Appeal No. UKEATS/0042/19/SS (V)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On the 5th February 2021
Judgment handed down on 4th May 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

A APPELLANT

v

B RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel) Instructed by: The Appellant
For the Respondent	MS ALICE STOBART (of Counsel) Instructed by: Arthur & Carmichael LLP The Whitehouse Cathedral Square Dornoch Sutherland IV25 3SW

SUMMARY

The employment tribunal had struck out a claim under Rule 37(1)(b)(c) and (e) of the 1993 Rules. It concluded that certain email communications from the Claimant to a witness were "scandalous, unreasonable and vexatious" in that they were designed to intimidate the witness, in breach of a prior order from the tribunal and had made a fair trial impossible. On appeal Held (1) that two of the emails upon which the tribunal had based its decision did not provide a proper basis for strike out. The emails had been sent before the Claimant had received the Tribunal judgement which explained that such conduct was unacceptable. The judgement warned the Claimant about her conduct and contained three orders designed to moderate her behaviour. In particular she had been ordered not to repeat certain allegations, to correspond in a polite fashion and to seek the tribunal's prior approval for any witnesses the claimant proposed to call. While there had been informal warnings previously, the Tribunal should have based its decision on conduct which occurred after the Judgement had been issued and the Tribunal's position had been made plain. In addition, the intimidatory aspect of the emails was not a sufficiently powerful threat to the fairness of the hearing to justify strike out. Held (2) that strike out was nevertheless appropriate. Further emails sent by the Claimant after she had received the Judgement were in breach of the Tribunal's orders. In particular they breached the orders which required her to refrain from repeating allegations which the Tribunal considered scandalous, unreasonable and vexatious, and to communicate politely with the Respondent's representative. In these circumstances the Tribunal was entitled to strike out the claim and no perversity or error of law had been demonstrated. The appeal was refused.

TOPIC NUMBER(S): 7 PRACTICE AND PROCEDURE

THE HONOURABLE LORD SUMMERS

1. In this case I heard A's appeal against a strike out order pronounced by the employment tribunal (hereafter "the Tribunal") on 5 March 2019. Before describing the background to the appeal, I require to deal with a question that has arisen as to the anonymization of the appeal.

Anonymization of Appeal

2. An Anonymity Order of 6 March 2019 was pronounced in respect of proceedings before the Tribunal. Having regard to **Curless v Shell International Ltd** [2020] IRLR 36 and **A v B** [2010] IRLR 844, I invited parties to advise me whether they wished a further order to be pronounced.

3. I received applications from the Respondent and C to extend the Anonymity Order to the appeal proceedings. The Claimant opposed the applications of the Respondent and C but submitted that she was entitled to anonymity. The Respondent sought in addition a Restricted Reporting Order.

4. I accept that the principle of open justice indicates that parties should be named. I also accept that there is a right to privacy under article 8 of the European Convention on Human Rights. If the terms of my Judgement require me to narrate facts and circumstances that breach the privacy of a party then it is open to me to take steps to prevent a breach of that party's Convention right. In this case the Respondent is an NHS Trust. I do not consider that the Respondent has locus in this case to apply for an Anonymity Order. It would appear to me that the Claimant and C are the persons whose rights are at stake. Thus although I have read the Respondent's written submission I consider that it is for the Claimant and C to vindicate their

respective rights to privacy. The applications made by the Claimant and C are based on the factual circumstances more fully narrated in the Judgement below.

5. I am not prepared to accept that the Claimant should be anonymised, and the Respondent and C identified. The Claimant and C engaged in an intimate sexual relationship while work colleagues. The relationship was as far as I can determine from the previous judgments in this case and the emails supplied by the Claimant, a consensual one. But I also notice that the Claimant alleged that she had been sexually assaulted by C. I am unclear as to the precise basis of her complaint. I am advised that this was investigated by the Police and that no prosecution took place. I have no information as to the basis for that decision. In these circumstances I consider I should be cautious about identifying the Claimant. On the other hand I note that the matter has to some extent been aired publicly. The Claimant was prosecuted for an alleged assault on SS, a witness in this claim (see paragraph 8). She was acquitted. I assume however that these proceedings took place in public. Where a matter has already been the subject of publicity a subsequent application for anonymity will usually have less force. I am persuaded however on balance that given the sexual aspect to the allegations made by the Claimant against C and the involvement of C's family I should anonymise the Judgement. C's wife is referred to in the judgements of the tribunals below and referred to in this Judgement. C's wife, sister and mother had no role to play in the relationship between the Claimant and C and in the dispute that has arisen between the parties. As the judgement below explains however they have become involved in the dispute. Article 8 provides protection for "family life". I can see that if the facts of the case as rehearsed in this Judgement were to lead to their identification that might be regarded as breach of their right to privacy. Although they have not made any submissions, I am satisfied that C is able to speak for the broader interests of the family of which he is part. Since there is a risk that they will be identified if the parties' names appear in the Judgement, I consider I should grant the Anonymity Order. I have decided that for the same reason a witness

in the case (SS) should also be anonymised. I consider, like the Tribunal below, that a Restricted Reporting Order is unnecessary and that an Anonymity Order is sufficient to secure the protection of the parties' right to privacy.

Introduction

6. For the sake of continuity, I have used the designations utilised by the Tribunal. The Claimant is thus designated as A and the Respondent is designated as B. I have continued to designate two witnesses referred to in the judgements of the Tribunal as C and SS although C is referred to as Dr X in EJ Hendry's judgement of 7 December 2018 and in some of the quotations from his judgement reproduced below. I have also decided to extend the order to C's wife. She is referred to by name in email correspondence referred to below. I shall designate her as D. In order to preserve continuity of terminology with the underlying judgements I will continue to refer to A as the Claimant and B as the Respondent. B is an NHS trust. In this Judgement I will have cause to refer to two prior judgements. The first as I have indicated was by EJ Hendry of 7 December 2018 and the second by EJ Hosie of 5 March 2019. When it is necessary to distinguish them I shall refer to EJ Hendry's judgement as the "First Judgement" and EJ Hosie's judgement as the "Second Judgement". This appeal is against the Second Judgement. Where I refer to paragraph numbers in these judgements I hope it will be obvious from the context which of the two judgements I have in mind.

