Neutral Citation Number: [2020] EWHC 3099 (QB)

Case No: QB-2020-001325

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2020

Before :

THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

London Underground Limited	**Applicant**
- and -	
Roger Mighton	**Respondent**

- -
- -

Ms Lydia Seymour and Ms Elizabeth Grace (instructed by **TfL Legal Department**) for the **Applicant**
The Respondent appeared in person

Hearing date: 8th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 18th November 2020 at 10.30am.

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MRS JUSTICE STACEY

Mrs Justice Stacey:

1. This is an application brought under Part 8 of the Civil Procedure Rules (CPR) for the Court to exercise its power to make a general civil restraint order (GCRO) pursuant to CPR 3.11 and practice direction 3CPD3 to restrain the respondent, Elder Roger Mighton, from issuing any claim or making any application in the High Court, any County Court, any Employment Tribunal (ET) or the Employment Appeal Tribunal (EAT) without first obtaining the permission of a specified judge.

2. It is brought by the applicant, London Underground Limited (LUL), who are the former employer of the respondent who has initiated 10 claims as a claimant before the ET, none of which has been successful. To avoid confusion I shall refer to the parties by their names. The chronology of the litigation history is set out below.

3. In addition to the bundle of documents filed by LUL entitled "Mighton complete paginated bundle" (consisting of 2071 pages) the court had before it 2 bundles of documents filed by Elder Mighton including his response to LUL's Part 8 application in which he had set out his response by annotating the application paragraph by paragraph. LUL had also filed and served an authorities bundle and skeleton argument attaching 2 schedules. Schedule 1 set out the claims, applications and appeals brought by Elder Mighton and schedule 2 contained extracts from the correspondence sent by Elder Mighton to LUL and others including the courts and tribunals dealing with his cases.

The facts

4. Elder Mighton arrived in the United Kingdom from Jamaica aged eight in 1966 and since 1994 has worked on the London Underground. Most recently he was employed by LUL from 19 May 2008 as a fitter (2) in the lift and escalators team until his eventual dismissal on 27 August 2015.

5. He was shocked to receive a final written warning in 2013 after what he considered to have been exemplary service and was initially dismissed following a period of absence for stress at a medical case conference which he did not attend on 17 April 2014. He initiated ET proceedings for unfair dismissal, race discrimination and religion or belief discrimination on 18th of July 2014 (case number 3200845/14, the First Claim), but the details of the claim were not adequately set out. At a preliminary hearing on 22 September 2014 the judge (Employment Judge Gilbert), provided a clear and helpful written note (in accordance with her duty under the ET's overriding objective under ETs (Constitution and Rules of Procedure) Regulations 2013 (the Rules) paragraph 2(a)) to ensure that the parties are on an equal footing), setting out how Elder Mighton should particularise his claim, the burden of proof in discrimination complaints and the matters that he needed to address in his particulars of complaint. In the meantime, however, he was reinstated by LUL through the internal dismissal appeal procedure and the First Claim was withdrawn. At that stage he was assisted by lawyers, DLG, through a home insurance policy.

Second ET claim

6. Following his reinstatement Elder Mighton presented a second ET claim on 5 December 2014 for victimisation contrary to s.27 Equality Act 2010 (Case number

2202261/14, the Second Claim). A central concern in those proceedings was that the manager who had previously dismissed him was now back in charge of him and had assigned him to cleaning duties, which he considered demeaning, rather than the role of fitter (2) which he alleged was less favourable treatment because he had brought the First Claim. His allegations were not upheld however and the Second Claim was dismissed following a five day ET hearing in the London Central region of the ET before Employment Judge A.M. Snelson and 2 lay members. No written reasons were requested for the tribunal's judgement which were given orally. Elder Mighton was represented by Mr M Grant of counsel at the ET hearing. There was no appeal from that judgment.

Third ET claim

7. Back in the workplace Elder Mighton had been suspended from work on 21 March 2015 and was dismissed by LUL on 27 August 2015 for gross misconduct following a disciplinary hearing which he did not attend. The disciplinary panel found that he had been unmanageable, disruptive and he had bullied and harassed a number of colleagues and managers and his behaviour amounted to gross misconduct. He was not reinstated on appeal through the internal procedures.

8. A third ET claim was issued by Elder Mighton against LUL on 15 October 2015 for unfair dismissal, race discrimination and sick pay and annual leave (the Third Claim, case number 3202079/15).

9. At a preliminary hearing before Employment Judge Wade (as she then was) on 24 March 2016 EJ Wade rejected LUL's application to strike out the claim in its entirety and allowed the Third Claim to proceed on a limited basis. The substantive hearing of the Third Claim took place over a number of days in late June and early July 2016, once again before EJ A. M. Snelson and 2 lay members. The Third Claim was dismissed. Written reasons for the ET's judgment were requested and provided. An application for reconsideration was refused on the papers on 18 July 2016 as EJ Snelson considered there were no reasonable prospects of the ET decision being varied or revoked. On seeking to appeal the tribunal's judgement on the grounds that there had been an unspecified error of law and that EJ Snelson was not a fair judge, HHJ Eady QC (as she then was) sitting in the EAT certified the appeal as being totally without merit and rejected it under rule 3(7ZA) of the EAT rules of procedure 1993 (as amended) on 11 July 2016.

