EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Longobardi	and	Aviation Fuel Services Limited

Heard at: Reading **On:** 14 March 2017

Before: Employment Judge Vowles

Appearances
For the Claimant: In person
Assisted by: Interpreter in the Italian language: Ms S Bryant
For the Respondent: Mr M Jones, solicitor

PRELIMINARY HEARING
RESERVED JUDGMENT

Application to amend claim

1. The Claimant's application to add a complaint of protected disclosure detriment under section 47B Employment Rights Act 1996 was granted.

Application for strike out

2. The Respondent's application to strike out the whole of the Claimant's claim was granted. The manner in which the Claimant has conducted the proceedings has been scandalous, unreasonable and vexatious and he has not complied with the Tribunal's order dated 12 October 2016. The conduct of the Claimant had been such that it is no longer possible to have a fair hearing. The whole claim is struck out under Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3. The hearing listed for 24 – 28 April 2017 is cancelled.

Reasons

4. This decision was reserved and written reasons are attached.

REASONS

Background

1. On 13 April 2016 the Claimant presented an ET1 claim form to the Tribunal.

2. On 27 April 2016 the Respondent presented a response and resisted all complaints.

3. At a preliminary hearing held on 29 September 2016 the claim was clarified and a case management order confirmed that the following complaints would proceed to a 5 day full merits hearing before a full Tribunal on 24 – 28 April 2017:

   Discrimination arising from disability – Section 15 Equality Act 2010;
   Harassment – Section 26 Equality Act 2010;
   Unfair constructive dismissal – Sections 95(1)(c) and 98 Employment Rights Act 1996.

4. The Respondent did not accept that the Claimant was a disabled person for the purposes of the Equality Act 2010 and an order was made as follows:

   Disability

   1 *The Claimant makes a claim of unlawful disability discrimination. The Respondent does not accept that the Claimant is, or was, a disabled person for the purposes of the Equality Act 2010.*

   2 *No later than 13 October 2016 the Claimant shall provide to the Respondent a statement signed by the Claimant setting out:*

   2.1 *the impairment relied on;*

   2.2 *the precise nature and extent of the effects the impairment has or had on the ability to carry out normal day to day activities;*

   2.3 *the periods over which those effects have lasted;*

   2.4 *whether or not there has been treatment for the impairment and what difference, if any, such treatment has had on the effects of the impairment.*

   3 *The Claimant may wish to obtain a letter or report in relation to the matters set out in the above statement from a GP or other person providing medical treatment. Any such letter or report shall be sent to the Respondent by no later than 27 October 2016.*

   4 *No later than 3 November 2016 the Respondent shall inform both the Claimant and the Tribunal in writing whether or not the Respondent accepts that at the relevant dates the Claimant was a*

disabled person for the purposes of the Equality Act 2010, together with the basis for any denial.

5. On 14 March 2017 following protracted correspondence and disputes between the parties, a further preliminary hearing was held. The issues to be considered were as follows:

Claimant's application: Whether to amend the claim to include a complaint of protected disclosure detriment under Section 47B Employment Rights Act 1996;

Respondent's application: Whether the whole claim should be struck out under Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Evidence

6. Evidence on oath was heard from the Claimant. Both parties made submissions and provided documents in support of their respective applications.

Claimant's application to amend the claim

7. Although the Claimant referred to *"whistleblowing*" in his ET1 claim form, this was not included in the list of complaints at the end of the claim form.

8. At the preliminary hearing held on 29 September 2016, the Claimant made no mention of a whistleblowing claim and accordingly it was not included in the claims set out in the case management order.

9. It was only later, in correspondence to the Tribunal and to the Respondent, that the Claimant said that he wished to pursue a complaint of whistleblowing.

10. In the ET1 claim form the Claimant had ticked the box at paragraph 10.1 to indicate that his claim included a complaint of protected disclosure and that he wanted a copy of his claim form to be forwarded to a relevant regulator. Also, in the body of his claim form, he included the following

"Aviation safety: The rules and language of Aviation Law are difficult to explain in a civic Tribunal but this subject forms a crucial part of my case. I will summarise:

In regard to safety training and standards when fuelling an aircraft, there should be initial training of a high standard, followed by a yearly refresher course (specific to each individual airline). On completing the course to the qualified standard, a certificate should be issued to the fueller. It is totally inadequate to be asked to simply sign a sheet of paper, once a year for this to be called 'refresher' training, as is the case with my company. I reported this lack of training to CAA Gatwick and CAA House, London

(alleged breach of Air Navigation Legislation). Following my communication, I asked for an investigation and my company is unhappy with [me] for doing this and I have in writing from them that do not wish me to pass on this information. Importantly, this 'whistle-blowing' is one of the main reasons that my company want to eliminate me."

