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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105806/2022

Held in Glasgow on 21 and 22 August 2023

Employment Judge P O'Donnell

Mr P McAuley	**Claimant** **In Person**
Ethigen Ltd	**Respondent** **Represented by:** **Mr G Millar -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The Tribunal does not have jurisdiction to hear a claim under the Protection from Harassment Act 1997 and the claim brought under that legislation is hereby dismissed.

2. There was no contract between the claimant and respondent at all, let alone a contract of employment. In these circumstances, the respondent is not the claimant's employer and so there is no jurisdiction to hear a claim of unfair dismissal against the respondent. The claim of unfair dismissal is hereby dismissed.

3. The remainder of the claim is struck out under Rule 37(1)(b) of the Employment Tribunal Rules of Procedure on the basis that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious.

REASONS

Introduction

1. The claimant has raised proceedings against the respondent. At a case management hearing in March 2023, it was identified that the ET1 as originally pled raised the following claims.

    a. A claim under the Protection from Harassment Act 1997 (PHA).

    b. A claim for unfair dismissal under Part 10 of the Employment Rights Act 1996 (ERA) relying on Regulation 17(1) of the Agency Worker Regulations 2010 (AWR).

    c. A claim of detriment under Regulation 17(2) AWR.

2. The respondent resists those claims and, in particular, raises two issues of jurisdiction:

    a. They say that the Tribunal does not have the power to hear claims under PHA.

    b. They dispute that there is jurisdiction for the claim of unfair dismissal on the basis that they were not the claimant's employer given that there was no contract between them and the claimant at all, let alone a contract of employment.

3. The respondent also made an application for the claim to be struck-out under Rule 37. This was initially made in relation to the prospects of success (Rule 37 (1)(a)) but was later expanded to include the claimant's conduct of the case (Rule 37(1)(b)).

4. At the March case management hearing, the claimant indicated that he wished to pursue claims beyond those which had been identified from the ET1. He then made an application to amend the ET1 to add claims under the Equality Act 2010 (EqA) of discrimination/harassment relying on the protected characteristic of religion/belief and a claim under s47B ERA that he

had been subjected to detriments because he had made a protected disclosure. This application was opposed by the respondent.

5. The claimant also made an application for the response to be struck out under Rule 37 on the basis of prospects of success and conduct of the case (specifically the fact that CCTV footage had not been retained by the respondent). This application is opposed by the respondent.

6. At a further case management hearing in May 2023, the Tribunal directed that a hearing should be listed to determine the various preliminary issues and applications. This was on the basis that the resolution of these issues would clarify what matters, if any, will proceed to a final hearing.

7. This hearing was, therefore, listed to determine the following issues:

   a. Whether the Tribunal has the jurisdiction to hear a claim under the Protection from Harassment Act 1997?

   b. Whether the Tribunal has the jurisdiction to hear the claim of unfair dismissal? Specifically, whether there was a contract between the Claimant and the Respondent, and, if so, whether that was a contact of employment? This will be referred to below as the "contract issue".

   c. The Respondent's application for strike-out of the claim.

   d. The Claimant's application to amend.

   e. The Claimant's application for strike-out of the response (covering the three elements of the CCTV issue, no reasonable prospects of success and abuse of process).

8. The Tribunal's judgment will deal with certain issues of case management first. It will then set out comments on the evidence heard and its findings of fact before turning to setting out its decision on each of the issues above.

Case Management

9. In advance of the hearing, directions had been made for the timetabling of witness evidence and submissions with a clear explanation given to parties

that the timings in question would be applied strictly and parties not permitted to lead evidence or make submissions after the time had expired.

10. At the outset of the hearing, the claimant requested a further 15 minutes to give his evidence-in-chief. Mr Millar had no objection in principle, although he expressed a concern about the relevancy of the evidence. The Tribunal granted the additional time.

11. In his submissions, the claimant spent the majority of the time allocated under the timetable dealing with the contract issue and so devoted little time to the other four matters for determination. The Tribunal did warn the claimant when he approached the last third of the allocated time that he had not yet addressed the other issues but little time was given to these by the claimant.

12. The Tribunal explained to parties that it would take account of what had been set out in writing by parties during the case management process. There had been directions for parties to set out their respective positions on the issues to be determined and the Tribunal considered that it would be appropriate to take into account what these say as well as the oral submissions made at the hearing, particularly where oral submissions had been brief.

Evidence

13. At the May case management hearing, it was directed that evidence would only be heard in relation to the contract issue. The other issues were ones which would be dealt with by submissions only but the contract issue would require the Tribunal to make findings of fact in order to be able to resolve it.

14. The Tribunal heard evidence from the following witnesses:

    a. The claimant.

    b. Scott Walker (SW) – a warehouse shift supervisor employed by the respondent.

    c. Dariusz Goracy (DG) – a warehouse shift supervisor employed by the respondent.

Evidence from the agreed evidence bundle has 'pp' beside it.

15. There was an agreed bundle of documents prepared by the parties running to 435 pages. References to page numbers below are a reference to the page number from this bundle.

16. There was not a significant dispute in relation to the facts relevant to the contract issue and so the Tribunal did not have to come to any particular view on the credibility and reliability of the witnesses.

17. Much of the evidence led by the claimant was not relevant to the contract issue. It was clear that he was seeking to litigate the merits of his claims despite the explanations made during the case management process that this hearing was not concerned with the substantive issues of the claims.

Findings in fact

18. The Tribunal made the following relevant findings in fact in relation to the contract issue.

19. The respondent operates a pharmaceutical warehouse which supplies medicines to various pharmacies.

20. In or around June 2022, a number of the respondent's competitors ceased trading. As a result, the respondent anticipated that there would be an increase in work as clients of those competitors transferred their business to the respondent.

21. The respondent, therefore, considered that there would be a need for more warehouse staff to cope with the anticipated increase in work. They contracted with an agency, Red Rock (RR), to provide these workers on a short term basis.

22. At this time, the claimant was looking for work for a few months over the summer. He saw an advert placed by RR looking for warehouse workers, he applied for this and was successful.

Example of evidence from the evidence bundle with 'pp' & number beside it

23. On 29 June 2022, the claimant signed a contract with RR (pp52-55). The contract is described as a "contract of employment for temporary assignees". The contract sets out the following relevant matters:

a. It describes the role as "picker packer" but gives no further description of the duties to be performed. It does state that the terms of the contract apply regardless of the role actually undertaken.

b. It states that RR will endeavour to allocate the claimant to suitable assignments with a guarantee of a minimum 336 hours assigned to a client or clients over a 12 month period. The contract does not specify any particular client of RR to whom the claimant will be assigned.

c. Payment on any assignment will be not less than the National Minimum Wage.

d. There is no guarantee that there will be a suitable assignment to which the claimant can be assigned and when there is none then RR is not obliged to pay the claimant.

e. Refusal of a suitable assignment by the claimant without good cause can amount to gross misconduct.

f. The contract sets out obligations on both parties in terms of information to be provided about assignments and the claimant's availability.

g. The contract sets out the claimant's obligations to RR and any of its clients to whom he is assigned. This includes a requirement to obey all reasonable instructions of the client and perform the work required.

h. There are provisions relating to paid holiday entitlement which the claimant was entitled to arrange and take with RR.

i. The contract sets out terms relating to disciplinary and grievance procedures.

j. There is also a clause dealing with the termination of the contract setting out the notice required by each side.

24. The claimant started working with the respondent on 30 June 2022. He was required to attend an induction that all staff, whether directly employed by the respondent or through an agency, had to attend. The respondent is regulated

by the Medicines and Healthcare products Regulatory Agency which requires staff working in a pharmaceutical warehouse to be given a certain level of training.

25. The claimant then started working on the warehouse floor learning the tasks required of him. He shadowed and was shadowed by existing staff before being allowed to work broadly unsupervised. The work involved collecting medicine and other health products from the warehouse shelves in order to satisfy orders received by the respondent. These would then be packed to be sent out to clients.

26. He continued to work for the respondent until 12 July 2023. He worked on the night shift. If there was insufficient work then staff would be asked to undertake cleaning or other tasks. On occasion, the claimant was sent home early due to a lack of work.

27. On 11 July 2023, he was asked by SW to carry out bin duty (also described as "box man") which involved collecting empty boxes or plastic from around the warehouse. These would then either be given to other workers to be reused or, if not in a suitable condition, sent for recycling. The claimant objected to this as not being part of his contract. He wished to raise a complaint with HR but SW, after being reminded by DG that the claimant was an agency worker, informed the claimant that he would need to take his complaint up with RR rather than the respondent's HR department.

28. On 12 July 2023, the claimant received a text from an employee of RR (p199). This informed him that his assignment with the respondent had been terminated by them. It offered him another assignment starting the next day at a site in Paisley.

29. The claimant was paid by RR in respect of work done during his assignment with the respondent. He received pay slips from them (pp56 & 57) which show, on one occasion, RR deducting National Insurance.

Decision – Protection from Harassment Act 1997

30. The Employment Tribunal is a UK tribunal created by an Act of Parliament (the current Act being the Employment Tribunals Act 1996). The Tribunal does not have an inherent power to resolve all workplace disputes but, rather, is given powers by various other Acts of Parliament to determine whether particular statutory employment rights have been breached.

31. To put it another way, the Tribunal can only hear claims which it has been given the power to hear by an Act of the UK Parliament.

32. The claimant argues that s8(2) of the PHA gives the Tribunal such a power. This section provides as follows:

> *(2) An actual or apprehended breach of subsection (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question; and any such claim shall be known as an action of harassment.*

33. The Tribunal notes that this provision does not specifically and expressly state that the Tribunal has the power to hear such a claim. This can be contrasted with the wording of sections in other legislation which gives the Tribunal the power to hear particular claims (for example, ss11, 23, 48, 111 and 163 ERA, s120 EqA and Regulation 18 AWR), all of which expressly state that an individual who believes that their statutory rights have been breached can bring a complaint to the Employment Tribunal.

34. The Tribunal considers that if Parliament had intended to give the Tribunal powers to hear claims under the PHA then it would have used the same wording that it has used in every other instance it has given the Tribunal such power. The fact that such wording was not used in the PHA means that there is no basis on which it can be assumed that Parliament intended to have the Tribunal hear claims under that Act.

35. The claimant submitted that the wording of s8(2) PHA does not prevent the Tribunal from hearing a PHA claim. However, it is not the case that the Tribunal can hear claims unless it is specifically said that it cannot. In fact, it

is the opposite; the Tribunal can only hear a claim if it is positively given the power to do so and s8(2) does not give the Tribunal such a power in express and unambiguous terms.

36. If the claimant was correct then it would lead to the anomaly that the Tribunal could hear PHA claims in Scotland and not in England & Wales. The claimant himself argued that this would be the case. The Tribunal considers that Parliament could not have intended that a UK Tribunal could provide a remedy in one part of the UK that it could not provide in another. If that had been the intention then Parliament would have said so expressly and unambiguously but they did not.

37. The claimant places reliance on Article 3 of Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 which provides as follows (underlining added):

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

a. *the claim is one to which section 131(2) of the 1978 Act* [a reference to the provision of the Employment Protection (Consolidation) Act which gave the Secretary of State the power to extend the Tribunal's jurisdiction to hear breach of contract claims] *applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;*

b. *the claim is not one to which article 5 applies; and*

c. *the claim arises or is outstanding on the termination of the employee's employment.*

38. The claimant submits that the underlined part of the Article gives the power to the Tribunal to hear claims for damages which would include claims under PHA. Unfortunately, the claimant's submission was only based on the underlined part of Article 3 and not the important provisions below which

define the limits of what claims the Tribunal is being given the power to consider. It is not, as submitted by the claimant, some broad power to hear any claim of damages from an employee against their employer but, rather, the power to hear claims for breach of contract.

