Neutral Citation Number: [2024] EAT 124

Case No: EA-2022-000830-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 July 2024

Before:

BRUCE CARR KC
DEPUTY HIGH COURT JUDGE

- -

Between:

L. OYEBISI

Appellant

- and -

HYDE HOUSING ASSOCIATION LTD

Defendant

- -
- -

MR ARFAN KHAN (instructed by **Chipatiso Associates LLP**) for the **Appellant**
MR JONATHAN COOK (instructed by **Trowers & Hamlins LLP**) for the **Respondent**

Hearing date: 16 July 2024

- -

JUDGMENT

- -

SUMMARY

Practice and Procedure

Claimant's claims struck out under Rule 37 ET Rules 2013 due to conduct of her representative and ET's conclusion that a fair trial was not possible as that conduct was thought not likely to change. However, the procedure adopted was fundamentally unfair on the Claimant in that neither she nor her representative had been given reasonable notice of the application to strike out her claims. Having concluded that the Claimant's representative was 'on a crusade' and not acting in his client's best interest, it was not fair to then immediately proceed to strike out her claims on that basis.

BRUCE CARR KC, DEPUTY HIGH COURT JUDGE:

Introduction

1. In this judgment I will refer to the parties by reference to the titles that they had in the Employment Tribunal ("**ET**")**.** This is an appeal from a decision by Employment Judge Wright ("**EJ Wright**") sitting in London South on 1 November 2021, pursuant to which she struck out claims brought by the claimant ,

2. The conclusion that the judge had reached, to which I will turn in more detail in due course, was that the manner in which the proceedings had been conducted was scandalous, unreasonable or vexatious and there had been non-compliance with a tribunal order, with the conclusion that the matter should be struck out under r.37(1)(b) Employment Tribunal Rules of Procedure 2013 ("**the ET Rules**").

3. The brief background to these proceedings is that the claimant started work with the respondent as a project manager on 14 October 2019 and was dismissed from that employment on 8 October 2020. She brought two claims before the ET, one issued on 28 September 2020 and the second on 15 October 2020. In her first claim she made allegations of racial and sexual harassment and whistle blowing, and in her second claim she expanded to an extent on those claims but also sought interim relief.

4. The proceedings had a relatively protracted history, including the dismissal of the application for interim relief, but the matter eventually came before Employment Judge Truscott QC ("**EJ Truscott**") as he then was, KC as he now is, on 9 April 2021. EJ Truscott ordered that there would be an open preliminary hearing on 7 and 8 October 2021 to consider a number of matters, including whether the Tribunal had jurisdiction to entertain the claimant's second claim or whether it ought to be struck out because it had no reasonable prospect of success. There was also a cross application from the claimant

to strike out the ET3 which had been filed on behalf of the respondent. There were also questions of possible amendment to the ET1 and identification of the issues for the main hearing, following which it was anticipated that the matter would be listed for a full hearing with any appropriate case management orders added to it.

Strike out hearing - 7-8 October 2021

5. What happened in the course of the hearing on 7 and 8 October is set out in the reasons which were sent to the parties on 25 May 2022 and which read as follows.

> **"1. The Tribunal apologises for the delay in providing these written reasons. The claimant's request however was not referred until recently.**
>
> **2. On the second day of an open preliminary hearing (on the 8/10/2021) the respondent's application to strike out the claims under Rule 37(1)(b) and (c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 was successful as:**
> - **The manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious; and**
> - **The claimant had not complied with the Order of the Tribunal dated 9/4/2021.**
>
> **3. The proceedings have been conducted scandalously, vexatiously and unreasonably by the claimant's representative and although less serious, there have been repeated non–compliance with the Tribunal's Orders.**
>
> **4. The Tribunal was satisfied and as had been demonstrated over the two day hearing that Mr Ogbonmwan sees this case as a crusade. He is not acting in the claimant's best interests and is pursuing his own agenda against the respondent. His conduct has been disrespectful and that was evidence by him laughing and smiling when Mr Cook was making his application. There has been a persistent disregard of the Tribunal's orders and during the course o9f this hearing and flagrant breachers of protocol. The Tribunal reminded the parties at the start of the hearing that although this hearing was a formal hearing (even though it was conducted via CVP) all of the usual protocols applied.**
>
> **5. In addressing the 3 stage test in Bolch v Chipman 2004 IRLR 140, the Tribunal did find Mr Ogbonmwan's conduct of the proceedings and during the hearing amounted to scandalous, unreasonable and vexatious behaviour.**
>
> **6. The Tribunal then had to consider if a fair trial is still possible and concluded that it was not. Even with the threat of the two claims being struck out, Mr Ogbonmwan continued to make scurrilous allegations, entirely without foundation. Furthermore,**

he would not engage with the Tribunal when attempting to identify the issues, which was a matter which this hearing was clearly listed to consider.

7. The Tribunal has considered whether another penalty is appropriate, such as a cost order. As Mr Cook submitted, even if the claimant or her representative could meet any costs award made, it is clear that Mr Ogbonmwan would not be prepared to conduct himself appropriately.

8. The Claimant was present throughout the hearing (it is accepted she may not have attended the final session, it was not clear) and she was aware of how Mr Ogbonmwan was behaving and how he has behaved in the past in his conduct of the proceedings. She has seen the responses from him in respect of Tribunal outcome, for example his response to the failed Interim Relief Application.

