Case No: 1801533/2018
1804856/2018

EMPLOYMENT TRIBUNALS

Claimant Mr E Idusogie

Respondent: Suez Recycling & Recovery Kirklees Limited

HELD AT: Leeds **ON:** 6 and 7 September 2018; 5 November 2018; 12th December 2018

BEFORE: Employment Judge Eeley

REPRESENTATION:

Claimant: In person
Respondent: Mr M Humphreys, counsel

PRELIMINARY HEARING

JUDGMENT

1. The part of the conversation on 7th March 2018 which was recorded by the Claimant is subject to the without prejudice rule and is therefore inadmissible as evidence before the Tribunal.

2. Having determined the admissibility of the without prejudice communications on 7th March it is still just and equitable for Employment Judge Eeley to determine the subsequent preliminary issues in this case and Judge Eeley does not recuse herself from further determinations.

3. The effective date of termination in this case is 26th March 2018.

4. The claim for unfair dismissal in this case having been presented on 22nd March 2018 it was presented prior to the effective date of termination on

26th March 2018. It is therefore a premature claim and the Tribunal does not have jurisdiction to hear it. The claim for unfair dismissal is therefore dismissed.

5. The following paragraphs of the Claimant's grounds of complaint in claim 1804856/2018 are struck out: 1, 2, 4, 6, 7, 9.

6. The Respondent's application for costs set out in letter dated 4th September 2018 is dismissed.

REASONS

1. Prior to determining the effective date of termination in this case so as to rule on the issues set out at paragraph 8 of Employment Judge Drake's hearing summary of 3rd July 2018 it became apparent that I needed to determine whether certain aspects of the evidence were 'without prejudice' and therefore inadmissible before the Tribunal for the purposes of determining the issues in the claims. In consultation with the parties I decided that:

    a. The parties should be able to draft any fresh witness evidence required for me to determine the nature of the allegedly "without prejudice" communications and the audio recording of the discussion should be played to me, at the Claimant's request.

    b. Oral witness evidence and submissions would be received by the Tribunal so that the 'without prejudice issue' could be determined.

    c. Once I had determined the without prejudice issue depending on my determination I would either proceed to determine the remainder of Judge Drake's list of issues (if all evidence was admissible) or, if part of the evidence which I had heard was inadmissible, I would hear the parties' representations and determine whether I should recuse myself from further consideration of the case on the basis that I had heard without prejudice evidence.

    As the parties' witness statements originally drafted for the preliminary hearing did not deal adequately with the 'without prejudice' material the first day of the hearing was adjourned to enable them to produce further witness statements to facilitate the further consideration of the case.

2. Upon resuming the hearing on 7thSeptember I listened to the Claimant's recording of part of the conversation between the parties on 7th March 2018. I heard oral evidence from witnesses and representations on behalf of both parties on the without prejudice issue which I then proceeded to determine. Having determined that part of the evidence was properly classified as 'without prejudice' I had to determine whether to recuse myself. As the Claimant did not feel prepared to address me on this issue and as it was near the end of the Tribunal day I adjourned the hearing to 5th November for

consideration of this matter and to enable the parties to prepare their representations.

3. Prior to the resumed hearing on 5th November the Respondent sent written representations to the Claimant and to the Tribunal having sought clarification from the Claimant as to whether he wanted a different judge to determine the remainder of the preliminary issues in the case. The Claimant had been unable to provide that clarification. The Respondent provided written representations in which it urged me not to recuse myself from the remainder of the preliminary hearing.

4. At the resumed hearing on 5th November I sought clarification of the Claimant's position on the issue of recusal. After lengthy attempts explain the issue to him and to determine his position on the issue he provided written confirmation that he was happy for me to determine the remaining issues. I considered and gave a decision on the recusal point. I then heard representations from the parties on the issue of the effective date of termination and its impact upon the validity of the Claimant's complaint of unfair dismissal. As this process took us to the end of the Tribunal day it was agreed that the listed hearing on 12th and 13th December would be utilised to determine the remaining preliminary issues. The Respondent agreed to set out its position in writing in relation to the remaining parts of the second claim form.

5. At the hearing on 12th December I dealt with the remaining applications for strike out or deposit made by the Respondent in respect of the second ET1. I also determined the Respondent's application for costs dated 4th September 2018.

6. Below I set out my reasons for each of my determinations in this case so far.

Without Prejudice Evidence

Facts

7. I was asked to consider whether or not a section of the correspondence and conversations on 7th March 2018 should be held to be without prejudice and therefore inadmissible in evidence before the Tribunal. I listened to the audio recording covering the relevant part of the meeting on 7th March. I heard evidence from the following: the Claimant; Mark Williams; Saima Latif and Helen Jones.

8. Having considered the evidence I find that there were two clear parts to the discussion between the parties on 7th March. The first part took place before the audio recording started and was essentially a clarification between the parties of the appeal outcome and a clarification of the options remaining to the Claimant regarding his return to work (i.e. would he return to work in his old post with mediation to support him or, alternatively, would he accept a transfer to a new work site).

9. Essentially an impasse was reached during this discussion. The Claimant had rejected both the options put to him by the Respondent but remained off work on sick leave so the question arose as to what should happen next to resolve matters. At this point there was a break in the formal meeting in order for the Claimant to get advice and guidance from Mr Dyer, his trade union representative. That advice and guidance was given in the absence of the Respondent's witnesses.

10. The Claimant then returned to the meeting with the Respondent's witnesses, accompanied by his trade union representative. At that point the Claimant started the audio recording of the meeting. The audio recording produced by the Claimant does not cover the discussion before this point in time.

11. Towards the beginning of the audio recording the Respondent introduced a without prejudice discussion. Mr Dyer explained to the Claimant what without prejudice discussions were and what this meant for the Claimant. The Claimant was asked to state his preference as to the way forward following the outcome of the grievance procedure. He was asked what he wanted from the Respondent. Reference was made to the Claimant's first Tribunal claim which had already been presented to the Tribunal at that point in time. At various points the concepts of without prejudice discussions and settlement proposals were explained to the Claimant as were the remaining options for a return to work. The Claimant was asked to state his preference for a resolution to the dispute, if necessary in the form of a settlement proposal. He requested time to think. He then had a further period of time to speak to his trade union representative alone. The meeting resumed for a third time and there was a discussion between the parties regarding how long the Claimant could have to consider his position. Proposals varied between 3 weeks and 7 days. This discussion took some time but was left unresolved. There was no clear decision between the parties as to the appropriate time frame but the clear intention was that the Claimant would come back with his response in due course. The meeting then ends.

