EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	2 June 2025
Claimant:	Mr R Armstrong		
Respondent:	The London Fire Commissioner		
Before:	Employment Judge Ramsden		
Representation:			
Claimant	Ms Bouffé, Counsel		
Respondent	Mr Amunwa, Counsel		

JUDGMENT

1. The Claimant's application to strike-out the Respondent's Response is refused.

REASONS

2. These written reasons are provided at the request of the Claimant following oral reasons given on 2 June 2025.

Background

3. The Claimant has been employed by the Respondent as a firefighter since 20 September 2003 (the Claimant says) or 15 March 2006 (the Respondent says). He remains employed by the Respondent.

4. Early conciliation began on 13 December 2023 and ended on 24 January 2024. The Claimant presented his Claim Form on 17 February 2024, together with some Particulars of Claim. The Claimant did that without legal assistance.

5. In April 2024 the Claimant requested that an investigation be opened into complaints made by him of bullying, harassment, discrimination and victimisation by various of the Respondent's personnel. The Respondent commissioned an

external consultant, CMP Solutions (**CMP**), to investigate the Claimant's complaints.

6. The Claimant gained legal representation on 25 July 2024 and, having the benefit of legal advice, on 7 November 2024 sought to rely on Amended Grounds of Claim. Those Amended Grounds of Claim included new matters which had arisen since the presentation of the Claim. Those Amended Grounds were accepted, and permission granted for the amendments to the Claimant's claim they contained, by EJ Burge in a Preliminary Hearing for Case Management on the same date.

7. At the hearing before EJ Burge, the parties presented an agreed list of issues, which EJ Burge appended to her Orders as setting out the list of the Claimant's complaints and the issues between the parties.

8. (As amended) The Claimant brings complaints of direct discrimination on the grounds of sex, race and religious belief, harassment related to sex, race and religious belief, and victimisation (the **Claim**).

9. On 7 November 2024 EJ Burge listed the Claim for Final Hearing over seven days beginning on 2 June 2025. EJ Burge made various Orders for the parties to take preparatory steps in the run-up to the Final Hearing, which included Orders that:

    a) By 24 January 2025 the parties send to each other copies of all documents relevant to the issues in the Claim;

    b) By 14 February 2025 the Respondent was to send to the Claimant a draft index for the hearing bundle;

    c) By 7 March 2025 the Respondent was to send to the Claimant an electronic copy of the hearing bundle; and

    d) The parties were to exchange copies of their witness statements by 11 April 2025.

10. CMP produced a report setting out its conclusions on nine allegations made by the Claimant against named individuals at the Respondent on 13 January 2025 (the **CMP Report**). The CMP Report upheld eight of those allegations, and upheld the ninth allegation in part.

11. As noted above, the initial disclosure process between the parties was due to culminate by no later than 24 January 2025. Despite the fact that EJ Burge's Orders only permitted the parties to vary that deadline by a maximum of 14 days without the Tribunal's permission, the parties mutually decided to delay disclosure to 7 March 2025. The parties agreed to a 14-day delay to the date for the Respondent to produce the bundle – that was to occur by 21 March 2025.

12. The Claimant's solicitors chased the Respondent about disclosure on 12, 14 and 19 March 2025. The Respondent's solicitors replied on 20 March 2025, indicating they would be ready to disclose on 21 March, but in fact that did not occur until

25 March 2025, more than two months after the date that had been Ordered by EJ Burge.

13. Needless to say, the timetable for the production of the bundle was similarly delayed. The Claimant's solicitors chased the Respondent about that on 15 April 2025, and received no reply.

14. On 15 April 2025 the Respondent made an application to the Tribunal to postpone the Final Hearing for three months, saying that it was looking to implement the recommendations of the CMP Report, which included pursuing misconduct proceedings against two key Respondent witnesses in this litigation. The Respondent said that:

    a) The conclusion of those internal proceedings could result in the Respondent making concessions in this litigation, and therefore it is in everyone's interests that the postponement be granted;

    b) Its ability to resist the Claim would be hampered if the Final Hearing proceeded while the internal processes were ongoing, as it "*must now remain neutral as to whether those allegations [that are the subject of the CMP Report] occurred*";

    c) If the Final Hearing were to go ahead it "*would impede the effectiveness of [the Respondent's internal] disciplinary process, including that there is a real risk that the Respondent prejudges the conduct issues*";

    d) The Respondent would be unfairly prejudiced if the Final Hearing were to proceed as listed before the conclusion of the Respondent's internal proceedings, which would not be in the interests of the overriding objective; and

    e) It was optimistic that a settlement could be reached without the need for a Final Hearing.

15. The Claimant objected to the Respondent's postponement application on 24 April 2025, and applied for an Unless Order that the Respondent serve the bundle by 30 April 2025. The Tribunal did not reply to that application.

16. The Claimant wrote to the Respondent again on 30 April 2025, requesting the bundle and asking about exchange of witness statements (by then, already more than 14 days after the deadline set by EJ Burge). Further "chaser" emails were sent on behalf of the Claimant to the Respondent.

17. The Respondent's solicitors emailed the Claimant's solicitors:

    a) On 1 May 2025, stating that: "*It would premature to provide a bundle for the final hearing until the Tribunal has determined the [Respondent's postponement] application*"; and

b) On 8 May 2025, stating that: "*We remain of the view that it would be premature to incur further costs until we have heard back from the Tribunal [on our postponement application]*".

18. REJ Khalil wrote to the parties on 21 May 2025 seeking an update on whether the parties had settled the matter, noting that if the Final Hearing did not proceed the relisted hearing would not be before October 2027.

19. The Claimant's solicitors wrote to the Tribunal on 22 May 2025 again objecting to the Respondent's application to postpone, and repeating its application for an Unless Order should the Respondent fail to produce a bundle by midday on 23 May 2025.

20. The Respondent's solicitors replied on the same day, noting that "*The case is not ready to be heard by the Tribunal not least because the bundle of documents is yet to be finalised*", and that "*As the parties have yet to agree the bundle, and for the same reasons which form the basis of the Respondent's application for postponement, the Respondent is not ready to exchange witness evidence*".

21. REJ Khalil wrote to the parties again on 28 May 2025, saying that the Final Hearing remains listed and the Respondent's postponement application would be determined at the outset of that hearing. The letter further stated: "*It is not clear why an investigation commissioned after April 2024 with a report produced in January 2025 should need a postponement of the final hearing and likely if postponed would not be re-listed for over 2 years*".

22. The Claimant then took the decision, on the afternoon of 28 May 2025, that in light of the failure to have a trial bundle or sight of witness statements from the Respondent's witnesses, it would not be possible to proceed with the Final Hearing. As a result, the Claimant made an application to strike-out the Respondent's Response on 30 May 2025. It is that application that is the subject of this reasoned judgment.

The application

23. The Claimant applied to strike-out the Respondent's Response to his claim on three bases:

a) Firstly and primarily that it is no longer possible to have a fair hearing in respect of the claim (Rule 38(1)(e)), because the Respondent's actions in failing to prepare for this Final Hearing have necessitated a postponement of this hearing, which will:

(i) Have a significant detrimental impact on the Claimant's mental health; and/or

(ii) Occasion forensic prejudice;

b) Secondly, the manner in which the Respondent has conducted the proceedings has been scandalous or unreasonable (Rule 38(1)(b)); and

c) Thirdly, the Respondent has failed to comply with EJ Burge's Orders to agree a bundle, produce a bundle and exchange witness statements, and that failure, in light of the postponement it has necessitated and the consequences for the Claimant's mental health and forensic prejudice, means that strike-out is proportionate and appropriate (Rule 38(1)(c)).

The hearing

24. Both parties were represented by Counsel.

25. The parties had agreed a hearing bundle (for the postponement application), and each party had prepared written submissions and collated their own legal authorities. Each party referred the Tribunal to additional legal authorities in the course of their submissions.

