EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr T Bhamra **v** **Healthcare Homes (LSC) Limited**

Heard at: Watford **On**: 22 September 2020

Before: Employment Judge R Lewis

Appearances

For the Claimant: No attendance or representation
For the Respondent: Ms A Rokad, Counsel

RESERVED JUDGMENT

1. The claimant's application for recusal of the present judge is refused.

2. The claimant's application for an adjournment is refused.

3. The claimant's application under rule 38(2) to set aside dismissal of his claim is refused.

4. The respondent's application for an order for costs is refused.

REASONS

1. These reasons are given of the tribunal's own initiative. It is in the interests of justice to do so, the claimant having failed to attend this hearing.

This hearing

2. During the lockdown, on 9 June 2020, I conducted a telephone hearing in which the claimant took part in person and Ms Couldrey (HR Manager) represented the respondent.

3. The arrangements were made for this hearing to take place, and the date was set. The arrangements were confirmed in writing by order sent on 11 June.

4. Shortly before this hearing the respondent sent the tribunal a PDF bundle of 187 pages. It included 5 emails which the claimant had sent to the respondent on 31 July 2020 (101-106) in compliance with paragraph 2.2 of the June order.

5. The June order had stated that the listing was for a hearing in person or by video. On the morning of Monday 21 September, the tribunal emailed the parties to inform them that the hearing would proceed in person. I deal below, under the heading of adjournment, with the email correspondence received from and on behalf of the claimant later that day and up to the start of this hearing.

Correct name of respondent

6. It is confirmed for avoidance of doubt that the respondent is correctly named above.

Recusal

7. By email sent at 00:16 on the day of this hearing, the claimant made an application which he summarised, “I want the tribunal to remove Judge Lewis from my case with immediate effect.” I treated this as an application that I recuse, and dealt with it first.

8. The claimant wrote that he applied for my removal or recusal on the following grounds:

   8.1 The claimant quoted a number of remarks which he said had been made to him by Ms Couldrey about my approach to this and other cases. He submitted that these indicated bias on my part against Indian people;

   8.2 He wrote that I had had a private conversation or conversations with Ms Couldrey about the case, outside the framework of the proceedings, and therefore without his knowledge or participation;

   8.3 He implied that I had been paid a sum of money by Ms Couldrey on behalf of the respondent;

   8.4 He wrote that I had telephoned him privately that afternoon (21 September), and tried to persuade him to withdraw the case.

9. I declined, on the first point, to attach any weight to any comment allegedly made about me by a third person outside my hearing. It therefore was of no consequence if Ms Couldrey did not agree that she had said what the claimant alleged she had said. I disregarded point 8.1.

10. I informed the respondent that none of the events which I have summarised at points 8.2, 8.3 and 8.4 above, or anything like any of them, had occurred. I declined to recuse on any of those grounds.

11. I bore in mind the argument that even if an application for recusal is refused, its contents may influence the judge against the party who has applied; and that a judge should in any event recuse, so as to avoid any resulting bias against that party. In other words: accepting that each allegation at points 8.2 to 8.4 above is untrue, should I step down for fear that any allegation itself may influence me against the claimant?

12. In declining to recuse for that reason, I respectfully adopt the reasoning of the EAT in Enamejewa v British Gas UKEAT/0347/14 at paragraph 28, rejecting an application to remit to a new judge:

> 'As originally drafted the grounds of appeal made extensive allegations of racism, fascism, hooliganistic conduct and, to put it at language of a lower temperature, unjudicial conduct on the part of Judge Lewzey and Judge Pearl but in particular on the part of Judge Lewzey. If it were to be thought that, by making allegations of that kind, which have been dismissed as unfounded, a litigant could influence the choice of Judge who was to determine his claim, then it would be open to unreasonable and unscrupulous litigants in effect to select the Judge that they thought most likely to be favourable to their cause. That is something which, as a matter of principle, must not be allowed.'

Adjournment

13. I here summarise the correspondence trail received by the tribunal in which the claimant applied for an adjournment.

14. On Monday 21 September at 15:56, the tribunal received an email from Mr Amos Obadiah requesting an adjournment. The email stated that the claimant was not aware that the hearing would be conducted today at Watford. It also stated that the claimant's father was critically ill in Glasgow, where the claimant had had to travel to be with him, although the claimant (Mr Obadiah wrote) has Covid-19.

