Neutral Citation Number: [2024] EAT 110

Case No: EA-2022-000901-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 13 and 14 June 2024

Before:

JUDGE KEITH

- -

Between:

STAFFORDSHIRE COUNTY COUNCIL

Appellant

- and -

MS DESNA LOWERS

Respondent

- -
- -

MR GHAZAN MAHMOOD & MR DAVID JONES (Counsel, instructed by **Weightmans LLP**) for the **Appellant**
MS KATHERINE ANDERSON (Counsel, instructed by **Excello Law**) for the **Respondent**

Hearing date: 13 and 14 June 2024

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JUDGMENT

SUMMARY:

PRACTICE AND PROCEDURE - Consequences of strike-out

The Employment Judge erred in a single respect. She failed to consider, in striking out the Appellant's response, what the appropriate consequence of strike-out was (paragraph 55(4) of **Bolch v Chipman** – EAT/1149/02 applied), specifically the Appellant's participation in any remedy hearing. That error did not undermine the EJ's conclusion that a fair trial on liability was not possible. As the Appellant has been permitted to participate in a remedy hearing, as a result of a later ET hearing, the error of law does not require further directions from the EAT.

JUDGE KEITH:

1. These written reasons reflect the full oral reasons which I gave to the parties at the end of the hearing. I will refer to the parties as they were before the Employment Judge, namely "the claimant" and "the respondent."

2. I have considered three bundles, which I will refer to as "Core Bundle" ("CB") (or page x/CB); "Supplementary Bundle" ("SB") (or page x/SB) and an authorities bundle.

3. The respondent appeals against the decision of Employment Judge Noons (the "EJ") who, in a judgment sent to the parties on 18th August 2022 (page 342/CB), struck out the respondent's defence and grounds of resistance, pursuant to **Rule 31, schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "ET Rules").**

Background

4. The procedural history is lengthy. Large parts, but not all of it, are summarised by the EJ at paragraphs [4] to [48], beginning at page 345/CB. I pause to add that the respondent accepts the chronology as outlined but contends that it was not complete and omits references to deficiencies in the claimant's formulation of her claim, which in turn necessitated amendments to the respondent's grounds of resistance.

5. The respondent nevertheless did not seek to blame the claimant for delaying progress of the litigation and accepts the history of non-compliance by it. The gist is of periods of months of inactivity by the respondent's representatives; multiple breaches of Tribunal directions; and purported compliance or activity shortly before Preliminary Hearings, of which there were six, before the eventual seventh Preliminary Hearing on 5th August 2022, at which

the EJ struck out the respondent's defence and grounds of resistance, having concluded that a fair trial was no longer possible and that it was proportionate to strike out the defence.

The litigation history

6. Given the complexity and importance of the litigation history, it is necessary to recite the EJ's reasons, at paras. [4] to [48]:

> "4. The claimant's ET1 was received on 28 November 2019. The particulars of claim run to 19 pages. The Respondent was required to submit their response by the 3 January 2020. On the 30 December 2019 the Respondent emailed the Tribunal stating that they would not be in a position to respond by the deadline and seeking an additional 28 days. At this point no request for further particularisation of the claimant's claim was made.
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> 5. The respondent submitted an ET3 and grounds of resistance on 3 January 2020, that is to say within the original time limit for doing so. The grounds of resistance were a bare denial of the claims with no factual detail at all. Employment Judge Miller therefore refused the application for an extension to submit the ET3 and grounds of resistance but ordered that the Respondent may, no later than the 7 February 2020, provide further and better particulars of its response
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> 6. On the 7 February 2020 the Respondent wrote to the Tribunal requesting an extension for doing so until 21 February 2020 on the basis that "the respondent has been provided with a significant number of documents relating to the claimant which have been reviewed and have resulted in further requests to the relevant department for information. The respondent is awaiting this information." The claimant objected to this extension request. No amended response was submitted on 7 February 2020 nor on 21 February 2020.
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> 7. A telephone preliminary hearing took place on 30 April 2020, (**"First Preliminary Hearing"**). The respondent submitted no documents for the First Preliminary Hearing and had still not submitted particularised grounds of resistance. The claimant did complete a standard agenda form ahead of the first preliminary hearing. There was no suggestion at this stage that there was any need for further particulars from the Claimant.
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> 8. The First Preliminary Hearing had to be adjourned to 15 May 2020 with the respondents being directed to submit their particularised response by 7 May 2020.
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> 9. On the 7 May 2020 the respondent submitted amended grounds of resistance that ran to 54 pages. The grounds of resistance themselves were 18 pages but, in a departure from usual tribunal practice, the respondents appended a number of documents to these grounds of resistance.

10. The adjourned preliminary hearing (**"Second Preliminary Hearing"**) took place on the 15 May 2020. At this hearing, Employment Judge Algazy QC observed that "the respondent had served a lengthy draft response exhibiting substantial evidence but which did not address the specific matters under "Claims" in the claim other than to plead a generic defence which was substantially replicated for the various claims advanced. Difficulties arising from the pandemic were specifically adverted to".

11.The following directions were given at the second preliminary hearing:

11.1 The respondent was to serve a detailed request for further particulars of the claim by 1 June 2020 with the claimant to serve a response by 29 June 2020.

11.2 The respondent was to serve any application to amend its response together with a draft of the amended response by 21 July 2020.

11.3 The claimant was to file an application for costs by 22 July 2020 and a further preliminary hearing was listed for 24 July 2020.

12. On the 1 June 2020 the Respondent submitted a document they referred to as a request for Further and Better Particulars, however it included a request for an Impact Statement, disclosure of documents and what amounted to detailed witness evidence (including requests for the 'gist of all words spoken' in a number of meetings) Given the nature of the request the claimant requested an extension of time to respond and provided a full response 10 July 2020.

13. On the 21 July 2020 the Claimant submitted an application for costs, referring to what they said was the Respondent's ongoing disruptive conduct, failure to comply with directions, and the costs incurred due to multiple preliminary hearings to seek their compliance.

14. On 21 July 2020, purportedly in accordance with the Tribunal's Order made at the Second Preliminary Hearing, the respondent submitted an application to amend it [sic] response along with a copy of that response. However, the grounds of resistance submitted with that application were not new but were in fact the ones which had already been submitted by the respondent on 7 May 2020 and which had been subject to criticism by the Employment Judge at the Second Preliminary Hearing.