11. With some difficulty, and after being pressed to provide details of the claim, the Claimant explained that he first made a disclosure regarding safety matters in connection with aircraft refuelling in January 2008 to one of the Respondent's managers whose identity he could not now recall. It was about the lack of a JIG refresher training package which related to aircraft refuelling. He said that he also made the same disclosure to the Civil Aviation Authority on 8 June 2016.

12. He said that because he had made these disclosures, he was punished with a 2 years' written warning on 5 June 2013 which was later reduced to a 1 year written warning.

Decision

13. The Respondent objected to the application and pointed out that, as at June 2013, the Claimant had already received previous warnings for the same conduct, that is refuelling while sitting in a vehicle. The Respondent was unaware of the 2008 disclosure and was aware only of the disclosure to the Civil Aviation Authority on 8 June 2016 which postdated the Claimant's resignation by 3 months.

14. Despite the lack of detail and the difficulties the Claimant might face in establishing a causal link between a disclosure in 2008 and a written warning in 2013, he should be allowed to pursue a complaint of protected disclosure detriment. There was clearly mention of "whistleblowing" in the ET1 claim form even though the Claimant had failed to mention it at the preliminary hearing on 29 September 2016. This was not an amendment. The complaint had been mentioned in the claim form but had simply not been identified by the Claimant until this late stage.

15. The Claimant's application was granted.

Respondent's application for strike out

16. In accordance with the Tribunal's order the Respondent had provided to the Claimant written details of this application together with copies of supporting documents. The basis of the application was set out as follows:

1. The Respondent applies to strike out the Claimant's complaints as set out in his claim (ET1) under rule 37(1) of Schedule 1 – Employment Tribunals Rules of Procedure (ETRP) to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, due to:

1.1 the manner in which the proceedings have been conducted by or on behalf of the Claimant has been scandalous, unreasonable or vexatious (rule 39(1)(b) of the ETRP); and/or

1.2 the Claimant has not complied with an order of the Tribunal (rule 37(1)(c) of the ETRP).

…

3. The basis of the application relates to:

3.1 the Claimant's failure to comply with paragraph 2 and/or 3 of the Tribunal's order dated 12 October 2016 (Order 2) and the Claimant's allegation that he had complied with the Order;

3.2 the Claimant's conduct during the course of the proceedings:

3.2.1 the letters written by the Claimant to Turbervilles, the Respondent (and its employees) and third parties, which contain amongst other things actual or veiled threats;

3.2.2 the Claimant failure to provide access to his medical records in order that the Respondent could comply with the Order; and

3.2.3 the Claimant's reference to a "whistleblowing" complaint by emails dated 23 November 2016 and 16 December 2016, which should have been dealt with at the preliminary hearing on 29 September 2016 and his application to amend his ET1.

17. Rule 37 - Striking Out

(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

18. The word 'scandalous' in the context of rule 37(1)(a) means irrelevant and abusive of the other side. It is not to be given its colloquial meaning of signifying something that is 'shocking' – Bennett v Southwark London Borough Council [2002] ICR 881.

19. A 'vexatious' claim or defence has been described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive – ET Marler Ltd v Robertson [1974] ICR 72. The term is also used more widely to include anything that is an abuse of process. In Attorney General v Barker [2000] 1 FLR 759 Lord Chief Justice Bingham described 'vexatious' as a 'familiar term in legal parlance'. He said that the hallmark of a vexatious proceeding is that it has 'little or no basis in law' (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way that is significantly different from the ordinary and proper use of the court process'."

20. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a Tribunal must take into account whether a fair trial is still possible – De Keyser Ltd v Wilson [2001] IRLR 324 the EAT made it clear that certain conduct, such as the deliberate flouting of a Tribunal order, can lead directly to the question of a striking-out order. However, in ordinary circumstances neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

21. In Bolch v Chapman [2004] IRLR 140 the EAT set out the steps that a Tribunal must ordinarily take when determining whether to make a strike-out order:

- Before making a striking-out order under what is now rule 37(1)(b), an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings

- Once such a finding has been made, he or she must consider, in accordance with De Keyser Ltd v Wilson (above), whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.

- Even if a fair trial is unachievable, the Tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response."

