

Striking out (Rule 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) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

3. The respondent relies on Rule 37(1)(b)

4. The judgment of the Court of Appeal in **Bennett v. Southwark LBC [2002] ICR 881** (Bennett) provides helpful guidance including as to how I should regard the term “scandalous” It notes that scandalous in the context of the Rules (albeit a previous version of the Rules) is not the same as ‘shocking’ This is how Sedley LJ describes it (para 28)

“Without seeking to be prescriptive, the word ‘scandalous’ in its present context seems to me to embrace two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process.”

5. The judgment in Bennet also makes clear that even where the conduct of the proceedings is categorised as scandalous, a tribunal must then go on to consider whether striking out is a proportionate response. This is what is said at paragraph 29:

“But 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.”

6. In her submissions (see below) Ms Brewis referred me to various authorities. I note particularly the EAT’s decision in **Hargreaves v Evolve Housing [2023]EAT 154** (Hargreaves) and the summary of relevant cases provided at paragraphs 15 to 18. I set this out below as they are paragraphs that I have considered carefully and relied on when making my decision not to strike out the claim.

“ 15. In [Bolch v. Chiplan 2004 IRLR 140], the EAT set out the test which a Tribunal should apply when considering whether a claim or response should be struck out under rule 37, a test which was affirmed in [Abegaze v. Shrewsbury College of Arts 2010 EWCA 840] and summarised by Elias LJ [15]:

“In the case of a strike-out application brought under [rule 37(1)(b)] it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings, that the result of that conduct was that there could not be a fair trial and that the imposition of the strike-out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial then the strike-out should not be employed.”

16. As was observed in *T v Royal Bank of Scotland* [2023] EAT 119 [40]:

“There are examples in the authorities of cases where the specific nature of a litigant’s impugned conduct means that the conduct has itself inherently made it impossible for there to be a fair trial. From time to time there will also be cases where, unfortunately, a litigant’s conduct is, for example, so threatening abusive or disruptive that, whatever the cause, it ought not to be tolerated and they will be done no injustice by being treated as having thereby forfeited their right to have their claim or defence tried, but outside of such cases a claim should not otherwise be struck out on account of conduct unless the conduct means or has created a real risk that the claim cannot be fairly tried. See De Keyser at [24] citing the discussion of the earlier authorities in Arrow Nominees.”

17. In [Emuemukoro v. Croma Vigilant (Scotland) Limited 2022 ICR 335] [21], Choudhury J, then the President of this tribunal, emphasised the high hurdle to be surmounted in an appeal against strike-out:

“I bear in mind when considering whether or not to interfere with the Tribunal’s decision here that the test for the EAT, as confirmed in Riley v Crown Prosecution Service [2013] IRLR 966, is a “Wednesbury” one; that is to say, in an appeal against striking out, the case will succeed only if there is an error of legal principle in the Tribunal’s approach or perversity in the outcome (see Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223”.

18. In *Blockbuster Entertainment Limited v Jones* [21], Sedley LJ emphasised the need to consider the proportionality of striking out a claim, against a backdrop of the right to a fair hearing:

“It is not only by reason of the Convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr Jones has reminded us, has for a long time taken a similar stand (see Re: Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H). What

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

The respondent's application

7. The application is made under Rule 37(1)(b)) and 37(1)(e) of the Employment Tribunal Rules of Procedure 2013. The respondent's position is that the claimant has, in the conduct of these proceedings, behaved in a manner which is scandalous, vexatious or unreasonable.

8. There are 2 incidents in which the respondent says the claimant behaved in ways that were scandalous vexatious or otherwise unreasonable:-

a. A chance encounter between the claimant and Professor Harrison on 6 February 2024, when (according to Professor Harrison) the claimant behaved in an intimidating way towards him (Allegation One).

b. A visit by the claimant (and his representative Ms Rai) to the Christie hospital in October 2022 (Allegation 2).

9. I need to make findings of fact about these.

10. Having made findings of fact I need to:-

a. Decide whether the conduct I have found to have occurred, falls within the terms of 37(1)(b).

b. Whether individually or collectively they prevent a fair trial

c. If so, whether the claim should be struck out.

Allegation One

11. On 6 February 2024, there was a chance encounter between the claimant and Professor Harrison, the respondent's former medical director and current deputy chief executive. The encounter was in Didsbury, a suburb of Manchester. The claimant had been for a meal with his business colleague and friend Ms Rai (who also represents him, in her capacity as his friend, in these proceedings). There is no dispute that the chance encounter took place at about 4pm.