15. A telephone preliminary hearing took place in front of Employment Judge Perry on 24 July 2020, (**"Third Preliminary Hearing"**). At this hearing the Employment Judge was able to identify the complaints. He also noted that the respondent had not complied with the order made at the Second Preliminary Hearing to serve its application to amend its response along with a copy of that response. Employment Judge Perry noted "it has not done so - the response is a repeat of that previously lodged."

16. He also noted "Sadly, little progress has been made". He commented that the respondent "has merely relodged the current response and despite what

Employment Judge Algazy QC stated as the requirement to apply to do so, it has not made a substantive application setting out the grounds for doing so to include the reasons why it has not so before. This conduct of the proceedings by the respondent meant that even at the Third Preliminary Hearing the Employment Judge was not able to list the case for final hearing.

17. The respondent was ordered, by 21 August 2020, to serve *"a detailed amended response setting out [the respondent's] position as shall be relied on at trial, to include its [response to the claim under] s44(c) Employment Rights Act 1996"* and "a substantive application to amend its response setting out the grounds for its application".

18. At the Third Preliminary Hearing Employment Judge Perry listed an open preliminary hearing on 30 September 2020 to deal with, amongst other things, the claimant's application for costs and the respondent's application to amend its response.

19. The Respondent applied for an extension of time to the 4 September 2020 to comply with the orders given at the Third Preliminary Hearing. Nothing was received by the claimant by 4 September 2020 and they applied for an Unless Order on 7 September 2020.

20. On the 29 September at 4.45 pm the Respondent submitted an application to amend its grounds of resistance accompanied by a witness statement and an 'amended' grounds of resistance. These amended grounds of resistance did not have any track changes in them. This submission was over a month after the order should have been complied with and over 3 weeks after the revised date the respondent had requested to comply with the order. It should also be noted that this submission was at the very end of the working day before the preliminary hearing listed for 30 September 2020.

21. At the preliminary hearing on the 30 September 2020, (**"Fourth Preliminary Hearing"**), Employment Judge Coghlin QC set the matter down for final hearing starting on 1 November 2021. He also awarded costs against the respondent on the grounds of their unreasonable conduct to date in the matter. The amount of the costs award was not determined so as to allow the parties to try to agree the amount to be paid failing which Employment Judge Coghlin QC would determine the matters on the papers.

22. At the Fourth Preliminary Hearing the Employment Judge again noted that both the previous Employment Judges had commented on the regrettable lack of progress on the case. In relation to the respondent's application to amend its grounds of resistance Mr Mohammed, the respondent's solicitor, accepted at the Fourth Preliminary Hearing that the "amended" grounds of resistance submitted the day before were in fact the same ones that had already been submitted twice before and which had been found to be insufficient by Employment Judge Perry and Employment Judge Algazy QC. The respondent accepted that they did not advance matters and did not press the application to submit an amended response.

23. The respondent also did not oppose the claimant's application for an Unless Order requiring compliance with the third and fourth bullet points under paragraph 2.3 of the Order of Employment Judge Perry following the Third Preliminary Hearing.

24. Employment Judge Coghlin QC therefore made an Unless Order stating that "The litigation cannot proceed until the respondent's case has been properly pleaded. Too long has passed already without this happening". The Respondent was therefore given until 4 pm on 14 October 2020 to comply with the Unless Order.

25. Further case management directions were also given at the Fourth Preliminary Hearing to get the case ready for final hearing. For the purposes of this judgment it is relevant to note that the respondent was ordered to liaise with the claimant to agree the bundle of documents and that a copy of the bundle had to be sent to the claimant by 10 February 2021.

26. On the 13 October 2020 the Respondent issued amended grounds of resistance.

27. On the 10 November 2020 the Claimant's amended list of issues was provided to the Respondent. The Respondent had been ordered at the Fourth Preliminary Hearing to respond by the 25 November 2020, agreeing the same or providing an amended draft. To date the respondent has not done so.

28. Following no contact from the respondent for a period of 2 months the claimant applied to the Tribunal for a stay of all directions to the 30 April 2021. That was due to having been advised previously that a relative of the respondent's representative had COVID, although the respondent's representative had been communicating (albeit only in respect of extensions of time) for two months following that notification. The claimant did not want to apply pressure to the respondent's representative when it was unclear as to whether there were possibly personal circumstances which prevented progress on this matter.

29. A further preliminary hearing was listed for 17 May 2021, (**"Fifth Preliminary Hearing"**). The respondent only replied to the claimant on Thursday 13 May 2021, this being the first response to any communications since January 2021.

30. In the end the Fifth Preliminary Hearing took place on two days, 17 May and 8 July 2021 in front of Employment Judge Harding. Employment Judge Harding noted that the respondent had complied with the Unless Order set out at the Fourth Preliminary Hearing.

31. At the Fifth Preliminary Hearing, the hearing for November 2021 was postponed as both parties agreed that the case was not ready for hearing and in fact more than 10 days were needed in any event. The claimant had submitted a 40 page list of issues and Employment Judge Harding pointed out the "need for cases to be kept within proportionate bounds and pointed out that it is often helpful (and proportionate) for the claimant to focus their claims on

the issues that lie at the heart of their case". The claimant's representative, Ms Anderson, "acknowledged that both a greater degree of clarify [sic] and a greater degree of focus was required".

32. The Claimant was directed to provide a revised list of issue [sic] by the 1 September 2021 in a prescribed format, The respondent was directed to "file an amended Response to those allegations by no later than 29 September 2021. This shall include setting out the respondent's position in respect of the following matters;

> 32.1 For the section 15 claim, in the event that a tribunal finds that the unfavourable treatment asserted occurred, whether it is accepted that it occurred because of the "something" identified by the claimant and, if it is not, what the respondent asserts was the reason for the treatment. The respondent shall also set out whether it is accepted that the "something" arose in consequence of the claimant's disability. If the respondent relies on justification the respondent shall set out the legitimate aim on which it relies.
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> 32.2 For the indirect discrimination claim whether it is accepted that the asserted PCP/PCP's were applied, whether or not it is accepted that these caused the group disadvantage identified and the particular disadvantage to the claimant. If the respondent relies on justification the respondent shall set out the legitimate aim on which it relies.
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> 32.3 For the reasonable adjustments claim the respondent shall set out whether or not it is accepted that each PCP asserted by the claimant was applied to her and whether or not the nature and extent of the substantial disadvantage suffered by the claimant as a result of the application of the PCP is accepted. The respondent shall also set out for each adjustment the date from which it is asserted time began to run for limitation purposes.
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> 32.4 For the harassment claim whether or not it is accepted that the unwanted conduct occurred, and if so whether it is accepted that it was unwanted. Whether it is accepted that the conduct was done with the proscribed purpose or had the proscribed effect (as the case may be), and whether it is accepted that the conduct relates to disability.
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> 32.5 The respondent shall also set out whether it considers that any of the claims in the list of issues requires an application to amend on the part of the claimant. If so it shall identify the type of amendment application that it asserts is being made and whether it agrees or objects to such an application. If it objects the respondent shall set out the grounds for its objections".

