5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4102322/2018

Held on 28 and 29 July 2021 by Cloud Video Platform

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Employment Judge: P O'Donnell

15 **Mr J A Wright**	**Claimant** **In Person**
20 **Citysprint (UK) Ltd**	**Respondent** **Represented by:** **Mr Whincup –** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The application by the Claimant under Rule 37(1)(b) to strike-out the Response on the basis that the manner in which the proceedings have been 30 conducted on behalf of the Respondent has been scandalous, unreasonable or vexatious is hereby refused.

2. The application by the Claimant under Rule 37(1)(a) to strike-out the part of the Response relating to the jurisdictional issue of the Claimant's employment status on the basis that it has no reasonable prospects of success is hereby 35 refused.

3. The application by the Respondent under Rules 75 and 76(1)(a) & (b) for expenses in relation to this hearing is hereby refused.

4. The Claimant's application to vary the order of proceedings to deal with employment status before disability status is hereby refused.

5. If the Claimant seeks to add a new cause of action to this claim regarding an allegation that he was subject to some form of unlawful action because he exercised his right to annual leave under the Working Time Regulations then he requires to apply to amend his ET1 to add this cause of action setting out the factual and legal basis of the claim. Such application should be made within 28 days of the hearing. Within 28 days of any such application being made, the Respondent will indicate if the application is opposed and, if so, the basis of any opposition.

6. If the Claimant intends to argue that he was subject to any discrimination caused by one of his medical conditions other than cataracts (or caused by something arising from such medical conditions) then, within 28 days of the hearing, he should apply to amend the ET1 to set out the factual and legal basis of any such claim for discrimination. Within 28 days of any such application being made, the Respondent will indicate if the application is opposed and, if so, the basis of any opposition.

7. The Claimant's application to set aside the Order dated 13 April 2021 for him to specify the "substantial disadvantage" relied on by him in his claim of a breach of the duty to make reasonable adjustments is hereby refused. The Order is varied to the extent that the date for compliance with its terms is 14 days from the date on which this judgment was sent to the parties.

8. The Respondent's application for Orders regarding the Claimant's conduct of proceedings in the future is hereby refused.

9. The Claimant's application of 18 August 2021 for case management orders is hereby refused.

REASONS

Introduction

1. The primary purpose of this hearing was to determine a number of applications made by both parties in the course of the proceedings relating to the Claimant's claims for disability discrimination and wages.

2. The applications in question are:-

   a. An application by the Claimant under Rule 37(1)(b) to strike-out the Response on the basis that the manner in which the proceedings have been conducted on behalf of the Respondent has been scandalous, unreasonable or vexatious. This is based on contact made by the Respondent's agent with the Claimant's former solicitors and his mortgage broker who had assisted the Claimant with correspondence relating to the case. This will be referred to below as the "conduct application".

   b. An application by the Claimant under Rule 37(1)(a) to strike-out the part of the Response relating to the jurisdictional issue of the Claimant's employment status on the basis that it has no reasonable prospects of success. The basis of this application is that the Respondent has lost this defence in other cases and that various decisions from the higher courts relating to employment status mean that the Respondent cannot succeed in this defence. This will be referred to below as the "prospects application".

   c. An application by the Respondent under Rules 75 and 76(1)(a) & (b) for expenses in relation to this hearing on the basis that the conduct and prospects applications amount to vexatious, abusive, disruptive or unreasonable conduct of the proceedings on the part of the Claimant or that both applications had no prospects of success. This will be referred to below as the "costs application".

3. The Tribunal also addressed matters of case management that it considered required to be dealt with regardless of the outcome of the various applications.

Evidence

5 4. The Tribunal heard evidence from the following witnesses:-

a. The Claimant.

b. Graham Thomson (GT), the Claimant's former mortgage broker. He gave evidence by way of Cloud Video Platform due to his personal circumstances preventing him from attending the hearing in person.

10 c. David Whincup (DW), the solicitor for the Respondent.

5. There were separate bundles of documents prepared by each party. A reference to a page number below is a reference to a page number in the relevant bundle which will be identified with "C" for the Claimant's bundle and "R" for the Respondent's bundle. The Claimant's bundle is also divided into 15 sections with page numbers within those sections so any reference to a page within this bundle will identify the section number followed by the page number.

6. This was not a case where there was, ultimately, a significant dispute of fact. The findings in fact made below relate only to the conduct application; the 20 prospects application was made on the basis that the Respondent's defence relating to employment status must fail as a matter of law. The findings of fact relate to contact DW had with the Claimant's former solicitor; the Claimant was not a party to that contact and he relied on internal emails which he found in his file when this was provided to him. DW, in his oral evidence to the 25 Tribunal, did not dispute the contents of those emails and accepted that they accurately reflected his contact with the Claimant's former solicitor.

7. The position is different in relation to the contact between DW and GT. The oral evidence of GT given at the hearing was that the telephone call with DW

was very short and he had no clear recollection of what was discussed. He did say that he had come away from the call with the impression that DW was the Claimant's solicitor but when asked what DW said that gave this impression, GT could give no detail and it was his evidence that he could not recall any specific words used by DW. It was GT's position that he may have misunderstood DW's role in the proceedings because he had not had much involvement with the case and did not understand the roles of the different people involved. For his part, DW denied saying anything which could be construed as saying that he was acting for the Claimant.

8. The oral evidence of GT stands in contrast to a letter dated 16 March 2021 signed by GT (C/1/8-9) and which was produced by the Claimant to support the conduct application when it was made in April 2021. This letter stated, in clear and unambiguous terms, that DW had contacted GT in January 2020 portraying himself as the Claimant's solicitor and attempted to obtain information about the Claimant. The letter described this as a "*totally dishonest and illegal approach*" by DW and encouraged the Claimant to "*report him to all official channels*".

9. The Tribunal was troubled by the differences in GT's oral evidence and the contents of the letter of 16 March. In particular, the oral evidence was that GT could not recall the conversation with DW in any detail given the passage of time since it occurred in January 2020 but the letter of 16 March, produced only a few months before the present hearing, sets out his recollection in clear and confident terms. The Tribunal found it highly unlikely that GT's recollection had declined so sharply in such a short period of only 4 months when it had been so clear after the 14 months which passed between the conversation between GT and DW in January 2020 and the letter of 16 March 2021 being written.

10. The Tribunal, therefore, gave little weight to the letter of 16 March; it was not a contemporaneous note of the conversation and its contents stood in stark contrast to the oral evidence given at the hearing.

11. Further, the Tribunal did not find GT to be a reliable witness overall. He was at times evasive in his answers with the Tribunal having to intervene to direct him to answer questions which were being put to him in both chief and cross examination. On one occasion, the Tribunal itself had to put the same question three times to GT about what was said during discussions he had with the Claimant when his response related to the conversation he had with DW.

12. In these circumstances, the Tribunal placed very little weight on the evidence of GT, both the oral evidence and the letter of 16 March 2021. In relation to the conversation he had with DW in January 2020, the Tribunal preferred the evidence of DW where there was any dispute.

