EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
(1) Mr Claudio Costagliola di Fiore (2) Ms Huma Shams Qadri		Introhive UK Limited

Heard at: London Central (by video) **On**: 20 April 2021

Before: Employment Judge Stout

Representations
For the claimant: Alexandra Sidossis (counsel)
For the respondent: Jen Coyne (counsel)

JUDGMENT

The judgment of the Tribunal is that the claim should not be struck out under Rule 37(1)(a) and/or Rule 37(1)(c).

REASONS

The type of hearing

1. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V: fully video. A face to face hearing was not held because of the pandemic and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 747 pages, together with some additional documents that were provided to me in the course of the hearing by the parties.

2. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were no connectivity issues of any significance.

3. The participants were told that it is an offence to record the proceedings.

The issues

4. The issues to be determined at today's hearing were as follows:

   (1) The Claimant's application for reconsideration of my Judgment of 4 December 2020;
   (2) Whether the evidence concerning the First Claimant's settlement with his previous employer and other correspondence with his previous solicitors is admissible;
   (3) The Claimant's application of 1 April 2021 to amend the ET1 and the Claimant's application to amend the ET1 to include reinstatement;
   (4) The Respondent's application to strike out all or parts of the Claimant's claims under Rule 37 because:
      a. The Claimants are vexatiously abusing the Tribunal's process; and/or
      b. The two claims were incorrectly included on the same form in breach of Rule 9.

5. Further issues of case management arose which are dealt with in an accompanying (closed) Case Management Order.

Background

6. The Claimants commenced employment with the Respondent on 8 October 2019. The Respondent is involved in the business of selling cloud-based software solutions to business customers. The First Claimant was dismissed on 16 January 2020 for what the Respondent alleges was poor performance. The Second Claimant was dismissed on 20 January 2020 for what the Respondent alleges was redundancy. The Claimants commenced these proceedings on 21 May 2020 on the same claim form. They claim that the real reason they were dismissed was because they had made protected disclosures concerning what they regarded as the Respondent's non-compliance with GDPR requirements, in particular that the Respondent was using and selling to its clients IT solutions which were not GDPR compliant and not disclosing this non-compliance to customers and those with

whom they dealt. They further maintain that they alleged that the Respondent's IT solution breached the personal data privacy of the data owners whose mailboxes were being harvested by Introhive Solution and that it was making such data available to others in the company for the purpose of driving sales and marketing activities. The claim is listed for a 10-day hearing commencing 11 October 2021.

7. In their original claim form, the Claimants brought claims of unfair dismissal, for redundancy payments, for automatic unfair dismissal (s 103A Employment Rights Act 1996 (ERA 1996)) and subjection to detriment for having made protected disclosures (s 47B ERA 1996). The First Claimant also brought a claim for victimisation under the Equality Act 2010 (EA 2010). They prepared Schedules of Loss, first presented to the Respondent on 2 June 2020, but filed with the Tribunal on 7 October 2020 in substantially the same form, totalling £867,451.27 for the First Claimant and £1,000,712.24 for the Second Claimant.

8. At a closed Case Management Preliminary Hearing (CMPH) before me on 4 December 2020, the Claimants withdrew their claims of 'ordinary' unfair dismissal, and for redundancy payment and other payments and the First Claimant's claim for victimisation and I dismissed those claims accordingly by judgment. The parties had produced competing Lists of Issues and the Respondent was seeking further particulars of the Claimants' case, especially in relation to the terms in which the Claimants alleged they made protected disclosures. I gave guidance and orders as to how they should go about agreeing a final list by 7 January 2021. The parties had already done disclosure. There was an issue as to potentially 'without prejudice' material referred to in the Respondent's Response, which I ordered be considered at an Open Preliminary Hearing (OPH). The Respondent had not at that stage been provided with a copy of the ET1a containing the Second Claimant's details, so I provided them with a copy at that hearing.

9. On 11 December 2020 the Claimants wrote to the Tribunal requesting reconsideration of the Judgment at the Preliminary Hearing to include a finding that an ET1a was correctly filed for the Second Claimant and that both Claimants had correctly issued their claims.

10. On 22 December 2020 the Respondent wrote to the Tribunal applying to have the Claimants' claim struck out in part on the basis that the claims had wrongly been brought on the same form in breach of Rule 9.