33. Employment Judge Harding also made directions for disclosure with each party having to "send to the other all relevant documents which are or have been in that party's control including documents on which that party relies and documents which adversely affect that party's case". This was to be done by 11 November 2021 with a bundle being agreed by 9 December 2021 and the respondent to prepare and send to the claimant a copy of the bundle by 22 January 2022. The matter was set down for a final hearing lasting 16 days

starting on 19 September 2022 which is 2 years and 10 months after the claim form was submitted and was the second time the matter has been listed for a final hearing.

34. The claimant duly filed a revised list of issues. The respondent did nothing. The claimant sent her disclosure documents despite the respondent's failing. The Respondent subsequently provided some documents to the claimant. On 23 March 2022 the respondent's new legal advisers requested a copy of the claimant's disclosure as this had not been given to them by the respondent. This was sent to them.

35. The parties were required to attend a further telephone preliminary hearing (**"Sixth Preliminary Hearing"**) on 7 April 2022 to check compliance with the orders made at the Fifth Preliminary Hearing. On 6 April 2022 at 7.35 pm, that is to say after working hours on the night before the hearing, and it would appear in response to the claimant's application for strike out and costs, the respondent provide new grounds of resistance. This was nearly 7 months after it should have been provided. Again, contrary to standard Tribunal practice, the amended response did not contain any track changes. The grounds of resistance changed the respondent's position on certain matters from the earlier grounds of resistance.

36. The claimant also maintained that the grounds of resistance still did not provide full particularisation, making sweeping assertions such as that the respondent had reduced the Claimant's workload 'on numerous occasions' as a reasonable adjustment and providing a list of other adjustments said to have been made, but with no detail as to when, how or by whom such as was required for the case to progress.

37. At the Sixth Preliminary Hearing Employment Judge Harding noted "Unfortunately there had not been compliance with directions; the respondent had failed to produce amended grounds of resistance, as ordered, disclosure had only partially taken place and consequently there was no agreed bundle and there had been no exchange of statements. I should add that given the extremely lengthy history of this case this failure to comply with the tribunal orders was wholly unsatisfactory. Matters went awry, it would appear, at least initially because the respondent had failed to lodge an amended response by 29 September 2021, as it had been ordered to do. This remained the case until shortly before this hearing…"

38. The respondent sought clarification in respect of one aspect of the claimant's claim and the clarification was given at the Sixth Preliminary Hearing. The respondent confirmed that it was not in a position to "set out its pleading in respect of the reasonable adjustments claim (which was the only outstanding matter)". The claimant requested some further information from the respondent which their representative confirmed that they were "content to provide the information requested as part and parcel of the amended response, particularly as the information requested may limit the size of the disclosure exercise somewhat".

39. The respondent was ordered again to provide amended grounds of resistance addressing the claimant's reasonable adjustments claims in the format set out in the order following the Fifth Preliminary Hearing and, by consent, the further information requested by the claimant no later than 5 May 2022.

40. By no later than 26 May 2022 the parties were to send each other any outstanding disclosure. The bundle was to be agreed by 9 June 2022 with the respondent sending a copy to the claimant by 16 June 2022. Witness statements were to be exchanged by 14 July 2022.

41. The claimant's representative confirmed in writing on 11 April 2022 the further particulars that they were requesting and which the respondent had agreed to respond to at the Sixth Preliminary Hearing.

42. Amended grounds of resistance were served on 5 May 2022, again the amendments were not marked in track changes. This meant the claimant's representatives had to conduct their own exercise of identifying all the changes from the version sent to them on 6 April 2022. No explanation has been given to me as to why the various iterations of the grounds of resistance did not contain track changes to help the Tribunal and the claimant identify what changes had been made.

43. Having carried out this exercise the claimant's representative was of the view that the respondent had failed in two regards to provide the answers to the request for further particulars which they had agreed to do at the Sixth Preliminary Hearing. They therefore emailed the respondent's representative on 6 May 2022 clearly setting out where they believed the answers had not been provided.

44. The respondent's representative responded on 13 May 2022 bluntly saying they considered that the respondent had complied sufficiently with the Tribunal's orders and the claimant's request for further particulars. This response did not point out where in the amended grounds of resistance it believed it had answered the requests, clearly it would have been helpful had they done so given there were no track changes in the amended grounds of resistance. The point taken by Mr Peacock before me today on some of the requests is that it will be contained within witness statements but I note that at the Sixth Preliminary Hearing the respondent had agreed to provide answers to the request for further particulars even where is [sic] strayed into the realms of evidence.

45. No explanation has been given to me today as to why the respondent changed this position or why the respondent is seeking to go behind an order that was made by consent at the Sixth Preliminary Hearing especially as they agreed that answering the requests would limit disclosure. The claimant maintains that some requests have not been answered and that the respondent is trying to go behind what it had previously agreed to provide and what was ordered at the sixth preliminary hearing.

> 46. The effect, the claimant says, of not providing this information is that the requests for specific disclosure are very wide, because the issues/timeframes cannot be narrowed without the information requested. The respondent has refused to provide the disclosure requested on the basis it is excessive. This is clearly the point which their representative recognized at the Sixth Preliminary Hearing and therefore why he agreed that the respondent would provide the answers in full. It is not clear on what basis the respondent has changed its mind nor is there an application before me to vary the consent order made on 7 April 2022.
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> 47. The respondent disclosed documents on 25 May 2022 and a bundle was agreed on 9 June 2022 which ran to some 1015 pages. This was in accordance with the directions given at the Sixth Preliminary Hearing.
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> 48. On 26 July 2022 the respondent's representative sent over 1200 pages of additional documents to the claimant. The explanation for this is that their legal representative was at their offices taking witness statements and that during the course of those discussions it became apparent that more documentation existed which had not been disclosed. The respondent's legal advisers quite properly advised the respondent of their ongoing duty of disclosure and the documents were duly sent to the claimant.''

7. Of note, the claimant's solicitors had already applied for a strike-out of the respondent's defence before the last and late disclosure by the respondent on 26th July 2022, on 6th June 2022 (page 75/SB), on the basis that the respondent had failed to comply with orders to which the respondent itself had consented. This related to further and better particulars of when the respondent had reduced the claimant's workload on numerous occasions, in the context of a claim that it had failed to make reasonable adjustments to any PCP of requiring the claimant to carry out her work (page 82/SB). Moreover, the claimant asserted that the respondent had failed to respond to the claimant's list of issues despite orders to do so, including on 25th November 2020. The claimant referred to the respondent's conduct and the seriousness of the repeated defaults which must be considered as deliberate (page 84/SB). The respondent had, the claimant contended, intentionally submitted the same amended grounds of defence three times, purporting to be fresh grounds, to give the appearance of compliance and had attended hearings and made sudden new assertions that it required additional information, which could

have been requested at previous points to distract from their own non-compliance. The claimant asserted that EJ Coghlin's "unless" order had yet to be substantively complied with.

8. The claimant contended that a fair trial was no longer possible in light of the significant delay; the respondent's seeming inability to comply with other directions; and noting that a full hearing had already been vacated once already (see page 86/SB) with no realistic prospect that the parties could prepare adequately for a 16-day hearing only three months hence, in particular given the claimant's disability in circumstances where also she was dismissed in 2019, nearly three years ago.

9. By analogy to the well-known authority of **Peixoto -v- British Telecommunications plc** EAT/0222/07, there was no prognosis as to when the trial could take place, in the context where the respondent had demonstrated wilful non-compliance.

10. The respondent replied on 13th June 2022, objecting to the strike-out application (page 88/SB) and saying that how, where and who had offered the claimant supportive relief in terms of adjustments was a matter for evidence. It responded to the criticism that it had not provided tracked changes of its amended defence that it had not been ordered to do so. It further asserted that the list of issues had been agreed to as confirmed at the sixth Preliminary Hearing on 7th April 2022. It considered that preparation for the substantive hearing listed for 19th September to 10th October 2022 remained achievable. The respondent had proposed a joint bundle of documents and witness statements could be exchanged in line with Tribunal directions.

11. The claimant reiterated its strike-out application on 18th June 2022 (page 93/SB), to which the respondent objected and made the briefest of references (page 109/SB) to additional documents.

12. I turn next to agreed points in the seventh Preliminary Hearing which were contained in written comments later provided by Mr Peacock, Partner and a solicitor with Weightmans, who had represented the respondent at the hearing (pages 116 to 125/SB). The respondent accepted that it did not make any submission to the EJ to the effect that she could not take the matter of late disclosure into consideration, when considering whether to strike out the defence, because the respondent had not been put on notice.

13. In fairness to Mr Peacock, at page 125/SB, he added that he had been asked to cover the hearing at relatively short notice due to the unavailability of a case handler and did not have a great deal of prior knowledge of the detail of the case. In preparation, he had read through a large bundle, 465 pages and 27 supplementary pages and the 14-page strike-out application. The issue of late disclosure was not something he believed was part of or included in the strike-out application and not one of the reasons being put forward, but importantly at para. [8], page 126/SB, he had been put on notice in instructions for the hearing of the late disclosure issue and the fact that it was something likely to be raised at the Preliminary Hearing, although he had focused his preparation on the points raised in the application; a point which he reiterated to the EJ.

14. Mr Peacock had explained to the EJ, that because the issue of late disclosure had become a key part of the strike-out application, for the first time at the hearing, he had not been prepared to respond to it. He had not undertaken anything other than a scan through the additional disclosure to get a feel for what it included and had done no preparation to be able to provide a detailed explanation for the circumstances of the late disclosure. He added that whilst he may not have invited the EJ not to take into account the material, clearly, she was going to consider the point. He believed he explained that he was at something of a disadvantage.

15. Importantly, it was also agreed that the respondent did not make any representation to the EJ that the hearing should be adjourned to enable the respondent to prepare her representations on the matter. At the time, Mr Peacock explained (see paragraph 14, page 127/SB) they were over an hour into the hearing already. Also it was accepted that the late disclosure of 26th June 2022 had not been disclosed previously and included appendices to a disciplinary investigation report. I pause to add that it has since been suggested that the claimant may already have had certain parts of the appendices to the disciplinary investigation report, although that remains disputed as to the precise extent.

16. Next, on the respondent's failure to provide agreed further and better particulars, which the respondent continued to resist because some of that information would be contained in witness statements, at the hearing, the respondent provided no explanation for the failure to comply with the original order, which had been made by consent. Mr Peacock's response was that there had been no failure to provide further and better particulars either at all or to warrant a strike-out. The further and better particulars were adequate as provided to enable the claimant to understand the response to her claim and that they were no substitute for witness evidence.

17. He said in his comments that he did recall indicating that work was advanced for the preparation of witness statements, which were close to completion and would include evidence around the responses to further and better particulars.

18. The claimant disputed that Mr Peacock had made any submission to the EJ along the lines of what was now relied on at paras. [56] to [59] of the grounds of appeal (page 378/CB); namely a failure to consider the big picture. Mr Peacock indicated that he may not have used exact words such as: "Failure to consider the big picture" but did put forward that it was disproportionate to strike out the claim, taking into account all of the circumstances, including the seriousness of the allegations and potential value of the claim.

Grounds of Appeal

19. As already indicated, the respondent took no issue with the chronology of its non-compliance outlined already at para [4] onwards by the EJ in her reasons (see para. [3] of the Notice of Appeal, page 367/CB). The respondent raised eight grounds of appeal, four of which were permitted to proceed, which it had labelled A to H. I address only grounds A to D, which had been permitted to proceed.

20. **Ground A** began:

> "The ET misdirected itself on the law as to the crucial and decisive question under r.37(1) of whether a fair trial of the issues is still possible.
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> 48. The ET did not apply the principles enunciated in **Emuemukoro v Croma Vigilant (Scotland)** Ltd EA-2020-000006. There was a two-stage test required, firstly whether or not a fair trial was possible within the allocated window, secondly, whether strike-out was a proportionate sanction.."