Fourth ET claim

10. On 6 October 2016 Elder Mighton lodged his fourth ET claim (Case number 2208049/16, the Fourth Claim) against LUL and 12 individually named respondents seeking to challenge his dismissal. The case came before Employment Judge Wade at a preliminary hearing on 14 February 2017 when the claim was struck out in its entirety in accordance with the ET powers under rule 37 as the complaints were either out of time, had already been decided (and were thus res judicata) or should and could have been the subject of earlier litigation (the rule in *Henderson v Henderson*). Her judgment set out in clear and accessible language why the case had been struck out. EJ Wade also noted that Elder Mighton was pursuing a civil action against the applicant for personal injury for which the EJ has no jurisdiction and she took the trouble to direct him towards the County or High Court.

11. On appeal to the EAT against the EJ Wade's strike out judgment, HHJ David Richardson rejected the appeal and declared it to be totally without merit pursuant to rule 3(7ZA) on 26 April 2017.

Fifth ET claim

12. Five weeks later on 1 June 2017 a further ET claim (case number 2201026/17, the Fifth Claim) was lodged by Elder Mighton against LUL, once again seeking to challenge the fairness of his dismissal and repeating the allegations he had already made in his previous claims. He additionally alleged that his work locker had been broken into and vandalised after his dismissal on an unspecified date and that valuable evidence had been stolen and his wedding ring was missing. He also complained that British Transport Police had not properly investigated his complaint of theft but had instead referred him back to LUL.

13. Using the procedure under rule 27 ET rules of procedure, on a paper consideration of the papers in the Fifth Claim EJ Wade's view was that the tribunal had no jurisdiction to hear the claims and that the claim had no reasonable prospects of success. The ET Rule 27 procedure enables such a view to be taken on the papers, conveyed to the parties and provides a mechanism for a claimant in the ET proceedings to make representations to the contrary. After considering the representations, an EJ may then decide that the case may proceed to a full hearing or list the matter for a hearing to decide whether the claim, or part of it, should be permitted to proceed (rule 27(3)). A respondent to ET proceedings need not attend a Rule 27(3) hearing.

14. Elder Mighton disagreed with EJ Wade's view and made written representations that the claim should not be dismissed. A preliminary hearing was convened under rule 27(3) on 17 August 2017 before EJ Wade who refused an application to recuse herself and, after hearing his representations, she concluded that the claim had no reasonable prospects of success. She dismissed it under rule 37. EJ Wade noted that Elder Mighton had had two substantive hearings of the facts in the Second and Third Claims and that the Fourth and Fifth Claims had been struck out at preliminary stages because they were essentially a repetition of earlier matters. In her judgment she explained for the benefit of Elder Mighton that:

> "There are strong and clear legal rules preventing this [repeated hearings about the same issues], as well as rules on time limits. It is not in the interests of justice for the claimant to be allowed more trials of the same facts and I fear that if he does try to continue to litigate he will face more frustration because his opportunity to have a full trial of the facts has expired."

15. In paragraph 13 of her judgment she explained that it was his choice whether to continue with the litigation, which he had said had made him ill, and at times suicidal. She urged him to consider carefully before initiating another claim in the ET. She pointed out to him that if he was to return with more repetitious claims, he risked the claims being considered vexatious. She also repeated that his concern that his workplace had caused asthma was not a matter for the Employment Tribunal.

16. Elder Mighton did not heed the advice, but sought a reconsideration of EJ Wade's decision, which she refused on the papers which she was entitled to do pursuant to

rule 72(1) ET rules of procedure as she considered that there were no reasonable prospects of the decision being varied or revoked. Elder Mighton then sought to appeal the strike out judgment in the Fifth Claim.

17. On a paper sift on 21 November 2017 HHJ Eady QC ordered that the appeal be rejected and certified it as being totally without merit pursuant to rule 3(7ZA). She noted that the tribunal was correct to characterise the claim as an abuse of process. It was not open to Elder Mighton to seek to obtain further hearings of the claims that had been rejected by the device of simply lodging further ET claims to revisit the same points that had previously been decided and rejected. She further warned Elder Mighton not to abuse members of the ET judiciary and the ET and EAT tribunal staff. His allegations were made:

> "without foundation and it is entirely improper for the appellant to conduct his appeal in this manner."

Sixth ET claim

18. Meanwhile Elder Mighton did not follow the guidance he had been given by EJ Wade to him as a litigant in person and had issued a further claim (Case number 2207502/17, the Sixth Claim) on 20 October 2017. Once again he repeated the previously dismissed allegations and once again it was considered by EJ Wade pursuant to rule 27 and then struck out pursuant to rule 37 at a preliminary hearing for the same reason that the Fourth and Fifth Claims had been struck out: it was a re-visitation of the matters previously raised and rejected in earlier proceedings.

19. Once again Elder Mighton sought to appeal the ET judgement in the Sixth Claim. Once again it was rejected by the EAT and once again it was certified as totally without merit. This time by Simler P (as she then was) on 15 May 2018. Elder Mighton was warned of the risk of his being subjected to a civil restraint order by Simler P in her judgement in the following terms:

> "The appeal is totally without merit. It is the fourth totally without merit appeal brought by the Appellant who has inundated the Employment Appeal Tribunal with unnecessary and irrelevant material. This must stop. It interferes with the efficient administration of the Employment Appeal Tribunal and it prevents staff from doing their jobs. The Appellant is warned that he is at risk of civil restraint proceedings as a vexatious litigant."

20. Elder Mighton's response was to seek to appeal the EAT judgment to the Court of Appeal. Permission to appeal was refused by Sharp LJ on 16 January 2019 who noted that:

> "the judge was merciful in merely giving the applicant a warning that he was at risk of a civil restraint order"

and that the circumstances may arise when the court must consider whether to impose a civil restraint order if he were to continue to seek to bring the same issues to the courts again.