Law

12. In light of the legal complaints presented by the Claimant to the Tribunal there was the potential to consider both common law 'without prejudice' privilege and the application of section 111A of the Employment Rights Act 1996 in this case. However, I heard from the parties initially solely on common law privilege rather than section 111A. In light of my decision on that issue it was not necessary to consider the potential issues raised by section 111A.

13. The common law principle of without prejudice communications applies to Tribunal proceedings as it does in civil courts in England and Wales. It arises out of the public policy requirement for parties to a dispute to be able to resolve that dispute by agreement without recourse to litigation and without fear that statements, admissions, offers or concessions made in the course of negotiation will become public in litigation and potentially prejudice their position (Rush & Tompkins Ltd v Greater London Council [1989] AC 1280*)*. In addition to public policy justification the rule has been held to rest on the express or implied agreement between the parties themselves that their

negotiations should not be admissible (Unilever plc v Proctor & Gamble Co [2000] 1 WLR 2436 at 2442, per Robert Walker LJ).

14. Parties to a 'without prejudice' discussion or correspondence are not required to label it as such at the time in order for it to be considered a without prejudice exchange. The law looks at the substance, purpose and content of the communications rather than at the label that one or more of the parties applies to it. *"If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission"* (Rush & Tompkins Ltd v Greater London Council, at 1299H, per Lord Griffiths).

15. Communications which would not otherwise be considered without prejudice will not become without prejudice merely by application of the label. South Shropshire District Council v Amos [1987] 1 All ER 340, [1986] 1 WLR 1271, CA.

16. In order for the without prejudice rule to apply there must be an existing dispute between the parties at the time that the alleged without prejudice communication is made coupled with a genuine attempt to settle that dispute. The dispute in question may consist of litigation but need not do so. Negotiations can be to settle a dispute before it comes to litigation (Framlington v Barnetson [2007] IRLR 598). The question is not purely a temporal one rather, it is whether the parties contemplated or might reasonably have contemplated litigation if they could not agree. As Auld LJ put it in Framlington (para 34):

"The critical feature of proximity for this purpose, it seems to me, is one of the subject-matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close to litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made."

17. A without prejudice communication may nonetheless become admissible if one of the established exceptions to the rule applies. One exception to without prejudice inadmissibility is that of "unambiguous impropriety". The rule cannot, for example, be relied on if the exclusion of evidence of what a party said or wrote in without prejudice negotiations would 'act as a cloak for perjury, blackmail or other "unambiguous impropriety"' (Unilever plc v Proctor & Gamble Co, at 2444F-G). This exception arises where there has been a

serious abuse of the privilege by one of the parties. The courts will be slow to apply the exception to the general rule except in clear cases. Unambiguous impropriety means more than one party being disadvantaged forensically by the exclusion of the evidence (Portnykh v Nomura International plc UKEAT/0448/13 [2014] IRLR 251, EAT, at paras 41–42, per Judge Hand QC).

18. The exception should only be applied in the clearest cases of abuse of a privileged occasion, otherwise 'this highly beneficial rule … will all too readily become eroded' (Fazil-Alizadeh v Nikbin (1993) Times, 19 March, CA, per Simon Brown LJ; Unilever plc v Proctor & Gamble Co, at 2444H).

19. The principle of without prejudice communications applies equally in discrimination cases Woodward v Santander UK plc (formerly Abbey National plc) [2010] IRLR 834, *EAT.* The limits of the rule lie in the established exceptions such as unambiguous impropriety which applies only in the clearest of cases.

20. Without prejudice privilege can be waived but only where both parties to the negotiations consent unequivocally, whether by words or conduct (see, for example, Graham v Agilitas IT Solutions Ltd UKEAT/0212/16 (12 October 2017, unreported), at para 16). Moreover, parties cannot cherry pick particular parts of the discussions for disclosure whilst seeking to maintain the confidentiality of the remainder (*Graham* at para 39).

Conclusion on 'without prejudice'

21. I find that there were clearly two parts to the discussions between the parties on 7th March. The first part of the discussion took place prior to the audio recording and was effectively a clarification of the Claimant's grievance appeal outcome. An impasse was reached. Two options for a return to work had been put forward and both had been rejected by the Claimant. He was off work sick and so the question arose as to how matters would be resolved. There was a break to enable the Claimant to get advice from his trade union representative. When the meeting between the Claimant and the Respondent's management resumed it was of a different nature and focused on the future resolution of the impasse alongside the Claimant's Tribunal claim. No solution was agreed upon and the Claimant was given some time to consider his options.

22. I conclude, applying the relevant without prejudice rules, that there was a clear dispute between the parties arising out of the internal grievance and the Tribunal proceedings which had already been presented. After the adjournment the nature of the meeting changed and it became a without prejudice meeting. The discussion was genuinely aimed at resolving the dispute which was expressly said to be in existence between the parties. The nature of without prejudice discussions was explained to the Claimant by his trade union representative.

23. There is a strong public policy argument in support of the without prejudice rule. The exceptions to without prejudice protection are narrow. The most obvious potentially applicable exception in this case would be that of so-called "unambiguous impropriety". I have considered that doctrine in the context of this case and have concluded that there is no unambiguous propriety here. The closest the Claimant gets to asserting that there is such impropriety is by saying that he was "taken by surprise" by the settlement discussion but the reality is that in every case one party or another has to initiate that discussion. This may surprise the other party i.e. the recipient of the opening offer. That in itself does not constitute unambiguous impropriety in my view. There is no evidence of bullying, unambiguous discrimination, blackmail or any of the other myriad of possibilities considered by the case law. It is a rational and dispassionate attempt to resolve the dispute between the parties, pure and simple.