15. At the June hearing I had commented on the unhelpful role of Mr Obadiah. He had written to the tribunal with medical information about the claimant, which the claimant told me was untrue. The 21 September email was sent to the Watford ET inbox, and, unnecessarily, to two members of the Watford staff personally, but was not copied to the respondent, as required by rule 30.

16. The email was referred to me and I refused the adjournment. I set out my refusal in an email sent by tribunal staff at 16.11. I pointed out that the application had not been copied to the respondent. I pointed out that the claimant had been told of the listing during the June hearing. The listing had been confirmed in writing.

17. The application was unsupported by medical evidence. I noted that the claimant had told me in June that medical information provided by Mr Obadiah was unreliable. I did not point out the obvious inconsistency between the claimant stating that he had Covid 19, and wished to travel to Glasgow to be with an ill, elderly parent. I noted in the bundle and / or file at

least two other adjournment applications based on the claimant's father's then ill health.

18. Mr Obadiah replied at 16:31 as follows:

> "This email was sent on the behalf due to medical emergency which is unforeseeable due to Tejdeep does not have internet access in Glasgow hence this email sent on his behalf to inform all parties to this case."

19. At 00:16 on the morning of this hearing the claimant wrote at length from his own email account. He stated that Mr Obadiah did not represent his interests, and indeed that he had been induced by Ms Couldrey to write to the tribunal, on the promise of promotion. That was the first indication which I had encountered that Mr Obadiah is said to be an employee of the respondent.

20. The claimant then set out what he alleged had been said to him about me by Ms Couldrey, and applied for me to recuse or be removed from the case.

21. The claimant emailed 20 minutes later, at 00:36 to state as follows:

> "I am currently suffering from Covid-19, I am informing the tribunal to my safety and the safety of hours I am not allowed to go out due to my cough, breathing and temperature I have had these symptoms since Sunday evening 20 September 2020. "

22. At 09:35 the claimant sent the tribunal a statement to be used at this hearing. It came from the claimant's email address. The final line wrote that it was sent on his behalf by his mother.

23. At 09:48 from the same address, and with the same final line, the claimant's mother wrote:

> "This morning my son Tejdeep was walking he fall down all of a sudden and fainted and is unconscious and he is having breathing difficulty. I have to seek medical assistance for him, he will not be able to attend duet to unconscious and breathing difficulties the tribunal need to consider this emergency situation with Tejdeep, Tejdeep was not well prior to today, I believe the tribunal was aware."

24. At 09:56, from the same email account, and again in the name of the claimant's mother, the tribunal received the following:

> "I request the tribunal can the tribunal deal with this email and forward to the relevant person or Judge to remove Employment Judge Lewis from this case see below, this needs to be acted on in timely manner and take into consideration."

25. Ms Rokad was accompanied by Ms Couldrey. Ms Couldrey informed me at the start of the hearing that she had no knowledge of a person called Amos Obadiah and was not aware of the respondent employing a person of that name. I asked her to make further enquiries and she confirmed later in the day that a check of the respondent's payroll records since 2016 showed no employee of that name.

26. In order to consider the application to adjourn fairly, I ensured first that the respondent had all the above emails, not all of which had been copied to it.

27. The claimant's first point was that he had not known of this hearing. This hearing date had been arranged during the telephone hearing in which he had taken part on 9 June, and confirmed in writing by order sent two days later.

28. The second point, which Mr Obadiah had raised, but which the claimant may have retracted, was that the claimant's father was seriously ill in Glasgow and the claimant had travelled to be with him. There was no evidence to support this. I was unable to reconcile the claimant's assertion that his elderly father was seriously ill, with the accompanying assertions that he had travelled to Glasgow to be with him while he had Covid-19. I did not find that this ground for adjournment was made out.

29. The third ground was the claimant's email of 00:36, stating that he had Covid-19. I did not understand the NHS to work so efficiently that symptoms experienced on a Sunday evening could lead to a definite diagnosis of Covid within 28 hours (Sunday evening to the early hours of Tuesday). I could not understand why, if the claimant had Covid related symptoms, or was shielding, he had not notified the tribunal at the earliest opportunity. My experience in other case shows that if a Covid test is positive, the patient will receive email notification which can be produced as evidence. There was no such evidence.

