Appeal No. UKEAT/0301/15/JOJ
UKEAT/0302/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 January 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

UKEAT/0301/15/JOJ

MR S BABER APPELLANT

THE ROYAL BANK OF SCOTLAND PLC RESPONDENT

UKEAT/0302/15/JOJ

MR S BABER APPELLANT

THE ROYAL BANK OF SCOTLAND GROUP PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MR BRIAN CAMPBELL (Solicitor) Messrs Brodies LLP 100 Queen Street Glasgow G1 3BX

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

1. A party against whom a strike out application is made must be given reasonable and proper notice of it however that is done. The notice need not be given by the Tribunal. If the requesting party seeks a hearing to make representations, a hearing must be convened: Rule 37(2) of the **2013 Rules**.

2. Proper notice was given in this case.

3. However, the order was made in error of law. The Employment Tribunal failed adequately to identify the extent and magnitude of the Claimant's non-compliance with case management orders, simply stating that there was non-compliance.

4. More significantly, there was no consideration given to the fact that strike out orders are draconian. They are not intended to be punitive. There was no consideration of whether a fair trial could still take place, or whether a lesser sanction than strike out could be imposed

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THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

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Preliminary Matter

1. This appeal of Mr Shah Baber has been ongoing for some considerable time, and seeks to challenge a Judgment of the Employment Tribunal, promulgated in July 2015 - so we are just coming up to the two and a half year anniversary. The appeal has been adjourned on at least one if not more occasions, as a result of Mr Baber's ill-health and in the weeks leading up to today's hearing there was some suggestion that ill-health might prevent him from attending again. In the event the Employment Appeal Tribunal has received correspondence in the form of emails timed at 09:15 and 09:22 this morning, stating that Mr Baber's train from Birmingham to London was first delayed and then cancelled, and that there are power line issues in the Wolverhampton area causing significant disruption on the railway. He states that he has looked for an alternative means of travelling to London, but the expense is prohibitive and he is therefore not going to be able to do so. He also referred to other issues, including current flu symptoms and states that he is not well at present.

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2. Accepting all that has been said by Mr Baber and accepting entirely that the delay and then cancellation of his train occurred today and has prevented him from travelling this morning, I consider nonetheless, when all considerations are weighed in the balance, that I should go ahead with the appeal hearing this morning in Mr Baber's absence, rather than adjourning it. I have very full submissions and representations from him in relation to the three principal issues raised by this appeal. The points made by the Respondent are set out in writing. The appeal is itself stale and the matter, if it has to resume in the Employment Tribunal, is unlikely to improve with age. The strike out occurred in July 2015. It related to a claim submitted on 29 December 2013 complaining of unfair dismissal and unlawful disability

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discrimination where the dismissal took effect on 30 September 2013. Any further or continued delay would be inimical to fairness and the interests of both sides, and will serve only to make it harder for the fact-finding process to take its course.

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3. The Respondent, who appears by Mr Campbell of Brodies Solicitors, wishes to proceed this morning. I have made it clear that should any matter arise that Mr Baber has not had reasonable notice of and therefore not had the opportunity to address, I am prepared to revisit my decision to continue at that point. Moreover to the extent that there are matters raised in relation to disposal of this appeal, those can be dealt with in writing giving him the opportunity to address me in writing on those matters. On that basis, I decided to proceed with the hearing, there being no prejudice to Mr Barber in proceeding in his absence.

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The Appeal

4. This is an appeal by Mr Shah Baber, against The Royal Bank of Scotland plc.

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5. I refer to the parties as they were referred to below for ease of reference.

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6. I record the fact that Mr Campbell has been fair and measured in his representations, and alive to the importance of ensuring that nothing new was said that had not been addressed previously by the Claimant. As a result, nothing has occurred to alter my view that it was appropriate for the appeal to proceed in the Claimant's absence.

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7. An effect of proceeding in the Claimant's absence is that it was unnecessary to address a number of applications he made about hearing the appeal in private and about restricted reporting orders or orders anonymising individuals involved in the appeal. To the extent that

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those remain live applications which he wishes to make, those can be made in response to the transcript of this Judgment as part of addressing the disposal of this appeal. That is not an invitation to the Claimant to make applications at that stage; he will need to consider the Judgment and determine whether there is any need either for a restricted reporting or anonymity order in light of the material included in the Judgment. My preliminary view is that there is no such need, but that will be a matter for him.

8. The appeal challenges a Judgment of Employment Judge Gaskell made without a hearing, and originally promulgated on 6 July 2015 but corrected and freshly promulgated on 21 July 2015. The Employment Judge struck out the claim pursued by the Claimant against the Respondent on the basis of his non-compliance with orders made at a case management hearing on 8 May 2015. A subsequent application for reconsideration was refused by a further Judgment, also promulgated with Reasons on 21 July 2015, and the original Judgment was corrected in one respect.

