Appeal Nos. UKEAT/0097/14/KN
UKEAT/0102/14/KN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 31 October 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR M HARRIS — APPELLANT

(1) ACADEMIES ENTERPRISE TRUST
(2) MS C HAYNES
(3) MR M MULDOON
(4) MR I COMFORT — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel)
For the Respondents	MS CHARLOTTE HADFIELD (of Counsel) Instructed by: Qdos Consulting Limited Windsor House Troon Way Business Centre Humberstone Way Leicestershire LE4 9HA

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Postponement or stay

Perversity

The Claimant appealed the refusal of an Employment Tribunal to strike out the response. The exchange of witness statements had been ordered for 19 February 2014, 12 days prior to trial. In breach of this order, the Respondent did not serve 13 witness statements, but sought an extension of time for doing so. That was refused. The statements were still not provided. On the Thursday before the Monday when the hearing was due to start, another Judge ordered the statements to be brought to the Employment Tribunal, saying that strike-out would be considered. However, no unless order had been made.

The Claimant suffered from anxiety and depression, likely on the evidence to be exacerbated by a delay in the hearing of his claim. The judge found that the delay had been intentional and contumelious, such that he had a discretion to strike out the response, but declined to do so. An important factor in his reasoning was that the failure was a personal failure of the Respondent's solicitor. The claims asserted discriminatory conduct toward the Claimant by individual Respondents; the failure was not directly their responsibility, there could be fair trial, and it would on balance cause them greater prejudice to be at risk of unjustified stigma than the prejudice would be to the Claimant if strike-out was refused.

The Claimant argued that the Employment Tribunal had adopted the wrong test - the unforgiving "post-**Mitchell**" approach adopted in the **Civil Procedure Rules** (CPR) should be applied in the Employment Tribunal; that the conclusion as to the balance of prejudice was perverse, and that individual Respondents should be regarded as indissociable from their solicitor, such that his fault was theirs. Other ancillary complaints were also made.

Held: the overriding objective in the **CPR** contains specific considerations, of particular importance in the context in which those rules operate, which do not apply to the Employment Tribunals, where the overriding objective was repeated in revised Rules in 2013 without specific mention of those considerations. It is nonetheless part of dealing with a case justly that regard is had to the impact of a case upon the resources of the Tribunals, to ensure that one case does not exhaust a disproportionate share of them and by doing so deprive a later case of time, or delay its start. The Judge correctly applied the principles and authorities. An exercise of discretion cannot readily be attacked on appeal, and there was no error of law in the Employment Judge's approach to his exercise of it in this case. He was entitled on the facts to find that the real fault was that of the solicitor, and was not in error of law in drawing the balance of prejudice as he did.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. The exercise of the power to strike out involves a discretion. Where an Employment Judge exercises a discretion a successful appeal against his Decision is likely to be rare. There is a wide ambit within which generous disagreement is possible in many matters of judgment, and this is undoubtedly the case in respect of the exercise of a discretion. As it was put in the case of **Governing Body of St Albans Girls' School and Anor v Neary** [2010] ICR 473 by Smith LJ, there may be two correct answers, or at least two answers that are not so incorrect that they can be impugned on appeal (see paragraph 49).

2. Appeals to this Tribunal lie only on a point of law. For the exercise of a discretion to be reversed it therefore has to be shown that the Judge was in error in his approach to that exercise. A discretion must be exercised judicially; that is, with due regard to reason, relevance, logic and fairness. It will usually be only if the Judge has misdirected himself on the law that he is to apply, plainly misapplied it, failed to take into account a factor that demonstrably he should have done, left out of account something he should not have, or reached a decision that is so outrageous in its defiance of logic that it can be described as perverse, that his decision may be overturned.

3. It is said nonetheless that a decision reached by Employment Judge Warren at Colchester when he dictated his reasons for a decision to refuse an application by the Claimant to debar the Respondents from taking any further part in the proceedings – in effect, striking out the Respondents' response – on 4 March 2014, a hearing having begun before him a day earlier, demonstrates a number of errors of law.

