Neutral Citation Number: [2024] EAT 134

Case Nos: EA-2022-001201-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 August 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MS NKECHI LEEKS

Appellant

- and –

UNIVERSITY COLLEGE LONDON HOSPITALS NHS FOUNDATION TRUST

Respondent

- -
- -

MARTINA MURPHY (instructed through Advocate) for the **Appellant**
GARETH PRICE (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 2 July 2024

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in holding that the claim should be struck out because a witness had left the employment of the respondent which meant that the witness was "lost" and a fair trial was no longer possible.

The Employment Tribunal erred in law in holding that refusal to enter judicial mediation or assessment could not amount to unreasonable conduct.

Both issues were remitted to the same Employment Tribunal to be redetermined.

HIS HONOUR JUDGE JAMES TAYLER

The key issues in the appeal

1. This appeal raises three key questions:

    1.1. If a witness leaves the employment of a respondent is the witness "lost" so that a fair trial will no longer be possible?

    1.2. To what extent must the possibility of a fair trial have been compromised for strike out to be proportionate?

    1.3. Can a refusal to engage in judicial mediation or assessment amount to unreasonable conduct that could result in an award of costs?

The history of the proceedings

2. To understand the appeal it is necessary to understand the history of the claims.

3. The Claimant lodged claim 2200214/2018 on 20 January 2018 and then claim 2200278/2018 on 27 January 2018. The claimant alleged that the respondent offered her jobs conditionally but withdrew the offers. The two claims were listed to be heard together for five days from 4-10 September 2018 by a notice of hearing sent to the parties on 28 February 2018. The Order set out standard directions to prepare for the hearing. The claimant complied with the first direction to prepare and submit a schedule of loss.

4. At a Preliminary Hearing for Case Management on 23 April 2018, the claims were identified as public interest disclosure detriment, direct disability discrimination and discrimination because of something arising in consequence of disability. Orders were made by consent retaining the listing for 4-10 September 2018, but adjusting the time for compliance with the orders to prepare the matter for hearing.

5. The claimant failed to provide a witness statement on time. An unless order was made requiring her to provide her witness statement. The claimant provided a very brief statement within the time limit set by the unless order.

6. The preparations for the hearing proved problematic. The claimant raised multiple issues about the bundle for the hearing.

7. At 7.22 am on 4 September 2018, the day that the hearing was due to start, the claimant applied for a four day stay to the commencement of the hearing. She complained about the bundle, sought more time to "finish" her witness statement and raised a medical issue. The claimant did not attend the Employment Tribunal, contending that she was not well enough to do so. The final hearing was adjourned, solely because of the claimant's medical condition. A new hearing was fixed for 6-8 February 2019.

8. On 30 January 2019, the claimant provided some medical evidence, including fit notes. The claimant asked that the relisted full hearing be converted into a Preliminary Hearing because she contended that the respondent had obstructed preparation for the hearing. The claimant asserted that the respondent had "so dishonestly compiled the bundle with full fraudulent intentions of obstructing and blindsighting the ET from seeing the real and actual evidence in this matter", she contended that there was manufactured and fabricated evidence and that the bundle prepared by the respondent should be rejected in its entirety. The full hearing was not converted into a Preliminary Hearing. The claimant did not attend. Employment Judge Pearl postponed the full hearing for a second time. He made orders that permitted the claimant to submit a further witness statement and provided for the respondent to make any applications they considered appropriate.

9. The Respondent applied to the Tribunal to strike out the claims under Rule 37(1)(b), that the conduct of the proceedings was scandalous, unreasonable or vexatious; alternatively Rule 37(1)(d), that the claim had not been actively pursued; and/or under Rule 37(1)(e), that it was no longer possible to have a fair hearing.

10. The claimant served a lengthy further witness statement on 1 April 2019.

The first strike out application

11. The strike out application was listed for 24 April 2019 before Employment Judge Walker. The claimant attended but would not come into the hearing room. She was represented by Counsel.

The claimant's Counsel said that the reason the claimant had not come into the hearing room was that she was too unwell. The Employment Judge was told that the claimant was lying across several chairs and when Counsel had asked her to look at a document, she sat up, and fell off the chairs. The hearing was adjourned to 11 July 2019. The claimant was ordered to provide medical evidence, particularly to address the question of whether she would be fit to participate in a future hearing.