9. The Tribunal accept the submission made about Mr Ogbonmwan's repeated outrageous allegations and was taken to various examples in the bundle. He was warned, referring to the exchange the previous day when it was said that the Interim Relief application was concluded, it had been reconsidered and there had been no appeal. Mr Ogbonmwan was asked to move on and to respond to the application to reject the ET1 and he replied that the Tribunal was biased and had pre–judged matters. Despite that warning, he continued to make allegations against Judges and on this occasion Mr Cook (and previously in writing against Mr Caiden – whom he accused of criminal acts).

10. Mr Ogbonmwan repeatedly made misleading statements. He said for example Judge Andrews agreed the claimant had made protected disclosures, she clearly said the opposite. He said in response to the final hearing and that he himself was going to hear the case. In fact Judge Truscott listed this preliminary hearing and expressly said it could be heard by any Judge.

11. Mr Ogbonmwan was discourteous and had to be muted on occasions so that Judgement could be delivered. He disregarded clear instructions, such as re–joining times.

12. It is also accepted there has been non-compliance with Orders of the ET so as to fall within Rule 37(1)(c). Mr Ogbonmwan demonstrated that, irrespective of what he was directed to do and when, that he submitted whatever it was he wanted to submit when he chose to do so. The respondent did not object to the very late submission of the response to (what was referred to as) the strike out application. As observed, there was no evidence for the excuses Mr Ogbonmwan provided and it was probably not cost effective for the respondent to object and it was better served to proceed with its application. That however demonstrates Mr Ogbonmwan's contemptuous disregard for the Tribunal's Orders.

13. The previous day's application took so long due to Mr Ogbonmwan incoherent and unstructured pleadings which as a result took a considerable and disproportionate amount of time to read. The respondent reasonably offered Mr Ogbonmwan a final chance at 12:10pm when the hearing resumed to co–operate with progressing to agree a list of issues without disruption. He did not take that

opportunity and continued to argue. Another example was, when asked a very simple question, had anything risen overnight or could the Tribunal move onto giving Judgment? Mr Ogbonmwan instead attempted to re–open the time limit given to him the previous day. It had been made perfectly clear that he had limited time to speak and it was suggested that he set out the claimant's position in response to the respondent's application. He interruptions resulted him being muted in order to continue.

14. Mr Ogbonmwan was warned that he could not continue to behave with impunity and that if he continued to do so, that there was a risk of a costs order or the claim being struck out.

15.Due to Mr Ogbonmwan's disruptive and therefore unreasonable conduct, what should have been more than ample time of two days to deal with that five matters listed, resulted in unsuccessfully attempting to identify the issues at 11:35am on the second day, when Mr Ogbonmwan did not re–join and did not provide any explanation after a break (which was granted to assist the claimant).

16. To conclude, Mr Ogbonmwan has demonstrated contempt towards the Tribunal and the processes to be followed. Both his behaviour and conduct of the proceedings amounts to scandalous, vexatious and unreasonable conduct so as to warrant striking out the claim. Although of itself, the Tribunal would not have found the non–compliance with the Orders of the Tribunal enough to warrant strike out, that coupled with the conduct does lead to striking out the first two claims."

6. It is clear from those reasons that the principal basis on which the strike out was allowed was because the conduct of the representative of the claimant, Mr Ogbonmwan was regarded as scandalous, vexatious, or unreasonable and the judge concluded that there was no prospect of a fair hearing, given that conduct. It is therefore equally clear that it was not the claimant's own behaviour that was the subject of criticism but rather that of her representative.

7. It was also clear from the reasons that the basis upon which the judge reached the conclusion that she did was not limited to the representative's conduct at the hearing on 7 and 8 October 2021. That is clear, in particular, from the contents of para.5 of the reasons and the reference to "the conduct of proceedings" and, more specifically, under para.9 where the EJ made reference to a submission that had been made on behalf of the respondent relating to conduct of the proceedings more generally, not simply conduct on 7 and 8 October.

Appeal to the EAT

8. Following the striking out of her claims, the claimant appealed to this Tribunal. The matter was initially sifted by HHJ Auerbach, who ordered an appellant only preliminary hearing which came before HHJ Shanks on 4 August 2023. Judge Shanks gave permission to appeal to a full hearing and gave leave to amend the notice of appeal in accordance, broadly, with the contents of the skeleton argument that had been provided on that day. His view was that all of the grounds advanced should be allowed to proceed with the exception of Grounds 6 and 7 which corresponded to paras.22 and 23 of the skeleton argument. The case has been distilled down into five distinct points as set out in the skeleton arguments of both counsel, which have been helpfully prepared and presented to me today.

The legal framework

9. Starting with the ET Rules, r.37 provides for the potential for a strike out application to be made. It reads as follows:

> **"(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**
>
> ……..
>
> **(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.**
>
> **(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."**

10. It is therefore apparent from the wording of the rules that an application to strike out may be made either on the application of a party or by the Tribunal of its own motion. However, in either case the requirement under r.37(2) is for a party to have a reasonable opportunity to make representations either in writing or, if requested by that party, at a hearing.