12. I heard from both the claimant and Professor Harrison. Their accounts are very different.

13. Professor Harrison's version of events is as follows:-

a. Professor Harrison's car was in a public car park next to a restaurant where the claimant and Ms Rai had eaten. He had parked his car there, to go shopping nearby.

b. Professor Harrison returned to his car with his shopping bags, placed them in the boot of the car and then went to the driver's side door.

c. The claimant approached him. The claimant had his arm raised. Professor Harrison was afraid that the claimant was going to hit him and he held up his own arm to use as a block.

d. The claimant then took hold of Professor Harrison's hand and held it whilst making various comments. He told Professor Harrison that he had "*fucked him over*;" that he had "*shown false concerns*" that he was "*an evil bastard*" and an "*evil wanker*." He held Professor Harrison's hand as he said these things.

e. During the incident, the claimant had his other hand in his pocket and Professor Harrison was concerned that he might have something concealed in there that might be used to hurt him.

f. Professor Harrison attempted to remove his hand from the claimant's grasp. The claimant did not initially let go and told Professor Harrison that they were "*just 2 old friends having a chat*" but that he was angry as Professor Harrison had "*fucked him over*." His evidence is that he thought that the encounter might have been as long as 5 minutes.

g. Professor Harrison drove home although he decided not to drive directly home in case the claimant attempted to follow him. He lives close to the restaurant and car park, usually about 5 minutes away by car.

h. On arriving home, Professor Harrison made a note of what had happened. He did so more or less straightaway. He ends the note "I have written this at 16.37 having returned home."

i. That note then became an email to the respondent's HR Director (Eve Lightfoot (EL)) and chief executive (Roger Spencer (RS)). There is a copy of this email at page 504 of the Respondent bundle. It is timed at 16.56.

j. Later that afternoon, Professor Harrison decided to file a complaint with Greater Manchester Police (GMP). He found out that there is a process of reporting an incident online and that is what he did.

k. Professor Harrison described being shaken and upset at the time. He said that the incident has continued to affect him to the extent that he has shown symptoms of Post Traumatic Stress Disorder (PTSD).

14. The claimant's version is as follows:-

a. He was standing outside of the restaurant after having eaten, waiting for Ms Rai. Ms Rai was inside the restaurant because she needed to pay her half of the bill. He had already paid his half.

b. He heard someone shout "Andrew" and saw Professor Harrison walk towards him. Professor Harrison held out his hand as a greeting and the claimant felt he had no option but to take his hand and shake it.

c. Professor Harrison asked how the claimant was and the claimant replied that he was "*getting there.*"

d. Professor Harrison laughed loudly, turned and went to his car.

e. The claimant was in shock at this encounter. He returned to the restaurant and spoke with Ms Rai. He told her that he had just seen Professor Harrison. Ms Rai replied; "*I know. I was watching it all.*"

15. I also heard evidence from Ms Rai which I set out below. Ms Rai has been described by the claimant as an independent witness to these events (Claimant Bundle page 12 for example). She is not. Ms Rai is (and has been) a close supporter of the claimant and his friend. Ms Rai brought employment tribunal proceedings at the same time as the claimant. The claimant was a named second claimant in the claim issued by her. In those proceedings she sought to raise complaints that she had been subjected to detriments because she had made protected disclosures. The claimant and Ms Rai are also business partners, having set up a company called Outreach Research and Innovation Limited (which I understand is now called Cancer Services Limited although I found the claimant's and Ms Rai's evidence about this company to be confusing).

16. Ms Rai's version of events is as follows:-

a. She and the claimant went for a meal at the restaurant in question.

b. After finishing the meal, the claimant stepped outside of the restaurant to take some air whilst she paid her part of the bill.

c. Ms Rai and the claimant had been sitting at a table by the window overlooking the car park as she was precious about her new car.

d. Ms Rai was sitting at the table, waiting for the waiter so that she could pay her part of the bill. There was no one else in the restaurant at that time.

e. Ms Rai watched the claimant through the window. He was standing at the foot of the stairs to the restaurant close to the entrance to the restaurant and to the window that Ms Rai was looking through. Photographs provided by the claimant and Ms Rai show just 2 stairs.

f. Ms Rai saw a large white man stride towards the claimant with his hand outstretched. She saw them together for less than a minute. The claimant returned to the restaurant. He was trembling. He told Ms Rai that he had just seen Professor Harrison. The claimant looked again and saw Professor Harrison get in his car and drive away.

g. The claimant and Ms Rai sat for a while until Professor Harrison had left the car park. The waiter came to take the claimant's payment for her meal. When he did so, they asked for a glass of water for the claimant.