39. A claim under PHA is not a claim for breach of contract but a claim for a statutory delict. The 1994 Order does not, therefore, assist the claimant's arguments at all.

40. Finally, in his written particulars in relation to this issue, the claimant made reference to a number of EAT decisions in which he says claims under the PHA were pursued in the ET and EAT, that is, *Fecitt & Ors v NHS Manchester* [2010] UKEAT 0150_10_2311, *Metropolitan Police Commissioner and Others v. Eioyaccu* [2009] UKEAT 0023_09_0611 (6 November 2009), *Laing v Bury & Bolton Citizens Advice* (VICTIMISATION) (Rev1) [2022] EAT 85 (01 June 2022) and *Richmond Pharmacology v. Dhaliwal* [2009] UKEAT 0458_08_1202 (12 February 2009).

41. The Tribunal has reviewed these cases and it is clear that the claimant has fundamentally misread them. Whilst the PHA and cases decided under it are mentioned in these judgments, this is in the context of the legal arguments being advanced by the parties or in the reasoning of the decision where cases decided under the PHA are used to assist in deciding how to interpret provisions in employment legislation such as the EqA.

42. A plain reading of the decisions relied on by the claimant clearly shows that none of these cases were pursued under the PHA.

43. For all these reasons, the Tribunal does not consider that s8(2) PHA (or any other statutory provision) gives it the jurisdiction to hear the claim under the PHA brought by the claimant and this claim is dismissed.

Decision – Unfair dismissal claim

44. A claim of unfair dismissal only lies against a claimant's employer, that is, the person with whom they have a contract of employment.

45. In the present case, the respondent denies that there was a contract, of any kind, between them and the claimant. Rather, they say that they contracted with RR to provide workers, one of whom turned out to be the claimant.

46. A contract is created by the exchange of offer and acceptance between the parties. This can be done in writing, orally or be inferred from the actions of the parties. It does not need to be couched in formal terms and there are a broad range of ways in which offer and acceptance can occur. For example, the most common example of a contract being created occurs in shops across the country everyday where the shop is offering to sell a product for a price and the customer accepts that offer by agreeing to pay that price.

47. In his submissions, the claimant stated that he accepted that there was no offer and acceptance between him and the respondent. Strictly speaking, that concession is potentially enough to determine that there was no contract between the claimant and the respondent. However, the Tribunal will go on to address the issue in more detail below.

48. The claimant did submit that there was no need for offer and acceptance but gave no authority for this. This is assertion is plainly wrong; it is the foundational principle of Scots law of contract that a contract is created by offer and acceptance. The Tribunal considers that the claimant's submission arises from certain misunderstandings he has regarding the applicable law in this case which it will address further below.

49. There was no written contract in this case between the claimant and respondent. This is not a matter in dispute.

50. Further, the Tribunal considers that there was no oral contract either. Although the claimant made reference to there being an oral contract, he led no evidence of anything said between him and someone with the authority (or ostensible authority) to bind the respondent that could be interpreted as being an agreement by the respondent to employ him directly.

51. It is possible that a contract of employment can be implied between an agency worker and an end user by their actions. However, the case of *James v*

Greenwich London Borough Council ([2007] ICR 577, EAT & [2008] ICR 545, CA*)* makes it clear that an Employment Tribunal should only do so where it is necessary in order to give business reality to the situation. The Court of Appeal was clear that where agency arrangements are genuine and accurately represent the relationship between the parties there is no necessity to imply a contract of employment between the end-user and the worker.

52. At the EAT level in *James*, Elias P, at paragraphs 54-60 gave the following guidance to assist Tribunals in deciding whether to imply a contract between the end-user and the worker:

> *54. In the casual worker cases, where the issue is whether there is an umbrella or global contract in the non-work periods, the relevant question for the tribunal to pose is whether the irreducible minimum of mutual obligations exists. It is not particularly helpful to focus on the same question when the issue is whether a contract can be implied between the worker and end-user. The issue then is whether the way in which the contract is in fact performed is consistent with the agency arrangements or whether it is only consistent with an implied contract between the worker and the end-user and would be inconsistent with there being no such contract. Of course, if there is no contract then there will be no mutuality of obligation. But, whereas in the casual worker cases the quest for mutual obligations determines whether or not there is a contract, in the agency cases the quest for a contract determines whether there are mutual obligations.*
>
> *55. If there were no agency relationship regulating the position of these parties then the implication of a contract between the worker and the end-user would be inevitable. Work is being carried out for payment received, but the agency relationship alters matters in a fundamental way. There is no longer a simple wage-work bargain between worker and end-user.*
>
> *56. In Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437 Munby J was surely right when he observed that in a tripartite relationship of*

this kind the end-user is not paying directly for the work done by the worker, but rather for the services supplied by the agency in accordance with its specification and the other contractual documents. Similarly, the money paid by the end-user to the agency is not merely the payment of wages, but also includes the other elements, such as expenses and profit. Indeed, the end-user frequently has no idea what sums the worker is receiving.

57. The key feature is not just the fact that the end-user is not paying the wages, but that he cannot insist on the agency providing the particular worker at all. Provided the arrangements are genuine and the actual relationship is consistent with them, it is not then necessary to explain the provision of the worker's services or the fact of payment to the worker by some contract between the end-user and the worker, even if such a contract would also not be inconsistent with the relationship. The express contracts themselves both explain and are consistent with the nature of the relationship and no further implied contract is justified.

58. When the arrangements are genuine and when implemented accurately represent the actual relationship between the parties-as is likely to be the case where there was no pre-existing contract between worker and end-user-then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end-user. If any such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end-user which are incompatible with those arrangements.

59. Typically the mere passage of time does not justify any such implication to be made as a matter of necessity, and we respectfully disagree "591 with Sedley LJ's analysis in Dacas on this point. It will no doubt frequently be convenient for the agency to send the same worker to the end-user, who in turn would prefer someone who has proved to be able and understands and has experience of the systems in operation. Many workers would also find it advantageous to work in the same environment regularly, at least if they have found it convivial. So the mere fact that the arrangements carry on for a long time may be wholly explicable by considerations of convenience for all parties; it is not necessary to imply a contract to explain the fact that the relationship has continued perhaps for a very extensive period of time. Effluxion of time does not of itself establish any mutual undertaking of legal obligations between the worker and end-user. This is so even where the arrangement was initially expected to be temporary only but has in fact continued longer than expected. Something more is required to establish that the tripartite agency analysis no longer holds good.

60. It will, we suspect, be more readily open to a tribunal to infer a contract in a case like Cable & Wireless plc v Muscat [2006] ICR 975 where the agency arrangements were superimposed on an existing contractual relationship. It may be appropriate, depending on the circumstances, to conclude that arrangements were a sham and that the worker and end-user have simply remained in the same contractual relationship with one another, or that even if the intention was to alter the relationship that has not in fact been achieved. That may be legitimate, for example, where the only perceptible change is in who pays the wages. In such a case the only effect of the agency arrangements may be to make the agency an agent of the employer for the purpose of paying wages. However, in these cases the tribunal is not strictly implying a contract as such but is rather concluding that the agency arrangements have never brought the original contract to an end.

53. The Tribunal does not consider that there is any evidential basis on which it could conclude that the arrangements between the claimant, RR and the respondent are anything other than a genuine agency arrangement. Indeed, in his submissions, the claimant stated that he did not seek to say that the arrangements were a sham.

54. Pausing for a moment to address one issue which the claimant did raise, the Tribunal does not consider that there was any evidence supporting his assertion that RR were, in fact, his agents who received payment on his behalf from the respondent from which they deducted commission and paid him the remainder. This is not the terms of the contract between the claimant and RR nor does it reflect the reality that the respondent had contracted with RR to provide workers for the respondent's warehouse. It might have been different if the claimant had contracted with RR to find work for him but that is not what happened. Rather, RR advertised the work and the claimant responded to that advert.

55. Returning to the issue of implying a contract between the claimant and the respondent, the Tribunal does not consider that this is necessary in order to explain the relationship. Indeed, in the Tribunal's industrial knowledge, the facts of this case give rise to a common and standard working relationship where a business, in need of workers in the short-term, contracts with an agency to provide such workers. There is nothing unusual or novel about the circumstances of this case.

56. In considering this matter, the Tribunal takes account of the following matters; the claimant had a contract of employment with RR; the claimant was paid by RR; it was RR who informed the claimant that the assignment was terminated; RR offered the claimant an assignment with another of their clients which is consistent with him being their employee.

57. The claimant sought to make an argument that the respondent paid him "indirectly" but there is nothing in this argument. Every agency arrangement could be described in the same way. Indeed, so could every situation where

a business bills a client for work done by the employees of the business but that would not mean those employees become the employees of the client.

58. It is not in dispute that the respondent controlled the work of the claimant when he attended their premises. However, this is entirely consistent with every agency arrangement where the end-user directs the agency workers as to what duties they are to perform and it does not require the implication of a contract between the worker and the end-user in order to explain the arrangement.

59. Further, it is also consistent with the terms of the contract between the claimant and RR where he undertakes to comply with all reasonable instructions from the client and perform all the work required by them.

60. For these reasons, the Tribunal does not consider that there is any basis on which it can imply a contract between the claimant and the respondent.

61. The claimant's arguments in relation to the contract issue proceeded on the basis of a fundamental misunderstanding of the law. He had quite clearly confused and conflated the issue of employment status (which involves determination of the nature of the contract between parties) with the issue of whether there was a contract between the parties at all.

62. The claimant's submissions were all directed towards the question of whether he could satisfy the various tests related to employment status and he did not engage with the question of whether there was a contract between him and the respondent. The Tribunal did intervene during the hearing to make this point but the claimant's response was that it was the Judge who did not understand the law rather than himself.

63. The claimant relied on various cases to support his position such as *Uber BV v Aslam* [2021] IRLR 407 and *Autoclenz Ltd v Belcher* [2011] IRLR 820. However, none of these cases assist the claimant; they were all cases in which the courts were deciding the nature of contracts between the parties in circumstances where it was not in dispute that some form of contract existed.

In this case, there is a dispute as to the existence of a contract between the claimant and respondent.

64. Similarly, he relied on the case of *Royal Mencap Society v Tomlinson-Blake* [2018] IRLR 932 CA, [2021] IRLR 466 as authority for the proposition that he could not be an employee of RR because the management of the agency were asleep at the time he was working on night shift. This case was dealing with the calculation of the National Minimum Wage for workers engaged in shifts where they were asleep for part of the shift. It comes nowhere close to providing the authority for the claimant's proposition.

65. None of the cases relied on by the claimant provide any authority for the proposition he was advancing that if he could demonstrate that he satisfied the tests for employment status then he becomes an employee of the respondent. There was nothing in any of the cases which he quoted in his submissions which provided authority for the proposition that a contract would be created in such circumstances.

66. The relevant authority for any argument that a contract should be implied between an agency worker and the end-user is the *James* case (above) and the Tribunal has already addressed this.

