EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms A Logan-Overy	v	**Richard Watts and the City of Rochester Almshouse Charities**

OPEN PRELIMINARY HEARING

Heard at: London South **On: 15 December 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: In person
For the Respondent: Ms T O'Halloran of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claimant's application to amend the ET1 to show the correct respondent as identified in the ACAS EC Certificate is granted.

2. The claimant's claim is treated as one that the Tribunal should have rejected under Rule 12(1)(b).
.
3. The claimant's claims are struck out as having no reasonable prospect of success under Rule 37(1)(a), Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. This Preliminary Hearing is to determine the following issues, as set out by Employment Judge Mason at the Preliminary Hearing on 31 March 2020 as follows:
(i) Should all or part of the claim be struck out on any of the following grounds:

a) it has no reasonable prospect of success? (Rule 37(1)(a) Employment Tribunal Rules of Procedure ("ET Rules"));
b) it is vexatious (Rule 37(1)(a) ET Rules);
c)for non-compliance with the ET Rules (Rule 37(1)(c))
d) under rule 10(b) ET Rules as the Claimant has failed to supply the minimum information in relation to who the claim(s)s are being brought against;
e) under rule 12(a) of the ET Rules as the Tribunal has no jurisdiction to consider claims brought against "the Chairman/Board of Trustees" in their individual capacity;
f) under rule 12(b) of the ET Rules as the Claimant has failed to plead her claims in any detail or in a manner which the Trust can respond to.
(ii) Does any allegation or argument have little reasonable prospect of success and if so, should there be a deposit of up to £1,000 as a condition of the Claimant continuing to advance each such allegation or argument? (Rule 39 ET Rules).
(iii) The Employment Judge will then make case management orders for the FMH.

3. The claimant represented herself at the hearing. The respondent was represented by Ms T O'Halloran, barrister. There were several sets of documents and email correspondence with a link to a sound recording made available to the Tribunal not all of which was relevant. The Tribunal was most concerned with:

(1) The ET1
(2) The ET3
(3) The strike out application dated 15 August 2019
(4) The strike out application dated 9 June 2020
(5) Further and better particulars from the claimant dated 30 June 2020
(6) Amended ET3

4. In addition to the application under Rules 10 and 12, strike out is sought on the basis that the claim is vexatious or the case has no reasonable prospect of success, rule 37(1)(a), the manner in which the proceedings have been conducted, rule 37(1)(b) and for the non-compliance with an order of the Tribunal - rule 37(1)(c

Background

5. On 10 January 2017, the claimant commenced employment with Richard Watts and the City of Rochester Almshouses Charities ("the Trust") as a Home Help/Domestic Assistant. The Trust terminated her employment on 11 December 2018; the Trust says it dismissed the claimant without notice on grounds of misconduct. Thus the claimant did not have two year's qualifying service to claim unfair dismissal.

6. The claimant contacted Acas and an Early Conciliation Certificate (R127019/19/71) was issued naming the Trust as the prospective respondent.

7. On 2 May 2019, the Claimant presented this claim (form ET1) naming "Chairman/Board of Trustees" (rather than the Trust) as the respondent.

8. The ET1 presented by the claimant is inadequate in its terms and does not set out a case for the respondent to answer although she does offer evidence in support

of her claim. No doubt for this reason, EJ Mason ordered the claiamnt to provide further information, as follows:

.2.2 Public interest disclosure claim:

(i) What she expressed concern about, to whom, how (whether verbally or in writing) and when;

(ii) In respect of each concern, whether in her belief, the information disclosed tended to show one or more of the following:

a. a criminal offence had been committed and if so, what offence and by whom;

b. a person failed to comply with a legal obligation to which he/she was subject;

c. a miscarriage of justice had occurred;

d. the health or safety of any individual had been put at risk; and/or

e. the environment had been put at risk.

(iii) The detriments she says she was subjected to by the Respondent as a result of any protected disclosure made.

(iv) Which of the disclosures she is relying on in support of her unfair dismissal claim.

2.3 Wrongful dismissal

Specify how much notice of termination of her employment she was entitled to under her contract of employment or otherwise and how much she is claiming on a gross and net basis.

2.4 Holiday pay

Specify how much she is claiming in respect of accrued but unpaid holiday with clear calculations.

2.5 Arrears of pay.

Specify the hours she says are missing from pay sheets identifying the relevant hours/dates and specifying how much she is claiming on a gross and net basis.

2.6 Missing pay slips.

Specify the dates of the payslips the Claimant says are missing.