9. There are two Notices of Appeal by which the Claimant contends that Employment Judge Gaskell was wrong in law to strike out his claim; that the Employment Tribunal failed to give him an opportunity to make representations or to request a hearing, and that the Employment Judge erred in law in wrongly refusing to permit reconsideration of the application without a hearing, and despite issuing what the Claimant contends was a substantial correction to the Judgment. That amounted in effect to a fresh Judgment. Those are the three key issues and described as such in the first Notice of Appeal.

10. The second Notice of Appeal which challenges the reconsideration Judgment identifies a series of points at paragraph 3, detailed at paragraphs 3.1 to 3.10, which take issue with the

failure to conduct a reconsideration and challenge as wrong, without a basis in the evidence or insufficiently reasoned, a number of factual matters identified by the Tribunal. For example, an asserted finding that there had been four separate trial dates fixed, all of which had been vacated by reason of the Claimant's non-compliance, is said to be inaccurate. Other points are taken, but for reasons that will become clear, in light of this Judgment, it is unnecessary to deal with the second appeal, because I am satisfied that the strike out order cannot stand and was made in error of law. The reconsideration Judgment did not and could not cure the error in the strike out Judgment, given that no reconsideration was undertaken.

Strike Out Orders

11. Rule 37 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (set out at Schedule 1 to those Regulations) provides as follows:

> **"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
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> > **(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;**
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> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
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> > **(d) that it has not been actively pursued;**
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> > **(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).**
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> **(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.**
>
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."**

As is clear, non-compliance with Tribunal Rules or a Tribunal order is an express ground for a strike out decision; and can lead to striking out the whole or part of the claim or response.

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However, and critically, there is nothing automatic about a decision to strike out and such orders are not punitive.

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12. It is common ground and accepted by Mr Campbell that in deciding whether to strike out a party's case for non-compliance, Tribunals must have regard to the overriding objective of seeking to deal with cases fairly and justly. That is the guiding principle and requires consideration of all the circumstances and, in particular, the following factors: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his or her representative; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question.

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13. Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible: see **Bolch v Chipman** [2004] IRLR 140 EAT where, having cited **De Keyser v Wilson** [2001] IRLR 324 EAT and **Arrow Nominees Inc v Blackledge** [2000] EWCA Civ 200, Burton P set out guidance for Tribunals when determining whether or not to make a strike out order, as follows:

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(i) There must be a finding that the party is in default of some kind, falling within Rule 37(1).

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(ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.

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(iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.

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(iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

See also **James v Blockbuster Entertainment Ltd** [2006] IRLR 630 CA to similar effect,

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where Sedley LJ recognised the draconian nature of the strike out power and that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response in the

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particular circumstances of the case, and the answer to that question must have regard to whether the claim can be tried because time remains in which orderly preparation can take place, or whether a fair trial cannot take place.

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14. Rule 37(2) provides an important safeguard. A claim or response cannot be struck out unless the party in question has been given a reasonable opportunity to make representations. The Rule provides that such representations must be considered at a hearing if the requesting

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party has asked for one.

15. In **Beacard Property Management & Construction Co Ltd v Day** [1984] ICR 837,

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the EAT held that a failure to comply with the notice requirements before striking out a claim will render any order to strike out invalid. Although that case was decided in relation to an earlier version of the Tribunal Rules, I can see no reason for concluding that the position is different under the current Rules, given their terms.

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16. The other Rules that are relevant to this appeal are Rules 70 to 73. Those give Tribunals power to reconsider certain judgments, either on their own initiative or on the application by a party, where it is necessary in the interests of justice to do so. Decisions to strike out constitute a judgment capable of being reconsidered under these Rules. Moreover, as Mr Campbell accepts, a reconsideration hearing in circumstances where there has been a strike out order, would provide the affected party with an opportunity to seek relief from sanctions and might be particularly important in a case where the strike out decision was reached without a hearing.

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<u>The Facts and Chronology of the Proceedings</u>

17. The Claimant was employed from 13 October 2008 as an expert complaints handler until his dismissal with effect from 30 September 2013. His claim, submitted on 29 December 2013, complained of unfair dismissal and unlawful disability discrimination.

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18. The facts and events leading to his dismissal have not been determined. It is unnecessary to make any reference to them here. What is important, however, is to describe the chronology of the proceedings and I do that by reference to the documents supplied by the parties in the agreed appeal bundle. Those documents show the following chronology.