67. The claimant also sought to rely on what the Tribunal considers to be irrelevant evidence. For example, he put great emphasis on the fact that DG described him in evidence as a *"colleague"* but this does not provide the claimant with the assistance he clearly thinks it does. It was no more than a term someone might use to describe those with whom they work and was clearly being used in that sense by DG. Similarly, the mere fact that the ET3 agrees with the job title, dates of work, hours and pay given by the claimant in the ET1 does not mean that they concede he is an employee as he sought to suggest. It means nothing more that they agree that the information in the ET1 is not in dispute.

68. The Tribunal does not propose to address the specific arguments made by the claimant about the employment status tests because these simply do not

get him over the initial hurdle of the lack of a contract between him and the respondent.

69. For all the reasons set out above, the Tribunal does not consider that there was any contract between the claimant and respondent at all, let alone a contract of employment. In these circumstances, the respondent is not the claimant's employer and so there is no jurisdiction to hear a claim of unfair dismissal against the respondent. The claim of unfair dismissal is hereby dismissed.

Decision – Respondent's strike-out application

70. The Tribunal has power to strike-out the whole or part of claim under Rule 37 which provides as follows:

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;

...

71. The process for striking-out under Rule 37 involves a two stage test (*HM Prison Service v Dolby* [2003] IRLR 694, EAT; *Hasan v Tesco Stores Ltd* UKEAT/0098/16). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.

Rule 37 was not passed until 2013. It is not physically possible for the Court to have referred to it in 2003.

72. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18) given the draconian nature of the power.

73. Similarly, In *Anyanwu and anor v South Bank Student Union and anor* 2001 ICR 391, HL, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims under Rule 37(1)(a) given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

Rule 37 was not passed until 2013. It is not physically possible for the House of Lords to have referred to it in 2001.

74. In considering whether to strike-out under Rule 37(1)(a), the Tribunal must take the Claimant's case at its highest and assume he will make out the facts he offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA* 2016 ICR 1121, EAT).

75. 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).

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

Rule 37 was not passed until 2013. It is not physically possible for the Court of Appeal to have referred to it in 2002.

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).

77. 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.

78. The Tribunal will deal with the application under Rule 37(1)(b) first.

79. This is a case which has generated a considerable amount of correspondence entirely at the instigation of the claimant who has, in effect, sought to litigate by correspondence. Much of the correspondence from the claimant was lengthy, discursive and repetitive.

Rule 37 was not passed until 2013. It is not physically possible for Burton J to have referred to it in 2004.

80. For example, after the May case management hearing, the claimant made multiple applications for the Tribunal to vary the issues to be determined at the present hearing to restrict this to only the issue of his strike-out application (in particular, the issue relating to the absence of CCTV footage). These were made to both the Judge managing the case and the President of the Tribunal.

Multiple applications were made for the trial not to go ahead after the CCTV footage of the incidents had been deleted.

81. The claimant also made no less than five applications to postpone the present hearing on different grounds, all of which were refused.

82. However, the volume of correspondence, in itself, would not be sufficient to satisfy the test under Rule 37(1)(b). Rather, it is the combination of this and the terms in which the correspondence was couched that is the issue in this case. In particular, the claimant sought to attack and offer gratuitous insult to one of the respondent's witnesses, the respondent's agent, the legal profession in general, the judge managing the case and the entire Scottish and UK judiciary.

83. The Tribunal would highlight the following matters in relation to the terms of the claimant's correspondence:

No 'pp' - document 1 not in evidence bundle

a. In an email dated 14 June 2023, the claimant states that he considers that case management decisions were being made by an *"institutionally racist Judge in favour of an institutionally racist member of the Law Society of Scotland* [a reference to the respondent's agent], *a society who have been severely violating the human rights of Scots Law Graduates for decades"*. A similar comment regarding the judge and the respondent's agent being institutionally racist had previously been made by the claimant in an email of 12 June 2023.

No 'pp' - document 2 not in evidence bundle

b. In the same email of 14 June, the claimant goes on to state that he *"knew from the offset in this matter with EJ O'Donnell belittling my LLB & Diploma in Legal Practice calling me a lay person because I was not a member of a racist human rights violating company like the utterly despicable Law Society of Scotland that he was an oppressor who was going to act the bully-boy with me, and I knew he did not properly*

respect the history, integrity & prestige of Scots Law as an objective discipline".

No 'pp' - document 3 not in evidence bundle

c. In an email of 19 June 2023, the claimant stated the judge managing the case was acting as a *"bully"* towards the claimant. The basis for this assertion was that the judge had not granted the claimant's applications to vary the issues to be determined at the present hearing.

No 'pp' - document 4 not in evidence bundle

d. In an email of 14 July 2023, the claimant describes the Law Society of Scotland as a *"Neo-Nazi cabal & cartel"* and that the requirement to have carried out a traineeship in order to become a solicitor as a *"criminal legal trading requirement".*

No 'pp' - document 5 not in evidence bundle

e. In an email dated 18 July 2023, the claimant made the following comment *"this is believed to have been such clear & deliberate falsifications EJ O'Donnell perpetrated about the Claimant, to maliciously & falsely make him look stupid, that this is believed to have reached the degree of being blatant cheating constituting misconduct in public office by EJ O'Donnell".* This is a reference to an issue dealt with by the Judge where the claimant had misrepresented certain matters and this will be addressed further below.

No 'pp' - document 6 not in evidence bundle

f. In an email dated 19 July 2023, the claimant made the following comment *"Why is there no mention of the Respondent being the one who started this? Why am only I mentioned? Is this Judge obsessed with me? I am not surprised that EJ O'Donnell has decided to defame me over this rather than Mr Millar however - it is very clear what EJ O'Donnell's M.O. is, although perhaps that was just the M. O. he learned at Thompson's law firm - in a racist Law Society of Scotland, in which West of Scotland Roman Catholics of Irish descent, particularly those with Irish names, are disproportionately under-represented and discriminated against, the M.O. of some other people of Irish descent is to make up lies about Roman Catholics, maybe Jock Stein as well for example, to appease the Anglo-Saxon Presbyterian paymasters & Orangemen in the Law Society. History never changes,*

it only repeats, and we know what people with this M.O. are called in the Irish history books". The email in question came in the middle of a number of emails from the claimant in relation to various case management matters and the comment in question was prompted by an email from the Tribunal indicating that the Judge did not consider that a response was required to a previous email from the claimant.

No 'pp' - document 7 not in evidence bundle

g. In an email dated 21 July 2023, the claimant made allegations against one of the respondent's witnesses, DG, to the effect that the witness had sexually assaulted the claimant by ordering him to carry out bin duty on 12 June 2022.

   i. This is a serious allegation of criminal behaviour which is simply not borne out by the facts; DG was not, even on the claimant's own pled case, the person who directed him to carry out the work in question.

   ii. Further, being asked to pick up boxes or empty bins comes nowhere close to being an allegation of sexual assault.

   iii. The claimant goes on to state in the same email *"if people disagree it is presumably because they themselves do things like that too & are a pervert as well".* The Tribunal considers that this was directed at any judge considering the email.

   iv. The email concludes by alleging that the judge managing the case is subjecting the claimant to harassment under s26 EqA by requiring him to be in the same building as DG for the purposes of the hearing.

   v. The Tribunal notes that the claimant had, prior to this email, made an application to postpone the present hearing on the basis that he wished to carry out a criminal background check on DG (although he had not indicated an intention to do the same for SW).

No 'pp' - document 8 not in evidence bundle

h. In an email of 28 July 2023, the claimant makes the comments listed below. This email from the claimant was a response to an email from the Tribunal itself replying to an earlier email from the claimant asking questions about the procedure to be followed at the hearing.

i. *"Lord Carloway's Scottish Judges* [a reference to the judge managing this case] *seemingly able to undeterred make up blatant lies about representatives and falsify that they referred to personal injury statutes in their ET1* [this is a reference to the Judge managing the case asking the claimant at the March case management hearing whether or not he sought to pursue a claim under the Management of Health & Safety at Work Regulations given that it was a listed authority in his ET1]".

ii. *"Lord Carloway & EJ O'Donnell are not following on the lead of the other Scottish Judiciary Presidents before them in recommending the criminalisation of Scots Law Graduates for practising legal services in the market place without completing a traineeship; Lord Carloway is a shocking human-rights violator in recommending this who is disgracing all the great Scots Law Judges of the past, as the Scots Law Judges of the past recommended a traineeship as being a legal requirement for those with an LLB in completely different circumstances where there were legitimate holes in their legal knowledge from the LLB - I hope Lord Carloway and the Scottish Parliament will come to their senses on this, admit that they have made a mistake in regards to this (as anyone can) & stop criminalising Scots Law Graduates & violating their human rights".*

No 'pp' - document 9 not in evidence bundle

i. In an email of 9 August 2023, the claimant stated that he intended to make a complaint to his MP, MSP and Police Scotland that the respondent's agent and the Judge managing the case were *"seeking to pervert the course of justice by falsifying evidence".*

i. This is a very serious allegation to make against a member of the legal profession and a member of the judiciary.

ii. The claimant set out no detail of this allegation.

iii. The allegation was made as part of correspondence in which the claimant was seeking a postponement of the hearing and a reconsideration of the Tribunal's decision to refuse to grant a postponement. The Tribunal considers that this threat can only have been intended to influence its decision.

iv. During the course of the claimant's oral submissions at the hearing, it became clear that this was a reference to the fact that one page in the joint bundle had not been photocopied clearly.

No 'pp' - document 10 not in evidence bundle

j. In an email of 18 August 2023 sent to the Tribunal (copied to the respondent's agent and the EAT), the claimant describes the Scottish and British courts as a *"fascist time warp overseen by tyrants"*, that the judges in the courts are *"a complete & utter disgrace"*, that there is a complete disregard for human rights by the judiciary and that this is a disgrace to British soldiers who died in WW2.

84. The Tribunal should be clear that the matters listed above are only examples of the way in which the claimant couched his correspondence. All of his correspondence was written in similar terms, often being intemperate. In particular, the reference to the Law Society of Scotland, the legal profession and the judiciary being racist or institutionally racist was a regular feature of the claimant's correspondence.

85. The Tribunal does pause to note that the claimant's correspondence, on the face of it, indicates that he considers "racism" to mean a difference of treatment between solicitors and non-solicitors rather than the meaning normally given to the term, that is, a difference in treatment based on colour, national or ethnic origins (for example, the definition set out in s9 EqA). The reason that the Tribunal says this is that he uses the term in comparing his

treatment with that of the respondent's agent which he says arises from the fact he is not a solicitor and Mr Millar is, rather than any difference in race between them.

86. The claimant also sought to misrepresent what had been said by the respondent's agent or the Tribunal on a number of occasions:

No 'pp' - document 11 not in evidence bundle

a. In correspondence dated 7 June 2023, the claimant sought to have the response struck-out under Rule 37(1)(c) on the basis that EJ Eccles (who had previously case managed the proceedings) had issued an Order for disclosure with which the respondent had not complied.

No 'pp' - document 12 not in evidence bundle

i. No such Order had ever been issued; the claimant had sought an Order; EJ Eccles sought comments from the respondent; comments were provided and nothing further occurred. It would be plain to anyone reading the correspondence that no Order had been issued. This was confirmed to the claimant in a letter from the Tribunal dated 12 June 2023 refusing the application for strikeout.

No 'pp' - document 13 not in evidence bundle

b. In an email dated 12 June 2023 in response to the Tribunal's correspondence of the same date referenced above, the claimant asserted that the Judge managing the case had stated that the respondent ignoring an Order for disclosure was not a material issue. This wholly misrepresents what was said in the Tribunal correspondence of 12 June which was that there was no Order made at all.