24. Whilst the Claimant may not have wanted to instigate the without prejudice discussion himself and did not want to make any proposals then and there he did have the nature of without prejudice discussions explained to him and agreed to continue with the meeting for a time knowing what a without prejudice discussion was. Once he decided he did not want to proceed further and he wanted time to consider his position the meeting was adjourned. The Claimant did, either expressly or implied, consent to the without prejudice discussions which took place on 7th March in those circumstances.

25. I have to consider the nature, content and purpose of the discussion and I have done so. I find that it falls squarely within the without prejudice rule. The fact that no actual resolution to the dispute has been reached also does not mean that the discussion itself ceases to be without prejudice. It is not only successful without prejudice discussions which are protected by the evidential rule.

26. Having reviewed the evidence in this case I cannot see that any exception to the without prejudice rule applies and so the evidence in question remains without prejudice and inadmissible in the remainder of these proceedings before the Tribunal.

27. So, in those circumstances I have concluded that the common law rule of without prejudice inadmissibility applies. The issue of section 111A of the Employment Rights Act 1996 has not been addressed by the parties and so I do not determine it.

Recusal

28. Having determined the issue of without prejudice communications and having excluded certain evidence from the record for the purposes of determining when the effective date of termination took place, the question arose as to whether or not the same Judge could then go on to consider and determine the effective date of termination having seen evidence which is inadmissible.

Having heard submission from the parties I decided that it was not necessary to recuse myself from further involvement in the proceedings.

29. There was little available guidance on this point in the Tribunal case law but I was referred to the following sources of guidance by Mr Humphries:

    a. An extract from *Zuckermann on Civil Procedure: Principles of Practice 3rd Edition Chapter 17- Without Prejudice Communications Para q7.30-17.31.*
    b. Berg v IML London Limited [2002] 1 WLR 3271
    c. Plymouth City Council v White UKEAT/0333/13

    Both Zuckerman and Berg arise in the context of civil litigation. White is an EAT case but it concerns the issue of disclosure rather than the particular issue in this case.

30. Zuckermann states that it is desirable for a different judge from the one who determined an application that a document was privileged to decide the case on its merits *"…to avoid the risk that the judge will be influenced by the contents of the documents which he excludes after inspection."* This appears to be a guideline with a specific policy justification rather than a strict rule which must always be followed.

31. Paragraph 11 of the White decision deals with the sequence to be followed in a disclosure application: *"… the disclosure Judge having read the disputed documents should not conduct the full hearing unless the parties agree."* It can be said that this guidance applies by analogy to a case involving without prejudice material given that it is aimed at the same mischief of ensuring fairness to the parties where a judge has previously seen evidence which is judged to be inadmissible at the subsequent trial.

32. Berg sets out the relevant principles for determining the issue which are:
    a. Whether the Judge, subjectively, considers that the knowledge acquired disables her from fairly continuing with the case.
    b. Whether, objectively, a fair-minded and informed observer would conclude that there was a real possibility or a real danger that there could not or would not be a fair trial.

Conclusion

33. In determining this issue I considered that there were a number of relevant factors. Firstly, I have the consent of both parties to go ahead and determine the effective date of determination so any requirement for consent set out in White is met in the instant case. Secondly, the guidance which I was referred to in Zuckerman states that a different Judge is "desirable". It is not said to be required or necessary in all cases. Thirdly, I have considered the civil procedure test in Berg the first element of which is a subjective test. Looking at the matter subjectively I do not think the fact that I heard the recording nearly two months ago affects my ability to determine the issue fairly today.

The recording was last heard two months ago and the detail of what was said cannot be recalled. I have not heard the recording again and it is perfectly possible for me to put it out of my mind to the extent that I can recall it.

34. Moving on to the objective element of the Berg test: what would a fair minded and informed observer conclude? My view is that a fair minded and informed observer would conclude that there was no real possibility or danger that there could not be a fair trial.

35. Any prejudice in these proceedings would be to the party who asserted the without prejudice privilege. They would run the risk of having the judicial mind tainted by inadmissible evidence. In this case that is the Respondent. However, the Respondent has consented to me determining the remaining issues at this preliminary hearing. Furthermore, I have no recollection of the contents of the meeting being particularly prejudicial to either party. This is not the sort of case where there has been a without prejudice admission or a payment made into court. I note that there has been a gap of months since I last heard or saw the evidence in this case so there is no real danger of recalling it to taint my decision making and I will not re-read any of the notes of the privileged evidence.

36. Part of the judicial task is to discard and ignore irrelevant evidence and I am capable of doing that. Indeed, section 111A of the Employment Rights Act which deals with so-called 'protected conversations' at least envisages the possibility of the same Judge deciding a case including protected conversation evidence for some purposes, (for example, a discrimination claim) but excluding it for other purposes (such as an unfair dismissal claim). The legislator has implicitly recognised the ability of the judicial mind to compartmentalise the evidence that it hears. Likewise, in the case of claims for unfair dismissal and wrongful dismissal findings need to be made in the course of a judgment in relation to what evidence the Respondent employer had before it and what conclusions could reasonably have been drawn from that evidence for the purposes of the unfair dismissal claim. However, for the wrongful dismissal claim the same Tribunal may have to conclude whether, notwithstanding the evidence available to the employer's decisionmaker, the employee was <u>in fact</u> guilty of gross misconduct. On that basis it is clear that Judges are often required to discard or disregard evidence for certain purposes.

37. If there is a potential prejudice to a party in the same judge determining the effective date of termination as dealt with the privilege issue it is surely to the party claiming privilege. In this case that is the Respondent and yet the Respondent is content for me to determine the rest of the preliminary issues in this case.

38. I have also taken into consideration the overriding objective including the efficient use of Tribunal time. If I am able to determine the effective date of termination there will be no further delay in the case. There will be no need for oral witness evidence to be heard again and further findings of fact to be made, which would be a duplication of judicial tasks already completed. Therefore, it is the more efficient way using judicial resources and time.

39. Taking the issues in the round all these factors outweigh any preliminary consideration that a separate Judge is desirable to determine the remainder of the preliminary issues in this case. I therefore decide that I will not recuse myself from the remainder of this preliminary hearing.