Background

7. The Claimant is Indian and an observant Hindu. She is a doctor and was employed by the Respondent for 8 years. While in the Respondent's employment, she had a sexual relationship with a married, senior, male colleague (C). EJ Hendry in the First Judgement describes C's conduct towards the Claimant as having abusive and controlling aspects

(paragraph 10). Having read some of the emails sent by C to the Claimant (tab1 in Joint Bundle) I can understand why he reached this conclusion. The Claimant states that she regarded C as a father figure and that she regarded herself as married to C. Her belief that she is married to C is based on her religious beliefs about marriage. Thus although they had not gone through a ceremony of marriage and although C was married to another woman, the Claimant throughout the proceedings has referred to C as her husband and regards herself as his wife. According to her perspective on marriage this means that she must treat C "as a god" and obey his wishes. In considering her submissions I have assumed that her religious beliefs are genuine.

8. After a period of time, the Claimant came to suspect that C had entered into another sexual relationship with SS, a junior doctor at the hospital and was carrying on that relationship on hospital premises. This caused certain difficulties. It was alleged that the Claimant assaulted SS. In course of time matters were referred to the procurator fiscal and the Claimant was prosecuted. She was acquitted. C was investigated by the Police in respect of an allegation of rape against her. No proceedings were taken. Disciplinary proceedings were undertaken by B against the Claimant. The Claimant was dismissed on 17 August 2016 by the Respondent.

9. In December 2016 the Claimant raised proceedings against the Respondent seeking a finding that she had been unfairly dismissed from her post as a Speciality Doctor and that she had also been the victim of sex and religious discrimination. The claim has proceeded slowly (paragraph 4). A brief perusal of the history of the claim suggests that the fraught relationship between the parties and C has impeded progress. It would appear that the Claimant has engaged in prolific correspondence about a variety of matters with the tribunal and the Respondent. Dealing with the correspondence no doubt took time. The Claimant has sought to raise a number of causes of action lying outside the jurisdiction of the tribunal including allegations of sexual assault, fraud and manslaughter.

10. There have been two strike out hearings. Both were enrolled by the Respondent. The first heard by EJ Hendry was unsuccessful. The second, heard by EJ Hosie, was successful. This appeal is against the successful strike out. The principal basis of both motions was the Claimant's communications. For convenience I reproduce below those with which this appeal was principally concerned. The first group were before EJ Hendry when he refused strike out. These appear in the First Judgement at paragraphs 12-33.

11. The second group were before EJ Hosie.

The Offending Communications (part 1)

12. On 18 September 2017 the Claimant emailed SS -

> **I am the legal representative investigating this case and the court will be investigating you in the court in Public. The following documents must be submitted by 9 a.m. on 19th September 2017 to my email address …**
>
> **9. Where were you based since 2014. where is your office which had been given to you.**
>
> **Did you continue to stay in my Dr X's research office on the first floor in the (B) where you have sex with him almost daily both in the office and….**
>
> **15. Does the SENATOR team members know you had sex …. during all the …. meetings and in (B) .**
>
> **31. STATEMENT From You Regarding your evidence on 3rd May 2017 in (B) process where you said I had a relationship with my man …. is DIRTY ILLICIT and you continued to scream and shout saying that my Dr S has nothing to do with me. WHAT DO YOU MEAN BY ILLICIT AND DIRTY describe in details of that what do you mean by that. YOU HAVE BULLIED, HARASSED, ABUSED, THREATENED, STALKED, ASSAULTED ME AND MADE DEFAMATORY REMARKS.**

On 25 September 2018 the Claimant emailed SS, C and others as follows -

> **This is my REMINDER 364.**
>
> **I had written to you last year in September 2017 and you still did not send me any information and you continuing to have sex with my husband [C] ……. in the offices of (B) and in various hotels around the world All that is the Public money, the money for your salary, stipend, hotel rooms, your food, your travel, your sleeping in various hotels with various men around UK and outside of UK, the millions of pounds spent on Criminal court. This is not your inherited family property, it is taxpayers money. Did you take permission from Taxpayers before you used them,**

> **you are looting Public money in the name of Research and misusing the funds. Do REPLY ASAP. Do you understand or not? Normally shameless people and a fraudster like you should keep their head down and mouth shut not shout and scream in Public, it will only cause harm to you as you will be exposing yourself in Public of all your crimes that you had committed since 2014. You are definitely not clever and you are totally dumb and lack insight.**

On the 13 February 2018 the Claimant emailed Mr Gunn, the Respondent's solicitor. Her email was copied to the tribunal and ran as follows –

> **The President Shona Simon did not react at all until now when I had been telling the court since more than a year about attempted manslaughter of the 44 patients, killing of patients by Dr C, Dr CB and JN, forgery and patient abuse by AM, abuse by this student SS towards me and this student having sex in the offices of (B) but Shona Simon tried to cover up everything including covering up of Judge Gall…**
>
> **[It is] very clear that Daniel Gunn has a family member who is senior in the Legal profession and people are trying hard to cover up his crimes including sexual harassment. Is there no Code of Conduct in the employment law for the lawyers who are engaged in crimes and sexual harassment when the case is the court and do the Judges not have any responsibility to deal with such criminals and sexual harassers.**

On the 11 September 2018 the Claimant emailed Mr Gunn as follows -

> **You all had repeatedly sexually harassed me, humiliated intimated Bullied threatened and forced me to tell you all the dates of loosing Virginity what does it mean to loose a sort of Virginity and what does it mean to be seen naked by my husband (C), forcing me to tell when I had sex with my husband and tell you all my bedroom details with my husband (C). This Sexual harassment and abuse was during the internal process in (B) which was authorised by Dr F You and all the management had said throughout that you all had followed Employment Laws and Policies in (B) which allowed you to sexually harass abuse and intimidate and threaten me….. I want the reply this evening. I will make sure the Prime Minister and the Westminster Government conducts a formal investigation.**