No 'pp' - document 14 not in evidence bundle

c. In a further email of 12 June 2023, the claimant asserted that the respondent's agent had *"refused"* to give the name of one of the witnesses they intended to call at the present hearing. This was not correct; at the May case management hearing, the respondent's agent could not recall the surname of this witness, only the first name. The full name was subsequently confirmed to the Tribunal and the claimant, although the Tribunal notes that the respondent's agent had to be chased for this confirmation.

No 'pp' - document 15 not in evidence bundle

d. In an email of 13 July 2023, the claimant asserted that the respondent had falsely referred to DG as "Mark Kelly" in their ET3. He gave no basis for this assertion and it was clear from the pleadings that Mr Kelly was a wholly separate person from DG; he was, in fact, the manager of DG and SW. This was borne out by the evidence heard at the present hearing.

No 'pp' - document 16 not in evidence bundle

e. In correspondence dated 18 July 2023, the claimant asserted that the Judge managing the case had *"falsified that the Claimant never carried out a disclosure process with Vice President Eccles"* which is a reference to the Tribunal correspondence of 12 June 2023 explaining that no Order had been made. What is said by the claimant is simply wrong; all that had been said was that no Order had been made and not that the claimant had not sought such an Order.

No 'pp' - document 17 not in evidence bundle

f. In correspondence dated 16 August 2023, the claimant stated that, in the Note of the May case management hearing, the Judge had indicated that if there was an appeal to the EAT then he would *"very strongly consider"* postponing the present hearing. No such words were used in the Note nor could such an inference be drawn from what had been said. The Note recorded the claimant seeking a delay in the listing of the present hearing to allow him to report the respondent to the police in relation to the CCTV issue. This was refused and all that was said was that if something arose in the future which either party considered required a postponement then they were at liberty to make such an application.

No 'pp' - document 18 not in evidence bundle

g. The claimant repeated this assertion in correspondence to the EAT dated 17 August 2023 (copied to the Tribunal).

87. The pattern of the claimant asserting that someone involved in the proceedings had said something which they had not continued at the present hearing. There were a number of instances during the claimant's cross-examination of the respondent's witnesses when either Mr Millar or the Judge

had to intervene when the claimant had put to a witness that they had said something in their evidence which they had not said.

88. The Tribunal considers that the claimant's conduct in this regard cannot be excused as a simple misunderstanding given the nature of what was said and frequency with which this occurred. In each instance outlined above, what was said by the other person was clearly not what the claimant later asserted it to be and could not reasonably have been interpreted in the way in which the claimant had done so. The Tribunal considers that the claimant simply asserts whatever suits his position regardless of how divorced that is from the facts.

89. Taking the whole of the claimant's conduct into account, the Tribunal considers that he has conducted the proceedings in a scandalous, vexatious and unreasonable fashion. In particular, he has used the proceedings to vent his very strongly held views about the legal profession and the judiciary rather than focussing on the issues in dispute between him and the respondent. He has, however, gone further than that and made wholly unfounded and gratuitous attacks on one of the respondent's witnesses, accusing them of serious criminal misconduct. This would undoubtedly bear on the mind of any witness when giving evidence. Further, the claimant had sought to unduly influence the Tribunal in its decision making process by threatening to report the Judge to the police.

90. The Tribunal is satisfied that the claimant's conduct meets the test under Rule 37(1)(b). The claimant has held himself out as being legally educated and sought to be treated equally to solicitor during the course of proceedings. The manner in which he has conducted the proceedings is well below what would be expected of any solicitor, advocate or any other professional representative (such as trade union representatives, HR professionals or representatives from the voluntary sector). In fact, the claimant's conduct falls below what would be expected of any person appearing the Tribunal including party litigants such as the claimant.

91. However, that is not the end of the matter and the Tribunal needs to go on to consider whether a fair trial is still possible and whether some lesser sanction than strike-out would be appropriate.

92. The Tribunal does not consider that there is any basis on which it conclude that the claimant's conduct is likely to improve.

93. During submissions, he was asked by the Tribunal whether he considered it was appropriate to say he was going to report the judge and the respondent's agent to the police for falsifying evidence or say that the judiciary operated a fascist state. He responded that he considered that it was and began a diatribe about the judiciary supporting the current system of regulation for the legal profession which he alleged amounted to a breach of human rights and discrimination.

94. The claimant showed no insight or awareness that his conduct was unacceptable. He indicated that he considered that this was how litigation was conducted. He suggested that, as he had been involved in the technological side of the law for some time, things may have changed in the practice of law. Given what the claimant has described as his career in the law, it is not the case that he is returning to practice after decades when things may have changed. In any event, it has never been the case that it was acceptable for anyone to conduct themselves in the manner in which the claimant has done.

95. It was clear to the Tribunal that, when looked at as a whole, the claimant is someone who struggles to accept that he can be in the wrong and reacts badly when he does not get his own way. The more that the claimant's various applications to the Tribunal were refused, the worse his conduct has become with some of the more serious matters such as the allegations against the witness and the threat to report the Judge and respondent's agent to the police coming in the latter stages of the process.

96. In these circumstances, the Tribunal considers that, if the claim were to proceed, the claimant would continue in the same vein of engaging in extensive, repetitive and lengthy correspondence, misrepresenting what

others have said and offering intemperate and gratuitous insult to all those involved in the case. In particular, there is the real risk that any witnesses for the final hearing will be subject to unfounded allegations of serious wrongdoing which would undoubtedly bear on their mind when having to give evidence against the claimant.

97. Further, the Tribunal does not consider that there is any other lesser sanction which could ensure a fair trial given the circumstances set out above.

98. For all these reasons, the Tribunal upholds the Respondent's application to strike-out the claim under Rule 37(1)(b).

99. Although it is not necessary, given the decision in respect of Rule 37(1)(b), the Tribunal will address the application under Rule 37(1)(a) for the sake of completeness. This will only be in relation to the claim under Regulation 17(2) AWR given that the other claims have already been dismissed for want of jurisdiction.

100. As set out in his response to the directions made at the March case management hearing, the claimant advances his Regulation 17(2) claim on the basis that he was subject to two detriments; being asked to carry out bin duty (or work as a box man, both terms were used at the hearing) and having his assignment with the respondent terminated.

101. In order for those detriments to be unlawful, the reason why the respondent treated the claimant in the manner alleged must be that the claimant did something which falls within the scope of Regulation 17(3). The claimant relies on Regulation 17(3)(a)(iii)-(vi) & (b) in this regard.

102. The difficulty for the claimant is that, in respect of the first detriment, all of the matters (as set out in his response to the directions made at the March hearing) on which he relies as satisfying Regulation 17(3) occurred after he was asked to do the bin duty. Specifically, he states that his complaints about being asked to do bin duty is what satisfies Regulation 17(3)(a)(iii)-(vi).

103. As a matter of logic, the reasons for the claimant being asked to do bin duty cannot be things which had not yet happened. Further, until he objected,

there was no basis on which it could be said that the respondent believed he was going to do these things in terms of Regulation 17(3)(b).

104. In these circumstances, even taking the claimant's case at its highest, there are no reasonable prospects of him showing that he was subject to the alleged detriment of being asked to do bin duty for reasons which had not yet occurred.

105. There is no other viable course of action which would get round this issue. The chronology is such a fundamental problem that further specification of the claim could not fix this problem. The Tribunal would, therefore, have struck-out this part of the claim under Rule 37(1)(a).

106. The position is different in relation to the second detriment of the termination of the assignment. At this point he had objected to doing the bin duty and so it is possible for such objections to be a reason for the termination of the assignment.

107. However, the claimant's specification of his case does not, in the Tribunal's view, set out matters which fall within the scope of Regulation 17(3)(a). In particular, the claimant relies on the following:

    a. Regulation 17(3)(a)(iii) that he *"made a request under regulation 16 for a written statement"*.

        i. The claimant does not allege that he made such a request. He states that he was not given an email address for HR and so could not make such a request. However, that is different from making such a request which is what is required by AWR.

    b. Regulation 17(3)(a)(iv) that he *"otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person"*.

        i. The claimant does not allege that he did anything under the Regulations and, in relation to this provision, says no more than

asserting that the respondent were the source of the termination of his assignment.

c. Regulation 17(3)(a)(v) that he *"alleged that a temporary work agency or hirer has breached these Regulations"*.

i. The claimant does not set out any case that he alleged a breach of AWR. Rather, he states that he had alleged that being asked to do bin duty was a breach of his contract but makes no reference to a breach of the Regulations.

d. Regulation 17(3)(a)(vi) that he *"refused (or proposed to refuse) to forgo a right conferred by these Regulations"*.

i. The claimant does not set any basis on which he was refusing to forego a right under the AWR. He simply makes reference to his assignment being terminated.

e. Regulation 17(3)(b) that he that the respondent believes or suspects that the claimants has done or intends to do any of these things.

i. The claimant only states that the respondent believed that he would refuse to do bin duty and not that he would do any of the things listed in Regulation 17(3)(a).

108. In these circumstances, the claimant's case, taken at its highest, does not offer to prove that he had done anything which fell within Regulation 17(3)(a) or that the Respondent believed he would do so in terms of Regulation 17(3)(b).

109. There would, therefore, be no reasonable prospects of success of the Tribunal concluding that the termination of the claimant's assignment was for a reason prohibited by Regulation 17 AWR.

110. Again, there is no other course of action, short of strike-out, which the Tribunal considers would remedy this difficulty. The claimant had already been directed to provide further particulars and it was his response to this direction that the Tribunal has referenced above. Asking him for more particulars

would not make any difference and would, arguably, prejudice the respondent as the claimant would be getting a "second bite of the cherry" in setting out the basis of this claim in the knowledge of the defects of the claim which he has already pled.

111. For these reasons, the Tribunal would have struck out this part of the claim under Rule 37(1)(a).

112. In summary, if it had to determine the application to strike-out the claim under Rule 37(1)(a) then the Tribunal would have granted the application.

Decision – Claimant's amendment application

113. Given the Tribunal's decision to uphold the respondent's application to strike-out the claim, the claimant's amendment application is rendered somewhat academic; the Tribunal has struck out the whole claim based on the claimant's conduct and, even if the amendment was allowed, the Tribunal would have struck out the additional claims as well.

114. However, for the sake of completeness, the Tribunal will address the application to amend.

115. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 29.

116. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.

117. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in Selkent, consider any other relevant factors and then

take all of those into account in balancing the injustice and hardship to all sides.

118. First, there is the nature of the amendment itself. The Tribunal considers that the claimant is seeking to add new claims which are not pled in the original ET1. There is no indication on the ET1 form itself that claims under EqA or s47B ERA are being pursued. For example, at part 8.1 of the form, none of the boxes relating to discrimination claims have been ticked. The Tribunal bears in mind that this, in itself, would not be determinative especially if the narrative set out such a case but it does not. At part 15 of the form, the claimant lists legislation, cases, textbooks and guidance which he relies on but makes no mention of EqA or s47B ERA.

119. The ET1 was accompanied by a paper apart running to 20 pages. This comprises a very long narrative, a description of how the alleged conduct by the respondent has affected the claimant, how he calculates damages due to him, a narrative of alternative dispute resolution which the claimant says he has attempted, a list of 20 witnesses he intends to call, a list of documents he seeks to rely on, a list of newspaper articles, a reference to various definitions in the Oxford dictionary and a further list of legal authorities. In all of this, there is no mention at all that the claimant seeks to pursue a claim under EqA or s47B ERA. The only claims mentioned are those identified at the March case management hearing.