12. On 28 May 2019, the Claimant wrote to the Employment Tribunal requesting an extension of time to produce a medical report and later sent a second email asking the Employment Tribunal to vacate and relist the hearing listed on 11 July 2019 to a future date. The claimant explained that she was due to be at a full merits hearing in another of her numerous claims at an Employment Tribunal in London South for a period of time including 11 July 2019. Because the claimant delayed in providing supporting evidence the hearing went ahead on 11 July 2019, with the claimant's husband attending on her behalf.

13. Employment Judge Walker noted that there were numerous steps that would still have to be taken to prepare the matter for hearing, including:

13.1. dealing with the claimant's complaints about the bundle

13.2. determining the claimant's application to adduce a new witness statement

13.3. determining any application to amend the claim

14. Employment Judge Walker expressed considerable concern that the final hearing would be likely to be listed some time in 2020, three years after the revocation of the job offers.

15. Employment Judge Walker concluded that the claimant had acted unreasonably but decided against striking out the claims because a fair trial remained possible, although she stated:

> 70. It is my view time remains during which orderly preparation can take place. It is however, important that the Claimant's application and future case management directions are considered sensibly and with the appropriate legal considerations in mind. Additionally, it is essential that the Claimant cooperates fully as required by the over-riding objective. Such co-operation would encompass her communications in future and seeking to find a convenient date for that hearing as well as attending any future hearings. If, as the matter progresses, it turns out that a fair hearing is not in fact possible due to future events or for reasons I had not considered, the question of strike out may be revisited.

The second strike out application

16. Nearly three years later no progress had been made in preparing the matter for a final hearing despite the fact that the claimant had been actively engaged in other claims in the Employment Tribunals during that period. The respondent again applied to strike out the claims.

17. The second strike out application was heard by Employment Judge Walker on 9 August 2022. The Employment Judge described the lack of progress and the claimant's purported explanation:

> 13 Since the 2019 application to strike out was refused, almost three years have passed. It is five years since the events giving rise to the claims. In that time the claims are no further progressed. The only action which the Claimant says she took to pursue the claims was that she chased the Tribunal about listing the claims and she gave evidence about that. Her evidence was that she telephoned the Tribunal in what she refers to as the lockdown period. The first lockdown commenced about 23 March 2020. According to the Claimant, she regards that as ending in December 2020 for family reasons. The Claimant cannot remember when she called the Tribunal or who she spoke to, but according to her description of the time, it was during the period March to December 2020. She did not make a note of her conversation, but she recalled that she had been told that the reason her case had not been listed was that the Tribunal was extremely busy with COVID related claims. She thought that had been a matter of common knowledge and so when she telephoned again, she merely asked if the case was listed and when she was told it was not, she did not take any further action or ask the Tribunal to do anything about it. She assumed that the pressure of the COVID claims still applied.

18. Employment Judge Walker concluded that the claimant had not actively pursued the claims. Employment Judge Walker then went on to consider whether to exercise her discretion to strike out the claims and decided to do so on the basis that a fair trial was no longer possible:

> 48 **Having reached the conclusion that there has been both inordinate and inexcusable delay, I then have to consider whether that gives rise to a substantial risk that it is not possible to have a fair trial.** That is **the second ground on which the Respondent relies, but it is also a component of the assessment of whether the failure to pursue the claim has reached the point where striking out is appropriate**. In my view, **on that question, it is no longer possible to have a fair trial.**
>
> 49 **The Respondent has lost access to one key witness. That means there is now no prospect of a fair hearing**. I made it clear in the Reserved Judgement in October 2019, that the only reason the claim was not struck out then was because it was possible to have a fair hearing. That position has been prejudiced. It is no longer possible for there to be a fair hearing.
>
> 50 **I note in the Emuemukoro case that it was the held that the question was not whether a fair trial was ever possible, but in that case whether a fair**

trial was possible in the course of the time allotted. Because it was not, the claim was struck out.