On 2 November 2018 the Claimant emailed Mr Gunn as follows –

> **To the SEXUAL HARASSER AND BULLY AND STALKER,**
>
> **I am writing to you here as a victim of abuse by you. You are involved in sexually harassing me on multiple occasions both directly and indirectly including Bullying, harassment, Threatening (including in this e-mail), Stalking, Abuse, treating Indians and Hindus as slaves and treating Indians in the degrading manner. You are involved in Torture and violent behaviour towards me including Breach and assault of my human rights. You have encouraged and supported and said all these crimes by more than 80 members involved is legal and lawful. STOP WRITING RUBBISH TO ME YOU SEXUAL ABUSER. STOP WRITING DISGUSTING E-MAILS TO ME YOU ABUSE AND SEXUAL HARASSER. You DISGUSTING PERSON STOP WRITING APPALLING AND DISGUSTING INFORMATION TO ME. DO YOU UNDERSTAND OR DO YOU WANT ME TO START THE MARCHING AND PROTESTS IMMEDIATELY IN PUBLIC IN FRONT OF YOUR HOUSE, YOU SEXUAL HARRASSER AND BULLY AND SHAMELESS MAN.**

The First Strike Out Motion

13. After the second Preliminary Hearing on 18 October 2018 EJ Gall issued a Note in which he referred to the Claimant's emails (paragraphs 21 and 22). He stated that the language she had used was "not appropriate". The tribunal however did not seek to place any formal restraints on the Claimant's email correspondence.

14. On 14 November 2018 the Respondent decided to take action and lodged a strike out motion. EJ Hendry decided he should not strike out the claim. His decision is contained in the First Judgement. In introducing his reasons, he had this to say -

> **I consider that it has been clearly demonstrated that there has been scandalous, vexatious and unreasonable conduct on the part of the claimant. The content of her communications, containing personal slurs, threats and intemperate language is ample evidence of this. The issues that remain are whether a fair trial is possible and whether strike out in the whole circumstances is a justified and proportionate response to her behaviour. (paragraph 46)**

He acknowledged that in assessing the Claimant's conduct there were mitigating features that should be considered.

> **The claimant was clearly very upset at the events surrounding her dismissal and the way in which the investigation developed. She was apparently put on Sick Leave and the respondents suggested that her relationship was a delusion. She was apparently questioned about intimate details of that relationship. The failure of Dr X (to whom she regarded herself as married) to acknowledge their sexual relationship or to continue it was devastating to her. She clearly perceives that there has been a number of injustices perpetrated against her by the respondents, a failure by them to recognise this background, acknowledge her religious views and their impact on the relationship and by ultimately dismissing her. It seems that for some time her protestations that there was a relationship were disbelieved until she provided email evidence for it. (paragraph 47)**

15. EJ Hendry acknowledges that as an observant Hindu the Claimant found it difficult to discuss a relationship which was private. He accepted that it violated her principles of modesty (paragraph 48). On the other hand, he also considered that the Claimant was "very bound up in the rights and wrongs of the events surrounding her dismissal" (paragraph 50) and took little account of how her conduct was affecting others.

16. EJ Hendry acknowledged that he must be slow to strike out a claim where there was an allegation of race discrimination (paragraph 49). He accepted that the Claimant had intimidated

SS but since she was not an essential witness, he did not consider that a great deal of weight could be attached to that factor. He noted that despite the intimidation alleged SS had provided a witness statement (paragraph 52). He noted that Mr Gunn, the Respondent's solicitor, had been on the receiving end of a great deal of abuse. He took the unusual step of taking evidence from him at the Preliminary Hearing. He summarised its effect as follows.

> **I also fully accept that Mr Gunn despite, having as he put it, a thick skin has found the way in which he has been regularly described by the claimant in correspondence as very wearisome and upsetting and that he had genuine concerns that she might act on her threat to protest outside his house. A concern that I have is that solicitors in his position are in a particularly difficult position when defending themselves against such allegations given that their overriding duty is to their client's interests. (paragraph 51)**

17. I consider it is important to note that EJ Hendry accepted that the Claimant's communications with Mr Gunn were upsetting and that he was concerned that the Claimant would visit his home. He also noted that Mr Gunn's professional responsibility to defend his client's interests meant that his ability to defend himself against the Claimant's allegations was restricted. Ultimately however EJ Hendry was satisfied that he should not strike out the claim. He concluded –

> **Looking at all the facts before me and focusing on whether a fair trial is possible I am *not quite convinced* that it is not but I agree that it may be in considerable jeopardy if the claimant's behaviour continues. (*my italics* - paragraph 53).**
>
> **The answer *if there is one* I believe lies in more robust case management. It must be clear to the claimant that no further behaviour of this sort will be tolerated. At an earlier stage it perhaps should have been made clear to the claimant that her approach was completely wrong and that the Tribunal expects parties to act with courtesy, not to use inflammatory language and to confine themselves to the issues a Tribunal has the power to deal with namely unfair dismissal and discrimination and not wild allegations of medical negligence and terrorism. This could have been buttressed by formal orders made either at the Tribunal's initiative or at the behest of the respondents. If there had then been serious lapses in required standards then the Tribunal could be asked to strike out the proceedings and the claimant would have had ample warning. I therefore, with some misgivings, refuse the strike out request. (*my italics* - paragraph 54)**

18. It is evident from paragraph 54 that he thought the Tribunal should have taken a firmer line with the Claimant at an earlier stage. There is a degree of self-criticism in this part of the judgement as EJ Hendry had been responsible for some of the previous preliminary hearings. On balance he considered that the Claimant should be given a chance to respond to "robust case

management". This took the form of three orders (see below) designed to curtail the Claimant's behaviour. He concluded -

> **I would record that the claimant's behaviour in this case has been quite extraordinary and I have experienced nothing like this in my lengthy experience as an Employment Judge. If I had the power to strike out the proceedings on the basis that the claimant's behaviour was an affront to justice then I would have seriously considered that this would have been the sort of unusual case where such a power might be properly exercised. I do not and am bound by the Rules I have discussed and I must act accordingly. (paragraph 56)**