30. I noted what had been written in the claimant's mother's name minutes before this hearing. I noted that the claimant's mother had used the claimant's email account, and had been able to write to the tribunal twice in eight minutes, at a time when, on her account, the claimant was unconscious, suffering from breathing difficulty, and urgent help had been called.

31. Ms Rokad resisted the application to adjourn, referring me to the overall length of the case, the number of adjournments, and the claimant's conduct, in which in about 18 hours before the start of this hearing, he had put forward a number of different reasons for adjourning.

32. Ms Rokad reminded me of similar emails in June: on 5 June the claimant had written that he was 'abroad in lockdown.' On 8 June Mr Obadiah had written (in words said by the claimant to be incorrect),

    > 'Due to the Coronavirus outbreak this morning Tejdeep breathing problems and fell unconscious his health is affected and he has been taken to Hospital ..'

    She reminded me of paragraph 11 of my June order, stating that in light of information about the claimant's health, any further application for adjournment based on ill health would have to be accompanied by medical evidence.

33. Drawing these matters together, it seemed to me that Ms Rokad's objections to adjournment were well founded. The claimant had put before the tribunal a number of requests for adjournment on grounds which were inconsistent, incoherent, and unsupported by any medical or other independent evidence.

34. This hearing started at 10:28am. I heard submissions on reconsideration until 12:15 and then adjourned, giving judgment on reconsideration at 12:45. I then adjourned until 2pm and heard the respondent's costs application, on which I reserved judgment at 2:50pm. At the end of the hearing I asked Ms Couldrey (but did not order) to email the claimant to inform him briefly of the outcome of this hearing, so that he would not have to wait for the process of preparing this judgment and these reasons. I said that in light of the allegations made by the claimant against Ms Couldrey, in particular in his email of 00:16, I would understand if she declined to do so.

The present case

35. Day A was 9 May 2018, Day B was 24 May and the claim was presented on 23 June. It was served on 13 July and at about the same time a preliminary hearing was listed for 14 February 2019 for case management. On receipt of the ET3, the file was referred to a judge in accordance with rule 26. I considered the file at that stage. I recognised the claimant's name. I recalled that the claimant had brought an earlier group of cases which were assigned for management and hearing at Reading by Employment Judge Hill. I recalled that I had one involvement in that case, when I refused a last-minute adjournment application. That was a routine case management decision, which I concluded did not require me to stand down from the present case (Ansar v Lloyds Bank 2006 EWCA Civ 1462).

36. The ET1 stated that employment began on 1 November 2017 and was continuing; the ET3 agreed the start date, and gave 22 January 2018 as the end date. It stated,

    > 'Employee was summarily dismissed from employment on the 22/01/18 which was communicated verbally on the same date.'

    If that were correct, the claim was on its face presented well out of time.

37. There were stark differences in the information provided on the ET1 and ET3 about hours of work and amount of pay. The claimant gave no further narrative about his claims. The tribunal file did not contain any additional attachment. In a short summary (36) the respondent wrote that the claimant had failed to attend work on or after 30 November (stating, 'on [that day] he called and said that his father was in hospital') and been dismissed at a meeting on 22 January.

38. The ET1 showed boxes ticked for discrimination on grounds of age, race, religion / belief and sex; for notice pay, holiday pay, and arrears of pay, and

the words 'Whistleblowing claim' were written in at Section 8. There was no clarification of any of these headings of claim.

39. On 24 September, the tribunal informed the parties, on my instruction, that the listed preliminary hearing was converted to a hearing in public to consider whether the tribunal had jurisdiction to hear the claim, as it appeared to have been presented out of time. The tribunal's letter directed exchange of witness statements with annexed documents, relevant to that issue, by 14 January 2019. Little turns on this letter, although subsequent reference was made to it (38).

40. On 17 October, the tribunal sent an order made on my own initiative requiring the claimant to send to the respondent "copies of all Judgments issued in all previous Tribunal claims which he has brought" (40). I overlooked at the time to give reasons for that order, but subsequently gave them by letter dated 7 July 2019, stating (58),

> "It appeared to me in the interests of justice that all potentially relevant information which is in the public domain should be available to the parties and the tribunal at the hearing of this matter."

41. The respondent was not aware of the claimant having brought previous tribunal claims. It searched online with the results referred to below. For reasons given below, I find that the results of the online search are not the totality of tribunal judgments in the claimant's cases.