Effective date of termination

40. I have to consider whether or not the effective date of termination in this case is 7th March 2018 or 26th March 2018. The Claimant contends that he was dismissed on 7th March whereas the Respondent contends that the effective date of termination was 26th March and asserts that the Claimant resigned.

Facts

41. The first Tribunal claim in this set of proceedings was presented on 25th January 2018.

42. On 3rd January 2018 Mark Williams had chaired a grievance appeal hearing into the Claimant's grievance and he was supported by Ms Latif of HR. The outcome letter in relation to the grievance appeal is dated 8th January 2018 and is at page 207 in the bundle. It reiterated two options: mediation to enable the Claimant to be supported to return to work in his original job at the original site; or transfer to another site to get the Claimant back to work. In that letter the Respondent confirmed that there was nothing available for the Claimant in the Kirklees area. The only option currently available was in Calderdale. On 11th January Mr Dyer the Claimant's trade union representative sent an email (page 210) querying the options which were available and on 17th January the Claimant sent an email to both Saima Latif and Mark Williams specifying the areas to which he would be prepared to transfer and confirming that he would not transfer to Halifax.

43. On 8th February the Claimant met with Helen Jones to discuss the options for a return to work. The options available to him were reiterated but it was decided, as a result of the contents of that discussion, that it would be beneficial for the Claimant to meet once again with Mr Williams. As a result, that further meeting was arranged, initially by invitation letter dated 20th February. Unfortunately, the original date had to be cancelled and eventually the date was changed to 7th March. Both of the invitation letters refer to the purpose of the meeting as being to confirm a couple of the Claimant's queries from his appeal.

44. The meeting eventually took place on 7th March. I refer only to those sections of the meeting which were not conducted on a without prejudice basis. I have excluded from my consideration the inadmissible sections which coincided with those parts of the meeting which were recorded after the Claimant had had a break to speak to his trade union representative.

45. I find that Mr Williams introduced the purpose of the meeting and explained that it was to clarify the issues arising from the appeal outcome. He discussed the options which were available to the Claimant (which were

mediation and a return to his job at the old site or alternatively transfer to a new site). The Claimant confirmed that he did not want the transfer that had been offered (i.e. to Halifax) but rather wanted to remain on a contract within the Kirklees area. Mr Williams reiterated that no other roles within the Kirklees area were available for him to transfer to.

46. Towards the end of that conversation Mr Dyer (who was the Claimant's trade union representative) suggested a break so that he could talk to the Claimant. It is at this point that there is a break in the meeting in so far as the Respondent's attendees are concerned. The meeting was reconvened as a without prejudice discussion and I make no further findings regarding what was said during that portion of the meeting. It appears that there was a further break for the Claimant to talk to his trade union representative. The meeting again resumed with all parties present and the upshot of the final closing remarks was that the Claimant would take time to consider what he wanted to do regarding a return to work and would let the Respondent know his preference. It appears that although there was a discussion as to an appropriate time frame there was no actual agreement between the parties as to when the Claimant would revert to the Respondent with his decision.

47. In terms of the chronology the next event was the letter from the Claimant dated 26 March at page 224 of the bundle. In that letter, which is entitled "Re: Confirmation of Dismissal," the Claimant says this:
"I write this letter following our meeting of March 7, 2018 where you told me you would not be able to transfer me to another site. I therefore informed you that I am not going to work here in MRF, due to the discrimination, victimisation, harassment, bullying, negligence by management, being racially abused and threats from your employees. Since you could not find me a suitable site to transfer me, you also offered to settle me which I believe to be a constructive and unfair dismissal. Yours sincerely…"

48. The Respondent acknowledged this letter in its own correspondence dated 9th April to be found at page 228 of the bundle. Amongst many other points that are made on behalf of the Respondent in that letter, the following is stated:
"We note from the ET1 recently filed by you at the Leeds Employment Tribunal that you state your termination date was 7 March 2018. We will therefore treat you as having resigned from your position without notice as of that date. You will be paid up to that date. You will also receive a payment in lieu of any accrued untaken annual leave up to 7 March 2018 and your P45 will be issued shortly. P45 will be forwarded to your home address as soon as possible".

The letter carries on and signs off in the usual way.

49. Essentially this letter from the Respondent treated the Claimant's letter of 26th March as confirming his resignation but with effect from 7th March. Some time after this correspondence the P45 was in fact processed by the Respondent with a date of 7th March as the effective date of termination (see page 239). For various administrative reasons the termination date of 7th March was not entered into the Respondent's payroll system until 24th May so the Claimant continued to receive pay past both 7th March and 26th March.

50. In cross-examination before the Tribunal it was put to the Claimant at one point that: *"at no point during the meeting did Saima Latif and Mr Williams say you were dismissed"*. The response from the Claimant was *"the two of them were talking to me at the same time. I was a bit confused. Mr Williams started first speaking about the way forward. They said something without prejudice…".*

    The next question from the Respondent's counsel was:

    "At no point did they say you were being dismissed did they?" and the Claimant's response was: *"both said we pay you out to go away from contract".*

    It was put to the claimant that: *"at no point in the meeting did you say you had resigned"* and the Claimant's response is noted as *"I didn't resign but management conduct- the way I was treated- saying we'll pay-walk away*" and it continues in a similar vein. Subsequently the Claimant accepted in evidence that he was given some time after the meeting to consider his options.

    The law

51. For an express dismissal to take place it must be communicated by the employer to the employee. Usually the words of dismissal will be clear and unambiguous. If the words used are ambiguous the Tribunal has to consider how a reasonable listener would understand them. It is effectively an objective test.

52. Section 97 of the Employment Rights Act 1996, so far as relevant, provides:

    (1) Subject to the following provisions of this section, in this Part "the effective date of termination"-

    (a) in relation to an employee whose contract of employment is terminated by notice, whether given by the employer or the employee, means the date on which the notice expires,

    (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

    (c)….