Seventh ET claim

21. However, on 21 March 2018, two months and a few days later, Elder Mighton lodged a further claim to the ET (2201896/18, the Seventh Claim) naming LUL and 38 individually named respondents. Once again he repeated the allegations previously made that had been determined. Once again the claim was subject to the Rule 27 procedure. Once again Elder Mighton challenged the initial view of the Judge and requested a hearing and once again the claim was struck out at a preliminary hearing under rule 37 on 24 September 2018. EJ Wade noted in her judgment:

> "The claimant has litigated in relation to the same issues seven times and his claims appear to be barred because they have already been decided (res judicata) or are an abuse of process. He names 38 additional respondents this time, more than he has ever named before, but they are all named in relation to the same issues….All the claims are out of time as the claimant's employment ended on 27 August 2015….. . "

22. The EJ also noted that it seemed likely that the additional respondents had been individually named vexatiously.

23. Elder Mighton did not accept the judgment of the ET in the Seventh Claim and applied for a reconsideration of the strike out judgment. On the tribunal dismissing his reconsideration application on the papers as having no reasonable prospects of success pursuant to rule 72(1)), he sought, once again, to appeal the judgment to the EAT. The matter was considered to have no reasonable prospect of success on a paper consideration under rule 3(7) by HHJ Tucker. She did not certify it as being totally without merit and Elder Mighton exercised his right to an oral hearing under EAT rule 3(10) to determine if it had any reasonable prospects. The Rule 3(10) hearing came before HHJ Eady QC on 17th July 2019. In a reserved judgement sent to the parties on 9th September 2019 and following further written representations by Elder Mighton, the appeal was rejected. The judge helpfully set out the full history of the case. She found the appeal to be totally without merit and directed that her judgment and the earlier EAT orders be forwarded to the Attorney General to consider whether to make an application for a civil restraint order.

24. Elder Mighton sought to appeal HHJ Eady's judgment dismissing the appeal against the Seventh Claim. The Court of Appeal refused permission to appeal the judgement of HHJ Eady QC on 12 November 2019 noting that "an appeal would have no real prospects of success."

Eighth ET Claim

25. Less than one month later, on 8 January 2019, Elder Mighton lodged a further ET claim, once again seeking to revisit the circumstances of his dismissal four years earlier (case number 2200062/19, the Eighth Claim) which named 43 individual respondents in addition to LUL. As with the previous Fourth, Fifth, Sixth and Seventh Claims it was dismissed pursuant to rule 27 and 37 ET Rules of Procedure on 14 May 2019. Elder Mighton's application for a reconsideration of the tribunal's judgment was refused. He sought to appeal to the EAT and on 3 December 2019 the appeal was

rejected and certified totally without merit pursuant to rule 3(7ZA) and as vexatious, on this occasion by Choudhury P:

> "It is not open to a litigant to repeatedly raise the same issues. The Appellant's continued appeals are vexatious….I also declare that for the same reasons, this appeal is totally without merit."

Ninth ET claim

26. Four months after the Eighth Claim was struck out by the ET (but before the determination of the appeal in the EAT in his appeal against that judgment), Elder Mighton lodged a further ET claim on 24th of September 2019 (Case number 2203601/19, the Ninth Claim). The pattern is by now becoming familiar. Since the Ninth Claim did no more than repeat the matters raised in the previous claims that had been decided and dismissed, it was considered on the papers to have no reasonable prospects of success and struck out at a preliminary hearing on 7 January 2020 as it had no reasonable prospects pursuant to rule 27 and 37 ET rules of procedure. In her judgment she noted:

> "This is the Claimant's ninth Tribunal claim (the tenth including one which was rejected when filed) and fifth Rule 27 hearing. He claims unfair dismissal, race discrimination, and arrears of pay. There are all claims which he has brought before and this decision contains the same reasoning as before"

Tenth ET claim

27. Elder Mighton once again ignored the earlier rulings and on 11 February 2020 issued a further claim before the ET seeking to revisit his dismissal on 16 March 2020 (case number 2201495/20, the Tenth Claim). As before it was considered on the papers by Regional Employment Judge Wade (as she now is) who considered it had no reasonable prospects of success pursuant to Rule 27. Elder Mighton has made written representations as to why it should not be dismissed and I understand that the hearing under Rule 27(3) has been stayed pending this application.

The Respondent's communication with LUL, the Tribunal and Court and wider members of the judiciary.

28. The tone and contents of Elder Mighton's correspondence with LUL, their staff and their lawyers, the EAT and the Court of Appeal has become increasingly intemperate and inappropriate over the years and is now utterly unacceptable and contemptuous of the Court. It is expletive-ridden and abusive and he makes baseless allegations against anyone who makes any ruling against him. He abuses the court and tribunal staff as well as the judges and LUL. I will not dignify the language that he uses with repetition.