42. The respondent reported to the tribunal that the claimant had not complied with either the September direction or the October order.

43. On 12 February 2019 Employment Judge Bedeau issued an unless order ordering compliance with the orders of 24 September and 17 October 2018, to be complied with by 19 February or the claim would be dismissed. The preliminary hearing listed to consider limitation on 14 February was postponed.

44. Although the unless order referred both to the direction to exchange witness statements for the limitation point; and to the order to disclose further tribunal judgments; this matter thereafter proceeded with reference to the latter only. I likewise proceed on that basis. Ms Rokad stressed that the respondent has complied with the order to submit evidence on limitation, and submitted that the claimant has not done so.

45. On 11 March 2019, on my direction, the tribunal notified the parties that the claim had been dismissed in accordance with Rule 38.

46. On 23 March, the claimant applied "for reconsideration for the decision sent to me on 11 March 2019 by email" (53). That was not an application to reconsider either the September direction or the October order, or the unless order, but an application to reconsider dismissal. It was strictly made under rule 38(2), not rule 70. On my direction, the application was listed for hearing, which in the event was listed for 9 June 2020. That hearing could

only take place by telephone due to the lockdown, and this hearing was listed then.

47. Ms Rokad confirmed that the claimant remained in full non-compliance with the October order. She confirmed that the judgments in the bundle were obtained online, and that the respondent had no access to any judgment which pre-dates February 2017 (which was when the practice of posting tribunal judgments online was initiated). She understood that earlier judgments are or have been retained in a paper archive which is accessible to members of the public.

This application

48. I turned to the claimant's points raised in his application of 23 March 2019 (53) and in a subsequent letter of 20 December 2019 (75). I understand them to be as follows: as points 1 and 2 of the March 2019 email, the claimant wrote that he had complied with the tribunal orders. I accept Ms Rokad's denial that he had done so at the time of his application in March 2019.

49. I accept the respondent's consistent denial that the claimant has ever submitted a witness statement which addresses the issue of limitation. I accept that on 31 July 2020 he may have purported to comply with the direction of September 2018 by sending the respondent the five emails which are discussed further below (#4 above). I can attach no further weight to this point.

50. The claimant's third point related to how the September direction was formulated. I accept that it was a letter from the tribunal and therefore I have called it a direction not an order signed by a judge. I attach no further weight to it.

51. The claimant's fourth point was that the judgments ordered disclosed were irrelevant. That seemed to me the claimant's main point, and I deal with it below.

52. The claimant's letter of 20 December 2019 raised a fifth point, which was a misconceived point in relation to data protection and confidentiality. I have dealt with this at paragraph 13 of the June order and I repeat: the original disclosure order applied, by definition, only to documents which were in the public domain.

53. There were on reflection three other points which potentially troubled me, which had not been raised by the claimant. The first was that it might not, in isolation, be proportionate to strike out the claim for non-compliance with the September direction, as the limitation point could be decided at a hearing on the basis that the claimant had produced no evidence. The second was that it might not be proportionate to strike out the claim for failure to disclose documents which the respondent had obtained from another source. The third was that while I did not believe that by making the October order I had taken sides, I understood that it might be in the interests of justice to

reinstate the claim, while leaving the disclosure order in place, the case then to be heard by another judge, who would be in a position to assess all the evidence, including the previous judgments if appropriate.

Previous claims

54. The bundle contained judgments of the tribunal in which two groups of claims brought by the claimant against Mitie Aviation Security Limited were struck out. They were Judgments of Judge Heal at Watford on 8 November 2017 (129) and of Judge Gumbiti-Zimuto at Reading on 17 December 2018 (142).

55. I find that these were not the totality of judgments in all claims brought previously by the claimant. I noted the language of Judge Heal (November 2017, 135) that she decided the case before her,

> 'on the basis only of what the claimant has told me today. I have not reached this conclusion on the basis of what any other judge has said about him ..'

56. I interpret the underlined words (emphasis added) as indicating that Judge Heal had had before her words used about the claimant by another judge. I also had my recollection of a case at Reading (#35 above), and I was reminded by Ms Rokad that the practice of posting judgments online is relevantly recent.

