Appeal No. UKEAT/0097/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 February 2018
Judgment handed down on 5 April 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS S CHIDZOY — APPELLANT

BRITISH BROADCASTING CORPORATION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Direct Public Access
For the Respondent	MR SEAN JONES (One of Her Majesty's Counsel) and MS SOPHIE BELGROVE (of Counsel) Instructed by: British Broadcasting Corporation Law Department Broadcast Centre Floor 2 Area B6 201 Wood Lane London W12 7TP

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

Strike out of claim - unreasonable conduct of proceedings

During a short break in the course of giving evidence at the Full Merits Hearing of her claims, the Claimant participated in a conversation with a journalist, which included some discussion about the case and about a particular aspect of the Claimant's evidence given shortly before the break. Aspects of this were overheard by one of the Respondent's witnesses and by two members of its legal team, who brought the matter to the attention of the ET. Allowing the Claimant to give instructions to her legal representative and to thus provide an initial account of what had taken place, the ET then adjourned for a long weekend to enable the parties to provide statements about this matter. Upon the resumption of the hearing, the Respondent applied for the claim to be struck out due to the Claimant's unreasonable conduct of the proceedings. Concluding that the Claimant had indeed been party to a discussion about her evidence, in flagrant disregard of the warnings given by the ET on six separate occasions that she must not do so when still giving evidence, the ET concluded that it had irretrievably lost trust in the Claimant and could no longer fairly hear her case. It considered whether there were any alternatives to striking out the claim but concluded that there were none. It therefore struck out the Claimant's case. The Claimant appealed.

Held: dismissing the appeal

The ET had correctly addressed the four questions identified in **Bolch v Chipman** [2004] IRLR 140 EAT. Adopting an entirely fair process, it had been entitled to make the findings it did as to what had taken place and had permissibly concluded that the Claimant had thereby unreasonably conducted the proceedings. The ET had gone on to consider whether it could still conduct a fair trial of the Claimant's case but, having concluded that trust had broken down, had correctly concluded it was not. Asking itself whether it was proportionate to strike out the claim, the ET had considered whether there were any alternatives but had concluded there were

none. In the circumstances, that was a conclusion that was open to it and the challenge to its decision to strike out the claim would be dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the approach of the Employment Tribunals ("the ET") to the striking out of a claim, part-way through a hearing, due to the Claimant's conduct in talking to a journalist during a break in her cross-examination, after she had been warned by the ET against speaking to anyone about the case. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the Cambridge ET (Employment Judge Ord, sitting with members Mr Davie and Mr Reuby, on 6 to 9 and 13 February 2017), sent out on 23 February 2017, by which the Claimant's claim was struck out in its entirety. Before the ET, the Claimant was represented by her solicitor, Mr Jackson; she now appears by Ms Brown of counsel. The Respondent was represented below by Ms Belgrove of counsel, who continues to represent its interests on this appeal, albeit now led by Mr Jones QC.

2. The Claimant's proposed appeal in this matter was set down by HHJ Hand QC for an Appellant-only Preliminary Hearing. That came before me on 31 July 2017, when I permitted the appeal to proceed on the basis of amended grounds.

The Relevant background and the ET's Decision and Reasoning

3. The Claimant had worked for the Respondent as a journalist and home-affairs correspondent for some 29 years. She was pursuing claims before the ET of whistleblowing, sex discrimination, victimisation and harassment. Those claims were resisted by the Respondent. A Full Merits Hearing of the claims had been listed before the ET, for 11 days,

commencing on 6 February 2017. It is with events that took place at the hearing with which the current appeal is concerned.

4. As recorded in the ET's Judgment, the hearing initially proceeded in uneventful fashion. Having spent the first day engaged in preliminary reading and clarifying the issues for determination, on Tuesday 7 February the ET began to hear evidence from the Claimant. After confirming the truth of her witness statement - standing as her evidence-in-chief - the Claimant was cross-examined by counsel for the Respondent. That cross-examination continued through Wednesday 8 February (allowing for the interposition of two witnesses for the Claimant due to their limited availability) and into Thursday 9 February. There were breaks during the course of the Claimant's evidence (comfort and meal breaks as well as at the end of the day) and, on each occasion, the ET - adopting its usual course - advised her that she must not discuss her evidence or any aspect of the case with anyone during each such adjournment.

5. Shortly before noon on Thursday 9 February, the ET took a short break and again warned the Claimant in similar terms, observing this was likely to be the last time she would be given this warning as her cross-examination was approaching the end.

6. The hearing resumed at 12.20pm, at which stage Ms Belgrove, counsel for the Respondent, advised that she needed to raise a serious matter with the ET, namely that during the adjournment the Claimant had been seen in discussion with a third party (later identified as Ms Gliss, a journalist working for a local newspaper, the Eastern Daily Press). The ET allowed the Claimant the opportunity to speak with her solicitor about this matter and a further adjournment took place until 12.55pm.