21. The respondent contended that the parties were co-operative with regard to the preparation of the final hearing and there was still significant time between the Preliminary Hearing on 5th August and the substantive hearing listed to start on 19th September 2022. The EJ had failed to consider whether a fair trial was not possible and whether strike-out was proportionate. As a bare minimum, the EJ ought to have permitted the respondent to have taken part in the remedies hearing, or at least to have explained and considered the consequences of strike-out for such participation.

22. **Ground B** began:

> "The ET erred in law by failing to properly consider the requirement to ensure that the effect of a strike-out is not disproportionate
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> 55. Despite the ET's correct self-direction to **Blockbuster Entertainment Ltd v James** (2006) IRLR 630, the ET failed to articulate why it says that R's conduct had past the point of no return warranting strike-out.

> 56. The ET failed entirely to consider the 'big picture' in that, this case was nearing readiness for the full merits hearing (even as at the date of the PH), no reference is made either to R's position in respect of C's claims nor the value of them. It is averred that proportionality cannot be considered justly without reference to the parties respective positions, the seriousness of the allegations against C, the value of her claims, or a greater consideration of the Additional Disclosure.

23. **Ground C** included:

> "The ET erred in law by failing to properly consider all the circumstances when deciding whether to strike out or whether a lesser remedy would be an appropriate sanction; in particular (1) the magnitude of default; (2) what disruption, unfairness or prejudice had been caused; (3) whether a fair hearing is still possible.
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> 61. The ET failed to apply the principles in **Weir Valves & Control (UK) Ltd v Armitage** (2004) ICR 371.

24. **Ground D** started:

> "The ET erred in law by concluding that the Additional Disclosure was a permitted reason for striking out the Response, in circumstances where that was not included or part of the Application and in circumstances where R had not been given any or any reasonable notice that it was intended to be part of the strike out Application or would form a ground in the decision of the ET to do so."

25. Permission to appeal was initially refused on the papers by Michael Ford KC, sitting as a Deputy High Court Judge (page 382/CB). At a **Rule 3(10)** hearing, His Honour Judge Auerbach allowed grounds A to D to proceed (page 388/CB). The claimant filed an Answer, which is at page 410/CB, which I have considered along with all of the other relevant documents.

26. I take the grounds out of order, as some are simpler than others. I only recite the submissions where it is necessary to explain my decision, but I have considered them in full.

Ground D

The Respondent's case

27. The respondent relied on **Hasan v Tesco Stores Ltd** UKEAT/0098/16, in particular para [13], and **Catton v Hudson Shribman & Anor** UKEAT/111/01 as authority for three propositions:

i) A party at risk of a strike-out application must be given a reasonable opportunity to respond to it.

ii) A reasonable opportunity is an adequate one to give oral or written representations.

iii) That opportunity is not watered down because a person has a legal representative available or that that representative had an opportunity to speak. For example, Mr Catton was represented by a lawyer at that hearing.

The Claimant's case

28. The claimant agreed that the correct test was that of an adequate opportunity to respond to a strike-out application, and the test as no different where a party is legally represented. However, what was adequate is fact-specific and this includes the fact of a representative being a solicitor whose firm was responsible for the recent disclosure. Mr Peacock accepted (at page 125/SB) that he had been put on notice in instructions, for the hearing, of the late disclosure issue and the fact that this was something likely to be raised at the hearing, but had focused his preparation on the points in the strike-out application. As a consequence, he had not undertaken anything other than a scan through the disclosure to get a feel for it and had not been prepared to provide a detailed explanation of the circumstances. He further accepted that he had not asked

for an adjournment to enable him to respond, albeit he explained he had been at something of a disadvantage.

29. Ms Anderson points out that what Mr Peacock chose to focus on in circumstances not only where the respondent was on notice of the late disclosure issue but believed it was likely to be raised at the hearing, was ultimately a matter for him. It was reasonable to expect the respondent to have given him instructions on the disclosure process to date which might explain the late disclosure, when it was aware of the gravity of events and in particular a strike-out application. It was not incumbent upon the claimant to amend its strike-out application further.

My Decision on Ground D - Procedural Unfairness

30. I do not accept that the EJ erred procedurally in striking out the respondent's defence and grounds of resistance as a result of non-compliance with **Rule 37(2)** of the **ET Rules**, namely that the respondent had not been given a reasonable opportunity to make representations either in writing or, if requested, at a hearing. I accept that a reasonable opportunity amounts to having an adequate chance and not merely the possibility of speaking at a hearing. That is just as important where the respondent party is legally represented. However, in considering the cases of **Catton** and **Hasan**, Mr Mahmood was, in my view, correct not to infer the general principles beyond those three propositions which he had outlined, as whether an opportunity is reasonable will be intensely fact-specific.

31. In cases such as **Catton**, a party may have had no appreciation that there was likely to be a strike-out application, let alone the basis on which it was put. In the circumstances, one question is how a representative could have been expected to address their minds to various criticisms which might otherwise be taken at face value, without having an opportunity to formulate a response or provide documents in rebuttal of those allegations.

32. Where the adequacy of an opportunity to respond to an allegation will necessarily be different is where an experienced legal representative attends a hearing, as opposed to a litigant in person and, as here, the representative, even if not the usual case holder, is a senior member of a firm with responsibility for the disclosure exercise. What they might be expected to have addressed their minds to in order to formulate responses is very different. This was not a case where the disclosure issue, which ultimately was pursued as an additional basis for strike-out, was unknown to the respondent. Mr Peacock candidly accepted in his note that he had anticipated that it was, "likely to be raised" (page 126/SB). In circumstances where the respondent was already on notice that the claimant was asserting that a fair trial was no longer possible for other reasons, the fact that Mr Peacock did not have a great deal of prior knowledge of the case was not because of the absence of any procedural notice, because also, as he candidly admitted, he had been asked to cover the hearing at relatively short notice due to the unavailability of a case holder. He therefore focused on the written application already made, but that does not excuse or explain the lack of instructions on a point as basic as the conduct of the disclosure exercise; not only by the respondent before it instructed Weightmans in March 2022, but also since that date, bearing in mind that, as Ms Anderson pointed out, the respondent continued to be in breach of its disclosure obligations, by which the respondent was required to provide final disclosure by 26th May 2022.

33. Moreover, in an email from Mr Peacock's colleague, Mr McArdle, dated 26th July 2022, at page 109/SB, Weightmans had referred clearly to the firm having given its mind to the disclosure exercise, in referring to locating "additional documents," which presumably must have been relevant. Not only had Mr Peacock anticipated that the issue was likely to be raised, but it was open to him to seek instructions on the disclosure exercise. Added to this is the fact that Mr Peacock did not seek an adjournment of the hearing or suggest that it was impermissible for the EJ to have considered the disclosure issue as part of the strike-out application.

34. In the circumstances, ground D discloses no error of law and is dismissed.

Ground A – the finding of unreasonable conduct, based on a deliberate disregard of orders, and a failure to consider whether a fair trial was still possible

The Respondent's case

35. The respondent argued that the EJ's reasons were flawed as there was no evidence of a deliberate or wilful disregard by the respondent. In essence this was in all but name a perversity challenge.

36. The respondent argued that the EJ's analysis was limited to four reasons:

i) at paras. [61] to 63 of the EJ's reasons, namely a breach of disclosure obligations on three occasions with no explanation as to the disclosure exercise undertaken;

ii) at para. [65], a conscious decision not to comply with an order to which the respondent's same firm of solicitors had consented a matter of months previously;

iii) at para. [66], a failure to provide full grounds of resistance until 5th May 2022 in the context of previous non-compliance and a further order at the sixth Preliminary Hearing, which the respondent says fails to appreciate the context that the claimant had failed to particularise her claim.

iv) At para. [67], that the respondent had not engaged in the litigation for times for several months and then only at the last minute.

37. The respondent pointed out that wilful disregard was not the sole reason specified as being the reason for the strike-out but was one of them. The EJ's other reasons included that a

fair trial was not possible, (para. [69]), and that some of the claimant's disclosure requests were still outstanding (para. [70]). The respondent argued that the latter was not based on the EJ's analysis of the supposed outstanding disclosure and whether it was truly necessary, but rather the EJ had taken the claimant's word for it.

38. The respondent argued that the EJ's recital of the litigation history, whilst correct in its important parts, omitted other aspects. The respondent argued that the claimant's original Claim Form was lengthy and unfocused, which is why earlier Judges had required the claimant to reformulate her claim. The respondent in turn had had to amend its grounds of resistance in response. It was not the case that the respondent had left it until May 2022 to file its amended grounds. It had served amended grounds as early as October 2020, which EJ Harding had accepted was in compliance with an "unless" order previously issued by EJ Coghlin QC. Similarly, the claimant had been dilatory in filing a schedule of allegations which gave sufficient details (see para. [3.16], page 172/CB) as identified by EJ Perry and as initially required by 7th August 2020.

39. Whilst the respondent accepted that it was late in applying to amend its response by 21st August 2020 and did so by 13th October 2020, following the "unless" order requiring compliance by the following day, EJ Harding later recorded that the respondent had complied with the "unless" order, in her Preliminary Hearing reasons, following the hearings on 17th May and 8th July 2021. She also recorded that the list produced by the claimant required more focus (see para. [2], page 278/CB).

40. As a consequence, the claimant had bene ordered to provide a revised list of issues by 1st September 2021 to which the respondent could then provide an amended response by 29 September (see para. [3], page 279/CB). The respondent accepted having received an amended list on 31st August 2021, about which it still had questions. It did not file an amended response

as directed by 29th September 2021 but instead only filed it on 6th April 2022 and it can provide no explanation, beyond a comment at para. [18], page 78/SB, in a letter from the claimant's solicitor about the possible illness of a representative. However, the EJ had erred in concluding that a list of issues was not agreed; it was by the time of the Preliminary Hearing in April 2022 (see para. [4], page 319/CB).

41. The respondent argued that aside from the amended grounds of resistance, the EJ had not adequately considered the circumstances of the respondent's initial agreement to provide further and better particulars, and its change of mind, which did not constitute a wilful disregard, even if it were misguided. True it was that the respondent had consented to the original order (see para [5], page 319/CB) but its amended response served on 5th May 2022 made the request otiose.

42. At para. [25], page 327/CB, the respondent conceded that requiring the claimant to carry out work placed her at a disadvantage, but it did not do so after April 2017. That answered the first of the further and better particulars (see page 82/SB). The requests about support and relief, in the same paragraph, for example, paras. [8.1] and [8.2], pre-dated 2017. I pause to note, and as I pointed out to Mr Mahmood, the other requests for further and better particulars, namely about auxiliary aids at paras. [8.3] to [8.8], post-dated 2017, and the respondent expressly relied on them as reasonable adjustments, but without providing particulars pursuant to the previously agreed consent order (see para. [26], page 327/B).

43. Nevertheless, on that basis, and however misguided, Mr McCardle had believed that the further particulars sought (and ordered) could be answered in witness evidence (see page 89,/SB) and this was not the same as wilful disregard of a direction.

44. The EJ had also failed to appreciate that there was a mismatch between the disclosure requests and the issues in the further and better particulars (see the document requests at page

108/SB). Mr Peacock had submitted that the disclosure request was disproportionate (see para. [46], page 356/CB) and the EJ had merely accepted the claimant's opinion.

45. In terms of the additional disclosure, the EJ had failed to consider that the claimant may already have some of the appendices to an investigation report, even if not all of them. The claimant's solicitors had effectively downed tools and refused to agree to a bundle once they made the strike-out application (see page 112/SB). In terms of wilful disregard, it made no sense for Weightmans to choose to make only partial disclosure delivery. There was a spectrum of likely reasons for late disclosure, ranging from a lack of experience, which the respondent's in-house lawyer candidly accepted that he had, to a deliberate intent to defy orders. The former was more likely, and to leap to the latter without evidence was, the respondent contended, an error of law.

46. In respect of the challenge that the EJ had failed to consider whether a fair trial remained possible, the respondent argued that the EJ simply accepted the claimant's assertion that she could not prepare for the remainder of the hearing so soon or why a further trial delay, say, of nine months was not permissible as an alternative to strike-out.

47. On the issue of being barred from a remedy hearing, the EJ had failed to consider whether the respondent should be barred from participating at the liability stage only (see the fourth-stage of the test in **Bolch v Chipman** [2004] IRLR 140).

The Claimant's Submissions

48. It was not a fair criticism that the EJ had sought to blame the respondent for all of the delay or had not appreciated that the respondent had previously complied with an "unless" order. At para. [11], page 347/CB, the EJ had referred to the claimant needing to respond to further and better particulars. The assertion that the provision of an amended list of issues somehow delayed

the respondent at material times from amending its grounds for resistance was not correct. This could be seen, for example, at EJ Coghlin's "unless" order where the amended grounds were ordered by 14th October (see page 222/CB) and the list of issues, afterwards, at para. [5.1], page 223/CB

49. The respondent could not simply disavow its behaviour before it instructed Weightmans in March 2022. This showed repeated periods of inactivity by the respondent resulting in the "unless" order in 2020, which wasted most of 2020; and the lack of activity after 29th September 2021, as identified by EJ Harding in the subsequent sixth Preliminary Hearing at para. [2], page 319/CB. The fact of repeated failures to provide the disclosure were despite orders on 16th December 2020 and 11th November 2021.

50. It was also relevant that that there had been failures by the respondent after Weightmans were instructed, specifically the final disclosure to disclose by 26th May 2022 (see para. [2.1], page 319/CB). In the absence of an explanation for the course and progress of the disclosure exercise, it was unarguably open to the EJ to conclude that this part of the default was wilful (see paras. [61] to [63], page 360/CB). It was equally open to the EJ to conclude that the respondent had consciously decided not to comply with the request for further and better particulars.

51. The EJ accurately recorded that the orders for further and better particulars had been by consent (see para. [65], page 350/CB). The respondent's solicitors had not applied to vary the order and had simply declined to comply with it. The fact that they then claimed to have taken witness statements and were at an advanced stage, near to finalising them, begged the very question that if those statements could answer the request for further and better particulars, why the respondent could not simply answer the further and better particulars.

52. The EJ's reference to the respondent not providing the full grounds of resistance until 5th May 2022 (see para. [66], page 360/CB) could not be fairly taken to mean that the EJ had

ignored the earlier litigation history. The reference to non-compliance on multiple occasions was unarguably inaccurate and EJ Harding had made an order in the context of a further default and there being compliance at the last possible minute (see para. [2] and order [1], page 319/CB).

53. It was also not accurate to say that the list of issues had been agreed, as EJ Harding did not record this. If this were the case, the EJ would not have recorded the need for amended grounds of resistance. The respondent's claim that the issues had been agreed was disputed, in the sense that the claimant had not agreed to them.

54. Next, by reference to the case of **Emuemukoro v Croma Vigilant (Scotland) Ltd** EA-2020-000006, the EJ had unarguably considered whether a fair trial was still possible. That much was clear from the reasons at para. [69], page 361/CB. The EJ explained why a fair trial was no longer possible, at paras. [69] to [70]. The EJ did not simply accept the claimant's assertion, without more, that she could not prepare for the substantive hearing in seven weeks' time. The claimant had provided detailed submissions on why this was, even absent the late disclosure, and why a further trial in the same nine months was not appropriate as an alternative to strike-out. The EJ was entitled to use her experience in considering whether it was possible to proceed to trial in seven weeks, noting the previous timeframes which EJ Harding set out.

55. Further, the EJ had explained why a delay of nine months would not result in a fair trial. The claimant had drawn an analogy with the case of **Peixoto** as there was no sense of when a fair trial could ever take place, given the respondent's repeated non-compliance. Moreover, the EJ expressly considered whether the respondent could fairly participate in defending part of the claim, but this was a case where the claimant alleged that her dismissal was unfair and discriminatory so that the issues were intertwined (see para. [75] at page 363/CB).

56. On the issue of participation in respect of remedy, the EJ's decision did not preclude participation in a remedies hearing, which was considered at a later **Rule 21** hearing.

My Decision on Ground A

57. Whilst a strike-out decision is not made lightly made by any Judge, I am satisfied that the EJ did not err in conflating lack of experience or incompetence with wilful disregard and I conclude it was unarguably open to the EJ to conclude that the respondent had wilfully disregarded tribunal directions, specifically (and repeatedly) its disclosure obligations; and the consent order for further and better particulars, and that these two aspects, combined with the delay in providing amended grounds of resistance formed the basis of conduct which the EJ was entitled to conclude was unreasonable.

58. The EJ did not fail to appreciate the whole of the litigation history as contended, but equally was not obliged to add to her already comprehensive summary, in giving her reasons. Whilst Mr Mahmood relies on particular aspects of the history where he argues that the claimant's actions delayed matters and that the EJ had failed to appreciate the full history, I accept Ms Anderson's submission that this does not detract from or display any misapprehension of the history. The core inference open to the EJ was that the respondent's repeated actions were such that they raised the issue of whether the default was intentional. Overall, the EJ's reasons accurately reflected of the litigation history, namely that the respondent had failed to comply with multiple directions, including with months of inactivity, which resulted in the amended grounds of defence only being finalised in May 2022.

59. The EJ considered the absence of an explanation from the respondent's representatives about conducting searches ahead of disclosure, namely that individual witnesses cannot have been asked, despite legal representation first by in-house legal representatives, and after March 2022 by Weightmans Solicitors. In respect of the further particulars, it is no answer to say that because Mr McArdle had reasons for not complying with an order, which he had expressed to the claimant's representatives, this was not a wilful default, even if misguided. He had not

applied for a variation of the order. I accept Ms Anderson's submission that the respondent had quite clearly chosen not to comply with an order to which a representative from the same firm had consented to only a month previously, without any application for a variation.

60. On the issue of outstanding disclosure requests which the EJ had considered, in the context of whether instead of a strike-out of the defence and grounds of resistance, there could be a sequential exchange of witness statements (see para. [70], page 361/CB), once again, the EJ was not required to list the documents sought. However, the EJ had plainly considered them in the context of the respondent's refusal to provide further and better particulars. Indeed, the potentially extensive scope of the claimant's disclosure requests had been exacerbated by the respondent's refusal to provide further and better particulars (see para [38], page 354/CB), which is exactly why the respondent had originally agreed to provide the further and better particulars.