The Orders

19. EJ Hendry made the following orders -

> **(One) The claimant shall immediately desist from repeating the allegations previously made by her in email correspondence against SS, Dr X and Mr Gunn, whether in future correspondence or otherwise, except where it is necessary and relevant to advance the issues in her claims for unfair dismissal and discrimination and she had beforehand obtained the express permission of the Tribunal to do so.**
>
> **(Two) The claimant shall correspond professionally and politely with Mr Gunn or any other representative of the respondents.**
>
> **(Three) The claimant shall not except with the sanction of the Tribunal contact or attempt to contact any witnesses until a Witness List is agreed.**

The Second Strike Out Motion

20. The Respondent lodged a second strike out motion. It was precipitated by the following emails.

Offending Communications (part 2)

21. The Claimant emailed C on 12 January 2019 as follows -

> **How are you. I just wanted to let you know that the Preliminary hearing against (B) is scheduled for 12 February 2019 at 10am in the Employment Tribunal, Aberdeen. The Judge had advised that the witnesses could attend the hearing.**
>
> **The final trial dates which were set earlier will not be the same as before as there had been some delay due to the delaying tactics by (B) management. On 14 November 2018 there was a Preliminary hearing to set the dates for final trial but the Counsel representing (B) made an application to struck off (sic) my case from the court and made arguments that my case must**

be struck off from the court. (B) Counsel had been Unsuccessful and the case is going ahead. Not only that the Judge had decided that the Preliminary hearing must be held in Public against (B) request for private hearings.

I will write to you as soon as I want documents from you. The Judge had advised me that all the documents that I wish to produce in the form of disclosure documents must be made in few copies and submit (sic) to the Tribunal on the day of the Preliminary hearing. I will write to you the list of all the documents/e-mails which I would need from you for the Preliminary hearing to allow a fair legal trial.

Good night C

Kind Regards

A.

22. A further email followed the next day, 13 January 2019.

I have decided to add D (C's wife) as a witness in this case. Please let her know. I request to please not to write on her behalf and would appreciate if she writes to me directly as this is a Legal trial. I will let you know if I will add your sister and your mother as well as you had referred all of them throughout the process (B) .

23. Further emails were sent to the Tribunal. The excerpts below are drawn from the Second Judgement. They were copied to the Respondent and Mr Gunn.

Email of 28 January 2019

This is Bullying, harassment, Intimidation and coercive behaviour by Mr Daniel Gunn, Counsel Stobart and Respondents. The Respondent's legal representatives had been writing repeated correspondence to me for no reason and had been forcing me to take their orders and instructions and are forcing me to follow their orders for to do their work which Mr Gunn and counsel and the Respondent think are correct. This had happened in twice (sic) on Friday 25 January 2019. This is an unwanted behavior of Mr Gunn, Counsel Stobart and the Respondent which amounts to Bullying, harassment, Intimidation and Coercive behaviour, this is belittling me.

Last Friday Mr Gunn wrote an e-mail to the Tribunal administrative staff and was instructing me through them to do his work and take instructions from him and from the Respondent and do their work and follow their instructions. He did the same again in the evening of Friday despite writing a response.

This bullying, belittling, humiliation, intimidation, coercive behaviour had been going on since 2 weeks. Please see their e-mails where they are making fun of me and belittling and humiliating me.

I already wrote a formal response to the Judge in response to the request. I do not wish to receive any unwanted e-mails from Mr Gunn, Counsel and Respondent in relation to matters which are not my business.

Email of 30 January 2019

> **This is a formal complaint against Counsel Alice Stobart and Mr Daniel Gunn for Bullying, harassment, Intimidation, Coercive behaviour and giving me instructions to do their work, writing unwanted e-mails without no reason to me instead of writing to the appropriate staff, making false accusations against me regarding the Judgment document and when the complete fault is of the Tribunal staff and repeatedly harassing me to do things and their jobs and forcing me to take their instructions and do their jobs.**
>
> **This is an application against the Respondent seeking damages for Defamation.**

Email of 8 February 2019 -

> **My husband C is involved in committing Sexual offences towards me which B and their legal representatives who conducted the process had repeatedly said both in writing and in the audio recordings that it is not B's business. Mr Gunn had said to the Tribunal that the audio recording evidence had been destroyed. Mr Gunn himself and the management are involved in Sexual harassment.**

24. As these emails show the Claimants allegations of bullying, harassment etc. were extended by the Claimant to include Ms Stobart, counsel for the Respondent.

25. EJ Hosie responded on behalf of the Tribunal to the last of these emails on the same day (8 February 2019) as follows -

> **The implications of this continuing course of conduct, will require to be considered by the Tribunal. Meantime, EJ Hosie directs you to desist from making such unfounded allegations. You also complain of delay, but in very large part that is due to the volume of your correspondence, its often accusatory and confrontational nature and the multitude of complaints you have levelled, which in EJ Hosie's experience is unprecedented. As previously advised, you should reflect carefully on the manner in which you are conducting this case. (paragraph 83)**

26. Shortly thereafter the Respondent lodged its second strike out motion.

The Claimant's Knowledge of the Orders

27. It was agreed between the parties that the Claimant did not receive a copy of the First Judgement until 23 January 2019. Although it was issued on 7 December and entered on the register on 10 December 2019 the Tribunal sent the judgement to the Claimant's former solicitors and not to the Claimant herself. In the event she did not receive a copy of the First

Judgement until 23 January 2019. I note that she appears to have known that the strike out motion had been refused before she received the First Judgement (see the terms of her email of 12 January 2019). How that came to be is not explained. Whatever the explanation I have proceeded however on the basis that she did not receive the First Judgement until 23 January 2019 and could not therefore have been aware of its terms and orders before then.

Strike Out

28. The Employment Tribunals (Rules of Procedure) 2013 provide as follows -

> **37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> **(a) ….**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **(c) for non-compliance with any of these Rules or with an order of the Tribunal.**
>
> **(d)…**
>
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **The Respondents relied on grounds (b), (c) and (e) and submitted that the manner in which the Claimant had conducted proceedings was scandalous, unreasonable and vexatious, that she had breached a tribunal order and that the tribunal should be satisfied that it was no longer possible to have a fair trial. They moved of new to strike out the claim.**

The Law

29. The parties referred me to a number of authorities. These are set out below. The parties were as far as I could detect in agreement that the relevant law was set out in the cases.