13. The Claimant, not having been party to DW's contact with his former solicitor or with GT, could not give any direct evidence about these matters. He could only refer to the file notes from his former solicitors and the evidence of GT. In these circumstances, much of the Claimant's evidence in relation to the conduct application was not directly relevant to the findings of fact. For example, he gave evidence about how these matters affected him and his health but this is not relevant to the question of whether proceedings are being conducted in a scandalous, vexatious or unreasonable manner which has to be assessed objectively.

14. The Claimant did give evidence about the reasons why he had come to a view that the conduct of DW did amount to unlawful conduct by making reference to various print-outs from websites regarding the rules relating to solicitors imposed by the Law Society of Scotland and the Law Society of England & Wales, data protection and human rights which were produced in sections 2-4 of his bundle. This evidence was relevant to the costs application and provided background evidence to the conduct application.

15. In support of the prospects application, the Claimant did seek to lead evidence about his contract with the Respondent and working practices. The Tribunal did not allow this evidence for two reasons; first, the basis for the prospects aspect was that the Respondent's defence on employment status

was destined to fail as a matter of law and they had had no notice that the Claimant was seeking to present a case based on the facts of the case; second, a strike-out application does not involve a mini-trial of the facts and the Tribunal should take the Respondent's case at its highest.

5 **Findings in fact**

16. The Tribunal made the following relevant findings in fact.

17. The Claimant's ET1 (R1-12) was lodged in February 2018. It set out claims for disability discrimination and unlawful deduction of wages. The basis of the disability discrimination claim is that the Claimant's engagement with the
10 Respondent was terminated because he had taken time off to recover from a cataract operation. On the face of the pleadings, the relevant medical condition which is said to be a "disability" was cataracts.

18. At the time at which the ET1 was lodged, the Claimant was represented by a firm of solicitors, Livingston Brown (LB). They subsequently ceased to act
15 by the Claimant.

19. At a case management hearing before the Tribunal held in August 2019, an issue arose about the medical conditions relied on by the Claimant being more than his cataracts and he wished to rely on other conditions. By this time, LB were no longer acting for the Claimant. It was said by the Claimant
20 (or on his behalf) that he had instructed LB in relation to these other conditions but they had not pled them in the ET1.

20. In light of that assertion, DW decided to contact LB to see if they could provide any further information on the instructions given to them regarding the preparation of the ET1. He took the view that, in asserting that he had
25 instructed LB to plead the other medical conditions and their alleged failure to do so, the Claimant had waived privilege in relation to these matters.

21. DW contacted LB on 27 August 2019 and spoke to an administrator, Claire Burns. Ms Burns sent an email at 14.27 on 27 August 2019 to the head of the employment law team at LB, Mark Allison. A copy of this email is at R38-

39 and DW agrees that this email accurately reflects the discussion he had with Ms Burns.

22. By email of 14.57 the same day (R38), Mr Allison replied to Ms Burns indicating that he does not consider that he could discuss with DW any instructions from or discussions with the Claimant without the Claimant's permission. He asks for DW to be asked to put his request in writing and he would speak to the Claimant.

23. Ms Burns called DW back the same day to inform him of Mr Allison's response. She emailed Mr Allison at 17.48 on 27 August 2019 confirming her conversation with DW and this is produced at R38. Again, DW accepted that the contents of this email accurately reflects the discussion he had with Ms Burns.

24. There was no further contact between DW and LB.

25. The Claimant was not aware of this contact between LB and DW at the time it occurred. It was only when he obtained a copy of his file from LB that he discovered the emails referred to above.

26. On 11 January 2020, GT sent a letter on behalf of the Claimant to DW and copied to the Tribunal which enclosed various documents comprising the Claimant's medical records. A copy of the letter is at C/1/6-7. The letter also sets out information about alleged domestic abuse suffered by the Claimant and describes the state of his health at that time.

27. GT was the Claimant's mortgage broker and became involved in the Tribunal process as a favour to the Claimant who needed assistance in sending the relevant documents to DW and the Tribunal. At the end of the letter of 11 January 2020, GT explains this and confirms he does not act for the Claimant. The letter goes on to ask that any communications to the Claimant are sent in large print due to his visual impairments.

28. In light of what was said about the state of the Claimant's health, DW wanted to confirm that the Claimant was fit to deal with the Tribunal process and contacted GT to see if he could provide further information on this point.

29. This contact took place by telephone and DW identified himself as the Respondent's solicitor. GT responded that he was not involved in the Tribunal proceedings and was not in a position to discuss any matters with DW. The conversation ended on that and there was no further contact between GT and DW.

30. The Claimant was aware of the contact between DW and GT at the time it took place; he made reference to it in a letter to the Tribunal dated 27 January 2020 (R46-54 with the reference at R46). However, he was not aware of the allegation that DW had held himself out as his solicitor until the letter of 16 March 2021 was produced. The Tribunal should be clear that it does not find that DW held himself out as the Claimant's solicitor.

Claimant's submissions

31. The Claimant produced written submissions which he adopted as his submissions and did not supplement orally.

32. In relation to the conduct application, the Claimant made the following submissions:-

    a. DW attempted to breach the Claimant's client confidentiality with LB by his contact of 27 August 2019.

    b. This information is protected at common law, by the Data Protection Act 1998 (DPA), by the General Data Protection Regulations (GDPR), by Article 8 of the Human Rights Act 1996 (HRA) and by legal privilege.

    c. In relation to legal privilege, it is only the Claimant that can waive this.

    d. Both legal privilege and client confidentiality continues after the relationship with the solicitor has ended.

e. Reference is then made to DW being a qualified solicitor, the amount of his hourly rate and the knowledge and expertise which he is said to have. It is said that, in light of this, he would be fully aware that his actions in contacting LB was an illegal and blatant attempt to breach privilege.

f. The submissions then make reference to various authorities which were produced at section 5 of his bundle.

g. Reference is then made to the contact with GT and there is an assertion that this was an attempt by DW to breach the Claimant's confidentiality which was protected by the same provisions as was the information held by LB (with the exception of privilege).

h. It is submitted that DW's attempts were thwarted by LB and GT with no information being disclosed.

i. It was said that in making these attempts, DW lacked the following:-

    i. A valid mandate from the Claimant authorising disclosure of information.

    ii. An Order from the Tribunal or any other court regarding disclosure

j. It is noted that DW does not deny the contact he made with LB or GT. It is said that he showed no remorse and has not apologised for his actions.

k. The submissions go on to set out the impact these matters have had on the Claimant and describes them as causing him "trauma". The Claimant then sets out information about his health.

l. It is submitted that DW's actions were pre-meditated and that he knew that what he was doing was unlawful.

m. The Claimant denies that his conduct of the proceedings is scandalous or vexatious; he makes reference to previous correspondence in which he asked the Tribunal to ask DW to "*wind his neck in*" and stop attempting to contact LB; he makes reference to the matter being raised at a case management hearing held on 15 October 2020.

n. It is asserted that the conduct of DW is his own doing and the Respondent was not involved in the telephone calls.

o. It is submitted that the Claimant did nothing wrong and so should not be subject to a cost order. It is asserted that DW's firm should not profit from DW's actions.

p. It is submitted that if the Tribunal does not find that DW has done something wrong then the Tribunal is condoning his actions and giving a green light to other solicitors to do the same in other cases.

q. The Claimant cannot find another Tribunal case where the same has happened.

