Neutral Citation Number: [2022] EAT 47

Case No: EA-2021-000192-OO

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 March 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MR N MENDY	**Appellant**
- and -	
MOTOROLA SOLUTIONS UK LIMITED	**First Respondent**
RONAN DANIEL MICHEL DESPRES	**Second Respondent**
UWE NISKE	**Third Respondent**
CAROLE LAWRENCE	**Fourth Respondent**
FERGUS MAYNE	**Fifth Respondent**
~~**MOTOROLA SOLUTIONS INC**~~	~~**Sixth Respondent**~~
CLIVE HALLSWORTH	**Seventh Respondent**
MONIKA TOWSNED	**Eighth Respondent**
MARTIN WOODFORD	**Nineth Respondent**

- -
- -

Title of proceedings corrected under EAT Rule 33 on 13 May 2022

Ming-Yee Shiu of counsel (instructed pro bono) for the **Appellant**
Lance Harris of counsel (instructed by Osborne Clarke) for the **Respondent**

Hearing date: 9 March 2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE *– striking out of claim*

In his lengthy grounds of complaint, the claimant had made a claim of indirect race discrimination. At a closed, private preliminary hearing, the ET had made a case management order that had the effect of removing any complaint of indirect discrimination from the face of the claim before it. The effect of that ruling was thus to determine that the claimant's claim of indirect discrimination could not proceed and, absent a successful application to amend, brought any such claim in the proceedings to an end. Whatever the ET's subjective intention (the Employment Judge had subsequently stated that the pleaded claim of indirect discrimination had been overlooked), that amounted to a final determination of the claimant's claim of indirect discrimination and, as a determination on the pleadings without any consideration of the evidence, it was tantamount to a striking out of the claim and thus amounted to a judgment. As such, the ET's subsequent purported revocation of its decision under rule 29 **ET Rules** was of no effect. The decision had, however, been made at a private preliminary hearing, without giving the claimant proper opportunity to make representations on the possible striking out of his claim, and thus amounted to an error of law.

Allowing the appeal; the relevant part of the ET's order would be set aside.

The Honourable Mrs Justice Eady DBE:

Introduction

1. Can a claim be struck out inadvertently? This appeal raises the question whether an Employment Tribunal's direction, given by way of case management order, was properly to be understood to amount to the striking out of a claim, such as to give rise to a judgment on that part of the case before it.

2. In giving this judgment, I refer to the parties as the claimant and the respondents, as below. This is the hearing of the claimant's appeal against the decision of the London Central Employment Tribunal (Employment Judge Hodgson, sitting alone at a closed preliminary hearing on 20 November 2020; "the ET"). By its case management order, sent to the parties on 28 November 2020, the ET directed that, "*there being no discernible claim of indirect discrimination at present*", the claimant would need to make an application to amend should he seek to pursue such an allegation. Following a hearing on 18 November 2021, under rule 3(10) **Employment Appeal Tribunal Rules 1993** (as amended) ("the EAT Rules"), the claimant was given permission to appeal on the bases that: (i) the ET was in error in considering there was no claim of indirect discrimination within the existing grounds of claim, and (ii) the order amounted to a striking out of the claim, without the necessary safeguards having been afforded to the claimant.

3. By a later decision, sent to the parties on 8 December 2021, the ET determined that its earlier order regarding any allegation of indirect discrimination was revoked. For the claimant it is said that this decision is of no effect and the appeal should proceed. The respondents contend, however, that there is no longer any proper basis for proceeding with the appeal and it should be dismissed. It otherwise does not seek to contest the appeal.

4. The claimant has acted in person in his ET litigation but has had the benefit of representation by counsel, acting pro bono, both at the rule 3(10) hearing and today (albeit Ms Shiu did not represent the claimant at the rule 3(10) hearing). Mr Harris has acted for the respondents throughout both the ET and the EAT proceedings.

The Relevant Background

5. The claimant was employed by the first respondent from 16 July 2018 until his summary dismissal on 5 May 2020. The claimant filed four ET claims relating to his employment with the first respondent, which, by order dated 16 June 2020, were consolidated to be heard together. At a preliminary hearing on 24 June 2020, the claimant was directed to file and serve, in a single document, the full particulars of all his claims (the ET's order in this regard was dated 25 June 2020). The claimant did this in the form of a consolidated grounds of complaint ("the grounds of complaint"), with seven appendices. Relevantly, at paragraph 123 of the grounds of complaint, the claimant stated:

> "123) The First and Sixth Respondents subjected the Claimant to the following prohibited conduct;
>
> …
>
> 123.2 Indirect discrimination because of his race and/or colour, and/or nationality, and/or ethnic or national origins contrary to Equality Act 2010 s19(1). The First Respondent applied the provisions, criteria, or practices (PCP's) *[sic]* particularised at Appendix 3 to the Claimant. The said PCPs did put or would put persons sharing the Claimant's race, colour, nationality, ethnic or national origins at a particular disadvantage when compared with persons without those characteristics. The Claimant himself was placed at that disadvantage. The PCPs were not a proportionate means of achieving a legitimate aim."

Appendix 3 was entitled "Schedule of PCP's *[sic]* (S19 EQUALITY ACT 2010)".

6. By order dated 17 September 2020, the ET directed that the grounds of complaint should stand as the claim in the proceedings.

7. A private case management preliminary hearing then took place before EJ Hodgson (who had not previously been involved in the proceedings) on 20 November 2020. In advance of that hearing, I am told that the claimant provided the ET with a number of documents, which included an ET1 claim form, the grounds of complaint, with appendices, and the earlier case management orders. Following that hearing, on 28 November 2020, an order was sent out to the parties ("the November 2020 order"). At schedule A, this document provided "*a record of the discussion, complaints and issues arising in the case*"; schedule B set out the orders and directions that had been made.

8. At paragraph 2.9 schedule A, it was recorded:

> "There is a reference in the claim form to indirect discrimination. There is no discernible claim of indirect discrimination. It appears that the provisions, criteria or practices (PCPs) relied on appear to be allegations of direct discrimination. I can discern no claim of indirect discrimination. Should the claimant wish to bring a claim of indirect discrimination he must apply to amend and he should set out the essential elements of such a claim."

9. At paragraph 3.5 schedule B, the ET made the following order:

> "Indirect discrimination
>
> 3.5 There being no discernible claim of indirect discrimination before the tribunal at present, if the claimant wishes to allege indirect discrimination he should serve an application to amend. That application should be served on or before 7 December 2020 and should address the following:
>
> 3.5.1 the provision, criterion or practice relied on or if more than one, each of them;
>
> 3.5.2 the disadvantage experienced by the group with the particular characteristic on which the claimant relies in relation to each provision, criterion or practice relied on; and
>
> 3.5.3 whether it is alleged the claimant was put at that disadvantage for the same reason as the relevant group."

10. The claimant lodged an appeal against the November 2020 order. On the initial, on-paper, consideration, this was considered to identify no reasonably arguable error of law. On the subsequent oral hearing (on 18 November 2021) under rule 3(10) **EAT Rules**, however, the

claimant had the benefit of representation under ELAAS and two points of challenge were identified that were permitted to proceed as amended grounds of appeal:

> "Ground 1 – procedural irregularity
>
> 2. The ET's direction that "there being no discernible claim of indirect discrimination … if the claimant wishes to allege indirect discrimination he should serve an application to amend" was effectively a strike out of part of the [claimant's] claim … The direction was the result of a procedural irregularity because the Preliminary Hearing was not in public (r.56 ET Rules) and the [claimant] had not been given a reasonable opportunity to make representations either in writing or at his request a hearing (r.37(2) ET Rules). This amounted to an error of law.
>
> Ground 2 – misconstruction of the claim form
>
> 3. Further or alternatively, the ET misconstrued the [claimant's] claim form. On a proper construction of the … claim form, there was a claim for indirect discrimination. Whether the PCPs alleged were in fact PCPs was an evidential issue. The ET's conclusion that there was "no discernible claim of indirect discrimination" was wrong in law. These errors of approach infected the ET's direction that the [claimant] be required to serve an application to amend if he wished to allege indirect discrimination."

The references to the "**ET Rules**" are to the rules set down in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

11. On 24 November 2021, EJ Hodgson, having received notice of the order made following the rule 3(10) hearing, sent a letter to the parties in the following terms:

> "On reading the notice EJ Hodgson has noted the reference to paragraph 123.2 of the amended particulars of claim. On considering the order of 20 November 2020 and the notes of the hearing, it would appear that paragraph 123.2 was not brought to the attention of EJ Hodgson and in the circumstances he is considering revoking the order 3.5 from 20 November 2020.
>
> The parties must provide any written comments, submissions and any application to vary by 16:00, 6 December 2021."

12. On 29 November 2021, the claimant responded to that letter, expressing surprise and asking for an explanation for EJ Hodgson's approach.

13. On 1 December 2021, EJ Hodgson sent a further letter to the parties, not responding to the claimant's queries but requesting a response to his earlier letter from the respondents.

14. On 6 December 2021, the claimant sent written submissions to EJ Hodgson, seeking to resist the proposed revocation of the November 2020 order, indicating that he wanted the EAT hearing to proceed. On the same day (about two minutes after the claimant's email), the respondents also provided written submissions, resisting any variation of paragraph 3.5 of schedule B of the November 2020 order, albeit stating that it was the respondents' recollection that paragraph 123.2 of the grounds of complaint had been referred to at the earlier hearing.

15. On 8 December 2021, EJ Hodgson's further decision in this matter, revoking paragraph 3.5 schedule B of the November 2020 order, was sent out to the parties. The written reasons provided for that decision explained as follows:

> "3. The case management hearing [on 20 November 2020] proceeded on the assumption there was no expressly pleaded indirect discrimination, and no discernible claim, …
>
> 4. As far as I am aware, there was no application to vary my order …, no application for reconsideration, and no subsequent application for amendment.
>
> 5. On 22 November 2021, I received notification from the EAT that there had been a rule 3(10) hearing and the question of whether there was an indirect discrimination claim that should proceed. The covering letter sought clarification as to whether there had been any review of the decision.
>
> 6. I was concerned to note that within the order, there was reference to a specific paragraph in the grounds of claim as follows:
>
> "It is arguable that the Judge erred in considering that there was no discernible indirect discrimination claim given the terms of para 123.2 of the grounds of claim."
>
> …
>
> 10. I have reviewed my case management note, my notes of the hearing, and the representations made by all parties.
>
> 11. There was a considerable quantity of material before me at the hearing. Further, given all the matters that were covered, it is clear that the question of indirect discrimination was not considered in any depth.

> 12. Having reviewed the documentation, I accept that there is reference in the particulars of claim at paragraph 123.2 to an indirect discrimination claim.
>
> 13. Having regard to all the information, I am satisfied that paragraph 123.2 was not drawn to my attention during the hearing and it was not taken into account when considering my decision. It was overlooked. If my attention had been drawn to it, I would have referred to it and dealt with it expressly.
>
> 14. No claim can be struck out at a private case management hearing. Having had the paragraph drawn to my attention I am not satisfied, absent further representation and consideration, that it can be said the indirect discrimination claim has not been pleaded.
>
> 15. It is possible to vary or revoke any case management order at any time, pursuant to rule 29 Employment Tribunals Rules of Procedure 2013, provided it is in the interests of justice to do so. Frequently, it may be necessary to identify a change of circumstances. Where there has been a fundamental error, in the sense that documentation has not been considered which was available, whether that is the fault of the judge or of the parties, it may be appropriate to treat that as a relevant change of circumstances, and in any event, to revisit the decision, as it is in the interest of justice to do so.
>
> 16. The decision was made on inadequate information. Now the matter has come to my attention, I consider that it is in the interest of justice to revoke the decision.
>
> 17. I have considered whether I should not exercise my discretion, given that there is an appeal. I have considered the practice direction (Employment Appeal Tribunal Procedure) 2018 as updated September 2019. I do not believe there is anything in principle which would prevent a variation which, in the circumstances, is in the interests of justice. …
>
> 18. As this order was intended as a case management order, and not a judgment, it seems to me that any revocation of the order initially falls to be considered under rule 29. Having regard to the overriding objective, and given specific wording referring to indirect discrimination that has now come to my attention, I am satisfied that the order should be revoked. …
>
> 19. I am conscious that it may be argued that the effect of the order was to strike out a claim. If it is maintained by the parties that this order was a judgment and not a case management order, I may reconsider the decision at any time pursuant to rule 70 Employment Tribunal Rules of Procedure 2013. If the parties consider that a reconsideration is necessary I will consider the matter further. …"

16. I pause at this stage to note that Ms Shiu has informed me that the claimant did in fact make an application to amend his claim to add a complaint of indirect discrimination but this was refused (that decision being taken by a different Employment Judge).

17. Returning to the history, on 29 December 2021, the claimant requested that the decision sent out on 8 December 2021 be revoked as (inter alia) he wished his appeal to proceed. On 5 January 2022, the respondents wrote to the ET confirming that their position was that the decision of 8 December 2021 should stand; no objection was now taken to the revocation of order 3.5 from the November 2020 order.

18. By a decision sent to the parties on 27 January 2022, EJ Hodgson refused the claimant's request for reconsideration. In explaining his reasons for this refusal, EJ Hodgson referred to the claimant's earlier representations of 6 December 2021, stating:

> "7. … The representations dated 6 December 2021 were sent by the claimant late and not until 8 December 2021; they were not considered. I have considered them now. They do not affect the reasons for the decision of 8 December 2021."

19. Further observing that "*it may have been better not to exercise my discretion and revoke order 3.5*", EJ Hodgson nevertheless considered that, as the respondents now accepted, that order 3.5 should be revoked:

> "12. … I cannot find it is in the interests of justice to reinstate a decision which is objected to by the claimant, not pursued by the respondent, and which I consider to be wrong …"

20. There has been no appeal against the ET's decision of 8 December 2021. The claimant's claims have been set down for a full merits hearing in April 2022; the list of issues for that hearing does not include any complaint of indirect discrimination.

The Parties' Positions on Appeal

21. For the claimant, it is contended that the decision recorded at paragraph 3.5 schedule B of the November 2020 order amounted to a strike out of the claimant's claim of indirect discrimination. Indeed it was apparent that EJ Hodgson had carried out an evaluation of the merits of the claim. That was demonstrated from the statement at paragraph 2.9

schedule A that "*the provisions, criteria or practices (PCPs) relied on appear to be allegations of direct discrimination*"; EJ Hodgson had apparently formed a view as to the merit of the pleaded claim and the effect of his order was to determine the complaint of indirect discrimination. That was a decision that was not capable of revocation pursuant to rule 29 of the **ET Rules** and EJ Hodgson's purported revocation of his order, as recorded in his decision sent out on 8 December 2021, had no effect. There had been no reconsideration pursuant to rule 70 of the **ET Rules** and thus paragraph 3.5 still stood and there remained substance in the appeal. That said, EJ Hodgson had acknowledged a "*clear and obvious error*" in relation to paragraph 3.5 of the November 2020 order and the respondents had also indicated that the matters that had been highlighted by the amended grounds of appeal were "*no longer in dispute*" and were not resisting the appeal.

22. For the respondents it was noted that the amended grounds of appeal were solely concerned with the correctness of paragraph 3.5 schedule B of the November 2020 order. Following EJ Hodgson's decision to revoke that paragraph, the appeal must fall away as it no longer had any substance. Allowing that, if paragraph 3.5 amounted to a strike out of part of the claim before the ET, the revocation of 8 December 2021 could have no effect, that was not the correct characterisation of the November 2020 order: EJ Hodgson was doing no more than seeking to clarify the issues (a commonplace case management step in ET proceedings); he was not purporting to strike out any part of the claim and, correctly understood, any claim made at paragraph 123.2 of the grounds of complaint still stood.

The Legal Framework

23. The rules governing proceedings before the ET are contained within schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules").

24. By rule 29 it is provided:

> "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

25. Rule 1(3)(a) explains that a case management order is:

> "an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment;"

26. An ET judgment is defined by rule 1(3)(b), as (so far as relevant):

> "a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—
>
> (i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or
>
> (ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);
>
> …"

27. By rule 37 **ET Rules**, the power to strike out a claim (or response) is provided, 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—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;

> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

28. At rule 37(2), however, it is made clear that:

> "(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."

29. Moreover, by rule 56, read together with rule 53(1)(c), it is made clear that the consideration of whether a claim (or response) should be struck out under rule 37 shall take place in public (not at a private, or closed, preliminary hearing).

30. Where an ET has struck out a claim, or part of a claim, that will amount to a final determination or disposal of that matter such as to mean that it has given a judgment in that regard (see the definition at rule 3(1)(b)). As that will amount to a judgment, and not a case management order, the ET will not be able to subsequently exercise its powers under rule 29 to vary, suspend or set aside its earlier decision to strike out a claim (or part) even if it considers that is necessary in the interests of justice. By rule 70, however, it is provided that an ET:

> "… may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again."

31. In the present case, neither party had applied for the ET to reconsider the November 2020 order and the EAT had not requested that it do so. If, however, that order – at least insofar as it related to any claim of indirect discrimination – amounted to a judgment by which the ET had struck out part of the claimant's claim, it was open to the ET, acting on its own initiative, to reconsider that decision if it was satisfied that it was necessary in the interests of justice to do so. That course, however, was not adopted in this case.

32. More generally, in interpreting any of the powers afforded under the **ET Rules**, effect should be given to the overriding objective, as set out at rule 2, as follows:

> "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."

Discussion and Conclusions

33. The questions that I am required to answer can be stated as follows:

(1) As at the ET hearing on 20 November 2020, had the claimant made a claim of indirect discrimination?

(2) If so, was that claim struck out as a result of the ET's November 2020 order?

34. The answer to the first question can be taken relatively shortly: on the face of the grounds of complaint, at paragraph 123.2 the claimant had made a claim of indirect race discrimination. As EJ Hodgson acknowledged in the decision promulgated on 8 December 2021, absent any representation or consideration to the contrary (and none has been identified either in the ET proceedings or before me on the appeal), it could not be said that a claim of indirect discrimination had not been pleaded. Thus, until determined or otherwise disposed of, the proceedings before the ET included a claim made by the claimant of indirect discrimination.

35. In addressing this point on 8 December 2021, EJ Hodgson recorded his belief that he had not been referred to paragraph 123.2 at the hearing on 20 November 2020; it was "*overlooked*". The claimant says that was not the case: the parties had referred to paragraph 123.2 at the hearing on 20 November 2020 (as the respondents had

acknowledged in their representations of 6 December 2021) and it was apparent that EJ Hodgson had reached a view as to the merit of the claim there made, as demonstrated by his observation (at paragraph 2.9 schedule A of the November 2020 order) that "*the provisions, criteria or practices (PCPs) relied on appear to be allegations of direct discrimination*".

36. There is inevitably a difficulty for a judge in seeking to recall the precise detail of a hearing that took place some 12 months earlier. In the present case, it is also apparent that there was a great deal of material before the ET at the hearing on 20 November 2020, including a document setting out the grounds of complaint over some 64 pages (including appendices); an ET might be forgiven for missing one of the claims made amongst the mass of paperwork thus presented. That said, as EJ Hodgson subsequently acknowledged, it was simply wrong to say that there was "*no discernible claim of indirect discrimination*".

37. In any event, it is clear that, at the hearing on 20 November 2020, some reference must, at least, have been made to appendix 3 of the grounds of complaint (the "*Schedule of PCP's [sic]*"), which apparently led EJ Hodgson to observe that these appeared to be allegations of direct (rather than indirect) discrimination. It was in that context that it was stated that if the claimant wanted to bring a claim of indirect discrimination he would need to apply to amend.

38. In so directing, I am prepared to accept that EJ Hodgson did not intend to strike out an extant claim in the proceedings before him. That, however, cannot be determinative of the second question I have to address: although informed by the procedural context, the meaning and effect of a judicial decision must necessarily be determined objectively. Thus, accepting (as I do) that the claimant's pleaded case included a claim of indirect

discrimination, what, objectively speaking, was the effect of the ET's ruling that there was "*no discernible claim of indirect discrimination before the tribunal at present*"?

39. Contrary to the respondents' submissions, it is clear that the effect of the November 2020 order was to remove any complaint of indirect discrimination from the face of the claim before the ET. This was not a case where the claim in issue was ambiguous and the ET's order was merely providing clarification of how the claimant had stated his case was being pursued (effectively recording a further particularisation of the claim made at the case management hearing); the ET was itself stating that it did not recognise that such a claim could be pursued on the basis of the pleaded case. The effect of the ET's ruling was thus to determine that the claimant's claim of indirect discrimination could not proceed and, absent a successful application to amend, that brought any such claim in the proceedings to an end. That, in my judgement, amounted to a final determination of the claim of indirect discrimination that the claimant had made in the ET proceedings at that stage. As a determination made on the pleadings, without any consideration of the evidence, it was tantamount to a striking out of the claim. Thus understood, it is apparent that the ET erred in its ruling at paragraph 3.5 schedule B of its November 2020 order. Whatever EJ Hodgson's subjective intention, the effect of that paragraph was to strike out the claim of indirect discrimination absent the procedural safeguards provided by rule 37(2) and at a private preliminary hearing, contrary to rule 56. Moreover, as this amounted to a determination of this part of the claimant's claim, the ET's decision was properly to be understood as a judgment, not merely a case management order, such that the subsequent revocation of paragraph 3.5 under rule 29 (per the ET's decision of 8 December 2021) could be of no effect.

40. In reaching this decision, I recognise that it is commonplace for ETs, carrying out their case management functions at a private preliminary hearing, to seek to clarify the claims that are being pursued and to draw up a list of issues to be determined at the full merits hearing in

order to decide those claims. In carrying out that task, an ET will, consistent with the overriding objective, seek to avoid unnecessary formality and adopt a flexible approach. At the same time, however, if the effect of that "clarification" is to strike out a claim that is properly before the ET, it would not be consistent with the need to deal with the case fairly and justly not to recognise that fact. In most cases, there will be little issue as to the claims pursued. Where, however, there is a need to clarify how the case is being put, the ET will need to exercise care in defining the claims before it. Just as a withdrawal of a claim cannot simply be inferred (see **Arvunescu v Quick Release (Automotive) Limited** UKEAT/1099/16), a failure to adequately particularise a claim does not mean that it is not being pursued. In such cases, it would be open to an ET to direct that further particulars be given or, where it is considered that the claim as pleaded could have little, or no, reasonable prospect of success, to adopt the procedure laid down (under rules 39 or 37 of the **ET Rules** respectively) for the consideration of the making of a deposit order or for the striking out of the claim. At all stages, in undertaking its case management functions in this regard, the ET should be assisted by the parties and their representatives, consistent with their obligation to further the overriding objective.

41. In the present case, in attempting to clarify the claims before it, the ET unhappily fell into error, inadvertently striking out part of the claimant's pleaded case. The error might have been rectified by the ET's exercising its power of reconsideration under rule 70 but it was not a decision that could simply be revoked under rule 29.

Disposal

42. For the reasons provided, the claimant's appeal is allowed. As was common ground before me, the appropriate order on disposal in these circumstances is for me to set aside paragraph 3.5 schedule B of the November 2020 order.

43. The claimant requests, however, that I go further and make directions that will impact on the future conduct of the ET proceedings. Specifically, he asks that I direct that the ET carry out a case management hearing so as to determine the future progress of the case and, in so doing, that I make clear that EJ Hodgson should have no further involvement in the proceedings. As the respondents have observed, however, given that I have set aside the relevant part of the ET's order, this is not a case where I am remitting any matter to the ET; my function has come to an end with my order allowing the appeal and setting aside the impugned paragraph from the ET's November 2020 order. That being so, the steps that are to be taken, following from my determination of the appeal, must be for the ET. Equally, to the extent that the claimant seeks to make any application as to the future involvement of any Employment Judge, that is a matter for him to pursue in the ET proceedings; it is not an issue that is properly before me.