Questioned documents

22. The Respondent claimed that the Claimant had, both before and during the course of the Tribunal proceedings, sent to the Respondent and to the Respondent's solicitor, a number of documents, some of which were anonymous and/or were fabricated. It was claimed that some of these documents contained actual or veiled threats.

23. Each one of the questioned documents was put to the Claimant. His answers were evasive, but when pressed he denied that he had sent any of the documents or that he had been involved in drafting or sending them.

24. When referred to three letters dated 15 October 2015, 17 December 2015 and 29 December 2015 addressed to the Respondent, purportedly from an organisation named "*Associated Counsel Law Assistance (ACLA)"* he said these were false letters but, strangely, said that his GP had told him that he had also received a couple of similar letters. He said that the letter dated 15 October 2015 was a false letter and that the letter dated 17 December 2015 may be from a supporter of his. He said he did not send any of the ACLA letters. It was clear, however, that the letters contained information which only the Claimant would know. For example, the last letter enclosed a copy of a letter received by the Claimant from his GP surgery and contained a reference to the Claimant being *"capable of remembering when he signed medical consent forms"* and *"willingly gave signed consent many months ago, allowing full access to his GP"*. It said *"The subject of medical consent forms has been greatly distressing to Mr Longobardi and if his GP has been swayed by AFS, he will find himself under the same scrutiny as Ms Jackie Cuneen".* Ms Cuneen was the Claimant's former solicitor.

25. On 31 March 2016 the Respondent received the following anonymous letter:

> *"Considering your continue actions to use bribery trying in vain to get rid of me.*
> *I have to protect mydelf.*
> *I have made a video and ready to be posted on the networks by friends and family. It based on this matter/including all locations, names, date ect..*
> *Before the situation escalate (Think It)"*

26. In May 2016 a different Employment Judge made various case management orders in respect of this case. These were sent only to the Claimant and the Respondent's solicitor.

27. On 6 June 2016 the Respondent received an anonymous note naming the Employment Judge and giving his home address (which was accurate but out of date). It concluded:

> *"You can buy him with a modest price*
> *good luck"*

28. On or around 14 June 2016, the Respondent received a letter which purported to be signed by the practice manager of the Claimant's GP surgery as follows:

> *"Glendale Medical Centre*
> *Telephone: 020 8897 8288*
> *Fax: 020 8754 1539*
> *155 High Street*
> *Harlington, Middx, UB3 5DA*
>
> *Paul Hill General Manager*
> *Aviation Fuel Services Ltd*
>
> *Date 13-06-16*
>
> *Dear Hill . Please give me a call . 020 8897 8288*
>
> […… Gap …….]
>
> *Yours sincerely*
>
> *[signature]*
>
> *Jenny Cook*
> *Practice Manager"*

29. There was a large gap in the middle of the letter where something had clearly been cut out. The Respondent claimed that this letter had been forged by the Claimant or someone on his behalf.

30. On 21 June 2016 the Respondent's solicitor received the following anonymous note:

> *"Dear Mr Jones*
>
> *Thank you for applying for 'strike out' at the forthcoming preliminary hearing on 6 July, the Tribunal have given great consideration to your application and now see fit to convert the private hearing into an open public hearing.*
> *This will be a wonderful opportunity for the profile of Turbervilles, a top law firm in west London, in particular for you to display your own talent, as the media will there to record this event."*

31. The Respondent claimed that this had been sent by the Claimant or on his behalf as it referred to a preliminary hearing in the Claimant's case listed for 6 July 2016. The hearing did not take place on 6 July 2016 but was re-listed for 29 September 2016.

32. On 17 October 2016 the Claimant presented a schedule of loss to the Tribunal claiming the sum of £1,768,547.

33. On or about the same date the Respondent's solicitor received the following note:

> *"BBC, Evening Standard and Sky have asked me to make public this story.*
> *Marc think about It*
> *It is not a notice, But is a prevention*
> *Matteo"*

34. This note is signed by the Claimant (first name only).

35. On 20 October 2016 the Respondent's solicitor informed the Claimant of the anonymous letters it had received which it believed the Claimant had sent, or had been sent on his behalf, and expressed concern about his conduct.

36. On 21 October 2016 the Respondent's solicitor informed the Claimant that he was in breach of the case management order made on 29 September 2016 and that he had not provided the disability impact statement or medical documents required.