53. If the purported dismissal is in fact a constructive dismissal the Tribunal has to consider whether there was a repudiatory breach of contract by the Respondent and whether the Claimant responded to it by resigning, and, if so, when. The date of termination is determined by the resignation and not the date of the repudiatory breach which the Claimant is responding to. Rather the date of termination is either the date that the resignation is given and takes effect or, if the resignation is with notice, the date the notice expires.

Conclusions

54. I conclude that there was no express dismissal on 7th March. There was no communication via clear and unambiguous words of a dismissal of the Claimant. Nor were there any ambiguous words that could be objectively seen as dismissal. In fact, the Claimant was given time after this meeting to consider his options. Had there been any intention or communication of dismissal such period of time to reconsider would have been otiose.

55. In relation to any issues of constructive dismissal again it is not possible to identify any breach of contract on the part of the Respondent at this meeting to which the Claimant could respond with his resignation. In any event the Claimant made it clear in cross examination that he did not resign that day. He made that clear on his own account.

56. In the later letter of 26th March the Claimant says that he is confirming the position but the reality is that there was no termination on 7th March. The Claimant may seek to characterize the 26th March letter as a confirmation of what had already taken place but in reality, that letter is the first communication of his intention that the employment should come to an end. Looking at the 26th March letter it is either a resignation itself or the resignation component of a constructive dismissal. For present purposes I do not need to determine which. This letter is the first time that either party to the employment contract has said that the employment is at an end. It comes from the Claimant first. It does not confirm the 7th March events but addresses them for the first time.

57. The fact that the Respondent refers to the 7th March date and puts that on the P45 arises out of the Claimant's letter of 26th March. The P45 and the contents of the Respondent's 9th April letter are responses to the Claimant's letter of 26th March and also his ET1 which asserts a termination date of 7th March. They (the P45 and the letter of 9th April) cannot retrospectively create an effective date of termination of 7th March if, as a matter of law, the termination was not communicated at that point in time. The effective date of termination is a statutory concept and it is not open to the parties by agreement to override the statute and determine that the effective date of termination will be a different day. The EDT is to be objectively determined. (Fitzgerald v University of Kent [2004] IRLR 300 Sedley LJ paras 17-23).

58. I note that the Claimant continued to be paid after 7th March. I also note that at the preliminary hearing on 20th March (page 50 of the bundle) the Claimant was still said to be in the Respondent's employment and no issue was taken with this assertion on his behalf. One would expect this to have been at least questioned if it was not a correct statement of the position.

59. Therefore, for the reasons set out I conclude the date of termination was 26th March and the claim presented on 22nd March in relation to unfair dismissal is premature. The Tribunal therefore has no jurisdiction to hear the unfair dismissal complaint and it must therefore be struck out. The date from which the limitation period begins is the Effective Date of Termination (s111 Employment Rights Act 1996 and also *Harvey on Industrial Relations and*

Employment Law/P1 Practice and Procedure/ 1. Employment Tribunals/F. Time Limits for Presentation of Claims/ (6) Premature Claims.) The claim for unfair dismissal is therefore dismissed.

Strike out/deposit

Law

60. The relevant provisions are set out at rules 37 and 39 of the Employment Tribunals Rules of Procedure 2013. The relevant parts for present purposes are 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 and 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).

……..

39

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit

…..

61. For the purposes of these proceedings the Respondent advances its argument on strike out on the basis of the allegations having no reasonable prospects of success.

62. The striking out process under rule 37 requires a two-stage test (see HM Prison Service v Dolby [2003]IRLR 694 EAT, at para 15; approved and applied in Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported). The first stage involves a finding that one of the specified grounds for striking out has been established and, if it has, the second stage

requires the Tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

63. The grounds for striking out a pleading under r 37(1)(a) include anything that might be deemed to be an abuse of the process of the tribunals. The term 'abuse of process' is not to be narrowly construed and the circumstances constituting such an abuse are not limited to claims (or defences) that are a 'sham and not honest and not bona fide' (Ashmore v British Coal Corpn [1990] IRLR 283, [1990] ICR 485, C*A*). According to Stuart-Smith LJ in *Ashmore*:

    "A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material."

64. Cases should not, as a general principle, be struck out on the grounds that they have no reasonable prospects of success when the central facts are in dispute (see Ezsias v North Glamorgan NHS Trust [2007] IRLR 603) On a striking-out application the Tribunal is not conducting a mini-trial. It is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence (see E D & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 *at para 10* per Potter LJ (in the CPR context) and Ezsias at para 29). Such an exception might be where the facts sought to be established by the Claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ). In these circumstances, it has been said that the correct approach for a tribunal to adopt is to take the claimant's case at its highest, as it is set out in the claim, 'unless contradicted by plainly inconsistent documents' (Ukegheson v London Borough of Haringey [2015] ICR 1285, EAT, at paras 4 and 21 and summary*)*).

65. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. See Anyanwu v South Bank Students' Union [2001] IRLR 305, HL, Lord Steyn stated (at para 24):
    "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."
    And Lord Hope of Craighead stated (at para 37):
    " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

66. The test for making a deposit order under r 39(1), namely, that the specific allegation or argument has *little reasonable prospect of success* is similar to the wording of the test for striking out the whole or part of a claim or response under r 37(1)(a), which is that it has *no reasonable prospect of success*. However, the wording is not the same and the threshold is lower for making a deposit order than for striking a claim out.

67. When considering whether to strike out elements of the claim it may also be appropriate to consider potential amendments to the claim as an alternative to strike out. The power to amend is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions' (Mummery J Selkent Bus Co v Moore [1996] IRLR 661) Before making the decision the Tribunal must take account of all the circumstances and the interests of justice and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I refer also to the relevant Presidential Guidance which directs me to consider the nature of the amendment and whether or not it is substantial. I must consider whether it is a mere difference of labelling or the inclusion of a new factual allegation. If a new cause of action is made by way of amendment the Tribunal should consider whether the new complaint is out of time and whether the time limit should be extended. I should also consider the timing and manner of the application.

68. Even though it may be necessary for the Tribunal to consider the time limits, they are only a factor, albeit an important and potentially decisive one, in the exercise of the overall discretion whether or not to grant leave to amend. One of the factors that may be taken into account when determining whether a new claim should be allowed by way of amendment is an assessment of the merits of the new claim (Gillett v Bridge 86 Ltd UKEAT/0051/17 (6 June 2017, unreported), at para 26).