11. By the beginning of February 2021 the parties had still not managed to agree a List of Issues as ordered by me at the hearing on 4 December 2020. The List of Issues as it stood on 8 February 2021 contained a lot of yellow highlighting indicating where the Claimants had sought to include matters in the List of Issues that the Respondent maintained were not in the pleaded case.

12. On 16 February 2021 the Claimants disinstructed their solicitors and switched representation to Whistleblowers UK, a not-for-profit organisation.

13. The OPH was held before EJ Grewal on 5 March 2021. At that hearing the parties had a number of applications they wished to make as listed in paragraph 1 of her Reasons in her Order from that hearing, but EJ Grewal decided only to deal with the question of whether 'without prejudice' privilege had been lost in relation to the matters at paragraphs 116-121 of the Grounds of Resistance. EJ Grewal considered the supposedly 'without prejudice' correspondence between the parties between 2 June 2020 and 12 August 2020, and in particular emails from the First Claimant dated 25 June and 21 July 2020. She found that in those emails the Claimants (para 32 of her Reasons): *"acted improperly by making threats to take actions against third parties with serious consequences for them if the Respondent did not accede to their demands to make them an offer that they considered made it worth their while to engage in mediation and by giving the Respondent very short time scales within which to respond. That went beyond what is permissible in settlement negotiations"*. She concluded (para 33): *"I am satisfied that there was unambiguous impropriety on the part of the Claimants and that the "without prejudice" rule does not apply to the emails of 25 June and 21 July 2020 and any parts of the file notes that are identical to what is said in the emails, and that that evidence is admissible. If it is admissible, it would not be right for me to restrict the purposes for which it is admissible. It is always open to a party to object to the admissibility of evidence on the grounds of its relevance. If the Respondent wishes to rely on them at the substantive hearing and the Claimants believe that they are not relevant to any of the issues in the case, they can object to their admissibility."*

14. On 1 April 2021 the Claimants applied to amend their claim and there has been further correspondence between the parties since which, so far as is relevant to the applications I have to decide, I refer to below.

Reconsideration application

15. After hearing from Ms Sidossis for the Claimants, I decided that this application was unnecessary and/or inappropriate and Ms Sidossis did not press it. There can be no application for 'reconsideration' because there is no relevant judgment to reconsider. The question of whether or not the Second Claimant was included on the original claim form (as indicated by Form ET1a) was not in dispute and I can simply record in this judgment, to the extent that it is necessary, that the Second Claimant was included on Form ET1a. The question of whether the two claims were properly brought on the same form (the Rule 9 question) is a separate point, on which I heard no submissions on 4 December 2020 and did not determine. It is an issue that arises for determination today and I deal with it below.

Application to exclude evidence

16. The Respondent seeks to rely in relation to its application to strike out the claim for being vexatious on documents that it says it found on the First Claimant's work computer after he left, comprising three documents or categories of document:

    a. Invoices from his previous solicitors dating from the early part of 2019 and relating to legal proceedings that the Claimant took against his previous employer (bundle pp 259-286);
    b. Email communications with his previous solicitors relating principally to their fees for those previous proceedings (bundle pp 402-412);
    c. Settlement agreement dated 6 March 2019 between the Claimant and his former employer.

17. The Claimants applied to exclude the evidence on the basis that it was subject to legal advice privilege and/or was confidential to the First Claimant and had been improperly obtained by the Respondent and/or because it was not relevant (or sufficiently relevant) to the issues before the Tribunal.

18. I gave reasons orally at the hearing, but the First Claimant had connection difficulties during my giving of reasons so I indicated that I would provide written reasons.

19. I considered first whether any of the documents were subject to legal advice privilege. It was agreed that the settlement agreement was not privileged, on the authority of *BCG Brokers LP v Tradition (UK) Limited* [2019] EWCA Civ 1937. As to the invoices and the emails, the question for me was whether they evidenced the substance of confidential communications passing between the First Claimant and his then lawyers for the purpose of giving or receiving legal advice (*Three Rivers DC v Bank of England (No 5)* [2003] EWCA Civ 474 at paragraphs 19 and 21). I was also referred by Ms Coyne to *Phipson on Evidence* at para 23-57 as authority for the proposition that a solicitor's fee notes are not covered by legal advice privilege unless they meet the *Three Rivers* test. Having reviewed the documents, I concluded that the emails did not concern legal advice, save in relation to one request for advice at p 405 on 4 February 2019. Parts of the invoices did reveal the content of legal advice in that they indicate consideration being given to calling particular evidence or taking particular actions which tends to reveal the content of the advice for which the invoice is raised.