The Background Facts

4. The Claimant was a litigant in person. He is a teacher employed by the first Respondent. He complained in three earlier separate complaints of the Respondents' behaviour towards him. A fourth complaint was issued in December 2013. That made complaints that he had been subject to detriment by reason of making a public-interest disclosure; he claimed disability discrimination against him, and that he had been victimised and subject to harassment. The claim was not only brought against his employer but against the headteacher and two other colleagues.

5. The Claimant suffered from anxiety and depression at a moderate to severe level, requiring chemical treatment and regular review at the surgery he attended and by a psychiatric team. Delay in resolving his complaints could be deleterious to him, though, as Ms Hadfield, who appears for the Respondents before me today, points out, there was no evidence that I have been shown that it would have prevented him participating in any subsequent hearing.

6. A hearing was set to start on Monday, 3 March 2014. At a preliminary hearing on 20 January all four claims were brought together for hearing on that occasion. Employment Judge Goodrich directed that witness statements be exchanged by 19 February. That order was not recorded by the Tribunal, but the parties are agreed it was made. He made other orders too, providing that there should be general disclosure between the parties in respect of the fourth claim by 3 February and specific disclosure in relation to certain specified matters. There is no suggestion in the Judgment that those specific orders were not complied with, though, as it happens, and in my view immaterially, the Claimant was a day late in providing some of the disclosure.

7. On 19 February 2014 Mr Berriman the solicitor, acting for the Respondents, applied for an extension of time for the exchange of witness statements. He asked that the date be changed to a week later, 26 February. It will be obvious that would give very limited time between then and the date five days later when the hearing was due to begin. It is not difficult to understand how that could cause a person in the position of Mr Harris and with his condition some difficulty if the witness statements were extensive. Employment Judge Goodrich, who had the advantage of knowing the case, having dealt with it on three occasions, refused the extension of time. On 21 February Counsel acting pro bono for the Claimant told Mr Berriman that if witness statements were not promptly exchanged, the trial could not sensibly be effective.

8. By 26 February the witness statements had not yet been provided. Mr Harris applied for an unless order. No unless order was made, instead the Employment Judge said that she was considering striking out the response because of non-compliance with the order. Thus what by now had happened was that the Respondents were seven days late in providing witness statements with the trial five days away. The Judge indicated that she was minded to strike out the response. At the commencement of the hearing on 3 March that application was made by Mr Milsom on behalf of the Claimant, who advances the appeal before me today.

The Judgment

9. It has to be remembered that the Judgment was ex tempore. Not only should a Judgment of a Tribunal be read with due allowance for the fact that it is unlikely to have the polish of a Chancery draft or Judgment of the Court of Appeal, and highly likely both to contain infelicities of expression, and to contain its essential reasoning in more than one place though on the same issue, but such observations, which are trite, may all the more be true where a Judgment is made on the hoof. It seems to me that what the Judge said was, despite that, relatively clear.

He plainly took considerable time overnight, having heard the argument, to consider what his decision should be.

10. The application to strike out was made under the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (ET(CRP)R). Rule 37(1) 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 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)."**

11. The Judge described the application as having been made on the basis that the claim had not been actively pursued but plainly had in mind also grounds (b) and (c). He found in clear terms at paragraph 75 that the conduct of the case by the Respondents had been unreasonable, in that the witness statements had not been exchanged, and the failure to do so had been in breach of the Tribunal order. Thus grounds (b) and (c) had both been satisfied. He did not specifically make a finding upon ground (d) but did not need to do so, nor does any point arise before me in respect of that. He expressed the view that the delay in exchange of witness statements could also be described as intentional and contumelious. Plainly he accepted that was the case. There is no challenge before me to those findings. He then said, "The Claimant therefore crosses the Rule 37 threshold. Is a strike-out proportionate?"