69. The test for extending time limits in a discrimination case is to consider whether it is “just and equitable” to do so. The discretion has been said to be as wide as that available to the civil courts in relation to section 33 of the Limitation Act 1980 in personal injury cases. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*a*) the length of and reasons for the delay; (*b*) the extent to which the cogency of the evidence is likely to be affected by the delay; (*c*) the extent to which the party sued had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see British Coal Corpn v Keeble [1997]IRLR 336 at para 8). However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a Tribunal to go through such a list in every case.

Conclusions

70. I heard representations from both parties in respect of the grounds of complaint in the second ET1 which was to be found at p66 of the Tribunal bundle. I also had the benefit of written submissions from both parties. There was no formal application to amend the claim by the Claimant and he presented no written amendments. I took time to clarify with him orally precisely what case he was trying to present in respect of each paragraph of his grounds of complaint.

71. For ease of reference I adopt the same numbering of the paragraphs as that used by the Claimant at box 8.2 of the ET1.

72. Paragraph 1 of the grounds of complaint refers to the unfair dismissal. Given my earlier determination that the effective date of termination in this case was 26th March and my determination that the unfair dismissal claim was lodged prematurely the Tribunal has no jurisdiction to hear this part of the claim. Paragraph 1 is therefore struck out.

73. I took time to clarify Paragraph 2 of the Grounds of Complaint with the Claimant. In part it relates to the alleged actions of Nathan Hirst on 20th and 21st September 2017. To that extent it is a duplication of the claims of direct discrimination and harassment in the first set of proceedings and is therefore struck out. It is effectively an abuse of process.

74. Paragraph 2 makes reference to 2014 and provides a list of names. It does not specify what the Claimant is actually complaining about in respect of 2014. There are no details of what the alleged discriminatory acts were, who did them and when. To the extent that the Claimant was able to provide oral clarification he stated that the problems with Nathan Hirst continued and did not stop. He did not provide specific details of what he did or said. The Claimant alleged that he had made other complaints to the Respondent during this period which were not written down by the Respondent or investigated by the Respondent. He alleged that in the first half of 2014 Eric Townsend discriminated against him by referring to him as “the prodigy of Robert Thompson”, a fellow employee of mixed-race heritage. This was apparently a derogatory comment. He alleged that Jacqui Ross allowed his colleague Cliveland to bully him and that management turned a blind eye to this. He was unable to give specific details of what happened and on what approximate dates. I was also referred to evidence within the bundle: a letter from Robert Thompson dated 24th September 2018 (p3 Claimant’s submission bundle); witness statement of Abraha Zenawi (p4 Claimant’s submission bundle); minute of meeting with Eric Townsend 9th July 2014 (p163 bundle); minute of meeting with Jacqui Ross 8th July 2014 (p157 bundle); Claimant’s list of documents for preliminary hearing (p248 bundle); grievance appeal decision letter 4th November 2014 (p250 bundle); Claimant’s grievance letter 24th September 2017 (p190 bundle); Claimant’s appeal letter dated 27th November 2017 (p201-203 bundle). I read these documents in light of the Claimant’s oral clarifications.

75. Doing the best that I could and taking the Claimant's oral submissions and written documents together it appears that the Claimant raised a grievance in 2014 about his treatment at the hands of his colleagues. His colleague Cliveland apparently made derogatory comments about the Claimant's wife and child. The Claimant alleges that Jacqui Ross, Alan Sparks and Stuart Ross took no action in relation to the Claimant's complaints about this. He also makes an allegation with regard to fish and chips. Apparently, the Respondent's management would on occasion buy fish and chips for all the staff and this was in some way linked to the workforce's accident record. On one occasion the management did not buy the said fish and chips allegedly because the Claimant had had an accident. The Claimant was blamed for this by his colleagues. The Claimant also raised a grievance in relation to the withholding of a copy of his medical report, in relation to material being deliberately left in a cabin for the Claimant to clear away and in relation to the Respondent hiding information from the Claimant regarding a "Manual Handling Tracker".

76. Paragraph 2 also refers to "indirect" discrimination. However, it does not specify what that discrimination consisted of. It does not set out the necessary "provision criterion or practice" and does not deal with the other limbs of the legal test at section 19 of the Equality Act 2010. I sought further clarification from the Claimant at the hearing. He was unable to explain what the PCP was in his case and was unable to frame his claim as a section 19 claim despite my attempts to clarify this with him. He used "direct" and "indirect" discrimination terminology interchangeably and it was apparent to me that what he was actually complaining about was a difference of treatment because of his ethnicity which is properly framed as a direct discrimination claim rather than an indirect discrimination claim. The first ET1 already contains claims of direct discrimination and harassment which will be determined in due course.

77. Paragraph 2 of the grounds of complaint also refers to "Discrimination by association- comparing me to Robert Thompson" This is apparently a reference to Eric Townsend's comment set out at paragraph 74 above. The Claimant did not give clarification as to how this was meant to work as an associative discrimination claim. Rather it appears to be a claim of direct discrimination or harassment.

78. As the contents of paragraph 2 are currently drafted they are insufficiently particularised and have no reasonable prospects of success and should be struck out. For the avoidance of doubt this is not a case where I have sought to determine disputes of fact. Rather I have taken the Claimant's case as currently pleaded and have determined whether it can be said to have reasonable prospects of success.

79. I went on to consider whether, despite the absence of an application by the Claimant, an amendment to the claim at paragraph 2 should be allowed in order to clarify it rather than strike it out. In considering this point I bore in mind the Selkent principles and the current Presidential Guidance in relation to amendments to claims.

