Neutral Citation Number: [2023] EAT 11

Case No: EA-2021-000062-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 February 2023

His Honour Judge James Tayler

- -

Between :

Mr T Smith	**Appellant**
- and -	
Tesco Stores Limited	**Respondent**

- -
- -

No appearance or representation for the Appellant
John Platts-Mills (instructed by Pinsent Masons LLP) for the **Respondent**

Hearing date: 2 February 2023

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JUDGMENT

SUMMARY

Practice and Procedure

The employment tribunal correctly held that the claimant had acted in a manner that was scandalous, unreasonable or vexatious, concluded that a fair trial was no longer possible and decided it was proportionate to strike out the entire claim. A fair trial was not possible because the claimant refused to cooperate with the respondent and the employment tribunal.

His Honour Judge James Tayler:

Introduction

1. This appeal concerns the exceptional circumstances in which, when all that can reasonably be done to get to grips with the issues in a claim brought or defended by a litigant in person has been done, an employment judge may reluctantly conclude that person is refusing to comply with the obligation to assist the tribunal to further the overriding objective, through conduct that can properly be described as scandalous, unreasonable or vexatious, so that a fair hearing is no longer possible, and there is no proportionate lesser sanction than striking out the whole claim or response.

2. Good case management requires strong judicial skills. I appreciate it is easier to comment on than to undertake. It is particularly important at the early stages of a case. From the outset, the aim should be to identify the core claims and to manage them through to a full hearing, without the fundamental claims becoming encrusted with lengthy further particulars, in which more and more subsidiary claims and issues get added that obscure the real dispute between the parties. That is why it is best to avoid sending litigants in person away to provide additional information, whenever practicable.

3. If a claim form, or response, is of excessive length, and is not set out in a logical format (generally chronological), effective early case management is extremely difficult, and the more likely it is that there will have to be some form of further particularisation and case management before a hearing can be fixed. Litigants in person may not know the law, but they should generally be able to set out a coherent history of the events and explain the claims they consider arise. Claims rarely succeed because of the quantity of the allegations, it is the quality that matters.

4. The longer case management goes on, the greater the risk that a litigant in person will become embattled and fail to engage properly with the employment tribunal. Good case management requires that the parties work with the employment tribunal and each other in a constructive manner. Even litigants in person must focus on their core claims and engage in clarifying the issues. It is not the fault of a litigant in person that she or he is not a lawyer, but neither is it the fault of the other party

or the employment tribunal. While the employment tribunal should take reasonable steps to assist litigants in person, this must not be at the expense of fairness to the other parties to the claim, and to litigants in other proceedings who seek a fair determination of their disputes, having regard to the limited resources of the employment tribunal.

5. Regrettably, those who are confused by, or disagree with, proper case management decisions that are fair to both parties, sometimes jump to the conclusion that the employment judge is biased and that the employment tribunal and its staff are adversaries to be challenged and attacked. If such a mistaken view results in a withdrawal from the required co-operation with the employment tribunal and the other party, necessary to advance the overriding objective, it puts a fair trial at risk.

The claim

6. The claimant worked as a Customer Assistant for the respondent from 8 September 2008 until he was dismissed on 5 September 2018. The respondent asserted that the claimant was dismissed because when shopping in his own time he had an altercation with a store manager, pushed and insulted him, resulting in the Police being called and the claimant being arrested, he was also alleged to have been abusive to a shopper and refused to sign his training record.

7. The claimant submitted a claim form received by the employment tribunal on 26 November 2018. The claimant has acted as a litigant in person throughout. The claimant asserted claims of unfair dismissal, race discrimination, disability discrimination and for various payments. The claimant attached a relatively lengthy document entitled “Background and Details of My Claim”. Some complaints were reasonably clear, whereas others were not. The discrimination complaints span the period from 2014 to the claimant's dismissal at the end of 2018.

8. The case was considered at a preliminary hearing for case management before Employment Judge Flood on 4 March 2019. EJ Flood rolled up her sleeves and did all she could to get to grips with the core issues in the various claims. She drew up a list of issues and a table of the facts that the claimant relied on for one or more of the claims. EJ Flood fixed a further preliminary hearing for case management to consider compliance with the case management orders, any application to amend and

to list the final hearing. The parties were directed to inform the employment tribunal if they disagreed with the issues that had been identified.