12. In asking that question, which he then proceeded to consider on the facts before him, leading to a reluctant conclusion that the case should not be struck out, he plainly was taking his

starting point from that which he had identified earlier in his Judgment when he set out the relevant law. He noted the terms of the overriding objective within the Rules. Secondly, he thought the starting point was the case of **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 CA. Although the Rule itself does not state how the discretion should be exercised if any of the factors 37(1)(a) to (e) is shown to be the case, case law is clear as to the approach that should be taken, subject only to the points that Mr Milsom would make on this appeal. In **James** the Court of Appeal held that the power to strike out under what was then Rule 87 of the earlier Rules, which were in similar form, was a "draconic power not to be too readily exercised". As the headnote rightly records, taken from paragraph 5 of the Judgment of Sedley LJ:

> **"… 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. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."**

13. Like Sedley LJ, I shall return to proportionality later.

14. The Judge at paragraph 42 correctly set out the statement of principle as derived from that case. There has been no argument before me that **James** has been overruled by any subsequent decision of the Court. Nonetheless it is said that the Judge erred in law in that he did not adopt the correct test; secondly, that the Tribunal erred in its approach towards the overriding objective after **Mitchell v News Group Newspapers Ltd** [2013] EWCA Civ 1537, and should have but did not pay due regard to authorities since **Mitchell** that had considered the approach to applications for relief from sanction where, following an unless order, witness statements had not been provided. Thirdly, it is said that the Judge came to a perverse view in

respect of the balance of prejudice, which was a central factor in his approach to deciding whether or not strike-out was proportionate.

15. Before I deal with the further grounds of appeal, I return to the Judgment below. The Judge set out in some detail the submissions that Mr Milsom had made to him and referred to the submissions made by Ms Hadfield for the Respondents. He then came to his conclusions. It was plain that the witness statements had not been provided on 19 February as ordered. He found the reasons given by Mr Berriman woefully inadequate, saying that he had struggled to find an appropriately polite description, and observing, "Four fee earners should be able to sort something like this out". He thought (paragraph 72) that it should have been perfectly possible to have prepared witness statements and to have exchanged them in time:

> **"… One would have thought that witness statements would have been in draft form already and simply in need of fine tuning once the finalised bundle was prepared with its pagination."**

16. The bundle was due to be prepared by the Respondents. The bundle was not given to the Claimant until the weekend before the hearing. It was said to be in part a reason for the delay that the Respondents wished to match in the references within the Respondents' witness statements to the bundle.

17. The Judge came to the view he did of the way in which the Respondents had conducted themselves through Mr Berriman at page 75. What then determined the question of whether, in the light of passing the threshold, there should be a strike-out or not was his approach to the overriding objective. The overriding objective in the **ET(CRP)R** is not in the same form precisely as it is in the **Civil Procedure Rules** (CPR). In the **ET(CRP)R** it reads:

> **"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 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."

18. The Tribunal is to seek to give effect to that objective in interpreting or exercising any power given to it by the Rules, and it hence applied to the exercise of the power under Rule 37.

19. Having looked at each of the particular characteristics, the Judge said at paragraph 83 that he looked to balance the "relative prejudice to each of the parties". Mr Harris had been placed under pressure to assimilate the content of those witness statements and had lost the opportunity to review those documents with Counsel free of charge. He noted the effects of the illness from which Mr Harris suffered. He thought that a refusal would mean that he would have to go through the "rigmarole of a full trial" when he was not well.

20. He then considered the prejudice on the other side to the Respondents to see if it out-balanced that to Mr Harris. He said:

"86. If I strike-out [sic] the response or simply disallow the witness statements, whether I allow cross-examination or not, either way it is very likely that Mr Harris' claim will succeed on his evidence, without evidential contradiction. That may mean that he will succeed on his claim which might be entirely without merit and he will receive a windfall of significant compensation which he does not deserve. It will mean that findings of discrimination will have been made not only against a school, which is funded by public money as an institution, but also findings of discrimination against individual Respondents named in these proceedings.

87. There is no evidence that the failings of Mr Berriman is [sic] their fault. There is no evidence at this stage that Mr Berriman was acting on their instructions.

88. This to me represents the greater prejudice. I may, or my Tribunal may, make findings against individuals and ultimately order significant compensation to be paid by individuals who have not had the opportunity to be heard, through no fault of theirs but the fault of their legal advisors. There is no comfort to be taken from the fact that they could perhaps sue their legal advisors for negligence. I cannot be sure that they will succeed and, in any event, such financial recompense would not take away the stigma of a finding of discrimination.

89. Is a fair hearing still possible if I refuse the application? Yes, I could postpone the hearing and re-list it in November. That however would leave matters in an unsatisfactory state of affairs for another nine months. That will not be good for Mr Harris, (his doctor's letter says that a conclusion will help with his cure) nor would it be good for the three named individuals

facing accusations of discrimination to have this Sword of Damocles hanging over their heads for 9 more months.