The 31 July 2020 items

57. The respondent's case is that the five separate items disclosed by the claimant on 31 July 2020 (101-106, #4 and # 49 above) are fabrications. Its case is that a search of its server has revealed none of these items, and that they had been fabricated. Fabrication is an unusual if not exceptional finding for a tribunal to make. I mentioned to Ms Rokad that in about 15 years' experience as a Judge, I could recall three cases in which I was a member of a tribunal which made that finding. That is some indication of the rarity of such a finding, which I suggest reflects the rarity of fabricating documents as a form of behaviour.

58. The claimant is agreed to have started employment on 1 November 2017 as a probationer. It appears to be common ground that the last occasion on which he attended work was 29 November.

59. The respondent's case is that it wrote to him on 4 December 2017 about non-attendance (100) and that there were then two undocumented events: a meeting with his manager on 22 January 2018 when he was dismissed, and a telephone call which he made two days later to ask his manager to reconsider.

60. It appears from the pleadings, and from the witness evidence produced by the respondent for the limitation hearing, that issues arise as to the claimant's hourly rate of pay (the claimant says it was £9.50, his offer letter [99] states £7.60); the basis on which the claimant failed to attend work after

30 November (the claimant states suspended on full pay, the respondent states absent without leave); if and when and in which terms the claimant made a protected disclosure/protected act (which the respondent denies); and whether, after 22 January 2018 the claimant understood that he had been dismissed, as opposed to understanding that he remained suspended on full pay.

61. I note that although there has been some correspondence about the litigation, and although the respondent has produced evidence about limitation, neither side referred to any of the allegedly fabricated items before 31 July 2020. I note that the items appear to assist parts of the claimant's case. One confirms that the claimant's hourly rate is £9.50, at odds with the £7.60 offered in the same writer's offer letter of the same day (99 / 101). One states that the claimant has been suspended on full pay from 30 November (104). Two items said to be written by the claimant include one which makes allegations which appear to be a protected act/protected disclosure; and in March 2018 he raises a question as to why he had not been paid, although suspended on full pay. I note that one email from the respondent is written in strikingly ungrammatical English (102).

Discussion

62. Ms Rokad referred me to the recent discussion by the EAT in Uwhubetine and another v NHS Commissioning Board England and others UK EAT/0264/18/JOJ, and in particular, the discussion at paragraphs 41-49, which I set out below:

> "41 I turn to the arguments before me today and my decision. As to the law, Rule 38 of the Employment Tribunals Rules of Procedure 2013 provides: "Unless orders 38.—(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred. (2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations. (3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in Rule 21."
>
> 42 A number of propositions emerge from the authorities, in particular Royal Bank of Scotland v Abraham UKEAT/0305/09; Marcan Shipping (London) Limited v Kefalas [2007] EWCA Civ 463; Johnson v Oldham Metropolitan Borough Council UKEAT/0095/13; and Wentworth-Wood and Others v Maritime Transport Limited UKEAT/0316/15.
>
> 43 I can summarise these points as follows. Firstly, there are potentially three distinct decision points for a Tribunal under Rule 38. Firstly, there is the making of an Unless Order. Secondly, there is the determination of whether an Unless Order has been complied with, and hence whether the relevant claim or response or part thereof has been automatically dismissed by

operation of the Unless Order. Thirdly, the determination of an application, if there be one, to set aside the Order on the basis that it is in the interests of justice to do so. These are distinct decision points to be approached on distinct bases, in respect of which, if any such decision is to be challenged, a separate appeal is required and time would run from the date of the relevant decision.

44 Where a Tribunal is determining whether there has been compliance with an Unless Order and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Order taking effect, the Tribunal is not concerned at that point with revisiting the terms of the Order: whether it should have been made, or whether it should have been made in those terms. Nor is it concerned at that point with the question of whether, if there has been non-compliance with the Order, there should be some relief from sanctions.

45 The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be UKEAT/0264/18/JOJ -16- A B C D E F G H facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.

46 Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test.

47 Finally, the Rules do not require any particular formalities to be observed in relation to the process for determining whether there has been non-compliance with an Unless Order, leading, if non-compliance be found, to a written notice confirming that the relevant pleading has been dismissed in accordance with it. This is something that can potentially be done by a Judge on paper without a hearing, although a Judge may decide to invite written submissions and/or to convene a hearing, before making that determination. The obligation on the Tribunal, whichever route it goes, is to comply with the overriding objective.