9. The second preliminary hearing for case management was conducted by EJ Flood on 8 May 2019. Unfortunately, rather than cooperate to finalise the issues, the claimant sought to add a plethora of further allegations. EJ Flood recorded:

> (5) The second matter discussed was the fact that the claimant had provided significant further detail of his claims following the last hearing and wished to amend his claim and the respondent is now concerned that he is trying to significantly expand his claim adding further complaints. I am also concerned that there has been a proliferation of the issues. I had set out my understanding of what I understood the claimant's complaints to be in a Schedule of Allegations which was set out in n Appendix after the last hearing and sent this to the parties. The claimant firstly emailed the Tribunal and the respondent after the first hearing on 28 March 2019 making a request to amend and reinstate claims he agreed would be omitted. This was objected to by the respondent. He wrote again on 8 April providing a further 52 page document headed "Claimant's response to respondent's grounds of resistance". He then provided another further lengthy document on 15 April 2019 which he describes as "additional information in support of the claimant's claims". The claimant has also amended and added to the Schedule of Allegations considerably in a further document sent to the Tribunal on 30 April 2019. Attempts were made during the time available to go through some of the allegations and new allegations, but in the time available it was not possible for any significant progress to be made towards clarifying the position.
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> (6) I explained to the claimant that the Schedule of Allegations was designed to set out briefly what the issues were that the Tribunal had to determine and was not a witness statement or the place where the full details of the case and what evidence supported it should be set out - there would be time and opportunity for that in due course. At the end of the hearing, we agreed that a sensible next step would be for me to consider the claimant's suggested amendments to the Schedule of Allegations and to add my comments and to capture some of the discussion held today and assist the parties in trying to move forward in this initial stage of identifying the issues. This may also assist as to determine whether certain allegations were:
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> > (i) made as specific allegations in the current complaint and if so they are made in the appropriate legal framework;
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> > (ii) provided as background, setting the current allegations in context; or
> >
> > (iii) were new allegations which would require an amendment application.

> (7) The respondent would attempt to compare this to the new to the original Schedule of Allegations using software to try and identify any new matters raised and to consider its position on whether this amounted to an amendment oft he claim and what its position was if it did.
> This would all be done in good time for the next preliminary hearing to be held on 7 June 2019 where we would attempt to make further progress (perhaps with the assis1ance of an ELIPS representative to act as the claimant's representative at the hearing itself if available). I asked that for the moment, that the claimant refrain from producing and sending any further documents setting out what his claim was about.

10. EJ Flood was not deterred by the fact that her hard work in attempting to clarify the core issues had been undermined by the claimant seeking to add voluminous further material. She sought to find a constructive way forward, requiring that the respondent assist, and recommending the claimant obtain assistance from an ELIPS pro-bono barrister.

11. The third preliminary hearing for case management took place on 7 June 2019. EJ Flood understandably concluded that the time had come to list the matter for a final hearing. The case was listed for hearing over 10 days in July 2020. Considerable effort was put into finalising the issues and reassuring the claimant that proper identification of the issues was not to his disadvantage:

> (6) The main purpose of today's hearing was to review compliance with orders; make any further orders; determine whether further preliminary hearings are required and to list for final hearing. It is also crucial that the issues that a Tribunal will need to determine in this claim are clearly and definitively identified. Attempts have been made at the last two hearings to do this. After the first hearing, a draft Schedule of Allegations had been produced as a starting point. The claimant had then added significantly to this, expanding on his claims in additional written documents. Whilst in no way wishing to limit how the claimant should put his case, I was becoming concerned that the claim was becoming unclear and difficult to manage.
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> (7) A further Schedule of Allegations was produced after the second hearing and was sent to the parties. The respondent was to add its comments and then it was agreed that we would further discuss this Schedule at the hearing today. The hearing was scheduled for today in order that the claimant could seek the assistance of an ELIPS representative (who were present in the Tribunal offices today) as I was of the view this might assist. The claimant has had some advice from ELIPS but chose not to be represented by ELIPs as he was not sure it was in his best interest. He is of course perfectly entitled to take this view and he was happy to proceed with the hearing in person.