33. In support of the prospects application, the Claimant made the following submissions:-

a. The submissions start by setting out various factual assertions regarding the contract and working relationship between the Claimant and the Respondent. As noted above, the Tribunal was not making findings of facts regarding the employment status issue at the present hearing nor was the application based on the facts of the case. The Tribunal does not therefore intend to set out this part of the submissions in detail.

b. The submissions go on to set out various previous judgments which the Claimant relies on including *Uber v Aslam*, *Pimlico Plumbers v Smith*, *Leyland & ors v Hermes Parcelnet*, *Dewhurst v Citysprint* and *O'Eachtiarna v Citysprint*. Written judgments for all of these cases appear in section 9 of the Claimant's bundle.

34. In rebuttal of the submissions made on behalf of the Respondent, the Claimant made the following submissions:-

    a. He made submissions about his evidence regarding his discussions with GT regarding the contact from DW, in particular that he had looked GT in the eye and pressed him regarding what was said by DW. It was submitted that the Claimant had no hand in writing the letter of 16 March.

    b. He accepted that no data had been disclosed to DW and that DW's intent in contacting LB was to obtain notes about what should have been in ET1 and that he has supplied this to DW.

    c. Reference was made to legal privilege, DPA, GDPR and HRA. It was said that if information leaked then they would be hammered by the Information Commissioners Office and people would lose their job. The Claimant knew financial services and anyone who got caught could not work in that sector. It was submitted that solicitors would be struck-off.

    d. The Claimant was not here for the fun of it; these contacts should never have happened. There was no reason or excuse for DW to contact GT.

    e. The documents from LB show that the contact genuinely happened.

Respondent's submissions

35. The Respondent's agent made the following submissions.

36. In relation to the conduct application, reference was made to the evidence heard by the Tribunal.

37. The call with GT was with him and the Claimant does not profess to have knowledge of this. It was a short call and, whilst GT had the impression that DW acted for the Claimant, GT could give no specifics as to why he thought this. GT did agree that it was odd for DW to have contacted him using his

own name if he was seeking to portray himself as the Claimant's lawyer. GT had explained that his role in both the letter of January 2020 and March 2021 was as a secretary.

38. Turning to the contact with LB, it was submitted that it was agreed that DW asked no questions and got no answers. The Claimant had no idea what questions DW intended to ask. The Claimant agrees, now, that no further contact was made and that, contrary to what was said in the written application for strike-out itself, DW was not told by LB to stop ringing them.

39. The Claimant was unable to give any answer as to the connection between these matters and the merits of the case. He did not put any specific words used in either contact to DW. There is nothing in the Claimant's submissions which advances a positive case.

40. Mr Whincup denied any wrongdoing and submitted that, even taking the Claimant's case at its highest, there was no evidence of any wrongdoing and there were legitimate grounds for both contacts.

41. Even if the Tribunal was against the Respondent on this, there was not enough to justify strike-out. The power to strike-out is a draconian power and should only be used where a fair trial is not possible.

42. In this case, there was no leakage of confidential information. There was no assertion of any connection between the alleged misconduct and the merits of the case. It was submitted that the case had been continuing for two years since these matters occurred without any prejudice to the Claimant's case and with none being alleged by the Claimant.

43. In these circumstances, it was submitted that the conduct application is wholly misplaced and should be dismissed.

44. Turning to the prospects applications, Mr Whincup made the following submissions:-

a. The Tribunal has to take the Respondent's case at its highest and accept the terms of the ET3 unless there was clear evidence this was not true.

b. The Claimant's submissions contain factual assertions which will be disputed.

c. Once evidence is needed to assess the merits of a defence then it is not appropriate for strike-out.

d. Cases decided on other facts are not relevant to this case.

e. The *Dewhurst* case involved cycle couriers who were under more control than others.

f. Reference was made to the case involving Deliveroo where the Respondent won because of the right of substitution.

g. There is a distinction in the facts in this case and that of *O'Eachtiarna* and that this case is due to be heard by the Employment Appeal Tribunal in November in any event.

45. It cannot be said that the Respondent's prospects in relation to the issue of employment status are no more than fanciful.

46. In relation to the application for expenses, it was submitted that this was made on two grounds; that the conduct application itself amounted to unreasonable or vexatious conduct and that it had no reasonable prospects of success.

47. It was submitted that the application was clearly personal and reference was made to the correspondence from the Claimant regarding this matter in which the Claimant expressed the intention of destroying Mr Whincup's career and humiliating him in the national press. However, none of the allegations had any bearing on the merits of the case.

48. The allegations made by the Claimant, which have been made by the dozen, were said to be of the most serious nature but had no factual basis.

Reference was made to the Claimant's evidence that no information was disclosed to DW, the Claimant did not know what had been asked, the call to GT was short and the evidence heard about the calls with LB.

49. Reference was also made to the fact that the Claimant purports to copy his correspondence relating to these matters to a range of bodies but in his evidence indicated that he did not always do so.

50. It was submitted that this was clearly about damaging DW and not concerned with the merits of the case.

51. The Claimant knew that the Solicitors Regulatory Authority had rejected his complaint but still asserted this complaint in advancing the conduct application.

52. Mr Whincup submitted that it was clear that the Claimant did not ask GT what was actually said by him and, further, nothing was put to Mr Whincup in cross-examination as to what he said. If the Claimant had made the slightest attempt to find out what had been said then it would have been clear.

53. It was the letter of 16 March 2021 which prompts the conduct application and it was submitted that the Claimant had wrote it; GT was totally unable to defend the contents.

54. The Claimant was offered the cost of getting advice on his application which he rejected. He cannot, therefore, rely on any alleged ignorance.

55. The Claimant had demanded money from DW's firm.

56. All of this was based on the obvious fallacy that ringing up LB and GT amounted to multiple criminal offences.

57. It was submitted that the application was absolutely vexatious and unreasonable; the Claimant took no steps to find out what GT's evidence would be and made the application on the basis of a false legal premise.

58. In relation to the grounds that the application had no reasonable prospects of success:-

    a. The Respondent relies on broadly the same facts as they do for the first ground of the costs application.

    b. There was no evidence of any wrongdoing, no evidence of any connection to the case and no evidence of why a fair trial was no longer possible.

    c. The Respondent had no choice but to respond robustly and in detail; the Claimant was making allegations which there was no choice but to defend.

    d. It was accepted that the Claimant had been unwell but this was not a case where the Claimant says that he did something because he was ill and he cannot give his illness as an excuse.

    e. It was clear that the Claimant was intent on continuing in reporting this matter and there was no mitigation in terms of his illness.

59. There was no point in asking for full costs taking into account the Claimant's means. Mr Whincup sought an Order in terms that gave the Claimant a message that it is not acceptable to conduct proceedings in the way which he has by making allegations without evidence. Mr Whincup put down a marker that if this persists then the Respondent would be asking for the whole of the claim to be struck-out.