30. In **Anyanwu v South Bank Students Union** 2001 I.C.R. 391; [2001] I.R.L.R. 305 Lord Steyn said -

> **Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. (p 399E-F)**

This indicates that a tribunal should be slow to strike out a claim, particularly where there is an allegation of race discrimination. Lord Hope also emphasised that where it was accepted that an arguable case had been presented, strike out should be avoided if at all possible (p. 404F-G).

31. In **Bennett v Southwark LBC** 2002 I.C.R. 881; [2002] I.R.L.R. 407 Sedley, LJ emphasised that if a tribunal was asked to strike out a claim it must seek to determine whether such a response was proportionate to the wrong done. He put the point as follows

> **…proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the description scandalous, frivolous or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution…'' (p. 892C).**

In that case a lay representative had complained that the tribunal was biased against him because he was not an "Oxford educated white barrister with a plummy voice" (p. 884G). The Court of Appeal considered whether the conduct in question was "scandalous" (p. 890E) and whether striking out was a proportionate response. The Court of Appeal considered that the tribunal had over reacted by proceeding to strike out and that the offending party should have been offered an opportunity to retract his allegation.

32. In **Blockbuster Entertainment Ltd v James** 2006 I.R.L.R. 630 Sedley LJ dealt with a case where the Claimant despite being ordered to produce certain documents before the hearing, chose to produce them on the morning of the full hearing. The tribunal struck out his claim. Sedley, LJ held that since the hearing had been set down for six days and the tribunal could

A have used some of that time to examine these new documents, strike out was a disproportionate response to the Claimant's failure.

> **The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact…. that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences. (paragraph 21)**

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33. I was also referred to **Force One Utilities v Hatfield** [2009] I.R.L.R. 45. In that case it was alleged that one of the witnesses had physically threatened the Claimant and had blocked his car from exiting the tribunal car park. Tribunal members had witnessed some of the offending behaviour. Evidence was led to show that the Claimant had been frightened by the experience and was anxious about proceeding with his claim. The tribunal struck out the claim. The E.A.T. (per Elias P.) held that it was entitled to do so and observed that the tribunal was in the best position to judge whether in light of the witness intimidation a fair trial was possible. It would only disturb the tribunal's finding if it could be said to be perverse (pp 46-47).

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34. It was submitted by the Claimant that securing a fair trial was the key consideration. The tribunal should only strike out if it was necessary in the interests of justice and the tribunal was satisfied that there was no alternative.

G

35. I am grateful to the parties for the skill and economy with which they presented their submissions. I intend no disrespect to Mr Matovu, who appeared for the Claimant, or Ms Stobart who appeared for the Respondent by omitting to set out their respective submissions. Their respective arguments appear where necessary in the discussion below.

H

A

Discussion

36. EJ Hosie's reasons for striking out were, broadly speaking, that the Claimant had ignored warnings about her conduct, that she had intimidated C and other parties and that she had breached orders of the Tribunal. I discuss these points in order below.

B

Ignoring Warnings.

C

37. In this part of the Judgement I will confine myself to the emails of 12 and 13 January 2019 and whether they indicate that the Claimant ignored EJ Hendry's warnings and orders. As I have shown above EJ Hendry's judgement condemns various aspects of the Claimant's conduct. Although EJ Hendry does not state in terms that the claim would be struck out if the Claimant's conduct was repeated, he states that "no further behaviour of this sort will be tolerated" (paragraph 54). The combination of EJ Hendry's dismay at the Claimant's "extraordinary" behaviour (paragraph 56) and the stringency of his warning mean in my opinion that if the Claimant must be taken to have appreciated that if she persisted in her previous course of action, strike out was likely to follow.

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38. The orders pronounced by EJ Hendry were designed to moderate the Claimant's behaviour. He indicated that if the Claimant wished to allege that she had been bullied or harassed by C, SS or Mr Gunn, the Respondent's legal representative, the Claimant should seek the permission of the tribunal and the tribunal would only permit repetition if it was relevant to her claim of unfair dismissal and discrimination (order 1). He ordered the Claimant to keep her correspondence with Mr Gunn professional and polite (order 2). He ordered the Claimant not to contact any witnesses without the prior approval of the tribunal (order 3).

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39. Mr Matovu pointed out however that even if all that was true, until such time as the Claimant had received the First Judgement and had an opportunity to read the warning and orders, she could not be held in breach of them. She could only obey a warning or orders of which she had knowledge.

40. EJ Hosie knew that the Claimant did not receive the First Judgement until 23 January 2019. That being so I find it hard to understand why he appears to have considered that the emails she sent on 12 and 13 January 2019 were sent in defiance of EJ Hendry's warnings. This appears to be his reasoning in paragraph 77

> **In my view, the correspondence clearly demonstrates that the claimant has intimidated C, an essential witness for the respondent, and significantly there is no indication whatsoever that she has taken heed of EJ Hendry's warnings and that she will desist or moderate her conduct in any way.**

41. The "correspondence" to which EJ Hosie refers must be the emails of 12 and 13 January 2019 as these are the communications which it is said intimidated C. The quotation above appears to proceed on the basis that in sending the emails of 12 and 13 January 2019 the Claimant demonstrated that she had not taken heed of EJ Hendry's warnings. Ms Stobart submitted that since EJ Hosie plainly knew that the Claimant did not receive the First Judgement until 23 January 2019, he must be taken to have meant warnings given prior to those that appear in the First Judgement. She submitted that he was referring to informal warnings given to the Claimant by the judges who had conducted previous hearings. I do not consider that this is the natural reading of the judgement. No warning other than that referred to in the First Judgement is rehearsed by EJ Hosie. Although it may well be that EJ Hosie had read the case file and the Tribunal's correspondence with the Claimant, there is no specific reference to any warning other than that which appears in the First Judgement. In any event I consider that if strike out is to be based on a party's failure to heed warnings, it is desirable that the warnings should be in clear and unmistakeable terms. It is desirable that a party should appreciate the potential

consequences of his or her actions. Since formal warnings only appear in the First Judgement I consider that EJ Hosie would not have been entitled to rely on other warnings. Since the emails of 12 and 13 January 2019 were written before she received the First Judgement it could not be said that the Claimant had ignored EJ Hendry's warnings. To ignore the warnings she would have had to have received and read the First Judgement.