> (8) We spent much of the hearing going through each of the allegations one by one and the claimant was able to confirm his position on what he says about each allegation by the end. I have set out my understanding of the position that had been reached following these discussions in the updated Schedule that is attached to this Order. I have limited the Schedule of Allegations to the factual matters complained about as allegations of direct age and race discrimination and harassment. The issues raised on the other complaints of unfair dismissal, dismissal and detriment on the grounds of having made a protected disclosure, disability discrimination and victimisation are now set out in the list of issues below. I stated again that this was just a summary list of issues and it did not stop the claimant giving further evidence to support each of the points made. I reassured him that the documents had had produced to date could be useful or even form the basis for his witness statement and he was able to include all such documents in the Bundle of Documents that would be before the Tribunal in the final hearing. The List of Issues and Schedule of Allegations was just to record in list form what questions the Tribunal had to answer. I asked the parties to consider the List of Issues and Schedule of Allegations and only provide comments if there were any major objections that they wanted to make.

12. EJ Flood correctly concluded that the time for ascertaining the issues had come to an end and, subject to any minor final perfection, the time had come to determine them. EJ Flood declined to list a preliminary hearing to determine whether any of the claimant's claims should be dismissed because they were out of time and/or had no reasonable prospects of success, because she considered it would not be proportionate to do so.

13. EJ Flood sensibly fixed what was designed to be a final brief preliminary hearing, shortly before the full hearing, to ensure that the case was trial ready. Alas, it was not.

14. On 8 September 2019, the claimant submitted an application to amend his claim to add depression as a disability. The fourth preliminary hearing for case management, that had been fixed to check trial readiness, was converted to consider the amendment application.

15. The fourth preliminary hearing for case management was held by Employment Judge Miller on 16 October 2020. EJ Miller declined to consider a renewed application for strike out by the respondent. The claimant added two further matters that he wished to add to the claim by amendment. The amendments were refused.

16. The respondent had sent a draft list of issues to the claimant by email on 6 October 2020 based on the lists produced by EJ Flood. The respondent identified gaps that it contended required filling to

enable it to finalise the list of issues and prepare for the hearing. The claimant was not prepared to accept the list of issues as accurate, but also was not in a position, in the time available, to explain which parts of it he objected to and why. EJ Miller urged the parties to reach agreement on the issues. The claimant requested an opportunity to provide further and better particulars of his claims generally. The application was refused on the basis that there had been repeated opportunities for the claimant to set out his claim. A more limited order was made requiring that by 13 November 2020:

> "the respondent must write to the claimant with a request for any information they need to complete the draft list of issues appended to this case management order. That request must be precise and specific"

17. The claimant was required to respond by 11 December 2020. EJ Miller stated:

> The claimant must not introduce new issues that are not included in his claim form or the appendix to the order of EJ Flood of 7 June 2019. The claimant may not introduce issues in respect of which an application to amend has been refused and that includes the issues referred to in paragraph 1.1 of these orders.

18. The final hearing was listed, for the second time, over 10 days in November and December 2021. A further preliminary hearing for case management was fixed for 17 March 2021, once again with the purpose of ensuring that the case was trial ready.

19. The claimant failed to comply with the order to provide the information needed to complete the draft list of issues. Instead, on 7 January 2021, the claimant submitted an application to amend to add claims of victimisation and setting out 13 headings of what he described as his "prohibited conduct claims" including claims, some of which, such as indirect harassment, are not recognisable legal claims. He did not give particulars but stated that the claims would be clarified in an updated chronology of events, a diary account of events, and witness statements to be submitted in "due course". The matter was dealt with on the papers by EJ Miller who refused the application to amend and then converted the preliminary hearing listed for 17 March 2021 to consider an application for strike out that had been made by the respondent on 12 January 2021.