29. He has been repeatedly warned that he must stop his abusive emails but instead of taking heed of the advice, he replies with further abusive correspondence doubling down on his behaviour. As noted by HHJ Eady QC in her dismissal of his appeal against The Third Claim:

> "The Appellant's various references to Employment Judge Wade (and Employment Judge Goodman) suggest that he considers an Employment Judge 'fair' only when they find in his favour. That would explain many of his generalised assertions against the Employment Tribunal chaired by Employment Judge Snelson"

30. On 21 November 2017 in her dismissal of The Fifth Claim HHJ Eady QC warned Elder Mighton as follows:

> "I further note that the Appellant has used the appeal process and his correspondence in this matter to abuse various members of the Employment Tribunal judiciary and Employment Tribunal and Employment Appeal Tribunal staff. The allegations are made without foundation and it is entirely improper for the Appellant to conduct his appeal in this manner"

31. He paid no heed and on 10 April 2019 the EAT Registrar had cause to write to Elder Mighton about his correspondence relating to his appeal against The Seventh Claim:

> "You continue to inundate the EAT with lengthy and discursive correspondence which is most recently littered with profanities and offensive language. I consider this to be an abuse of process and wholly unacceptable. I have directed that any further such correspondence from you will not be considered, answered or actioned"

32. In 2019 Elder Mighton began copying his abusive correspondence to the ET and the EAT to numerous MPs, Ministry of Justice staff, the Mayor of London, the Home Office and others. In his correspondence he has repeatedly made clear that he will not comply with the instruction to remain civil and he has also made clear that he does not accept the rulings of the Tribunals and Courts. Examples include: "I do not accept a thing you have written here" (1st March 2019) "I am on a Mission…. You are incorrect in your behaviour" (12 March 2019) and he will not be dissuaded. "Now TFL legal, you think I am scared of your potential application for General Civil Restraint Order…evidence is on it's way to you now…. Yes, I have not finished yet" he wrote in a letter dated 19 February 2020 to a number of recipients and he responds to correspondence sent to him with further abuse and generalised allegations that are not backed up with evidence.

33. As well as the profane and abusive contents of his correspondence Elder Mighton has also been warned about the quantity of his repeated emails and correspondence with the Tribunals and Courts. He is in the habit of inundating the Courts and Tribunals with emails that contain the same information, often identically worded, by email and post. It has been explained to him on numerous occasions that he must desist as it impedes the administration of justice.

34. In his submissions to the court Elder Mighton said that he would not stop from bringing claims against LUL and was intending to continue lodging ET claims until he obtained what he considered to be justice. He also explained in open court that

that if LUL were willing to settle with him he would be open to reasonable offers and if they wanted him to stop bringing claims then he would do so in exchange for compensation.

The law

35. The law and procedure concerning CROs and ETs is now settled. There is no provision in the ET or EAT rules to make orders restraining litigation in the ET or EAT. In *Nursing and Midwifery Council v Harrold* [2015] EWHC 2254 (QB) Hamblen J (as he then was) followed and paid tribute to Proudman J in *Law Society v Otobo* [2011] EWHC 2264 (Ch), and considered the history of Civil Restraint Orders (CROs) and the academic literature in some detail and confirmed what had previously been assumed in a number of cases that the High Court has an inherent power to make a CRO restraining proceedings in the ET and EAT, since the ET and EAT have no jurisdiction of their own to make a CRO or equivalent order.

36. CPR 3.11 puts on a statutory footing the inherent power of the court to prevent abuse of its process and 3PDC is the Practice Direction made pursuant CPR 3.11 which sets out the circumstances in which the court has power to make a CRO against a party to proceedings; the procedure to be followed in an application; and the consequences of the court making a CRO. Although the CPR does not apply to tribunal proceedings, Hamblen J observed that

> "No doubt, however, the inherent jurisdiction to make CROs in relation to tribunal proceedings would be exercised consistently with the principles and practices set out in [3PDC]" (para 30)

37. It is therefore appropriate to follow 3PDC by analogy. Three levels of CRO are set out in 3PDC: a Limited CRO (LCRO) may be made by a judge where a party has made 2 or more applications which are totally without merit. If granted, it restrains that party from making any further applications in the proceedings in which the order is made, without first obtaining the permission of a specified judge. An Extended CRO (ECRO) restrains the party subject to the order from issuing claims or making applications and ancillary steps "concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made" without first obtaining the permission of a judge identified in the order. A General CRO (GCRO) may be made:

> "where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate. (3PDC pars 4.1(2))"

38. The consequences of a GCRO have been described as draconian, but that may be to overstate matters. Warby J in *Chief Constable of Avon and Somerset Constabulary v Gray* [2016] EWHC 2998 described it as a "permission filter". Where the order is made by a High Court Judge, as is sought here, the party against whom an order is made is restrained from issuing any claim or making any application in the High Court or the County Court without first obtaining the permission of a judge identified in the order. The permission of a specified judge is also required if the party wishes to apply to amend or discharge the order.

39. A GCRO may be made for a period of up to two years. The two year period may be extended, but it must not be extended for more than two years on any given occasion.

40. As has been repeatedly made clear in all the authorities, the purpose of a CRO is to protect the process of the courts and tribunals from abuse and parties from vexatious claims and applications.

41. The three questions to be addressed when considering a GCRO, set out in *Nowak v NMC* [2013] EWHC 1932 are:

    i) Has the litigant persistently issued claims or made applications which are totally without merit pursuant to PD3C.1 (the threshold requirements)?

    ii) Does an objective assessment of the risk which the litigant poses demonstrate that they would, if unrestrained, issue further claims or make further applications which would abuse the Court's process (exercise of discretion)?

    iii) What order, if any, is just and proportionate to make to address the risk identified (the appropriate order)?

42. In an application for a GCRO a third threshold requirement in addition to persistence and claims or applications being totally without merit is the inadequacy of an ECRO. Persistence means more than habitual

> "there has to be an element of persistence in the irrational refusal to take 'no' for an answer" (*Bhamjee v Forsdick* [2004] 1 WLR 88 para 42)

43. In *Odutola v Hart* [2018] EWHC 2260 (Ch) persistence was held to require a minimum of three totally without merit or unmeritorious claims or applications.