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19. There was a closed Preliminary Hearing on 21 July 2014 dealt with by Employment Judge Dawson in Birmingham. The claim form produced by the Claimant, who was then self-represented, was described as lacking clarity both as to the claims he had pleaded and also in relation to proposed amendments he wished to make. It was recorded that the Claimant agreed in the course of that hearing to provide a schedule of the allegations he was seeking to bring, setting out, in relation to each numbered allegation, the date of the alleged act giving rise to his claim, a description of the act complained of, the person alleged to have performed the act or

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the document in which the act appeared, the complaint made. There was to be a column allowing for any response by the Respondent to be inserted subsequently (commonly described as a Scott Schedule of allegations). The Employment Judge made clear that in making the order that the Claimant agreed to, he was not giving blanket permission to amend at that stage. So far as disability is concerned, again it was recorded that on the question of disability the Claimant had not properly complied with an earlier order made by the ET on 16 May 2014, and that there were documents that had not been disclosed.

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20. Time for compliance was extended to 18 August 2014 in respect of paragraph 1 of the 16 May 2014 order, and time was extended to 1 September 2014 in respect of paragraph 2. In addition, the Claimant agreed to provide a schedule of loss by 22 September 2014 and other orders were made. To be clear, paragraph 1 related to the preparation of the Scott Schedule, and paragraph 2 related to disclosure and provision of information in relation to disability.

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21. Following that hearing, still acting in person, the Claimant sought an extension of time in relation to all time limits set by Employment Judge Dawson by email dated 27 August 2014. This was granted by the ET by letter dated 29 August 2014. There followed correspondence between the Respondent's solicitors and the Claimant and some compliance with the order was achieved. For example, in mid-September, information was provided but it was made clear that there was still further information to be provided in due course. So far as the schedule of loss was concerned, the deadline was extended by agreement to 30 August but in the event, it had still not been provided by 6 November when the Respondent sought an unless order for its production.

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22. At a hearing on 17 November 2014, attended by the Claimant in person, Employment Judge Horne made two orders. By 4pm on 27 November 2014, the Claimant was to provide the Tribunal and the Respondent with certain information requested in italics in the right-hand column of the Scott Schedule, attached to the Respondent's application letter dated 6 November 2014. Secondly, an unless order was made. This provided that the Claimant was to supply and deliver to the Respondent a schedule of loss complying with the earlier case management order by 4pm on 20 November 2014. The Reasons given by Employment Judge Horne for that order are as follows:

> **"By paragraph 5 of the above-mentioned order the claimant was required to send a schedule of loss to the Respondent by 22 September 2014. That deadline was extended by 4 weeks by letter from the tribunal dated 29 August 2014. In their letter of 6 November 2014 the respondent's solicitors have informed the tribunal that the respondent has not received a schedule of loss despite having indicated on 30 October 2014 that the schedule would be delivered very shortly. The tribunal has asked the claimant for his comments but received no reply."**

23. The order provided that the claim would be dismissed without further order in the event of a failure to comply. This was the first unless order in the case.

24. By 20 November, the Claimant had instructed a solicitor, Ian Pettifer, who came on record with effect from 20 November. By letter dated 28 November, Mr Pettifer wrote to the Tribunal by email, copied to the Respondent, seeking an extension of time for the provision of outstanding issues in relation to the Scott Schedule and revised directions in relation to all other matters. The letter explained that he had only just been instructed and was at a relatively early stage of taking instructions from the Claimant. He also expressed concern that the Scott Schedule produced by the Claimant in person did not adequately bring out the essence of the claim and made the point (on the second page of the letter) that it was apparent to him that the Claimant was "*experiencing some serious difficulties in providing us with instructions which are caused by his disabilities. These are matters that are also relevant to the hearing*". The

letter dealt with the stage preparation had reached in relation to the Claimant's witness statement about the effect of his disability on him, and proposed a revised timetable for directions and outstanding matters to be dealt with. The Tribunal responded by agreeing the directions suggested by Mr Pettifer in his letter; see the Tribunal's letter dated 9 December 2014.

25. The claims had been listed for a substantive hearing commencing on 2 February 2015 but as a consequence of delays in the preparation, the hearing was postponed until 7 April 2015. Thereafter there was, as Mr Campbell accepts, partial compliance by the Claimant with the various orders.

26. A further Preliminary Hearing took place on 21 January 2015. At that hearing, Employment Judge Gaskell, who made a minute of the hearing which was sent to the parties on 28 January 2015, referred to the "*wholesale non-compliance*" by the Claimant with orders made by the Tribunal. In fact that is not strictly correct, as Mr Campbell accepts. There had been wholesale non-compliance with the requirement to produce a schedule of loss, but as indicated, there had been compliance at least to some extent with the other orders.