90. I could proceed now, but I recognise the need for Mr Harris to have time to assess the Respondents' statements and the Grounds of Resistance and give him time to arrange to take advice. He will have from today, (Tuesday) until next Monday to do so. The medical evidence quoted above does not suggest he is not capable of doing so. It will give him time to arrange for advice if that is his wish. To begin with he will only have to present his supplemental points and answer questions in cross examination [sic].

91. I recognise that a Time Preparation Order goes nowhere near to adequately dealing with the current situation.

92. I am not influenced by the tone of correspondence of Mr Berriman and his conduct of these proceedings so far. I regard some of the examples of what he wrote, to which I have been referred, as unprofessional, (whatever the circumstances) when dealing with a litigant in person. He appears to have lost his professional objectivity, but there is no evidence that was on the instructions of the Respondents at this stage. I did not want to hear his explanation because I felt that was not going to assist me in the strike-out decision. His explanation may have a bearing in due course, if events go a certain way, on an application for aggravated damages or if it argued that it amounts to the foundations of a victimisation claim.

93. For me, the fact that a strike-out would probably result in judgment against Respondents who may not be at fault, is what weighs my decision against a strike-out and therefore I refuse the application. I do so reluctantly.

94. Mr Milson [sic] was most persuasive. Mr Berriman's conduct was unacceptable. I am exasperated that there are no means available to me by which I may effectively sanction the Respondents' solicitors. Had Mr Harris been represented other than on a pro bono basis, I would have heard more evidence from Mr Berriman with a view to considering whether a Wasted Cost Order would have been appropriate. …"

21. He went on to describe the time preparation order that he did make as an "obviously inadequate £132". He also ordered the repayment by the Respondents to the Claimant of the fees he had had to pay on issuing his fourth claim, the sum of £250.

22. In addition to the three grounds to which I have already referred, which were the first three grounds of appeal, the Claimant argues, fourth, that in those paragraphs the Judge wrongly disassociated the Respondents from the actions of their representative Mr Berriman; and fifth, that the Judge, by ordering a timetable that required the Respondents to serve the Claimant with their Grounds of Resistance on claim four by 10.00 the following morning, had in effect allowed the Respondents to amend their Grounds of Resistance and was wrong to do so; sixth, that it erred in excluding the Respondents' conduct in correspondence from its consideration as indicated at paragraph 92; and finally, that it erred in refusing an application to

postpone that the Claimant made upon the rejection of his application to strike out, he not wishing to commence the hearing on the following Monday within the tight timetable that the Judge had imposed, which could cause him significant difficulty.

23. I shall deal with each of these grounds in turn. As to the first, what Mr Milsom argues is that the test that the Judge posed to himself was wrongly applied; in dealing with the question posed by **James** he should have adopted the approach of asking whether there was a less drastic means to the end for which the strike-out power existed. He submitted that the purpose of the strike-out power was to ensure that orders of a Tribunal were observed and not flouted. Such a narrow approach to that which "proportionate" means in answering the question, "Proportionate to what?" gives little scope, once there has been a finding of intentional contumelious default, for any consequence other than that a court will consider it proportionate to strike out the claim.

24. Mr Milsom argued that the Judge should have ensured support for the order of the Tribunal and that a party – here, the Claimant – not in default should not be expected to tolerate an imperfect trial, which was the consequence of the decision to which the Judge came. The answer that he gave at the conclusion of the case was not that this was a claim that could safely be adjourned for several months and then tried entirely fairly since that would be an undesirable result. His solution, proposed to the parties during the course of the hearing, was to conduct it in three tranches, the first beginning on the Monday following, to consist of the Claimant's evidence, then adjourning with sufficient time for the Claimant to review the material he had not yet had a full chance to consider, produced late as it was by the Respondents, and in that way take advantage of the period of time left within what had been an appropriate trial window but leading to the disadvantage that the trial would be staggered over some time.

25. The question of law ultimately comes down to the question of what is meant by proportionality in this context. I am clear that the way in which the court thought of it in **James** is shown by paragraph 18, where Sedley LJ said, "The first object of any system of justice is to get triable cases tried". He observed in the last two sentences of paragraph 21:

> **"Proportionality … 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."**

26. Mr Milsom's argument focused more upon the need to ensure that Tribunal orders were respected than a consideration of whether the consequences – plainly, to both parties – were disproportionate to the nature of the particular wrong done. In most cases this will not necessarily be an easy question. A Judge may wish to ask why the Respondent has behaved as he has. He will wish to consider the nature of what has happened. A failure to comply with orders of a Tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that. Equally, what has happened may be an aberration. Of their nature there may be circumstances that are unlikely to reoccur. This requires a careful judgement. A court on appeal looks to see whether the Judge below has carefully considered the evidence leading both ways and considered whether in the light of the wrong that was done the question of proportionality was appropriately addressed.

27. The first ground is one of approach. I reject Mr Milsom's argument in favour of a narrow approach; what is proportionate is a consideration of the consequences in the light of the breach in respect of which Rule 37 provides a remedy. The question of whether the Judge appropriately addressed the factors and came to a conclusion that was permissible is the territory of the third ground, that of perversity.

28. I turn to the second ground. Here Mr Milsom argues that Tribunals generally adopt the principles that underlie the **CPR**. In **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251 HHJ Peter Clark said, considering the overriding objective as it had been introduced in 2001 to Employment Tribunals, that this was the (paragraph 26):

> **"… clearest possible indication that when exercising any power under the Rules, as here, the employment tribunal will follow the same principles as those spelt out in the Civil Procedure Rules."**

29. This case was the start of a chain of cases relating to the approach in respect of giving relief from sanction that was considered by the Court of Appeal in **Neary**. There, Smith LJ rejected the submission that Tribunals generally were required as a matter of law to set out specifically each of the factors referred to in **CPR** Rule 3.9 as if they were requirements of the law in respect of Employment Tribunals, but she did not in doing so say that the principles were entirely distinct as between Employment Tribunals and civil courts. What she said (paragraph 47) was this:

> **"I would accept [Counsel for the Respondent's] submission that it should be inferred that Parliament deliberately did not incorporate CPR r 3.9(1) into employment tribunal practice when it chose to incorporate the overriding objective. There is, to my mind, an obvious reason why Parliament did not do so. It has always been the intention of Parliament that employment tribunal proceedings should be as short, simple and informal as possible. We all know that that intention has not been fulfilled and employment law and practice have become difficult and complex. But where Parliament has apparently decided not to incorporate into employment tribunal practice a set of requirements such as those in CPR r 3.9, I do not think it proper for the courts to incorporate them by judicial decision. *It is one thing to say that employment tribunals should apply the same general principles as are applied in the civil courts and quite another to say that they are obliged to follow the letter of the CPR in all respects* [emphasis added]. It is one thing to say that employment tribunals might find the list of CPR r 3.9(1) factors useful as a checklist and quite another to say that each factor must be explicitly considered in the employment judge's reasons. I would overrule the line of Employment Appeal Tribunal authority which, in effect, requires specific consideration of all the CPR r 3.9(1) factors on an application involving relief from a sanction in the employment tribunal."**

30. Mr Milsom therefore argued that an Employment Tribunal should not be unmindful of what he described as the seismic change that had taken place in the civil jurisdiction when interpreting the overriding objective after the decision in **Mitchell**. That case was the leading case that considered the cost-budgeting provisions introduced following the Jackson reforms.

In civil litigation cost is potentially liable to defeat justice. To keep it at a proportionate level, a change of culture was thought to be required. A view was taken that justice was wider than merely securing a result fair at the time between the parties. As Dyson MR said at paragraph 38, quoting his own lecture in March 2013 (paragraph 26), the revisions to the overriding objective in the **CPR** had been made so as to make it clear that the relationship between justice and procedure had changed, though not by transforming rule compliance into trip-wires nor making them the mistress rather than the handmaid of justice:

> **"If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. [The culture] has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective."**

31. He went on to observe that parties could no longer expect indulgence if they failed to comply with their procedural obligations; the reason was that those obligations not only served the purpose of ensuring they conducted the litigation proportionately to keep their own costs within proportionate bounds but of ensuring that other litigants too could obtain justice efficiently and proportionately and be enabled by the court to do so.

32. The **CPR** now contain provisions which differ in detail from those that are set out in the **ET(CRP)R**. It was from the **CPR** that Dyson MR drew his Judgment in **Mitchell**. Its provisions are described as a "new procedural code". The overriding objective is said to be that of enabling the court to deal with cases "justly and at proportionate cost". By comparison, the overriding objective in the 2013 Rules of the Tribunal is to deal with cases fairly and justly; proportionate cost is not mentioned as a central objective. The **CPR** (Rule 1.1(2)) state that dealing with a case justly and at proportionate cost includes, so far as is practicable:

> **"(a) ensuring that parties on an equal footing;**
>
> **(b) saving expense;**

(c) dealing with cases in ways which are proportionate—

(i) to the amount of money involved,

(ii) to the importance of the case,

(iii) to the complexity of the issues, and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

33. Those last two are not reflected in terms in the Rules of the Employment Tribunal. The fact that is so in my view emphasises the point that Smith LJ made in **Neary** that the **ET (CRP)R** are different from those of the civil courts. Though, it seems to me, there is much of principle that applies to both, it would be a mistake to suggest that the **CPR** applied in the Tribunals in the same way as they apply in the civil courts. Regard must be had, I have no doubt, to the insight given by cases such as **Mitchell** into that which constitutes justice. I accept, in line with Mr Milsom's submissions, that justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the **European Convention on Human Rights and Fundamental Freedoms**. It must also have regard to cost. Even if the Employment Tribunal is not in the same position as the civil courts because there is no cost-shifting regime, it was designed as a cost-free forum in so far as party-and-party costs were concerned. That is true of most Tribunals; it is a particular feature of most Tribunals. I would accept, too, that overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing.

34. Decisions made in the Employment Tribunal can accommodate these considerations not because they are separately spelt out in the **ET(CRP)R** as they are in the **CPR** to the extent I have quoted but because a Tribunal has to deal with a case fairly and justly. Justice is a wide concept. It includes justice viewed from the perspective of the system of which the Tribunals are part in ensuring that indulgence given to one party does not deprive another party of that justice to which they also are entitled.

35. Accordingly, it does seem to me to be relevant in an appropriate case for a court to exercise its powers to ensure that the case is heard promptly or, as the case may be, that case management powers are exercised to ensure that evidence is kept within reasonable bounds, or, as it may be where necessary excluding even evidence that is of relevance though marginal. All of this falls short of a requirement that the Tribunals apply a test that is identical to or so closely akin to **Mitchell** as that for which Mr Milsom contends. He argues that a Tribunal should not easily permit a party to subvert an order. He is right. A party that does not observe an order is at the mercy of the Tribunal. Though in many cases an unless order will be granted before there is a strike-out, it is not an essential prerequisite of an application to strike out and is no guarantee that one will not follow in an appropriate case. As it happens, there was no unless order in the present case. If there had been, I suspect that Mr Milsom would not be appealing the decision before me, because I suspect that decision might have been different.

36. Mr Milsom points to those cases that have followed **Mitchell** in the civil courts: **Durrant v Chief Constable of Avon & Somerset Constabulary** [2014] 1 Costs LR 130; and **Karbhari v Ahmed** [2014] 1 Costs LR 151 and **Denton v White**, CA [2014] 1 WLR 3926. They may be considered in some quarters as a roll-back from the strictness of the **Mitchell** principles as they had been understood, but the statement of principle is that in civil cases a Judge should

approach an application for relief from sanctions in three stages. Stage one involves the identification of a failure to comply with a rule, Practice Direction or court order and the seriousness and significance of it. If the breach was neither serious nor significant, then relief will usually be granted. The second stage involves the court in considering why the failure or default had occurred. The third requires a consideration of all of the circumstances of the case, such as the promptness of the application and other past or current breaches.

37. Heavy emphasis was placed on the co-operation that parties should have in furthering the overriding objective and the litigation. Jackson LJ, though agreeing in the result, dissented as to the weight to be given to two factors that Dyson MR and Vos LJ considered important. They had identified as factor A the need for litigation to be conducted efficiently and at proportionate cost and factor B being the enforcement of compliance with rules, Practice Directions and orders. It will be noted that neither of those two factors is specifically mentioned in the **ET (CRP)R**. Jackson LJ felt that they should not have the "top seats at the table", as he put it, as, plainly following that decision, they do in civil litigation in the common-law courts.

38. It is difficult, in my view, to draw too much from those three cases following **Mitchell**. All consider relief from sanction, the sanction being strike-out for earlier non-compliance; that is not this case. All consider factors A and B as having the "top seats at the table", whereas they are not specifically singled out even as particular factors within the **ET(CRP)R**. The **ET(CRP)R** have not lagged behind, being overtaken by history, since they were freshly and newly drafted and brought into force in 2013 in full knowledge, therefore, of the approach that the **CPR** were taking. As Smith LJ indicates in **Neary**, this is therefore a conscious decision by Parliament to adopt a different regime. Like her, I regard this as a reflection of the different function and purpose that Tribunals may serve. True it is, as Mr Milsom points out, that in

those discrimination cases that come before the County Court the **CPR** will apply, and in cases of discrimination of equal seriousness that come before the Tribunal they will not but the **ET(CRP)R** will, but in my judgment this does not of itself mean that there should be a wholesale incorporation of the approach of the **CPR** into the **ET(CRP)R**.

39. In conclusion, therefore, though I am satisfied that it would be entirely appropriate for an Employment Judge in a suitable case to take account of the wider view of justice as I have expressed it, a Judge is not required as a matter of law in the Employment Tribunal to deal with a claim as if the **CPR** applied when they do not. He must deal with the **ET(CRP)R** in respect of a strike-out power. No one has suggested before me that the law as it applied to the Rules before 2013 did not continue to have force save only for the point that Mr Milsom makes that Tribunals should have regard to the general principles that underlie the **Mitchell** approach.

40. I do not wish what I have said to let it be thought that Judges should be unduly forgiving of procedural default by parties. Rules are there to be observed, orders are there to be observed, and breaches are not mere trivial matters; they should result in careful consideration whenever they occur. It is a matter of frequent complaint to this Tribunal, in particular by litigants in person, that orders have not been observed to the letter by the other party to the litigation. Tribunal Judges are entitled to take a stricter line than they may have taken previously, but it remains a matter to be assessed from within the existing Rules and the principles in existing cases. Since the Judge here, in my view, approached the exercise of his discretion through the lens of **James**, since he did not misstate that principle, and since he did not require to take a stricter approach in line with **Mitchell**, I reject the first two grounds.

41. As to perversity, it is sufficient to say that the Judge came to a decision as to the choice he should make. It is of the nature of choices that they may go one way or the other. A court on appeal has no right to consider whether it would have made a different choice if the choice below is permissible. It does not seem to me here that for the breach concerned in the circumstances there could be no other determination than a strike-out; in short, it was open to the Tribunal Judge and not perverse for him to conclude as he did.

42. The fourth ground argued that the Judge exercised his discretion on a false basis because he separated the Respondents from Mr Berriman. He should, in Mr Milsom's submission, have taken the principle that, Mr Berriman being their representative, they were at fault if he was. If it were otherwise, then a litigant with the means to instruct a representative could hide behind the fault of the representative when a litigant in person would not have that luxury. In determining the central issue, the balance of prejudice, the Judge here regarded the failings of Mr Berriman as being his own and not the Respondents' fault. In saying there was no evidence that he was acting on the Respondents' instructions, the Judge had expressed the test the wrong way round. Rather, he should have asked whether there was any evidence that he was not so acting.

43. These are powerful submissions. They are supported by **Bennett v London Borough of Southwark** [2002] ICR 181, that what is done in a party's name is done "presumptively, but not irrebuttably" on that party's behalf; in the words of Sedley LJ in **Burt v Montague Wells**, unreported, 26 July 1999, "The acts of one are the acts of the other"; and in **Hytec Information Systems Ltd v Coventry City Council** [1997] WLR 1666 at 1675, where Ward LJ commented that there were good reasons why a court should not ordinarily distinguish between a litigant himself and his advisors.