44. A court may only certify a claim or application as being totally without merit if it is bound to fail (*Sartipy v Tigris Industries Inc* [2019] EWCA Civ 225 para 27). Once a court has made such a finding it is binding (subject only to a successful appeal of that judgment) (*Crimson Flower Productions Ltd v Glass Slipper Ltd* [2020] EWHC 942 (Ch) paras 26-31).

45. Where, at the time, no express finding has been made as to whether or not a claim or application is totally without merit, on the hearing of an application for a CRO it is open to a court to consider and decide the issue for itself, but it is bound by the facts before the court or tribunal. Thus in *Nursing and Midwifery Council v Harrold (No.2)* [2016] EWHC 1078 (QB) Laing J reviewed a number of ET claims and applications that had been made by the defendant to decide which were, and which were not, totally without merit. It forms part of the objective assessment of the risk of further claims or applications that would abuse the court's process necessary for the consideration of the exercise of discretion.

46. Stuart-Smith J (as he then was), as approved by the Court of Appeal described the proportionality assessment to be conducted by the court in the exercise of its discretion as follows:

> "In briefest outline, the question either on an original application for a GCRO or on an application for an extension is whether an order (or its extension) is necessary in order to (a) protect litigants from vexatious proceedings against them and/or (b) to protect the finite resources of the court from vexatious waste. The question is to be answered having full regard to the impact of any proposed order upon the party to be restrained." (para 15 *Chief Constable of Avon and Somerset Constabulary v Gray* [2019] EWHC 1954 (QB))"

The applicant's argument

47. There were three strands to LUL's argument that Elder Mighton has persistently made claims that are totally without merit and that an extended civil restraint order (ECRO) would not be sufficient to protect litigants from vexatious proceedings and the finite resources of the court. Firstly they relied on the repeated number of unsuccessful claims, appeals and applications brought by Elder Mighton against them, seven of which had been expressly found to be totally without merit and all of which repeatedly sought to re-litigate matters already decided. It was submitted that in addition to those declared to be totally without merit, the claims dismissed by the ET under rule 27 and 37 were also totally without merit as were each of his unsuccessful reconsideration applications that were dismissed on the papers by the ET.

48. Secondly, the failure of Elder Mighton to engage with the outcome of his claims and appeals and his apparent determination to continue issuing repetitive claims and his repeated insistence that he would continue to bring claims. Thirdly LUL relied on the tone and content of his correspondence which was itself vexatious and often abusive.

49. There were two limbs to the argument that an ECRO would be insufficient in the circumstances. Firstly, because there are no proceedings before the High Court other than the Part 8 application for a GCRO (relying on *Nursing and Midwifery Council v Harrold* [2016] EWHC 1078 (QB)). Without extant civil proceedings on which to attach an ECRO, a GCRO is appropriate. Secondly because an ECRO would provide insufficient restraint because of Elder Mighton's refusal to take "No" for an answer.

The respondent's argument

50. In his oral submissions Elder Mighton sought to revisit events leading up to his dismissal in 2015 and the detail of the history of his employment with LUL. He explained how deeply hurtful he had found the graffiti on his locker and how upset he had been by the words written on it which suggested he was gay in homophobic language. He agreed with the court's understanding that his opposition to the imposition of any form of CRO could be categorised as follows.

    i) He has been a victim of injustice and will not rest or be deterred from seeking to obtain a full hearing before the ET to conduct a forensic examination of the evidence leading to his dismissal. He had been badly treated by his employer and humiliated by being dismissed in 2015 on trumped up charges following his successful internal appeal and reinstatement after his initial dismissal in 2014. He was a man of great standing within work and within the wider community. He had been featured twice in the Transport for London

magazine. He was a mentor and coach to young people in the Greenwich and Lewisham boroughs and had been a governor of Haberdashers Aske's Knight's Academy in Eltham and was a role model for young people. He had been unfairly dismissed and subjected to unlawful discrimination by his former employer and he is entitled to justice.

ii) He did not accept that it was right for the Employment Tribunal to have a 3 month time limit for bringing claims and they should not apply to his case. He contrasted the time limit regime for Employment Tribunal proceedings with that of other jurisdictions, such as the prosecution of World War II war criminals. He also considered that Ecclesiastes 3 should be followed and that "to everything there is a season and a time for every purpose under heaven" and on that basis his claim was still in time.

iii) He did not accept that his later claims were materially identical to his earlier, decided or withdrawn claims. He considered he had produced new evidence and had framed his claims differently to the initial complaints adding matters such as theft, defamation of character and failure to provide personal protective equipment (PPE) and work related asthma and lung complaints.

iv) In The Fifth, Sixth, Seventh and Eighth Claims which had been struck out under the Rule 27(3) and 37 procedure he did not accept his claims could be struck out when LUL had not attended the Rule 27(3) Tribunal hearing. In the letters sent to him in advance of the hearing he was warned that a failure to attend the tribunal could lead to his claim being struck out. This appeared to him to be uneven handed treatment – surely LUL's defence should be struck out as they had not attended instead of his claim being struck out.

v) He wanted his case to be considered in the context of his wider health issues. He had been diagnosed with COPD which he considered had been brought about by the poor air quality in the London underground and the lack of PPE over many years[1].

vi) Other wider issues were relevant too. The Covid 19 pandemic is particularly stressful and distressing for him as an Afro-Caribbean man in middle age. He has been unable to see his granddaughter for six months. He is also anxious and concerned about wider political events both nationally and globally. He has been affected by the deaths in America of African Americans such as George Floyd and others. In the UK he has been affected by the treatment of some Windrush generation individuals. He accepted that was not directly affected having obtained a British passport in 1979, but he explained that he felt the pressure in general terms by the hostile environment he perceived exist to black first generation immigrants such as himself. He also wanted to draw attention to health and safety issues and air quality and TFL's attitude to health and safety of its workers.