27. The Employment Judge refused to grant a further adjournment, concluding that it was not in the interests of justice for there to be any further delay and made orders so that the hearing listed to start on 7 April would remain in the list for hearing. Instead, the Employment Judge made orders for a partly truncated timetable. Under the heading in the minute of hearing of "*Case Management Orders*", the Employment Judge made the following unless order:

> **"6. By 4pm on 4 February 2015, the claimant shall file with the tribunal and serve on the respondent:-**

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> **(a) His full response to the request dated 6 November 2014 relating to allegations contained within the Scott schedule.**
>
> **(b) A statement from himself and from any witness upon whose evidence he wishes to rely at the OPH with regard to the effects of her medical condition on his ability to carry out normal day-to-day activities.**
>
> **Unless the claimant complies with the requirements of Paragraph 6 above by the date and time stated therein the claimant's claim will be struck out in its entirety without further order of the tribunal."**

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This was the second unless order.

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28. Thereafter, the Claimant complied with that unless order by supplying his full response to the allegations contained and questions asked in the Scott Schedule (paragraph 6(a)) and so far as paragraph 6(b) is concerned, he complied by sending all relevant documents to the Respondent, albeit he did not send those documents to the Employment Tribunal. The latter omission led the Tribunal to strike out the claim for non-compliance with the unless order by an order dated 5 February 2015.

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29. The Claimant wrote seeking reconsideration of the strike out order and reinstatement of his claim. The application was not resisted by the Respondent. They had received the information and documents provided by the Claimant in compliance with the unless order. By letter dated 24 March 2015, the application was acceded to by the Tribunal and the claim reinstated. The Tribunal said expressly that all case management orders previously given would continue to apply though, inevitably, the hearing date was lost.

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30. There followed, on 8 May 2015, a further case management hearing dealt with by Employment Judge Gaskell. The Claimant was represented by his solicitor, Mr Pettifer. The Respondent was represented by Ms Gillian Mair of Brodies and the Tribunal prepared a minute of the hearing which set out the case management orders that were made. The Tribunal referred

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to the protracted history of the case, the strike out order made on the basis that there had been a failure to comply because the Claimant, although he complied in substance, did not send documents to the Tribunal as required, and to the fact that the claim had been reinstated.

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31. The claim was, at that point, listed to start on 1 July for four days but it was re-listed to start on 24 August. The Employment Tribunal made further orders on 8 May 2015 and in particular, so far as relevant to this appeal, at paragraphs 8 and 9 made orders as follows under

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the heading "*Case Management Orders*":

> **"8. By 4pm on 22 May 2015, the claimant shall file with the tribunal and serve on the respondent his response to the request for information relating to his reasonable adjustments claim dated 29 April 2015.**
>
> **9. By 4pm on 22 May 2015, each of the parties shall exchange with the other photocopies of all documents in that party's possession or control to include documents which are held in electronic format which are or may be relevant to the issues in this case."**

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That order plainly was not an unless order.

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32. The Respondent's case is that the Claimant failed altogether to comply with those two case management orders. There was a short extension to the deadline for compliance from 22 May to 26 May 2015 agreed to by the Respondent. By email dated 21 May 2015, Mr Pettifer

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wrote to Gillian Mair saying:

> **"My client was taken ill earlier this week, which had impeded progress. I must alert you to the possibility that I will unable to comply with the directions due tomorrow, in which case, I hope to comply on Tuesday, the next working day.**
>
> **I am also aware that you are awaiting a response on the request you made, and other issues.**
>
> **I apologise for this anticipated delay."**

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33. By further emails on 27 May, Mr Pettifer wrote, first at 10:19 to Ms Mair apologising and saying that he had been unable to complete the tasks and was hoping to complete them

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today but would update her. Later in the day at 14:50, he wrote stating:

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> **"My client and I have reviewed progress on discovery and disclosure, and there are a number of steps which still remain for us to complete this process.**
>
> **Our assessment is now that we will have completed the necessary steps to be able to provide disclosure on Friday of this week.**
>
> **I am very sorry about the delay. It has been unavoidable, and is due to my client being quite seriously unwell during last week, when we were expecting to complete the process.**
>
> **I continue to hold the disclosure bundle you provided to your order, and I have not read it or provided it to my client, pending our compliance."**

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34. There followed an email from Ms Mair on behalf of the Respondent to Mr Pettifer stating:

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> **"Please find attached a copy of an application to the tribunal made by the Respondent today.**
>
> **Any objections should be sent to the tribunal as soon as possible, in accordance with Rules 30(2) and 92 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013."**

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The attachment is addressed only to the Employment Tribunal and explains the order made on 8 May 2015 and that there had been non-compliance with that order. The letter states that the Claimant had not fulfilled either case management order. It referred to the short extension that had been granted but made clear non-compliance persisted. The letter applied for a strike out application in light of the history of non-compliance and in the alternative, in the event that the Tribunal was not minded to strike out the claim, sought an unless order requiring the orders to be complied with by 4 June, failing which the claim should be dismissed without further order. There was a third alternative application made which asked for additional information as set out in an enclosed schedule to be provided by the Claimant.