11. In the normal course, if a respondent was seeking to strike out a claim brought by a claimant on the basis of the provisions of r.37(1)(b), one would expect to see that application made in the first instance in writing to the Tribunal, but in any event the application would be supported by some explanation of the basis upon which the respondent was contending that the claim should be struck out.

12. The scope of the power to strike out has been considered by a number of authorities, perhaps the most significant is *Bennett v Southwark London Borough Council* [2002] ICR 881. In *Bennett*, claims of race discrimination were struck out based on the way in which a lay representative had conducted proceedings on behalf of the claimant. The EAT decided that the representative's behaviour had indeed been scandalous and vexatious, and struck out the claimant's claims, following which the claimant took the matter to the Court of Appeal.

13. Of particular significance to today's proceedings are the contents of paras.26-29 of the judgment of Sedley, LJ, as follows:

> **"26. ……. While Mr Harry's explanation of his conduct leaves a great deal to be desired (and while Mrs Bennett's expressed attitude to it makes the worst that could be made of the situation he created) it suggests pretty clearly that if he had been confronted by the Lamb tribunal with the impending consequences of his intemperate outburst he would, not too graciously perhaps, have climbed down. As the EAT put it: "Before discontinuing the proceedings [the tribunal] ought to have required Mr Harry to affirm or withdraw his accusations." It is possible, of course, that he would have refused to do either thing – but there was only one way to find out. In other words a point had not been reached, and was not necessarily going to be reached, at which**

> **the entire lengthy hearing had to be aborted. I think that the Lamb tribunal, although its motives command respect, retreated prematurely from the field.**
>
> ***B. Was the case conducted in a scandalous manner?***
>
> **27. While the issue of scandalous conduct of proceedings does not depend on the tribunal's self-recusal, it is necessary to be clear what conduct we are looking at. Is it simply Mr Harry's conduct of the case up to the point when the Lamb tribunal recused itself? Is it that conduct plus his conduct and evidence before the Warren tribunal and possibly too before the EAT? Is it his conduct of the case as it would or might have been had he been given the chance to retract? I do not see, if I am right in my conclusion that he should have been given that chance, how it is permissible to judge his conduct of the case without regard to what might have happened had the tribunal, as it should have done, gone the next mile.**
>
> **28. If that is done, the basis of the Warren tribunal's decision falls away. Its conclusions include these passages:**
>
> > **'In this case the admitted conduct of Mr Harry was repeated and continued over a period of time, and was in our view on any objective view quite scandalous.… This tribunal, understandably in our view, were profoundly offended by the remarks which were made and felt that they were no longer able to carry out their function judicially. The Tribunal must be the judge of its own bias.'**
>
> **Instead we are looking at conduct which was certainly improper but which was reversible and did not therefore have as its implicit consequence the aborting of the entire proceedings. This, I think, was recognised by the EAT and is the reason why it turned to the exercise of its own powers, which I will come to under (d) below.**
>
> **29. But the predicate of the use of the strike-out power by either the Warren tribunal or the EAT was not simply that Mr Harry's own conduct should be able to be characterised as scandalous: it was that *the manner in which he had been conducting the proceedings* on the applicant's behalf should be able to be so characterised. This requires attention to be paid to three distinct things: the way in which the proceedings (which had gone on for 10 or 11 days) had been conducted; how far it is right to attribute any misconduct of the proceedings to the applicant herself; and the significance in this context of the epithet 'scandalous'."**

14. In *Bolch v Chipman* [2004] IRLR 140, the EAT identified, broadly speaking, a three-step process which the Tribunal had to go through before deciding whether a case should be struck out. First, it would need to conclude that there had indeed been scandalous, vexatious or unreasonable conduct; secondly, that the EAT would need to consider

whether a fair trial was possible; and thirdly, even if the Tribunal concluded that a fair trial was not possible the EAT were still required to consider whether or not a strike out was appropriate and proportionate in the circumstances. Paragraph 55 of the judgment reads as follows:

> **"55. However, quite apart from procedural matters, we turn to the questions that would require, as a matter of law as it appears to us, to be decided by a Tribunal, once faced properly with a question under Rule 15 (2) (d).**
>
> **(1) There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.**
>
> **As is clear from the decision, which we have quoted *in extenso*, there was no such finding by this Tribunal. The Tribunal commented, and we repeat the comment:**
>
> > **8 'If an employer such as the respondent seeks to operate outside the Tribunal and to take matters into his own hands, it is appropriate that he should forfeit the privilege of conducting a defence within the Tribunal.'**
>
> **Quite apart from the fact that the words "operating outside the Tribunal" almost indicate that they were concluding that he was not in fact conducting the proceedings of the Tribunal, there is, on any basis, that apart, no express finding within the terms of 15 (2) (d). We are by no means saying that there can be no finding that proceedings have been conducted in the relevantly objectionable ways, simply because the conduct that occurred is proven to have taken place outside the curtilage of the Tribunal. It is not necessary that such objectionable conduct should either amount to the sending of legal documents, or the receipt of legal documents, or their non-receipt, or behaviour in the waiting room, or behaviour in the court room.**
>
> **There can no doubt be a finding in relation to conduct outside the court room and outside the ambit of legal correspondence which could be found to be a method of conducting the proceedings. For example, it may well be, on appropriate facts, that a Tribunal might find that if there were a threat that unless proceedings were withdrawn some course or other could be taken, that that would amount to a scandalous method of conducting those proceedings. But as we have indicated, there was no such finding here.**
>
> **Now we have seen the notes of evidence of what Mrs Mills is said to have said on 28 May in the absence of Mr Bolch, we note, and this is the highest that the case can be substantiated, on the notes of evidence at any rate, and there is no reference to it, as we have indicated, in the Tribunal's findings, that she said "In my mind it was connected with**

the ET". But the case is put no higher than that. and, as we have indicated, there was no reference to that evidence in the Tribunal's decision nor any conclusion in that regard. If there is such to be a finding in respect of Rule 15 (2) (d), in this or any case, there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious such conduct.