[1] Although he had only 5 years continuous service with LUL prior to his dismissal he had worked on the London underground system for 30 years.

Discussion and conclusion

51. Six of Elder Mighton's seven appeals to the EAT over a three and a half year period have been certified as totally without merit, as has one of his two applications to the Court of Appeal. Those rulings are binding. The six EAT and one Court of Appeal totally without merit orders and sufficient to demonstrate persistency and meet the threshold requirements. In light of those facts it is hardly necessary for me to reach conclusions on each of the Fourth to Tenth ET Claims. But those seven further ET claims are also totally without merit for the reasons explained to Elder Mighton in each of the judgments dismissing that under Rule 37. They were bound to fail as the issues raised been already been decided in the earlier claims, or should have been raised in the previous claims and in any event the claims were all now time barred. Each of the applications for a reconsideration of the rule 37 judgments was also totally without merit.

52. Elder Mighton made no secret of the fact that he will continue to issue ET claims concerning his dismissal in 2015 and will continue to ignore the fact that his case was dismissed after a full hearing and that his attempts to re-litigate have repeatedly been found to have no reasonable prospects of success. He went further in his oral submissions to say that he would only stop if LUL paid him to do so and confirmed that he was content to say so in open court.

53. Elder Mighton has an obsessive approach to his employment with LUL which ended 5 years ago. He will not take 'no' for an answer even though it is apparent that many of the Employment Judges, especially REJ Wade, have painstakingly and patiently sought to explain to him the principles of finality of litigation and time limits in ET litigation. The need for restraint in correspondence, both in tone and content and volume has also been clearly spelt out, but he has ignored the advice and continued to bombard the courts and tribunals with repetitious material and in some correspondence has been highly abusive. As EJ Wade has explained to him the staff and judiciary are merely doing their job and performing their administrative and judicial functions which they are entitled to do without being abused by the tribunal users.

54. Ms Seymour submitted that an ECRO would not be sufficient or appropriate because the litigation sought to be restrained is in the ET and there is therefore no court proceedings peg on which to hang an ECRO order. Since the CRO application is made under Part 8 as a standalone claim because there is no equivalent rule in the ET or EAT there are no "proceedings in which the order is made" (3CPD.3.2) and only a GCRO can protect LUL and the court from abuse of process and vexatious waste.

55. The consequences of a GCRO or an ECRO would be hard for Elder Mighton as what he sees as his quest for justice dominates his life currently and it is his fervent desire to continue, whatever the obstacles.

56. Turning to what Elder Mighton agreed were the broad themes of his opposition to the proposed order, I well understand the impact the loss of employment can have. It is well known that dismissal can be as psychologically devasting as bereavement or divorce. It involves a loss of status and identity as well as income. It involves immediate day to day changes to routines and habits. It can leave the dismissed employee feeling powerless and humiliated. Where, as here, Elder Mighton had

worked on the underground for 30 years its impact cannot be underestimated. It is for that reason that employment law and the jurisdiction of the ET is such an important cornerstone of the judicial system. The impact of unlawful discrimination and breaches of the Equality Act 2010 are also well known and well documented and why the top of highest band of injury to feelings awards (absent psychiatric damage) is currently £45,000[2].

57. But the central difficulty for Elder Mighton is that his case has been heard by the ET – his Second ET Claim and his Third ET Claim both went to a full hearing before a full tribunal panel of an EJ and two lay members and both cases were unanimously dismissed. On both occasions he was legally represented. On his attempt to appeal the Third ET Claim the appeal was certified as totally without merit. He has thus had a full hearing of his claims and judgment has been given. It is not open to him to simply ignore the ET's previous findings and rulings and go back repeatedly, Groundhog Day fashion to try again. Finality of litigation is an important principle. Losing a case must be hard, but in the absence of grounds to appeal there must come a time for acceptance and moving on. It is useful to consider the matter from the other side's point of view. What would Elder Mighton think if he had won his case, there had been no error of law in the ET's judgment and LUL had refused to accept it and were allowed a new hearing in front of a different judge in the hopes they would get a different outcome? Justice has been done in Elder Mighton's case and his case has been heard.

58. The time limits in ET proceedings are set in statute and, at the risk of oversimplification, claims should be brought within 3 months of the dismissal or discrimination complained of (with some discretion to extend for a reasonable period). It is now five years since Elder Mighton was dismissed and it is far too late to still be bringing claims now. Adding, for the first time, a claim of disability discrimination as he did in the Tenth ET Claim in February 2020 in relation to his dismissal five years earlier will not circumvent time limits or get round the fact that the case about his dismissal and treatment by LUL has already been heard and decided.

59. Time limits in criminal proceedings are not comparable to tribunal proceedings between an employee and an employer brought in the relative informality of the ET. The ET was intended to provide a speedy resolution to disputes since reinstatement is the primary unfair dismissal remedy, which, if it is to be effective, should be decided swiftly. ETs are not religious courts and statutory time limits are not governed by Ecclesiastes, even if the verse could be interpreted as meaning the time for Elder Mighton to bring a claim was without end (which is itself doubtful and many could interpret the verse as meaning the opposite).