120. It is correct to say that the claimant does narrate the facts relied on in relation to his proposed claim under EqA (that is, that SW would mispronounce the name of another worker, Jesus) but there is no indication at all in the ET1 that this is anything more than a background fact in the claimant's lengthy narrative. The claimant makes a number of assertions in the ET1 about wrongdoing by the respondent, none of which formed the basis of the claims as originally pled or feature in the amendment. For example, he asserts that no women were ever asked to do bin duty but he has not sought to advance any claim of sex discrimination.

121. The claimant is wrong when he asserted in his submissions that so long as he pled the facts in his ET1 then he could *"chop and change"* his legal arguments as he wished. This betrays a fundamental lack of understanding about the purpose of pleadings such as the ET1; the pleadings from both parties are there in order that each party knows the case they have to answer and are not ambushed at a hearing in relation to a claim or defence which they knew nothing about. In the case of the ET1, this requires the claimant to give a respondent a clear indication of the claims being pursued against them and a claimant cannot just advance further claims on a whim.

122. In the present case, there was nothing in the ET1 which could reasonably have been read as indicating that the claimant sought to pursue claims under EqA or s47B ERA. These are entirely new claims being raised by way of amendment albeit the facts on which they are based were set out in the ET1.

123. Second, there is the issue of the applicability of time limits which is relevant given that the claimant is seeking to add new claims. It is beyond question that these new claims are being raised out of time. The Tribunal agrees with the respondent's agent that the latest date from which the time limit could run was 12 July 2022 and so the time limit would have expired on 11 October 2022. If these claims were being raised by way of a fresh ET1 lodged at the same time as the claimant made the amendment application then they would be clearly out of time. The Tribunal does bear in mind that the issue of time bar can be a determining factor but that it is not necessarily fatal to an amendment application (*Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07).

124. The Tribunal pauses to note that the claimant has not specified any dates for the claims under EqA so these may have occurred at earlier date. However, given the very short period of time with which the claimant was engaged with the respondent, the Tribunal does not consider that much turns on this.

125. It is relevant for the Tribunal to consider whether it would exercise any discretion to hear these claims out of time. There are different tests for the exercise of this discretion between the s47B ERA claim and the EqA claims.

126. The Tribunal has discretion to hear a s47B ERA claim outwith the time limit where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and that it was presented within a further period that the Tribunal considers to be reasonable.

127. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271).

128. In assessing the "reasonably practicable" element of the test, the question which the Tribunal has to answer is "what was the substantial cause of the employee's failure to comply" and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR 333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

129. The claimant has not advanced any reason why the s47B claim has not been set out in the ET1. If it was his intention to pursue such a claim all along then the Tribunal considers that he would have set this out. If not then the Tribunal agrees with the submission made on behalf of the respondent that this is no more than the claimant seeking to reframe and replead his case.

130. In either case, if the Tribunal was considering whether it would exercise its discretion to hear the claim out of time then the lack of any explanation for why the claim was not raised in time would lead the Tribunal to conclude that there was no basis to find that it had not been reasonably practicable for the claim to be lodged in time. The Tribunal would not, therefore, exercise its discretion in the claimant's favour.

131. Turning to the test in relation to the claims under EqA, the Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) of Act. In *British Coal Corpn v Keeble* [1997] IRLR 336, it was confirmed that this involved a consideration of the prejudice each side would suffer taking account of all the relevant circumstances of the case.

132. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR it is said that the Tribunal should take into account all relevant factors with no one factor being determinative.

133. The length and reason for any delay as well as the question of any prejudice to the respondent arising from the delay have been said to always be relevant factors (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050) although the Tribunal requires to bear in mind that no one factor is determinative.

134. The burden of proof in the exercise of the discretion lies on the Claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre* [2003] IRLR 434). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre* UKEAT/0312/13).

135. Again, there has been no explanation from the claimant why the claims under the EqA were not raised in the ET1 as originally pled. The facts giving rise to these claims were all known to the claimant and he has not suggested that he was in any way prevented from raising, in his ET1, the claims he now seeks to add.

136. In terms of the balance prejudice to both parties, this overlaps with the consideration of the relevant hardship and injustice to the parties in the amendment application. The Tribunal will address this in more detail below but, suffice it to say, the Tribunal would not have exercised its discretion to hear the claim under EqA if it had been dealing with a claim presented by way of a fresh ET1.

137. Third, there is the factor as to the timing and manner of the application. The application was made after the first case management hearing but the Tribunal bears in mind that the fact that the claimant sought to pursue these additional claims only came to light at the prompting of the Tribunal and the

amendment application was only made at the insistence of the Tribunal. If this had not been done, the Tribunal considers that the claimant would not have made the application to amend and would have proceed on the mistaken assumption that he could add new claims whenever he liked.

138. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that, if the application was granted, there would be a significant prejudice to the respondent in having to face new claims which were out of time and which the Tribunal would not have exercised its discretion to hear out of time if presented by way of a fresh ET1. The passage of time would inevitably impact on the recollection of events by witnesses. In particular, in relation to the claim under the EqA, there had been nothing to warn the respondents that they faced such a claim and needed to take protective measures such as asking witnesses to provide statements which recorded their recollections.

139. The claimant would face the prejudice of not being able to pursue these claims if the application was refused. However, this is a situation of his own making; the facts giving rise to these claims were known to him from the outset; he has not argued a lack of knowledge of his rights or the claims which he could pursue (to the contrary, he has presented himself as legally educated and knowledgeable); he has not suggested that something has occurred which prompted him to realise that he could pursue these claims such as a new and relevant fact coming to light. On the face of it, the Tribunal can only conclude that the claimant could have raised these additional claims in his ET1 if he wished but chose not to do so for reasons of his own.

140. The Tribunal also bears in mind that, if the claim as a whole had not been struck out, the claimant would not be deprived of a remedy if the amendment was refused. He would still have had a surviving claim under Regulation 17(2) AWR that could have proceeded to a final hearing. This would have reduced any prejudice to the claimant.

141. For all these reasons, the Tribunal, if it had been required to determine the amendment application, would have refused the application because the balance of prejudice fell in favour of the respondent.

Decision – Claimant's strike-out application

142. The same position applies to the claimant's strike-out application as applies to the application to amend; the striking out of the claim renders this academic. However, the Tribunal will address this for the sake of completeness.

143. The Tribunal should be clear that it is only assessing how it would have decided the claimant's strike-out in the context of the claim under Regulation 17(2) AWR. This is on the basis that, if the Tribunal had not granted the respondent's strike-out application, the only claim which would be proceeding to a final hearing was the Regulation 17(2) claim, the PHA and unfair dismissal claims having been dismissed for want of jurisdiction.

144. The primary ground for the claimant's application is the absence of CCTV footage. The claimant had sought this from the respondent from an early stage of the case (before raising his ET1) and the respondent's position is that this has not been retained, having been overwritten as a matter of course. The Tribunal records that the claimant does not accept this and maintains the position that it has been deliberately deleted.

KEY FACT: THE WORKER SOUGHT THE CCTV FOOTAGE FROM AN EARLY STAGE OF THE CASE.

145. The claimant's position is that the absence of the CCTV footage should mean that the response is struck-out and that he should then simply win his case. The Tribunal notes that the burden of proof in the various claims being pursued lies with the claimant and so it is not correct that he would simply succeed if the claim was undefended.

The CCTV footage of the incidents in dispute being deleted finally acknowledged

146. The claimant places great reliance on the Sheriff Court decision of *Procurator Fiscal, Alloa v McIntosh & Hutchison* 2018 SC ALL 33. In effect, his position is that this decision requires the response in this case to be struck out.

147. The Tribunal has reviewed this judgment of the Sheriff Court. In summary, it was a criminal case where CCTV footage had not been preserved by the

police. The police had had sight of the footage and statements provided by them indicated that the footage contained relevant evidence of an exculpatory nature, supporting the accused's version of events as opposed to those of the witnesses for the Crown. In the particular circumstances of the case, in which the Sheriff described himself as taking an "exceptional course", the proceedings were brought to an end and the prosecution did not proceed.

148. However, this case does not provide the claimant with the assistance which he thinks it does. The decision does not mean that, in every other case where CCTV footage is unavailable or been deleted, the party with control of the footage will have their case struck-out. Every case has to be assessed on its own facts.

149. In this case, there is not a significant dispute in relations to the essential facts; it is not disputed that the claimant was asked to carry out bin duty; it is not disputed that he objected to this; it is not disputed that SW told him that he had to do the bin duty or be sent home (there is some dispute as to the precise words used but there is nothing to suggest that any CCTV footage had an audio element which would assist with this); it is not disputed that the claimant did the work under protest; it is not disputed that the respondent then terminated his assignment.

150. In these circumstances, the probative value of the CCTV footage is questionable. It may well show the events in question but where these are not in dispute then the CCTV adds nothing.

151. There may be disputes about some of the precise detail of events. The Tribunal does note that there was a dispute between SW and the claimant about whether SW contacted his manager before insisting on the claimant doing the bin work. This is not something on which the case turns and, in any event, there is no reason why the Tribunal cannot resolve the dispute by hearing oral and other evidence. The Tribunal deals with disputes of fact between witnesses in many cases and very rarely has CCTV footage put before it. The Tribunal is still capable of resolving such disputes in the

Judge stating that there does not have to be precise details of the case from the CCTV footage shown, and can rely on supervisors' word from memory to get a general version of what happened.

absence of CCTV footage and there is no reason why it could not have done so in this case.

152. Further, the issues to be determined in the remaining claim under Regulation 17(2) AWR are not ones for which CCTV footage would be relevant. The claimant alleges he was subject to two detriments (that is, being asked to do bin duty and having his assignment with the respondent terminated) and there is no dispute that these events occurred. Any argument about whether they are a detriment would have been a matter for submissions.

153. The central issue in the detriment claim is whether the reason why the respondent took the actions in question fell within the scope of Regulation 17(3) and this would involve the Tribunal in assessing the thought process of the relevant decision makers. It is difficult to see how any CCTV footage would assist with that assessment.

154. In these circumstances, the Tribunal does not consider that the absence of CCTV footage would have prevented there being a fair trial and so it would have refused the application to strike-out on this ground.

155. The second ground for the claimant's application was that the respondent's defence had no reasonable prospects of success. Having reviewed the claimant's correspondence in relation to this, the Tribunal finds it difficult to see the basis on which this is advanced other than an argument that the claimant believes that he should win. The claimant did not particularly elaborate on this ground in his oral submissions.

156. The Tribunal considers that the terms of the ET3 set out a case which, taking it at its highest and assuming that the respondent proves the facts they are offering to prove, would provide a valid defence to the AWR claim.

157. The claimant may dispute the facts on which the respondent relies or argue that there are other facts from which the Tribunal could reach conclusions favourable to him but that requires there to be a final hearing at which all the evidence is heard. These are not grounds on which a claim or response can be struck-out.

158. There is nothing in what the claimant has said which sets out a basis on which it could be said that the respondent's defence to the Regulation 17(2) claim, taken at its highest, has no reasonable prospects of success.

159. Finally, the claimant sought to strike-out the response in the basis of the abuse of process. Again, the correspondence from the claimant does not clearly set out the grounds on which it is said that there has been an abuse of process by the respondent and he did not elaborate on this in his oral submissions.

160. To the extent that what the claimant sought to argue was that the respondent was advancing a baseless defence then this is no more than a repeat of his second ground for strike-out and the Tribunal has already addressed this.