In paragraph 80 he stated -

> **Nor did the claimant need to be aware of the Orders to know that she had to desist. EJ Hendry said this at Para 54 in the Reasons – "it must be clear to the claimant that no further behaviour of this sort will be tolerated." (paragraph 80).**

42. The opening sentence of this quotation might suggest that EJ Hosie had decided that the Claimant's conduct was so egregious that she did not need to be aware of the orders or to have read the judgement, to be aware that what she was doing was wrong and that in such an extreme situation the claim could be struck out as "scandalous, unreasonable or vexatious". I do not consider however that is what he meant. In the second sentence EJ Hosie supports his conclusion by referring to EJ Hendry's judgement. It is hard to reconcile a statement that suggests that she did not need to be aware of the orders to know she ought to desist with a reference to EJ Hendry's judgment which contains the injunction to desist. It may be that EJ Hosie interpreted EJ Hendry's statement to mean that the Claimant knew that intimidatory behaviour was unacceptable. Thus when EJ Hendry said "it must be clear" he meant that the Claimant already knew what she was doing was wrong. While that is a possible interpretation of the quotation from paragraph 54 of EJ Hendry's judgement, I consider that it is more likely that EJ Hendry intended his words to have prospective effect. What he meant was "it must be (made) clear to the claimant that no further behaviour of this sort will be tolerated". Having regard to the fact that EJ Henry decided not to strike out and to give the Claimant another chance this seems to be the likely meaning.

A

43. At paragraph 73 EJ Hosie states -

> **Although the claimant was unaware of the Orders when she sent these emails, she was aware that the respondent's counsel had expressed concern about her communicating with the respondent's witnesses at the previous Preliminary Hearing and alleged that "this was designed to cause upset and intimidate".**

B

Here EJ Hosie bases his decision to strike out on the fact that the Claimant was aware that the Respondent had complained that the Claimant had contacted SS and other witnesses directly and that the communications with them had been upsetting and intimidatory. In my view however

C

the Claimant "warnings" of this sort are irrelevant. They came from the Respondent. The only warnings that carry weight in this context are the official warnings given by the Tribunal. She was not bound to defer to complaints from the Respondent that she had contacted witnesses. In

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any event I am not aware of any rule that prevents a Claimant from contacting a witness directly or that requires the witness to be contacted through the employer. As to the Respondent's submissions at a previous hearing that her communications were upsetting and intimidatory, I consider that the Claimant was entitled to rely on the Tribunal's decision not the Respondent's

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submissions. An order was pronounced in due course preventing her from contacting witness without the prior approval of the tribunal. As EJ Hendry's decision makes clear this was based in part on his concern about the upsetting and intimidatory nature of the Claimant's

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communications. In that connection however the Claimant was obliged to moderate her behaviour because of EJ Hendry's judgement not because of submissions made by the Respondent.

G

44. I consider that EJ Hosie should not have regarded the emails of 12 and 13 January 2019 as contraventions of rule 37(1)(b) or (e). I do not think he could do so before 23 January 2019. I accept that his decision in this connection is in error.

H

Intimidation.

45. Rule 37 does not state that intimidation of a witness is a ground for strike out. But it is an obvious example of "scandalous, unreasonable or vexatious" conduct in that it tends to subvert the process of justice and has the potential to impair the fairness of the trial. The Claimant submitted however that the emails of 12 and 13 January 2019 could not be said to be intimidatory. EJ Hosie's reasoning in connection with the question of intimidation is as follows –

> **She was aware that C is an essential witness for the respondent in this case. His wife is not a witness and cannot give relevant evidence. Despite the letter being couched in the face of it in polite terms, I accepted the submission of the respondent's counsel that the letter was designed to be intimidatory. (paragraph 73; see also paragraph 74)**

46. EJ Hosie indicates that he considered the intimidatory material lay in a "letter". Since the email of 12 January 2019 does not appear to contain any features that might be regarded as intimidatory, I take it that the letter EJ Hosie is referring to is the email of 13 January 2019. In support of his conclusion that the letter was "designed to be intimidatory" EJ Hosie refers to the fact that the Claimant was aware that C was an essential witness. I take it that the significance of this is that in deciding whether witness intimidation should lead to strike out the Tribunal should have regard to the possible consequences of intimidation. Since C was an essential witness, it could be said that the intimidation of C was a material consideration. As EJ Hosie then goes on to point out, D was not able to give evidence relevant to the claim. EJ Hosie evidently considered that the email contained an implication that the Claimant intended to ask D questions about her husband's affair and his relationship with SS. EJ Hosie evidently considered that the Claimant could have no motive to lead evidence from D or C's family, other than to embarrass and humiliate C and his family.

47. I agree with EJ Hosie that the Claimant's intimidatory purpose cannot be found in the wording of the emails. Both are polite. I also consider that EJ Hosie is correct in discerning a malign purpose in her wish to call D and C's family. EJ Hosie notices at paragraph 75 that after

receiving the emails of 12 and 13 January 2019 C instructed solicitors. They appeared at the next Preliminary Hearing and moved to have the proceedings anonymised and sought a restricted reporting order. In addition, the Respondent advised EJ Hosie that C was no longer willing to give evidence on behalf of the Respondent (paragraph 76). EJ Hosie obviously considered that this demonstrated that the emails had intimidated C and that this was "scandalous, unreasonable or vexatious" (37(1)(b)) or conduct which rendered a fair hearing impossible (37(1)(e)).

48. Mr Matovu did not seek to suggest that C's family could offer any evidence relevant to the case. In seeking to explain why the Claimant had sent the emails of 12 and 13 January 2019 he submitted that the Claimant thought she was entitled to contact witnesses. In this connection he took me through correspondence the Tribunal sent to the Claimant. It showed that the tribunal wrote to the Claimant prior to 23 January 2019 advising that she was entitled to take any witnesses she thought appropriate to the next Preliminary Hearing. While that may be so, it does not explain why the Claimant wanted to call C's wife as a witness, and why she was considering calling his mother and sister.