20. I then considered whether the documents were confidential to the First Claimant and the overlapping question of whether they had been improperly obtained. Neither party had brought witness evidence to the hearing to deal with this point; both took the position that it was for the other to make out their case either that it was, or was not, properly obtained. In the circumstances, it appearing to me to be disproportionate to the nature of the issue and its relatively peripheral relevance to the proceedings to adjourn the hearing to enable the parties to call evidence (and neither party seeking an adjournment for this purpose), I took the approach that I should consider whether there was a *prima facie* case either way as to how the

documents had been obtained and then take that into account when considering the extent of the relevance of the documents and whether I should admit them.

21. I was satisfied that the Respondent has established a *prima facie* case that all the documents were located by it on the First Claimant's work computer. They have provided screenshots of where the documents were found which indicate this, although they do not prove it. The First Claimant has produced evidence that indicates that the documents were documents that he only had on his personal Hotmail account. This is apparent from the email addresses used on the documents in the bundle, and two additional documents that Ms Sidossis emailed to me and the Respondent in the course of the hearing. I am also satisfied that they are all documents that, ordinarily speaking, would have the necessary quality of confidence as they are in the nature of private communications between the First Claimant and his solicitors and a confidential settlement agreement. Ms Sidossis has submitted that the Respondent must therefore have intercepted the First Claimant's private emails, but I did not understand her to submit that the First Claimant had not accessed his private email address from his work computer and, if that is so, it is plausible that the documents would be accessible on his work computer in the way that the Respondent says it found them (i.e. in the 'Downloads' folder). Further, if the First Claimant did access his personal email from his work computer then clause 23.1 of his employment contract, signed by him, would mean he could have no reasonable expectation of privacy in respect of those documents. That clause in my judgment covers all communications, by any means, which are transmitted, undertaken or received using the Company's IT or property, which would include his work computer, and the clause is explicit that he should not regard any such communications are private.

22. Whether the documents were properly or improperly obtained, however, the question is whether they are of sufficient relevance to these proceedings that they should be admitted, at least for the purposes of this hearing. What happens at Trial is a matter for that Tribunal. I consider that it is relevant to the applications before me today that the First Claimant had previously obtained a substantial settlement from his former employer and that he had a substantial bill still owing to his solicitors as at March 2019. Given the decision already made by EJ Grewal in relation to the improper conduct of settlement discussions in June/July 2020, these are matters that potentially go to his purpose in commencing these proceedings. The evidence also goes to whether he believed that the matters he alleges to be protected disclosures in these proceedings were matters of public interest since they potentially provide evidence of a strong private interest (or expectation of personal gain) that might undermine the Claimant's case that he believed the matters he alleges he raised as protected disclosures were matters of public interest.

23. However, that is as far as it goes. There is no need to refer to anything other than the settlement agreement or the email of 5 March 2019 at page 402 for the purposes of today's hearing. Even if not legally privileged or confidential, those

documents are not sufficiently relevant to warrant them being placed before the Tribunal at his hearing and I exclude them.

24. I further consider that the identity of the First Claimant's former employer is irrelevant and can and should be redacted from the settlement agreement and not referred to in this hearing. Since I have determined that information to be irrelevant, I do not consider that a Rule 50 order is required in that respect, but if a Rule 50 order is required, then I make it of my own motion on the basis that the Claimant's former employer had a reasonable expectation of privacy in the Settlement Agreement (and indeed the Agreement binds the Claimant to keep it confidential). Even giving due weight to the very important principle of open justice, as the identity of the former employer is irrelevant to the issues there is no public interest in this information being made public, and since the former employer is no doubt unaware of the possibility of it being made public and has not had an opportunity to make representations, it would be unfair, and not in the interests of justice, for their identity to be revealed.