Events following the chance encounter.

17. EL decided that an incident report should be completed. A copy of the incident report is at respondent's bundle at pages 512-515. In turn this led to a report (called a Root Cause Analysis Report (RCA)) to the respondent's Executive Review Group. A copy of this report is at pages 515 – 521.

18. There are 5 actions listed in the RCA. These include seeking legal advice from solicitors because of *"implication of this incident for employment tribunal given potential impact on witnesses."* Another action is relevant to the claimant's relationship with the respondent as a patient. *"risk of intimidation of other staff when ex Christie consultant attends site for clinical appointment as patient"* and the action to *"complete risk assessment in liner with Trust's Violence and Aggression Policy."*

19. The actions also included an action to share information about the incident with the claimant's current "Responsible Officer." In essence, the respondent decided that the issue may be a professional regulatory one for the claimant. On 21 March 2024, RS submitted details of concerns with the GMC regarding the claimant.

20. As for Professor Harrison's online report to the police:-

a. The online reporting system did not provide him with a copy of his complaint. It did provide confirmation that the report had been made. When giving evidence Professor Harrison confirmed that he had a copy of a confirmatory email and, at my request, a copy was provided part way through his evidence. It is obviously an automated response thanking the recipient for completing the form and giving general and brief details under the heading *"what happens next."* A reference number is also stated on this automated response although that is different to the crime reference number that is given later. No other information is provided.

b. On 9 February 2024, Professor Harrison was contacted by a police officer who asked some more questions and offered to take the matter further. In that call, Professor Harrison told the police officer that he did not want to take the matter further with the police. He followed his conversation up with an email (also dated 9 February 2024) which sets out his position.

Thank you for discussing by telephone (Today 16.19) the incident involving Dr Andrew Wardley that has been assigned crime reference number 06/A30002606/24.

Thank you also for the text message (Today 16.51) confirming that the crime has been recorded on the police system. I am sorry I was unable to provide you any further details such as date or birth or address. I can obtain some further details if it is necessary in the future.

Whilst I was considerably shocked psychologically by what took place, and the perpetrator did make physical contact with me as well as swearing at me I suffered no physical injuries.

As I confirmed to you the perpetrator is a former employee of The Christie Hospital who is currently involved in several legal proceedings, in which I am a potential witness. I have not seen or spoken to him since mid-2020 when I spoke to him by video conference.

There are other staff members who may be witnesses and I am discussing with my hospital colleagues what management or legal action might be taken to prevent the perpetrator from approaching them in a similar intimidating manner.

Pending the outcome of these considerations please would you, as discussed, retain my complaint about the crime on file but not, at this stage, take further action. I understand the matter can be followed up later if circumstances change.

Thank you for discussing the matter sympathetically and for your advice regarding personal safety, including to call 999 if any similar event should occur.

21. On 20 February 2024, the respondent's Solicitors (Hill Dickinson(HD)) wrote to the Tribunal (with a copy to the claimant) making an application for a strike out order. According to the claimant and Ms Rai, this was the first that they knew of Professor Harrison's allegations about 6 February 2024.

22. On receipt of further information about the alleged incident the claimant contacted GMP to ask whether he had been reported to them about an incident on 6 February 2024 in a car park in Didsbury. 2 letters from GMP to the claimant dated 11 June 2024 and 12 July 2024 are in the claimant's bundle at pages 14-16. They are heavily redacted but the unredacted parts state (11 June letter) that there is no trace of a report about the claimant dated 6 February 2024 and (12 July letter) that the claimant is not named on a crime log – quoting the crime reference number that was provided to Professor Harrison (and which the claimant and Ms Rai saw when they received the respondent's disclosure made for the purposes of this hearing).

My findings about the events of 6 February 2024.