2.7 Other payments

Specify how much she is claiming and why (with calculations) in respect of other monies she says are due from the Respondent (being payments accrued and unpaid as at the date of termination of her employment).

9. The claimant sought to comply with the Order by providing the following:

"Orders made pursuant to the Employment Tribunal Rules 2013: Claimant further particulars.

Case number: A2301561.2019

2,2 Public Interest Disclosure Claim

(i) What she expressed concern about, to whom now (whether verbally or in writing) and when…. Please refer to timeline attached.

(ii) In respect of each concern, whether in her belief, the information disclosed tended to show one or more of the following:

a. a criminal offence has been committed and if so, what offence and by whom-Harassment by Jane Rose and Fleur Boyce.

b. a person failed to comply with a legal obligation to which he/she was subject-Employment Law, GDPR, Charity Commission, Safeguarding responsibilities.

c. a miscarriage of justice has occurred-Grievances responded to with action of a Disciplinary Hearing, in addition to my reputation with slanderous allegations made to other organisations.

In addition, the Disciplinary and Grievance Proceedings were not carried out justly or following procedure both by law and organisationally.

d. the health and safety of any individual has been put at risk-victimisation and mental health.

e. the environment has been put at risk-Safeguarding of clients, concealing information deliberately.

Please also refer to a copy of my original notes attached via photos as evidence of additional issues.

(iii) The detriments she says she was subjected to by the Respondent as a result of any protected disclosure made-rather than addressing the issues raised I was subjected to Disciplinary proceedings, Harassment, and slander, along with impact on wellbeing.

(iv) Which of the disclosures she is relying on in support of her unfair dismissal claim-All.

2.3 Wrongful dismissal…Specify how much notice of termination of her employment she is entitled to under her contract of employment or otherwise how much she is claiming on a gross and net basis-The citizens advice bureaux have given guidance on this so this email will be forwarded.

2.4 Holiday pay…Specify how much she is claiming in respect of accrued but unpaid holiday with clear calculations-annual leave at the end of November 2018 and December leave, along with any accrued during investigation proceedings to date.

2.5 Arrears of pay…specify the hours she says are missing from pay sheets identifying the relevant hours/dates and specifying how much she is claiming on a gross and net basis-Food Bank training, client cancelations, increase in client hours all not reflected in pay.

2.6 Missing pay slips…Specify the dates of the payslips the claimant says are missing-request made for copies to be sent, along with timesheet copies relating to each month, so can check through in order to respond, but as yet not received.

2.7 Other payments…Specify how much she is claiming and why (with calculations) in respect of other monies she says are due from the Respondent (being payments accrued and unpaid as at the date of termination of her employment-Please refer to CAB email advise mentioned in 2.3, loss of earnings, impact on Working Tax Credit, effect on work based pension, Christmas bonus, private work offered from clients met through Watts but had to turn down as some still connected to Watts for their services."

Submissions

10. The Tribunal received oral submissions from the parties.

Law
Public Interest Disclosure

11. The general right not to suffer detriment (short of dismissal) due to having blown the whistle is contained at ERA 1996 s 47B(1) which provides as follows:

> "A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

12. No qualifying period of employment is necessary to claim this right. The claim is brought to an employment tribunal in the normal way. There is an initial burden on the claimant to show on a balance of probabilities that: (a) there was in fact and law a legal or other relevant obligation on the employer or other relevant person; and (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject: **Boulding v. Land Securities Trillium (Media Services) Ltd** UKEAT/0023/06 (3 May 2006, unreported), per Judge McMullen. This particularly applies where the Claimant does not have the requisite service to claim unfair dismissal.

13. The claimant requires to prove that she made a qualifying disclosure within the meaning of section 43B (1):

> "In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

14. It has been held that a qualifying disclosure must be a disclosure of information, which means the conveying of facts, as opposed to mere allegation: **Cavendish Munro Professional Risks Assessment Ltd v. Geduld** [2010] IRLR 38. In **Kilraine v. London Borough of Wandsworth** [2018] ICR 1860 CA, the Court of Appeal supported the EAT's view that a rigid dichotomy between information and allegation should not be read into section 43B, but that a disclosure must contain sufficient detail and content to be capable of tending to show one of the prescribed categories of information in section 43B (1). Ultimately, this will be an evaluative judgement for the

Tribunal to make, see paragraphs 30 – 36. Further, it was held that the context in which the disclosure is made is a relevant consideration, see paragraph 41.

15. The editors of Harvey at CIII(4)(C) [21] summarise the position as follows:

> "… in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (the actual result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations… The question therefore is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide."

16. Once a disclosure has taken place it becomes necessary to consider whether or not that disclosure can be categorised as a qualifying disclosure. This largely depends upon the nature of the information revealed. As an initial starting point, it is necessary that the worker making the disclosure has a reasonable belief that the disclosure tends to show one of the statutory categories of 'failure' (ERA 1996 s 43B (1)). It needs to be stressed that what is required is only that the worker has a reasonable belief and it is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect. This was made clear by the Employment Appeal Tribunal in **Darnton v. University of Surrey** [2003] IRLR 133 EAT. In that case the employment tribunal had held that the claimant had not made a qualifying disclosure because the allegations relied upon were not factually correct. In allowing the employee's appeal, the Employment Appeal Tribunal confirmed that the proper test to be applied is whether or not the employee had a reasonable belief at the time of making the relevant allegations. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

17. The determination of whether a belief is reasonable is dependent on her subjective believe, but that belief must be objectively reasonable: **Babula v Waltham Forest** College [2007] IRLR 346.

18. In **Chesterton Global Ltd. v. Nurmohamed** [2018] ICR 731 CA at paragraphs 35 - 37, on the issue of public interest, it was held:

> "[35] …It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"…
>
> [36] The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be… The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

> [37] Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

19. The 'Laddie factors' referred to are: (a) the number of workers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; (c) the nature of the wrongdoing disclosed; and (d) the identity of the wrongdoer.

20. There are also provisions in relation to whistleblowing dismissal.

ET1

21. Rule 12 of the Employment Tribunal Rules 2013 states, in relevant part, that:

> (1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—
>
> (a) one which the Tribunal has no jurisdiction to consider;
>
> (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process; or
>
> …
>
> (2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) [(b), (c) or (d)] of paragraph (1).

22. Rule 12(2) is in mandatory terms. If a claim, or part of it, meets the threshold in rule 12(1)(b) it must be rejected.

23. In **Trustees of the William Jones's Schools Foundation v. Parry** [2018] ICR 1807, Lord Justice Bean said rule 12(1)(b) requires the respondent to be able to give a sensible response to a claim. In so doing, there is no "*general rule that the respondent to a claim in an employment tribunal must always be treated, for the purposes of rule 12(1)(b), as having detailed knowledge of everything that has occurred between the parties. If, for example, a claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else's case, that ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b).*" (paragraph 32)

Striking out

24. Rule 37 provides:

> **Striking out**
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
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> (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).

25. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
>
> "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
>
> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
>
> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from

> the parties who actually made the decision. It did not however exclude the possibility entirely.

26. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. 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. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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27. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

28. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the Claimant's case should be taken at its highest.
(ii) Strike out is available in the clearest cases – where it is plain and obvious.
(iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

29. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

30. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being

established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

31. It has been held that there are two 'cardinal conditions' for the exercise of the power under [SI 2013/1237 Sch 1 r 37(1)(b)], namely, that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (see **Blockbuster Entertainment *Ltd v.* James** [2006] IRLR 630*,* at para 5*,* per Sedley LJ). Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. As Sedley LJ put it, the power to strike out under [r 37(1)(b)] is 'a Draconic power, not to be readily exercised'. At paragraph 23, he said:

"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."

32. The scope of the rule was examined in some detail by the Court of Appeal *in* **Bennett v. London Borough of Southwark** [2002] IRLR 407.

33. In a helpful summary of what is required to be decided by an employment tribunal before making a striking out order under what is now SI 2013/1237 Sch 1 r 37(1)(b), Burton J, giving judgment in **Bolch v. Chipman** [2004] IRLR 140 EAT, stated that there are four matters to be addressed (see para 55). First, there must be a conclusion by the tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on his behalf in such a manner. As Burton J stated: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Such conduct is not confined to matters taking place within the curtilage of the tribunal, and could comprise, for example, the making of threats as to possible consequences if the proceedings are not withdrawn. Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation (see *De Keyser*), but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order.