Amendment application

25. The Claimants applied to amend the claim on 1 April 2021, following their change in legal representation. The amendments do not match the amendments effectively proposed by the Claimants in the course of liaising with the Respondent regarding the draft list of issues in January/February 2021 and marked in yellow on the draft list in the bundle as noted above. The proposed amendments may be categorised as follows:-

    a. Minor factual or typographical changes;
    b. Further or different details as to what was said on the occasions when it is alleged protected disclosures were made;
    c. Three new protected disclosures are identified, not previously pleaded, concerning what was said by the First Claimant to Mr Collier on 23 or 24 October 2019 and by the Second Claimant to Mr Collier on 24 October 2019, and the disclosures previously pleaded as being made on 16 October 2019 by the First Claimant to Mr Abbasi are pleaded to have been repeated on 1 November 2019; and,
    d. Two additional detriments are identified for each Claimant:
        i. Two said to have occurred on 1 November 2019 for the First Claimant at paragraph 86.2 and 86.3 which rely on previously pleaded facts at paragraphs 45 and 46; and,
        ii. One of those same new detriments is also relied on for the Second Claimant at paragraph 87.2 and at 87.3 there is newly identified detriment for the second Claimant based on paragraph 48 of the existing pleading.

26. At this hearing, the First Claimant also applied to amend his claim to include reinstatement as a remedy.

The law

27. The Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. In accordance with the principles in *Selkent* [1996] ICR 836, it is a discretion to be exercised in accordance with the over-riding objective, and taking into account all the circumstances, including the nature of the amendment, any applicable time limits, the implications of the amendment in terms of impact on the trial timetable or costs; and balancing the injustice/hardship of allowing the amendment against the injustice/hardship of refusing it.

28. The Tribunal must first consider the nature of the amendment and, in particular, whether it is the addition of factual details to existing legal claims or addition or substitution of other legal labels for facts already pleaded to or whether it amounts to making an entirely new claim.

29. If a new claim is to be added by way of amendment, then the Tribunal must consider whether the complaint is out of time or, at least, whether there is an arguable case that it is in time (*Galilee v Comr of Police of the Metropolis* [2018] ICR 634 and *Reuters Ltd v Cole* (Appeal No. UKEAT/0258/17/BA at para 31). For this purpose, the new claim is deemed received at the time at which permission is given to amend (*Galilee* at para 109(a)) (or possibly the date on which the application to amend is made, but not earlier).

30. If the proposed amendment is simply relabelling of existing pleaded facts with new legal labels, there is no need to consider the question of timings (*Foxtons Ltd v Ruwiel* UKEAT/0056/08 (18 March 2008) per Elias P at paragraph 13, which was common ground between the parties, post *Galilee*, in *Reuters v Cole* at paras 15 and 27). In *Reuters v Cole* Soole J specifically considered what is necessary to make something a new claim and concluded that a relabelling of already pleaded facts with a new legal label does not make it a new claim, but if additional facts are pleaded with the new legal label such that the 'new' claim involves a different factual enquiry, then it will be a new claim. It will still be relevant to consider how close the facts are to the old claim so as to consider the significance and likely impact of the amendment (para 30). In that case, it was held that a different reason for treatment, and a different causation issue, made it a new claim, not a relabelling: see paras 28-30.

31. The fact that an amendment is a 'mere' relabelling, however, does not mean that an amendment should automatically be allowed. The *Selkent* principles require that all the circumstances be considered.

32. The Tribunal must consider the timing and manner of the application, although it should not be refused merely because there has been a delay in making it. The Tribunal must consider all the circumstances, in particular the impact on the proceedings and whether there can still be a fair trial.

33. In this respect, the focus will often be on the extent to which the new pleading "is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely that it will be permitted" (*Abercrombie and ors v AGA Rangemaster Ltd* [2013] IRLR 952).

34. The underlying merits of the proposed amended claim may be relevant if the Tribunal is in a position to make a fair assessment of those merits, since there is no point in allowing an amendment to add an utterly hopeless case, but normally it should be assumed that the proposed amended claim is arguable: *Woodhouse v Hampshire Hospitals NHS Trust* (UKEAT/0132/12), at para 15.

My decision

35. I announced my decision at the hearing, indicating that I would give reasons for it in writing.

36. I decided to allow the whole of the amendment application.

37. The nature of the amendments in the 1 April application is that they do not raise new claims. The new detriments consist of matters already in the pleading, and what is already in the pleading includes not only the material to found the detriment, but sufficient to indicate that a causal link to the protected disclosures was also being alleged on the facts. This part of the amendment is therefore a re-labelling.

38. The addition of protected disclosures and the provision of new or different information in relation to those protected disclosures also does not constitute a new claim, but merely increases the number of occasions on which the Claimants allege that they made the protected disclosures for which they were then subjected to detriments/dismissed. Although the description of what the Claimants say they said on the occasions of those protected disclosures has changed substantially, if that is what they are going to say in their witness statements, it is better it is amended now in their pleading. It dents their credibility, and will be a matter on which they can be cross-examined in due course, but it does not change the legal claim made.