23. I accept the version of events provided by Professor Harrison. These are my reasons:-

a. I heard and saw both the claimant and Professor Harrison provide their version of events. I found Professor Harrison to be the more credible of the 2 witnesses about the events of 6 February.

b. Ms Rai questioned Professor Harrison extensively and tested his evidence. Her questioning included questions about where he was standing during this chance encounter. She attended the hearing with a large model motor car and, through the use of this prop, sought to discredit Professor Harrison's version of events, by reference to his movements around the car. Those questions (and Professor Harrison's responses) had the opposite effect. The responses to Ms Rai's questions were straightforward and entirely consistent with his version of events.

c. The documentary evidence following the incident. The reports provided by Professor Harrison confirm his version of events. I considered the submission made by the claimant/Ms Rai that Professor Harrison had simply made up this version of events and rejected it. For the claimant's version to be true, would require Professor Harrison to have engaged the claimant in the way that the claimant and Ms Rai have described; within 30 minutes or so of that greeting, to have returned home and made a report to the police with a version of events that he knew to be false; with the jeopardy of that encounter being witnessed by a third party or caught on a CCTV camera; of being investigated by the police.

d. For the claimant's version to be true would require some motive on the part of Professor Harrison to decide to make a false complaint about the claimant. If the motive was to support a strike out of this claim then that would have required Professor Harrison to have decided in the 30 minutes or so following the chance encounter that a false complaint about the claimant would have had that impact. I do not consider that to be credible.

e. Further, the version of events put forward by Professor Harrison does not support that motive. Whilst I have no doubt that Professor Harrison was intimidated by what happened, his version of events did not involve the claimant striking the claimant for example; the comments reported are abusive and offensive, but not threatening.

f. The claimant's and Ms Rai's version of events are unconvincing. The version includes the claimant having paid his part of the bill but not Ms Rai; Ms Rai then waiting in an empty restaurant for service so that she could pay her part of the bill. This part of the version put forward by Ms Rai was emphasised by her to indicate that she had an uninterrupted view of the chance encounter- that she was not being distracted by a waiter attending on her whilst that chance encounter occurred. No explanation was provided as to why the whole of the bill was not paid at once; alternatively why she did not pay her part of the bill at the same time as the claimant was paying his part. I find the version of events to have been put forward by the

claimant and Ms Rai in an effort to explain why the claimant was outside of the restaurant but Ms Rai was not and in an effort to persuade me that Ms Rai's eyewitness account was reliable because she was not being interrupted by a waiter at the time she witnessed the chance encounter. I do not accept it.

g. The version of events put forward by the claimant and Ms Rai also requires me to accept that Professor Harrison decide to walk away from his car to the stairs of the restaurant, greeting the claimant in a jovial manner. Given the circumstances of this claim, the serious allegations being made by the claimant against the respondent (including members of its executive board) and having heard and seen Professor Harrison give evidence; I do not accept that he would have acted in this way.

h. I have considered the section of the heavily redacted correspondence that the claimant has decided to disclose at pages 14-16 of the claimant's bundle. Given the correspondence between the police and Professor Harrison, I am satisfied that the comments made by the police in this correspondence is a straightforward error or that the answer from the police is given as a result of Professor Harrison deciding that he did not want to pursue the report of a crime that he had made. .

24. The claimant's actions were a moment of unprovoked anger. There was nothing planned on the claimant's part. He did not expect to see Professor Harrison on that day. But the sight of Professor Harrison outside the restaurant made the claimant angry and he left the restaurant to confront Professor Harrison. The claimant lost control of his temper and acted in the way described by Professor Harrison.

25. The claimant did not lose control of his temper for long and matters did not escalate. Professor Harrison's evidence was that the incident lasted about 5 minutes. Having considered the version of events provided by Professor Harrison (the version I accept) I find the confrontation was much shorter, no more than a couple of minutes, although I accept that it felt longer to Professor Harrison.

26. A significant cause of the claimant's anger was these proceedings, particularly the subject matter itself but also the progress of the proceedings. The final hearing was initially listed to take place in October 2023. In August 2023, the respondent applied to postpone that hearing and at the preliminary hearing on 25 August 2023, that application was granted. The record of that preliminary hearing provides various reasons for the decision to postpone the final hearing, including the following:-

There had been confusion as both parties had erroneously thought that the Tribunal had postponed the final hearing listed. As a result, a relevant witness is unavailable on the dates listed, and one has limited availability in the period leading up to the current hearing. This was not considered to be as significant a factor as the others outlined, but it is relevant. I would say that the respondent should not have assumed that the final hearing listed had been vacated (based upon what was said in the letter which the Tribunal sent);

27. The unavailable witness was Professor Harrison. The claimant had resisted the application to postpone the final hearing.

