Neutral Citation Number: [2025] EAT 109

Case No: EA-2024-000519-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 June 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MISS S BAILEY **Appellant**

- and –

AVIVA EMPLOYMENT SERVICES LTD **Respondent**

- -
- -

The **Appellant** did not attend and was not represented
Anisa Niaz-Dickinson (instructed by **Shoosmiths LLP**) for the **Respondent**

Hearing date: 24 June 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Strike Out

Where, on a strike-out application, the tribunal considers that a party has conducted the proceedings in a scandalous, vexatious or unreasonable manner, but their conduct is not so serious as to mean that they have forfeited their right to have their case heard, even if it is still triable, the tribunal needs to consider whether the matter is still capable of a fair trial, approaching that issue in line with the overriding objective (**Emuemukoro v Croma Vigilant (Scotland) Limited** [2022] ICR 327 at [19]). **Bolch v Chipman** [2004[IRLR 140 suggests that, in such cases the tribunal should ask first whether the matter is incapable of fair trial, and, if it is not, then whether a strike-out is disproportionate. But in practice these two questions may be intertwined. If the conduct is found to have imperilled a fair trial, the tribunal should consider whether it has in fact done irreparable damage to the ability of the matter to be fairly tried, or whether, on consideration, other proportionate steps can be taken to address, manage or mitigate the impact of the conduct, so as to enable a fair trial to happen.

In some cases the tribunal may properly conclude that the damage that has been done to the possibility of there being a fair trial is irreparable, so that there is no alternative to striking out, as was the case in, for example, **Chidzoy v British Broadcasting Corporation**, UKEAT/0097/17. In others there may be an alternative solution to the problem posed by the conduct, which enables a trial to proceed or take place in a way that is still fair to both parties – as, for example, the Court of Appeal considered was the case in **Blockbuster Entertainment Limited v James** [2006] EWCA Civ 6843; [2006] IRLR 684. In such a case it would not be proportionate or right to strike out the claim.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent.

2. This is the claimant's appeal. It relates to the reserved judgment and reasons of the tribunal, promulgated on 19 March 2024. The broad context of that decision, and this appeal, are as follows.

3. Following her resignation from the respondent's employment the claimant began an employment tribunal claim, acting as a litigant in person throughout. The matter was listed for a full merits hearing to take place over seven days from 13 – 15 and 18 – 21 September 2023. The complaints that were live and fell to be considered at that hearing were principally of victimisation, and direct discrimination because of both race and sex, by way of detrimental treatment during employment and constructive dismissal.

4. The full merits hearing began, as listed, on 13 September 2023 before Employment Judge Brain, Ms R Hodgkinson and Mr D Fields, sitting at Sheffield. The claimant represented herself. The respondent was represented by Mr T Benjamin of counsel.

5. As the tribunal describes in its reasons, in the event the September 2023 hearing was adjourned part way through, in particular because at a certain point the tribunal became concerned as to whether the claimant was well enough to continue. The hearing was listed to continue on further dates in November 2023. Because of further developments that the tribunal describes, during the course of the November hearing, the hearing did not conclude then either, and further dates were then listed for the hearing to resume and continue on 15 – 19 January 2024.

6. At the point when the hearing adjourned in November 2023 there was a live application by the respondent for the clam to be struck out. The tribunal listed a further hearing date for 23 December 2023 for that application to be heard, on the basis that, whether the substantive hearing did in fact resume on the further dates allocated in January would be dependent on the outcome of that application. In the event, however, at the beginning of December the respondent withdrew that

strike-out application, and the 23 December hearing that had been listed to consider it was cancelled.

7. The full merits hearing was therefore due to resume and continue as an in-person hearing on 15 January 2024. But because of a flood at the hearing centre where the Sheffield tribunal was based, the building was closed on Friday 12 January, and the decision was also taken that it would remain closed on 15 January 2024. The parties were notified and in exchanges on 15 January the parties agreed that the hearing should resume the next day, Tuesday 16 January 2024, by CVP.