49. Ms Stobart while adhering to her submission that the emails were intimidatory also submitted that it was legitimate to infer from the emails that the Claimant wanted to destroy C's marriage to D and that the Claimant wished to do so by questioning these witnesses and putting her complaints about C's behaviour to them. I was advised by the Respondent that the Claimant had actually gone so far as to travel overseas to visit C's mother and sister in their home. In order to preserve the anonymity of C's family I do not intend to say where this was. It is sufficient to say that it involved a flight of many hundreds of miles to a country far from Scotland. I am advised that she "doorstepped" the family. In the papers lodged in connection with the motion to anonymise this judgement it is said that this has occurred more than once.

Whatever the position, it is difficult to accept Mr Matovu's suggestion that the Claimant undertook an overseas flight for an innocent purpose. Such behaviour indicates hostility to C and his family.

50. It would appear to me therefore that the Claimant was seeking to use the tribunal process to pursue issues that were extraneous to the claim. It is possible that the Claimant was seeking to use the tribunal's processes to cause embarrassment to C. It may be that she saw her claim for unfair dismissal as part of a broader grievance.

51. EJ Hosie also considered the Claimant's insistence that she was C's wife as an act of intimidation (paragraph 76). For my part I do not consider that EJ Hosie should have been so ready to treat this feature of the case as likely to imperil the fairness of the trial. Throughout the case the Claimant has held herself out as C's wife. She alleges that this emerges from her religious beliefs. The Claimant must be taken know that C did not share her perspective. In light of this knowledge her insistence on describing C as her husband in communications with the tribunal and others betrays a troubling unwillingness to accommodate perceptions at variance with her own. But without further evidence about her religion and culture I do not consider that it is possible to treat her explanation as untruthful or hold that her motive for describing herself as C's wife was to intimidate C in the sense that it was designed to prevent him giving evidence.

52. I am not however so sure that the Claimant's purpose in calling D as a witness was to intimidate C in the sense that she wished to prevent C giving evidence. It would appear to me that there are strong indications that she wished C to give evidence. Nor do I see any reason to doubt that the Claimant's wished to question C's wife and her family. Thus while I am sure the Claimant understood that her email of 13 January 2019 would have intimidated C, it is not

necessarily the case that her object was to prevent C giving evidence. It is necessary to bear in mind that the Claimant may have perceived the hearing as an opportunity to air her larger grievances.

53. I do not require however to decide whether the Tribunal's conclusion that the Claimant intended to intimidate C with a view to preventing him from giving evidence was perverse. Nor do I require to consider whether a communication that is intimidatory would justify strike out. It would appear to me that the Tribunal has erred in law in that it failed to address the question of whether strike out was necessary. The law is clear that if there is a less draconian way of securing a fair trial that way should be chosen. The Tribunal had control over who could be called as a witness. It had set out its powers in order 1. In addition, the Tribunal had power to intervene during the hearing if questions were asked that strayed beyond the realm of legitimate enquiry. In reality therefore, the email of 13 January 2019 could achieve nothing unless the Tribunal was willing to allow the Claimant to call D. Thus, while I accept that C may well have found the emails disturbing and told the Respondent he was no longer willing to give evidence, that could not be the end of the matter. The Respondent was in a position to reassure C that his wife and family could not be called without the Tribunal's agreement. The Tribunal had already made it clear they had no relevant evidence to give. That being so there was every indication that the email of 13 January 2019 would not give rise to the concern that gripped C. In these circumstances I do not consider that the Respondent can show that the email of 13 January 2019 was "scandalous, unreasonable or vexatious". If it did have a malign aspect to it, I consider that the Tribunal was in a position to prevent the Claimant misusing its procedures. There was no imminent risk to the fairness of the hearing.

54. I consider that it is necessary to bear in mind the possibility that C's unwillingness to participate further may also have been influenced by the whole circumstances of the case. In

particular he may have been concerned that his affair with the Claimant and his alleged affair with SS would be the subject of evidence at the Tribunal. I have no doubt that this would be unpleasant to him. But given that the Respondent was in a position to reassure him that the Tribunal had the power to refuse to allow the Claimant to lead irrelevant witnesses and had the power to prevent the Claimant asking him questions other than those relevant to the case. In those circumstances I consider that he was in a position to give evidence and indeed could be required to give evidence.

55. I therefore accept that EJ Hosie was in error of law in considering that the emails of 12 and 13 January 2019 were intimidatory and in breach of rule 37(1)(b) and (e).

Breach of Orders

56. EJ Hosie also considered that the case should be struck out under rule 37(1)(c) which provides that a claim may be struck out when a party fails to comply with a tribunal order. EJ Hosie considers this issue between paragraphs 90-109 of the Second Judgement. He refers to a number of emails. These are set out above and include the Claimant's emails of 28 January 2019 timed at 09:52 and 15:12, 30 January and 8 February 2019. These post-date 23 January 2019, the date the Claimant received the First Judgement. That being so the Claimant is not in a position to claim ignorance of EJ Hendry's orders.

57. In her email of 28 January 2019, the Claimant complains to the Tribunal that Mr Gunn had been bullying, harassing, intimidating and coercing her. Since the Claimant had previously alleged that Mr Gunn had engaged in bullying, harassment, intimidation and coercive behaviour this email repeated allegations which the Tribunal had forbidden by Order 1. While the language used by the Claimant is less vituperative, the basic allegations remain the same. Thus the Claimant had stated in her email of 2 November 2018, "You are involved in sexually

harassing me on multiple occasions both directly and indirectly including Bullying, harassment, Threatening (including in this e-mail), Stalking, Abuse…". In the email of 28 January 2019, she stated "This is Bullying, harassment, Intimidation and coercive behaviour by Mr Daniel Gunn, Counsel Stobart and Respondents". While the wording of the emails is not identical and while other issues are raised in the email of 28 January 2019, the Claimant continues to allege that Mr Gunn is guilty of bullying and harassment.

58. Mr Matovu did not seek to suggest that the Claimant was justified in her criticisms of Mr Gunn's conduct. Nor did he seek to suggest that the communication was "necessary and relevant" to her case, as provided by order 1 or that she had been authorised by the tribunal to make the allegations. I consider that the email is in breach of order 1.