The impact of the claimant's behaviour

28. As noted above, the claimant's behaviour towards Professor Harrison was a result of a loss of control by the claimant. Professor Harrison was understandably upset and frightened by Professor Wardley's behaviour.

29. In an email to colleagues dated 9 February 2024, Professor Harrison raised a concern that the claimant may repeat that behaviour:

It is self-evident that Wardley's intimidating behaviour is directly connected to my potential role as a witness. My main concern is that he may similarly approach and possibly seek to intimidate other Trust staff (or former staff) who are also potential witnesses. I think it is important that we formally review the risks that this poses and, considering any relevant legal advice, decide what steps should be taken to protect staff and any necessary communications.

30. In his evidence provided at this hearing, Professor Harrison explained that the incident had a significant impact on his mental health, that he has experienced ongoing anxiety and disturbed sleep. More recently he has used an NHS online service called Manchester Talking Therapies and, through that service, was assessed and found to have symptoms of Post Traumatic Stress Disorder.

31. Whilst no medical records have been disclosed giving a diagnosis of PTSD, I have seen an occupational health report dated 19 June 2024 indicating that a course of therapy was about to commence and the professional and personal support that Professor Harrison was receiving.

32. There is no evidence to indicate that the claimant has behaved aggressively in the past. The evidence indicates that this was a "one off" incident. I find it unlikely that the claimant will approach and intimidate other Trust staff in connection with these proceedings. It is possible that a chance encounter will happen with another one of the respondent's employees (past or present) who the claimant considers may have wronged him in some way. The fact of this hearing, the findings made and the opportunity that the claimant now has to reflect on his appalling behaviour, reduce further the unlikelihood that this behaviour will be repeated.

Allegation 2

33. There is no dispute that the claimant and Ms Rai visited the Christie hospital on 18 October 2022. The claimant's evidence is that he was the person visiting and that Ms Rai "acted as my witness and friend." The claimant's evidence was that he needed the companionship of Ms Rai on that day because he was suffering from flashbacks and trauma. They arrived at the hospital about around 07.30am and remained there for about 3 hours in the morning and a further hour or so in the afternoon.

34. This incident was investigated by the respondent and a report (called a root cause analysis report) was compiled by Richard Postill (from page 483) who gave evidence at

this preliminary hearing. Mr Postill is the respondent's deputy director of finance. The evidence referred to in that report included CCTV footage and statements from various staff members who had encountered the claimant and Ms Rai during the morning of 18 October 2022.

35. The claimant's version of events is that there were 2 reasons for his attendance at the hospital:-

- a. members of staff had asked to meet him to provide information about failings at the hospital (whistleblowers).
- b. He wanted to meet CQC inspectors who were carrying out an investigation.

36. Sometimes the claimant was seen in staff only areas; other times he was in areas that were effectively public areas. His evidence was that he was not aware that the staff only areas were restricted. I found that evidence unconvincing. The evidence that formed part of the root cause analysis report indicated that the claimant told untruths to gain access (for example telling employees that he was one of the trusts directors- Respondent bundle p495), that he waited for a staff member to open a door to a restricted area (Respondent bundle p493). Accounts provided to the respondent's investigation also indicated that that he and Ms Rai told employees they were there to promote their new business (accounts at respondent bundle at p494).

37. The claimant confirmed in giving evidence that he did not meet with any of the CQC inspectors during this visit.

38. The respondent instructed solicitors to write to the claimant and Ms Rai about the visit and their unauthorised access to restricted areas. A letter from the respondent's solicitors (Hill Dickinson) dated 7 November 2022 was sent by email to the claimant and Ms Rai (Respondent Bundle page 481-2). The terms of this letter raised the following concerns:-

- a. That the claimant and Ms Rai had engaged in inappropriate conversations with employees.
- b. That the claimant was handing out business cards providing some explanation of his (and Ms Rai's new business) and indicating that they were open to working with the respondent's employees in clinical trials.
- c. That the claimant had falsely referred to himself as one of the respondent's directors, when speaking with a receptionist, in order to gain access to patient and staff only areas.