39. Because the amendments are relabelling, they do not introduce any new issue as to time limits that is not already raised by the existing pleading. It is right that the amendment does involve labelling as detriments matters that are potentially even further out of time than the detriments already pleaded. However, since other potentially out of time detriments are already proceeding to a full hearing, and the nature of the claims is a set of detriments leading up to a dismissal claim that was brought in time, I am satisfied that there is a *prima facie* case that these constitute a series of detriments or continuing act linked to an in-time claim. As such, the time limit issue is not in itself a reason to refuse the amendment application. The question of whether any of the detriments claims (other than dismissal) are in time,

however, will be one for the full hearing and will need to be included by the parties in the List of Issues.

40. As to the timing of the amendment, it has been made six months before trial so there is ample time for the Respondent to adjust its case to meet the amended claim and the nature of the amendments are such that they do not significantly expand the evidence that will be required for trial or the issues that the Tribunal will need to determine. There is limited prejudice to the Respondent in terms of preparation for trial.

41. There is some prejudice to the Respondent from the timing of the application because time and effort had been spent on seeking to agree a List of Issues, which time and effort has to an extent been wasted because the Claimants amended claim departs from the amendments to the claim / further particulars that they had sought to provide in the course of that process. However, a very large part of the amendments are directed to providing further particulars as to the alleged protected disclosures, which was a part of the Claimants' case that the Respondent had identified at the CMPH on 4 December 2020 as requiring further particulars. That further particulars have now been provided does not therefore prejudice the Respondent, but assists in the preparation for trial.

42. Against the limited prejudice to the Respondent, the prejudice to the Claimants of refusing the amendment would be that they would be confined to a pleading which apparently no longer conforms with what they intend to say at trial about their protected disclosures. That is not in the interests of justice. Further, in relation to the additional detriments, it is apparent from the pleading that to the Claimants these are significant points in the chronology towards dismissal and they would be prejudiced if these were to remain as mere 'background' matters and not subject to the increased scrutiny that comes with being identified as actual claims.

43. Finally, the Claimants have pointed to their change in legal advisors as part of the reason for the amendments. The Respondent objected to what was said about this on the Claimants' behalf on the basis that it sought to lay blame at the door of the Claimants' previous solicitors, which the Respondent submitted was not a point that could be accepted without waiving privilege. In the end, this point was not pursued by the Claimants so I did not need to resolve it, and in any event whether or not there was some fault on the part of the Claimants previous legal advisors would not be determinative of whether an amendment application should be granted. (I have in mind the authority of *Evershed v New Star Asset Management* UKEAT/0249/09 at para 33 per Underhill P, as he then was.)

44. At the end of the hearing, the First Claimant also applied to amend his claim to include a claim for reinstatement. The box had not been ticked on the original claim form, but the claim for reinstatement was indicated on the Schedule of Loss subsequently filed. Section 112(2) of the ERA 1996 makes it mandatory for the Employment Tribunal to explain to a claimant, where a claim succeeds, that reinstatement is an order that can be made. I am mindful that the EAT (Bourne J)

in *Levy v 34 ad Co Ltd* (UKEAT/0033/20/DA) recently held that similar apparently mandatory wording in s 38 of the Employment Act 2002 did not mean that a tribunal was bound to consider an uplift for failure to provide a written statement of particulars where that had not been specifically claimed by a claimant. Nonetheless, it seems to me that where a claimant has indicated, in good time before trial, albeit not at the start of proceedings, that they wish to claim reinstatement, that is an amendment to their pleaded case that should be permitted given the terms of s 112. On my drawing the Respondent's attention to the terms of s 112, Ms Coyne in any event withdrew her objection to that amendment.

Strike-out application

45. The Respondent applies to strike out the claim under Rule 37(1)(a) on the basis that the proceedings are vexatious. Further, or alternatively, the Respondent applies to strike out the claim under Rule 37(1)(c) on the basis that the claims (or part of them) were wrongly brought on the same claim form in breach of Rule 9.