The judgment subject of this appeal

20. The fifth preliminary hearing was held on 17 March 2021 by Employment Judge Cookson. The preliminary hearing was originally listed in person, but there was a proposal that it be converted to a remote hearing as part of a plan to minimise attendance at the employment tribunal because of the Coronavirus pandemic. The claimant raised a concern that he did not have the necessary equipment as a result of which the hearing was converted to a hybrid hearing with the claimant attending at the tribunal but counsel and the employment judge attending remotely. It appears that the claimant did not appreciate it would be a hybrid hearing until he attended at the employment tribunal. The hearing start time had been changed to 9.30 am, but this was overlooked by the claimant. EJ Cookson explained what happened at the hearing:

> 16.When the claimant attended the hearing on 17 March 2021 at 10am he was apparently upset that the hearing was not being conducted in-person. He asked the clerk to provide some comments to me about that and this was done. I understand that the clerk told the claimant to explain to me what he had said the clerk to when I joined the hearing remotely. The screen which shows remote attendees is to the side of the parties' desks in the hearing room that the claimant was using. I am aware that the clerk had offered the claimant the opportunity to sit at what is usually the desk used by the witnesses which would have facilitated his participation in the hearing because he would have been sitting facing the screen and the camera in the tribunal room directly, but that offer was refused.
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> 17.The claimant was informed that the hearing was beginning and that I had joined the hearing remotely. Mr Platt-Mills also joined the hearing remotely. The clerk asked the claimant to raise his concerns with me. However, the claimant refused to look at the screen, he refused to address me directly and he persisted making representations to the clerk which he required the clerk to address to me. I told him to stop doing that. I told the claimant he must address me and, when the claimant kept talking, I told him to stop speaking over me. The claimant ignored me entirely. I told the claimant to stop seeking to co-opt the clerk into acting as his representative and to address me as the judge hearing the case. In particular I told him to stop talking over me so that I would explain to him how I proposed hearing this case in the circumstances and asked him to listen to me. I was entirely ignored, and the claimant continued to talk to the clerk, talking over me. The clerk asked him to stop addressing him and to speak to me. That request was ignored. It appeared that the claimant was making comments to the clerk about me and the respondent's representative. I consider that was wholly unreasonable conduct on his behalf which was discourteous to the tribunal and which placed the clerk in an unfair and insidious position. If the claimant had behaved in a proper manner and had addressed me to raise objections to the hearing going ahead I would

> have considered them, but that did not happen. I have no doubt the claimant is aware of the way that parties are expected to behave in tribunal hearings having attended four previous hearings.
>
> 18.Having refused to turn to the screen to look at me and continuing instead to address the clerk, the claimant then collected his papers and left the hearing room. The claimant gave me no indication that he would comply with my reasonable directions or indeed that he would respect any decision that I made. Based on this conduct I concluded that the claimant had given gratuitous insult to this tribunal.
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> 19.The claimant had not addressed me to offer any good reason for adjourning the hearing. The case had been listed to consider the respondent's application to strike out and it had incurred the cost of instructing counsel to attend the hearing on its behalf. I had given the claimant the opportunity to participate in the hearing before me, but he chose not to listen to me or address me and chose not to give me the courtesy of letting me explain matters to him. He chose to walk out the hearing. In those circumstances I determined that the hearing should continue in the claimant's absence.
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> 20.I then heard oral submissions from Mr Platt-Mills in which he expanded slightly on his skeleton argument to make additional submissions that the claimant's conduct towards the tribunal at this hearing further justified and supported the grounds for strike out already set out.

21. EJ Cookson noted that the claimant had "failed to provide any clarification or comment on the list of issues he had been sent as he had been ordered to do" and had given no explanation for the failure. In considering the application for strike out EJ Cookson directed herself to Rule 37 **Employment Tribunal Rules 2013** ("**the ET Rules**") and focussed on the decision of Burton J in **Bolch v Chipman** [2004] IRLR 140.

22. EJ Cookson concluded that the claim should be struck out. Her judgment was that:

> On the application of the respondent, the claimant's claims are struck out because
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> > a. the manner in which the claimant has conducted these proceedings has been scandalous, unreasonable or vexatious (Rule 37(1)(b)), and
> >
> > b. I consider that it is no longer possible to have a fair hearing in respect of the claim because of the claimant's conduct (Rule 37(1)(e),
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> and in the circumstances it is proportionate and in the interests of justice to strike out the claimant's claims in their entirety.