26. While the Respondent had made a written application to postpone this hearing, both parties agreed that it was now not possible to proceed with this hearing, so the key issue to determine was whether the Claimant's application to strike-out the Respondent's Response should be granted.

Law

Strike-out

14. Rule 38 of the Employment Tribunal Procedure Rules 2024 (the **ET Rules**) provides:

"*(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds-*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).

(4) Where a reply is struck out, the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer's contract claim)."

15. The effect of a strike-out of a claim is to terminate the claim, or the part of the claim that is the subject of the order. The effect of striking-out a response can be more varied, as there is a question of whether the respondent should be permitted to make representations in relation to remedy.

16. The strike-out power is of a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is "*a matter of high public interest*" that such cases are heard (as per Lord Steyn in *Anyanwu v South Bank Students' Union* [2001] IRLR 305).

17. The application here is made under sub-categories (b), (c) and (e). There is some overlap between these categories on the facts.

Fair hearing no longer possible (Rule 38(1)(e))

18. The gateway condition to strike-out on this ground is whether a fair hearing is possible – and the central consideration will be where the balance of prejudice to the parties in the matter lies in continuing with the case or it being struck-out.

19. However, satisfaction of that gateway condition on its own is not enough – strike-out must also be a proportionate response in the circumstances. This involves engaging with the alternatives and taking account of all the factors relevant to a fair trial, such as:

a) Whether there has been fault on the part of the party in question (*Leeks v University College London Hospitals NHS Foundation Trust* [2024] EAT 134);

b) If so, the magnitude of the default (*Weir Valves v Armitage* [2004] ICR 371);

c) Whether the default is the responsibility of the solicitor or the party (*Armitage*);

d) What disruption, unfairness or prejudice has been caused (*Armitage*);

e) Whether a fair hearing is still possible (*Armitage*);

f) Whether a lesser remedy than strike-out (e.g., a costs order) would be an appropriate response (*Armitage*);

g) The implications of the different feasible courses of action, such as whether not striking-out will involve undue expenditure of time and money (*Emuemukoro v Croma Vigilant (Scotland) Ltd* [2022] ICR 328);

h) The demands of other litigants (*Emuemukoro*); and

i) The finite resources of the tribunal (*Emuemukoro*).

20. The Tribunal notes the following passage from Choudhury J's judgment in *Emuemukoro*, which provides guidance on how to approach the task of considering alternative courses of action:

"*If there are several possible responses to* [on the facts of that case] *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 responses which would be the least drastic of the options available*".

21. While the proportionality condition for strike-out on the grounds described in parts (b), (c) and (d) of Rule 38(1) only requires there to be "*a significant risk*" that a fair trial could not take place, where the ground relied upon is that set out in Rule 38(1)(e), the tribunal may need to have a greater degree of confidence that a fair trial is not possible (*Leeks*). HHJ Tayler in that case gave the example of an application under Rule 38(1)(e) based on the poor health of the party in question, and posited that the lack of fault needed to strike-out their claim or response (as opposed to the fault-based grounds of Rule 38(1)(b), (c) and (d)) may make it appropriate that the tribunal applies a higher threshold of confidence that a fair hearing is not possible.

22. The reported decisions on this 'fair hearing no longer possible' basis for strike-out emphasise the exceptional nature of strike-out on this ground, such as the following, where strike-out was found to have been appropriate:

a) The case of *Peixoto v British Telecommunications plc* UKEAT/0222/07, where there was no prospect of the claimant being able to give oral evidence and the case could not be decided on the documents alone. The tribunal concluded that there was no point in the foreseeable or distant future when a trial could take place, let alone within a reasonable time, as expected by Article 6 of the European Convention on Human Rights.

b) *Whelpdale v Moorfields Eye Hospital NHS Foundation Trust* ET Case no.2200336/18. In that case, the claimant's claim was reinstated four years after it had been brought. None of the potential witnesses for the respondent remained employed by it, five to seven years had elapsed

since the events in question, and the respondent had only been able to locate a handful of relevant documents.

23. If the basis for the assertion that a fair trial is not possible is the forensic prejudice that will be caused by delay (i.e., that the quality or cogency of the evidence will be diminished by the passage of time), that argument should be supported by evidence (*Daly v Northumberland and Tyne and Wear NHS Foundation Trust* UKEAT/0109/16).

24. A tribunal can bring its own experience to bear when determining whether it accepts that forensic prejudice is likely to occur (*Peixoto* and *McMahon v AXA ICAS Ltd* [2025] EAT 8).

25. The question for the Tribunal is not simply whether time will cause forensic prejudice, but the extent of that prejudice, and whether it is so severe that a fair trial is no longer possible (*Daly*).

Conduct (Rule 38(1)(b))

26. The cases (e.g., *James v Blockbuster* [2006] EWCA Civ 684) show that there is a staged test that must be satisfied for a strike-out application on the basis of conduct to succeed, and the following two conditions must be satisfied:

    a) The gateway condition: That the conduct of the party:

        (i) Was scandalous, unreasonable or vexatious; **and**

        (ii) Has resulted in a fair trial being impossible;

    and

    b) The proportionality condition: That the imposition of the sanction of strike-out is a proportionate response.

27. On the gateway condition, the tribunal needs to be confident that the conduct casts real doubt on the fairness of the process, such as the intimidation of witnesses, the suppression or alteration of a document, or a deliberate and persistent disregard for required procedural steps, each of which could amount to conduct which is scandalous or unreasonable. An example of vexatious conduct could be where the proceedings are brought on the basis of a falsified document, or purely so as to damage the business of the respondent. The conduct must be of a kind that there is a real risk that justice cannot be done (*Logicrose Ltd v Southend Football Club* Times (1988) 5 March). Strike-out is not a tool to punish, but should be used where there is a real risk that the conduct would render further proceedings unsatisfactory.

28. As to whether a fair trial is impossible, where that examination is made at the outset of a final hearing and the tribunal finds that adjournment would result in unacceptable prejudice, the tribunal should centre upon whether a fair trial is possible in *that trial window* (*Emuemukoro*).

29. Forensic prejudice may also be relevant (and if so the same considerations as summarised above would apply).

30. Satisfying the gateway condition to strike-out is not enough on its own. "*Even where a tribunal concludes that a fair trial is not possible, it is still necessary for the question of proportionality of this sanction to be considered*" (*Daly v Northumberland Tyne and Wear NHS Foundation Trust* UKEAT/0109/16).

31. The proportionality condition - whether strike-out is a proportionate response – is an assessment guided by the overriding objective in Rule 3 (*Armitage*). Strike-out is not a punishment, but is rather a tool to be exercised with caution in furtherance of justice (*Armitage* and *Arrow Nominees v Blackledge* [2000] 2 BCLC 167).

32. Some of the key considerations include:

    a) The magnitude of the default (*Armitage*);

    b) Whether the default is the responsibility of the solicitor or the party (*Armitage*);

    c) What disruption, unfairness or prejudice has been caused (*Armitage*);

    d) Whether a fair hearing is still possible (*Armitage*);

    e) Whether a lesser remedy than strike-out (e.g., a costs order) would be an appropriate response (*Armitage*);

    f) The point in the proceedings at which the strike-out is being considered. It takes something very unusual indeed to justify striking out on procedural grounds a claim which has arrived at the point of trial (*James*);

    g) The likelihood of recurrence (*Leeks*);

    h) Where the proposal is to strike-out a Response in a case of discrimination, whether the consequence of strike-out would almost inevitably lead to a discrimination finding against the employer, and any named individuals (*Harris v Academies Enterprise Trust* [2015] IRLR 208);

    i) The implications of the different feasible courses of action, such as whether not striking-out will involve undue expenditure of time and money (*Emuemukoro*); and

    j) The demands of other cases (*Arrow Nominees*) in the context of the finite resources of the tribunal (*Emuemukoro*).

33. Where a fair trial remains possible, careful consideration must be given to whether a strike-out is proportionate (*Bolch v Chipman* [2004] IRLR 140) – and in most cases it is unlikely to be so (*Daly*).

34. "*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 responses which would be the least drastic of the options available" (*Emuemukoro*).

35. When assessing the proportionality condition for strike-out under Rule 38(1)(b), (c) or (d) and assessing whether a fair hearing is still possible, that involves considering whether there is "*a significant risk*" that a fair trial is not possible (*Leeks*). (This was thought, by HHJ Tayler in that case, to be a lower threshold than cases under Rule 38(1)(e), where the tribunal would need to be satisfied that there is *more than* a "*significant risk*" that a fair hearing is not possible, given that the party whose claim or response is being assessed for strike-out could be at no fault, e.g., where ill health renders a fair trial not possible.)

Non-compliance with Orders (Rule 38(1)(c))

36. As noted by the Supreme Court:

"*it was a well-established principle of constitutional law that a court order had to be obeyed unless and until it had been set aside or varied by the court, or overruled by legislation*"

(*R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2021] UKSC 46).

37. The gateway (non-compliance) and the proportionality (approached in the same way as where the ground for strike-out is conduct) conditions apply for strike-out on this ground as well.

Application to the claims here

The Claimant's primary position: A fair hearing is no longer possible (Rule 38(1)(e))

38. The Claimant makes his application firstly pursuant to Rule 38(1)(e). The Claimant's application here rests on two bases – averring that there are two bases on which the gateway condition for strike-out under Rule 38(1)(e) are satisfied:

    a) That the delay caused by the Respondent's conduct will have such a significant impact on his mental health as to render a fair hearing no longer possible; and

    b) He will suffer forensic prejudice in the presentation of his case due to the delay.

39. On the first, the Claimant relies on a letter from his psychological therapist, Whitney Shaw-Dale, who wrote a letter on 30 May 2025 stating that the Claimant:

a) "*has expressed a strong and urgent need for the hearing to proceed without further delay*";

b) Has "*described the emotional strain as overwhelming, stating that news of the possible postponement has intensified his distress*";

c) "*has expressed deep concern*" about the impact of both his perceived treatment by the Respondent and the ongoing uncertainty and delay of his dispute with them is having on his family;

d) "*has described his immense anxiety and distress at the thought of a postponement of the tribunal hearing, and the need he has for a sense of closure to recover and move forward with his life*"; and

e) Has been experiencing suicidal thoughts since 2024.

40. These sentiments are extremely serious. They point to significant emotional toll further delay will have on the Claimant, but they do not support an argument that there is a significant risk that a delayed hearing will not be a fair hearing. There is nothing in Ms Shaw-Dale's report that, for example, tells the Tribunal that the additional emotional strain would be expected to render the Claimant, who is capable of giving oral now, incapable of doing so at a postponed hearing. This is very far from the kind of situation described in the *Peixoto* and *Whelpdale* cases.

41. On the second argument made by the Claimant, that delay will involve forensic prejudice, the Respondent agrees that delay will inevitably occasion some forensic prejudice, but it has cautioned the Tribunal to not simply accept that the degree of forensic prejudice will be such that there is a significant risk that a fair hearing will no longer be possible *without evidence of that fact*. The Respondent has cited the case of *McMahon* as authority for that proposition, and the Tribunal accepts and agrees with that argument.

42. Moreover, it seems to the Tribunal likely that it is the *Respondent* that bears the risk of disadvantage by reason of forensic prejudice. The nature of the Claimant's case – being one of unlawful discrimination – means that he would need to mount sufficient evidence to make a *prima facie* case of discrimination so as to shift the burden of proof to the Respondent. The Tribunal is told both that CMP has upheld most of the complaints the Claimant made about two key individuals involved on behalf of the Respondent, and that there is a very significant degree of overlap between the grievance complaints CMP investigated and the legal complaints made by the Claimant in this case. It seems, therefore, that forensic prejudice is most likely to disadvantage the Respondent when it comes to the question of whether it can discharge a shifted burden of proof, given that it has already ceased to employ one of the alleged perpetrators of the discriminatory acts, and has misconduct proceedings underway against two of the other three alleged perpetrators that may result in their dismissal.

43. Because the gateway condition is not made out, the Tribunal does not need to consider proportionality, but notes that:

a) There has been fault on the part of the Respondent (Leeks), but strike-out is a draconian measure, and should be resorted to only exceptionally where the case concerns discrimination (*Anyanwu*). Strike-out is a tool for responding to (on the basis of the argument here) a fair hearing not being possible – it is not a punishment (*Armitage*, *Arrow Nominees*). The Respondent here has behaved poorly, but that can be responded to by an Order for costs; and

b) Striking-out the Response here would effectively involve concluding that the Respondent, and the individuals named by the Claimant, have discriminated against him, without airing the allegations and the response to them. This points against the proportionality of strike-out (*Harris*).

This considerations bolster the conclusion that striking-out the Response is not appropriate on this ground.

The Claimant's alternative basis: Conduct (Rule 38(1)(b))

44. In order to strike-out the Respondent's Response on the basis of conduct, the Tribunal needs to be satisfied that:

a) The gateway condition is met, that the Respondent's conduct:

(i) Was scandalous, unreasonable or vexatious; and

(ii) The result of that conduct is that there can not be a fair trial; and

b) The proportionality condition is met, i.e., that strike-out is proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then strike out should not be employed.

45. As for the gateway condition, it is clear that the Respondent's conduct was unreasonable.

a) It was deliberate – the Respondent took a conscious decision not to prepare for this hearing, despite knowing of its listing since November 2024 (as shown, for example, by its emails of 1 and 8 May 2025).

b) The Respondent decided to commission CMP to investigate overlapping complaints, and it allowed CMP to report back to it in mid-January 2025, with then some to-ing and fro-ing to clarify the report's contents (as would have been predicted). The Respondent could, at any time since instructing CMP in April 2024, have paused that investigation pending the Tribunal's determination of the Claim. It chose not to do so, and now has sought to argue that these external legal proceedings should be postponed pending the outcome of the misconduct proceedings against two key witnesses recommended by that Report.

c) While authorities have been cited to me by the Respondent that a stay is appropriate in those circumstances, it should have been absolutely clear to the Respondent that it should – and was Ordered to – have prepared its

case for this hearing pending the Tribunal's determination of its postponement application. It was for the Tribunal, not the Respondent, to decide the postponement application. Effectively the Respondent took that decision out of the Tribunal's hands by choosing to be so ill-prepared for this hearing that it has made it not possible for this hearing to proceed. The Respondent made a conscious choice to do so to save costs – as is evident by its correspondence. That is not acceptable.

46. However, the Tribunal is not persuaded that by that conduct the Respondent has created a significant risk that a fair trial – whether in this trial window or otherwise - is impossible. The Tribunal was told that when the Final Hearing does proceed the Claimant wishes to call four witnesses (including himself), and the Respondent seven witnesses. Such a hearing could never have been expected to fit into the seven day hearing window for this matter, as both parties (both represented) would/should have appreciated. The Respondent's conduct, whilst poor, is not causative of the postponement. The parties should have contacted the Tribunal to say that it could not be heard in the window allowed, or sought a case management hearing if they could not "right size" the scope of the evidence to fit the window.

47. On the proportionality condition, the Tribunal is not persuaded that strike-out is proportionate. Specifically:

    a) A fair trial was never going to be possible in this hearing window, so the adjournment was not caused by the Respondent's unreasonable conduct (*Armitage*) – it would have happened anyway because both parties failed to right-size the evidence to the hearing window or write to the Tribunal to seek to extend the hearing length or seek a Case Management Hearing if the parties could not agree on the best course. The Respondent's conduct therefore does not create unacceptable prejudice, and therefore the consideration of proportionality is not confined to this hearing window (*Emuemukoro*);

    b) Strike-out of the Respondent's response would effectively involve the Claimant succeeding on complaints of discrimination (*Harris*). Not only is that a very serious matter for a public body such as the Respondent, it would involve very serious allegations against the individuals he alleged committed those acts being assumed to have been taken for the discriminatory reasons the Claimant asserts. Where those allegations could not have proceeded to have been determined in this trial window in any event, strike-out is far from proportionate;

    c) While the Claimant has taken the Tribunal to evidence about the distress that delay will cause him, that would have happened anyway given the evidence was going to be too voluminous for the hearing window. The Claimant's medical evidence does not indicate that a postponed hearing could not be a fair hearing;

d) Considering lesser responses to the Respondent's conduct, such as the matters specified in Rule 6(2):

(i) Waiving or varying the requirement is not appropriate – a bundle of evidence and witness statements cross-referencing that bundle will be needed;

(ii) Strike-out of part of the Response – that was not proposed, and nor does it seem appropriate, because if it were confined to, say, those matters concerning the Respondent personnel who are going through internal misconduct proceedings, again that would lead to allegations of discrimination being upheld without being tested, which is undesirable, particularly where specific individuals' conduct would thereby be impugned;

(iii) Barring or restricting a party's participation in the proceedings – that would be inappropriate for the same reason as striking-out the Response, it part of it, would be; and

(iv) Awarding costs – it strikes the Tribunal that this is potentially the appropriate response to the Respondent's conduct. The Tribunal invites the Claimant to address it on whether a costs award would be appropriate;

e) There is nothing to indicate that the Respondent's conduct is likely to recur; and

f) Whilst there are many other cases waiting to be heard, and the resources of the Tribunal are limited, it is in the interests of justice that this case be relisted, heard and determined.

48. Neither the gateway condition nor the proportionality condition for strike-out is met on the basis of the Respondent's conduct.

<u>The Claimant's third basis for seeking strike-out: Non-compliance with Orders (Rule 38(1)(c))</u>

49. Again, the gateway and proportionality conditions apply to consideration of the Respondent's third basis for seeking strike-out: that the Respondent did not comply with the Tribunal's Orders for the preparation of the case.

50. This is effectively the same argument as for conduct (the conduct complained of was non-compliance with Tribunal Orders), so the same conclusions as set out in relation to Conduct apply to this third basis for seeking strike-out.

51. On <u>the gateway condition</u>: the Respondent did fail to comply with Tribunal Orders, but that non-compliance has not rendered a fair trial impossible (with that assessment not confined to this hearing window, given the Final Hearing could not have proceeded now anyway). The gateway condition is not met.

52. More generally on the non-compliance, as the Respondent accepts, it should have done more to comply with the Tribunal's Orders, but it maintains that the Final Hearing could not have proceeded in this window (regardless of the volume of evidence and the length of the hearing window) because the internal proceedings have not yet concluded. The Respondent says that it would have been put in the difficult position of either:

    a) Effectively resisting the Tribunal case, but prejudicing its position in its internal proceedings; or

    b) Preserving its position in those internal proceedings, but not able to effectively the Claimant's claim in this case.

53. The Tribunal has already concluded that that is not an acceptable reason for its non-compliance, as those internal proceedings could have been stayed pending this Tribunal's determination of the Claimant's complaints. It was perfectly legitimate for the Claimant to make internal complaints and seek to have those determined, and the fact he did so does not justify the Respondent's inaction in preparing for this hearing.

54. However, a fair hearing remains possible, and strike-out is not a power to be used to punish. It should only be used in response to a failure to comply with Tribunal Orders where it has made a fair trial impossible which, for reasons already outlined, is not the case here. The proportionality condition is not met on the facts here.

55. Again, if appropriate, the Respondent's non-compliance can be answered in a costs award.

Conclusions

56. For all of the above reasons, the Claimant's application fails.

Employment Judge Ramsden

Date 16 June 2025

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/