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35. Mr Campbell accepts that there was some compliance by the Claimant with the order of 8 May 2015, albeit delayed. He directed me to the email from Ian Pettifer of 12 June 2015 in which he stated as follows:

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> **"I am finally in a position to provide disclosure. I apologise for the delay, and will write to you and the Tribunal separately about this.**

Following this e-mail, please find a further eight emails, which have attachments labelled "Baber Disclosure" and numbered 1 to 7 plus an attachment labelled "Baber Medical Disclosure".

Please could you acknowledge receipt when you have all eight e-mails with attachments?"

36. There was no evidence to suggest that those emails attaching the necessary disclosure were not provided as indicated. However, in addition, the Claimant was relying on audio recordings of conversations during the course of his employment and it had been agreed or directed that these should be transcribed faithfully. The audio recordings and the transcriptions had not been provided.

37. There is an email dated 12 June 2015 timed at 16:38 in which Mr Pettifer said he was posting a CD-ROM with the original audio files, transcripts of which had been included in the disclosure. However, it is apparent from subsequent emails that the CD-ROM was not received in the post by Brodies (see chasing email dated 19 June 2015). On 24 June 2015, Mr Pettifer wrote to Brodies apologising for the fact that, having investigated matters, the CD-ROM had not been dispatched to Brodies as he had intended. The correspondence does not disclose at what point the audio recordings were sent and received precisely, but Mr Campbell accepts today that at least by the date of the Tribunal's refusal to reconsider the strike out application, they had been sent and received, if not before; so that at least by the date of the reconsideration refusal, if not before, there was full compliance by the Claimant with the order made on 8 May.

38. On 1 July, by a Judgment promulgated on 6 July 2015, the claim was struck out by Employment Judge Gaskell. The Reasons given in the Judgment are shortly stated and the Judgment with Reasons is as follows:

"JUDGMENT

The claim is struck out.

REASONS

1. By a letter dated 8 May 2015 the Tribunal gave the claimant an opportunity to make representations or to request a hearing, as to why the claim should not be struck out because

- **the claimant had not complied with the Order of the Tribunal dated 8 May 2015.**

2. The claimant has failed to make representations in writing, or has failed to make any sufficient representations, why this should not be done or to request a hearing. The claim is therefore struck out.

3. The hearing fixed for 24 August 20 2 September 2015 [sic] will not take place."

39. The Claimant applied for reconsideration of the Judgment by letter dated 9 July sent on his behalf by Mr Pettifer of Davies and Partners. In the first substantive paragraph, the letter stated:

> **"The Reasons for the Judgement appear to be erroneous. The Tribunal refers to a letter giving the Claimant an opportunity to make representations or to request a hearing, as to why the claim should not be struck out. No such letter was ever received, and on telephoning the Tribunal's clerk, it appears that no such letter was ever sent. In any event the date of 8 May is plainly erroneous. This Judgement appears to have been made by reason of an administrative error, or a mistake of fact, and we submit that the Judgement must, in these circumstances, be set aside. In the alternative, we submit that the Order was made contrary to rule 37(2)."**

It also dealt with the extent of the Claimant's compliance with the two orders of 8 May, explaining that there had been delay by reason of illness on the part of the Claimant which was caused or seriously exacerbated by a criminal assault resulting in head injuries and an exacerbation of his migraines and his anxiety condition, stating:

> **"… It became impossible to take instructions from the Claimant for a lengthy period. We were, by the second week in June, able, finally, to obtain instructions on the documents. However, the Claimant had difficulty in dealing with instructions on the request dated 29 April and has only been able to deal with this during July."**

The letter explained that the assault was registered with the police and gave a crime number. It attached a letter from the Claimant's GP setting out the medical position, together with a short statement from the Claimant himself concerning the assault. Mr Pettifer accepted that he omitted to keep the Tribunal updated but did keep the Respondent updated and apologised for that omission. He explained that the Claimant had done all that he could to progress the case

expeditiously and diligently and had spent in excess of 40 hours dealing with transcripts of the audio recordings. The letter said that there had been no failure by the Claimant to progress the case. His conduct had not been unreasonable, and the letter said that a fair hearing was still possible.

40. The letter made clear, as I think I have indicated, that the Claimant had complied with his disclosure obligations on 12 June by email and that the Claimant was complying on 9 July with the requirement to file and serve a document setting out further information, done by a letter sent to the Tribunal and to Brodies which attached a document headed "*Response to the Request for information dated 29 April 2015*" and containing over six pages of responses to the requests that the Respondent had made.