48 To those points, which emerge from the foregoing authorities, I add the following. Firstly, the Rule does not actually impose an obligation on the Tribunal to issue a written notice if it considers that an Unless Order has been complied with. However, if it is alleged that it has not then this must lead to a determination of whether the Order has been complied with and has taken effect, or not. UKEAT/0264/18/JOJ -17- A B C D E F G H

> 49 Further, if the conclusion is that the Order has not been complied with, and has taken effect, although that will have occurred automatically, there is an obligation on the Tribunal to issue a written notice to the parties confirming what has occurred. That is both because that is what Rule 38(1) says and because it is the issuing of such a written notice that triggers the right of a party to make an application under Rule 38(2) to have the Order set aside on the basis that it is in the interests of justice to do so. That is why such an application is treated, as the authorities confirm, as an application for relief from sanctions, as opposed to a freestanding challenge to the original Order having been made in the first place."

63. I respectfully adopt the rigour of the EAT's analysis, and have approached today's hearing as a third step hearing, ie an application for relief from sanctions. I note that when I come to consider the overall circumstances, the division between the three stages indicated by the EAT becomes blurred. When considering what is serious and significant, and the overall circumstances, it seems to me that while I make my decision on the material before me today, and in accordance with the principles applicable to relief from sanctions, I am bound to give some consideration to the necessity and relevance of the original order and unless order, and to the claimant's response.

64. As this an application for relief from sanctions, the tribunal should have regard to the approach of the civil courts and the guidance in Denton v White [2014] EWCA Civ 906.

65. The claimant remains in default of the tribunal's October order for disclosure. The sole remaining reason for non-compliance is his view of relevance.

66. I regard the claimant's default as serious and significant at each of two levels. First, it is the decision of an experienced litigant (albeit a litigant in person), maintained over a period of nearly two years, to adhere to his own view, rather than respect the structure and discipline of the tribunal. I note that breach of an unless order was determinative before Judge Heal, and material before Judge Gumbiti-Zimuto.

67. Secondly, it is significant in light of the discussion above: in this case the claimant's production of documents of disputed integrity is a matter before the tribunal. I regard previous adjudications as relevant because earlier findings on fabrication may be an indication of a *modus operandi* which is generally unusual, and which the claimant is alleged to have adopted in this case.

68. My understanding that tribunals had considered the integrity of the claimant's documentation was confirmed by for example paragraph 48 of Judge Heal's judgment (137); and by paragraphs 12-16 of Judge Gumbiti-Zimuto's judgment (143-4). My order of October 2018 was made on the basis that the respondent and the tribunal should have access to all potentially relevant public material. At that stage, I considered previous judicial findings to be potentially relevant. I approach today's task on the

basis that that potential may well have been realised on 31 July 2020. The claimant's disclosure of documents which the respondent states are fabricated seems to me to place the question of fabrication centre-stage in this case, and to render previous judicial findings and comments on the point likely to be relevant.

69. I accept that previous findings or observations by other judges in earlier cases, in which other judges challenged the integrity of the claimant's documents, do not prove or disprove the integrity of any of the five disputed items in this case. They are probative of the claimant's way of doing things in the past. It is for another judge, at a final hearing, in light of all the evidence, to decide if any past findings assist in the determination of the present case, and if so how.

70. I add finally that if the respondent's evidence on the meeting of 22 January is accepted, the claim is out of time. If the claimant seeks an extension of time, it may well be a relevant consideration that he is an experienced employment tribunal litigant. It is possible, but more speculative, that if a claim were to succeed, his employment history, including past tribunal claims, might be relevant to a Polkey issue. That said, at the heart of this application is the potential relevance of previous judicial findings or comment about the integrity of documents produced by the claimant.

Other factors

71. I turn to the points which I identified at #53 above. First, I have excluded the September direction from my deliberation altogether. It would not be proportionate to strike out for the reasons stated at #53. I am satisfied that the October order can fairly and properly be considered in isolation. On the second point: I would struggle with the proportionality of strike out if the respondent had been able to obtain all previous judgments on line. It has not, and I therefore attach no more weight to the point. My view on the third point, at an early stage of this matter, was that I would not be the judge who heard the full and final hearing. That judge would have to decide if the items which I thought were potentially relevant were in fact to be admitted, and, if so, how they assist the tribunal. S/he would do so in the context of all the evidence at the hearing. I accept that I should not be that judge.