23. EJ Cookson gave the following concise reasons:

> 25. I have set out here the particular matters that I have considered the conclusions that I reached following the Bolch guidelines set out above:
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> a. The claimant's behaviour towards the respondent in failing to respond meaningfully to the draft list of issues and his disregard for his duty of cooperation, his failure to follow the orders of Employment Judge Miller in relation to the list of issues for this hearing and his behaviour in the tribunal on the day of the hearing before could properly be categorised as scandalous, unreasonable or vexatious conduct in the sense that it was abusive of the other side and of process. His behaviour at the hearing was part of a course of conduct that this claimant has chosen to adopt generally as set out by the respondent in its application and demonstrated by the correspondence in the preliminary hearing bundle. The claimant is aware from the extensive process undertaken by Employment Judge Flood and Employment Judge Miller that it would not be acceptable to simply assert a vague list of claims and that specific particulars of claims are required. He is aware from the amendment application before Employment Judge Miller what is required in an amendment application … and he had been provided with written reasons for that refusal. Not only did the claimant fail to engage with the list of issues as he had been ordered to do, his application to amend is made in terms which he must or should have been aware was unreasonable in light of what he had previously been told by Employment Judge Flood and Employment Judge Miller. For these reasons the terms in which the amendment application is made appears to be willfully vague and an abuse of process.
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> b. I gave careful consideration as to whether, in light of my finding on relation to the claimant's conduct, a fair trial was still possible. I took into account the claimant's failure to do what he had been required to do in the past by Employment Judge Flood and Employment Judge Miller which is why so many preliminary hearings have taken place in this case, and his refusal to comply with my instructions or indeed to show me the common courtesy of letting me speak. I have reluctantly concluded that this claimant has shown that he is not prepared to cooperate with the tribunal process. This led me to make the difficult and unusual finding that a fair trial in this case was no longer possible because I conclude that the claimant's behaviour in this regard is likely to be repeated.
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> c. I then considered whether striking out the claimant's claim was the appropriate remedy. I considered whether there was a lesser penalty that I could impose which might

> ensure compliance and the possibility of a fair trial, but I was unable to identify one. My judicial colleagues had have already taken considerable steps to try and identify the scope of the claimant's claims and their attempts to do that had been unsuccessful and despite their attempts the respondent is still faced with a vaguely worded application to amend the claim and an unresolved list of issues. A number of orders have been made but not complied with. In light of the difficulty of determining material noncompliance where an "unless order" is made in circumstances where further particularisation of claims is required I did not consider that the option of making such an order was an appropriate one in this case. I concluded that that there was nothing useful that I could do which would ensure compliance and a fair trial that has not already been tried without success.
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> d. I have taken into account the consequences of this order and what would happen if I did not make it. I recognise that to strike out a claim is the one of the most draconian measures I can take and of course is a step which is prejudicial to the claimant. However, I have also taken into account the prejudice to this respondent if these proceedings were allowed to continue. More than two years on from the issue of proceedings the respondent finds itself facing significant but unexplained and unparticularised new discrimination allegations and a continued refusal to cooperate with a matter as straightforward as agreeing a list of issues. That would be unsatisfactory in any case, but these proceedings have been the subject of four previous hearings with considerable judicial input into the process of identifying claims and legal issues, particularly by Employment Judge Flood. I do not consider that is in accordance with the overriding objective to expect a respondent to continue to face proceedings being conducted in this way.
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> 26. My conclusion in this case was that the attempts by the employment tribunal and the respondent to deal with this case in accordance with the overriding objective have been frustrated by the claimant's conduct, and his behaviour to date and at the hearing today strongly suggests that any future attempt by the tribunal to manage this case and by the respondent to prepare this case for final hearing in accordance the overriding objective will also be frustrated by him. In those circumstances I reluctantly concluded that I have no alternative but to strike out the claimant's claim under rule 37 (1) (b) and (e).

The reconsideration application

24. I note, in passing, that the claimant sought reconsideration of the strike out judgment. He asserted that he had been confused by what he expected to be an in person hearing being converted

into a hybrid hearing. He did not assert that he wanted a final chance to cooperate with the employment tribunal and respondent to finalise the issues and proceed with the hearing. Instead he asserted that he had not participated in the hearing "voluntarily or otherwise" and that "any such participation was not conducted by him willingly or with his permission, knowledge, agreement or acknowledgement". The claimant also argued that "underhanded means and covert, devious devices were used in trying to trick him into doing something he did not feel comfortable to do". The claimant stated that the person who had attended the hearing had not provided his name so that "no conformation [sic] of the claimant's name was provided, so the EJ could not be sure that the person was who the EJ thought or expected he or she to be". The claimant alleged that it was EJ Cookson who had acted vexatiously because she:

> "allowed emotions to cloud decision making; it was not the claimant's conduct that was scandalous, unreasonable or vexatious, as he was only exercising his basic human right to not participate in his own destruction or to do something he was not comfortable with doing. Had he participated in the CVP hearing he would have given the EJ Cookson, and possibly the ET and the Respondent's legal representatives, Pinsent Masons, the justification they were planning for from the outset, to issue the strike out that was planned from 2019, to avoid the Respondent from accounting for causing a criminal offence to have been committed, a miscarriage of justice to have occurred and a failure to comply with a legal obligation and duty of care towards its employees"

25. EJ Cookson refused the application for reconsideration.

The appeal

26. By a Notice of Appeal dated 15 April 2021, the claimant appealed against the strike out judgment of EJ Cookson. The matter was considered on the sift by HHJ Auerbach who was not, at that stage, persuaded that there was a good arguable basis for the appeal to proceed to a full appeal hearing, but was prepared to list it for a preliminary hearing at which the claimant would be able "to avail himself free of charge, of support from a specialist lawyer, under the Employment Appeal Tribunal's ELAAS scheme, including, as appropriate, by way of representation at the preliminary hearing itself".

27. The preliminary hearing was listed before HHJ Auerbach on 2 March 2022. The claimant chose to represent himself. HHJ Auerbach permitted the appeal to proceed to a full hearing on one ground he identified at paragraph 2 of his Order:

> 2 The ground that is allowed to proceed is that the Employment Tribunal erred in law in concluding that a fair trial was no longer possible, insofar as it relied, in reaching that conclusion, upon:
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> > (a) the fact that the Appellant had not engaged with or agreed the latest draft list of issues produced by the Respondent; and/or
> > (b) the fact that the Appellant had made a fresh application to amend which was unjustified and unreasonable.

28. In the reasons attached to the Order, HHJ Auerbach stated:

> The challenge which I have permitted to proceed is solely to the Employment Tribunal's conclusion that the matter was no longer capable of a fair trial, in so far as it relied, in so concluding, upon its findings in relation to two other particular aspects of the claimant's conduct of the litigation. The permitted ground does not extend to a challenge to the tribunal's findings that this was conduct that, as such, fell within Rule 37(l)(a). The permitted ground relates (only) to the tribunal's conclusion, relying on that conduct, in relation to the question of whether a fair trial was still possible.

The appeal hearing

29. The claimant refused to provide a skeleton argument or produce a bundle for this hearing. He asserted that EAT judges and staff, together with the respondent and the employment tribunal:

> "may have taken unfair and unjust steps that would pervert the course of Justice and potentially, cause a Miscarriage of Justice to occur, in this case, for the purpose of preventing the Claimant and or the Appellant, from being in a position where he could potentially, expose the 'R"s past misdemeanours against a loyal, longstanding and outstanding employee of the business."

30. The claimant did not attend the hearing. He was contacted by the Associate and confirmed that he would not attend.

31. Mr Platts-Mills, for the respondent, applied for a strike out of the appeal pursuant to rule 26 of the **Employment Appeal Tribunal Rules 1993** (as amended) on the basis that the claimant had failed to comply with the order of the EAT by failing to submit a skeleton argument, to produce a bundle and by failing to attend this hearing. I refused the application because I did not consider it

proportionate as it was possible for me to consider the appeal. HHJ Auerbach had clearly set out the ground of appeal he considered arguable. The respondent had helpfully prepared a bundle for the hearing. Mr Platts-Mills had submitted a skeleton argument. I decided to proceed with the appeal in the absence of the claimant because he had made it clear, on a number of occasions, that he would not attend, and had not sought a postponement.

The relevance of the events post the judgment of EJ Cookson

32. In considering the appeal I have put out of my mind the conduct of the claimant subsequent to the judgment of EJ Cookson as it cannot be relevant to the question of whether her decision involved any error of law.

The law

33. It is always worth going back to the wording of the overriding objective. Rule 2 of the **ET Rules** provides:

> Overriding objective
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
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> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. **The parties** and their representatives **shall assist the Tribunal to further the overriding objective** and in particular **shall co-operate generally with each other and with the Tribunal**.