41. Bodies objected to the reconsideration application by letter dated 15 July 2015. The long, protracted procedural history of the claim was set out. It was suggested that there were inconsistencies in the reasons provided for the delay. Issue was taken with the suggestion that there had been an inability to communicate with the Claimant by Ian Pettifer. As to ability to comply with the Tribunal order, again issue was taken with the suggestion that there had been an assault and the letter asserted that the strike out Judgment was not contrary to Rule 37(2) because the Respondent's letter of 28 May invited objections and in the period of five weeks between that letter and the strike out Judgment on 1 July, no representations whatsoever were made. Moreover, it was submitted that regardless of that letter, the strike out Judgment was not in error of law. Finally, it was suggested that there was still ongoing non-compliance with certain requests and that the Respondent had been attempting for over a year to obtain adequate particulars of the claim but had not managed to achieve that. Unnecessary and significant costs

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had been incurred and therefore it was in accordance with the overriding objective for the strike out decision to stand.

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42. The Employment Judge refused to accede to the application for reconsideration. The Judgment and Reasons promulgated on 21 July 2015 are shortly stated as follows:

> **"JUDGMENT**
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> **The claimant's application dated 9 July 2015 for reconsideration of the judgment sent to the parties on 6 July 2015 is refused.**
>
> **REASONS**
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> **1. There is no reasonable prospect of the original decision being varied or revoked because from the outset of this case there has been wholesale and repeated non-compliance by the claimant with Case Management Orders made by the tribunal. Four separate trial dates have been fixed and all have been vacated by reason of the claimant's non-compliance. On two occasions the tribunal has made "Unless Orders" to secure compliance. On the second of those occasions the claimant failed to comply and his claim was struck out. The claim was reinstated upon application for reconsideration. However the claimant's failure to comply with Case Management Orders has continued; he failed to comply with Case Management Order is [sic] made on 8 May 2015.**
>
> **2. There was an error in the strike-out judgment issued by the tribunal on 6 July 2015; this has been corrected, and a Certificate of Correction together with the corrected judgment is attached.**
>
> **3. Whilst the tribunal notes the difficulties which the claimant has encountered, no explanation has been provided for the claimant's solicitor's failure to make an appropriate application for an extension of time; or even to have the courtesy to contact the respondent or the tribunal to advise of the problem.**
>
> **4. Rule 37(2) has been fully complied with: the respondent wrote to the tribunal and to the claimant's solicitor on 28 May 2015 applying for the strike-out and explaining the circumstances. The tribunal took no action on this application until such time as the claimant [sic] solicitor had had sufficient time to make representations or to request a hearing. No such representations or request were received."**

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43. Consequent on that decision, a certificate of correction and a revised strike out Judgment was prepared and promulgated on 21 July. This declared the claim to be struck out and provided the following reasons:

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> **"REASONS**
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> **1. By a letter dated 28 May 2015 the respondent applied to the Tribunal for the claim to be struck out. The claimant was given an opportunity to make representations or to request a hearing, as to why the claim should not be struck out because the claimant had not complied with the Order of the Tribunal dated 8 May 2015.**
>
> **2. The Claimant failed to make representations in writing why this should not be done or to request a hearing. The claim is therefore struck out.**

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3. The hearing fixed for 24 August - 2 September 2015 will not take place."

The Appeals

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44. There are two appeals as I have indicated. The first challenges the strike out Judgment and the second challenges the refusal to reconsider the strike out order. The issues raised overlap to some extent, and it seems to me that two overriding issues should be addressed: first, whether the Claimant was given the opportunity required by Rule 37(2) before the strike out order was made; secondly, whether the strike out order itself was in error of law. If the Claimant is successful on either of those grounds it is unnecessary, as Mr Campbell concedes, to address the remaining grounds because the strike out order could not stand in those circumstances.

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45. The first ground as developed by the Claimant in writing is that the Tribunal failed to give him an opportunity to make representations or to request a hearing as to why the claim should not be struck out, as required by Rule 37(2), and wrongly concluded that the Claimant had been given that opportunity when refusing reconsideration. He contends that the critical issue is whether it is necessary for the Tribunal to give the requisite opportunity or whether it is sufficient for the affected party to be told in whatever way, whether by the Respondent or otherwise, that he or she has that opportunity.

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46. The submissions made in their skeleton argument by the Respondent in relation to Rule 37(2) are as follows:

"5.21. It is submitted that the claimant was "*given an opportunity*" from 28 May 2015 (the date on which the respondent's application for strike out was sent to the claimant's representative and which specifically invited him to make any objections to the application as soon as possible) to 1 July 2015 (the date on which the claim was struck out) to object to the respondent's application for strike out but failed to do so.