80. Having listened to the Claimant it is apparent that in order for the remaining parts of paragraph 2 to proceed there would need to be a clear written amendment to clarify the factual allegations made. The Claimant has sought to refer the Tribunal and the Respondent to pages of evidence to clarify his claim but this is not sufficient. Both the Tribunal and the Respondent need to have the case set out in a way which can be sensibly be responded to and determined. I bore in mind that it is not for the Tribunal to write the Claimant's amendments for him but I questioned him orally in order to see whether the claim could be explained in a way which could subsequently by provided in a written format. Despite my best efforts the Claimant was not able to provide sufficient clarity and specificity even orally. The account set out above is gleaned from a combination of my own reading of documents and some of the Claimant's representations. There is insufficient particularity for the Respondent to know the case it has to meet and based on the Claimant's representations at the hearing I am not confident that, even given time, he would be able to provide clear and comprehensive written particulars.

81. It is apparent that any amendment to paragraph 2 would be a significant factual amendment which would significantly increase the scope of the factual enquiry by the Tribunal at any final hearing. It cannot in any sense be said to be a relabelling of the matters already pleaded. I have thus had regard to the time limits. The amendments would be significantly out of time and relate to factual allegations which are now well over 4 years old. I asked the Claimant to explain why he did not pursue a Tribunal claim in relation to the 2014 incidents within the three month time limit. His explanation was that he was "giving the Respondent a second chance" to ensure that it did not happen a second time and that he decided to put in a second claim when similar issues recurred in 2017. It is apparent that there was nothing preventing the Claimant from presenting these aspects of the claim within the time limit. He knew all the relevant facts and was in a position to get advice if necessary. Instead, he made an active choice not to present the claims within time. It would not be just and equitable to extend time to allow the amendment. I have considered the balance of prejudice between the parties. The Claimant could and should have brought these claims earlier. He was able to do so and made a choice not to. He had access to legal representation when he presented his first claim and even then did not present these complaints at the Tribunal. The claims are old and the impact of the delay on the cogency of the available evidence will be considerable. The Respondent will be particularly prejudiced by this as much will turn on the recollections of individual witnesses and a consideration by the Tribunal as to "the reason why" individual witnesses acted as they did. Furthermore, I have considered the fact that even after significant discussion the way the amended claims would be put is not clear and specific. In those circumstances I cannot be satisfied that they would have reasonable prospects of success even if amended.

82. In light of the above, paragraph 2 should be struck out.

83. Paragraph 3 was clarified with the Claimant. It apparently comprises the following:

    a. A claim for the difference in pay between sick pay and normal pay during his period on sick leave following the alleged discrimination in September 2017. To this extent it is a claim for a remedy flowing from the discrimination claim already pleaded rather than an independent cause of action or claim. As an issue of remedy it can be "parked" pending determination of the discrimination claim. It should not be struck out.
    b. A claim for accrued but untaken holiday pay owed at termination of employment. This is a standalone claim which can be quantified by the Claimant following disclosure. It should not be struck out.
    c. A claim for unpaid paternity pay during January 2018. This is claimed on either a statutory or contractual basis. Again, it is a standalone claim which can be quantified by the Claimant following disclosure. It should not be struck out.

    Paragraph 3 is therefore not struck out and remains for determination by the Tribunal at the appropriate juncture.

84. Paragraph 4 refers to remedies claimed as part of the original unfair dismissal claim. It is therefore struck out for the same reasons as paragraph 1.

85. Paragraph 5 is also a claim for a remedy flowing from the extant claims of discrimination rather than a standalone cause of action. As an issue of remedy it can be "parked" pending determination of the discrimination claim. It should not be struck out.

86. Paragraph 6 as pleaded refers to a claim of victimisation. As currently pleaded it does not set out the relevant factors to be considered within the section 27 legal test and so would not have reasonable prospects of success. It does not specify the Claimant's protected acts or the detriments which flow from them. It would have to be struck out as currently pleaded.

87. As with paragraph 2 I sought further clarification from the Claimant to see if this paragraph would be 'saved' by an amendment. The Claimant clarified that his protected acts were the written grievances which he raised in 2014 and 2017. He had more difficulty specifying what the detriments were. He referred to the actions of Nathan Hirst on 20th and 21st September 2017. However, these predate the second protected act and are several years after the first protected act. Having heard the Claimant's explanations, it is hard to see how Mr Hirst's actions are to be causally linked to the first protected act. The Claimant did say that there were other detriments too but could not give details of what these were, when they took place and who was responsible for them, despite prompting from the Tribunal.

88. I again bore in mind the Selkent principles and the Presidential Guidance in determining the potential for an amendment to clarify paragraph 6. Once again, I was struck by the lack of clarity and specificity of the potential amendments. I concluded that it would be a significant amendment necessitating a much wider scope of enquiry by the Tribunal. It would involve

hearing significant amounts of evidence not already required for the existing claims. The amendment would again be out of time without a good explanation from the Claimant as to why he did not present it earlier. Again, I considered the balance of prejudice and noted the impact on the cogency of the evidence of the delay in making the amendment and the difficulty that there would be in obtaining evidence, particularly from the Respondent's employees, in relation to the events of 2014 and their potential impact upon events some 4 years later in 2017. I concluded that the amendment should not be granted.

89. In light of the above Paragraph 6 of the Grounds of Complaint should be struck out.

90. Paragraph 7 of the Grounds of Complaint is a bare allegation of harassment without specifics or details. As pleaded it would have to be struck out as having no reasonable prospects of success. I sought some further clarification from the Claimant in relation to his claims. He stated that it referred to derogatory comments made by colleagues in March/April 2014 about the Claimant's wife and child. Again, very little specific was proffered. I considered whether an amendment should be made to flesh out this claim. Again, I was concerned that this would be a significant factual amendment which would increase the scope of the evidence heard and the Tribunal's factual enquiry. The amendment would be made over 4 years after the alleged incidents in question and would therefore be significantly out of time without good explanation for the delay. Once again, I considered the adverse effect of the delay on the cogency of the evidence and the balance of prejudice as between the parties. I concluded that the balance of prejudice weighed against granting permission to amend.

91. In light of the above Paragraph 7 of the Grounds of Complaint should be struck out.

92. Paragraph 8 was clarified as being a claim for remedy flowing from the currently pleaded discrimination claim rather than being a separate standalone cause of action. As an issue of remedy it can be "parked" pending determination of the discrimination claim. It should not be struck out.