161. The Tribunal also notes that in correspondence sent in reply to directions made in the March case management hearing, the claimant sought to say that the respondent was not actively defending the case. This was clearly wrong; they submitted an ET3, responded to correspondence from the Tribunal and were represented at all the hearings listed by the Tribunal. The claimant's assertions were based on his view as to the adequacy of the ET3 but that is very different from the claim not being actively defended.

162. The Tribunal has considered the conduct of the proceedings by, and on behalf of, the respondent as well as the terms of the ET3 lodged by them. It can identify nothing in any of that which comes close to being an abuse of process.

163. For all these reasons, the Tribunal, if it had been required to determine the claimant's application to strike-out the response, would have refused the application.

Employment Judge: **P O'Donnell**
Date of Judgment: **28 August 2023**
Entered in register: **28 August 2023**
and copied to parties

Employment Appeal Tribunal, Edinburgh, Rule 3(7) Strike Out Judgment, 24/11/23

EMPLOYMENT APPEAL TRIBUNAL (Scotland)
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★ 24 Nov 23 ★

EA-2023-SCO-000094-

Our Reference: EA-2023-SCO-000094-DT

Patrick Henry McAuley
9 CALDER TOWER,
East Kilbride
South Lanarkshire
Glasgow G74 2HJ
Great Britain

24 November 2023

Dear Sir

McAuley v Ethigen Ltd

I am writing with reference to your Notice of Appeal from the Decision of an Employment Tribunal sitting at Glasgow (Employment Tribunal) and promulgated on 28 August 2023.

Under Section 21 of the Employment Tribunals Act 1996, the Employment Appeal Tribunal (EAT) only has jurisdiction to hear an appeals from a decision of an Employment Tribunal where the appeal raises a question of law. See Sections 2 and 3 of the Employment Appeal Tribunal Practice Direction 2023.

The appeal has been referred to Caspar Glyn KC, Deputy Judge of the High Court in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended) and in his opinion the Notice of Appeal discloses no reasonable grounds for bringing the appeal. He states:

1. ***The parties are referred to as the claimant(s) and respondent(s) as they were before the employment tribunal.***
2. ***After liaising with the EAT staff and heeding the requirements of the EAT Practice Direction the Claimant filed a 13 page document containing a synopsis of his Appeal. I take this as the Amended Grounds of Appeal and are filed to comply with the §3 of the EAT Practice Direction and replace the earlier Notice of Appeal which, excluding the ET1, ET3 and Judgment, run to some 179 pages.***
3. ***I have dealt with the Claimants Grounds which start at p.9 of the New Notice of Appeal. Unusually, the Ground of Appeal Heading and the***

Number is set out after the Narrative paragraph containing the substance of the Ground and not above it. There is nothing wrong with that, I just set it out for those who may read this document and wish to cross-refer to the Grounds of Appeal.

4. ***Ground 1 is that the Tribunal misinterpreted Section 11 HRA which is a reference to Section 11 of the Human Rights Act 1998 and the safeguard for existing human rights. A number of issues had to be decided by the Tribunal at the Preliminary Hearing ("PH") as set out at §7 and the decision to deal with all these matters was not only one within the ET's discretion but it would have been illogical and contrary to the overriding objective to hypothecate the issue about the CCTV away from the other issues. The CCTV issue was simply one of the issues with which the Tribunal needed to decide. It was clearly within the Tribunal's discretion to consider the issue of CCTV along with the other matters at the PH and not restrict the hearing, as the Claimant had requested at §80, simply to the CCTV issue.***

5. ***Ground 2 is the breach of the Claimant's rights to a fair trial by the CCTV not being available. I assume that the reference to Regulation 34 of the ETRoP Regs 2013 is a reference to Rule 34 which concerns the adding of parties. If the Claimant appears to be questioning decisions made at a Case Management Hearing prior to this PH and that is considerably out of time and discloses no reasonable ground. If he was not, but is questioning decisions made at the PH hearing on applications for witnesses to be called at the PH then it was too late for him to do so. If he is asserting that parties should have been added then there was no need to add any party. There was a dispute between the parties as to the CCTV – had it been deliberately deleted or subjected to standard overwriting with the effluxion of time. In any event as the Judge found the facts surrounding the events (§§142-164) were the subject of little contested evidence as the facts were largely, save for some of what was actually said, agreed. There was no suggestion that the CCTV had an audio element. It was held that §§151-4 the CCTV was not relevant to the AWR claim.***

6. *Ground 3 is that the EJ misinterpreted a range of statutory rights such as Article 6 right to fair trial, the overriding objective in relation to ensuring that the parties were on an equal footing, the GDPR and other sections concerning DPA. However, the Tribunal was entitled to find, that the facts were not in large areas contested save for some audio which was not suggested by anyone to be captured by the CCTV. As set out above the CCTV was not relevant to the issue or would assist the ET in the determination of the AWR claim. The Judge demonstrated no bias and simply, in his detailed and careful judgment, makes findings that lead him to make the Orders. The allegation that the Judge's findings amounted to a crime or that they were perceived to be a crime or were as a result of a financial interest in the case are made with no evidential foundation, no factual basis and no or any cogent support, betray the paucity of the argument made and the Claimant's continued allegations of those involved in his claim as committing criminal offences with no evidence. No reasonable ground of appeal is disclosed.*

7. *Ground 4 involves an allegation of a misinterpretation of Rule 2(d), namely avoiding delay so far as compatible with proper consideration of the issues by holding the ET PH prior to an EAT PH. I note §86(f) that the Claimant stated that the Note of the May case management hearing recorded something that was not in the note nor was there any basis to draw an inference that the matter was said. There is nothing wrong in a Judge carrying on with a case once an appeal has been made unless, as part of the appeal, the case is stayed by either the ET or the EAT. There is no ground of appeal that begins to be arguable let alone reasonable.*

8. *Ground 5 raises an issue of law in that the Claimant asserts that the Judge was wrong to hold that the ET had no jurisdiction to consider PHA 1997 claims. However, there is no arguable ground that the Judge was wrong to hold that the PHA granted jurisdiction to the Tribunal to hear general harassment cases as asserted in either Paragraph 4 on*

This is the time travel - this is apparently a 'model of clarity and reasoning'.

page 11 of Ground 5. The reasons given by the Judge §§30-43 were a model of clarity and reasoning. There is no error of law disclosed.

9. *Ground 6 challenges the conclusion that the Judge arrived at that there was no contractual relationship between the Claimant, as an agency worker, and the end user. §51 refers to James v Greenwich London Borough Council which case clearly directly bound the Tribunal to hold, on the facts as the Tribunal found, that there was no contractual relationship. Not only is no error of law disclosed but the Judge was inarguably right to find as he did.*

10. *Ground 7(i) takes issue with the Tribunal striking out the Claimant's claim for, amongst other things, expressing strongly held views in his correspondence. It is asserted that the ET was wrong to rely on this correspondence because it was not lodged for the hearing and was private. I have also considered the wider issue as to whether the strikeout for the Claimant's conduct which was clearly wholly scandalous, vexatious and unreasonable was a proportionate response and whether the Judge made an error in any conclusion that a fair trial was no longer possible.*

    A. *The strike-out decision runs for some 28 paragraphs §§70-98 detailing example after example of the Claimant's misconduct. Correspondence written to the Tribunal and to the various Respondents about the claim obviously fall within the definition of the conduct of proceedings. Further, letters to the Tribunal are not private correspondence such as those within a family which might engage Article 8. The correspondence is part of the conduct of proceedings. It was relevant and properly referred to.*

17 new documents not in the evidence bundle nor referred to at trial is supposedly relevant & properly referred to.

    B. *The Judge gave himself model directions on the law §§71-78.*
    C. *The examples of the Claimant's conduct demonstrated that he was, and repeatedly, rude, he was insulting, he demeaned others, he sought to bully others, he made allegations that others were guilty of criminal conduct without any proper basis. So frequent and repeated was the Claimant's conduct that it could fairly be*

described on reading it, as harassing those involved in the conduct of proceedings.

D. ***Further he misrepresented what the Tribunal and the Respondent's solicitor said in a way which could not have reasonably been raised.***

E. ***At the instant hearing the Claimant said that he would report the Judge and the Respondent's solicitor to the police for falsifying evidence. That was, on the facts, quite clearly a malicious allegation. Crucially to this decision the Judge canvassed with the Claimant whether he had insight into this allegation. This was necessary to divine whether the Claimant's conduct would change. The reaction described by the Judge at §93-4 confirmed the Judge's view that the Claimant's conduct would not change.***

F. ***Not only was the Claimant gratuitously and repeatedly insulting others but, in his reasons the Judge set out that a particular concern would be the effect on witnesses coming to court to face further malicious allegations such as the unfounded allegation that the Claimant was sexually assaulted by DG in being ordered to do 'bin duty' when it was not event DG, on the Claimant's case, who directed him to carry out bin duty.***

G. ***The Tribunal considered that there was no lesser sanction that could be visited on the Claimant that would prevent this conduct continuing.***

H. ***Accordingly, the claim was struck out because a fair trial was no longer possible. In my judgment there is no arguable error in this decision. The rich irony of this case is that, whilst the Claimant was alleging that he was harassed by being asked to do bin duty amongst other things, the Claimant conducted himself in such a way towards the Judges, representatives and potential witnesses, that it amounted to, on a reading of the decision, a campaign of harassment.***

I. ***The obvious impact on the mental health of <u>repeated</u> gratuitous insults including malicious criminal allegations on those involved professionally either as Judge or representatives and particularly***

the chilling effect on witnesses facing such malice well justified the conclusion that the Claimant, by his conduct, rendered a fair trial impossible.

11. *Ground 7(ii) is inarguable and rendered otiose by 7(i). In any event the Claimant's case was that he was subjected to detriment because under Reg 17(3)(b) AWR 2010 the hirer or temporary work agency believed that the worker had done or was about to perform one of the 'protected acts' set out at regulation 17(a)(iii)-(vi). The reason why the claim was struck out was that the first detriment occurred, being asked to do bin duty prior to the alleged protected act of objecting to do bin duty – clearly there is no basis for saying that the Respondent would have had any knowledge that the Claimant would object to the duty. Even if this were wrong the Tribunal found at §107 that nothing which the Claimant alleged that he did, including objecting to doing bin duty, falls within the identified protected acts of Reg 17(3)(b). Accordingly, there was no basis for the claim and it was rightly struck out.*
12. *Ground 8 challenges the Tribunal's discretion not to allow the Claimant's amendment application to include a s.26 EQA 2010 harassment claim. §120 does refer to a background fact set out in the Grounds of Complaint on which the Claimant wanted to use for his s.26 claim. However, there was nothing in the original GoC that suggested an EQA claim was being pursued see §121-2. The Claimant was raising a new claim considerably out of time §123, no dates are given for the claims §124, and the Tribunal considered the issue of time limits in the amendment application §§131-141 and noted the absence of any explanation from the Claimant and that the balance of hardship in allowing an amendment would cause significant prejudice the Respondent. The Judgment was a model of applying the correct law to the application which reached a conclusion firmly within the Judge's discretion. There is no reasonable ground of appeal.*
13. *Ground 9 for the reasons set out above there was no error in not striking out the Respondent's defence because of the missing CCTV.*

This is affirming that organisations in the UK are allowed to delete the CCTV footage of a worker sacking incident, even if the worker requests it early in the process.