Relevant Law

60. The Tribunal has power to strike-out the whole or part of claim or response under Rule 37:-

    At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

> (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> (d) *that it has not been actively pursued;*
>
> (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

61. The question of what amounts to scandalous, vexatious or unreasonable conduct is not be to construed narrowly. It can be matters which amount to abuse of process but can involve consideration of wider matters of public policy and the interests of the justice (*Ashmore v British Coal Corpn* [1990] IRLR 283).

62. Rule 37(1)(b) was considered in *Bennett v London Borough of Southwark* [2002] IRLR 407 and a number of principles can be identified:-

    a. The manner in which proceedings are conducted by a party is not to be equated with the behaviour of the representative but this can provide relevant evidence on this point.

    b. Sedley LJ observed that the Rule was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process.

    c. It can be presumed that what is done in a party's name is done on their behalf but this presumption can be rebutted and so a party should be

given the opportunity to distance themselves from what the representative has done before a claim or response is struck-out.

d. The word 'scandalous' in the rule is not used in the colloquial sense that it is 'shocking' conduct. According to Sedley LJ, it embraces both *'the misuse of the privilege of legal process in order to vilify others*', and *'giving gratuitous insult to the court in the course of such process'* (para 27).

e. Fourth, it must be such that striking out is a proportionate response to any scandalous, vexatious or unreasonable conduct. The Tribunal needs to assess whether, in light of any conduct found to fall into the relevant description, it is still possible to have a fair trial (see also *De Keyser Ltd v Wilson* [2001] IRLR 324).

63. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37(1)(b) was summarised by Burton J, in *Bolch v Chipman* [2004] IRLR 140:-

a. The Tribunal must reach a conclusion whether proceedings have been conducted by, or on behalf of a party, in a scandalous, vexatious or unreasonable manner.

b. Even if there is such conduct, the Tribunal must decide whether a fair trial is still possible.

c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.

d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

64. In considering whether to strike-out, the Tribunal must take the relevant party's case at its highest and assume they will make out the facts they offer to prove unless those facts are conclusively disproved or fundamentally

inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

65. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a cost order:-

5 *(1) A costs order is an order that a party ('the paying party') make a payment to—*

(a) another party ('the receiving party') in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

10 *(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or*

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

15 *(2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the*
20 *case, except for time spent at any final hearing.*

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer
25 *until a later stage in the proceedings deciding which kind of order to make.*

66. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application:-

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success; [or

(e) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

> (5) *A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.*

5 67. The principle in the Rules is that costs do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.

10 68. The Tribunal's discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard
15 to the "nature, gravity and effect" of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

Decision – Conduct Application

69. It is quite clear that the fundamental basis of the conduct application is the Claimant's belief that the actions of DW in contacting LB and GT was illegal
20 amounting to criminal acts. Unfortunately, the Claimant's belief regarding the legal position is simply wrong.

70. None of the matters on which the Claimant relies, either on their own or taken together, renders DW's actions illegal or criminal. The Claimant has come to a fundamental misunderstanding of the law in relation to these matters.

25 a. The duty of client confidentiality which arises from the rules of conduct applied to solicitors by either the Law Society of Scotland or the Law Society of England & Wales requires solicitors to keep <u>their</u> (emphasis added) client's information confidential. It does not mean that anyone else (whether another solicitor or not) is acting unlawfully in seeking

such information; the professional rules impose no duties on solicitors to not seek information from other solicitors about those solicitors' clients. Indeed, there can be many circumstances where one solicitor contacts another solicitor to seek information regarding that solicitor's client in relation to a matter in which they act for different parties. They would be acting entirely properly in such circumstances; the solicitor acting for the person about whom information is sought would undoubtedly seek their client's authority to release any such information to ensure they act in accordance with the professional rules but the solicitor making the request is not acting unlawfully in making that request.

b. The principle of legal privilege is intended to protect the discussions between a person and their solicitor (both the instructions given to the solicitor and the advice provided) from being disclosed in the course of legal proceedings. It allows a party to refuse to disclose such matters without any adverse inference being drawn. It does not, as suggested by the Claimant, mean that others (including other solicitors) are prohibited from seeking information about such matters or that doing so is somehow illegal. It is also important to note that privilege can be waived where a party relies on discussions with their solicitor in support of their case and not just by providing a mandate as suggested by the Claimant. In this case, the Claimant has relied on an allegation that he instructed LB about his various medical conditions but that they acted negligently in only pleading his cataracts in support of his attempts to bring those other conditions into the scope of the claim. The Tribunal agrees with the Respondent that he has, therefore, waived privilege in relation to those discussions.

c. The DPA and GDPR provide a statutory framework regulating the processing and handling of personal data. Those who hold or control such data must process it in accordance with the principles laid down in the legislation. Any disclosure of personal data about an individual to a third party must be made in accordance with those principles.

However, again, this does not mean that any such third party is acting unlawfully in seeking such data as is alleged in this case.

d. Finally, it is correct that HRA incorporates the European Convention on Human Rights into UK law and that Article 8 of the Convention sets out the right to private and family life. However, the protection provided by the legislation is from interference in individuals' private and family life by the state (or emanations of the state or those acting on behalf of the state). It does not create rights between individuals or impose duties on those who are not exercising public functions.

71. For these reasons, it is quite clear that DW did not act unlawfully or commit any criminal act in contacting LB and GT. The Tribunal does not consider that his conduct was inappropriate in any way and comes nowhere near to amounting to scandalous, vexatious or unreasonable conduct of the proceedings.

72. For that reason alone, the Tribunal would dismiss the conduct application. However, there is a further issue which the Tribunal considers would have led to the application being dismissed even if it had concluded that DW's actions amount to scandalous, vexatious or unreasonable conduct of the proceedings (which, to be clear, it does not).

73. This issue is the question of whether or not, in light of any scandalous, vexatious or unreasonable conduct of the proceedings, it is possible to have a fair trial.

74. The Claimant led no evidence and made no submissions on this point. He made no positive case at all that a fair trial was no longer possible. In fact, he made no case at all that the conduct of DW had any connection with the substantive issues of the case.

75. Indeed, on the facts of the case, it is difficult to see how he could have made such an argument. There was no connection between the conduct of DW and the substantive issues such as disability status, employment status and

whether the Claimant was discriminated against by the Respondent. The contacts with LB and GT were made between 2 years and 18 months ago with the claim proceeding since that time and no prejudice to the Claimant in being able to progress the claim in that time arising from those contacts.

76. In these circumstances, even if the Tribunal had found that there had been scandalous, vexatious or unreasonable conduct of the proceedings (which to be clear, again, it does not) the application would have been refused on the basis that any such conduct had no impact on the substantive issues in the claim and there was no basis on which it could said that a fair trial was no longer possible.

77. For these reasons, the Claimant's application under Rule 37(1)(b) is refused.

Decision – Prospects Application

78. The prospects application is made on the inter-related bases that the Respondent has lost in other cases in relation to issues of employment status and that other Respondents have lost on this issue in other proceedings which have been addressed by the higher courts.

79. The difficulty for the Claimant in this is that those other cases (whether they involved the present Respondent or a different respondent) are decided on their own facts and the outcome of those cases do not determine the outcome of this case.