37. On 26 October 2016 the Respondent's solicitor received a form of authority from the Claimant but instead of a signature block, he had inserted: *"Keep calm and enjoy my gift Mr Jones".*

38. During the course of the preliminary hearing, the Claimant said that he had provided an authority for the Respondent to obtain his medical documents and produced a copy of a letter as follows:

> *"Glendale Medical Centre*
> *155 High Street*
> *Harlington*
> *Middlesex*
> *UB3 5DA*
>
> *30/09/16*
>
> *Re: Matteo Longobardi Patient NHS: 649 039 3956*
>
> *Dear Dr MK Nanavati / Dr Anu Amanan*

I have been required to diclose my medical reports to Mr Marc Jones, Turbevilles Solicitors on behalf of my ex-employer Aviation Fuel services Ltd, a name that surely sounds familiar to this surgery.

Therefore I authorize my GP to comply with the request made for full medical reports (only medical reports). If Mr Jones (Turbevilles Solicitors Uxbridge) does require it.

Yours sincerely

Matteo Longobardi"

39. However, in a letter dated 21 October 2016 the Respondent's solicitor had informed the Claimant as follows:

"You have not provided your consent for our client to obtain a copy of your medical records as we requested in our earlier letter of even date. It is disputed that you provided our client with authorisation to obtain a medical report. The letter from Glendale Medical Centre to you dated 15 December 2015 expressly states you had indicated that even if you had signed a medical consent form not to disclose any information to our client.

Your GP will not release your medical records without your authorisation to do so.

As you appear to have refused our request to provide copies of your medical records within 7 days of this letter, please sign the form attached authorising us to obtain a copy of your medical records directly from your GP."

40. On 16 November 2016 the Claimant wrote to the Respondent's chairman as follows:

"Mary Henderson Operations Manager
Chairman ,AFS

16/11/2016

Dear Ms Henderson

I am writing to let you know that your time limit is this 17/01/2017
Your Turbervilles Solicitor has worth like the heel of my shoes.
I really suggest that your organization conclude this matter in an amicable way.
I look forward to hearing from you.
Regards
Matteo Longobardi"

41. The Respondent's solicitor requested the Claimant that he should correspond with the solicitors' office and not directly with the Respondent but the Claimant sent a further letter directly to a Director of the Respondent on 3 January 2017.

42. On 6 February 2017 the Respondent's solicitor received an anonymous letter with a CD containing music tracks. The accompanying note was headed *"DJ who continuously tagged people in links to his mixes found beaten to death"* and went on to describe at some length, using foul language, a gruesome murder whereby a DJ had been beaten to death with a blunt object and was found naked with a number of names and the words *"How do you like it*" etched into his skin. The Respondent claimed that the Claimant was, and may still be, a DJ. Due to the content relating to murder, the solicitors reported this matter to the police.

43. In respect of the CD enclosed with the anonymous letter, the Claimant said that he had personally handed the music CD to Mr Jones at his firm's office. He did not explain why or when he had done so. Mr Jones, in response, said that was *"utter nonsense"* and that he had found the CD in the envelope which came with the letter.

44. On 22 February 2017 the Respondent's solicitors received a further letter from the Claimant as follows:

> *"Date February 2017*
> *Re: Amicable conclusion*
>
> *Dear Mr Jones*
>
> *I enclose the statement that will be made public, at the Public Preliminary Hearing on 14/03/2017.*
> *If an amicable solution fails, on Tuesday 28 February 2017 at 12.01 (with a click), I will have no alternative but to make the content of this document public.*
> *This is not a threat, it is the wish to conclude this case by achieving a peaceful settlement.*
>
> *Matteo"*

45. On 22 February 2017 the Respondent's solicitor received a letter from the Claimant as follows:

> *"Date February 2017*
> *Re: Amicable conclusion*
>
> *Dear Mr Jones*
>
> *I write to you accordingly. I have a proposal for you and suggest you consider the following options.*

You have the right to disclose a claim for defamation against me, if you think that this is not a public interest disclosure and my statement is false.

You will find the Tribunal public gallery full of interested parties – if you choose to defend the public interest disclosure of 'Whistleblowing'. Next time there will be no postponed hearing, so your client cannot avoid the onslaught of public opinion.
In addition, as you are aware, a Confidentiality clause can legitimately be used in a settlement agreement. However, it is important to note that any confidentiality clause between an employer and an employee (or ex-employee), that seeks to prevent the employee from making a protected disclosure, in accordance with the Public Interest Disclosure Act 1998, is void and ineffective. This means that settlement agreements cannot be used in an attempt to stop employees from whistleblowing.