Supreme Court of Scotland, Inner House Court of Session, Interlocutory Judgment, 17/05/24

COS-XA17-24 **Patrick Henry McAuley for Leave to Appeal against Decision of EAT**

Party

17 May 2024 Lady Wise

Act: Party with Mr J McAuley

The Lords, having considered the unopposed motion of the applicant together with form 12 A-A, grant the motion and in terms of rule of court 12.A.1 grant permission to Joseph L McAuley to be lay assistant to the applicant in respect of the proceedings in this application; having heard the applicant on the single bills, refuse the application for leave to appeal the decision of the Employment Appeal Tribunal of 4 March 2024 and decern.

Patrick Henry McAuley Reasons for Refusal of Leave to Appeal

[1] In this application the appellant seeks leave to appeal a procedural decision by the Employment Appeal Tribunal to restrict the time allocated for a hearing under Rule 3(10) of the Employment Appeal Tribunal Rules 1993 ("the Rules") as amended to half a day – i.e, three hours in two related appeals.

[2] The appellant raised Employment Tribunal proceedings against the respondent, at whose premises he had worked as an agency worker for a third-party employment agency. His ET1 as originally pled raised a claim under the Protection from Harassment Act 1997, a claim for unfair dismissal under Part 10 of the Employment Rights Act 1996, and a claim of detriment under Reg. 17(2) of the Agency Worker Regulations 2010. Latterly, he applied to amend the ET1 to add claims of discrimination and harassment on the basis of religion or belief under the Equality Act 2010 and a s47B protected disclosure under the ERA.

[3] Before the Employment Tribunal, the respondent raised issues of jurisdiction; first that the Tribunal had no power to hear a Protection from Harassment Act claim and secondly that they were not the appellant's employer. Parties made mutual strike-out applications. Following a hearing on 21-22nd August 2023, convened to determine these preliminary issues, the Employment Tribunal (Judge O'Donnell) issued a Judgment on 28th August 2023 deciding the following:-

i) The Tribunal did not have jurisdiction to hear a Protection from Harassment Act claim;

ii) There was no contract of employment (or any other kind) between appellant and respondent;

iii) The statutory harassment and unfair dismissal claims were accordingly dismissed; and

iv) The remainder of the claim was struck out under Rule 37(1)(b) of the Employment Tribunal Rules of Procedure on the basis that the appellant's conduct of the proceedings was scandalous, unreasonable, or vexatious.

[4] Following that judgment, the appellant lodged two appeals with the Employment Appeal Tribunal. One related to an evidential matter. The other contained nine separate grounds and was considered at the first sift stage by an EAT judge (Caspar Glyn KC). On 24th November 2023 the appellant was informed that the EAT Judge had determined, in accordance with Rule 3(7) of the Rules, that the Notice of Appeal disclosed no reasonable grounds. The second appeal was considered by EAT Judge (HHJ Auerbach) who concluded that it disclosed no reasonable grounds and could not proceed.

[5] The appellant then applied for an oral hearing under Rule 3(10) of the EAT Rules. He sought separate hearings on the two appeals. His application was for a 2 day hearing, and a postponement. The EAT Registrar refused these applications, instead directing that the appeals were to be listed for a combined Rule 3(10) hearing with a time estimate of 1 ½ hours including 30 minutes for judgment.

[6] The appellant then appealed against the Registrar's directions, seeking either a two day full hearing or a longer preliminary hearing. On 4th March 2024, the EAT (HHJ Auerbach) refused the appeal other than to the extent of increasing the time estimate for the combined rule 3(10) hearing to half a day.

[7] It is against *that* decision, that on 6 March 2024 the respondent sought permission to appeal to the Court of Session. HHJ Auerbach refused same on 8th March 2024, on the following grounds:-

i) Nothing in the application showed that his decision on the appeal was arguably wrong;

ii) The relevant rules and procedures of the EAT were not incompatible with Convention rights.

iii) The appellant's proposed grounds in both appeals having failed to pass the sift under rule 3(7) his remedy was a s3(10) hearing to present fresh arguments. There was no basis to refer the underlying appeals to this court at that stage.

[8] The appellant sought a review of that decision on 10th March 2024. The EAT decided to leave aside the question of whether refusal of permission to appeal was competent and proceeded on the assumption that it was. HHJ Auerbach again refused the appellant's application, noting that:-

i) The appellant's submission that the rule 3(10) procedure was not HRA compliant was not arguable.

ii) Nothing about the appellant's submissions in relation to the underlying ET claim demonstrated that the Registrar's decision was wrong or that either of the EAT decisions were wrong.

[9] The appellant now appeals to this court.

Relevant law

[10] Section 37(1) of the Employment Tribunals Act 1996 provides that an appeal to this court regarding any decision or order of the Employment Appeal Tribunal is on a question of law only.

[11] The test for this court, following *Campbell v Dunoon & Cowal Housing Association* 1992 SLT 1136 is that "…applicants for leave to appeal must generally show something of the nature of *probabilis causa* in relation to a genuine point of law which is of some practical importance.

[12] As this appeal is against the decision of the Registrar, as amended by HHJ Auerbach's decision of 4th March 2024, the decision of the Employment Tribunal is not open to revision in these proceedings, which concern procedural issues in the ongoing appeal before the EAT.

Mr McAuley's submissions

[13] Mr McAuley submitted that Judge Glyn's decision under Rule 3(7) had been flawed and should be reduced. He drew attention to the terms of that Rule, which provides that *"where it appears to a judge or the Registrar that a notice of appeal or a document provided under paragraph (5) or (6)– (a) discloses no reasonable grounds for bringing the appeal; or (b) is an abuse of the Appeal Tribunal's process or is otherwise likely to obstruct the just disposal of proceedings, he shall notify the Appellant or special advocate accordingly informing him of the reasons for his opinion and, subject to paragraph (10), no further action shall be taken on the notice of appeal or document provided under paragraph (5) or (6)'*. He contended that this imposed a two stage test, namely that the sift judge required not just to consider whether there were any reasonable grounds for appeal but also go on to give reasons for that. No proper reasons had been given for the decision and there was only one reference to authority. Accordingly the Rule 3(7) decision had not followed the requirements of the rule itself.

[14] A number of other points were made in support of Mr McAulay's argument that there should be no Rule 3(10) hearing in relation to his two appeals but rather they should proceed directly to a full hearing. These included the following;-

- The complexity of the ET judgment is illustrative of the need for a full hearing after which there will be written reasons and not an oral decision. The fact that three hours had been set down for legal submissions supported the need for a written decision thereafter
- The likely damages in the case would be in excess of £50,000 and arguably " gigantic" (perhaps over £ 2million)
- The expenses incurred to date were over £20,000
- The case was a landmark one involving agency worker rights
- There was judicial divergence on the evidential argument (the CCTV) such that a full appeal hearing followed by considered judgment should take place
- There was " so much new evidence" in Judge Glyn's Rule 3(7) decision that it required to be explored on appeal
- Quite apart from the lack of sufficient reasons in the Rule 3(7) decision, it had failed to outline the factual matrix of the case. The Opinion of the Extra Division in *McAlpine for Leave to Appeal a decision of the EAT* [2010] CSIH 11, at paragraph [2], supported the proposition that a summary of the facts of the case was required.
- All of the case law referred to in the notice of appeal should have been referred to in Judge Glyn's decision
- Judge Auerbach had fundamentally contradicted himself in his decision as he had said both that the appeal was not arguable but also that a hearing would be fixed to determine whether it was arguable
- Judge Glyn had referred to the Tribunal's summary of the law as a " model of clarity" but this amounted to " time travel"

Lady Wise acknowledging that it was indeed time travel used as the reasons in the ET & EAT

[15] For all these reasons the decisions of the EAT were not acceptable. In such an important case as this, Rule 3(7) should not have been used. To do so was "irresponsible and reckless".

Decision and reasons

[14] In both the extensive documentation Mr McAuley has lodged and in his oral submissions to the court, he appears to misunderstand the very restricted scope of his proposed appeal against the decision of 4 March. EAT Rule 3(10) provides that, where notification has been given under paragraph 3(7) of the Rules, an appellant may express dissatisfaction in writing with the reasons given by the judge for his opinion and when he does so, is entitled to have the matter heard before a judge who must make a direction as to whether any further action should be taken on the notice of appeal. The rule thus affords litigants an important opportunity to persuade a single judge of the EAT that the appeal should be allowed to proceed to a full hearing, notwithstanding the previous view expressed on arguability. Importantly, the EAT gives fresh consideration to the proposed appeal or appeals at such a hearing. It is incumbent on a prospective appellant to explain which aspects of the first sift judge's decision are said to be wrong, otherwise the judge at the Rule 3(10) hearing may adopt some or all of the first sift judge's reasons. The effect of Rule 3(7) read with 3(10) is that a proposed appeal to the EAT will not be disposed of completely by way of a sift decision on the papers alone, unless that decision is accepted by the prospective appellant. There is an exception to that under rule 3(7)(ZA) but it does not apply here.

[15] In the present case, the only decision that could currently be the subject of leave to appeal to this court is that of 4 March 2024 (sealed on 6 March). That decision does no more than adhere to the Registrar's decisions on the fixing of a single Rule 3(10) hearing, its length and the issue of postponement, other than in relation to the length of the combined hearing, which was extended to half a day. Mr McAuley finds it difficult to accept that the only current procedural options are (i) to accept the Rule 3(7) decisions and accept that his appeals will not progress or (ii) to attend the Rule 3(10) hearing and seek to persuade another EAT judge that one or more of his grounds of appeal should progress to a full hearing. There is no third route of proceeding to a full hearing without a Rule 3(10) hearing; the relevant rules preclude that.

[16] As indicated, the decision against which leave to appeal to this court is now sought relates only to the fixing of the Rule 3(10) hearing and its duration. Mr McAuley confirmed that he is content that any hearing that takes places should be combined so

that both appeals are heard together. There is no reasonable basis for his contention that a Rule 3(10) hearing should not take place.

[17] Mr McAuley will have an opportunity to address the alleged errors in the Rule 3(7) decision at that hearing. He will be entitled to make all of the arguments he advanced to this court about the complexity of the case, the judicial divergence he claims there is on the CCTV point, the value of his claim, the importance of agency worker's rights and so on before the EAT judge. There is nothing in the Rules or the decision complained about that will prevent these issues being raised insofar as relevant to his application to appeal to the EAT. The application to this court for leave to appeal can be regarded as premature, in that the opportunity to address any perceived errors in the Rule 3(7) decisions has yet to be taken up.

[18] Mr McAuley also seems to have misunderstood the nature and extent of the reasons required to accompany a Rule 3(7) decision. It is of course necessary for the EAT sifting judge to give reasons for any decision that a proposed appeal should not proceed. In this case, the reasons given by Judge Glyn extend to over five pages. Each ground of appeal is dealt with and reasons given for the conclusion that it is not arguable or otherwise not reasonable for it to proceed. It is a reasoned and comprehensive first sift decision. Should it contain any errors, the Rule 3(10) hearing will provide the necessary safeguard against those standing uncorrected. The decision in *McAlpine for Leave to Appeal a decision of the EAT* [2010] CSIH 11 on which Mr McAuley relied is not authority for the proposition that a first sift decision requires to summarise the facts. That case involved a proposed appeal against a decision at a Rule 3(10) hearing, where the Extra Division refused leave to appeal to this court. It was the final stage of the case and an Opinion was published. No analogy can be drawn between that case and Judge Glyn's sift decision.

Lady Wise affirming that the quality of the Rule 3(7) reasons do not matter because the Rule 3(10) Strike Out Hearing will correct them. However, this Rule 3(10) Hearing gives Ethigen an unfair advantage that they hear all the arguments before they have to answer them.