39. The letter stated that the incidents are serious, involving potential criminal activity including trespass and harassment and that their actions may be a matter for the claimant's professional regulator.

40. By this letter, the respondent sought assurances that there would not be a repeat of the behaviour. They did not receive those assurances. Ms Rai responded to the letter from Hill Dickinson by letter dated 7 December 2022. In her response she referred to herself and the claimant as whistleblowers and insisted on disclosure of relevant documents (reports, statements and so on) before providing a response to the allegations. Ms Rai's letter concluded by alleging that the allegations appeared to be further acts of victimisation and slander. The letter did not provide any explanation for their attendance at the hospital.

41. Roger Kline of Middlesex University Business School attended this preliminary hearing to provide evidence in support of the claimant's explanation for the visit. Mr Kline is an expert in workforce culture and has worked extensively in this area within the NHS including with national NHS organisations, the CQC and professional regulators. Mr Kline's evidence (which was not challenged) included the following:-

- a. He supported the claimant in 2020 in having his protected disclosures investigated by NHS England. This led to a review, the outcome of which was published in January 2022.
- b. He and others were critical of the respondent's response to the review.
- c. In early October 2022, the CQC launched an unannounced inspection at the respondent Trust after multiple complains of bullying and harassment by whistleblowers.
- d. The claimant contacted Mr Kline to tell him about the review and to express concern that very few employees he was in contact with seemed to be aware of the inspection. Having been told this, Mr Kline contacted the CQC and a Teams call was arranged between Mr Kline and the CQC regional inspection leads.
- e. In that Teams meeting it was agreed that it was important to ensure that the maximum number of staff were aware of the CQC inspection and the confidence they could contribute safely. Mr Kline also learned in that meeting that there was an announced inspection commencing the week of 17 October 2022.
- f. A subsequent Teams meeting was set up between the CQC inspection leads and the claimant and Ms Rai who were both encouraged to tell any staff who might wish to give evidence both by word of mouth and in person because the CQC were keen that as many staff as possible gave evidence.

42. On this last point, Mr Kline told me that his view was this would include chatting informally to staff at the premises of the Trust to make them aware of the inspection and, further, that it was in the public interest that Ms Rai and the claimant publicised the CQC inspection including going on site on 18 October 2022.

43. I am not satisfied by explanations provided by the claimant and Ms Rai as to some of their activities on 18 October 2022, particularly their accounts of gaining access to restricted areas and their accounts of providing details of their new business. Even

so, I find that the visit to the hospital on 18 October was primarily about the CQC inspection. This was supported by the evidence from Mr Kline.

44. Another purpose of the visit was to provide information and promote the claimant's and Ms Rai's new business.

45. The visit had little (if anything) to do with these proceedings.

Submissions

46. I heard submissions from both parties late on day 2. Ms Brewis provided a short (11 paragraphs) written document to accompany her oral submissions. Ms Rai was provided with a copy of this and then with time to review the document. I also required Ms Brewis to make her submissions first so that Mr Rai could hear them before she spoke to me.

47. Ms Rai complained that she had not had an opportunity to prepare submissions. Following the hearing, Ms Rai subsequently wrote to the Tribunal and complained that she had not been copied into Ms Brewis written document (as noted above, she is wrong. She was provided with a copy and time to review). Ms Rai also then provided written submissions. I read these before reaching this judgment.

48. In her submissions Ms Brewis asked me to prefer the evidence of Professor Harrison and, assuming I do so, to find that the conduct was scandalous unreasonable and/or vexatious. On the basis that I do prefer Professor Harrison's evidence, Ms Brewis submitted, that outcome must lead to a decision that the claimant and Ms Rai have given untruthful evidence which I should consider to be further unreasonable conduct.

49. As for whether a fair trial remains possible, Ms Brewis submitted that the claimant has shown no remorse, has accused Professor Harrison of lying and, through his behaviour, continues to cause disruption to the proceedings.

50. As for the incident of 18 October 2022, the claimant and Ms Rai entered property without permission by providing dishonest and inaccurate information, engaged in inappropriate conversations and attempted to promote their new business.

51. Finally, Ms Brewis submitted that there is no lesser sanction that would effectively address the claimant's behaviour, that witness intimidation has already taken place and further intimidation cannot be ruled out.