This proposition is supported by the recent decision of the Court of Appeal, to which our attention has been drawn by Miss Genn, in Bennett v Southwark London Borough Council [2002] ICR 881, where the conclusion was that conduct in the Tribunal by an advocate, by way of aberrant and offensive behaviour, was not, in those circumstances, relevant conduct within Order 15 (2) (d).

(2) Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the Notice of Appearance must be struck out.

The helpful and influential decision of the Employment Appeal Tribunal, per Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324 is directly in point. De Keyser makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, and we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

But in ordinary circumstances it is plain from Lindsay P's judgment that what is required before there can be a strike out of a Notice of Appearance or indeed an Originating Application is a conclusion as to whether a fair trial is or is not still possible.

That decision is not only a decision binding on Employment Tribunals and persuasive before this Tribunal, but it follows well-established authority – in the High Court in the persuasive decision of Logicrose Ltd v Southend United Football Club Ltd by Millett J (as he then was), reported in The Times 5 March 1998, and in the Court of Appeal in Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167; both of which authorities were recited by Lindsay P in the course of his judgment in De Keyser.

An enquiry must be held by the tribunal, having made its finding as to the conduct in question, absent the exceptional case as to whether a fair trial is still possible. In Logicrose it was held that such a fair trial was still possible. In Arrow Nominees it was held that it was not.

The reason for the need for that question to be asked, save in the exceptional circumstance to which we and Lindsay P have referred, is that a striking out order is not (or at any rate not simply) regarded as a punishment. We quote from Millett J's judgment as reported in The Times:

> **'The deliberate and successful suppression of a material document was a serious abuse of the process of the court and might well merit the exclusion of the offender from all further participation in the trial. The reason was that it made the fair trial of the action impossible to achieve and judgment in favour of the offender unsafe.**
>
> **But if the threat of such exclusion produced the missing document then the object of Order 24, rule 16 was achieved. In his Lordship's judgment an action ought to be dismissed or the defence struck out only in the most exceptional circumstances once the missing document had been produced and then only, if, despite its production, there remained a real risk that justice could not be done.**
>
> **That might be the case if it was no longer possible to remedy the consequences of the document's suppression despite its production. It would not be right to drive a litigant from the judgment seat, without a determination of the issues, as a punishment for his conduct, however deplorable, unless there was a real risk that the conduct would render further proceedings unsatisfactory.'**

One has only to set those words of Millett J against the words of the Tribunal in paragraph 8 in this case "…it is appropriate that he should forfeit the privilege of conducting a defence within the Tribunal" to see that in our judgment the Tribunal in this case did not approach the question correctly in law.

Employment tribunals must have the power to manage cases, and to make orders that unless their orders be complied with applications will be debarred or dismissed, and if there are breaches of those orders then of course, pursuant to what Lindsay P himself made clear in De Keyser, there will have been, absent a proper excuse, wilful disobedience of a court order, which can lead to a strike out.

There will plainly be circumstances, perhaps such as we indicated earlier by way of illustration, in which conduct of proceedings, for example by way of a threat, even if it results in some kind of promise of good behaviour, or something of that kind, by a respondent, can still have such lingering effect that the Tribunal is of the view that there can no longer be a fair trial. That can certainly be the case in the example given by Millett J where documents have been fabricated, if, for example, no tribunal hearing the case can be satisfied that there are no further documents to be produced or that the present documents may not also have been fabricated, because confidence has been entirely lost in the good faith and honesty of one party or the other. But there must be, and certainly should have been in this case, in our judgment, a conclusion as to whether or not a fair trial can and could be held.

(3) Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach of Rule 15 (2) (d), and that

a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even in the absence of a conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the defendant from the judgment seat (in the words of Millett J) may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty.

(4) But even if the question of a fair trial is found against such a party, the question still arises as to consequence. That is clear because the remedy, under Rule 15 (2) (d), is or can be the striking out of the Notice of Appearance. The effect of a Notice of Appearance being struck out is of course that there is no Notice of Appearance served. The consequence of there being no Notice of Appearance by a Respondent is set out in Rule 3 (3), and it reads as follows:

> **3 (3) 'A respondent who has not entered an appearance shall not be entitled to take any part in the proceedings except –**
>
> **(a) to apply under rule 17 for an extension of the time appointed by this rule for entering an appearance'**

Another option would be to apply for a review of any decision under Rule 13, if the party had not received notice (sub-paragraph 3 (3) (c)).