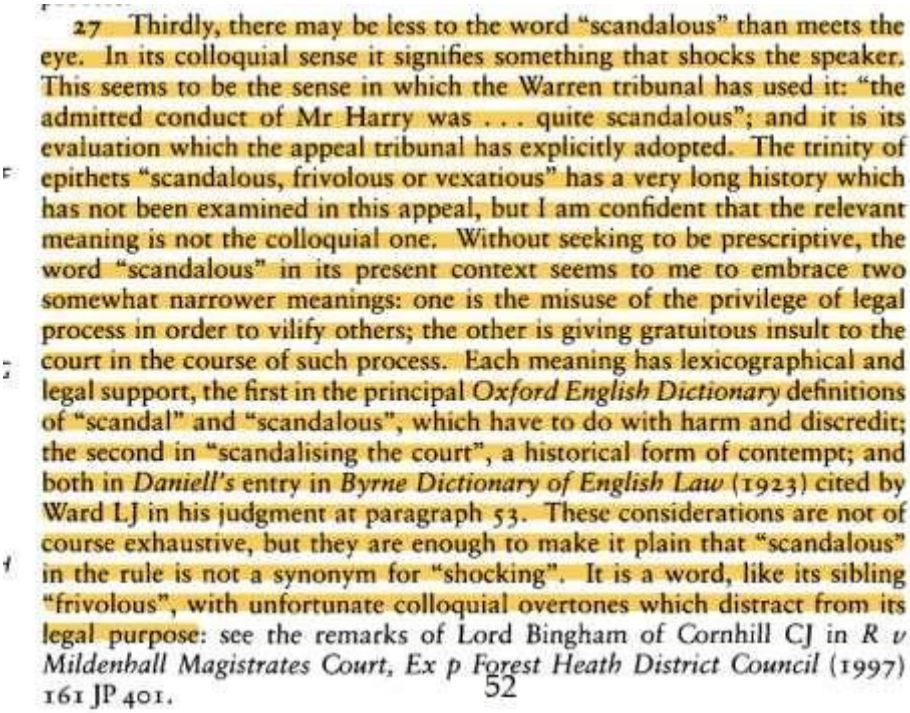
46. I announced my decision orally, but indicated that I would give my reasons in writing, which I now do.

The law

47. For the meaning of 'vexatious' in this context, Ms Coyne referred me to *AG v Barker* (2000) 1 FLR 759, especially at paragraph 19 per the Lord Chief Justice:

> 19. I am satisfied on the facts adduced in evidence before us that Mr Barker has instituted vexatious civil proceedings. "Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process. Those conditions are in my view met in this case. Many of the proceedings show no justiciable complaint and, as has been pointed out, several writs have been issued against individual officers in the same department when one writ would have served against them all.

48. She also referred to *Bennett v Southwark LBC* [2002] ICR 881 per Sedley LJ at para 27 where he gives guidance on what should probably be regarded as being the last of the Lord Chief Justice's 'hallmarks' from *Barker*, i.e. the 'abuse of process' point:



27 Thirdly, there may be less to the word "scandalous" than meets the eye. In its colloquial sense it signifies something that shocks the speaker. This seems to be the sense in which the Warren tribunal has used it: "the admitted conduct of Mr Harry was . . . quite scandalous"; and it is its evaluation which the appeal tribunal has explicitly adopted. The trinity of epithets "scandalous, frivolous or vexatious" has a very long history which has not been examined in this appeal, but I am confident that the relevant meaning is not the colloquial one. Without seeking to be prescriptive, the word "scandalous" in its present context seems to me to embrace two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process. Each meaning has lexicographical and legal support, the first in the principal *Oxford English Dictionary* definitions of "scandal" and "scandalous", which have to do with harm and discredit; the second in "scandalising the court", a historical form of contempt; and both in *Daniell's* entry in *Byrne Dictionary of English Law* (1923) cited by Ward LJ in his judgment at paragraph 53. These considerations are not of course exhaustive, but they are enough to make it plain that "scandalous" in the rule is not a synonym for "shocking". It is a word, like its sibling "frivolous", with unfortunate colloquial overtones which distract from its legal purpose: see the remarks of Lord Bingham of Cornhill CJ in *R v Mildenhall Magistrates Court, Ex p Forest Heath District Council* (1997) 161 JP 401.

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49. She further submitted, and I accept (although I was taken to no authority on this point), that if the claim is vexatious, it should be struck out, and there is no need to ask whether there can still be a fair trial of the claim, as is necessary where an application is made to strike out a claim because of the unreasonable conduct of a party. I accept this must be correct, because the vexatiousness as described in the authorities to which Ms Coyne refers is a species of abuse of process. If something is an abuse of the court's process, it should be struck out. The question of whether there can be a fair trial is immaterial. (For the avoidance of doubt, Ms Coyne did not submit that there cannot be a fair trial of this claim, subject to her arguments about vexatiousness.)