7. The ET records what took place next, as follows:

> **"7. On resumption of the Hearing, Mr Jackson on behalf of the Claimant stated that the Claimant had not been discussing her evidence. He told us at the time (as per the Judge's note crossed checked [sic] with the Members' notes and the record provided by Miss Belgrove's instructing solicitor) that:**
>
> > **1) Mr Jackson had offered to speak to the relevant journalist.**
> >
> > **2) That they went together towards a room where the Claimant was sitting on her own and therefore did not enter that room but spoke outside the room (or in another room).**
> >
> > **3) Mr Jackson then went into the room where the Claimant was to retrieve copies of some witness statements.**
> >
> > **4) Subsequently Mr Jackson and the Claimant and the journalist were all together in the open waiting area.**
> >
> > **5) Mr Jackson then left to go to the lavatory leaving the Claimant and the journalist together.**
>
> **8. Mr Jackson said that he had not heard anything said that was "untoward".**

8. To allow for the opportunity to have a full account of this matter from both parties, and to give the Respondent time to consider whether it wished to make any application arising from these events, the ET then adjourned until Monday 13 February 2017 (it had not been due to sit on Friday 10 February in any event).

9. On the resumed hearing, the Respondent made an application to strike out the claim under Rule 37(1)(b) and (e) Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). In support of this application, the Respondent had adduced statements regarding the events of Thursday 9 February from Ms Belgrove, her instructing solicitor and from one of the Respondent's witnesses, Mr Silk. For her part, the Claimant had also provided her own statement and one from Mr Jackson, as well as a hand-written note from Ms Gliss.

10. The ET recorded the relevant evidence from the Respondent - as derived from its statements - as follows:

> **"18. According to the Respondent's submissions and the reports of events provided by her instructing solicitor and witnesses, it was her instructing solicitor, Ms Janjua who first reported to Miss Belgrove that she had seen the Claimant with another person in discussion and specifically heard the Claimant use the word "Rottweiler". She immediately reported this to Miss Belgrove.**
>
> **…**
>
> **20. Acting on what Ms Janjua told her … Ms Belgrove went into the area where she had been told the Claimant was in discussion. En route she met Mr Silk who reported that the Claimant was in discussion with a third party and that he had heard discussion about "dangerous dogs". Miss Belgrove then approached the Claimant and the journalist, herself heard use of the word "Rottweiler" (but could not say who said it) and intervened in the discussion. As it broke up either the Claimant or the Journalist (Miss Belgrove could not say which) was heard by her to say "sorry, I have known her for ages"."**

11. As for the statements adduced by the Claimant, the ET noted:

> **"21. According to Mr Jackson's statement produced today the events were these. He, the Claimant and the Journalist briefly stood as a group of three in the lobby area in discussion. Mr Jackson then went to the bathroom saying he would return and provide the information the Journalist needed. On return, he said, the Claimant had gone. He invited the Journalist into a room and she said she could not go in because the Claimant was there and so Mr Jackson and the Journalist went to an adjacent room to discuss the case and he provide [sic] for her sight of some witness statements.**
>
> **22. The Claimant's report of events was that she was approached by the Journalist as she was leaving the Tribunal room for the adjournment and that they may have shaken hands. Everyone left the Tribunal room and the Claimant says that she walked over to the reception desk where she stood waiting for Mr Jackson because he would normally take her into the room where she would sit during an adjournment but he said he would be "back in a minute" and so the Claimant decided to wait for him. She said that she engaged pleasantries with the Journalist about her working for the Eastern Daily Press and staff shortages. The Claimant then says that the Journalist proffered the information that she had once been called a "Rottweiler or Terrier" in relation to her work and the Claimant said it was at this point that Miss Belgrove intervened.**
>
> **23. A written version of events was provided from Ms Gliss, the Journalist in question. She said that the Claimant had approached her and said hello and shook her hand. She said that the Claimant and she were chatting and that she herself volunteered that she had been called a "Rottweiler" in the past at which point the conversation was stopped by Miss Belgrove."**

12. As the ET went on to observe:

> **"24. The use of the word "Rottweiler" is relevant because the most recent part of the Claimant's cross examination before the adjournment related to an email circulated within the BBC (but not to her) in relation to the possible coverage of a story regarding the Dangerous Dogs Act where it was suggested that the Claimant could be the relevant reporter but referred to her as "Sally Shitsu". The Claimant had objected to this terminology which she said was demeaning on the grounds of her gender (by calling her, in terms, a dog) and abusive generally by implication that she was a "shit journalist". The Respondent's position was, inter alia, that the Claimant herself had said that she would not have objected if she had been called "Sally Terrier" or "Sally Rottweiler". The Claimant denied this and said that any reference to Rottweiler and Terrier during the course of the grievance hearing when this exchange was said to have taken place related to the occasional use of those words in a complementary [sic] way about journalists who would not give up on a story. The words themselves were in debate during cross examination of the Claimant by Miss Belgrove."**