93. I sought further clarification by the Claimant of the contents of Paragraph 9 of the Grounds of Complaint. Insofar as it related to a claim of unfair dismissal this must be struck out for the same reasons as paragraphs 1 and 4. The Claimant was unable to provide further clarification or specifics in relation to paragraph 9. Insofar as it might be read as bringing standalone personal injury complaints or claims for breaches of the health and safety legislation these are not claims which the Tribunal has jurisdiction to hear and would therefore have to be struck out. Insofar as the paragraph appears to bring breach of contract claims the Claimant was unable to give further clarification to enable the Tribunal to understand them. I was not satisfied that they had reasonable prospects of success as pleaded and was not satisfied that they could be amended in such a way as to give them reasonable prospects of success. Insofar as the claims relate to the removal of the Claimant's personal protective equipment in September 2017 these are already brought

as direct discrimination/harassment claims relating to Mr Hirst's actions and are therefore duplicates.

94. As stated, I could not discern an appropriate amendment to paragraph 9 from the Claimant's representations. In any event it was clear to me that any amendment would have to be a significant one and would be significantly out of time insofar as it related to 2014. It would not be just and equitable to extend time particularly given the lack of a good explanation for the delay and the impact of the delay on the cogency of the evidence. The balance of prejudice as between the parties would weigh against granting an amendment in relation to paragraph 9 of the Particulars.

95. In light of the above paragraph 9 of the Grounds of Complaint is struck out.

Costs application

96. By letter dated 4th September 2018 the Respondent made an application for costs pursuant to rule 76(1)(a) on the basis that the Claimant's failure to attend the listed preliminary hearing on 14th May 2018 was without good reason and constituted unreasonable conduct which should result in an award of costs. I heard representations on behalf of both parties and heard evidence from the Claimant as to his ability to pay any costs award in line with rule 84.

97. The Claimant's first Tribunal claim (1801533/2018) was filed on 25th January 2018 when he was represented by a solicitor. A telephone preliminary hearing took place on 20th March 2018 and directions were given for the conduct of the first claim. The Claimant ceased to be represented by his solicitor on 22nd March 2018.

98. On 26th March 2018 the Tribunal sent the parties a Case Management Summary following the telephone hearing which set out orders for the future conduct of the first claim and which stated that the first claim would be listed for a hearing on 11th and 12th July 2018. A separate notice of hearing was also sent to the parties on 26th March 2018.

99. The Claimant subsequently filed his second claim (1084856/2018) on 22nd March 2018. He was not represented at this time. In his ET1 he expressly requested that the Tribunal correspond with him via email. He also subsequently corresponded with the Respondent via email. The Tribunal listed the Second claim for a preliminary hearing on 14th May. The notice of this hearing was sent to the parties on 27th March 2018. It was apparently sent to the correct email address for the Claimant. On 27th March the Tribunal wrote to the parties asking for their views on whether the two sets of proceedings should be considered together. The Respondent responded to this correspondence but the Claimant did not. The Respondent sent an email to the Tribunal on 5th April and the Claimant was copied in as a recipient. The body of the email referred to the "the next preliminary hearing" although it did not give a date. On 11th May 2018 the Respondent emailed its case management agenda for the 14th May hearing to the Claimant and the Tribunal. The email specifically gave the date of the hearing.

100. The Claimant did not attend the hearing on 14th May. Attempts were made by the Tribunal to contact him via phone without success. He was asked by the Tribunal to provide an explanation for his non-attendance. He responded to that request by email dated 22nd May stating: "*I did not attend the Case Management Preliminary Hearing on 14th May 2018 as I did not check my email properly as I had the 11-12 July date in my head. I thought the case management hearing attended by my last solicitor was done and didn't understand there was another as I am representing myself. I apologise for not attending as it was no intentional but not being aware of Employment Tribunal processes…"*.

101. The Respondent contended that the Claimant's failure to attend was unreasonable and that his explanation for not doing so was inadequate. The fact that the Claimant had the 11th and 12th July dates in his head was not a sufficient reason for failing to check his emails properly. The Respondent contended that it was incumbent on the Claimant to check his emails properly having issued two sets of proceedings and having invited correspondence via email in relation to them. The Respondent contended that the Claimant had been sent three pieces of correspondence prior to 14th May which should have made it clear to him that there was a hearing listed for that day which he should attend. The Respondent contended that this unreasonable conduct necessitated the listing of a further hearing on 3rd July 2018 with the attendant costs to the Respondent.

102. At the hearing before me the Claimant reiterated his explanation from the email of 22nd May. He said that he did not realise there was a further hearing as he thought his representative had attended that on 22nd March. He maintained that his failure to attend was not intentional. He maintained that he had not seen the Respondent's emails of 5th April and 11th May. He did not think about the possibility that issuing a second set of proceedings after dispensing with the services of his solicitor might generate further hearings. He was unable to say how frequently he generally checked his emails but said that if there were problems with his internet provider he could take two weeks or more to check emails. Alternatively, he might go to the library to check his account. He did not allege that there was in fact any problem with internet access at home during the relevant period.

103. Having heard from the parties I concluded that it was arguably unreasonable of the Claimant to issue proceedings and ask for email communications and then not check his email on a regular basis. This is not a question of understanding the Tribunal procedure but rather of being diligent in correspondence and conducting his claim. If he had read the correspondence from Tribunal or the Respondent he would have had no reason to think that the next hearing was in July, no matter what his previous representative had said to him. It is not a question of the Claimant missing just one piece of correspondence- he missed three. He should not have sought communications via email if he was not going to check the email account regularly.

104. However, even if there was unreasonable conduct by the Claimant I have a discretion as to whether to order costs and should take into account the Claimant's ability to pay any award. I heard evidence from the Claimant as to his income. It is apparent that he has no savings and does not own his house. He works to support his wife and three children. He qualifies for Universal Credit and has a job at the minimum wage. Specific income figures were obtained but are not included in these publicly available reasons. Suffice it to say that I am not confident that the Claimant has the means to pay an award of costs without undue hardship to him and his dependants at this time. I am therefore not prepared to exercise the discretion and do not award costs on this occasion.

Employment Judge Eeley
Date 9 January 2019