My decision

50. I do not consider that this claim bears any of the hallmarks of vexatiousness identified in *Barker*.

51. First, this is not a claim that has 'little or no basis in law'. It is correct that some of the claims originally brought (for ordinary unfair dismissal, redundancy payment and victimisation) had little or no basis in law, but those claims were withdrawn at an early stage at the CMPH. Those claims were not a substantial part of the original claim, either in factual terms or in terms of the value of the claims. The potential value in the claims is in what is left, the automatic unfair dismissal claims. It is very common for an ordinary unfair dismissal claim to be wrongly included in proceedings (even when parties are legally represented), and it is understandable that substantial parts of the pleading are devoted to procedural issues in relation to the dismissals in circumstances where the Claimants were dismissed with very little process. Although the procedural issues are of more relevance to an ordinary unfair dismissal, they are not irrelevant to the automatic unfair dismissal complaints

since a failure to follow procedures on the part of the Respondent may provide the basis for an inference that the protected disclosures were part of the reason for the dismissals.

52. What is left of the claim is not an obviously hopeless claim. It is very fully pleaded. It may have weaknesses. In particular, the wholesale repleading of what was supposedly said in the protected disclosures suggests at the very least a lack of clarity about the content of the alleged disclosures. Further, EJ Grewal's finding as to the way the threat of reference to the ICO was used in the settlement negotiations does tend to undermine the Claimants' claim as to their belief in the public interest of the protected disclosures said to have been made, but it does not inevitably or fatally do so. The alleged disclosures themselves are, if correct, plausibly disclosures made in the public interest as involving alleged breaches of the GDPR potentially affecting significant numbers of third parties. It is conceivable that a person may have a belief in the public interest in a matter while being willing to compromise that public interest for private gain, even where that individual has achieved a measure of success in obtaining private gain in similar circumstances previously. However, whether or not that is the position on the facts of this case will be a matter for the full Tribunal.

53. Secondly, this is not a claim where there is an apparent intention to 'subject the Respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant'. The claims do put the Respondent to inconvenience and expense, but all claims do. The conduct considered by EJ Grewal probably also amounts to 'harassment', but those findings relate to the conduct of settlement discussions in June/July 2020. It does not follow that the legal proceedings are themselves 'harassment' or disproportionate. These are claims of substance, the claimants were highly paid employees and if they succeed in all respects they would (if they have not mitigated their losses) be awarded substantial sums. If they were unfairly dismissed, then the fact that they were only employed for three months will not make any difference to the principles that will apply in calculating their losses flowing from dismissal. It does not follow that if they succeed they would be likely to recover the sums claimed in the Schedules; the duty to mitigate loss is likely substantially to reduce what may be awarded, but even a substantial reduction on the amounts claimed would still be a significant sum. In the circumstances, the nature of the claims made is not disproportionate to the potential gain likely to accrue to the Claimants. The fact that claims were wrongly brought in the original claim that were withdrawn at an early stage at the first CMPH makes no difference to that assessment in my judgment. As already indicated, this is not a case where the claims wrongly included added much value to the claims. They did not. The potential value is in what is left.

54. Thirdly, this not a claim where the Claimants can be said to be 'abusing the process of the court significantly different to the ordinary and proper use'. EJ Grewal has found that there was unambiguous impropriety by the Claimants in their conduct of the settlement negotiations in June/July 2020. That must mean that there was unreasonable conduct in relation to the settlement negotiations. To adopt the

language of Ms Coyne at this hearing, EJ Grewal found that an improper 'carrot' to settlement was used in the form of the threat to report the Respondent to the ICO and to take actions with consequences for employees and their families. Ms Coyne is right that the legal proceedings were the 'stick' to that carrot, but it does not follow that the stick is itself an abuse of process. What was improper were the threats made. If the legal proceedings have (as I find they do) a sound legal basis and are not being brought with an intention of harassing and inconveniencing the Respondent out of all proportion to the gain likely to accrue to the Claimant, then the fact that the proceedings were used as a 'stick' in settlement negotiations does not amount to an abuse of process. On the contrary, parties are to be encouraged to settle their disputes and the legal proceedings are the 'stick' (to both sides) in any settlement process.