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5.22. It is submitted that Rule 37(2) does not, in circumstances where an application for strike out has been made and copied to the opposing party, require the tribunal to write to a party

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> **indicating that the tribunal intends to make an order for strike out before actually doing so. It is submitted that by virtue of compliance with Rule 30(2), a party opposed to an application for strike out is aware that an application for strike out has been made, that this will be considered by the tribunal and the opposing party is therefore inherently "*given*" an opportunity to respond.**
>
> **5.23. It is submitted that if parliament had intended that tribunals must write to parties in advance of considering an application for strike out, it would have been explicitly stated so in Rule 37(2).**
>
> **5.24. It is submitted that a period of 31 days to respond to an application for strike out amounts to a "*reasonable opportunity to make representations*".**
>
> **5.25. Moreover, it is submitted that the claimant was represented by a qualified solicitor who would have understood the importance of complying with case management orders and the potential consequences of an application for strike out being made by an opposing party. Still, he chose not to respond."**

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47. In the circumstances, where a party is told by the opposing party that an application for a strike out is pursued and is given time to make representations if he or she chooses to do so, knowing the importance and the potential consequences of an application to strike out, that is sufficient. In any event, Mr Campbell submits that the Claimant was, by the letter of 28 May, which invited him to make objections to the application as soon as possible and, in light of the period of five weeks between 28 May and 1 July, given ample opportunity to object to the application but failed to do so.

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48. I accept Mr Campbell's submissions in relation to the proper construction of Rule 37(2). It is not prescriptive in any way, either by reference to the time to be permitted to make representations, or as to who or how the invitation to make representations is made. It does not expressly require notice to be given by the Tribunal, in contrast to Rule 72(1), as Mr Campbell submits.

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49. Nonetheless, Rule 37(2) is an important procedural safeguard. It seems to me that what is required is for the affected party to be given reasonable and proper notice however that is done. Moreover, because a strike out has such serious consequences, it is essential that the

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Tribunal assures itself that the affected party is aware of the opposing party's application and has in fact had a reasonable opportunity to make representations. Tribunals should not act hastily and it should be clear to a Tribunal that proceeds to address a strike out application, that the affected party is aware of it and has had the requisite opportunity to respond.

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50. In this case, as I have indicated in dealing with the chronology, the Respondent emailed Ian Pettifer at Davies & Co Solicitors, and attached the letter seeking a strike out. The email is

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dated 28 May and is not itself copied to the ET. The strike out letter is only addressed to the ET and there is nothing on the face of the letter to indicate that it has been copied to the Claimant or his solicitors. Nonetheless, it seems to me to be clear from the email of 28 May that the

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Claimant's solicitor was made aware of the application and there is nothing to suggest that he did not receive the letter scanned and attached to it.

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51. Mr Campbell fairly accepts, subject to that, that it is odd that Mr Pettifer did not acknowledge receipt of that email and the strike out application and did not refer to it at all until after the strike out application was made. Even then, the original order striking out the claim made no reference to the Respondent's application letter of 28 May and so, to that extent, it is

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unsurprising that the letter of 9 July 2015 seeking reconsideration made no reference to it either. It seems to be clear from the first substantive paragraph (quoted above) that the solicitor was proceeding on the basis that no opportunity to make representations had been offered, whereas

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that was not in fact the case.

52. This was a case with a substantial history of delay and non-compliance with orders. An

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earlier unless order had been acted on by the Tribunal and visited with a strike out. In those circumstances, the Claimant's position was and should have been viewed as serious. He was

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represented by a solicitor on record who apparently received both the email and the attached letter. Accordingly, it seems to me that the Claimant was given an opportunity to make representations, why any of the courses invoked by the Respondent should not be adopted by the Tribunal. I am satisfied that proper notice was given, and a proper opportunity was offered but not taken. It may be that was entirely the fault of Mr Pettifer and not the Claimant's fault at all, there being nothing in the material provided thus far to suggest that the Claimant was aware of the strike out application. On this point however, if the Employment Tribunal had the letter of 28 May copied to the Claimant's solicitors, it was entitled to proceed on the basis that a reasonable opportunity had been given. This ground of appeal therefore fails.

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53. I turn to the second critical question, namely whether the strike out Judgment itself was made in error of law. The Claimant contends that this was a draconian step for the Tribunal to take and that it failed to act proportionately in adopting a last resort sanction that was not justified by the default. Good reasons for the delay were provided. Furthermore by 12 June 2015 there was substantial compliance with the orders which were not unless orders in any event. Moreover, by 9 July there was full compliance with the orders. Despite that, the strike out order was made and reconsideration, when it was invoked, was rejected without a hearing.