61. By reference to **Emuemukoro**, the EJ had unarguably considered separately whether a fair trial was still possible. That much was clear from para. [69], page 361/CB. The EJ did not simply accept the claimant's assertion without more that she could not prepare for the substantive hearing in seven weeks' time. Instead, I accept Ms Anderson's submission that the claimant had provided detailed submissions, which the EJ did not have to repeat as to why, even absent the issue of late disclosure, a fair trial was made possible; or why a further trial delay in the trial of, say, nine months, was appropriate as an alternative to strike-out.

62. The details were contained in the claimant's strike-out application at para. [41], page 104/SB, as including the claimant's disability, with a reduced capacity to write or type and with anxiety; and also the lack of clarity about the further and better particulars which she would need to address and answer in her witness statement, particularly in relation to extensive reasonable adjustments which the respondent had asserted. Added to this was the context of the additional

disclosure of 1,200 pages of documents, which the EJ concluded that there was not sufficient time to review, to consider if anything further were needed; and to finalise statements.

63. I accept Ms Anderson's submission that the EJ could be expected to form a view of realistic timeframes for pre-trial preparation and in the circumstances the EJ was best equipped to make that assessment. It is not a fair criticism that she simply accepted the claimant's generalised assertion that it was not possible. That much is clear when the EJ referred to a hearing in seven weeks' time with an additional 1,200 pages or double the size of the disclosure (see para. [69], page 361/CB). Crucially, and in the context of the authority of **Blockbuster v James**, this was not in the context of a strike-out of a party's case where it was at the point of hearing. The issue that the EJ was considering was that this was a case that was nowhere ready to be at the point of a hearing and the EJ explained why it was not.

64. The EJ considered and explained why a further delay in the trial would not result in a fair hearing, at para. [72], page 362/CB. This would mean a hearing nearly three years after the claimant's claim had been presented, with the significant risk of memories fading and a final trial having been postponed once previously.

65. The EJ also expressly considered and adequately explained why a partial strike-out would not be sufficient, namely a distinction between on the one hand, a defence to the unfair dismissal claim and on the other, a defence to a discrimination claim, where the respondent's defaults pervaded both defences. That conclusion was reached in the context of the default in providing further and better particulars, including claimed reasonable adjustments; the extensive additional disclosure relevant to dismissal, both allegedly unfair and discriminatory, and the outstanding disclosure requests. The EJ's decision on that aspect was unarguably open to her.

66. However, and finally on this particular point in ground A, on the issue of participation in a remedy hearing, I accept that on the face of it the EJ's decision did not refer to consideration

of the consequences of a strike-out of the defence on whether the respondent could be permitted to participate in a remedy hearing. Whilst I have not been given details of a hearing said to have taken place under **Rule 21,** nevertheless, at this stage of the decision there was no consideration. I accept the respondent's criticism that that omits an important part of the consideration as to the consequences of the strike-out of the claim, as per para 55(4) of **Bolch v Chipman**. For the avoidance of doubt, that error does not affect or undermine the EJ's conclusions of the appropriateness of strike-out and that a fair trial was not possible on liability. Thus, this one part of Ground A succeeds. The remainder of Ground A fails.

67. I invited representations from the parties. It transpired that pursuant to **Rule 21**, the respondent had been permitted to participate in a remedy hearing already scheduled in the future, so that no further directions from this Tribunal were necessary.

Ground B - No evaluation of whether conduct was beyond the point of no return and whether strike-out was disproportionate to the respondent's case

The Respondent's case

68. Mr Mahmood accepted there was a substantial overlap between Grounds B and C. Much ground has already covered in Ground A, so my reasons are far briefer. The respondent argued that the EJ failed to consider the "big picture": the seriousness of the allegations, the potential size of the claim and why the respondent's conduct had passed the point of no return. It was argued that the previous "unless" order of EJ Coghlin had got the case back on track. The EJ could have awarded costs and case-managed the proceedings until the full hearing starting 19th September 2022. There was no evidence that the past non-compliance was deliberate and so would be repeated. There was an explanation for the recent late disclosure and the respondent was blamed wrongly for not agreeing a list of issues. It had instead responded with amended

grounds of resistance. The EJ had failed to appreciate that the respondent had previously complied with an "unless" order.

69. Proportionality was key and the EJ ought to have considered whether the default was that of the respondent or its representatives; the unfairness arising and prejudice to parties; and lesser remedies.

The Claimant's case

70. The EJ unarguably considered the prejudice to both parties, including alternatives to strike-out: costs sanctions, (para. [74], page 362/CB); a partial strike-out, (para. [75], page 363/CB); sequential witness statements, (para. [70], page 361/CB); and a further postponement of the hearing, (para. [72], page 362/CB). The EJ also considered the overall "big picture" of a claim still not resolved or ready for trial after years. The seriousness of the allegations and the importance of the case cut both ways and also applied to the claimant.

My Decision on Ground B

71. In essence, the challenge is to the EJ's assessment of proportionality. I am satisfied that the EJ did consider all of the relevant factors, including alternatives to strike-out and in doing so, was acutely conscious of that effect of strike-out, which she recognised was only to be ordered in the most extreme of cases (see para [73], page 362/CB). She was unarguably aware of the high hurdle before issuing a strike-out, and draconian effect of doing so. She was also unarguably aware of the "unless order" and the respondent's earlier compliance with it, referring to it expressly at para. [66], page 360/CB.

72. The question of whether the respondent's conduct had reached a point of no return was, in my view, answered by the EJ's conclusions on the viability of alternatives to strike-out. Her reasons were clearly explained, and her conclusions were unarguably open to her.

73. Ground B therefore discloses no error of law and fails.

Ground C – did the EJ fail to consider a lesser remedy?

The Respondent's case

74. As already noted, Grounds B and C overlap, and so the submissions and conclusions on Ground C are brief. The respondent reiterated that an "unless" order has previously got matters back on track and the EJ had failed to consider the magnitude of default; the disruption and prejudice caused and whether a fair hearing was still possible.

The Claimant's case

75. Ms Anderson reiterated the adequacy of the EJ's consideration of whether a fair trial was still possible and the consequential magnitude of default and disruption of the parties.

My Decision on Ground C

76. For the same reasons that I have already given in respect of Grounds A and B, I conclude that the EJ did not err in striking out the response, save in one respect which was to fail to consider the consequences of doing so for the purposes of considering participation in a remedy hearing. I have already addressed that in Ground A, and except as already stated, Ground C discloses no further error of law and is dismissed.