34. It is important to remember that parties are not merely requested to assist the employment tribunal in furthering the overriding objective, they are required to do so.

35. Rule 37 of the **ET Rules** provides:

> Striking out
>
> (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—
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> > (a) that it is scandalous or vexatious or has no reasonable prospect of success;
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> > (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;
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> > (d) that it has not been actively pursued;
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> > (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).
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> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

36. The EAT and Court of Appeal have repeatedly emphasised the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.

37. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious and/or that it is no longer possible to have a fair hearing.

38. In **Bolch** Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of

the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.

39. This approach was adopted by the Court of Appeal in **Blockbuster Entertainment Ltd v James**, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated:

> This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

40. In considering proportionality the Court of Appeal noted:

> 18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him, though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably.

41. In **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167 it was held:

> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court

42. Choudhury J (President) made a very important point about what constitutes a fair trial in **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327:

> 19 I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of

> fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

43. The backdrop to the conclusion that the claimant had acted in a manner that was scandalous, unreasonable or vexatious so that a fair trial was no longer possible, were the extensive attempts that had been taken to clarify the issues in the claim. In his Notice of Appeal the claimant referred to **Cox v Adecco Group UK & Ireland and others** [2021] ICR 1307 in which, in the context of an application for strike out of a claim on the basis that it has no reasonable prospect of success, I considered the particular care the employment tribunal, and represented respondents, should take when dealing with litigants in person:

> 30 There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. …
>
> 31 Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

44. That said, while stressing the importance of understanding the difficulties faced by litigants in person, and stressing the paramount importance of seeking to establish the core of the claim and bring it on for a hearing, I also noted:

> 32 This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues.

Conclusions

45. This claim was not struck out because the failed attempts at identifying the issues meant that the claims had no reasonable prospects of success. Nor was the claim struck out because the failure of the claimant to cooperate in identifying the issues meant that there could not theoretically be a fair hearing of any of the claims because it would not be possible for the tribunal to understand the issues. The claim for unfair dismissal could have proceeded without further particularisation and it might theoretically have been possible to hold a trial of at least some of the discrimination claims on the basis of the list of issues produced by EJ Flood. The reliance placed by EJ Cookson on the two matters raised in the grounds of appeal, as clarified by HHJ Auerbach, the fact that the claimant had not engaged with or agreed the latest draft list of issues and that he had made a fresh application to amend, was not that they meant that there could not theoretically be a fair trial of any of the claims because none of the issues in any of the claims were sufficiently clarified; but that there could not be a fair trial because the claimant refused to cooperate with the respondent and employment tribunal. The great difficulty in identifying the issues was part of a course of conduct in which the claimant had shown that he was "not prepared to cooperate with the tribunal process". EJ Flood concluded that the course of conduct showed that the claimant would not abide by his obligation to assist in achieving

the overriding objective and that his disruptive conduct exhibited at the hearing before her was likely to be repeated. EJ Flood found that the claimant was guilty of a "continued refusal to cooperate". The claimant would not work towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. Preparation was moving backwards, not forwards. There was every reason to believe that the lack of cooperation would persist.

46. EJ Cookson, after very careful consideration, decided that the claimant had acted in a manner that was scandalous, unreasonable or vexatious, concluded that a fair trial was no longer possible and decided that a strike out of the entire claim was proportionate. I can see no error of law in that determination.

47. This judgment should not be seen as a green light for routinely striking out cases that are difficult to manage. It is nothing of the sort. We must remember that the "tribunals of this country are open to the difficult". Strike out is a last resort, not a short cut. For a stage to be reached at which it can properly be said that it is no longer possible to achieve a fair hearing, the effort that will have been taken by the tribunal in seeking to bring the matter to trial is likely to have been as much as would have been required, if the parties had cooperated, to undertake the hearing. This case is exceptional because, after conspicuously careful, thoughtful and fair case management, the claimant demonstrated that he was not prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial. He robbed himself of that opportunity.

48. As explained above, the conduct of the claimant subsequent to the judgment of EJ Cookson is irrelevant to the question of whether there was any error of law in her judgement. However, it does demonstrate that the conclusion EJ Cookson reached has been proved to be correct and that any attempt to bring some elements of the claim to a fair hearing was doomed to failure.

49. The appeal is dismissed.