60. Having carefully considered each of the Fourth – Tenth ET Claims I find that they are materially identical to the Second and Third Claims. In each case Elder Mighton seeks to challenge the fairness of his dismissal and allege race and religion or belief discrimination during the course of his employment by LUL. Introducing disability discrimination in the Seventh and Tenth ET Claims does not assist as it is both out of

[2] Third addendum to the Joint Presidential Guidance (England & Wales and Scotland) Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879, 27 March 2020

time and could and should have been raised in the in time proceedings (the Second or Third ET Claims). ETs have no jurisdiction to consider personal injury complaints in the tort of negligence, or defamation, or any alleged failings by the British Transport Police in the investigation of incidents and reported crimes as EJ Wade explained to Elder Mighton.

61. There is an innocent explanation for Elder Mighton's concern about disparity of treatment as between him and LUL at the Rule 27(3) hearings. The purpose of Rule 27 is to identify apparently very weak cases at an early stage to avoid unnecessary expense to all concerned and avoid wasted tribunal time and resource. Where a claimant disagrees with the initial view of the EJ who has considered the claim on the papers, it is for the claimant to make representations and then explain why the initial view of the tribunal was inaccurate. The procedure is specifically designed so that there is no need for the respondent to the claim to have to attend the Rule 27(3) hearing unless they wish to do so. But if the claimant wishes to be allowed to continue with his or her claim, if they do not attend the rule 27(3) preliminary hearing they run the risk of their case being dismissed since the tribunal will not have the benefit of hearing their oral representations before making a decision. There is nothing for respondent to do at that stage: the hearing takes place before a respondent is required to enter a notice of appearance. It is for that reason that there is a lack of symmetry at a Rule 27(3) hearing. LUL's absence from the Rule 27(3) hearings does not therefore mean that the decision of the ET to dismiss the claim under rule 37 was unfair or prejudiced against Elder Mighton.

62. During the hearing I asked Elder Mighton if he had any other proceedings pending or contemplated and he explained that he did not. I therefore conclude that he has not issued and is not planning to issue a personal injury claim in respect of his allegation that LUL is responsible for his COPD, nor defamation proceedings. To the extent that his concern is to publicise and campaign for better underground air quality, ET proceedings are not a suitable vehicle for raising his concerns. There are organisations and pressure groups he could join to raise these issues. It is an abuse of ET proceedings to seek to use them as a vehicle for publicity without a valid cause of action. Similarly if his aim is to bombard LUL with totally without merit claims in order to bludgeon them into a settlement of some sort, it would amount to an abuse of process which the court is bound to seek to protect against.

63. Elder Mighton became impassioned when he discussed the ills of the world and the difficult times we live in – from Covid-19, to concern in the build up to the American presidential election, to both global and local issues of race and identity politics. He explained that he wants to play his part in making the world a better place to benefit humanity and justice is of great importance to him. He had produced an educational exhibition stand with important landmarks in black British history that he would like to use in schools. It included reference to his case. In seeking to link wider issues with his dismissal from LUL in 2015 he is conflating wholly different matters. The role of the ET is specifically and exclusively for the adjudication of the employment disputes that it has been empowered to determine by parliament. It does not have a wider role. Conversely it may be that his educational stand would be more likely to be accepted in schools if it focussed exclusively on matters outside Elder Mighton's perception of his treatment by LUL.

64. ETs are particularly vulnerable to unmeritorious and vexatious claims and applications since there is little procedural formality and there is no fee payable for bringing a claim or making an application. The resources of the ET and EAT – both administrative and judicial - are finite indeed. Every piece of correspondence must be considered and dealt with and usually referred to a judge for direction or order. There are minimal formalities in order to promote accessibility, informality and speed in line with the principles set out in the Donovan Report of 1968 that led, eventually to the establishment of the system of ETs. As a consequence ETs are more susceptible to abuse and less able to enforce procedural rigour by tribunal users than the courts.

65. There is no doubt that the threshold requirements have been satisfied – that Elder Mighton has persistently made claims and applications that are totally without merit and that he will continue to lodge ET claims seeking to revisit his dismissal by LUL in 2015 if unrestrained. The next question is what type of order is appropriate.

66. The classic test for imposing a GCRO, as opposed to an ECRO, was set out in *R (Kumar) v Secretary of State for Constitutional Affairs* [2007] 1 WLR 536

> "[a GCRO] is apt to cover situation where a party adopts a scattergun approach to litigation on a number of different grievances, without necessarily exhibiting such an obsessive approach to a single topic that an extended civil restraint order can appropriately be made against him/her"

67. The reason is obvious: a GCRO restrains the party from bringing any form of application or proceedings without the permission of the nominated judge whereas an ECRO is limited any matter related to the proceedings in which the order is made.

68. I do not accept LUL's argument that a GCRO should be applied for want of a peg on which to hang an ECRO, if an ECRO would otherwise be the appropriate order to make. 3PDC is applied to ET and EAT proceedings by analogy, and a litigant in ET proceedings should not be in a worse position than a court user simply because there is no provision in the ET or EAT rules to impose CROs and therefore no extant proceedings. That would be the logic of LUL's argument if correct. It would be a surprising outcome if a more restrictive CRO was made only because the ET and EAT rules make no provision for restraining orders to be made.

69. However, ignoring the procedural difficulty raised by LUL for a moment, on the facts of this case there are several substantive reasons why an ECRO would be insufficient to protect both the resources of the ET and EAT and respondents from the persistent vexatious litigation brought by Elder Mighton.