But sub-paragraph 3 (3) (b) instantly entitles a respondent who has not entered an application:

> **'…to make an application under Rule 4 (1) for a direction requiring the applicant to provide further particulars of the grounds on which he relies and of any facts and contentions relevant thereto.'**

It is thus apparent that even a party who has not put in a Notice of Appearance, never mind one who has put one in and has it on the court file but is then debarred from further participation, is entitled to probe the case for the applicant.

We are satisfied that any tribunal making an order, in the circumstances in which this Tribunal made its order, must ask the question as to what the appropriate consequence is. As a result of Rule 3 (3) a respondent who has not entered an appearance is not entitled to take any part in the proceedings. But that does not prevent the tribunal, pursuant to its case management powers under Rule 4 or its powers to regulate its own procedure under Rule 15, to make appropriate and proportionate orders.

An option in such a case as this would have been for the Tribunal to debar the Respondent from taking any further part in liability but not necessarily to debar the Respondent but rather to permit him to take

> **part and at the very least probe the case for the Applicant on the question of compensation.**
>
> **This Tribunal did not ask itself any such questions."**

15. In *Blockbuster Entertainment Limited v James* [2006] EWCA Civ 684, the Court of Appeal, in the form of Sedley, LJ underlined the importance of proportionality in considering whether or not a strike out should be made, and in his judgment said the following:

> **"20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.**
>
> **21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."**

16. In *Hasan v Tesco Stores Ltd* [2016] UKEAT/0098/16, the EAT considered the question of notice in relation to an application made under r.37. The possibility of a strike out was

raised at a preliminary hearing without any prior warning to an unrepresented claimant in relation to some of the claims which the claimant was attempting to litigate in the ET. Other claims had been the subject to prior notice that there would be a strike out application made under r.37. At para.5 of the judgment, the EAT recorded a submission that had been made on behalf of the claimant that the scope of the jurisdiction to strike out under r.37 was circumscribed by the contents of r.37(2) and the submission was made that there must be a real and adequate opportunity to make representations and that such an application must always include advance notice.

17. The EAT's conclusions in relation to that submission are set out at para.13, the relevant part of which reads as follows:

> **"Dealing first with procedural unfairness, there is, in my view, a clear distinction between the discrimination and other payments claims on the one hand and the whistle blowing and unfair dismissal claims on the other. There was no notice whatsoever that the striking out of the former was to be considered at the Preliminary Hearing, while there was 11 days' notice in relation to the latter. In my view, the decision to strike out the discrimination and other payments claims was made in clear breach of the provisions of Rule 37. Rule 37(2) requires a party to be given a reasonable opportunity to make representations when consideration is being given to striking out. The opportunity must be adequate, and that necessarily includes notice so that oral or written representations can be prepared. I do not consider that Catton is distinguishable, on the basis that the ground for striking out was conduct where the facts were not intimated prior to the hearing. In any event, it was known in this case that the Claimant was a litigant in person. It was procedurally unfair in the extreme to expect him to address the issue of striking out of the discrimination and other payments claims when he had been given no prior notice that they could be dismissed at the hearing."**

18. The judge then dealt with the matters in respect of which there had been advance warning and reached the following conclusion at para.14:

> **"So far as the procedural unfairness argument relates to the other claims, the position is rather different. There is no specified period of notice required for a striking out claim. The Claimant was given 11 days' notice of the decision to canvass striking out the whistle blowing and unfair dismissal claims. While I am satisfied that fair notice of a hearing at which striking out will be considered is essential, it would**

> **be inappropriate and perhaps incompetent for me to try to "read into" Rule 37 any particular notice period. What is reasonable in any given case depends on the circumstances. While the Claimant's circumstances, including lack of legal representation and a first language other than English, are relevant, they are not sufficient for me to conclude that there was no reasonable opportunity for him to make representations about the possibility of these other claims being struck out. The Tribunal can expect even litigants in person to read and digest information sent to them or to seek assistance if they do not understand what the documentation conveys. The importance of advance notice of a striking out claim is that it allows a party to consider what may occur. The letter of 5 October 2015 from the Tribunal is in clear and simple terms. I conclude that the Claimant did have a reasonable opportunity to consider his position and prepare representations in relation to the intellectual property, public interest disclosure and unfair dismissal grounds against a background of notice that it might be decided at the hearing that they had no reasonable prospect of success."**

19. Of particular importance, it seems to me, as far as the contents of para.14 are concerned, is the reference by the Tribunal to the importance of advance notice being that it always will allow a party to consider what might occur. So applying that rationale to the circumstances of the current case, the claimant, had she been given advance notice of an application to strike out her claims on the basis of the conduct of her representative, might be expected to have at least thought about whether she wished to continue with the services of that representative and to continue to engage them.

The hearing on 7 and 8 October 2021

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20. In the bundle of documents prepared for the purposes of this appeal, there is a detailed attendance note taken by the respondent's solicitor at the two-day hearing. The contents of that note have been accepted by both side as being a reasonably accurate record of what went on at that hearing, and I proceed on that basis.

21. The focus of my consideration is on the events that took place on day two. It is apparent from the entries in particular at paras.142 and 171 that, even in advance of any foreshadowing of an application to strike out, there had been problems with the internet

connection between the Tribunal and the claimant and her representative, this hearing having been held remotely.

22. It is clear from a reading of the entirety of that attendance note that the hearing was a rather fraught one and the progress made against the five matters which were to be considered in accordance with the earlier order of EJ Truscott was extremely limited.

23. At numbered para.196 of the attendance note, the author records counsel for the respondent as having robustly rejected an allegation made by the claimant's representative that a document had been tampered with during the course of the Employment Tribunal proceedings. The judge then replied, according to the note, in the following terms:

> **"I need to say something at this point about conduct of the case. HO [the claimant's representative] has made serious allegations against NC [then counsel for the Respondent] in particular. Yesterday, I said to HO 'IR dealt with.' He said I was biased and had prejudged the outcome of the application. Inviting HO to withdraw allegations on 5 April. If any improper conduct for NC, he can pick it up later."**

Then the judge said this:

> **"You need to be mindful of unreasonable or vexatious conduct. Respondent already reserved the position on costs. Costs could be made against HO or against you personally for wasted costs. You cannot act unreasonably without impunity, risk it could be struck out."**

24. It is apparent from the transcript that the claimant's representative took some exception to the remarks that had been made and sought to defend himself against the allegation that he had been behaving unreasonably.

25. The transcript then continues with the judge attempting to work through the relevant paragraphs of the Truscott order and moving on to point.4 which was the determination of the issues. In response to this, the respondent's counsel indicated that it was going to be difficult to do agree the issues without going through the first ET1 that the claimant had submitted and working out exactly what those complaints were and what the issues were

as a consequence. The claimant's representative's position was that he did not feel it would be appropriate to identify the claims on that day.

26. There was then a break at about 11.25 a.m., and when the judge attempted to resume the hearing, she did so in the absence of the claimant and her representative. During the course of an exchange over the next five or ten minutes or so, counsel for the respondent is recorded as saying this:

> **"If they [the claimant and her representative] do not reappear or are unprepared to engage, I am instructed to make a strike out application on the basis of the way the case has been pursued and because we still do not know what the issues are."**

The judge then replied: **"How long will you need to prepare? Twenty minutes?"** To which counsel's response was: "**A little bit longer,**" and the judge agreed to give thirty minutes. The judge then, at 12.10 p.m. said this: "**I will email the claimant to say hearing strike out application at 12:10 p.m.**" There was then a break at 11.40 a.m. and the hearing restarted at 12:10 p.m.

27. Although I have not seen the email to which the judge was referring, I am reliably informed that it was sent at 11.41 a.m. and contained a reference to the strike out application being made but did not set out any of the grounds on which the respondent might rely in making that application. In addition, when the parties came back at approximately 12.10 p.m., it does not appear that the judge took any step to establish whether or not the claimant's representative had actually received the email and/or whether the claimant had also seen it and had a chance to discuss it with her representative.

28. Pausing there for a moment, even if they had had sight of the email, it is clear that they would only have seen that an application was being made, and whilst they may have been able to work out that the application had something to do with the earlier conduct of the claimant's representative, there was certainly no information as to how the application was to be put.

29. When the parties returned, the judge asked counsel for the respondent how long the application would be, and he said it would be thirty minutes, but he was prepared to hold off making the application if the claimant is prepared to engage in distilling the list of issues. The note then records him saying this: "**If further disruption, will need to make it.**" The judge then turned to the claimant's representative and asked him what he said about it, to which the response was: "**I am not sure what application**," to which the judge replied: "**Application to strike out claim,**" to which the representative replied: "**What claim?**" The judge said: "**The entirety of it.**" There was then an exchange between the judge and the representative about the process of identifying the claims, and the transcript demonstrates that matters had become, to say the least, a little bit tense.

30. The note records as follows:

> Judge: **"Are you prepared to engage to assist us?"**
>
> Representative**: "Like I said, I've always said."**
>
> Judge: **"A simple yes or no."**
>
> Representative: **"Yes of course, but I think a false application."**
>
> At which point, counsel for the respondent said**: "I would like to make my application."**

31. The claimant's representative was then put on mute in order that the application could be made by the respondent's counsel, which he duly did over the next fifteen minutes. After his submissions were completed, the judge said this:

> **"Took just over fifteen minutes. Just unmute HO [claimant's representative]. Do you want to respond? You have fifteen minutes?"**

32. The claimant's representative then did his best to respond to the application that had been made, but in the course of his submissions he said this:

> **"Today not appropriate time to make application. I think it is unreasonably canvassed. Trying to use advantage on the basis of references I have made …. I am not prepared today to respond properly. Should have been made before hearing. Your position as a judge professionally embarrassed."**

He then later on said: "**I will ask you to give me more time. Impromptu application.**" To which the judge replied with the word "**No**".

33. It follows from that sequence that the first occasion on which the claimant's representative had notice of the basis upon which the application was being put was when the application itself was being made. It also follows, given that the response from the claimant's representative followed immediately and without and break after the submissions made by the respondent's counsel, that what had been said by counsel for the respondent had not been discussed between the claimant and her representative.

34. The judge then went on to give her decision orally, and whilst of course I proceed on the basis that the written reasons take priority over any oral reasons given at the time of the hearing, it is nevertheless apparent from the way in which the judgment was given, that the judge, having referred to the ability of the parties to apply for written reasons, went straight to the question of whether or not the proceedings had been conducted scandalously, vexatiously and unreasonably, and then went through the three-stage test in *Bolch v Chipman*. It is not apparent from the oral reasons that the judge ever turned her mind to the question of whether or not the application had been made in circumstances in which the claimant had a reasonable opportunity to respond to it. That apparent deficiency also appears on the face of the written reasons which I have already read into the judgment, and which are set out above.