13. The ET was concerned by what it considered to be potential discrepancies in the evidence from the Claimant's side:

> **"28. There is some divergence of evidence between the information given to the Tribunal by Mr Jackson in the immediate aftermath of the events of 9th February as we have recorded them above and the version of events now reported by him, the Claimant and Miss Gliss.**
>
> **29. In particular, it is not clear whether the Journalist and Mr Jackson spoke separately before the discussion with the Claimant in the lobby or not."**

14. The ET recorded its views as to what had happened on 9 February as follows:

> **"33. The discussion between the Claimant and the Journalist was either facilitated by Mr Jackson (he did not ensure the Claimant returned to her room but engaged, on his own report, in a three way discussion with the Claimant and the Journalist) or permitted by passive conduct. He was engaged in a three way discussion with the Journalist and the Claimant, absented himself to go to the lavatory but did not ensure that the Claimant also terminated the conversation and went into her room.**
>
> **34. We unanimously take the view that it stretches the bounds of credulity to believe that in those circumstances (in particular where the third party was a Journalist who was asking for information about the case and who on Mr Jackson's own evidence was going to be given information when he returned) would not have asked questions about the Hearing. Miss Belgrove, Ms Janjua and the Journalist all confirm the use of the word "Rottweiler" and Mr Silk referred to the Claimant speaking about "dangerous dogs". Even if, as is stated by the Claimant and the Journalist it was the latter who initiated the use of the word "Rottweiler", that clearly points to discussion as regards the questions put in cross examination to the Claimant that very morning. There is no mention of that word in the Claimant's own evidence as set out in her witness statement.**
>
> **35. We therefore unanimously find as a fact that the Claimant was engaged in discussion about the case and her evidence with Ms Gliss. It is beyond our understanding as to why the Claimant was left by Mr Jackson alone with the Journalist during an adjournment and equally why she was allowed to be part of a three way discussion with the Journalist and Mr Jackson at what was a very late stage of her evidence with the strictures of the Tribunal given, as we have said, no less than six times ringing in their ears."**

15. The ET concluded that this had constituted unreasonable conduct on the Claimant's part. It asked itself whether a fair trial was still possible. It resisted the Respondent's suggestion that it should infer that similar conduct might have taken place on previous occasions but was troubled by the apparent discrepancy in the account given by the Claimant's side:

> **"39. … We are concerned, however, that in the immediate aftermath of the incident on 9th February, Mr Jackson first told us that he had heard no inappropriate discussion (but then confirmed that he had left the Claimant and the Journalist alone and could not hear what they were saying) and further that his record in particular of the sequence of events of the day has altered substantially from his immediate contemporaneous recall to the events as they are now described in writing."**

16. In the circumstances, the ET concluded that a fair trial before the same panel was not possible, reasoning as follows:

> **"40. The fact of the discussion and its contents, compounded by the way it was allowed to take place, the clear finding that the Claimant and the Journalist were engaged in a discussion about the case and the Claimant's evidence part way through her cross examination by specific reference to matters raised in cross examination that morning have led us to conclude, however, that the trust which the Tribunal should have in the Claimant has been irreparably damaged. That is reinforced by the doubtful veracity of the report of events which we have had from the Claimant's representative which has altered significantly between Thursday and today (Monday).**
>
> **41. Miss Belgrove draws to our attention the fact that after the incident had taken place, it was not the Claimant or her representative which sought to bring the matter to the attention of the Tribunal and explain it but rather it was left to the Respondent to raise it. The Claimant's representative should have realised that allowing the Claimant to speak to a Journalist alone at the relevant time was at least foolhardy and some explanation, once the Respondent was aware of the discussion and had intervened in it, was clearly due.**
>
> **42. All of this has led us to the conclusion that we as a Tribunal do not have the necessary trust in the Claimant who should have well understood that a discussion about her evidence and any aspect of the case, during an adjournment whilst she was still under oath and undergoing cross examination should not have taken place. We have considered carefully whether this is a matter which we can, in terms, overlook but we cannot. Unanimously we consider that a fair trial is no longer possible. The flagrant disregard of clear and repeated instructions from the Tribunal not to discuss the case for her evidence given to the Claimant on a number of occasions has been disregarded. Information passed between a third party and a witness during that person's evidence runs the substantial risk of corrupting the evidence of the person concerned and that is why clear warnings are given. Here there was clear discussion about a matter which had been raised during cross examination that very morning."**

17. The ET then went on to consider the alternatives to striking out the Claimant's claim at that stage. It considered whether the case could be listed before a different ET, but concluded that was not a proportionate response, given the stage reached in the proceedings, and that this would place the second ET in an invidious position, not least as it would know of the reasons for the re-listing. It also considered whether it might be possible to strike out only part of the Claimant's claim - that which apparently had been discussed with the journalist - but was unable to see that this would address the fundamental loss of trust that had occurred. In the circumstances, the ET concluded that the Claimant's claim would be struck out in its entirety.

The Appeal

18. The Claimant now appeals against that decision, on the following grounds:

(1) She complains that the ET erred in its conclusion that she had engaged in unreasonable conduct. It had failed to consider whether any information had passed between the Claimant and Ms Gliss that was capable of corrupting the Claimant's evidence, or to assess whether there was a substantial risk that the Claimant's evidence may have been so tainted or corrupted. The process adopted by the ET in dealing with the application to strike out on this basis was also procedurally inadequate and unfair: to the extent that the ET had found that the Claimant had engaged in unreasonable conduct by communicating something to Ms Gliss such as would be capable of corrupting her evidence, it ought to have first heard oral evidence before reaching any such determination.

(2) Alternatively, the ET had erred in its conclusion that a fair trial was no longer possible on the basis that trust had been "*irreparably damaged*".

(3) Yet further, the ET erred in concluding that a strike out was the appropriate sanction.

19. The Respondent resists the appeal, relying on the ET's reasons and further contesting that there was any irregularity in the procedure adopted by the ET but, in any event, submitting that, had there been, it had been waived by the Claimant, who had not made any application to question the Respondent's witnesses. More generally, the Respondent contended that, to the extent that the ET had made any error of law, it was not material; its conclusion was plainly and unambiguously correct.

The Relevant Legal Principles

20. The ET was concerned with an application to strike out the Claimant's claim, thus exercising its powers under Rule 37 of the **ET Rules**, which relevantly provides:

> **"37. *Striking out***
>
> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
>
> > **(a) …**
> >
> > **(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;**
> >
> > **…**
> >
> > **(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)."**

21. By Rule 41 of the **ET Rules**, it is generally provided that:

> **"The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."**

22. In exercising its powers under the **ET Rules**, the ET was also bound to have regard to the overriding objective, as provided by Rule 2:

> **"2. *Overriding objective***
>
> **The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -**
>
> > **(a) ensuring that the parties are on an equal footing;**
> >
> > **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
> >
> > **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
> >
> > **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
> >
> > **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."**

23. It is common ground between the parties that the striking out of a claim is a draconian measure that should not be imposed lightly, see **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 CA. More specifically, in **Bolch v Chipman** [2004] IRLR 140 the EAT

(Burton P presiding) held that, where the ET is considering the possibility of striking out a claim or response due to the way in which the proceedings have been conducted, there were four matters it would need to address (I paraphrase):

(1) There must first be a conclusion by the ET not simply that a party has behaved unreasonably but that the proceedings have been conducted unreasonably by her or on her behalf.

(2) Assuming there is such a finding, in ordinary circumstances the ET will still need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a Debarring Order (see **De Keyser Ltd v Wilson** [2001] IRLR 324 EAT (Lindsay P presiding)). That might be, for example where there has been "*wilful, deliberate or contumelious disobedience*" of an ET Order, otherwise it might be where the conduct in issue is so serious it would be an affront to the ET to permit the party in question to continue to prosecute their case (see **Arrow Nominees Inc v Blackledge** [2000] EWCA Civ 200).

(3) Even if a fair trial is not considered possible, the ET must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate.

(4) And even if it determines that a Debarring Order is the appropriate response, the ET should consider the consequences of that Order (allowing that, for example, where a response has been struck out at the liability stage, it might still be appropriate to allow the Respondent to participate in any remedy hearing).

See also observations to similar effect made by the EAT (Simler P presiding) in **Arriva London North Ltd v Maseya** UKEAT/0096/16 (12 July 2016, unreported).

24. When an ET is satisfied that a Claimant has conducted the proceedings unreasonably (or scandalously or vexatiously), it should not move to strike out the claim when firm case management might still afford a solution - in some cases, the objectionable conduct may not be irreversible, see **Bennett v Southwark London Borough Council** [2002] IRLR 407 CA (a case in which the claim had ultimately been struck out by a second ET, the first having considered it was bound to recuse itself given the nature of the conduct in question). In order to determine whether irreparable damage has been done, the ET would need to assess the nature and impact of the wrongdoing in issue, to consider whether there was, in truth, any real risk of injustice or to the fair disposal of the case, see **Bayley v Whitbread Hotels** UKEAT/0046/07 (16 August 2007, unreported). It will, for example, be a very rare case in which it would be appropriate to strike out a case at the end of a trial; in such circumstances, it would, in almost all cases, be more appropriate for the Tribunal to dismiss the claim in a judgment on the merits, which could take account of the wrongdoing in issue, in the usual way (and see the observations to this effect in **Zahoor and Ors v Masood and Ors** [2009] EWCA Civ 650).

Submissions

The Claimant's Case

25. For the Claimant, Ms Brown stressed that the striking out of a claim is a draconian act (see **Blockbuster v James**); it was a power to be exercised in accordance with reason, relevance, principle and justice, and see **Williams v Real Care Agency Ltd** [2012] ICR D27. Where the strike out is being considered in relation to the conduct of a party, the bar was set particularly high: the misconduct in question must be such that it would be an affront to the Court to permit a party to continue to prosecute her claim, see **Arrow Nominees Inc v Blackledge**. Except in the most exceptional of cases, where the credibility and integrity of the party is called into question, the expectation must be that the Tribunal will adjudicate on the

issues raised in the claim, including deciding issues of credibility, see **Zahoor v Masood**. Even in the case of deliberate failure, the fundamental question for the ET was whether the party's conduct has rendered a fair trial impossible, see **Blockbuster** and **Bolch**. The ET thus had to consider: what was the nature and potential impact of the alleged conversation between the Claimant and the journalist such that a fair trial was impossible, see **Bayley v Whitbread Hotels**. And the ET should only use the draconian sanction of strike out if this was a proportionate response to the offence, see **Bennett v Southwark LBC**. Finally, even a flagrant disregard of the ET's warning not to discuss evidence did not of itself justify a conclusion that giving evidence on oath thereafter would be untruthful or that the Claimant's evidence was called into question - the ET still had to address the questions identified in **Bolch**. Moreover, although the warning given to witnesses was a well-established practice in use in ETs, that did not elevate the warning to an Order and non-compliance with the warning did not thus constitute a failure to comply with an ET Order, see **Castlemilk Group Practice v Chakrabarti** UKEATS/0065/08 (2 June 2009, unreported).

26. Turning to the present case, it was relevant that the Claimant was herself a journalist and there was evidence before the ET - which it had dismissed as not relevant - that she had properly liaised with the Respondent about approaches from journalists regarding the ET proceedings previously. In principle, there was nothing wrong in talking to press during an ET hearing: the Claimant had a right to freedom of expression (Article 10 **European Convention on Human Rights**) and there a wider public interest in justice being dispensed publicly, in particular, having regard to the freedom of the press to report Court and Tribunal proceedings fully and contemporaneously (**R v London (North) Industrial Tribunal ex p Associated Newspapers Ltd** [1998] ICR 1212).

27. Although the Claimant had been instructed by the ET not to discuss her evidence, she had not been advised that failing to comply with that instruction might mean that her case would be struck out and it cannot have been foreseen that any such breach would have that result. The warning was not an Order of the ET and the ET is a creature of statute that must operate by the **ET Rules** so that parties can be clear as to the position.

28. On the evidence of the Claimant and Ms Gliss, the most that could be said was that Ms Gliss had made a comment to the Claimant that she herself had been called a Rottweiler; there was no evidence that the Claimant had responded.

29. Moreover, the process adopted by the ET in dealing with the application to strike out was procedurally inadequate and unfair. It did not receive any oral evidence on the application and neither the Claimant nor her representative were given the opportunity to respond to the assertions contained in the Respondent's accounts (which were not given in the form of signed statements). To the extent the ET had found that the Claimant had engaged in unreasonable conduct by communicating something to Ms Gliss such as would be capable of corrupting her evidence, it ought to have first heard oral evidence before reaching any such determination. The Employment Judge had, however, stated that he had no intention of "*holding a trial within a trial*" and the parties were not invited to make any representations on that position. Specifically, the ET ought properly to have heard from the Claimant before drawing any inferences adverse to her; it could not be assumed that hearing oral evidence from her could not have assisted her position: her account was that she had not herself engaged in any discussion about her evidence and had not responded to Ms Gliss.

30. This not only gave rise to a procedural unfairness but the ET had then erred in its conclusion that the Claimant had engaged in unreasonable conduct. Specifically, it failed to consider whether any information had passed between the Claimant and Ms Gliss that was capable of corrupting the Claimant's evidence and had failed to assess whether there was a substantial risk that the Claimant's evidence may thus have been tainted or corrupted. Had it carried out this assessment, it would have concluded the evidence in question was of marginal relevance: although the Claimant had been questioned as to whether she would have objected to being called "Sally Rottweiler", the ET was in fact concerned with whether the reference to the Claimant in an email as "Sally Shitsu" was demeaning on grounds of gender and more generally by implying she was a "shit journalist". The ET had, further, failed to take account of the fact that the majority of the Claimant's evidence had already been given: her cross-examination was coming to an end and the ET needed to consider whether there could in fact be any impact on the Claimant's evidence (which was only due to last a further 15 minutes).

31. Alternatively, the ET erred in concluding that a fair trial was no longer possible on the basis that trust had been "*irreparably damaged*". In particular, it had erred in drawing any inference regarding Mr Jackson's accounts: first, because his account had not changed in any material respect, and, second, because it could not be relevant to the question whether the Claimant had acted unreasonably. Even if there was some relevance to Mr Jackson's position, the ET still needed to carry out a proper assessment in this regard and explain its conclusion.

32. Yet further, the ET had erred in concluding that a strike out was the appropriate sanction. It had been wrong to assert that any other ET asked to deal with the remitted hearing would be placed in an "*invidious position*"; that was not necessarily the case, see **Bennett v Southwark LBC**.

The Respondent's Case

33. Addressing first the question of unreasonable conduct, the Respondent submitted it was necessary to be clear as to what the ET had decided and what had been before it. At the minimum it was agreed that there had been a discussion between the Claimant and Ms Gliss, in which the word "Rottweiler" was used, which referenced back to the evidence given by the Claimant just before the break in the ET proceedings. There could not, however, have been just one use of that word (as the Claimant and Ms Gliss had stated) because Ms Belgrove had independently heard the word being used but had also been told that it had previously been said. The ET had also been entitled to have regard to the differences in the accounts given by the Claimant's solicitor, whose first account had been provided after he had the opportunity to take instructions from the Claimant. The ET had thus been entitled to find that the Claimant's account "*stretches the bounds of credulity*".

34. In those circumstances the question arose as to what the ET should do next? On the Claimant's case, it was said that the ET should have then heard evidence on the point. That set an impossible target: inevitably the Respondent's statements were limited to the snatched parts of the conversation its witnesses overheard. The other source was the Claimant, but the ET (permissibly) did not feel able to trust her account. In any event, the Claimant had had two opportunities to provide her account - initially through her solicitor, and then on the following Monday; hearing her give that account on oath would have taken matters no further and cross-examination could have gone nowhere because the Respondent could not put a positive case. Moreover, adopting such a course would have led to significant difficulties and might have required an adjournment to enable alternative legal representation to be obtained - a disproportionate course that would have been contrary to the approach under Rule 41 **ET Rules** and the overriding objective. There had been no obligation on the ET to hear evidence but it

was notable that there was equally no objection on the part of the Claimant or her representative at the time. It was now being said that the point was obvious but it was not so obvious that anyone for the Claimant had raised it at the time. Even if that was wrong, the Claimant had not suggested there was anything else she could have added if she had given oral evidence; the failure to proceed in a different way did not render the ET's decision unsafe. Adopting the course the Claimant now said should have been taken could have made no difference: there was no dispute that she had been in conversation with Ms Gliss and that her evidence - the use of the term "Rottweiler" - had been discussed.

35. The ET's assessment of the nature and impact of the wrongdoing was also clear: it had found that the Claimant had been engaged in discussion about the case with Ms Gliss; that discussion related to evidence given by the Claimant in cross-examination; she had shown a flagrant disregard of clear and repeated instructions by the ET. In the circumstances, the ET permissibly concluded that this behaviour had given rise to a substantial risk of corrupting the Claimant's evidence (see the ET's Judgment at paragraph 42). This was, further, not a case where the trial had effectively been completed: the Claimant's cross-examination was still to be completed and there was then the possibility of re-examination.

36. As for the nature of the warning given by the ET, it had not needed to amount to an actual Order to warrant a strike out under Rule 37 **ET Rules** - it could still amount to unreasonable conduct. In any event, this was, on any normal use of the word, an Order: it had been an instruction given with the expectation that it would be obeyed (and **Castlemilk** did not assist the Claimant in this regard - the problem in that case was that the Order had not been served on the relevant party). The purpose of the instruction was to ensure the proceedings were properly and reasonably conducted; breach of that instruction jeopardised the reasonable

conduct of the proceedings and the fact that the ET had given the warning on six occasions meant that it was entitled to assume that the Claimant would understand it was significant. That was all the more so given the Claimant was legally represented and it was thus reasonable to expect that the point had been explained to her (although the Claimant had herself some experience of Court reporting so might have been expected to understand the point independently). As for the suggestion that the ET's warning might have in some way been inconsistent with press freedom, that was plainly not the case: the warning was entirely reasonable; it did not interfere with the Claimant's freedom of expression or with any right of the press to report the proceedings; it was, in any event, entirely proportionate.

37. As for the ET's finding that the discussion between the Claimant and Ms Gliss called into question her credibility, that was again a permissible conclusion, in particular given the ET had found that her account of that discussion stretched credulity. It had, further, been entitled to find that her conduct had amounted to a flagrant breach of a clear and repeated instruction and, in those circumstances, to have lost trust. On that basis, it had been open to the ET to strike out the Claimant's claim without consideration of the extent to which a fair trial was still possible (see as allowed at the second stage of the guidance provided in **Bolch v Chipman**). In any event, having found that the Claimant's conduct was such that it no longer had the necessary trust in her (this had been "*irreparably damaged*") and her behaviour had given rise to a "*substantial risk of corrupting the evidence*", the ET's conclusion that a fair trial was no longer possible was inevitable (see **Sud v London Borough of Hounslow** UKEAT/0156/14); the point was obvious, how could the ET fairly weigh the Claimant's evidence in those circumstances?

38. It was, further, a proportionate response to strike out the Claimant's claim. In this regard, the ET had done precisely what it was required to do: first, examining the nature of the transgression and finding it was serious and deliberate, going on to consider its impact on the proceedings and then specifically considering whether there were other ways of dealing with the case at that stage, permissibly concluding that there were not. The particular difficulty that plainly weighed with the ET was the corruption of the Claimant's evidence and that did not disappear if the case went before a new ET: the benefit of the misbehaviour would still be open to the Claimant and it would, equally, still be open to the Respondent to raise this as going to her credit - the issue could not be avoided.

The Claimant in Reply

39. It was not open to the ET to treat the warning it had given as if it had been an Order - there was a distinction between good practice and the strict requirements of an Order (see **Castlemilk** at paragraph 47).

40. As for the suggestion that ET had found that there was substantial risk of corruption of evidence (per paragraph 42 of the Judgment), it had made no finding as to what it had found had taken place such as to mean that the evidence was likely to be corrupted. Its only finding (see paragraph 34) related to what was said by Ms Gliss (the journalist); there was nothing regarding any response from the Claimant (although it had later appeared to assume that the Claimant had been a participant in the discussion, see paragraph 35).

Discussion and Conclusions

41. It is common in a trial for witnesses (including the parties) to be warned that they must not discuss their evidence whilst they are under oath or affirmation. In the normal course, it is

unlikely that the warning will ever be expressed in terms as a formal Order of the Court or Tribunal but its purpose and the importance of compliance will be clear: the evidence given must be that of the witness and if others might have influenced the content or manner of that evidence, it will be tainted in a way that is hard to assess and might thus prejudice the fair determination of the case. It is unnecessary to determine whether the ET's instruction in the present case (given to the Claimant on six separate occasions) amounted to an Order. I am satisfied that any witness in those circumstances would have understood the nature and significance of the instruction; that was particularly so in this instance, given that the Claimant was legally represented and it would be reasonable to assume that the instruction would have been explained to her by her own representative. As for whether the warning was reasonable or in any way impacted upon rights (for the Claimant or others) to freedom of expression, it is clear to me that this was an entirely reasonable and proportionate course for the ET to adopt: it did not impact upon the freedom of the press to report on the proceedings and it imposed an entirely reasonable condition upon the Claimant that was both compatible with Article 10.2 (freedom of expression) of the **European Convention on Human Rights** and respected the rights of both parties under Article 6 (right to a fair trial).

42. Notwithstanding the ET's clear instruction, it became apparent that, whilst under oath or affirmation, the Claimant had been party to a discussion in which there had been some reference to her evidence. The first question for the ET was whether that had amounted to the unreasonable conduct of the proceedings by the Claimant.

43. The Claimant says that on this question the ET ought to have heard her oral testimony; only then was it open to the ET to reach a conclusion as to what had actually taken place. On

the Claimant's case the most that could be said was that Ms Gliss had made a comment to her using the word "Rottweiler"; there was no evidence that the Claimant had responded.

44. This procedural point was not something raised before the ET. It was, further, for the ET to determine how best to regulate its own procedure (Rule 41 **ET Rules**), although it was to do so in a way that would enable it to deal with the case fairly and justly, in accordance with the overriding objective. Certainly, the ET needed to be clear as to what had actually happened. The question thus arises as to whether the procedure it adopted (to obtain statements from all concerned but not to hear oral evidence) enabled it to do so? It is apparent that the ET did not simply accept the Claimant's account at face value, but was it obliged to first hear her give that account on oath or affirmation before it rejected it? As the Respondent observes, it is unclear what purpose that could have served in this instance. Other than recounting the snatches of conversation they had overheard, the Respondent's witnesses (Ms Belgrove, Ms Janjua and Mr Silk) could not put a positive case by way of cross-examination and requiring that they give oral testimony to prove that which they were asserting would have given rise to difficulties, potentially leading to a longer adjournment while the Respondent obtained separate representation for this purpose. In any event, the real extent of the difference between the accounts was limited. On the accounts given by the Claimant and Ms Gliss, it was accepted that Ms Belgrove would have heard the term "Rottweiler" being used. There might have been an issue as to whether that term had previously been used in the discussion, but the ET was entitled to take into account that it was because she had already heard this word that Ms Janjua had alerted Ms Belgrove to the Claimant's conversation with Ms Gliss. It was also entitled to conclude that the word was being used in reference back to the Claimant's evidence given shortly before the break. Indeed, on the Claimant's own case, she was party to a discussion that included some reference to her evidence; even if she did not respond to the "Rottweiler"

reference, she had heard what Ms Gliss had to say. In the circumstances, I do not consider the ET erred in the procedure it adopted. Adopting an entirely proportionate approach to dealing with the issue that had arisen, it was entitled to conclude - even if it had only had regard to the statements emanating from the Claimant's own side - that the Claimant had been engaged in a discussion about the case and her evidence with Ms Gliss.

45. As for the ET's conclusion that the Claimant had thus unreasonably conducted the proceedings, I do not consider that it lost sight of the timing of this incident: it was towards the end of the Claimant's evidence but she was still being cross-examined, and might then be re-examined, and she had only just given evidence regarding the use of terminology referring to different breeds of dogs. And that evidence was not merely of peripheral relevance - it related to a particular complaint the Claimant had made; something which the ET - immersed in the case as it was - would be best placed to judge. The Claimant had, further, been warned on six separate occasions that she was not to discuss her evidence or any aspect of the case with anyone during breaks in the proceedings. As I have already said, she could reasonably be expected to understand the importance of complying with that instruction. In the circumstances, the ET was entitled to conclude that her conduct of the proceedings - engaging in a discussion about her evidence whilst still under oath or affirmation - was unreasonable.

46. For the Respondent it is said that these circumstances entitled the ET to conclude that it could immediately proceed to strike out the claim: it was akin to a wilful, deliberate or contumelious breach of an Order and was sufficiently serious to amount to an affront to the ET to permit the Claimant to continue in her claim. Whilst I agree that the Claimant's conduct was very serious, I consider the ET was right to exercise caution and not to merely assume that it should strike out the case. Having made primary findings as to what had taken place, the ET

appropriately considered what inference it should draw relevant to the question whether a fair trial might still be possible. It resisted the Respondent's suggestion that it should infer that the Claimant might have engaged in similar conduct on previous occasions but concluded, nevertheless, that it could no longer have the necessary trust in the Claimant's veracity to enable it to continue to hear her case. That was a conclusion reached given the ET's finding as to the nature of the Claimant's conduct, in being party to a discussion about her evidence with Ms Gliss, but was also informed by her failure to herself bring the matter to the ET's attention and by the differing accounts she had given - initially, by means of her instructions to her solicitor and then in her own statement. Viewed against the clear instructions it had given to the Claimant during the hearing, the ET was entitled to conclude that it could no longer conduct a fair trial of the Claimant's case; the loss of trust was irreparable.

47. Notwithstanding that conclusion, the ET then went on to consider whether there was an alternative to striking out the Claimant's claim. On the Respondent's case, taken at its highest, the Claimant's conduct was such that the ET would have been entitled to simply take the view that it was proportionate to strike out her claim. It seems to me, however, that to properly assess proportionality in these circumstances, the ET was right to consider first whether there was any alternative. It considered both whether the claim might be heard by a differently constituted ET and whether it might make some difference if only some parts of the case were struck out, leaving other parts to be determined. Having thus contemplated the possible alternative options, however, the ET concluded that there was no means of retrieving the situation; that finding again being informed by the ET's conclusion that the Claimant's conduct had given rise to a fundamental problem in terms of trust. Any new ET would be aware of the reasons why the first hearing had been aborted and there was nothing that could be done to

avoid the question raised regarding the Claimant's credit continuing to be an issue in the proceedings.

48. Having correctly identified and addressed each of the relevant questions in these circumstances, this ET reached entirely permissible conclusions that led it to determine that the Claimant's case must be struck out. It did so, having undertaken a fair procedure to establish the facts and from a perspective that meant it was best placed to form the assessment as to the significance of the Claimant's conduct for the fair disposal of her claim. Having reached the conclusion it did, as to the irretrievable loss of trust arising from the Claimant's conduct, the ET correctly held that there was no alternative to striking out the claim. Accordingly, the appeal against its Judgment in that regard must be dismissed.