Costs

72. Ms Rokad applied for costs after I had delivered judgment. I reserved judgment on the costs application.

73. I set out the relevant portion of the rules:

> "74(1) Costs means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party…
>
> (2) Legally represented means having the assistance of a person.. who
>
> (a) Has a right of audience in relation to any class of proceedings in any part of the … courts.

> 75(1)(a) A costs order is an order that a party ("the paying party") makes a payment to … the receiving party.. in respect of the costs of the receiving party has incurred while legally represented…
>
> 75(3) A costs order… and a preparation time order may not both be made in favour of the same party in the same proceedings.
>
> 76(1) A tribunal may make a costs order.. and shall consider whether to do so, where it considers that
>
> (a) A party… has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted..
>
> 76(2) A tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> 77 A party may apply for a costs order … at any stage… No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application
>
> 84 In deciding whether to make a costs, preparation time, or waste of costs order, and if so in what amount, the tribunal may have regard to the paying party's… ability to pay."

74. There were three preliminary matters.

75. The application which Ms Rokad initially advanced was for both costs and preparation time. She abandoned the preparation time element of the application, which therefore plays no further part in this order. Secondly, I questioned whether an application for costs could be made in circumstances where the respondent was represented throughout by its HR Manager, Ms Couldrey. I accept the evidence on file that she had external support from solicitors, and raised with Ms Rokad the point that the only stage at which the respondent had been legally represented had been at this hearing. At all other times Ms Couldrey had been the sole channel of communication with the tribunal and with the claimant.

76. I questioned whether the respondent was legally represented within the meaning of Rule 74(2). My difficulty was that the word represented does not ordinarily mean, as the rule states, "having assistance" rather bears the meaning of "entitled or appointed to act or speak for another person." A litigant in person who three months before her tribunal hearing spends an hour with a solicitor obtaining advice is not represented in any common sense interpretation of the word, but has had legal assistance.

77. Ms Rokad helpfully drew to my attention the parallel provision in the 2004 Rules of Procedure, which defined represented as "represented <u>at the</u>

hearing." I accept that there must have been some good reason for the removal of that restriction in the 2013 rules, and on that basis alone I accept that the rule applies to the word "represented" a broader meaning which is broader than the dictionary meaning.

78. My third preliminary concern was notice. The claimant had clearly been put on notice that a costs application would be considered. However, contrary to frequent practice (although not mandatory practice) he had not been put on notice of his right under Rule 84 to make representations about ability to pay. I proceeded on the basis that that hurdle could be met by my making an order either in 'show cause' terms, or by explaining this concern in reasons, and reminding the claimant of his right to apply for reconsideration.

79. I approach the application through the well-known three step approach. The first is whether the claimant has been shown to have conducted the proceedings in a manner which falls within Rule 76(1); if so, the tribunal must consider whether it is in the interests of justice to make a costs award; if so, it must have the third stage and in light of any information about ability to pay consider the amount of such award.

80. Ms Rokad showed me a letter sent by Ms Couldrey on 23 January 2019 to the claimant, without prejudice save as to costs, which invited the claimant, in light of the witness evidence on limitation, and in light of his own failure to comply with the orders of the tribunal, to withdraw no later than 2 February 2019, and stated that if he did so, no application for costs would be made.

81. I understood Ms Rokad's submission to be in effect that the claimant's unreasonable conduct fell into four broad categories. The categories are capable of overlapping. They operate cumulatively, in the sense that the tribunal may consider the totality of the relevant behaviour.

82. The first category was that this claim is from the outset based on deliberate deceit. Counsel's submission was that the claimant knew and understood that he had been dismissed at the 22 January meeting, as is shown by his phone call two days later asking the respondent to reconsider. It follows that a claim based on the premise that he has been suspended on full pay, not dismissed, is false, and that the claimant must always have known it to be false.

83. The second category was that the claimant has at all times refused to comply with the order for disclosure. Ms Rokad submitted that his refusal falls under both rules 37(1) and 37(2). At the June hearing the claimant found out that tribunal judgments are public documents, so that his objections based on confidentiality fell away. That leaves only relevance as the stated reason for non-compliance.