80. The issue of employment status is determined on the facts of the contract agreed between the claimant and respondent in any case and how those contractual terms reflect the reality of the working relationship. Simply because respondents in other cases (or even the same Respondent in other cases) have failed to persuade the relevant courts that, on the facts found in those cases, the claimants in those cases do not have the relevant employment status does not mean that the Respondent in this case is bound to fail on this point as well.

81. In particular, the Respondent has pointed out that the other cases involving itself related to bike couriers and not delivery van drivers such as the Claimant. It is their position, which the Claimant did not seek to dispute, that the contracts and working practices (particularly relating to the right of substitution) are different for those two groups. It is, therefore, their position that the previous decisions involving themselves can be distinguished from the present case. If they can establish that there was a genuine right of substitution for the Claimant then they may be able to establish that he does not have the necessary employment status. However, that is a matter to be determined by a Tribunal on another day, having heard all the relevant evidence, and the present Tribunal has not come to any conclusion on this issue.

82. In these circumstances, the Tribunal does not consider that there is any basis on which it can be said that the Respondent's defence in relation to employment status does not have reasonable prospects of success. The Claimant's application under Rule 37(1)(a) is, therefore, refused.

83. After the hearing, the Claimant sent an email to the Tribunal dated 4 August 2021 enclosing job adverts placed by the Respondent online for delivery drivers and making various submissions about these by reference to documents in the bundle he produced for the hearing.

84. The Tribunal considered that the contents of this email related to the prospects application and asked for the Respondent's comments. These were provided by email dated 17 August 2021 with the Respondent noting that this only relates to the employment status issue and not the disability status which is the issue which the Tribunal has previously ordered would be determined first.

85. The Tribunal considered that the contents of the Claimant's email of 4 August 2021 sought to present evidence about his employment status and, as explained to the Claimant at the hearing, the Tribunal was not concerned, at the present hearing, with hearing evidence and making findings of fact regarding his employment status. For the same reasons as given at the

hearing for not allowing the Claimant to lead evidence at the hearing on this issue, the Tribunal has not taken any account of the contents of the Claimant's email of 4 August 2021 in coming to its decision to refuse the prospects application.

5 86. There are, however, a number of issues which arise from the email of 4 August which the Tribunal considers it would be useful to address to assist in future conduct of the proceedings:-

a. The email did not comply with Rule 92 because it was not copied to the Respondent's agent; this was not an accidental omission and the 10 Claimant specifically stated that he deliberately did not copy the email to the Respondent's agent. This is not the first time that the Claimant has deliberately not complied with Rule 92; the email containing the conduct application was also intentionally not copied to the other side. The Claimant should take note that the interests of justice require that 15 both parties are aware of each other's correspondence with the Tribunal and a failure to comply with Rule 92 will simply cause delay in matters being addressed whilst compliance takes place.

b. The Claimant makes reference in the email to the Employment Judge being able to carry out his own investigations into the matter being 20 raised. The Tribunal is not an investigatory body. Rather, it determines issues by hearing the evidence and submissions presented by the parties.

c. A hearing convened to determine a particular issue is the opportunity for parties to bring all the evidence which they consider relevant in 25 supporting their case on that issue before the court or tribunal in question and to make all arguments as to why their case on that issue should succeed. As a result of this, there are limits on the scope for parties to seek to lead further evidence or make further argument after a party has closed their case. In this instance, the contents of the 30 Claimant's email of 4 August was, ultimately, not relevant to the prospects application but, in other circumstances, evidence or

submissions being put forward after the hearing has concluded or the judgment issued will be unlikely to be taken into account.

Decision – Costs Application

87. The application from the Respondent is made on two grounds; that the Claimant's conduct application had no reasonable prospects of success and that the application amounted to scandalous, vexatious or unreasonable conduct of the proceedings. The Tribunal will address each ground in turn before assessing whether to exercise its discretion to award expenses.

88. It is quite clear to the Tribunal that the conduct application had no reasonable prospects of success. Putting aside the question of whether DW's actions amounted to scandalous, vexatious or unreasonable conduct of the proceedings, there was absolutely no basis on which it could be said that a fair trial was no longer possible. Indeed, the Claimant did not even advance such an argument at the hearing.

89. This point, on its own, would be sufficient to say that the application had no reasonable prospects of success but the Tribunal also considers that the argument that DW's conduct amounted to scandalous, vexatious or unreasonable conduct of the proceedings had no reasonable prospects.

90. It is quite clear that the Claimant had researched the relevant legal and regulatory provisions but had come to an entirely wrong conclusion from that research. As set out above, there is absolutely nothing in the provisions relied on by the Claimant which renders DW's conduct unlawful.

91. There was no evidence before the Tribunal as to why the Claimant had come to such a fundamentally wrong conclusion as to the legal position and it does not intend to speculate on such matters. All that can be said is that, in his bundle, the Claimant produced extracts from various websites which set out the provisions relied on by him and various authorities to which he referred in his submissions. A proper reading of this material would not have led to the conclusion which the Claimant had reached regarding DW's conduct and he had clearly misunderstood the material which he had researched.

92. Turning to the question of whether the application scandalous, vexatious or unreasonable conduct of the proceedings by the Claimant, there were various pieces of correspondence from the Claimant to various persons regarding the issue of DW's conduct which were referred to in evidence:-

5

a. An email dated 30 December 2020 from the Claimant to DW and copied to the Tribunal (R60-62).

b. A letter dated 12 April 2021 from the Claimant to the Tribunal and copied to DW (R74-81).

c. An email dated 15 April 2021 from the Claimant to DW and copied to

10 the Tribunal (R86-87).

d. A letter dated 5 February 2020 from the Claimant to the Tribunal and copied to DW (R55-59).

e. A letter dated 7 March 2021 from the Claimant to DW and purporting to be copied to the Tribunal, the compliance officer of DW's firm, the

15 Solicitors Regulatory Authority (SRA), the Information Commissioners Office (ICO), LB and GT (R63-70).

f. An email dated 15 April 2021 from the Claimant to DW (R82-85).

g. A letter dated 15 April 2021 from the Claimant to the compliance officer at DW's firm and purporting to be copied to the Tribunal, SRA, LB and

20 GT (R88-90).

h. An email dated 3 May 2021 from the Claimant to the Tribunal and copied to DW (R127-128).

i. An email dated 8 July 2021 from the Claimant to the Tribunal and copied to DW (R138-142).

25 93. It was common ground between the parties that the Claimant had complained to the SRA regarding DW's conduct. A copy of the complaint was not in either bundle. It was also common ground that the complaint was rejected

and this was confirmed to DW's firm by email from the SRA dated 27 April 2021 (R115).

94. From this correspondence, a number of matters can be identified:-

a. The Claimant has engaged in extensive correspondence regarding this matter with a range of people or organisations.

b. The correspondence is frequently copied (or purports to be copied) to a range of individuals or organisations. In particular, the correspondence being copied to the SRA and ICO prior to formal complaints being made to those organisations implies an intent to put pressure on DW or his firm.

c. The correspondence is couched in strong and intemperate terms and making very serious allegations against DW. Examples of this can be found as following:-

i. The use of the phrase "*totally unethical and totally dishonest"* (R61).

ii. That the Claimant had contemplated taking his own life due to DW's actions but had not done so because he wanted to hold DW accountable through the SRA (R64)

iii. That DW's conduct was "*pre-meditated dishonest conduct"* (R64).

iv. That the Claimant would *"leave no stone unturned to bring you to account for your despicable actions"* (R65),

v. The repeated use of the phrase *"dishonest conduct"* (R63 & 64, R79).

vi. That the approach to LB was *"illegal and dishonest"* (R66) and that it amounted to professional misconduct (R69).

vii. That DW's actions were *"totally illegal"* (R76).

viii. The assertion (which is not supported by evidence) that DW *"pretended to be my solicitor"* and that he was *"committing fraud by deception or fraud by misrepresentation"* by doing so (R78)

ix. The allegation that DW was attempting to pervert the course of justice (R81, R139, R140).

x. Accusing DW of *"questionable honesty"* when DW indicated that he was not in a position to comment about the Claimant's allegation at a hearing before the Tribunal in October 2020 (R84).

xi. Describing DW's conduct as *"despicable and totally dishonest"* and alleging *"criminal fraudulent misrepresentation"* (R88).

xii. That there had been criminal activity by both the Respondent and DW (R138).

d. The Claimant also threatens serious actions against DW, for example, indicating that he is seeking for DW to be struck off as a solicitor (R61, R67). In the letter to the compliance officer at DW's firm of 15 April 2021, the Claimant raising a series of questions (R89) asking why the Claimant had not been suspended by the firm and why he is still being allowed to practice. It asks whether the firm condones what the Claimant describes as criminal behaviour by the Claimant and whether they consider he has brought *"shame and disgrace"* upon the firm.

e. The correspondence exaggerates the number of times which DW made contact with others regarding the Claimant, for example, using the word "*numerous"* on several occasions to describe the contacts with LB, asserting that DW had engaged in a "*volume"* of contacts (R61) and had shown *"tenacity"* (R61) and that DW was *"repeatedly"* told not to contact LB (R75). The Claimant, in cross-examination, sought to justify the use of the word "numerous" by saying he meant more than one contact but it is quite clear when these phrases are read in context that he was seeking to suggest that DW had engaged in an

extensive campaign of attempting to obtain information about the Claimant involving a larger number of contacts than had actually occurred.

f. The Claimant made assertions that he would *"name and shame"* DW in the national press (R62, R67).

g. The Claimant also asserted that he was going to take legal action against DW and his firm (R62, R142) and sought a financial package from DW's firm to settle the matter (R69).

h. He also asserted an intention to report the matter to the police although he has not done so (R79).

i. There was also an assertion made that he would bring a *"Lay Person Prosecution"* to the Solicitors Disciplinary Tribunal (p128).

j. The Claimant also asserted that documents relating to the issue was being supplied to the ICO (R140) although this had not been done by the date of the hearing.

95. The Tribunal also notes that the Claimant's email of 4 August 2021 sent after the hearing and which is addressed above in relation to the prospects allegation continues to use similar language describing the wording of job adverts placed by the Respondent as "*devious"*.

96. It is quite clear from these matters that the Claimant has had an extraordinary reaction to the conduct of DW that was disproportionate to what had actually occurred when viewed objectively. As a result, he has conducted himself in a manner that, both in the substantive content of the correspondence and the terms in which it is couched, amounts to scandalous, vexatious or unreasonable conduct of the proceedings. He makes very serious allegations which have no real basis in fact and law, he has indicated an intention to raise these matters with a range of bodies, he is undeterred by the fact that the SRA has rejected his complaint and he couches all of this in terms that are, at best, unreasonable and often intemperate.

97. If these were the only matters to which the Tribunal had regard then it would have little hesitation in granting the Respondent's application on both grounds. However, there are issues of mitigation which must be borne in mind.

98. First, there is the fact that the Claimant is a litigant in person. The Tribunal should be clear that this factor is only relevant to the prospects ground of the expenses application and not the conduct ground. All parties engaged in proceedings before the Tribunal, whether legally qualified or not, are expected to conduct themselves in an appropriate, courteous and reasonable manner, not just when they appear at any hearings but also in any correspondence whether that is with the Tribunal or between parties. The fact that someone is a litigant in person does not excuse conduct which is scandalous, vexatious or unreasonable.

99. However, the status of the Claimant as a litigant in person is relevant when considering the prospects ground as he cannot be expected to have the same knowledge, understanding and expertise as would be expected of a legally qualified person when it comes to dealing with legal concepts and principles.

100. The second mitigating factor is closely related to the first and, that is, the fact that the Claimant's conclusions on the legal position regarding DW's conduct, whilst wrong, are genuinely held. There was nothing in the evidence heard by the Tribunal to suggest, and the Respondent made no argument to this effect, that the Claimant's view on the law was anything other than a genuinely held opinion. There was nothing to suggest that it was a sham or that the Claimant was advancing a position which he knew to be wrong. The Tribunal is satisfied that the Claimant had a genuinely, albeit wrongly, held opinion that what DW had done was illegal.

101. The Tribunal does note that the Respondent had sought to assist the Claimant in obtaining advice on the conduct application by offering to pay a contribution to any legal fees for such advice. There was, therefore, a possibility that the Claimant could have obtained legal advice that would have impacted on his view. In the event, the Claimant had been unable to find a

solicitor from whom he could obtain such advice and so there was nothing to disturb the Claimant's opinion that he had correctly interpreted the law.

102. Third, it was clear to the Tribunal that the Claimant's reaction to DW's conduct was driven, to a significant degree, by his view that what DW had done was wholly illegal and criminal. The contents of the correspondence from the Claimant, particularly the language and terminology used, is clearly influenced by his view as to the nature of DW's conduct.

103. Fourth, related to the preceding point, is the fact that the Claimant was genuinely upset and offended by what he, wrongly, perceived to be illegal conduct by DW. There was no suggestion by the Respondent, and no evidence before the Tribunal, that the Claimant's feelings on the matter were a sham or had been overly exaggerated for the purpose of advancing the strike-out application.

104. Finally, the Tribunal takes account of the fact that the Claimant has faced a number of very serious health and personal issue during the course of proceedings. Although there is no suggestion that the Claimant has conducted himself in the manner in which he has because of these matters, his reaction to the conduct of DW has to be considered in the context of these issues.

105. Taking account of all of these matters and balancing the conduct of the Claimant and the lack of prospects in the application against those mitigating factors, the Tribunal is not persuaded that it would be in keeping with the Overriding Objective or the interests of justice to grant the Respondent's application for expenses in this instance.

106. However, the Claimant should be very aware that the Tribunal's conclusion on this was very much in the balance and had there not been the mitigating factors then the Tribunal would have had little hesitation in granting the application.

107. The Claimant should take this as a warning as to how he should conduct himself in relation to these proceedings in future. The correspondence which

the Tribunal reviewed above falls far short of how the Tribunal would expect parties to conduct themselves. Parties are entitled to make their case or advance arguments in support of applications in correspondence but the use of intemperate language, the making of serious allegations which do not have a basis in fact and law, making allegations in exaggerated terms and the other issues set out above regarding the correspondence reviewed above is not how correspondence in proceedings should be framed.