35. The written reasons are silent on the issue of whether or not reasonable notice of the application or a reasonable opportunity to respond had been given. The closest one comes to that point is at para.8 of the reasons, where the judge noted that whilst the claimant had been present throughout the hearing and had witnessed the conduct of her representative on which the respondent relied in part in making its application, it was accepted that she may not have attended the final session, i.e. the session at which the question of strike out was considered. The judge recorded that it was not clear whether she had in fact attended.

The grounds of appeal

36. The first ground of appeal which has been advanced by the claimant's counsel in these proceedings is the failure to give proper notice (Ground E). It is part of the claimant's case that fourteen days' notice is required before a strike out application can be made, and reliance is made on an Employment Tribunal decision called *Mannaparambil v AHRO Scientific Publishing Ltd* Tribunal Case No: 4106946/2023. I do not accept that there is a requirement for a particular period of notice to be given before an application can be made. The wording of r.37 is that parties should be given a reasonable opportunity to respond to any application to strike out. As to what is a reasonable opportunity is a case specific exercise and a factual inquiry as to whether or not reasonable notice was given will produce different results in different circumstances. That said, that does not dispose of the question of whether or not a reasonable opportunity was given in this case to deal with the application made by the respondent's counsel. As to that, Mr Cook, on behalf of respondent, says it is for the Tribunal to determine what constitutes a reasonable opportunity.

37. The difficulty I have is one that I have already noted, which is in the ET's decision, there is nothing to indicate that the judge ever considered the question of whether or not any reasonable opportunity had been given in these particular circumstances. That seems to

me particularly important where the basis on which the matter is ultimately struck out is because of the conduct of a representative. In other words, the claimant's claims face being dismissed because of what her representative had done to date and based on an assessment of what he might or might not do in the future, that latter point being necessary in order to determine the question of whether or not a fair hearing was possible in the circumstances. If the claimant had had notice that that was being said, she would want to have considered that particular point.

38. In *Hasan,* the point was made that notice given at a hearing that a strike out application was to be made was unlikely to be enough to satisfy the requirements of r.37(2). In the present case, the only notice that was potentially given in advance of the application actually being made was possibly the email which the judge had decided to send immediately in advance of the application being made at 12.10 p.m. on the second day of the hearing. On the assumption that that email was read immediately after it was sent, the claimant's representative would have had in the region of about twenty-eight minutes to consider his response and to take his client's instructions as to how they should deal with the application. But even if one takes that position and assumes -- which one cannot do because the judge did not make a finding about it -- that he had read the email, all it would have told him was that an application was being made and would not have given him any forewarning as to the basis upon which it was being made.

39. As I have already indicated, it seems to me that where a party makes an application under r.37, the requirement flowing from r.37(2) is not simply to inform a party that an application is being made, but also to inform them of the basis upon which it is being made. Instead, in this case, the whole exercise of indicating that an application was to be made, potentially providing some notice of that application to the claimant's representative, hearing submissions from both sides, was done in less than an hour. The period from 11.40 a.m. until 12.10 p.m. was taken up with the respondent's preparation.

The period from 12.10 p.m. to 12.25 p.m. was taken up with the respondent's submissions on that point, and the period from 12.25 p.m. to 12.40 p.m. was taken up with the claimant's response to the submissions that had been made between 12.10 p.m. and 12.25 pm., and without any opportunity for the matters raised by the respondent's counsel to be considered by the claimant and her representative together.

40. I therefore take the view that the procedure adopted was extremely unfair to the claimant who, on any view, did not have any reasonable opportunity to make representations or consider whether or not she even wanted to continue with the services of her particular representative. It seems to me particularly unfair for the Tribunal to have adopted a procedure in the form that they had and then struck out the claimant's claim upon the basis of the conduct of her representative. It does, in my view, look much more like a punishment that was being meted out on the claimant based on the conduct of her representative. If a reasonable opportunity to respond to the submissions that had been made would, in my view, at the very least have required the Tribunal to adjourn for a period in order for the claimant to give instructions to her representative, and indeed her representative to consider his own position because it may also have been the case that if the representative took on board the criticisms that were made of him, he might have withdrawn from the case on the basis that his representation of the claimant was, to say the least, counterproductive.

41. I therefore conclude that Ground E of the appeal is made out, albeit on a slightly different basis from that advanced by the claimant. It is allowed on the basis that the process adopted by the Tribunal did not give the claimant a reasonable opportunity to make representations in response to the application that was made by counsel for the respondent. I will deal with the other grounds for the sake of completeness and in order to provide some additional reasoning in support of my conclusion on Ground E.

42. Ground A raises the question of whether or not the conduct of the claimant's representative could be regarded as part of the proceedings for the purposes of r.37(1)(b). I am not sure that that submission adds very much in this particular case, but I proceed on the basis that the Tribunal was plainly entitled in considering an application under r.37(1)(b) to take account of the way in which the proceedings have been conducted, not just by the claimant potentially but by somebody acting on her behalf. That is what is said in the express wording of r.37(1)(b).