59. I also consider that the email is in breach of order 2. The order requires correspondence with Mr Gunn to be professional and polite. This order overlaps with order 1. In my opinion where allegations of serious misconduct are made which it is acknowledged are unjustified it is difficult to see how such an allegation could be called polite or professional. I accept that order 2 is designed to focus on the way in which the Claimant communicated as opposed to content of her communications. But there is no sharp distinction between the content of a communication and the manner of a communication. A polite and professional communication does not contain allegations which the Claimant knew (or ought to have known) were false. In my opinion the series of assertions made about Mr Gunn are in breach of order 2.

60. Mr Matovu suggested that since the email was sent to the Tribunal and copied to Mr Gunn it could not be correspondence "with" Mr Gunn and thus lay beyond the scope of order 2. In interpreting the order, it is proper in my opinion to take account of its purpose. The purpose of orders 1 and 2 was in part to protect the Respondent's legal representative from abusive

communications. The Tribunal evidently considered that abusive communications were capable of impinging on the fairness of the Tribunal's process and the aim of securing a fair trial. I have no difficulty in accepting that communications that undermined or had the potential to undermine Mr Gunn's ability to represent his client would be in breach of the orders. If order 2 was interpreted to exclude emails copied to Mr Gunn such a purpose would be subverted. I accept that it would be reasonable having regard to the purpose of the orders to interpret them as preventing emails that were copied to Mr Gunn. In my view an email copied to Mr Gunn is correspondence "with" him even though he is not its primary recipient. While copy emails are often "for information" and may have no direct bearing on their recipient, these had a direct bearing on Mr Gunn and his conduct of the case. As the Claimant knew, Mr Gunn had given evidence about the impact of her previous correspondence at a Preliminary Hearing before EJ Hendry. I acknowledge that phlegmatism is a desirable attribute in both counsel and solicitors. I accept that criticism and to an extent abuse may be an occupational hazard when dealing with party litigants. But as EJ Hendry acknowledged the Claimant's conduct in this case was extreme. Order 2 was designed to provide Mr Gunn with protection against further allegations so that the Tribunal could be assured he would be able to provide his services without the burden of dealing with personal attacks on him by the Claimant. I do not consider that EJ Hendry was simply trying to restore civility to proceedings. EJ Hendry made it clear that the Claimant's conduct represented a challenge to the tribunal process itself. I accept that communications like these were likely to distract Mr Gunn from the performance of his duties. I am satisfied that the order was sufficiently connected to the objective of a fair trial and satisfied that the Claimant was in breach of the order. I am further satisfied that the breach merits strike out and that EJ Hosie was not in error of law.

61. EJ Hosie also records that in an email of 29 January 2019 to the Tribunal about C's application for anonymity the Claimant repeated her allegations that the Respondent had been

guilty of "manslaughter" and "encouraged and supported sexual misconducts of C and his student SS" (paragraph 93). She alleged that the Respondent and C's solicitor were colluding.

62. The email of 30 January 2019 repeats allegations of bullying, harassment, intimidation and coercive behaviour contrary to order 1. The email of 8 February alleges that Mr Gunn and the Respondent's management "are involved in sexual harassment". It was copied to Mr Gunn.

63. EJ Hosie concluded as follows

> **The terms of the Orders issued by EJ Hendry are in clear, unambiguous terms. Not only that, the Reasons could not have been clearer in warning the claimant that her behaviour was wholly unacceptable and, "that no further behaviour of this sort will be tolerated." Despite this, the claimant has not desisted or even moderated her conduct as she was ordered to do. Significantly, there is no indication whatsoever that she would do so in the future should I allow the claim to proceed. In my view, what EJ Hendry said in the Reasons and the Orders were an attempt at, "robust case management" but, regrettably it had no effect. (paragraph 104)**
>
> **The claimant could not have been left in any doubt about what she was being ordered to do, and that she was being warned to moderate her future conduct. She chose to ignore these warnings. She did not, "desist from repeating the allegations previously made by her in e-mail correspondence". She repeated the allegations against C, Mr Gunn and SS and also made further allegations of discrimination against the Tribunal staff. (Paragraph 105)**

64. I respectfully agree with EJ Hosie's conclusion that the Claimant has failed to comply with orders 1 and 2. Having regard to these emails both individually and collectively I agree with EJ Hosie that they show that the Claimant was either unable or unwilling to comply with the Tribunal's orders.

65. The wording of EJ Hosie's judgement indicates that he considered that breach of rule 37(1)(c) was a "also" a ground of dismissal, that is a separate and independent ground of strike out, distinct from those provided in rule 37(1)(b) and (e) I agree with this conclusion. The breach of rule 37(1)(c) was sufficiently serious to provide a basis for strike out.

66. I consider that the Tribunal having regard to the Claimant's conduct could have no confidence that she would act with appropriate restraint in further correspondence with parties

or with the Tribunal or in her conduct at any hearing of evidence. Mr Matovu conducted the appeal on the Claimant's behalf with appropriate restraint. But there was no assurance that he would continue to act for the Claimant nor that she would control her email communications in future.

67. Ms Stobart drew my attention to a typographical error in paragraph 108. EJ Henry states that "the claim is also struck out in terms of Rule 37(1)(e) for non-compliance with orders of the tribunal." It is clear that in this part of his judgement EJ Hosie was dealing with rule 37(1)(c).

Conclusion

68. An anonymisation order will be granted as follows. The Claimant shall be referred to as A, the Respondent as B, and the witnesses referred to in the Judgement as C, D and SS. I refuse the Claimant's appeal.

Postscript

69. While this appeal was under consideration (or "at avizandum" to use the terminology of Scots Law) the Claimant by email of 23 March 2021 made further complaints to the EAT against the Respondent's legal representative and C's representatives.

70. I do not consider that I have any role in determining the issues raised by the email nor do they bear on the decision of EJ Hosie which is under appeal. I notice that many of the allegations raised by the Claimant before the employment judges hitherto, appear in the complaint. The email is irrelevant to the issues argued on appeal and I have not attached any weight to it. It is not for the EAT to deal with complaints of this nature.