84. The third category was that the claimant has on at least three separate occasions (December 2019, and June and September 2020), at the last minute before listed hearings, sent the tribunal and respondent volleys of emails, asking for adjournment on medical grounds. He has never

submitted medical evidence in support of any of the applications. The applications have contained internal inconsistencies. Further, two of his applications have been supported by emails from Mr Obadiah, which show detailed knowledge of the factual circumstances, but which the claimant has then repudiated. It is possible that there is no such person as Mr Obadiah, and that this is an email address created the claimant. Some emails have been sent from the claimant's email account, but in the name of the claimant's mother. It is possible that they were written by the claimant. There are two potential aspects to this unreasonable conduct: the first is that the applications have been late, inconsistent, and not supported by evidence. The second is that the claimant may have been the author of emails sent in two other names.

85. Finally, the claimant has submitted five purported emails on 31 July 2020, which the respondent submits are fabrications. This category of conduct may overlap with the second limb of the previous category. If the claimant has sent emails which purport to be sent by another person, they are also fabrications.

86. Ms Rokad's difficulty at this stage was that the first and fourth categories, and the second limb of the third category, depend on findings of fact which I am not in a position to make. I have heard no evidence. All I can say, in considering the matter at this stage, is that if any of those categories were found as fact, each in isolation, and all cumulatively, are capable of constituting unreasonable conduct.

87. It follows that at this stage, I consider myself limited to what I have called above the second category, and the first limb of the third.

88. I accept that the claimant has been at the extreme end of challenging opponent for Ms Couldrey. In saying so, I have regard to the observation of Sedley LJ in Blockbuster Entertainment Limited v James [2006] IRLR 630:

> "The courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably."

89. I take that phrase as a salutary reminder that there is a boundary between challenging behaviour, versus behaviour so unreasonable as properly to disentitle a party of the right to be heard and / or to be liable to be penalised in costs.

90. The first limb of the third category is the manner of the claimant's adjournment applications. They have been made at the last minute, including during the night before this hearing. They have been made by the claimant, and his mother, both using the claimant's email address. They have been supported by Mr Obadiah, whose interventions the claimant has twice rejected. They have been made on medical grounds without any medical evidence to support any of them. They have been inherently inconsistent. They have on occasion appeared implausible to the extent of absurdity: in that comment I include the recurrence of similar misfortunes

afflicting the claimant and his father at or around the dates of hearings in this and previous cases.

91. Even so, I decline, in the absence of hearing the claimant's explanation of any of these points, to find that on this limb alone the claimant has met the test of unreasonable conduct. In so saying, I accept that the claimant may have been unable to give such an explanation, and that he may well assisted his own interests therefore by not attending this hearing. Not without concerns and misgivings, my judgment is that the claimant has not been shown in this one respect to have conducted his case unreasonably in accordance with Rule 76(1).

92. It cannot be disputed that the claimant has been and remains in contravention of Rule 76(2). The first stage of the costs application under that sub rule is made out.

93. At the second stage, and in the exercise of discretion, should a costs order be made? I bear in mind the general approach: costs orders are the exception in the tribunal not the generality. Costs do not ordinarily follow the event. The tribunal must balance the right of access to justice for claimants with its duty to safeguard respondents against unmeritorious claims, and its duty to ensure that the finite resource of the tribunal is properly used. That is a difficult balancing exercise in every case.

94. In the balance, I think it right to bear in mind that precisely the matter for which costs are sought, namely non-compliance with the disclosure order, has led to strike out of the claim and therefore to the claimant being deprived of his right of hearing. It seems to me as a matter of proportionality that in the specific circumstances of this case, it would not be right to add the sanction of costs to the existing sanction of strike out, and not without misgivings, it is in my judgment not in the interests of justice for a costs order to be made.

95. Although it is not strictly necessary to do so, I add two further observations. If I had made a costs order, and subject to representations about ability to pay, I would have limited any costs award to Counsel's fee for this hearing, namely £1,200.00. I would have had to give consideration, before making any costs award, to affording the claimant the opportunity to submit information about ability to pay. Although the tribunal is not required to advise a party of his right to do so, it is good practice, and no more than fairness in a case where only one side is represented.

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Employment Judge R Lewis

Date: 14 October 20

Sent to the parties on: 16 October 20

For the Tribunal Office