# EAT considers whether an Employment Tribunal was right to strike out a claim on the basis that a claimant's conduct meant that a fair trial was not possible

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***Rev Dr James George Hargreaves v 1) Evolve Housing and Support 2) Mr Simon McGrath:* [2023] EAT 154**

## Relevant background

1. R1 is a charitable housing organisation which supports homeless and vulnerable people in London, by which C was employed as a Supported Housing Night Concierge Worker. R2 was a board member of R1.

2. C was dismissed for gross misconduct and brought various claims against Rs, including for discrimination.

3. C's objective, in his own words, wanted to use the ET proceedings to: *'create a damning narrative of a racist, abusive organisation: Evolve Housing + Support the unregulated housing organisation that leads young people into harm's way, including murder, whilst raking in millions from the taxpayer'*; '*unseat* [R2] *and his colleague…from their Dundonald Ward Council seats'*, and '*plunge* [R2's] *political party into a religious harassment scandal during the election time, which may lead to other political colleagues losing their seats and his party's general election ambitions being hindered'*. C further threatened Rs with a '*relentless'* campaign '*through protracted legal actions continuing for years'*. His approach was vindictive and sought to weaponise the ET proceedings to achieve his vendetta against Rs and cause as much damage to them as he possibly could.

## ET decision

4. The ET rejected C's submission that R2 and Rs witnesses could withstand the pressure of this kind and the Tribunal is well equipped to calm witnesses and assist them with giving their evidence. The issue goes well beyond the witnesses feeling uncomfortable and needing the Tribunal to step in to give them time and space to recompose themselves. The fundamental issue is that C wanted to assume the role of the prosecutor and the judge in relation to Rs and their witnesses and deal with them inside and outside the proceedings as he found appropriated[1].

5. The Tribunal noted that strike-out is a draconian sanction, to be exercised only in exceptional circumstances. Nevertheless, having concluded that a fair trial was not possible, it stated that it could not see what lesser sanction could turn it back into a fair trial[2]. Accordingly, the ET struck out the claim on the basis that the manner in which C had conducted the proceedings had been scandalous, unreasonable and vexatious, such that there could not be a fair trial.

## Grounds of appeal[3]

6. C advanced 5 grounds of appeal, by which he argued that the Tribunal:

   (i) failed to recognise his constitutional right of access to the courts;
   (ii) attributed motive to him which was both irrelevant and inaccurate;
   (iii) erred in failing to have recognised the interplay between an open court process and access to the court;
   (iv) erred in holding that a fair trial was not possible, or that a measure short of strike-out would not suffice to enable a fair trial; and
   (v) erred in failing to have recognised that, in alleging discrimination, his case constituted a matter of high public interest which ought to have been struck out only in the plainest and most obvious case.

[1] [4f]
[2] [4g]
[3] [1]

## The relevant law[4]

7. Rule 37(1) of the ET Rules provides:

> "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 prospects of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or 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)."

8. In **Bolch v Chipman [2004] IRLR 140**, the EAT set out the test which a Tribunal should apply when considering whether a claim or response should be struck out under rule 37, a test which was affirmed in **Abergaze v Shrewsbury College of Arts & Technology [2009] EWCA Civ 96** and summarised by Elias LJ [15]:

> "In the case of a strike-out application brought under [rule 37(1)(b)] it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings, that the result of that conduct was that there could not be a fair trial and that the imposition of the strike-out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial then the strike-out should not be employed."

9. As was observed in **T v Royal Bank of Scotland [2023] EAT 119 [40]**:

> "There are examples in the authorities of cases where the specific nature of a litigant's impugned conduct means that the conduct has itself inherently made it impossible for there to be a fair trial. From time to time there will also be cases where, unfortunately, a litigant's conduct is, for example, so threatening abusive or disruptive that, whatever the cause, it ought not to be tolerated and they will be done no injustice by being treated

[4] [14] – [18]

as having thereby forfeited their right to have their claim or defence tried, but outside of such cases a claim should not otherwise be struck out on account of conduct unless the conduct means or has created a real risk that the claim cannot be fairly tried. See *De Keyser* at [24] citing the discussion of the earlier authorities in *Arrow Nominees*."

10. In **Emuemukoro v Croma Vigilant (Scotland) Limited and Others [2022] ICR 335** [21], Choudury P, emphasised the high hurdle to be surmounted in an appeal against strike-out:

"I bear in mind when considering whether or not to interfere with the Tribunal's decision here that the test for the EAT, as confirmed in *Riley v Crown Prosecution Service* [2013] IRLR 966, is a "*Wednesbury*" one; that is to say, in an appeal against striking out, the case will succeed only if there is an error of legal principle in the Tribunal's approach or perversity in the outcome (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223".

11. In **Blockbuster Entertainment Limited v Jones** [21], Sedley LJ emphasised the need to consider the proportionality of striking out a claim, against a backdrop of the right to a fair hearing:

"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 Jones has reminded us, has for a long time taken a similar stand (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 read 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.

## EAT decision

12. Ground (iv) only succeeded.

13. The ET had received no evidence from any prospective witness for Rs to the effect that he or she was fearful of giving evidence, or of involvement in the claim, or intimidated by C. The ET's reasoning had proceeded on the basis of the assumed effect of C's conduct. The ET did not find that C would be done no injustice by being treated as having thereby forfeited his right to have his claims tried, nor were the claims themselves characterised as having fallen within rule 37(1)(a). Rs had disavowed any concern over improper behaviour towards witnesses by C in the course of the hearing[5].

14. Accordingly, allowing the appeal, whilst the EAT acknowledged the ET's concern at what it termed C's weaponization of proceedings, nonetheless it held that C had demonstrated that the ET's conclusion that a fair trial was not possible was an error of principle, or perverse on the material with which it had been provided. The fact that no alternative order is merited or appropriate cannot itself serve to establish that the draconian sanction of strike-out is warranted.

## Disposal

15. The claims were reinstated and remitted for an OPH at which all necessary directions enabling the matter to proceed to a substantive hearing would be considered[6].

## Commentary

16. Generally, this case provides yet another salutary reminder of how difficult it is to get claims struck out before Employment Tribunals. Specifically, it demonstrates that when asserting that a fair trial is not possible because of a party's conduct, it would be prudent to have cogent evidence available to support such an application and put before the ET considering such application rather than relying on an ET to make assumptions based on proved scandalous, unreasonable or vexatious conduct.

[5] [22]
[6] [25]

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