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54. The Respondent resists that at paragraphs 5.1 to 5.19 of the skeleton argument and contends there was no error of law by the Tribunal. The history of repeated non-compliance and delayed compliance is set out. The failure to comply with the May 2015 order by the extended deadline of 26 May and subsequently on 27 May is referred to and the Respondent relies on the failure by the Claimant's solicitor or the Claimant himself to explain that there had been an assault or to notify the Respondent and the Tribunal of any difficulties preventing compliance. Although some documentation was provided, there was a failure fully to comply

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with the case management order of 8 May 2015 which persisted up to and including 1 July 2015 when the claim was struck out. The order striking out the claim was, the Respondent submits, in accordance with the overriding objective, having regard to the long and protracted history of the case, the significant and additional costs already incurred by the Respondent as a result of the continued delays and the prejudice to the Respondent. Accordingly, overall the ET was fully justified in striking out the claim.

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55. I do not accept the Respondent's submissions on this ground of appeal. It seems to me that the Employment Judge did not go through the approach identified by Burton P in **Bolch v Chipman**. The Tribunal first failed to identify specifically the extent and magnitude of the non-compliance, simply stating that there had been non-compliance. As a matter of fact, by 1 July, there was at least some compliance and on the Claimant's case, substantial compliance with those orders; but that was not necessarily known to the Employment Tribunal.

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56. More significantly however a strike out order is neither automatic nor punitive. There is nothing in the Judgment or Reasons to indicate that the Tribunal considered at all the critical question whether a fair trial remained possible, or a lesser sanction was available. This is a case where the Respondent's application itself identified a lesser sanction for the Tribunal than the last resort of a strike out. The Respondent sought three possible orders. There was nothing in the Respondent's application of 28 May to suggest that a fair trial was not possible at that stage or thereafter. In those circumstances I would have expected, at the very least, some consideration by the Employment Judge before reaching the conclusion that strike out was a proportionate and fair course to take, of the possibility of either of the lesser courses suggested, and if rejected, reasons why that was so.

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57. In light of the reasons given by the Tribunal, I have no confidence that the Tribunal recognised the draconian nature of a strike out decision and the importance of not too readily exercising the strike out jurisdiction. Above all, there is no recognition of the features to which I have referred and importantly, of the need to consider whether the sanction of strike out is a proportionate response in the particular circumstances of this case, including by reference to the question whether a fair trial remained possible, or a lesser sanction was available.

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58. Unless orders made at earlier stages had, as Mr Campbell concedes, achieved full compliance with the relevant order and, in my judgment, there is no reason to suppose that a further unless order would not have been complied with. Moreover, it is clear that by 9 July, as Mr Campbell concedes, the further outstanding matters were dealt with by the Claimant's solicitors who confirmed compliance with the order of 8 May and produced the Response to the requests dated 29 April 2015. There is nothing in the material provided to me that would indicate that a fair trial was not possible at that stage.

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Conclusion and Disposal

59. In those circumstances, I have concluded that the Tribunal was in error of law in striking out this claim on 1 July and failed to have regard to important relevant considerations in doing so. The order striking out the claim must accordingly be set aside as Mr Campbell concedes in those circumstances. This is not a case where additional Reasons could be sought. The whole exercise was flawed.

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60. That leaves the question of disposal. In light of the material showing, if not full compliance, close to full compliance with the outstanding orders of the Employment Tribunal in relation to the preparation of this claim for trial, the claim should be reinstated and on the

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material currently available, my preliminary view is that it should now proceed to a hearing, there being no current basis for striking it out. If the Respondent considers that the strike out application should be pursued, it will, on my current thinking, have to start afresh, on the basis of the state of affairs existing at the date of the application. That is my preliminary view but the parties may if they wish to do so, make submissions as to the final disposal of this appeal in writing. Those submissions should address the question whether having set aside the strike out Judgment and reinstated the claim, it should be open to the Respondent, if it chooses to do so, to pursue the strike out application and, if so, on what basis, or whether the Respondent should be prevented from doing so if that is possible, and if that is advanced, what power this Employment Appeal Tribunal has to make such an order.

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61. Written submissions should be made within 14 days of the date the transcribed Judgment allowing this appeal is sent to the parties. I will deal with final disposal on receipt of such submissions, if any, are made.

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62. My conclusions in relation to the two critical grounds of appeal make it unnecessary to deal with the other grounds because, as Mr Campbell accepts, the reconsideration refusal cannot cure the errors in the strike out Judgment, and falls away. In conclusion, the appeal is allowed on ground 3 of the first appeal. The strike out Judgment is set aside as in error of law, and the reconsideration Judgment falls away. The claim pursued by the Claimant in the Employment Tribunal is reinstated and should now proceed to a Full Hearing subject to any further submissions made on disposal.

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