44. The matter that plainly exercised the Judge was that here in a discrimination case there were serious allegations against other teachers; for them not to be able to respond and defend those allegations may lead to the very serious harm to them that they would be condemned wrongly without the chance to avoid the stigma that would come with it, as to which the ability to sue their representative would have no benefit. But the question is whether the Judge was wrong to separate Mr Berriman from them. In the event, I have been satisfied by the answers given by Ms Hadfield that there was evidential material that all pointed that particular way. Thus the Judge could conclude, and in effect was unlikely to conclude anything else other than, that the Respondents had not instructed Mr Berriman to behave as he did. Plainly his fault was that of a solicitor who had simply lost control of the action. It was a purely solicitors' fault (see paragraph 36) where the exchange of witness statements and the necessary amendments as described do not on the face of it seem to have anything directly to do with the behaviour of the Respondents in giving instructions to that effect. The Judge made reference to how solicitors' offices should be run, disparagingly to Mr Berriman. He thought Mr Berriman had lost control of the case and said so. The correspondence that he wrote is described in terms that suggest that this was entirely the doing of Mr Berriman and not a reflection of instructions from his clients (see paragraph 92).

45. In the event, I have decided that Ms Hadfield is right in her submission that, given the nature of the material before the Judge, he was entitled to think that it would be a prejudice to the Respondents to have a finding made against them without the ability to respond first, and he was entitled to come to the conclusion that that outweighed the undoubted prejudice to the Claimant. Another court might have weighed the prejudice differently, but that is not the test.

46. As to ground 6, it is said that the Judge was in error in saying what he did at paragraph 92. What the Judge is describing there had nothing directly to do with the default that led to the application before him. It was part of the overall history. It reflected on Mr Berriman. The Judge was right to draw attention to the fact that eventually, should the Claimant succeed, there would be potential for an award of aggravated damages and drew attention to the possibility of a victimisation claim. The Judge did not think that he was going to be assisted in determining whether a strike-out would be proportionate or not by the way in which Mr Berriman had unprofessionally behaved previously. I do not think that he was bound to take that correspondence into account.

47. Ground 7 relates to the application to postpone made by the Claimant. Although Mr Milsom in his written Skeleton described the ground as being somewhat academic, the point is twofold. First, it demonstrates that there were consequences as a result of the initial decision not to grant a strike-out that were visited on the Claimant. One consequence was that the Tribunal thought it appropriate that the case should proceed on the following Monday. That put him under a pressure of time. It was not his fault; it was the Respondents' fault. It was unavoidable as a consequence of there being no strike-out.

48. This point, however, was plainly taken into account by the Judge in determining his decision as to the balance of prejudice and as to whether a strike-out would be proportionate, the grounds for it having been established. Accordingly, it takes that matter no further.

49. Separately, it seems to me that the question, again, is whether the court was entitled to exercise the discretion as it did. I would have to have a developed case showing that the Judge in deciding not to postpone the case for a longer duration than he did failed to exercise his

discretion in accordance with the law. Though I can well see that in these circumstances he might, and though I fully appreciate the view that HHJ Birtles took and expressed at a Preliminary Hearing before this Tribunal and recognise that the Tribunal ultimately saw the wisdom of that approach and did in fact adjourn, I could not say that as a matter of law the Tribunal was wrong to come to the conclusion it did. It had before it a Claimant whose claim needed to be resolved sooner rather than later. It had the cases of Respondents to the claims against whom those claims also needed to be resolved sooner rather than later. He plainly thought that allowing the case to be heard as he had proposed, in three stages, was preferable to putting the matter off for a longer period. Ultimately, the Tribunal has changed its mind, and a full hearing in one chunk awaits, but I cannot say that the Judge was necessarily in error of law in applying the overriding objective and the Rules in his decision as to postponement in that case.

Conclusion

50. It follows that, despite the eloquent arguments of Mr Milsom, to whom I pay tribute, made all the more impressive by the fact that he appears pro bono here as he did below, I have to dismiss this appeal on each of the grounds. In conclusion, I note the Judge's view that the decision was a close-run thing. No doubt the future conduct of this case by the Respondents will take note of that, because, should the Respondents fall short, a Tribunal considering their failure subsequently may be drawn to the conclusion that they cannot be satisfied that the Respondents would behave fairly towards this litigant in respect of his trial in the future. I say no more about that.