The limits of strike-out, the right to representation, and the proper application of natural justice

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***Odusanya v Pennine Care Foundation Trust & Others* [2026] EAT 5**

Summary

1. The Employment Appeal Tribunal (EAT) allowed the appeal in part against an Employment Tribunal (ET) decision to strike out the claimant's claims under Rule 37(1)(b) and (e) of the Employment Tribunal Rules 2013, on grounds of unreasonable conduct and impossibility of a fair trial. The strike-out had followed a finding that the claimant, while still under oath, had discussed her case with her sister and a newly-instructed representative, contrary to repeated judicial warnings. The EAT upheld Grounds 2 and 3, finding that the claimant had been denied her statutory right to representation and that the procedure adopted was procedurally unfair. Grounds 1, 4 and 5 were dismissed. The case provides important guidance on the limits of strike-out as a remedy, the scope of the right to representation under section 6(1) of the Employment Tribunals Act 1996, and the proper application of natural justice in misconduct hearings arising mid-trial.

Background

2. The claimant, Mrs M Odusanya, brought claims against Pennine Care Foundation Trust and three individual respondents. She had originally been represented by the Royal College of Nursing but became a litigant in person shortly before the hearing. On the first day of the final hearing she made late applications to introduce new evidence and to amend the issues; both were refused as unreasonable and prejudicial to the respondents.

3. During the course of the hearing, the claimant was cross-examined over several days. She was repeatedly warned by the Judge not to discuss her evidence with anyone while she remained under oath, including during overnight and comfort break adjournments. The

warnings were given clearly and on multiple occasions, and the claimant acknowledged each of them.

4. On the fourth day of the hearing, it emerged that the claimant had, during an overnight break, arranged a conference call with her sister and instructed a new representative, Mr Lennard, who arrived at the Tribunal the following day. The claimant had sent him approximately 800 pages of the hearing bundle along with her supplemental statement. The respondents applied to strike out the claims under Rule 37(1)(b) and (e), arguing that the claimant's conduct amounted to unreasonable conduct of proceedings and that a fair trial was no longer possible.

5. The ET considered the relevant case law and found that the claimant's conduct was unreasonable and had breached clear instructions; that trust in her evidence had been irreparably damaged; and that no lesser remedy, such as a costs award or adjournment, was appropriate. All claims were struck out. The ET acknowledged that strike-out was a draconian measure but concluded that it was justified in the circumstances, having regard to the breach of instructions, the claimant's lack of candour, the potential for tainted testimony, and the prejudice to the respondents and the administration of justice.

Appeal to EAT

6. The claimant advanced five grounds of appeal. Ground 1 alleged that the ET had misapplied *Chidzoy v BBC*, arguing that the ET had failed to make clear findings of fact as to what had actually been discussed while she was under oath and had wrongly assumed that note-taking equated to discussing her evidence. Ground 2 argued that the ET had unlawfully interfered with her statutory right under section 6(1) of the Employment Tribunals Act 1996 to appoint and consult a representative of her choice. Ground 3 contended that there had been a breach of natural justice because adverse findings were made without proper opportunity to adduce evidence and without permitting the claimant to consult her representative before responding to the strike-out application. Ground 4 alleged that the ET had misinterpreted the warning given to her, treating it as a blanket prohibition on any discussion of the case when its purpose was more limited. Ground 5 argued that strike-out was a disproportionate response and that alternatives had not been properly considered.

Legal analysis

7. The EAT considered the strike-out framework established by *Bolch v Chipman* [2004] IRLR 140, which requires a tribunal to: (i) identify the conduct and determine whether proceedings have been conducted in an objectionable manner; (ii) assess whether a fair trial remains possible; (iii) if not, consider the appropriate remedy; and (iv) weigh the consequences of a strike-out. The EAT also considered *De Keyser Ltd v Wilson* [2001] IRLR 324, *Chidzoy v BBC*, *Bailey v Aviva Employment Services* [2025] EAT 109, and *Arrow Nominees v Blackledge* [2000], the last of which confirmed that where a litigant's conduct puts the fairness of the trial in jeopardy, it may be appropriate to refuse to allow that litigant to continue with the proceedings.

8. On Ground 1, the EAT confirmed that in most cases a tribunal must seek to ascertain the content of any discussion alleged to breach a witness warning, since it is the interference with the administration of justice that is at stake. However, it accepted that the ET is entitled to reject a claimant's account; if it does so, it may treat the conduct as deliberate and contumelious without knowing the precise content of the discussion, in accordance with the principles in *De Keyser*. On the facts, the ET had made findings at paragraphs 60 and 61 of its reasons rejecting the claimant's account of what was discussed; that approach was permissible. Ground 1 was dismissed.