43. Ground C seeks to attack the finding that no fair trial was possible. The Employment Tribunal found, at para.6 of the reasons, that a fair trial was not possible because the claimant's representative continued to behave in an outrageous manner and would be likely not to engage in the Tribunal process in future. The claimant says that the judge should have considered alternatives to that, as had been suggested by the Court of Appeal in *James v Blockbuster* (at para.5). The respondent says that this conclusion is susceptible to challenge only on the basis of perversity and the Employment Tribunal was entitled to conclude that the claimant's representative would not moderate his behaviour in the future.

44. That may or may not be correct, and I do not go as far as to find that the appeal should be allowed on this basis alone as a standalone point, but what this point does, to my mind, do is to reinforce my reasoning on Ground E. If the respondent was going to invite the Tribunal to conclude that no fair trial was possible in the light of the conduct of the claimant's representatives, both he, i.e., the representative, and the claimant should have had a proper opportunity to consider that submission and respond to it. At that point, the claimant could either have taken the decision that she would continue to have the same representative and take whatever consequences flowed from that, or, alternatively, she might have taken the view that she was better served by looking for alternative representation or even, *in extremis*, acting for herself.

45. Ground B deals with the extent to which the conduct of the representative can be attributed to the claimant herself. The claimant's position is that on the basis of the Employment Tribunal's findings, her representative was on a frolic of his own, pursuing a crusade and was not acting on behalf of the claimant. The claimant relies on principles derived from the law of agency in order to attempt to advance the point that the representative had clearly stepped outside his actual or ostensible authority in pursuing the case in the way that he did. I am not at all sure that one can reach that conclusion based on the agency cases that the representative was to be regarded as on such a frolic of his own that he could properly be recorded as acting outside the scope of his authority, but the observations of the ET recorded at para.4 are important, and I remind myself that the Tribunal was very clear in concluding that Mr Ogbonmwan was not acting in the claimant's best interests and was pursuing his own agenda against the respondent.

46. The ET plainly saw the claimant's representative, therefore, as not acting in the best interests of his client and was pursuing his own agenda. If that is right, it seems to me that it is somewhat disproportionate to visit the consequences of that on the claimant, particularly in circumstances where she had no prior warning that this was an argument to be put against her. Again, it reinforces the difficulty that was caused to the claimant by the Tribunal adopting the procedure that it did and not giving her any prior warning of the substance of the application that was subsequently made by counsel for the respondent. Again, I should make it clear that I am not deciding this point on the basis that the Tribunal had a power either under r.6 or under r.41 to exclude the claimant's representative from the Tribunal process. It is not necessary for me to make a ruling of that kind and it is right that I note that neither counsel has identified any authority that demonstrates that the case management powers within r.41 of the ET Rules give the Tribunal that power. For all those reasons I conclude that the appeal succeeds on Ground E as supplemented by reasoning in relation to the other grounds.

47. This then takes me to the issue of disposal. Applying the well-known authority of *Jaffri*, it is clear that I cannot decide this case. In any event, it would be impossible for me to do so, given that the procedural safeguards that were not in place at the time are not replicated before me today. For example, I do not know what the claimant's position would have been had she been given property notice of the application that was being made. In those circumstances, I have no option but to remit the matter to the Employment Tribunal.

48. The next question that arises is to whether or not that remission should be to the same or a differently constituted Tribunal. Applying the principles in *Sinclair Roche & Temperly v Heard*, it seems to me that this is a case in which it would not be appropriate to give a second bite of the cherry to the Employment Judge in circumstances where it is clear from the wording of the decision that she reached that she has reached very firm views about the conduct of the claimant's representative. To remit the matter to the same judge would, in my view, amount to be giving that judge a second bite of the cherry in circumstances where there a significant difficulties with the procedure that the judge adopted in this particular cases. For the record, Mr Cook on behalf of the respondent, did not raise any substantial objection to the issue of whether or not the matter is remitted to the same or a differently constituted Tribunal. For those reasons, I will allow the appeal and order that it be remitted to the Employment Tribunal to be handled by a different Employment Tribunal judge.

49. As I indicated during the course of argument earlier on today, I do not do so on the basis that it is necessary for the judge immediately to field an application to dismiss the proceedings on the basis of unreasonable conduct. There are a number of reasons for that:

    (1) First, the respondent may or may not want to make that application.

(2) If they do make that application, they may want to make it on a different basis or on different grounds to those which have been advanced to date.

(3) They may wish to apply to strike out the claim for other reasons, as was at least considered at an initial stage of the preliminary hearing on 7 October, namely whether or not the claim actually has any reasonable prospects of success.

50. So I simply remit the matter to the Tribunal. It will be for the respondent to consider its position and make such application as it thinks appropriate in the light of my judgment and in the light of the way in which matters sit today. For example, it may be that the respondent concludes that, given the change of representation that has clearly taken place between the ET and the EAT, its prospects of persuading a Tribunal that no fair hearing would be possible because of the conduct of the representative may not be a submission that finds much favour in the changed circumstances in which we now find ourselves.

Application for costs

51. After I had given my judgment orally in this case, counsel for the claimant made an application for the costs of the appeal. I did not consider that the respondent could be said to have acted unreasonably in seeking to uphold EJ Wright's judgment and there was in my, no basis on which the respondent should be ordered to pay costs.