70. Firstly although his primary focus is the single issue of LUL's treatment and dismissal of him in 2015, he has adopted an increasingly scatter gun approach in the litigation by the naming of an ever widening circle of individual respondent employees of LUL in the ET claims he has lodged, with little or nothing to do with his case: 39 individuals in the Seventh ET Claim, 52 in the Eighth ET Claim and 37 in the Tenth ET Claim.

71. Secondly, as time goes on, he is casting his net more widely to include increasingly tangential claims and issues and thus broadening the themes and the subject matter

and stretching causal links beyond breaking point. For the same reasons as set out by Laing J (as she then was) in *NMC v Harrold (No 2)* [2016] EWHC 1078 (QB) at paragraph 137 it would be difficult to identify the prescribed issues with sufficient precision.

72. Given Elder Mighton's determination to seek to re-open the already decided issue of whether he was unfairly dismissed or subjected to unlawful discrimination by LUL through ET litigation come what may, he has already said he will seek to continue to issue ET claims. When he does, he will doubtless assert that the new claims fall outside the scope of the ECRO, when they do not, just as he has unsuccessfully tried to argue in the Fourth to Tenth ET Claims. It would result in satellite litigation requiring the ET or this court to adjudicate on each occasion whether the new claim concerned "any matter involving or relating to or touching upon or leading to the proceedings in which the order is made" which would result in further vexatious waste of the resources of the courts and tribunals.

73. An ECRO would be hard to police and enforce and would encourage Elder Mighton to develop his spaghetti strategy of throwing everything at the wall to see what might stick. Since his avowed intent is to harry LUL as much as he can as demonstrated by his actions to date and in the hopes they might settle on good terms for him, an ECRO is neither sufficient or appropriate.

74. It follows from the above that LUL has proved that a GCRO is just and proportionate. An order is necessary since Elder Mighton has confirmed that he will continue to issue ET proceedings unless restrained from doing so. I do not reach that decision lightly. A CRO interferes with the right of access to a court or tribunal, which is a fundamental civil right and can only be imposed if, and only to the extent, that it is necessary to achieve a legitimate aim and goes no further than is required to achieve that aim.

75. Here the twin aims of protecting others from totally without merit and abusive claims and the limited resources of the tribunals from vexatious time wasting claims are legitimate aims.

76. A GCRO will provide sufficient, but not excessive restraint and is no more than necessary to achieve the legitimate aims. It consists solely of a requirement to seek permission from this court to bring further claims. It is not an absolute bar, but a permission filter. Although a permission filter is unusual in ET litigation, if a claim of substance and arguable merit were to be presented, the permission process would ensure that the claim could be effectively case managed, any untenable aspects removed and directions and orders made to ensure efficient use of the parties and ET resources to ensure a fair hearing of the arguable parts of the claim. Any interference of Elder Mighton's article 6 rights would thus be proportionate. Given the history of the litigation the full period of 2 years is necessary to protect LUL and the ET.

Conclusion

77. I consider that I should make a GCRO which restrains Elder Mighton from making any claims or bringing any applications in the ET, the EAT, the county court and the High Court without first obtaining the permission of the specified judge with

immediate effect. It includes the Tenth ET Claim currently stayed by the ET. It should last for the maximum initial possible period of two years.

78. Since he cannot make any applications, it means that there is likely to be little reason for Elder Mighton to write to or contact the ET or EAT or Court of Appeal. He must appreciate however that he if he does have reason to communicate with them, he must remain civil, no matter how passionately he feels. If he persists in communicating using abusive and profane language he risks facing further sanction and could face contempt of court proceedings. He described how profoundly affected he was by the graffiti on his locker. He must therefore well understand how unpleasant it is for the ET, EAT and Court of Appeal staff and judiciary to see the contents of his correspondence with them.

Final observation

79. Laing J ended her judgment in *NMC v Harrold (No.2)* with a practical suggestion that it would be desirable for ETs, when they make decisions in weak claims, expressly to consider, and to make a finding on, the question whether the claim or application is totally without merit. She also suggested that those who draft the ET and EAT rules of procedure may wish to give some thought to the topic. I repeat those observations. The Rule 27 procedure was specifically introduced to weed out hopeless claims, in any Rule 27(3) hearing it may be appropriate to consider whether a claim, or any part of it, is totally without merit as a matter of course in order to lay down a marker.

80. In this case it has not been an onerous task to decide that the Fourth to Tenth ET Claims and subsequent reconsideration applications were totally without merit. It was probably not even necessary for me to do so as the total of seven totally without merit appeals before the EAT and Court of Appeal on their own were sufficient to establish persistency and the need for a GCRO. But it is important to describe things as they are. In other cases it may be a more laborious exercise to trawl back and revisit earlier claims and applications to make appropriate findings. As Brooke LJ observed in *R(Kumar) v Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990 at para 79:

> "If this [the recording of whether a statement of case or application is TWM] is not done, wholly avoidable expense may have to be incurred in disinterring and examining the evidence of past litigation"

81. It is a sobering thought to think of the time spent by the ET over the last four and a half years dealing with the repeated, materially identical and out of time Fourth to Tenth ET Claims: the initial consideration under Rule 27(1), each of the subsequent applications made by Elder Mighton under Rule 27(2), each of the Rule 27(3) hearings held in each of those claims, each of the reconsideration applications made under Rule 72, together with all the other many ancillary applications and emails and letters and the use of administrative and judicial resource and court time in dealing with them.

82. The litigation has also taken its toll on Elder Mighton who described its impact on his own health and emotional well-being. It is to be hoped that Elder Mighton will now be able to move on from this painful chapter of his life.

83. LUL did not seek a costs order against Elder Mighton and for that reason, none is made.