108. If such conduct is repeated in the future then the Claimant needs to be aware that he runs the very real risk that expenses could be awarded against him or that his claim could be struck-out.

109. The Claimant should also think carefully about the merits of any future applications he may make to the Tribunal. Both parties are entitled to make relevant applications to progress the case and the Tribunal does not seek to preclude such applications. However, both parties need to consider whether any such application achieves the purpose of progressing the case in light of the merits of any such application.

110. In this instance, the present applications from the Claimant have simply delayed the progress of his claims which have stalled whilst the applications, which had no merit, were resolved. Even in the highly unlikely event of the Respondent's defence having been struck-out in whole, this would have taken the Claimant no further; he would not have automatically succeeded in such circumstances and all the substantive issues in the case, in which the burden of proof lies with the Claimant, would still require to be resolved.

Case Management

111. At the end of the hearing on the three applications, the Tribunal discussed future case management with the parties to identify whether any steps could be taken which would assist in progressing matters whilst the Tribunal considered the applications.

112. A number of issues were identified which the Tribunal will address in turn.

113. First, there had been an application by the Claimant dated 29 April 2021 to vary earlier case management directions that the issue of disability be dealt with first and then the issue of employment status. The application appears at R119 and seeks to reverse the order of the issues. It is opposed by the Respondent.

114. In light of the prospects application, the Tribunal did not consider it appropriate to deal with this at the hearing given that any strike-out of the defence relating to employment status may render the application academic. The Tribunal indicated that it would address this issue once it had made its judgment on the prospects application.

115. Having refused the prospects allegation, the Tribunal considered that it would be in keeping with the Overriding Objective application, in particular the avoidance of delay, to address the application to vary the order of proceedings in this judgment.

116. The Claimant had, by email dated 16 August 2021, indicated that he sought a hearing on this application but gave no reasons for this. The Respondent submitted that a hearing was not required or proportionate (in terms of costs) for dealing with this application. The Tribunal did not consider that there was any reason why a hearing was needed; this was not an application for which evidence was required and parties had had the opportunity to make their submissions. A hearing would have caused further delay in this case and prevent progress being made in relation to the substantive issues as well as incurring additional work and costs for both parties; this would not be in keeping with the overriding objective.

117. The Claimant's application to vary the order of proceedings is based on the assertion that he did not give his previous solicitor permission to agree to the issue of disability status being addressed first. He then goes on to make various assertions regarding discrimination which the Tribunal will address in more detail below under the second case management issue.

118. In response, the following submissions were made on behalf of the Respondent:-

    a. The direction regarding the order of proceedings was made several years ago because it was considered that dealing with the issue of disability status first being considered to be in keeping with the Overriding Objective.

    b. This is the first time that any wider issue of his previous solicitor's conduct of the proceedings have been raised (it was acknowledged that an issue had been raised regarding the disabilities pled in the ET1).

    c. The Claimant has been aware of the direction for several years and has never sought to vary it previously.

    d. The Respondent has incurred costs in relation to the disability status issue.

    e. The Claimant has set out no positive case as to why the order of proceedings should be changed in terms of ensuring a fair trial or compliance with the Overriding Objective.

    f. It was a matter of general principle that a party should not be allowed to seek to vary an Order made some years ago and to which parties have been working during that time.

119. The Tribunal is not persuaded that there is any basis to vary the earlier Order regarding the sequence in which issues will be addressed. The Claimant has set out no case at all as to why this would ensure a fair trial or would be in keeping with the Overriding Objective. Taking the Claimant's case at the highest and assuming he will succeed on the issue of employment status, the issue of disability status is one which will require to be resolved at some point.

120. The Claimant's sole reason for the application is that he had not instructed his solicitor to consent to this. Putting to one side the issue that solicitors can have a professional discretion in how they conduct legal proceedings, the

consent of a party is not fundamental to the Tribunal's decision-making process in considering an application made to it. Such applications are often opposed but simple opposition does not mean that an application is refused. Indeed, even if a party consented to an application by the other side, the Tribunal could still refuse to grant it.

121. In these circumstances, the application to vary the order of proceedings is refused.

122. Second, in the same correspondence of 29 April which made the application to vary the order of proceedings, at R120, the Claimant raises an allegation relating to him having been allegedly discriminated against because he exercised his right to annual leave under the Working Time Regulations.

123. The terms of the allegation are difficult to follow and it appears that the Claimant seeks to raise a claim in relation to this. However, it is not clear what statutory provisions the Claimant relies on and how he says he has been discriminated against.

124. In any event, this is an entirely new allegation which is not pled in the ET1 and has not been raised in any earlier hearing or correspondence. At the hearing, the Tribunal explained to the Claimant that it considers that if he seeks to add a new cause of action to this claim then he requires to apply to amend his ET1 to add this cause of action setting out the factual and legal basis of the claim. Such application should be made within 28 days of the hearing. Within 28 days of any such application being made, the Respondent will indicate if the application is opposed and, if so, the basis of any opposition.

125. Third, there had been a discussion at the case management hearing on 8 April 2021 regarding progress in obtaining a joint medical report in relation to the issue of disability status. This had been stalled because the Claimant had been seeking a report into a range of medical conditions whereas the Respondent considered that only the Claimant's cataracts were relevant.

126. At the April hearing, the Tribunal had indicated that, as the ET1 was presently pled, only the condition of cataracts was relevant to the claim because it was

the only medical condition relevant to the Claimant's pled case (that is, he had been dismissed because he had taken time off to recover from a cataract operation) unless the Claimant made an application to amend his claim. No such application has been made.

5 127. At the present hearing, the Tribunal indicated to parties that this issue needed to be addressed to allow for progress on the issue of disability status to be made.

128. The Tribunal, therefore, made the following directions at the hearing:-

a. If the Claimant intends to argue that he was subject to any
10 discrimination caused by one of his medical conditions other than cataracts (or caused by something arising from such medical conditions) then, within 28 days of the hearing, he should apply to amend the ET1 to set out the factual and legal basis of any such claim for discrimination.

15 b. Within 28 days of any such application being made, the Respondent will indicate if the application is opposed and, if so, the basis of any opposition.

129. Fourth, the Claimant had made an application to set aside an Order made at the April case management hearing for him to identify the "substantial
20 disadvantage" relied on by him in saying that the duty to make reasonable adjustments was engaged. This application had not been addressed prior to the present hearing.

130. The Tribunal, at the present hearing, asked the Claimant to resubmit this application to the Tribunal and the Respondent's agent within 7 days of the
25 present hearing. Directions would then be made for this to be resolved. By the time this judgment was written, this direction had been met by the Claimant. The Tribunal then asked the Respondent for their comments which were provided.

131. As with the first case management issue, the Claimant sought a hearing on this application and the Respondent opposed this for the same reasons as set out above in relation to the first case management issue. For the same reasons as set out above in relation to the first case management issue, the Tribunal considered that a hearing was not in keeping with the Overriding Objective and addressed this application on the papers as part of this judgment.