[19] For the reasons given, the proposed appeal against the EAT's decision of 4 March 2024 is misconceived and should not be allowed to proceed further in this court. Leave to appeal is refused.

UK Supreme Court, London, Interlocutory Judgment, 28/10/24

Supreme Court of the United Kingdom Parliament Square London SW1P 3BD
registry@supremecourt.uk
0207 960 1991/1992
DX 157230 Parliament Sq 4

28 October 2024

Ref: LSC-2024-0324

McAuley v Ethigen Ltd

Dear Mr McAuley

You applied to have the decision of the Registrar communicated to you by letter dated 9 July 2024 reviewed. Your papers were referred to a Justice of the Supreme Court. I am writing to inform you of the outcome of the review.

Lord Leggatt has reviewed the papers and directed as follows:

"Mr Patrick McAuley has applied for a review of the Registrar's refusal to accept his application for permission to appeal to the Supreme Court on the ground that the Supreme Court does not have jurisdiction in this matter. His application for a review has been referred to me as a Justice of the Supreme Court.

Procedural history

Mr McAuley brought claims in an employment tribunal, which were in part dismissed on grounds of jurisdiction and were otherwise struck out as vexatious. He appealed to the Employment Appeal Tribunal (EAT). His two notices of appeal were reviewed by judges of the EAT, who in each case determined that the notice of appeal disclosed no reasonable grounds for bringing the appeal. Under the EAT Rules the only recourse available to a person whose notice of appeal is rejected in this way is to apply under rule 3(10) for a hearing before a judge to decide whether the appeal should be allowed to proceed.

Mr McAuley requested such a "rule 3(10) hearing" in relation to his two proposed appeals. The EAT Registrar directed that there should be a combined rule 3(10) hearing with a time estimate of 1 ½ hours. Mr McAuley appealed against that direction to a judge, requesting either a two-day full hearing or a longer preliminary hearing. The EAT

judge allowed this appeal but only to the extent of increasing the time estimate for the rule 3(10) hearing to half a day.

Mr McAuley applied for permission to appeal from that decision of the EAT judge to the Court of Session. Such permission was refused, first by the EAT judge and then by the Court of Session for reasons given by Lady Wise on 17 May 2024.

Mr McAuley sought in turn to challenge this decision of the Court of Session. He filed an application in the Registry of the Supreme Court for permission to appeal to the Supreme Court.

On 9 July 2024 the Registrar decided that the Supreme Court does not have jurisdiction to accept the application because the decision of the Court of Session dated 17 May 2024 refusing his application for permission to appeal to the Court of Session does not fall within the scope of section 40 of the Court of Session Act 1988. This statutory provision lists the decisions against which an appeal may be taken to the Supreme Court. The Registrar considered that the decision of 17 May 2024 was not "a decision constituting a final judgment in any proceedings" falling within section 40(2)(a) nor does it fall within any of the other categories of decision listed in section 40(2).

Decision on Review

After filing an application for a review of the Registrar's decision by a Justice of the Supreme Court, Mr McAuley filed a further application requesting: (1) that the date when the matter is considered by a Supreme Court Justice be delayed until after 22 August 2024 to give him time to seek to be restored to the roll of solicitors and granted a practising certificate and to instruct an advocate or barrister; and (2) that the review of the Registrar's decision on jurisdiction be replaced by an expedited hearing of his application for permission to appeal to the Supreme Court.

He has been afforded an extension of time considerably longer than the extension requested and no further delay is warranted. The request to proceed straight to consideration of his application for permission to appeal is misconceived because the question whether the Supreme Court has jurisdiction to grant such permission is a logically prior question which must be decided first. Unless the decision of the Court of Session dated 17 May 2024 falls within the scope of section 40, the Supreme Court has no legal power to hear an appeal and the question whether or not to grant permission to appeal therefore does not arise.

I therefore proceed to consider the question of jurisdiction. Mr McAuley has advanced two reasons for contending that the Supreme Court has jurisdiction under section 40. He relies on section 40(2)(a) and also on section 40(2)(d)(ii).

Section 40(2)(a) applies to "a decision constituting a final judgment in any proceedings". The term "final judgment" is defined in section 40(10) to mean "a decision which ... disposes of the subject matter of the proceedings on its merits, even though judgment may not have been pronounced on every question raised ..."

The decision of the Court of Session dated 17 May 2024 is manifestly not a decision constituting a final judgment. It has not disposed of the subject matter of the

proceedings on its merits. The proceedings are continuing. Mr McAuley remains entitled to a rule 3(10) hearing, which the EAT judge has directed should be listed with a time estimate of half a day. At that hearing the EAT judge will consider whether Mr McAuley has reasonable grounds for bringing an appeal against the decision of the employment tribunal.

Mr McAuley argues that "it could be interpreted that [the Court of Session] inadvertently addressed the 'unfair dismissal' merits plea in law with 'finality' in obiter dictum". As Mr McAuley must be aware, an obiter dictum is not a decision of the court and nothing said in the reasons given by the Court of Session, however the statement made is interpreted, can elevate its decision to refuse permission to appeal to the status of a final judgment.

Mr McAuley also argues that it is unnecessary that the decision should constitute a final judgment because his claims raise issues under the Human Rights Act 1998 (HRA) and the EAT has shown that it proposes to violate his Convention rights, thus enabling section 7(1) of the HRA to be invoked; in addition, if his grounds of appeal are not upheld there will be violations of his rights under articles 6 and 7 of the Convention. These complaints are baseless but, in any event, cannot alter the wording and effect of primary legislation - in this case section 40(2)(a) and (10) of the Court of Session Act 1988. There is no way around the fact that the decision of the Court of Session dated 17 May 2024 is not a decision which falls within the wording of these provisions.

Section 40(2)(d)(ii) applies to "any other decision in any proceedings if ... the decision is one sustaining a preliminary defence and dismissing the proceedings". The term "preliminary defence" is defined in section 40(10) to mean "a defence that does not relate to the merits of the proceedings".

Mr McAuley argues that the decision of the Court of Session falls within section 40(2)(d)(ii) because it sustained a "preliminary defence". However, the decision of the Court of Session did not sustain a defence of any kind. All that it sustained was the decision of the EAT judge giving directions regarding the form of the rule 3(10) hearing which Mr McAuley had requested. In any case, the second part of section 40(2)(d)(ii) is not satisfied. As set out above, section 40(2)(d)(ii) applies only if the decision in question is one "sustaining a preliminary defence **and** dismissing the proceedings" (emphasis added). The decision of the Court of Session was not one dismissing the proceedings. It therefore does not fall within section 40(2)(d)(ii).

Accordingly, the Supreme Court does not have jurisdiction in this matter. The arguments to the contrary advanced by Mr McAuley are all totally without merit."

Yours sincerely,

Kelly-Anne Johnson

Kelly-Anne Johnson

EAT, Edinburgh, Procedural Decision, 14/01/25, making order of Court for Strike Out Hearing in McAuley v Ethigen to take place in June 2025

EA-2023-SCO-000067-DT

EMPLOYMENT APPEAL TRIBUNAL

Appeal No EA-2023-SCO-000067-DT
EA-2023-SCO-000094-DT

B E F O R E

HIS HONOUR JUDGE AUERBACH
IN CHAMBERS

IN THE MATTER of an Appeal under Section 21(1) of the Employment Tribunals Act 1996 from the decision of an Employment Tribunal sitting at Glasgow and sent to the parties on 02 June 2023

B E T W E E N :

Patrick Henry McAuley — Appellant

- and -

Ethigen Ltd — Respondent

The Appellant's application of 13 January 2025 is refused for the reasons appended.

D A T E D 14 January 2025

TO: Patrick Henry McAuley, the Appellant
Gilson Gray, for the Respondent

The Secretary, Central Office of Employment Tribunals, Scotland

(ET No. 4105806/2022)

REASONS

Appellant	Patrick Henry McAuley
Respondent	Ethigen Ltd
Reference numbers	EA-2023-SCO-000067-DT& EA-2023-SCO-000094-DT
Sitting Judge	His Honour Judge Auerbach

Reasons:

1 These two appeals were both considered not arguable on paper (rule 3(7)). The Appellant sought rule 3(10) hearings. The Registrar gave directions on 11 January 2024. The Appellant appealed her directions. I dismissed that appeal save that I increased the time estimate for the hearing of the two rule 3(10) applications together, from 1 ½ hours to half a day. My order was sealed on 4 March 2024.

2 The Appellant applied to the EAT for permission to appeal (PTA) from my decision to the Court of Session. That was refused by me. My order and reasons were sealed on 8 March 2024. On 10 March 2024 the Appellant applied for a review. That was refused by me. My order and reasons were sealed on 13 March 2024.

3 The Appellant applied to the Court of Session for PTA my order of 4 March 2024. He applied for the listing of the rule 3(10) hearing to be postponed, pending the outcome of his application to the Court of Session, and for me to be recused. The Registrar refused the former and indicated that the latter could be considered by me were any further matter in this appeal to come before me for consideration. The Appellant unsuccessfully appealed to Eady P.

4 The Court of Session refused the Appellant's application for PTA. The Appellant then made an application to the Supreme Court. The Supreme Court's Registrar decided that it did not have jurisdiction to entertain it. The Appellant applied for a review by a Justice. For reasons communicated in a letter of 28 October 2024 Lord

Leggatt JSC agreed with the Supreme Court's Registrar that it did not have jurisdiction and held that the Appellant's arguments were totally without merit.

5 By an application of 13 January 2025 the Appellant has applied for my previous decision relating to the rule 3(10) hearing to be reviewed and for a direction instead that the next stage should be a full appeal hearing.

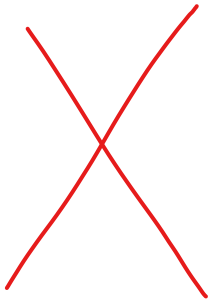
6 The Appellant has applied specifically for that application to be considered by me. He therefore appears no longer to be maintaining that I should be recused. But in any event I have considered his recusal application of 13 March 2024. It took issue with my earlier decision, which he plainly considers to be wrong; but that would not be a basis for me to recuse myself. I have previously addressed a jurisdictional point raised by the Appellant in para. 7 of my 4 March 2024 reasons.

7 This fresh application for the next stage to be not a rule 3(10) hearing but a full appeal hearing relies on a reference by Lord Leggatt to articles 6 and 7 of the Convention. Lord Leggatt was there referring to the Appellant's argument that if his grounds of appeal were not upheld there would be a violation of his rights under those articles. Lord Leggatt said that those complaints were "baseless".

8 The Appellant says that this was a "direction" by Lord Leggatt which has the consequence that the EAT should now direct a full appeal hearing. He reiterates other arguments he has previously advanced as to why the matter should proceed directly to a full appeal hearing.

9 The decisions of the Court of Session and Supreme Court mean that my decision stands. Lord Leggatt has rejected the Appellant's arguments by reference to articles 6 and 7 as baseless and his arguments overall as totally without merit. The Supreme Court's decision does not and cannot provide any fresh basis for challenging my decision.

FINAL POSITION OF THE UNITED KINGDOM THAT A STRIKE OUT HEARING IN THESE CIRCUMSTANCES VIOLATES NO CONVENTION RIGHTS.



10 The position remains that the next stage will be the rule 3(10) hearing. This involves no violation of Convention rights. There remains no basis to proceed instead direct to a full appeal hearing. There remains no basis to review my previous decision.

11 This application it totally without merit and I have dismissed it.