9. On Ground 2, the EAT upheld the appeal. It held that, whilst a witness who is under oath may not discuss her evidence, fairness may require that a litigant be permitted to obtain legal advice on a distinct procedural or legal issue arising mid-hearing. The strike-out application was precisely such an issue: it was a radical and potentially dispositive procedural step which did not concern the substance of the claimant's evidence. She had specifically asked to speak to her "lawyer" before responding. By refusing that request, the ET deprived her of her statutory right to representation on the most serious application made in the course of the proceedings. The EAT noted that, with represented parties, it is common practice for a Judge to permit brief consultation on a newly arising matter; a litigant in person was entitled to no less.

10. The EAT acknowledged the complication that arose from the representative's involvement in the alleged misconduct: Mr Lennard was a participant in the very discussion that the respondents said breached the Tribunal's instruction, and he was not qualified as a lawyer in England and Wales. However, the EAT held that this was not, of itself, a sufficient reason to prevent the claimant from taking advice on the strike-out application. The ET could approach his submissions with appropriate caution but could not treat its concerns about his status as

a basis for denying representation altogether. The EAT noted that had she been advised, her approach to the ET's enquiries might have been materially different, particularly in relation to telephone log evidence. The denial of advice could have made a material difference to the outcome of the application.

11. On Ground 3, the EAT upheld the appeal. It held that, having decided to make findings of fact about the alleged breach, the ET was obliged to afford the claimant a proper opportunity to give evidence and to take the advice she had requested before doing so. Requiring the claimant, who was unrepresented at that point, to respond on the spot to the strike-out application while still technically under oath and without legal advice was procedurally unfair. Drawing on *Cox v Adecco* [2021] ICR 307, the EAT observed that a litigant in person suddenly confronted with a legal application against which she had not prepared was in a "rabbit in the headlights" situation. That finding was sufficient to dispose of the appeal, but the EAT went on to consider the remaining grounds.

12. Ground 4 was dismissed. The EAT observed that, whilst instructions to witnesses should focus on preventing influence on evidence rather than imposing a blanket ban on all discussion, the ET had made a factual finding that the claimant had discussed her *evidence* with Mr Lennard and her sister, not merely administrative matters. That finding brought the conduct within the purpose and scope of the warning given, and the ET had not erred on this ground.

13. Ground 5 was also dismissed. The EAT held that, had the ET followed the correct procedural steps and reached the same factual conclusions, a strike-out would have been a proportionate and lawful response. The conduct, if established as found, was virtually on all fours with that which had justified a strike-out in *Chidzoy v BBC*. The ET had considered alternatives and was entitled to conclude that lesser measures would not suffice given the irreparable loss of trust that its findings disclosed.

Outcome

14. The appeal was allowed on Grounds 2 and 3, and the strike-out decision was set aside. The EAT declined to remit to the same panel, notwithstanding the presumption in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, because the panel had made significant adverse findings about the claimant's credibility and had expressed a loss of trust in her evidence. The matter was remitted to a freshly constituted Employment Tribunal. The EAT was explicit that nothing in its judgment prevented the respondents from renewing the strike-out application before the fresh tribunal if they considered it appropriate to do so.

Comment

15. This decision provides helpful clarification of the boundary between a witness's obligation not to discuss her evidence while under oath and her right to take legal advice on a procedural matter arising in the course of proceedings. The EAT's analysis makes clear that these are distinct issues: the former is concerned with protecting the integrity of testimony; the latter with ensuring that a party has a fair opportunity to respond to potentially case-ending applications. The distinction has practical importance for Judges managing contested hearings, particularly where one or more parties are unrepresented.

16. The decision also confirms that a tribunal which chooses to make findings of fact in response to alleged misconduct must do so by a process which is itself fair, including by affording the party concerned a proper opportunity to obtain advice before responding. The risk of procedural unfairness is heightened where the application is made mid-hearing against a litigant in person who is already under the stress of cross-examination and confronted with an area of law outside her preparation.

17. Practitioners should note that the outcome does not preclude the respondents from renewing the strike-out application before the remitted tribunal. The EAT's findings are limited to procedure; the substantive question of whether the claimant's conduct was such as to justify strike-out, if approached correctly, remains live. Respondents faced with a similar situation should ensure that any application is made and determined in a manner that demonstrably respects the claimant's right to representation and affords her a fair opportunity to respond to the specific allegation.

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