I am not in search of publicity or revenge but I have a long history in Aviation and I am respectful of procedures and training and confident in my knowledge. The time has come, for a large conglomerate of oil companies to accept that mistakes have been made, mistakes that have harmed me personally. It is time to conclude this matter once and for all.

Talk to your client and contact me when a decision has been made.

Yours sincerely
Matteo Longobardi"

46. The letter was accompanied, once again, by a schedule of loss claiming £1,768,547.

47. At the end of his evidence the Claimant said that the questioned documents which had been put to him were *"false letters*". He said that he would investigate and the person responsible for sending them would be punished. He denied sending or being involved in sending any of the anonymous letters.

48. The Employment Judge found as a fact that the Claimant was untruthful when he denied sending or being involved in the sending of the questioned documents referred to above. He gave evasive and defensive answers to straightforward questions about the documents. Their relevance, similarity and content, much of which could only be known to the Claimant, led to the firm conclusion that the Claimant had sent the documents or had been involved in sending them.

49. The documents sent before the proceedings were commenced were relevant to the issue of authorship of documents sent during the proceedings.

50. The intended effect of the letters, sent over a long period by the Claimant, some anonymous and some not, was clear. It was to intimidate and pressurise the Respondent into settlement of his claim by reason of threats that he would make his allegations public.

Conduct during the Preliminary Hearings

51. On 2 March 2017 the Claimant requested the Tribunal's permission to record and film the preliminary hearing on 14 March 2017. The request was refused.

52. During the course of the preliminary hearing the Claimant was argumentative and disruptive. He persisted in interrupting the Respondent's solicitor in the face of instructions from the Employment Judge to cease doing so. At various times when the solicitor was speaking, the Claimant was loudly huffing, puffing, laughing and tapping his fingers, and continued to do so even when warned that his conduct was inappropriate and unacceptable.

53. During the course of the hearing, he referred to the Respondent and its solicitor as "*clowns*".

54. It was clear that the Claimant had invited members of the press and media to attend the preliminary hearing and proceeded to grandstand to that audience by turning around to address them in the public seats and also holding up various photographs, including one of an aircraft which had crashed at Heathrow in 2008.

55. Additionally, although an interpreter in the Italian language had been provided at the Claimant's request, at public expense, the Claimant insisted on conducting most of his submissions and evidence in English and ignoring the interpreter despite directions from the Employment Judge that he should not do so.

56. At the end of the hearing the Claimant asked the Employment Judge for permission to "*go public*" with his whistleblowing. He was told that was not a matter for the Tribunal.

57. The Claimant's conduct and behaviour during the preliminary hearing was consistent with his conduct during the earlier preliminary hearing on 29 September 2016. At that hearing the Claimant was argumentative and unable or unwilling to give direct answers to direct questions.

Compliance with the Tribunal's Orders

58. The Employment Judge found that the Claimant, despite his protestations, had failed to comply with the Tribunal's Orders to produce an impact statement (paragraph 2) and medical documents (paragraph 3). His letter dated 30 September 2016 did not comply with the Order and in any event it seems that the Claimant had instructed his GP surgery not to provide

medical reports even if the Respondent produced a document purporting to authorise their release.

59. The Claimant responded by claiming that the Respondent's response should be struck out because of their failure to comply with orders. There was, however, no evidence of any such failure.

Decision

60. The Claimant has failed to properly engage with the Tribunal process. His intent is not to pursue a legitimate claim but to offend and harass the Respondent and its solicitor. He is using the proceedings to attempt to embarrass the Respondent by exposing them to public condemnation and by so doing to coerce them into a financial settlement. This is an improper motive and is an abuse of the Tribunal's process.

61. Firm case management, direction and warnings during the hearings have been tried and failed. Neither a deposit order nor a costs order would be effective. The Claimant has demonstrated that he is unwilling to moderate his behaviour or conduct himself in correspondence and/or in a Tribunal hearing in a manner which would enable a fair trial to take place.

62. The Claimant's attempts to involve the media, his failure to comply with the Tribunal's Orders, the content of his correspondence, his untruthful denials regarding the authorship of the questioned documents and his persistently disruptive behaviour during both preliminary hearings, amounted cumulatively to scandalous, vexatious and unreasonable conduct of the proceedings. It was of such seriousness that a fair trial of his claim is no longer possible.

63. The Respondent's application was granted and the Claimant's claim is struck out in its entirety. No lesser sanction is appropriate.

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Employment Judge Vowles

Date: 28 March 2017

Reserved Judgment and Reasons

Sent to the parties on: 6/4/2017

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For the Tribunals Office