34. Judge Richardson said, in **Weir Valves & Controls (UK) Ltd v. Armitage** [2004] ICR 371, at paragraph 17, the guiding consideration as to whether a claim should be struck out for disobedience with an order is the overriding objective:

> "This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

35. The importance of tribunals adopting a structured approach when considering whether to strike out a pleading, and carrying out a careful and dispassionate analysis of the factors indicating whether a fair trial is or is not still possible and whether a strike out is or is not a proportionate penalty, has been stressed in a number of cases. For example, in **Arriva London North Ltd v. Maseya** UKEAT/0096/16 *(12 July 2016, unreported)* Simler J (as she then was) stated: 'There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles' (para 27). That case concerned a tribunal's decision to strike out a response to a disability discrimination claim on the grounds that the respondents had conducted the proceedings in a scandalous and unreasonable manner by pursuing a 'false defence' and deliberately failing to disclose documents. Allowing the respondents' appeal, Simler J held that, on the facts, there was no justification for categorising the response as 'false', and no basis for concluding that there had been a deliberate failure to disclose relevant documents. In reaching these conclusions, the tribunal had failed to analyse the facts properly and had fundamentally misunderstood the nature of the cases put forward by the claimant and the respondent. Moreover, it had crucially failed to consider the authorities on striking out and the principles to be applied. It did not properly investigate whether a fair trial was still possible and did not consider the question of proportionality. Simler J found that the problems regarding amendments to the response and the disclosure of documents, which were at the heart of the decision to strike out, were all capable of resolution without causing undue delay, so that there was nothing to prevent a fair trial from taking place. Further, and in any event, she held that the draconian sanction of strike out was disproportionate in the circumstances. The case was accordingly remitted to a fresh tribunal for a full hearing on the merits. Again, in **Baber v. Royal Bank of Scotland plc** UKEAT/0301/15 (18 January 2018, unreported), Simler J expressed similar views on the draconian nature of striking out orders when setting aside an order striking out the claimant's unfair dismissal claim for non-compliance with case management orders. Pointing out that such orders are neither automatic nor punitive, she held that not only did the tribunal fail to identify the extent and magnitude of the claimant's non-compliance with the order, merely stating that there had been non-compliance, but it had not examined whether a fair trial was still possible or whether a lesser sanction could be imposed (see para 56).

Discussion and decision
Matters to be determined

Should the claimant's claim have been rejected under rule 10(1)(b), 12(1)(a) or (b)?

36. The claim was not so deficient as to fall foul of Rule 10. The claimant did not use the correct name of the respondent in her ET1 although she correctly identified it in the ACAS EC certificate. She applied to amend her ET1 to make it conform with the EC Certificate and the Tribunal granted the application. It was appropriate that the claim proceed against the correct respondent and Rule 12(1)(a) was complied with.

37. The Tribunal concluded that the claimant has failed to particularise her claim in her ET1. She has had no greater success when trying to comply with the Order of EJ Mason. The claimant has failed to plead her claims in any detail, or as required or in a manner in which the Trust can understand what protected disclosures were allegedly made, to whom, and when, or what unlawful deductions from wages have been made, and when. No figures have been provided as to what the claimant is claiming in relation to wrongful dismissal, holiday pay, arrears of pay or other payments, nor have any particulars been provided as to when the alleged unlawful deductions from wages have been made. Reference out to other documents is not sufficient for this purpose.

18. The Tribunal concluded that the claims should be rejected in their entirety under Rule 12(b), Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as the Trust is unable to respond to any claims raised against it.

Should the claimant's claim be struck out?

19. The claimant said that she had tried her best to comply with the Order to provide further and better particulars and had legal advice in so doing. Having regard to the contents of the further particulars, it seems unlikely that she had legal advice. She refers to various adminicles of evidence but the basic information about the case must be in the pleadings.

20. The respondent sought that the claim be struck out under Rule 37(1)(a)(b) and (c). The Tribunal would not have struck the claim out as vexatious under (a) or under (b) and (c) because there had been a genuine attempt to comply with the Order.

21. However, when considering Rule 37(1)(a), Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Tribunal took into account the whole proceedings and that the claimant had had some form of assistance although trying her best as a party litigant. It seemed that there was no substantial case that the claimant could bring and this was probably why she had been unable to articulate it. She is plainly aggrieved by her dismissal but it is the alleged unfairness that is at the heart of it. The Tribunal considered whether the claimant ought to be given another opportunity to articulate her case but on the basis of the history and type of claim, the basic position would not be improved upon.

22. The Tribunal considered what the claimant had to establish in law for a whistleblowing detriment or dismissal claim and reviewed the additional documentation provided where the same lack of specification of relevant information to the respondent was evident, having weighed all matters in the round, decided that a deposit order was not appropriate and to strike out the claims including the monetary ones which had not been quantified as having no reasonable prospect of success. No further case management was necessary.

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Employment Judge Truscott QC
Date: 16 December 2020