there is sufficient authority or instructions, or could include, in certain circumstances, the tribunal seeking to communicate directly with the party concerned as well as with the representative. See, for example, albeit in a different context, the recent observations of the Court of Appeal in **Phipps v Primary Education Services Ltd** [2023] ICR 1043 at [43].

56. I would not therefore be disposed to say that in any and every case where such concerns arise, it is not sufficient, and is an error, for the tribunal to accept some assurance or statement made by a representative, in a letter or at a hearing, without requiring independent written evidence or sworn witness evidence to be provided in support. The EAT should only generally interfere in such decisions on usual irrationality or *Wednesbury* grounds, or where there has been some principled error of law on the part of the tribunal.

57. However, in the present case the circumstances were highly unusual and concerning. It could fairly be said that what Mr Neckles had written and then told the tribunal gave rise to at least as many questions as it answered. One way or another, the matter needed to be explored further

before the tribunal decided whether to strike out at that stage or, if not, what further steps it might need to take before permitting the case to proceed. I have come to the conclusion that in this particular case the judge did err by proceeding, simply on the basis of the very limited statement that had been made by Mr Neckles at the hearing, to take a decision to decline to strike out on that basis, and, having decided not to do so, to direct that the matter proceed to be relisted for a full merits hearing, without further ado. That was not fair to the respondent, and not an option reasonably open to the judge as a way of proceeding. On the very particular facts of this case, this ground of challenge therefore succeeds.

58. As Mr Nuttman acknowledged during the course of argument this morning, it also follows that this is not a case in which I can say that the only correct decision with the tribunal could have arrived at, at the point of the hearing on 6 October 2021, would have been to strike out the claim. What was required was further proactive steps by the tribunal to investigate and satisfy itself as to the factual position regarding authority and representation in respect of the claimant, and then to consider the options in light of the picture emerging. Those might have included a decision to strike out on the basis that the claim was not actively being pursued, or possibly, for example, a decision to stay the claim for a further period to enable further steps to be taken, although the interests of the respondent and of finality in litigation would of course need to be kept firmly in mind when considering whether to direct a stay, and if so, on what basis and for how long.

59. I will therefore simply quash the particular decision of the tribunal to refuse to strike out the claim, which is the subject of this appeal, but I will not substitute a decision striking out. The matter must return to the tribunal where it will be a matter for the respondent, if so advised, to renew, or advance a fresh application to strike out, whether on the basis of its case in relation to maintenance/champerty, or otherwise. Any such application would need to be considered on the basis of all the circumstances as they may now appear to the tribunal when it is considered.

60. As I have also noted, in the Answer to this appeal, tabled in December 2022, Mr Ibekwe wrote that the claimant had returned to the UK and was "in a position to oversee the giving of instructions and directions to PTSC"; and, as recently as 8 August 2023 Mr Neckles wrote that he had been informed by the claimant that the claimant wished to seek ELAAS representation, and he asked for what he referred to as the necessary application form "so that we can forward it to him for completion", indicating, on the face of it, recent proactive communication with the claimant.

61. Mr Nuttman made plain to me that the respondent would not necessarily be disposed to accept such assertions at face value. But any such issues, if so advised, should be raised with the employment tribunal, as should any application that the respondent may wish to make for further directions or steps to be taken by the tribunal in order to satisfy itself of the current position in that regard. Any other matters of case management, whether raised by the claimant, the respondent or the tribunal itself, will also be a matter for the tribunal when the matter returns to it.