52. Turning to the claimant's submissions, Professor Harrison had a motive to invent a story about the claimant attacking him as he is an intended witness and also, as a senior executive, involved in managing the respondent's response to the claim. It is submitted that I should take account of the evidence from an independent witness (this is a reference to Ms Rai – see my earlier observations about Ms Rai's independence); that the police told the claimant that no crime had been reported; that the purpose of the allegation was to damage and vilify the claimant and that there is no evidence that Professor Harrison has suffered from PTSD.

53. In both the oral and written submissions, Ms Rai referred to various authorities including:

a. **Chaba v. West London Mental Health NHS Trust [2013] UKSC 80**. This case concerns the role of an investigator in disciplinary processes used in the NHS (called Maintaining High Professional Standards).

b. **R. (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 158** concerning the redaction of documents.

c. Various authorities on nuisance/licence to enter premises (for the purposes of the second allegations) and authorities concerning case management (more relevant to the claimant's strike out application).

d. Abegaze v. Shrewsbury College – a case that is referred to in the Hargreaves decision - see above.

Conclusions

Regarding allegation 2.

54. Whatever the rights and wrongs of the claimant's conduct during the visit on 18 October 2022, it had little (if anything) to do with these proceedings.

55. It is also relevant to note that the events occurred almost 2 years ago. Even had I decided that the conduct was within Rule 37(1) b, applying the next stage in the decision-making process, I am not aware of any adverse impact the events of 18 October 2022 have had on the fair conduct of these proceedings since October 2022 and there is nothing to indicate that those events will jeopardise a fair hearing.

Regarding allegation 1.

56. The claimant's aggressive and offensive conduct towards Professor Harrison easily meets the definition of unreasonable conduct of these proceedings, for the purposes of Rule 37(1)b. As such I have not considered whether it also meets the definition of scandalous or vexatious conduct.

57. I also agree with Ms Brewis, that the claimant's denial and apparent absence of any remorse, adds to the unreasonableness of the claimant's conduct.

58. Having regard to the extract from the Employment Appeal Tribunal's (EAT's) judgment in T v. Royal Bank of Scotland quoted above, I considered whether the conduct, in itself it should result in the claim being struck out; where the conduct is so "*threatening abusive or disruptive that, whatever the cause, it ought not to be tolerated.*" I have decided that it should not. Whilst threatening and abusive, it is not of the level that the EAT had in mind when making those comments.

59. I have considered whether the claimant's conduct means that a fair hearing is still possible and I have concluded that it is. These are my reasons:-

- a. My decision that the claimant's offensive and aggressive conduct was as a result of a sudden loss of control; there was no plan to intimidate.
- b. The language used by the claimant towards Professor Harrison came from a loss of temper. That resulted in an offensive, puerile outburst rather than any indication of calculated intimidation towards Professor Harrison.
- c. The language used did not threaten Professor Harrison with adverse consequences if, for example, he continued to support the respondent's case.
- d. It was evident from Professor Harrison's contribution to this hearing, that he is capable of participating in these proceedings by providing his evidence at a final hearing. He gave compelling evidence, clearly and rationally.
- e. To the extent required, there is no reason why Professor Harrison cannot provide his evidence remotely (by CVP) at the final hearing should he decide that he would be more comfortable to do this, rather than attending in person. The terms of this decision will assist an application to give evidence by CVP.

60. In considering whether the sanction of strike out would be a proportionate response, I have also taken some account of the potential seriousness of the issues in this case. The claimant is a highly regarded oncologist and a former, senior member of the respondent's medical staff. The respondent is a leading NHS Trust with a local and national reputation for its work in treating cancers. The respondent attracts significant amounts of public and charitable funding. This case includes complaints that the respondent took steps to prevent the claimant's effective participation into investigations in to alleged financial wrongdoings and, because the claimant had "blown the whistle" he was shut out of systems that the claimant needed to access, to undertake his clinical work. Strike out would be a disproportionate response.

61. I accept that (unlike strike out applications based on non-compliance with case management orders for example) it is difficult to consider what a lesser sanction to strike out would be to address the claimant's behaviour. This might be unusual situation where the respondent makes an application for its costs arising from the claimant's unreasonable behaviour, possibly including its costs incurred in making this strike out application. But that application has not been made and this comment should not be taken as an indication that those costs would be awarded.

62. The respondent's application is refused.

Employment Judge Leach

Date 27 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28 August 2024

FOR EMPLOYMENT TRIBUNALS

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