55. Finally, the fact that the Claimant had obtained a substantial sum in settlement from his previous employer, and may have owed his solicitors a significant sum of money, no doubt did provide a considerable incentive to try again with this employer, and adds grist to the Respondent's mill in relation to each of the *Barker* hallmarks, but ultimately if the claim that is brought has legal substance, and is pursued proportionately, those matters cannot turn what is not an abuse of process into an abuse.

56. I therefore decline to strike the claims out under Rule 37(1)(a).

57. As to Rule 37(1)(c) and the requirements of Rule 9: Rule 9 as it was at the time that these proceedings were brought provided that *"Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under Rule 6"*. Rule 6 provides that in the case of non-compliance, the Tribunal *"may take such action as it considers just, which may include all or any of the following- (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37".*

58. In *Asda Stores v Brierley* [2019] ICR 910 Bean LJ (with whom the other members of the Court agreed) held at paragraphs 26-27:

> 26 I agree with Mr Short that if two claimants, Ms A and Ms B, seek to present a multiple claim together, their factual situations do not have to be identical in every respect. Ms A may have longer hours of work than Ms B. She may have greater length of service than Ms B. I also agree with Mr Short that it is the work done by Ms A and Ms B, not their job titles, which is important, but I do not think it can be said that if Ms A is a bakery assistant and Ms B is a checkout operator their claims can be said to be based on the same set of facts, even if they are relying on the same male comparators.
>
> 27 I therefore conclude that Regional Employment Judge Robertson's formulation is the correct one. Multiple claims are allowed under rule 9 where (whatever the titles attached) it is asserted by the claimants that their roles and the work they do are either the same, or so similar to one another that the claims can properly be said to be based on the same set of facts. It would be advisable in future for claimants' solicitors to err

> on the side of caution and issue multiple claims which comply with this interpretation of rule 9, applying if appropriate at the stage of case management for more than one multiple claim to be heard together.

59. Ms Sidossis valiantly sought to submit that the two claimants in this case have brought claims 'based on the same set of facts'. In my judgment they are not, and I go farther than the Respondent did in identifying the differences in this case: these are two claims brought by two different individuals, doing different jobs, who made different protected disclosures on different dates to different people, in response to which they were submitted to different detriments and dismissed at different times, purportedly for different reasons. True it is that there is very substantial overlap in their cases: some of the protected disclosures are the same, they all concern similar matters, some of the detriments are the same and they both bring the same legal heads of claim, but on any view these two claims are not 'based on the same set of facts' or on facts that are 'so similar to one another that they can properly be said to be based on the same set of facts'. The position is far removed from the equal pay claims considered in *Asda Stores* where the reality is that multiple claimants doing the same job will not have their claims considered individually at all, but by reference to a representative claimant and that is possible where the claims satisfy the (old) Rule 9 requirements. The Tribunal could not possibly approach the claims of the two individuals in this case in that way: different factual findings will need to be made in relation to each individual. It was therefore a breach of Rule 9 for the two claims to be included on the same claim form.

60. However, it does not follow that the claims should be struck out. That would be disproportionate. Although the claims are not based on the same set of facts, there are such significant overlaps in the claims that it is entirely appropriate that they should be considered together. It would be invidious for them to be considered by two separate tribunals with the risk of inconsistent findings. Moreover, it saved time and cost for the Claimants to include them both on the same form and with one joint pleading, and time and cost for the Respondent in responding to that combined pleading. Contrary to Ms Coyne's submission, the Respondent is not prejudiced by facing an 'irregular' pleading: it has benefitted from the approach taken by the Claimants (or would have done had it not sought to strike them out for adopting this course). Ms Coyne submitted that there was prejudice to the Respondent because if I struck the claims (or part of them) out now, the Claimants would be out of time to bring those claims properly, but that would be a 'windfall' for the Respondent, not prejudice. The prejudice to the Claimants of my taking that course of action would plainly be much greater and it is not in accordance with the overriding objective of dealing with the case proportionately, justly, and avoiding unnecessary formality and seeking flexibility in the proceedings.

61. It follows that I waive the requirement to comply with Rule 9 in this case and do not strike the claims out under Rule 37(1)(c).

Overall conclusion

62. The Respondent's application to strike the claims out is refused. Case management orders are made in a separate (closed) order.

Employment Judge Stout

Date: 23 April 2021 Sent to the parties on: 26/04/2021.

For the Tribunal: