Neutral Citation Number: [2023] EAT 152

Case No: EA-2021-001295-JOJ
EA-2022-001400-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 November 2023

Before:

THE HONOURABLE MRS JUSTICE STACEY

- -

Between:

MISS S BHARAJ

Claimant

- and -

(1) SANTANDER UK PLC

(2) MRS ALISON SIMMONS

(3) MR DEAN ROBINSON

Respondents

- -

- -

MR CHRISTOPHER MILSOM (instructed by **Keystone Law**) for the **Claimant**
MR PAUL NICHOLLS KC (instructed by **EMW LLP**) for the **Respondents**

Hearing date: 9 November 2023

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

There was no error in the EJ's decision to strike out the claimant's claims of whistleblowing, sex discrimination and sex harassment for non-compliance with a Tribunal order under rule 37(1)(c). Since a strike out is a terminating ruling, by common law and Art.6 the striking out of a claim or response must be proportionate. Proportionality principles circumscribe the scope of the ET's wide discretion in matters of case management. There will usually only be one proportionate response. If there has been a finding of unreasonable conduct or breach of tribunal order under rule 37 and if no less drastic measure would enable a fair trial to take place within the trial listing, the striking out of a claim or response will be proportionate, save in exceptional circumstances. The EJ's decision to strike out the claimant's claim was proportionate and there were no exceptional circumstances in this case. The appeal fails.

Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371, *Blockbuster Entertainment Ltd v James* [2006] IRLR 630; *Baber v The Royal Bank of Scotland* UKEAT 0301/15/JOJ & UKEAT0302/15/JOJ *and Emuemukoro v Croma Vigilant (Scotland) Ltd & Ors* [2022] ICR 327 followed.

When considering the exercise of the ET's powers in a reconsideration application under rule 70, cases concerning other jurisdictions with different procedural rules such as *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16 are of no assistance.

THE HONOURABLE MRS JUSTICE STACEY:

1. Miss Simran Bharaj appeals two decisions of Employment Judge Glennie sitting at the London Central Employment Tribunal in her claim against her former employer, Santander UK Plc, and two employees named as individual respondents, Mrs Alison Simmons and Mr Dean Robinson. I shall continue to refer to the parties as they were before the tribunal.

2. In the first appeal, she challenges the decision to strike out her claim pursuant to rule 37(1)(c) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the rules") for failure to comply with an order of the tribunal, which was sent to the parties on 2 March 2021 ("the strike out decision"). In the second appeal, she challenges the decision refusing her reconsideration application to the tribunal which was sent to the parties on 8 July 2022 ("the reconsideration decision").

3. The parties agreed that the fate of the appeal against the reconsideration decision would be decided by the outcome of the appeal in the strike out decision. If the appeal against the strike out decision fails, so too will the reconsideration decision appeal. If the appeal against the strike out decision succeeds, there will be no decision left to reconsider and the reconsideration appeal falls away. Whilst it is not therefore necessary to decide the reconsideration appeal, as the issue had been raised and fully ventilated, the parties suggested it would be helpful for this tribunal to consider the point anyway. It raises the narrow point of whether the employment judge erred in applying the judgment of the Supreme Court (*AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC

16 at [32]) which addressed the exercise of the High Court's power to reconsider orders governed by the civil procedure rules (CPR).

4. I am grateful to both counsel for their helpful oral and written submissions and their evident work and to all those who have worked behind the scenes.

THE BACKGROUND FACTS AND HISTORY OF PROCEEDINGS

5. The claimant was employed by the first respondent bank as a senior manager, policy implementation, with a role to identify gaps in financial crime processes and to develop policies and other solutions for filling any identified gaps. She commenced her role on 26 June 2017 and resigned by giving notice on the last day of her extended probationary period on 8 January 2018. She was then placed on garden leave until the expiry of her notice period on 2 April 2018 and on 16 April 2018, she instituted Employment Tribunal proceedings.

6. In final form, her claims were for public interest disclosure (whistleblowing) detriment and automatically unfair constructive dismissal contrary to sections 47B and 103A of the Employment Rights Act 1996 (ERA 1996); detriment and dismissal because of victimisation contrary to section 27 Equality Act 2010 (EqA2010), direct discrimination because of sex contrary to section 13 and harassment related to sex contrary to section 26 EqA 2010.

7. The allegations were wide-ranging. In support of her whistleblowing claim the claimant relied on nine protected interest disclosures, two of which were in written form and seven oral. She alleged 25 whistleblowing and/or victimisation detriments. There were ten allegations with 15 sub-allegations of direct sex discrimination and/or harassment. Three forms of harassment were

relied on in allegations principally focused on the third respondent: unwanted conduct with the purpose or effect of violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment (contrary to s.26(1)(a) EqA); conduct of a sexual nature (contrary to s.26(1)(b)); and the so-called anti-retaliatory provisions, less favourable treatment because of her rejection of the third respondent's conduct of a sexual nature (contrary to s.26(1)(c)). A list of issues extending to twelve pages had been agreed between the parties.

8. All the claims were disputed. Most of the primary facts on which the complaints were based were challenged. The respondents' case was that the conversations alleged did not occur, or not as recounted by the claimant and the documents relied on were said not to support the claimant's assertions. The respondents dispute that the claimant had made any qualifying or protected interest disclosures in the whistleblowing claim and denied knowledge or suspicion of any protected acts in the victimisation claim. Detriment and causation were also disputed in both the whistleblowing and all the EqA claims. Any less favourable or unfavourable treatment as might be found by a tribunal was said to be wholly unrelated to any protected disclosure, protected characteristic, victimisation or sex. The alleged harassment was said not to have occurred.

9. It was a factually complex case. The case has also had a complex procedural history. The preliminary hearing which resulted in the strike out decision took place on 4 and 5 January 2021 (four years after most of the events complained of), on what had been intended to be the first two days of a 20 day full merits hearing. It was the fourth time the case had been listed for a full hearing. Three

earlier full merit hearings had been postponed. There had been six previous preliminary hearings. There had been numerous written applications for case management orders involving extensive correspondence by the parties with the tribunal. The details and chronology are set out below and contained in the strike out decision, so are not repeated here.

10. Disclosure of documents was a particularly contentious issue. The respondent had successfully challenged the ambit of a specific discovery order made by Employment Judge Deol ("the Deol order") before this appeal tribunal in the judgment of Linden J on 15 October 2020. As the claimant relies on the history of that appeal in support of the appeal before me, it is necessary to set out a little of the background to that appeal. At a preliminary hearing on 28 May 2019 before Employment Judge Elliott, the tribunal had made a number of orders ("the Elliot order") in relation to 97 categories of document sought by the claimant, the details of which are not relevant for the purposes of this appeal. The claimant then challenged the respondent's compliance with the Elliot order and applied for a further order for specific discovery in relation to two matters. The application came before Employment Judge Deol on 14 October 2019. The Deol order required disclosure by the respondent of documents relating to the claimant's grievance and the investigation of her whistleblowing claim that were "relevant to the proceedings". The claimant did not believe that the respondent had complied with either the Elliott or the Deol order and did not accept the respondents' assertion that there were no more relevant documents beyond those that they had already disclosed.

11. In this Tribunal Linden J accepted the respondents' arguments, set aside the Deol order and approved a consent order that required the respondent to set out a statement about their searches and whether any documents found were relevant, supported by a statement of truth. The wording of the consent order was based on a precedent taken from the CPR, (r.31). The respondent duly provided the statement in the agreed format in which they stated that there were no relevant documents beyond those already disclosed that had been discovered. The claimant continued to remain concerned about disclosure and the contents of the bundle. To put it bluntly, she did not believe them.

12. Having provided that background we now turn to the preliminary hearing before EJ Glennie.

THE TRIBUNAL STRIKE OUT DECISION UNDER CHALLENGE

13. There were five applications before Employment Judge Glennie at the preliminary hearing ("the EJ Glennie preliminary hearing") on 4-5th January 2021 that resulted in the strike out decision. The respondents' strike out application was brought on two grounds: the unreasonable manner in which the proceedings had been conducted by the claimant (rule 37(1)(b)) and the claimant's failure to comply with the order of the tribunal (rule 37(1)(c)). There were also three applications brought by the claimant: the first was for an unless order to do with updates she sought to the bundle and index; the second was for an unless order for further directions requiring the respondent to confirm the attendance of its witnesses, and the third was for an order for the respondent to produce a timetable for the hearing. The fifth application before the Glennie preliminary hearing was for the relisting of the full merits hearing.

14. The claimant, who had been represented by experienced employment law counsel at all previous hearings under the direct public access scheme, was unrepresented at the Glennie preliminary hearing. The respondents were represented by Mr Nicholls KC, as they are today, and who has, appeared at every hearing in this case both before the Tribunal and the Appeal Tribunal. The decision was reserved and sent to the parties a few weeks later.

15. The employment judge first considered the respondents' application to strike out the claimant's claim for failure to comply with an order of the tribunal (rule 37(1)(c)). The order said not to have been complied with was made on 17 February 2020 by Employment Judge Davidson who had ordered the parties to exchange witness statements on 13 November 2020 ("the Davidson order") in advance of the full hearing listed to commence on 4 January 2021. The order had contained the following notice:

> "Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00
>
> Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84"

16. The date for exchange was extended by agreement between the parties to 15 December 2020, but witness statements were not in fact exchanged until 10am on 22 December following a further direction from the tribunal.

17. In a structured decision in accordance with rule 62(5), EJ Glennie set out the issues, explained the background and set out a very detailed procedural history of the case.

18. Witness statements had previously been ordered to be exchanged on 3 May 2019 by EJ Henderson at a preliminary hearing on 9 November 2018, when the full hearing had been listed for 24 June 2019. Exchange did not take place. On 14 October 2019 the full hearing was postponed and relisted for 17 February 2020 by EJ Deol who ordered witness statements to be exchanged a month beforehand, by 17 January 2020 and he made a number of other directions. All directions, other than for the exchange of witness statements, had been complied with by the claimant and the claimant had received the respondents' bundle of documents in December 2019 pursuant to EJ Deol's orders. However, the claimant refused to exchange her witness statement because of the continuing dispute she had with the respondents over the bundle and her scepticism about their compliance with the disclosure orders. The respondents therefore applied to the tribunal for an unless order to compel the claimant to exchange witness statements with them before the hearing scheduled for 17 February 2020. However their application was never dealt with because the claimant successfully applied to the tribunal to postpone the final hearing because of her ongoing dispute about disclosure. The full merits hearing would have had to be postponed in any event because of the respondents' appeal of the Deol order to this tribunal.

19. EJ Glennie found as a fact that the claimant's failure to exchange witness statements in January 2020 was because she was linking the production of her

witness statement to her request for further disclosure. On 17 February 2020, the day listed for the full merits hearing that had been postponed, Employment Judge Davidson conducted a preliminary hearing and made a further order for exchange of witness statements on 13 November 2020, in good time before the new hearing date listed for 4 January 2021, taking account of the Christmas break, which had the same 20 day time estimate as previously ("the Davidson order").

20. On 11 November 2020, in correspondence with the respondent, the claimant unequivocally agreed to exchange witness statements two days later at 4pm on 13 November in compliance with the Davidson order. Exchange did not take place however because the claimant told the respondents that she had computer problems that made it impossible. Her computer had crashed and taken her witness statement with it. She was also dealing with a number of personal issues at that time: the death of her sister and a consequent inquest, the ill-health of her mother and a number of her own problems, as well as the technical difficulties with her computer and the problems that all of us were experiencing with Covid at that time.

21. The respondents allowed her an extension of time and the claimant agreed to exchange statements on 22 November 2020. She confirmed that she had been able to rewrite and complete her statement. However shortly afterwards the claimant informed the respondents that there were further matters she wished to bottom out and explore in her witness statement and she again linked the exchange of witness statement with her ongoing concerns about documents and

the bundle and stated that she "did not foresee" exchange taking place on 23 November 2020.

22. In response, on 25 November 2020, the respondents applied to the tribunal for an unless order. Both parties had made a number of applications to the Tribunal in the preceding months. Unfortunately, none of the correspondence to the Tribunal from either party and none of their applications had been put before a judge since September 2020. The claimant had also sought to raise matters in letters to the regional employment judge ("REJ") which had also gone unanswered and not been placed before the REJ. The tribunal was under particular pressure at the time from the Covid restrictions, adapting to online hearings and the move away from paper-based files to enable remote working, against a background of the pre-existing backlog and volume of work and capacity issues.

23. The respondents did not agree to the claimant's requests about the bundle and disclosure and nor did they agree to the claimant serving a provisional statement reserving her right to serve a further statement when her concerns about the bundle and disclosure had been resolved to her satisfaction. On 14 December 2020, the respondent informed the claimant that if she did not exchange witness statements at 4pm the next day, 15 December 2020, they would apply to strike out her claim. She did not agree to do so but came back with two conditions prior to exchange that the respondent did not accept. Witness statements were not exchanged and the strike out application was duly made to the tribunal.

24. The parties' correspondence and their various applications to the tribunal were eventually referred to an Employment Judge on 21 December 2020. On the

same day, on Employment Judge Glennie's instruction, the parties were directed to exchange witness statements the next day, 22 December 2020. The parties complied. On 23 December 2020, the parties were informed that the case remained listed to commence on 4 January 2021. The respondents' reaction was to inform the tribunal that the case was not ready for hearing because of lack of sufficient working days to prepare because of the late service of the claimant's witness statement. The claimant agreed that the hearing could not proceed, but did not accept the respondents' reasons. Employment Judge Glennie directed that the witnesses could be stood down and that a preliminary hearing would take place on 4 and 5 January 2021, what would have been the first two days of the main hearing.

25. Having set out the full history of the proceedings in his strike out decision, Employment Judge Glennie found that the claimant had not complied with the tribunal order to exchange witness statements. The latest date on which she could have done so in compliance with the order, in accordance with the extensions offered by the respondents was 15 December 2020, five working days before exchange in fact took place on 22 December.

26. The employment judge considered all the applications before him and decided it was logical to hear and determine the respondents' strike out application under rule 37(1)(c) first. He then set out the rule and the applicable law. He correctly identified the lead reported case specific to strike out for non-compliance with an order as *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, [16] to [18], which he accurately summarised in paragraphs 39 to 42 of the strike out decision:

> "39. In paragraph 16 of its judgment [*Weir Valves*] the EAT stated that, where there was no breach of an order (for example, where unreasonable conduct alone was in issue), the crucial and decisive question will generally be whether a fair trial of the issues is still possible.
>
> 40. The EAT stated in paragraph 17 that, where breach of an order is relied upon, the guiding consideration is the overriding objective. I have reminded myself of the overriding objective, which is expressed in Rule 2 in the following terms:
>
> *'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 a way which is 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;*
>
> *(e) Saving expense.'*
>
> 41. The EAT then continued as follows:
>
> 'This [i.e. the overriding objective] requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.'"

27. Employment Judge Glennie then analysed and evaluated the facts and procedural history he had set out and applied the law to the circumstances he had found. He started by noting that the claim raised serious matters for both sides of protected interest disclosure, discrimination and sex harassment. He reminded himself that an Employment Tribunal will not lightly strike out complaints of this nature. Equally, it is important for them to be heard without

delay in accordance with the overriding objective. He noted that the hearing had already been postponed twice, but attributed no blame to either side for this. In fact it had been postponed three times, but nothing turns on that.

28. Applying the structured approach in *Weir Valves*, the judge firstly considered the magnitude of the default. He found it to be serious. Timely exchange of witness statements was necessary so as to allow for proper preparation by both sides which was fundamental to there being a fair trial of the issues. He found that given the Christmas holidays, exchange on 15 December was vital to retaining the hearing date. The hearing could not start on the date listed because the claimant had failed to exchange her witness statement. It made a real difference to the timetable for the case.

29. He carefully analysed the procedural history that he had set out in which the claimant had agreed to exchange and he found that she was unreasonable in her subsequent refusal to exchange having been in a position to do so on 15 December 2020. Her reasons for failing to do so were unsatisfactory. He said this:

> "51. It is evident that, when it came to the point of exchanging statements, the claimant had second thoughts about doing so. I accept that her reason for declining to exchange was her outstanding concern about documents and the bundle. I find that it was unreasonable for her to refuse to exchange for that reason. It is not open to a party to decide unilaterally not to comply with an order of the tribunal. There are other things that a party in such a position could properly do: for example, apply to the tribunal for an extension of time for exchanging and/or a postponement of the hearing, coupled with any other orders sought about documents; or exchange on the due date, addressing any problems with documents, page references, et cetera subsequently. On 14 December 2020 the claimant offered to exchange, but only subject to two conditions about documents being agreed. I find that it was unreasonable at that point to seek

> to impose these or any conditions, and that there was no reasonable alternative to an immediate exchange."

The responsibility for the breach of the order lay with the claimant. The effect of the failure had rendered a 20 day hearing ineffective and the earliest the case could be relisted was October 2021 which would have resulted in a nine month further delay.

30. He next considered if a fair trial on the listed date remained possible which he stated was:

> "an important factor, although not crucial and decisive as in a case where there has not been a breach of an order." [54]

He concluded, uncontroversially (both sides were agreed on that point if little else), that a fair hearing would not be possible in the original listing. He then considered whether a fair hearing would be possible in the future:

> "55. I have also considered whether a fair hearing will be possible in the future. I do not consider the test to be such that I have to definitively conclude that a fair hearing will be impossible. I find, however, that the prospect of a fair hearing is jeopardised by the case not being able to proceed in the current listing slot. There is already reason to be concerned about the passage of time since the events of June 2017 – April 2018. I find that there is a real risk that the passage of further time to October or December 2021 will have an adverse effect on the ability of witnesses to recall relevant events, and thus compromise the prospect of a fair hearing. "

31. He noted the fact that witness statements had now been exchanged and he considered if, as a result, there was a less drastic course of action open to him. Neither party had suggested lesser sanctions or measures that would obviate the problem caused by the claimant's failure to comply with the tribunal's order to exchange witness statements on 15 December 2020. He considered two possibilities of his own motion. The first was to dismiss the claim only as

against the individual named respondents which he rejected as it would not remove the allegations against them, and they would also still be alive in the regulatory context and could have Financial Conduct Authority ramifications.

> "56……As Mr Nicholls pointed out, however, taking this course would relieve them of the risk of being held liable, but would not remove the allegations or the fear of professional disciplinary consequences flowing from them. The evidential prejudice to the First Respondent arising from the passage of time would remain. "

32. The second idea he considered was starting the case later in the 20 day window. He concluded that the case could not be finished in less than 20 days – the listing had been accurate - and to go part-heard would be as undesirable as relisting. It would not be a solution:

> "56……..Inevitably that would result in the case going part-heard, which in my judgment is as undesirable as having to re-list it altogether, involving as it does finding dates when all concerned are available, and having a gap between the Tribunal hearing some of the evidence, and then hearing the rest and reaching its decision."

33. He very fairly discussed with the parties the fact that the tribunal had not responded to the correspondence until 21 December 2020, by which time it was too late to save the hearing. He concluded that he should not speculate about what might have happened if a judge had seen the correspondence sooner. He noted that there had been a warning attached to the Davidson order that failure to comply with an order might lead to the claim being struck out under rule 37, not to mention a £1,000 fine in the magistrates' court. He continued:

> "57…….The respondents had sought an unless order in relation to exchange of witness statements in January 2020. When they did so again on 25 November 2020, the claimant should have exchanged statements. With time so short before the hearing, further delay inevitably jeopardised the hearing and ran the risk of an application being made to strike out the claim.

> Furthermore, on 14 December 2020 the respondents warned the claimant that they would apply to strike out the claim if she did not exchange statements by 15 December.
>
> Essentially, the claimant took a decision not to exchange in accordance with the tribunal's order, which involved taking the risk that there would be an application to strike out the claim, and that such an application might succeed."

He continued at paragraph 59:

> "59. Ultimately, there is a discretion to be exercised when considering whether to strike out a claim. I find that the circumstances of the case are such that, although it is not something to be done lightly, I should strike out the claim under the jurisdiction to do so where the claimant has failed to comply with an order. It is not in the circumstances necessary for me to address the alternative ground of unreasonable conduct of the proceedings."

GROUNDS OF APPEAL AND APPELLANT'S SUBMISSIONS

34. At the sift stage His Honour Judge Beard permitted all grounds to proceed to a full hearing as being arguable. Mr Milsom very helpfully crystallised the somewhat discursive and overlapping grounds into three grounds and an overarching criticism.

35. The first ground was an error in the application of *Weir Valves*, the second was a failure to consider and apply *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 (CA), and the third ground was proportionality under Articles 6 and 10 European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA 1988).

36. The overarching criticism is that the employment judge failed to carry out the proper balancing and proportionality exercise having regard to all relevant

factors. Mr Milsom submitted that this case was concerned with the non-compliance of just one order for exchange of witness statements which had subsequently been complied with seven days later and the narrow purpose of the order had therefore been achieved before the strike out occurred. Although the employment judge found the listed hearing could not go ahead, he did not decide that a fair hearing in the future would be impossible, merely jeopardised. There had been no finding of deliberate or persistent disregard of required procedural steps and there had been no scandalous, unreasonable, or vexatious conduct and no finding had been made under the 37(1)(b) application.

37. He argued that there had been a failure to take account of a number of specific matters. Firstly, Covid and the problems of the Employment Tribunal at that time. Secondly, a failure to consider, if not determine, the claimant's applications before the Glennie preliminary hearing and the claimant's correspondence with the tribunal and attempts to obtain directions. She had written seven letters to the tribunal between 21 September and 18 December 2020 which had gone unanswered. Thirdly, the significance of a lack of a trial timetable had been overlooked. Fourthly there had been no account taken of criticism in judgments by both the Employment Tribunal and this tribunal of the respondents' "too narrow and overly technical approach to compliance with orders". Fifthly, the claimant's personal circumstances had not been considered. Sixthly insufficient regard was had to the fact that she was a litigant in person. Finally, the Judge had also failed to consider claimant's dispute about the bundle and disclosure.

38. The strike out order was a punitive sanction and it was wholly disproportionate to strike the case out. Proportionality is a binary matter, something is either proportionate or it is not. It was outwit the case law, the guidance in *Blockbuster*, *Weir Valves,* and the weight of much case law in this tribunal from successive presidents of the Employment Appeal Tribunal, permanent Employment Appeal Tribunal judges, visiting High Court and circuit judges and other tribunal judges. It was not open to the employment judge. Strike out was not to be done where, as here, a fair trial was not impossible, or there could be a lesser sanction.

39. On the reconsideration decision appeal, Mr Milsom's arguments were that *AIC* was a commercial dispute concerning the CPR which was neither helpful nor of direct relevance in employment tribunal proceedings. Reconsideration principles in the employment context had recently been considered by the Court of Appeal in *Mrs Lynn Phipps v Priory Education Services Ltd* [2023] EWCA Civ 652 which had emphasised the broad textured nature of the interests of justice test. *Phipps* had been heard just six months after *AIC* and the Court of Appeal was not referred to it. If it had been relevant in the employment sphere, the Court of Appeal would no doubt have dealt with it. The tribunal had mis-directed itself by considering *AIC* which had led them into error and caused them wrongly to refuse to reconsider the strike out decision.

THE RESPONDENTS' SUBMISSIONS

40. The respondents' submissions were that no errors of law had been identified, the tribunal had correctly applied the law, had had regard to rule 37(1)(c) and

the relevant case law. The decision to strike out the claim was well within the generous ambit of the tribunal's discretion.

41. Mr Nicholls submitted that the law the *Blockbuster* principles had been correctly applied and *Weir* appropriately followed. He also relied on *Emuemukoro v Croma Vigilant (Scotland) Ltd & Ors* [2022] ICR 327 which had upheld an Employment Tribunal strike out decision for unreasonable conduct in the proceedings in a rule 37(1)(b) application. The significance of that case was that a fair trial was not possible in the trial window even if a fair trial could have taken place at some point in the future.

42. On the reconsideration decision appeal, Mr Nicholls explained that he had intended to be helpful to the tribunal by referring it to *AIC* since he considered that it had affirmed and reinforced longstanding general principles applicable to reconsideration generally. It was always useful to have an up-to-date pronouncement from such a high authority as the Supreme Court to assist first-instance tribunals. It did not represent a change to the law. In any event, even if one disregarded the reference to *AIC* in the tribunal's decision, the employment judge had applied the correct principles.

THE LAW: STRIKE OUT

43. Rule 37(1)(c) provides that at any stage of the proceedings, either on its own motion or on the application of a party, the tribunal may strike out all or part of a claim, or a response, for non-compliance with any of the tribunal's rules or with an order of the tribunal.

44. The use of the verb "may" in the rule indicates a power and a discretion. A decision to strike out a claim or response involves the exercise of a case management power, as has frequently been stated. An often quoted example is that of Langstaff P in *Harris v Academies Enterprise Trust* [2015] ICR 617:

> "1. The exercise of the power to strike out involves a discretion. Where an employment judge exercises a discretion a successful appeal against his decision is likely to be rare. There is a wide ambit within which generous disagreement is possible in many matters of judgment, and this is undoubtedly the case in respect of the exercise of a discretion. As it was put in *Neary v Governing Body of St Albans Girls' School* [2010] ICR 473, para 49 by Smith LJ, there may be two correct answers, or at least two answers that are not so incorrect that they can be impugned on appeal.
>
> 2. ……..A discretion must be exercised judicially; that is, with due regard to reason, relevance, logic, and fairness. It will usually be only if the judge has misdirected himself on the law that he is to apply, plainly misapplied it, failed to take into account a factor that demonstrably he should have done, left out of account something he should not have, or reached a decision that is so outrageous in its defiance of logic that it can be described as perverse, that his decision may be overturned."

45. Where the exercise of a power which may result in a terminating ruling, such as a decision to strike out a claim or response, the exercise of the discretion must also be approached through the lens of the Court of Appeal authority of *Blockbuster Entertainment.*

> "5. This power [a reference to what is now the power to strike out for unreasonable conduct under rule 37(1)(b)] as the employment tribunal reminded itself, is a draconic (sic)[1] power not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has

[1] Draconic must be a typo for Draconian which has unfortunately not been corrected in the reported judgment. Draconic means dragon-like which is not usually associated with an order from a court or tribunal.

> made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge*[2000] 2 BCLC 167, *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371 but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."

46. As promised, Sedley LJ returned to the question of proportionality:

> "20. It is common ground that, in addition to fulfilling the requirements outlined in paragraph 5 above, striking out must be a proportionate measure."

He then explained how to approach proportionality in a strike out application:

> "21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re *Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact if it is a fact that the tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

47. The relevant paragraphs in *Weir Valves* in the judgment of HHJ Richardson are worth setting out in full:

> "13. What are the principles on which the Employment Tribunal should act in deciding whether to strike out in a case such as this, where there has been a breach of a direction?
> 14. Where the unreasonable conduct which the Employment Tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible: De Keyser Ltd v Wilson [2001] IRLR 324 , at paragraphs 24 to 25 applying Logicrose Ltd v Southend United Football Club Ltd (Times, 5 March 1998) and Arrow Nominees Inc v Blackledge [2000] 2 Butterworths Company Law Cases, 167 . De Keyser Ltd v Wilson was recently followed and applied in Bolch v Chipman [2003] EAT 19 May, a decision which has been starred and is likely to be reported: see pages 21–22.
> 15. Even if a fair trial as a whole is not possible, the question of remedy must still be considered so as to ensure that the effect of a debarral order does not exceed what is proportionate: see Bolch v Chipman at pages 23–25. For example, it may still be entirely just to allow a defaulting party to take some part in a question of compensation which he is liable to pay: see page 25.
> 16. Those principles apply where there is no disobedience to an order. What if there is a court order and there has been disobedience to it? This is an additional consideration. The principles which we have set out above do not apply in the same way. The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see De Keyser v Wilson at paragraph 25, Bolch v Chipman at page 22.
> 17. But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

48. In the unreported case of *Baber v The Royal Bank of Scotland* UKEAT 0301/15/JOJ & UKEAT0302/15/JOJ (EAT) Simler P (as she then was) the issue was considered in some depth in the specific context of an application under rule 37(1)(c).

> "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."

She had thus adopted the checklist in *Weir Valves*. She continued:

> "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."

49. Of the trio of cases listed by Sedley LJ at [5] of *Blockbuster* she set out the four stages identified by Burton P in *Arrow Nominees*:

> "(i) There must be a finding that the party is in default of some kind, falling within rule 37(1).
>
> (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.
>
> (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.
>
> (iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so."

And then directed herself by reference to [21] of *Blockbuster* that it is necessary to consider whether the sanction is a proportionate response in the 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.

50. A further relevant authority relied on by Mr Nicholls, is the judgment of Choudhury P in *Emuemukoro v Croma Vigilant (Scotland).*

> "26. If there are several possible responses to unreasonable conduct, and one of those responses is 'less drastic' than the others in achieving the end for which the strike out power exists, then that would probably be the only proportionate response and the others would not. There may be cases, which are likely to be rare, in which two or more possible responses are equal in terms of their efficacy in achieving the desired aim and equal in terms of any adverse consequences. However, in most cases there is likely to be only one proportionate response which would be the least drastic of the options available."

Applying the legal principle to the facts of the case before he noted the following:

> "28. It was a highly relevant factor, as confirmed by the Court of Appeal in *Blockbuster*, that the strike out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the respondent more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the respondent), then that leaves only the strike out. The tribunal did not err in considering the prejudice to the respondent; indeed, it was bound to take that into account in reaching its decision."

DISCUSSION AND ANALYSIS: STRIKE OUT

51. There was no challenge to the conclusion of the Employment Tribunal that the claimant had failed to comply with an order under rule 37(1)(c) and the first pre-condition identified in *Blockbuster* and *Arrow Nominees* was satisfied. Nor was there any doubt that the Employment Tribunal had made relevant findings which it was entitled to make. Findings of fact are for a first-instance tribunal, not the Appeal Tribunal, which by statute can only consider errors of law (see section 21(1) of the Employment Tribunals Act 1996).

52. It also correctly acknowledged that *Weir Valves* was the lead reported case specific to rule 37(1)(c) as the Employment Tribunal correctly identified. *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672; [2021] IRLR 1016 is a helpful reminder that where an employment tribunal has correctly stated the law, an appellate court should be slow to conclude that it has not applied those principles unless it is clear from the language used that a different principle has been applied to the facts found (Popplewell LJ [58]). I shall return to Mr Milsom's submission that there was a slight misrepresentation of the *Weir Valves* principles in the tribunal's decision in a moment.

53. The tribunal found that the default was serious, that if the hearing date was to be retained it was vital that statements be exchanged on 15 December. The Tribunal found that the reason for the claimant's default was unsatisfactory: she was ready to exchange but delayed, in order to use exchange as leverage in her dispute about the bundle and about disclosure, knowing it would impact on the ability of the case to go ahead as listed. She had also been warned about the risk of strike out by non-compliance with orders on a number of times and the EJ Davidson order she was in breach of carried a penal notice.

54. In fact she was on notice from the standard notes that accompanied most, although not all, of the previous orders that non-compliance carried with it the risk of strike out. She also knew from the respondents' applications for unless orders made in January 2020 and November 2020 that they were seeking to have her claim struck out for non-compliance. Finally, she was given 24 hours' notice of the strike out application on 14 December 2020 which gave her yet

another opportunity to reconsider before the deadline expired the following day. In short her statement was ready, but she deliberately chose not to exchange it.

55. The Employment Tribunal reminded itself of the draconian nature of a strike order in the sense of it being very severe or strict and if a fair trial is still possible is only to be exercised in exceptional circumstances. The employment judge concluded that a fair trial was not possible within the trial window, which was the correct question, not whether a fair trial would ever be possible, at some unidentified date in the future (see *Emuemukoro)*.

56. The Employment Judge then considered whether even though a fair trial within the trial window was unachievable, if a strike out was a proportionate sanction or whether there may be a lesser sanction that could be imposed. No suggestions were made by the parties but he diligently tried to identify possibilities for himself. He considered alternatives and concluded that strike out was the only proportionate sanction.

Ground 1

57. I can now turn to the grounds of appeal. I do not consider EJ Glennie to have misstated or mis-summarised *Weir Valves* at paragraph 54 of the decision when he said that the question of whether a fair hearing remains possible is an important, although not a crucial and decisive factor, unlike in a case where there has not been breach of an order. That is what *Weir Valves* says when one reads paragraphs 14 and 16 together. Where, as here a wilful breach of an order has occurred, the tribunal must be able to impose a sanction. It does not follow that the sanction will be a striking out of the claim or response, but exceptionally, and only if it is proportionate, it might be.

58. But in any event, the employment judge found that a fair trial on the dates listed was not possible because of the claimant's default, so the question does not arise on the facts of this case. The employment judge did not rely on his self-direction because it was not relevant given the facts that he had found. He then precisely followed the guidance of *Arrow Nominees* to consider if a lesser sanction could be imposed even though a fair trial was impossible within the trial window. Ground 1is dismissed.

Grounds 2 and 3

59. The allegation of failure to consider and apply *Blockbuster* and proportionality and to have regard to Articles 6 and 10 are best looked at together. The criticism is of relevant matters it is said that the employment judge failed to take into account, not that there were irrelevant matters that it is said that the employment judge did take into account.

60. Taking each of the matters listed at [37] above:

    i.) Contrary to the submissions made, the employment judge expressly acknowledged the stress on the Employment Tribunal arising from Covid which affected its ability to deal with correspondence from the parties (see paragraph 20). In other respects Covid was not relevant. The problem that the Covid restrictions created for the claimant of being away from home and staying with her mother in a tier 3 area when her computer crashed were not relevant because no criticism was made of the claimant over the time it took to repair her computer and rewrite her statement. She had succeeded in writing

or rewriting her statement by 22 November in spite of Covid. The problem was that she had chosen not to exchange it.

The fact that the Employment Tribunal building was closed because of Covid from mid December 2020 into the new year was also immaterial since the employment judge told the parties on 23 December 2020 that the case remained listed. The closure of Victory House would therefore not have stopped the hearing. An alternative venue would have been found if a fully remote hearing was not appropriate as was explained to the parties in correspondence from the Tribunal. The employment judge had taken tremendous trouble to try to keep the case on track and preserve the hearing and he continued to deal with the matters over the Christmas period, even setting up a separate Skype account when the facilities at the tribunal were not available, all totally in compliance with the President of the Employment Tribunal's orders at the time. He ensured that there were proper channels of communication even when Victory House was out of action. His diligence in very challenging circumstances at that time is noted.

ii.) The decision to deal with the respondents' strike out application before the claimant's applications for case management orders at the hearing on 4 January was a perfectly proper and sensible case management decision. An employment judge has a very wide margin of discretion in the exercise of their case management power to decide the order in which they will deal with a number of different

applications before them. It was logical to deal with the respondents' application first and made obvious sense to decide the only application that could result in a terminating ruling. It did not prohibit the claimant from raising her concerns about the respondents' compliance with orders in the assessment of the respondent's application.

iii.) Thirdly, the fact that the claimant's applications had not been dealt with before 4 January was also not relevant to the respondents' applications to strike out for the reasons explained under the bundle and disclosure dispute headings below. Nor was it an error of law to judge the case on the actual circumstances instead of an imaginary counterfactual basis.

iv.) I do not find that the lack of a trial timetable was a material factor that the tribunal should have taken into account. The allegations were very wide-ranging and the extent of the factual dispute between the parties was large. The Employment Tribunal judge did not need a trial timetable to make an evaluation that the hearing would be likely to take the four weeks it had been allotted and that additional time would be needed for preparation in light of the late exchange of statements shortly before the Christmas and new year public holidays. The claimant's statement was 35 or 45 pages long. The EJ did not need a trial timetable to conclude that the case could not be completed in the listed period.

v.) It is correct that Linden J in this tribunal criticised the respondents for taking "a too narrow and overly technical approach" to compliance with some orders, but he concluded that the orders had been complied with the disclosure orders made by the tribunal. There had been no breaches. There is no logical connection between the manner of the respondents' compliance with the orders and the strike out of the claimant's claim for deliberate non-compliance with orders. It was therefore not a matter that Employment Judge Glennie was required to have taken into account.

vi.) The personal circumstances and other various difficulties that the claimant was experiencing at the time were expressly taken into account by the EJ, contrary to the claimant's submissions. But they were beside the point on the facts of this case. The claimant had successfully overcome the personal circumstances that were affecting her ability to prepare the litigation and she had succeeded in re-drafting her witness statement. She had then deliberately chosen not to exchange it in compliance with the order when she was in a position to do so. This was not a case of circumstances outside her control making compliance difficult or impossible.

vii.) It was not an error not to address the question of the claimant being a litigant in person at the hearing, when there was no suggestion that she was unable to effectively participate in the hearing or that she was under any misunderstanding or confusion. She was a

sophisticated user of the tribunal, well versed in the procedure as is evident from the correspondence.

viii.) It was said that the tribunal erred by not considering the claimant's outstanding bundle and disclosure disputes, or her offer to serve a draft statement with revisions to follow, or her offer to show the statement to the REJ for her eyes only. The argument was that the claimant could not complete her witness statement without receiving more disclosure from the respondent and she could not insert the correct page references if the bundle had not been finalised. Therefore, it was not unreasonable for her to delay exchange of her witness statement. The problem with the argument is that it ignores the fact that the disclosure dispute had been conclusively dealt with by the previous preliminary hearings and the Employment Appeal Tribunal. The respondents had complied with their disclosure obligations as ordered. Although the claimant did not believe the disclosure statement, it was a matter that could only be further explored, if at all, by the Employment Tribunal itself at the full merits hearing (see *Lonrho v Fayed (No 3)* [1993] 6 WLUK 97, Court of Appeal, Civil Division). This had been explained to her in one of the earlier preliminary hearings (see the Elliot order of 2019 at [53] and also the Davidson order of 17 February 2020) so this was known by the claimant.

As for as the bundle was concerned, the respondent had served it on the claimant over a year earlier and she had not identified any

specific shortcomings, only made general criticisms about its length and that it contained some repeat documents. It is sometimes the case that there some pages are added or removed from an agreed bundle after witness statements have been exchanged. There is no end of numbering systems that can be devised to accommodate late changes, and it is no impediment to timely, prior witness statement exchange.

The respondents were entitled to have the entirety of the claimant's witness statement at the same time as they served theirs. They were entitled not to agree to receiving it piecemeal or to allow the claimant to reserve the right to serve her statement without qualification. It is relevant background context that she had confirmed that her statement was complete but had had second thoughts about exchanging it.

61. The tribunal is criticised for not taking note of the fact that statements were exchanged on 22 December 2020. This point was argued that the purpose of the order – for witness statements to be exchanged - had been achieved and it was therefore wrong to strike out the claim. If the trial could have gone ahead on 4 January 2021 notwithstanding the late exchange, it would have been an excellent point. The difficulty for the claimant was the tribunal finding that the delay in exchange was fatal to the hearing date being retained. The purpose of the order was to ensure that witness statements were exchanged so that there could be timely preparation in advance of the hearing on the date that it had been listed. The purpose of the order was for exchange on the date specified in

the order, so the claimant's default meant there could not be a fair hearing on 4 January 2021.

62. Mr Milsom's next point was that the tribunal had imposed a punitive sanction and wrongly taken into account the fact that the claimant had been a difficult and time-consuming litigant for the purposes of the tribunal. I find that the tribunal did not fall into the trap of using its draconian power to punish the claimant for having been a difficult litigant. I am satisfied that Employment Judge Glennie took no regard of whether the claimant was a challenging litigant or not, but he was impeccably logical and dispassionate.

63. It is apparent therefore that the Employment Tribunal had proportionality sharply in mind at all stages of the decision. The judge closely followed the guidance of *Blockbuster* which incorporates Article 6 considerations as explained by Sedley LJ at [21].

64. The arguments under Article 10 were misplaced. There is no dispute that pursuant to Article 10 ECHR "everyone has the right to freedom of expression" and that subjecting an employee to detriment or dismissal because of protected interest disclosure is liable to constitute a breach of Art. 10 (*Bates von Winkelhof v Clyde & Co LLP* [2014] UKSC 32; [2014] 1 WLR 2047 at [41]-[43]. But this issue in this appeal is about tribunal practice and procedure and compliance with orders. The EJ reminded himself that particular care and anxious scrutiny of a strike out application was required because of the discrimination and whistleblowing issues raised in the case. Article 10 did not confer any additional rights on the claimant to disregard tribunal orders.

65. The tribunal correctly understood and applied the law in exercising the discretion to strike out. EJ Glennie found that the claimant had been in breach of an order, he considered all the circumstances, the magnitude of non-compliance, who was responsible, the extent to which the failure had caused unfairness, disruption, or prejudice. He concluded a fair trial was not possible as the listed trial could not go ahead because of the non-compliance. He gave consideration to other lesser measures such as relisting the case at a future date but found to do so would jeopardise a fair trial (see paragraph 54) and he concluded that strike out was the only proportionate response. He considered all the circumstances of the case with conspicuous and detailed care.

66. During the course of the hearing a hard-edged dispute between the parties developed as to the scope of a tribunal discretion in a strike out decision. The issue between the parties was whether there was a wide ambit of discretion given to the judge in the exercise of the tribunal's discretion, or if the requirement for the consideration of proportionality means that except in the most unusual of cases there will be a right or wrong answer and if the decision was not proportionate the appeal will succeed.

67. The striking out of a claim or response under rule 37 is a case management decision, in which there is ordinarily a wide margin of appreciation or discretion which is not easily susceptible to appeal, but it is clear from the authorities: *Blockbuster*, *Emuemukoro* and *Baber* that under both common law and Art. 6 principles, because it is a terminating ruling, a claim or response can only be struck out if it is a proportionate measure. The scope of the discretion in a strike out application is thus considerably circumscribed. Proportionality means that,

save in exceptional circumstances, if there are less drastic responses to the unreasonable conduct or breach of tribunal order that will enable a fair trial to take place within the listing, strike out will not be a proportionate response. Similarly, if there are no less drastic measures that will enable a fair trial to proceed, then save in exceptional circumstances, it will be proportionate to strike out the claim or response. There is likely to be only one proportionate response. Mr Milsom is therefore correct to submit that it will usually be a binary question.

68. At first sight it may be surprising that an entire claim raising serious allegations was struck out for the breach of just one order that was complied with seven days late, but the judge cannot be faulted for his approach, nor his analysis to conclude that the strike out was the only proportionate response in the circumstances of the case. He was acting well within his case management powers to do so. The claimant had treated compliance with an order as a bargaining chip, using it as leverage in relation to a dispute about the bundle and disclosure that had no legal basis. She continued to do so even after the respondent had lodged the strike out application when she was aware of the risk, she was taking by continuing in her obduracy. The appeal is refused.

THE RECONSIDERATION DECISION

69. It follows from my conclusions on the strike out appeal that the reconsideration appeal must also fail. However, I will make a few observations on the question of whether it was an error of law for the tribunal to have relied on *AIC* in deciding a reconsideration application since it has been raised and fully argued before me.

70. It is a short point and can be dealt with briefly.

71. Employment Tribunal rule 70 provides that a tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. It is well established that the interests of justice includes the principle of finality of litigation. By rule 65, a judgment or order takes effect from the day on which it is given or made, unless the tribunal specifies it will take effect on a later date.

72. In considering the claimant's application for the Employment Judge to reconsider his strike out decision, EJ Glennie directed himself as follows:

> "9. A judgment may therefore be reconsidered where it is 'necessary in the interest of justice' for this to be done. In *Outasight VB Ltd v Brown* UKEAT/0253/14 HHJ Eady QC referred to the previous rules, under which specific examples of when a reconsideration might be allowed were given, in addition to the interests of justice, which was described as a 'residual category.' In paragraph 33 of her judgment, HHJ Eady said:
>
> 'The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interests requirement that there should, so far as possible, be finality of litigation.'
>
> 10. Given the broad discretion to be exercised, it is impossible to produce a definitive list of circumstances in which a reconsideration will be appropriate. However, it is apparent from the authorities that finality of litigation (referred to in the passage quoted above from the judgment in *Outasight*) is an important factor. In *Flint v Eastern Electricity Board* [1975] ICR 395, Phillips J said at page 404H:
>
> 'It seems to me that this is very much in the interests of the general public that proceedings of this kind should be as final as possible; that it should only be in unusual circumstances that the employee, the applicant before the tribunal, is able to have a second bit at the cherry.'
>
> 11. Underhill LJ cited *Flint* with approval in *Newcastle City Council v Marsden* [2010] ICR 743, referring in paragraph 19 of his judgment to the 'exceptional circumstance' which had risen

> in that case (the tribunal being misled by the claimant's counsel). The importance of finality was again emphasized by the Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128."

So far, so good. It is common ground that the above paragraphs were impeccable. The contentious paragraph is the next one:

> "12. Most recently, Lord Briggs JSC and Lord Sales JSC, giving the judgment of the Supreme Court in *AIC v Federal Airports of Nigeria* [2022] UKSC 16 observed at paragraph 32 of the judgment that a judge considering an application for reconsideration "should not start from anything like neutrality or evenly balanced scales" and in paragraph 39 that:
>
> "The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place." "

73. *AIC* was a commercial dispute about the enforcement of an arbitration award brought in the Technical and Construction Court (TCC) within the King's Bench Division of the High Court. The dispute was governed by the CPR. The CPR are different to the procedural rules in the Employment Tribunal. *AIC* concerned a problem specific to the CPR. A judge of the TCC was asked to reconsider a decision after the judgment and order had been announced in court but before the order had been sealed and served. Under the CPR an order is perfected and takes effect only once sealed by the court. There may be a delay between the delivering of the judgment and the sealing of the order. That is not the case in the Employment Tribunal, see rule 65 above.

74. The problem thrown up by the *AIC* case was whether the correct starting point in an application for reconsideration prior to an order being perfected is one of neutrality or finality. It did not arise in this case and is unlikely ever to arise in the Employment Tribunal. Unlike under the CPR, there is no space twixt cup

and lip for any slip to occur in the Employment Tribunal, unless the tribunal has specified that the order will take effect at some later date, which is a rare event and was not the case here.

75. Moreover, the reconsideration procedure set out in the Employment Tribunal rules at paragraphs 69 to 72 explicitly state that the starting point is not neutrality, but for the applicant to show that it is in the interests of justice for the judgment or decision to be reconsidered. The *AIC* point did not apply in this case.

76. Furthermore, the task of a judge faced with an application to reconsider a judgment and the exercise of their case management powers, is to consider the application in accordance with the relevant overriding objective of the jurisdiction in which they are judging. The overriding objective in the Employment Tribunal is set out in the Employment Tribunal Rules and is not identical to the overriding objective in the CPR.

77. It is a mistake to suggest the CPR apply in the Employment Tribunal (see for example *Neary v GB of St Albans Girls School & Anor* [2010] ICR 473 and *Harris v Academies Enterprise Trust* cited above). As Langstaff P stated in *Harris*:

> "A judge is not required as a matter of law in the Employment Tribunal to deal with a claim as if the CPR applied when they do not."

78. There is no shortage of case law specific to the question of reconsideration in the Employment Tribunal and rules 70-73 Employment Tribunal Rules of procedure. The case law is consistent, clear and settled and which was referred to by EJ Glennie in his reconsideration decision. Most recently, subsequent to

the decision under appeal in this case, the Court of Appeal delivered its judgment in *Phipps v Priory Education Services Ltd* [2023] EWCA Civ 652; [2023] ICR 1043. there was a further review of the authorities and rule 70 ET rules of procedure by. He noted:

> "The interests of justice test is broad textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The tribunal has a wide discretion in such cases but dealing with cases justly requires that they be dealt with in accordance with recognised principles. [31]

And continued:

> 36. An application for reconsideration under Rule 70 must include a weighing of the injustice to the Applicant if reconsideration is refused against the injustice to the Respondent if it is granted, also giving weight to the public interest in the finality of litigation."

79. EJ Glennie's reconsideration decision is entirely consistent and in line with the principles articulated by Bean LJ in *Phipps*. Interestingly, in *Phipps,* the Court of Appeal saw no need to refer to *AIC* and it does not appear to have been an authority cited to the court.

80. There is not only no need, but it will be unhelpful, and usually wrong, to import appellate court authority that concerns a different jurisdiction to the ET. It would introduce an unnecessary, additional task for the Employment Tribunal to analyse the distinction between the wording of the overriding objective in the CPR (or whichever other relevant jurisdiction) and the procedural rules on reconsideration specific to that other jurisdiction, to those of the Employment Tribunal, and then to decide if the principles set out in the authority being considered in the context of the other jurisdiction would make a difference as

applied to the specifics of the case in hand in the tribunal. Employment Judges have quite enough work to do already. It would add nothing.

CONCLUSION

81. In a reconsideration application the tribunal has a wide ambit of discretion to deal in accordance with recognised principles to act in the interests of justice. EJ Glennie was not distracted from the applicable legal principles in his judgment notwithstanding the reference to *AIC* in his judgment.

82. For the above reasons, both appeals are dismissed. It just remains for me to thank the parties and their representatives for all their work and assistance in this case.