132. The Claimant's application is based on similar grounds to that for varying the order of proceedings, that is, he seeks to have the employment status addressed first,

133. In reply, it is submitted on behalf of the Respondent that the particulars which the Claimant is being asked to provide must be in his knowledge and contemplation from the outset of his claim. It, therefore, requires no research or effort on his part and certainly would not cause him any prejudice. It is a question which he would have to address in respect of the substantive discrimination claim and there is no reason why he should not respond to this now.

134. The Tribunal did not consider that there was any reason to set aside the April Order; the question of "substantial disadvantage" is fundamental to any claim that there has been a breach of the duty to make reasonable adjustments; if there has been no substantial disadvantage then the duty is not engaged at all and so cannot be breached.

135. The Tribunal can see no prejudice to the Claimant in providing this specification now and, taking his case at its highest and assuming he succeeds on the preliminary jurisdictional issues, he will have to advance a substantial disadvantage if he is to succeed on the substantive issues in his discrimination claim.

136. The application to set aside the April Order is, therefore, refused. However, the Tribunal does vary the Order to change the date for compliance to the date 14 days from the date of this judgment being sent to parties.

137. Fifth, the Respondent sought Orders regarding the future conduct of the proceedings by the Claimant in similar terms to those which are described at para 19 of the Employment Appeal Tribunal in *A v B* UKEATS/0042/19 which was a case where a litigant in person Claimant had made various allegations against the Respondent and their agent of a very serious nature but with no basis. In that case, the Employment Judge hearing a first motion to strike-out refused that motion but did make Orders regarding how the Claimant should conduct themselves in the future. When those Orders were breached, a second motion for strike-out was made and this was granted. A significant factor in that decision, and in the decision by the EAT to uphold it, was the fact that the Claimant had been made aware that a repeat of their conduct would have consequences.

138. At the hearing, the Tribunal asked the Claimant for his comments on this application. In response he raised a point about matters raised in DW's cross-examination which he felt cast aspersions on his medical conditions. Mr Whincup clarified that these questions were intended to challenge what he considered as a discrepancy in the Claimant's evidence and he had not sought to suggest that the Claimant's evidence about his medical conditions was not true. The Claimant did not address himself to the specific allegation being made.

139. Whilst in no way seeking to minimise the seriousness of the Claimant's conduct or the impact on Mr Whincup, the Tribunal does consider that the facts of this case differ from those of *A v B*. In that case, the Claimant made wide-ranging and repeated allegations about the Respondent's agent, witnesses and others relating to bullying, abuse, stalking, torture and treating people of particular racial groups as slaves as well as allegations of cover-up by senior members of the legal profession and the judiciary.

140. The Tribunal has set out warnings to the Claimant above regarding future conduct of proceedings and the consequences of repeating his conduct described in this judgment. The Tribunal would hope that these, along with the substantive findings made in relation to the applications, would be

sufficient for the Claimant to understand how proceedings should be conducted and avoid a repeat of similar behaviour.

141. In these circumstances, the Respondent's application is refused. However, if there is a repeat of the Claimant's conduct then the Respondent is at liberty to make a fresh application.

142. A further case management arose, after the hearing had concluded, from correspondence that related to the issues being determined in this judgment. As noted above in relation to the prospects application, the Claimant submitted online job adverts by email dated 4 August 2021 which have been treated as further evidence in support of that application.

143. In their response to that email, the Respondent indicated that the Claimant had contacted them separately seeking copies of online job adverts placed by the Respondent from 2015 onwards. They indicated that they opposed any application for an Order for these documents (even assuming that the Respondent had retained copies of them) on the basis that they related to the employment status issue and so were premature in circumstances where, as matters stood, the disability status issue was being dealt with first.

144. In response to that, the Claimant sent an email dated 18 August 2021 making various calls on the Tribunal to compel the Respondent to take various actions. The Tribunal indicated to parties that it was treating the Claimant's email as an application under Rule 30 for case management orders as set out below and that it would address these calls in this judgment. The matters for which a call is made are:-

   a. The Respondent to disclose copies of all job adverts for van drivers placed by the Respondent on the "Gumtree" website from 2015.

   b. The Respondent to cease advertising for courier positions on Gumtree or elsewhere.

   c. The Respondent to correct previous job adverts to reflect what he describes as "*the true position*".

d. The Respondent to disclose "*a full detailed explanation as to why these misleading adverts have been placed on Gumtree and what immediate steps he will take to take them down and or reword them and correct them to show the true position regarding workers status rather than disguising it as full time "SELF EMPLOYED as advertised in Gumtree*".

145. Calls b and c can be dealt with in relatively straightforward terms; they are requests for the Tribunal to grant interdict (or specific implement) and the Tribunal does not have the power to grant such as part of its case management powers. Indeed, the Tribunal has no power to grant such remedies in relation to the claims brought by the Claimant; the relevant Acts of Parliament which give the Tribunal the power to hear the relevant claims do not set out interdict as a remedy for those claims.

146. The application in relation to these calls are, therefore, incompetent and so are refused.

147. In relation to calls a and d, it is not clear from the Claimant's application why the information sought is relevant to an issue to be determined by the Tribunal in this case.

148. The Claimant seeks to link these matters to the issue of employment status but he does not set out any basis on which these adverts go to the issue of whether the terms of the contract under which he worked for the Respondent (or the reality of the working relationship) brings that working relationship within the relevant definition of employment status.

149. Rather, the application is focussed on the adverts being misleading and the effects on persons other than the Claimant. There is nothing in the application that sets out any basis on which the Tribunal could conclude that the information being requested is relevant to the issues to be determined in the Claimant's case.

150. The Tribunal also notes the comments made on behalf of the Respondent that the application is premature where the issue of disability status is being

determined first. In light of the Tribunal's decision above not to vary the order of proceedings, the Tribunal agrees that any application, even assuming it was relevant to the issues to be determined, is premature.

151. In these circumstances, the application is refused.

152. In considering the application, the Tribunal has noted that the Claimant has used the same type of language which the Tribunal addressed above and warned that it was the type of language which falls short of how the Tribunal expects parties to conduct proceedings.

153. Indeed, the Claimant now uses this type of language in relation to the Tribunal and the following comments in the email of 18 August are noted:-

a. The Claimant asserts that, if his requests are not granted, the Tribunal will be *"making a rod for its own back"*.

b. Further, that, in not granting his request, the Tribunal will "*facilitate hundreds of innocent parties to be duped into joining Citysprint (UK) Ltd under the false illusion created by Citysprint (UK)*"

c. The Claimant goes on to ask that "*the tribunal to consider this matter immediately as it is or will have immediate ramifications on the lives of present and future couriers joining Citysprint (UK) Ltd and will no doubt involve numerous unecessary* [sic] *Employment Tribunals regarding "WORKERS RIGHTS" taking up valuable and unnecessary Employment Tribunal time through out the UK when it can be solved immediately via the applicants* [sic] *case immediately !!!"*

154. The Tribunal repeats its warnings to the Claimant as set above regarding the manner in which it expects parties to conduct proceedings, both in correspondence and at hearings.

5 Employment Judge: Peter O'Donnell
Date of Judgment: 26 August 2021
Entered in register: 31 August 2021
and copied to parties

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