51 My conclusion here is that it is now too late for there ever to be a fair hearing. Rule 37 provides this Tribunal may strike out a case where it is no longer possible to have a fair hearing in respect of the claim or response or part of it. **My conclusion is that a fair hearing is not possible due to the absence of one key witness for the Respondent and the length of delay which will impact on the other witnesses' recollections. A strike out is proportionate and appropriate as it would cause unacceptable prejudice to the Respondent if the case were to proceed.**

52 I bear in mind the fact that **the Claimant would be prejudiced by not having the opportunity of pursuing her claim, but I consider overall that it is clear she has made little or no effort to pursue the matter for a very long time**.

53 The Claimant argues that the Respondent was equally at fault in failing to pursue the listing, but there is no obligation on them to do so. It is the Claimant's case. It is inherent in the ground for striking out that if the Claimant does not actively pursue her case she may be struck out. There is no obligation on the Respondent to take on that mantle and pursue the case for her in relation to the claim.

54 **The third ground which the Respondent raised in the application and in their skeleton argument was the provision in rule 37 that the way in which the proceedings have been conducted has been scandalous unreasonable or vexatious. The Respondent says the Claimant's conduct of the proceedings has been unreasonable. I do not intend to consider that in any detail in the light of my other determinations**, save to say that was my conclusion in 2019. [emphasis added]

The law on strike out, including the possibility of a fair trial

19. The starting point is Rule 37 **Employment Tribunal Rules 2013 ("ETR**"):

37.— 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—

(a) that **it is scandalous or vexatious or has no reasonable prospect of success**;

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

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

> (d) that it has **not been actively pursued**;
>
> (e) that the Tribunal considers that it is **no longer possible to have a fair hearing** in respect of the **claim or response (or the part to be struck out**).
>
> (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. … [emphasis added]

20. It is long established, and well known, that the question of whether a fair trial remains possible is generally relevant to an application for strike out pursuant to Rule 38(1)(b)(c) and (d) **ETR** as well as being expressly provided for by Rule 37(1)(e) **ETR**. That begs the question of why the rule provides specific grounds for strike out if a claim will generally not be struck out if a fair trial is possible – why not only have rule 37(1)(e) **ETR**? The answer may be that where there is conduct that falls within Rule 38(1)(b)(c) and/or (d) **ETR** the likelihood of recurrence is relevant to the possibility of a fair trial. A claim could be struck out under Rule 37(1)(e) **ETR** even where the party against whom the application is made has done nothing wrong. The ill health of a party could mean that "it is no longer possible to have a fair hearing in respect of the claim or response" although a party cannot be criticised for being unwell. Where a party has conducted proceedings in a manner that has been scandalous, unreasonable or vexatious, has failed to comply with the **ETR** or an Order of the Employment Tribunal or the claim has not been actively pursued, that may be relevant to the possibility of a fair trial because if there has been repeated default in the past it is common for it to be repeated in the future, particularly if the party in default does not persuade the Employment Tribunal that their approach will change.

21. It is also important to note how the possibility of a fair trial has been analysed after a determination that there has been default of the type provided for by Rule 38(1)(b)(c) and/or (d) **ETR**. In considering the issue of fair trial in the Employment Tribunal the EAT and Court of Appeal have often referred to the decision of the Court of Appeal, on appeal from the Chancery Division of the High Court, in **Arrow Nominees v Blackledge** [2000] 2 BCLC 167 CA, a case in which the question was whether the disclosure of forged documents should result in strike out of the claim. Chadwick

LJ, stated that the test to be applied was that of whether there was **a significant risk that a fair trial could not take place**.

22. Chadwick LJ went on to hold:

> … **where a litigant's conduct puts the fairness of the trial in jeopardy**, where it is such that **any judgment in favour of the litigant would have to be regarded as unsafe**, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. **The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice.** The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue b proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.

23. This might be thought to be a lesser test than that provided for by Rule 37(1)(e) which requires that "it is no longer possible to have a fair hearing in respect of the claim or response". It might be said that strike out under Rule 38(1)(b)(c) and/or (d) **ETR** generally only requires that there is a "significant risk" that a fair trial could not take place whereas Rule 37(1)(e) **ETR** requires that has been established that it is not "possible" to have a fair hearing. There would be some logic to having a lower threshold for the impact of default on the possibility of a fair trial under Rule 38(1)(b)(c) and/or (d) **ETR** than under Rule 37(1)(e) **ETR** because the former provisions require that serious default has been established which diminishes any unfairness in the claim or response being struck out. However, the questions of whether a fair trial is impossible and whether there is a significant risk that a fair trial could not take place appear to be treated as interchangeable in many of the authorities. The point does not arise for final determination in this appeal because the Employment Tribunal struck out under Rule 38(1)(d) **ETR** so that on any view it was sufficient for the Employment Tribunal to determine that there was a significant risk that a fair trial could not take place before exercising the discretion to strike out.

24. A fair trial must take place within a reasonable period. As HHJ McMullen QC noted in **Peixoto v British Telecommunications PLC** UKEAT/0222/07/CEA:

> 54. In our judgment the principal finding by the Tribunal is firmly rooted in Article 6. This Tribunal held that it could not find any point in the foreseeable or even the distant future, when a trial might be likely. The requirement of Article 6 is that a trial must take place within a reasonable time. On that basis the Tribunal was correct. If it could not in 2007 see any time in the future when this case arising in 2003 could be tried, then it was correct to form the view that a fair trial was not possible and to strike it out.

25. In **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] I.C.R. 327, Choudhury J considered the relevant authorities including **Arrow Nominees**:

> 17. Ms Hunt submits that it was common ground in this case that a fair trial would not be possible at any point during the five-day allocation (see para 6 of the judgment). That is enough, she submits, to satisfy the second of Sedley LJ's cardinal conditions. She submits that it is quite clear from what he said in Blockbuster itself at para 21 that it is a highly relevant question that strike-out is considered on the first day of the trial and that it is obvious that whether or not a fair trial was possible includes the consideration of more than merely whether a trial can be held after an adjournment to allow any procedural defects to be remedied. She referred me to the following passage in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 :
>
>> "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. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was 'hijacked' by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.
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>> "56. In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents—and in the interests of the administration of justice generally—to allow the trial to continue. If he had considered that *335 question, then—as it seems to me—he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to

> punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

Ground 1—discussion

18. In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.

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.

20. Mr Kohanzad's reliance on rule 37(1)(e) does not assist him; that is a specific provision, it seems to me, where the tribunal considers that it is no longer possible to have a fair hearing in respect of a claim, or part of a claim, that may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the context of an application made under rule 37(1)(b) or (c) , where the issue is unreasonable conduct on the part of a party or failure to comply with the tribunal's orders or the Rules.

21. In this case, the tribunal was entitled, in my judgment, to accept the parties' joint position that a fair trial was not possible at any point in the five-day trial window. That was sufficient to trigger the power to strike out. Whether or not the power is exercised will depend on the proportionality of taking that step.

26. The approach where a claim has not been actively pursued was considered in **Evans and anor v Commissioner of Police of the Metropolis** [1993] ICR 151, CA in which it was held that **Birkett v James** [1978] A.C. 297 should be applied; the question being whether there has been **inordinate** and **inexcusable** delay that either **gives rise to a substantial risk that it is not possible to have a fair resolution of the issues** or **has caused, or is likely to cause or to have caused, serious prejudice**.

27. The approach where there has been breach of orders and/or Rules was considered in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, CA:

> 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.

28. The decision is important in that it was held that a "deliberate and persistent disregard of required procedural steps" may be sufficient for consideration of strike out, although for the reasons I have explained above I consider that such default will often mean that there is a significant risk that a fair trial could not take place because of the likelihood of repetition of the behaviour. The case also is a reminder that where the threshold for consideration of strike out is passed, there is still a discretion whether to strike out that must be exercised proportionately.

The appeal against the strike out decision

29. One ground of appeal in respect of the strike out decision was permitted to proceed:

> The Employment Tribunal misdirected itself in law that the loss of a key witness necessarily meant that there was no prospect of a fair hearing

Analysis of the strike out appeal

30. The Employment Tribunal held that the claim had not been actively pursued in the sense that there had been inordinate and inexcusable delay. That determination is not subject to challenge in this appeal. The Employment Judge correctly directed herself that she had to consider whether that gave

rise to a substantial risk that it was not possible to have a fair trial.

31. On any fair reading of the Judgment I consider it is clear that the primary reason for the conclusion was that:

> The Respondent has lost access to one key witness. That means there is now no prospect of a fair hearing.

32. The secondary ground was "the length of delay which will impact on the other witnesses' recollections" against the background of the history of the proceedings.

33. The Employment Judge did not determine whether the claim should be struck out on the basis that the conduct of the claimant was scandalous unreasonable or vexatious.

34. Analysis of the primary ground of the Employment Tribunal requires consideration of what was meant by the respondent having "lost access" to one key witness.

35. In its application for strike out dated 10 June 2022 the respondent stated:

> The claimant's claim relates to matters which took place between April and October 2017. The respondent intends to call three witnesses to the Final Hearing of these claims. Of those three witnesses, one has now left the respondent's employment and is not compellable. In any event, the witnesses' recollection of events in 2017 is likely to have deteriorated by the date of any hearing such that it will not reasonably be possible for the respondent to effectively defend itself against the claims.

36. The Employment Judge was not told anything more of substance at the hearing.

37. Unfortunately, I consider that this meant that the Employment Tribunal failed to consider important questions necessary to decide whether there was a significant risk that a fair trial could not take place.

38. Employers commonly consider that a witness is "lost" if they have left their employment. That is not the case. Many employees may be willing to give evidence if requested by a former employer, particularly if it is asserted that the former employee has been guilty of discriminatory conduct. Furthermore, there is always the possibility of seeking a witness order unless the former employee has left no forwarding address; a contingency it should be possible to mitigate against in many cases by making sure that contact details have been provided before the employee leaves. While there may be cases in which an employee has left in unfortunate circumstances that means that the

former employee is indisposed to assist their former employer that should be established by some evidence.

39. Where a witness has left employment the Employment Tribunal will generally need to consider, amongst any other relevant factors:

39.1. who is the witness

39.2. what evidence can the witness give

39.3. how long ago did the matter(s) about which the witness is to give evidence occur

39.4. has a draft or finalised witness statement been taken

39.5. to what extent is the evidence supported by contemporaneous documentation

39.6. can other witnesses give evidence about the matters

39.7. is the employer still in contact with the witness

39.8. is the employee prepared to give evidence voluntarily

39.9. can attendance be secured by making a witness order

39.10. is there any reason to believe that the witness is now disposed against the interests of the employer

40. None of these matters were considered by the Employment Tribunal. The respondent did not identify the witness in the application. I am told that the witness was the person who withdrew one of the two job offers. Had that been appreciated by the Employment Judge that would have raised the question, if the answers to the other questions made it appropriate, whether consideration of strike out should be limited only to the claim in respect of that job. The respondent did not suggest that they had lost contact with the witness or that the witness was not prepared to give evidence to defend the decision to withdraw the job offer against the contention that it was discriminatory. The Employment Tribunal did not have regard to the fact that the respondent had exchanged witness statements with the claimant so must have had a witness statement for the person with whom contact had been lost. While the Employment Judge noted that "some documents are still available" there was no consideration of the extent to which the rationale for the decision to revoke the job offer was

evidenced by such contemporaneous documentation or whether anyone else was involved in the decision who could give evidence. I have concluded that these failings mean that the decision to strike out the claim on the basis of the "loss" of a witness cannot stand on the basis of the current analysis.

41. I note that the Employment Judge also based her decision on the ground that "the length of delay … will impact on the other witnesses' recollections". An Employment Tribunal is entitled to have regard to the fact that recollection is bound to degrade over time, but even when that is relied on in support of strike out it will generally be necessary to consider the matters set out at 39.1 to 39.6. What is more, I consider that on any fair reading of the judgment this was a subsidiary rationale for strike out.

42. The first ground of appeal succeeds. I have considered carefully, having regard to the unhappy history of the proceedings, the significant case management issues that remain outstanding and the current absence of any reason to believe that things are likely to improve, whether there is only one possible answer to the question of whether the claim should be struck out. While close-run, I have concluded that I cannot say that is the case, particularly as I do not have the information necessary to answer some of the questions I have set out above. The matter is remitted for re-determination. I consider that it is appropriate for the matter to be remitted to the same Employment Judge considering her considerable experience of managing the case and the care taken in analysing the history of the claims. I consider that reliance can be placed on the professionalism of the Employment Judge to determine the matter afresh having regard to the analysis of the legal provisions and approach to strike out where there are witness issues set out above. The Employment Judge will be entitled to consider strike out on the basis of all the grounds asserted by the respondent (Rules 37(1)(b), (c) and (d) **ET Rules**) including that of whether the claimant has been guilty of conducting the proceedings in a manner that is scandalous, unreasonable or vexatious. Management of the matter on remission will be for the Employment Tribunal. If permitted by the Employment Tribunal the claimant may have the opportunity to provide evidence that she wishes to proceed with her claims and is taking steps to resolve all outstanding case management issues and will now fully co-operate with the Employment

Tribunal and respondent. If permitted by the Employment Tribunal the respondent may also have the opportunity to provide any further material evidence as to prejudice caused by the further delay that has occurred in this matter.

Costs

43. At the Preliminary Hearing the claimant applied for her costs, primarily on the basis that the respondent had refused to enter into judicial mediation or assessment. The Employment Tribunal provided reasons for this decision in a separate document stating:

> 15 Both judicial mediation and assessment are processes which are offered by the Employment Tribunal to cases which are considered appropriate but both processes are voluntary. The Tribunal requires consent from both parties before conducting either a mediation or assessment. **I did not regard a refusal to enter into a voluntary process of this nature <u>can</u> be described as unreasonable behaviour which enables me to consider an award**. [emphasis added]

The law on judicial mediation, judicial assessment and costs

44. Rule 2 **ETR** sets out the overriding objective:

> 2. 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—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and (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.

45. Alternative dispute resolution can advance the overriding objective. This is emphasised by Rule 3 **ETR**:

> 3. Alternative dispute resolution

> A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

46. Rule 7 **ETR** provides for Presidential Guidance:

> 7. Presidential Guidance
>
> The Presidents may publish guidance for England and Wales and for Scotland, respectively, as to matters of practice and as to how the powers conferred by these Rules may be exercised. Any such guidance shall be published by the Presidents in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

47. The relevant guidance at the time was in the **Employment Tribunals (England & Wales) Presidential Guidance Rule 3 – Alternative Dispute Resolution** issued on 22 January 2018, which makes provision for judicial assessment:

> 8. Having regard to Rule 2 and Rule 3, this Presidential Guidance reproduces a Protocol for an Employment Judge conducting a Judicial Assessment of a claim and a response as part of a preliminary hearing (case management) held under Rule 53(1)(a) of the Employment Tribunals Rules of Procedure. The Protocol on Judicial Assessments is appended to this Presidential Guidance (together with some Questions and Answers for the parties). It provides a formal framework for the preliminary consideration of the claim and response with the parties that is already often an important part of a preliminary hearing (case management) in defining the issues to be determined at a final hearing. It is not anticipated that it will lead to longer preliminary hearings or to an increase in the number of preliminary hearings conducted by electronic communications under Rule 46. It will be particularly helpful, but not exclusively so, where a party to a claim is not professionally represented at the preliminary hearing (case management).

48. Appendix 1 provided:

> 2. Judicial Assessment is an impartial and confidential assessment by an Employment Judge, at an early stage in the proceedings, of the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions. …
>
> 14. It is a requirement for Judicial Assessment that the parties freely consent to it. Whilst the Employment Judge will explain the advantages of Judicial Assessment, no pressure should ever be placed on any party to agree to it.
>
> 15. The information provided to the parties in advance will make clear that Judicial Assessment is strictly confidential. This will be repeated by the Employment Judge before the Judicial Assessment takes place.

49. Appendix 2 provided:

> What does "without prejudice" mean?
>
> Anything said during the Judicial Assessment may not be referred to in correspondence or at subsequent hearings. Such statements are inadmissible evidence. They include offers of settlement and what is said leading up to and to explain such offers. They are made with view to settling the case and are without prejudice to the parties' position at a full merits hearing. They include anything said by the Employment Judge during the Judicial Assessment.

50. The Presidential Guidance attached at Annex 3, "Judicial mediation – An explanation for the parties", which included the following:

> 1. It is often better for everyone involved to settle their legal dispute by agreement rather than by going through a possibly stressful, risky, expensive and time-consuming hearing. The process of judicial mediation is one method for achieving settlement. It is entirely voluntary and it is private. It no longer incurs a fee.
>
> 8. The mediation day starts relatively early. On arrival, the parties are provided with separate consultation rooms which they may occupy for the duration of the mediation. At 9.30 a.m. the parties are invited to meet the judge and each other around a table in a private room. The judge will outline what the parties should expect to happen and remind them of the vital confidentiality of the mediation process. The judge will emphasise that if the mediation fails, no mention may be made of it at all in the further stages of the case or at any hearing. The judge who conducts the mediation will not hear the case if the mediation fails. The parties need not contribute anything at this initial meeting: but they do have an opportunity to ask questions if they are at all unclear about what is to happen.

51. Both judicial mediation and assessment are voluntary processes. What is said in a judicial mediation or assessment is confidential and will be subject to without prejudice protection. Discussion leading up to a judicial mediation or assessment may also be without prejudice.

52. Rule 76 **ETR** provides, so far as relevant to this appeal:

> 76.— When a costs order or a preparation time order may or shall be made
>
> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

53. The direction of travel in the Civil Courts and Tribunal is increasingly to encourage alternative dispute resolution. In the Civil Courts a failure to engage with alternative dispute resolution may

result in the defaulting party failing to recover their costs and possibly even having an award of costs made against them. I shall consider some of the key decisions in the Civil Courts, but it should be remembered that costs generally follow the event in the Civil Courts and some of their practice directions require parties to engage in alternative dispute resolution.

54. In **Burchell v Bullard and Others** [2005] EWCA Civ 358, [2005] 3 Costs LR 507, Ward LJ stated:

> The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued.

55. In **PGF II SA v OMFS Co I Ltd** [2013] EWCA Civ 1288, [2014] 1 WLR 1386 Briggs LJ helpfully summarised the previous key authority **Halsey v Milton Keynes General NHS Trust** [2004] EWCA Civ 576, [2004] 1 WLR 3002:

> 22 *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 was the first case in which the Court of Appeal addressed, as a matter of principle, the extent to which it was appropriate for the court to use its powers to encourage parties to civil litigation to settle their disputes otherwise than by trial. It is sufficient to summarise the principles laid down, because none of them were in dispute on this appeal: (i) The court should not compel parties to mediate even were it within its power to do so. This would risk contravening article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and would conflict with a perception that the voluntary nature of most ADR procedures is a key to their effectiveness. (ii) None the less the court may need to encourage the parties to embark on ADR in appropriate cases, and that encouragement may be robust. (iii) The court's power to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes power to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to ADR. (iv) For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of ADR. Supplementing those statements of principle, the Court of Appeal adopted and explained a non-exclusive list of factors likely to be relevant to the question whether a party had unreasonably refused ADR proffered by the Law Society (which had intervened): (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; (f) whether the ADR had any reasonable prospect of success. Again, none of these guidelines was significantly in dispute on this appeal, although their applicability to the particular facts of this case was hotly debated, both before the judge and on appeal.

56. The Court of Appeal went on to consider whether a successful party might be ordered to pay the costs of an unsuccessful party:

> 52 There appears no recognition in the Halsey case that the court might go further, and order the otherwise successful party to pay all or part of the unsuccessful party's costs. **While in principle the court must have that power, it seems to me that a sanction that draconian should be reserved for only the most serious and fragrant failures to engage with ADR, for example where the court had taken it on itself to encourage the parties to do so, and its encouragement had been ignored**. In the present case the court did not address the issue at all. I therefore have no hesitation in rejecting Mr Seitler's submission that the judge did not go far enough in penalising the defendant's refusal to engage with ADR. [emphasis added]

57. These points were emphasised in **Naheed and Ahmed** [2017] EWCA Civ 369, [2017] 3 Costs LR 509 in which Patten LJ stated:

> 49. Mr McNae referred us to the decision of this court in *PGF II SA v OMFS Company 1 Ltd* in which Briggs LJ emphasised the need, as he saw it, for the courts to encourage parties to embark on ADR in appropriate cases and said that silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might in the circumstances have been justified. **Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion**.

58. It is important, as I have already mentioned, to bear in mind the different costs provisions in the Employment Tribunal, in which costs do not follow the event and are the exception rather than the rule, and the Civil Courts in which costs usually do follow the event, and are generally the rule rather than the exception.

59. Where one of the thresholds for making an award of costs is met, the Employment Tribunal has a discretion to exercise in deciding whether to award costs that an appellate tribunal or court should be slow to interfere with. In **Yerrakalva v Barnsley Metropolitan Borough Council and another** [2011] EWCA Civ 1255, [2012] ICR Mummery LJ stated:

> 39 I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.

> 40 The actual words of rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in McPherson v BNP Paribas (London Branch) delivered by me has created some confusion in the employment tribunal, Employment Appeal Tribunal and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the employment tribunal to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature", "gravity" and "effect". Perhaps I should have said less and simply kept to the actual words of the rule.
>
> 41 The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.
>
> 42 On matters of discretion an earlier case only stands as authority for what are, or what are not, the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them.

The costs appeal

60. One ground of appeal in respect of the costs decision was permitted to proceed:

> The Employment Tribunal erred in law in determining that the refusal to engage in judicial mediation or assessment was not unreasonable behaviour by the Respondent

Analysis

61. I consider that on a proper reading of the costs reasons the Employment Judge concluded that refusal to engage in judicial mediation could not as a matter of principle ever amount to unreasonable conduct of the proceedings. I do not accept that is correct as a matter of law. Rule 76 **ETR** does not place a limit on what types of conduct might be unreasonable and I do not consider that there is an

absolute prohibition on refusal to engage in judicial mediation being unreasonable conduct that could found an award of costs on a proper exercise of the discretion of the Employment Tribunal.

62. I am not persuaded that a distinction can be made, as suggested by the respondent, between mere refusal to engage in judicial mediation and the reasonableness of the decision to do so. The test will always be that of whether there has been unreasonable conduct in refusing to engage in judicial mediation which will depend on all the circumstances of the case. It is incumbent on the party seeking an award of costs to establish what it was about the circumstances and actions of the party that refused to enter into judicial mediation or assessment that made it unreasonable. That analysis will always have to take account of the fact that the process is voluntary, and that particular care must be taken to protect the sanctity of without prejudice discussions in the lead up to judicial mediation or assessment and anything said in a judicial mediation or assessment. The factors referred to in **Halsey** may often be relevant in undertaking that analysis. It will only be in an exceptional case that there could be a costs sanction against a party that has succeeded in defending in a claim or defence as is the case in the Civil Courts as explained in **PGF II SA v OMFS Co I Ltd**.

63. In this case the Employment Tribunal had very little material about the circumstances in which the respondent refused to engage in judicial mediation or assessment. The respondent stated no in answer to the questions “Is this a case that might be suitable for judicial mediation?” and “Are the parties interested in the possibility of judicial mediation?” in the agenda for the first Preliminary Hearing for Case Management. It does not appear that the claimant completed an agenda.

64. The claimant sent an email in the morning on the day of the Preliminary Hearing at which the application for strike out was considered, stating amongst a number of other points “the Claimant hereby urges the Presiding Judge to dismiss the respondents aforementioned applications as counterproductive applications, and for the Presiding ET Judge to rather list the above claims for Judicial review and or Judicial assessment”. In the costs reasons the Employment Judge recorded that the claimant stated that “She had pleaded with the Tribunal to be given a judicial mediation or assessment. The Respondent rejected that. She didn’t understand why.” However, there was no

further detail of the timing and circumstances of any such requests.

65. I consider that the application for costs was optimistic in circumstances in which the respondent was seeking strike out because of the claimant's conduct of the proceedings. However, I have concluded that the Employment Judge erred in law in holding that a failure to engage in judicial mediation or assessment could never result in an order for costs. Although the claimant faced an uphill struggle, I am not persuaded that there could only be one answer to the question of whether the respondent had acted unreasonably and, if so, whether the discretion to award costs should be exercised. The costs application shall also be remitted to the same Employment Tribunal for redetermination, particularly as the outcome of the remitted strike out application may be relevant because if it is permitted the claimant would also face the extra hurdle of seeking an award of costs against a party that has succeeded in defending the claim explained in **PGF II SA v OMFS Co I Ltd**. Case management of the matter on remission will be for the Employment Tribunal.