8. On 16 January 2024, there was a delay in the hearing starting, because one of the lay members had technical problems with the link. But it got under way at about 10.40 am. When it did, the claimant made a number of statements, which the tribunal sets out in full in its reasons. They included her saying that the tribunal "should not accept money from the respondent to sway a case"; that time had been lost because of the "apparent flood", that the respondent's solicitor had connections with the employment tribunal; that there were "inappropriate connections" involving two employment judges; and that there was "corruption" in the Courts and Tribunals Service.

9. By this point in the substantive hearing the claimant's evidence had been completed, and the tribunal had begun hearing the respondent's witnesses each give evidence and be cross-examined. During the course of the remainder of that day the claimant indicated that she objected to the respondent's witnesses giving evidence by video and the tribunal decided that the hearing would resume as an in-person hearing the next day. The claimant expressed a concern that two hearing days in the current allocation had now been lost, which would constrain her time to cross-examine the respondent's remaining witnesses. The tribunal's response was that it could sit for a further week beginning on 22 April 2024, so that she would not fall under any time pressure.

10. The tribunal describes that it then took the opportunity to warn the claimant about her conduct, explaining the meaning of the concept of scandalous conduct, and expressing a concern that she was using the privilege of the legal process to vilify others and giving gratuitous insult to the tribunal.

The tribunal recorded that, in the ensuing exchanges, the claimant made further allegations, contemplating that there would be a public enquiry, and stating that the tribunal was engaged in retaliatory treatment of her, as a "coloured person". She also accused the tribunal of laying the foundation for the respondent to make a further strike-out application.

11. The tribunal described its approach to these developments that day, citing the speech of Ward LJ in **Bennett v Southwark London Borough Council** [2002] EWCA Civ 223; [2002] ICR 881. It had "metaphorically shrugged its shoulders" and resolved to get on with the case, in order not to jeopardize the hearing, mindful that the case had already occupied ten days of hearing time.

12. The hearing resumed on 17 January 2024 and the tribunal recorded in its reasons that it was without incident on that day. Further evidence was heard for the respondent. The tribunal hoped at that point that it was on course to complete hearing the respondent's witnesses, and possibly also closing submissions, by the end of the afternoon of 19 January.

13. However, at the start of the hearing the next day, 18 January 2024, the claimant raised further allegations. These included her referring to "corruption", to the respondent having links with "certain people", to judges having committed crimes and to the respondent's solicitor being treated more favourably because she was white, and references to bribes. After an adjournment the tribunal invited the claimant to withdraw her previous comments. She declined to do so and referred to Mr Benjamin as "so-called counsel". She referred to her right of freedom of expression. She also referred to having depression, and the tribunal noted that adjustments had been made, as requested by her, in that regard. The claimant asked whether, if she withdrew her remarks, she could still complain. The tribunal said this caused it a concern that any such withdrawal would not be sincere.

14. After a further 90-minute adjournment embracing the lunch period there was a further discussion in which the claimant was asked what evidence she had to support her allegations of corruption on the part of the respondent and of links with the tribunal service. The claimant declined

to produce such evidence, asserting her right to privacy. The tribunal offered to consider any such evidence in private, but the claimant declined. She made further references to there being a public enquiry and to corruption. At one point she apologised to each member of the tribunal individually, but also indicated that she was not prepared to withdraw her comments.

15. Mr Benjamin then made an application on behalf of the respondent for the tribunal to strike out the claimant's claim based on her conduct on 16 and 18 January 2024. The tribunal allowed the claimant further to time to prepare her response to the strike-out application, and she made her submissions in reply to it the next day, 19 January. At that point the current allocation of hearing time had been exhausted and the tribunal reserved its decision on the strike-out application.

16. Prior to the tribunal producing its reserved decision on the respondent's strike-out application, on 20 February 2024 the claimant made a written application for the Employment Judge to be recused, to which there was a short written response from the respondent. In its written decision promulgated in March 2024 the tribunal determined both parties' applications.

17. The tribunal began its decision with an extensive review of relevant authorities on the power to strike out, including in particular **Bolch v Chipman** [2004] IRLR 140 (EAT); **Chidzoy v British Broadcasting Corporation**, UKEAT/0097/17, **Arrow Nominees Inv v Blackledge** [2000] EWCA Civ 200; [2000] 2 BCLC 167, **Bennett v Southwark LBC**, **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 6843; [2006] IRLR 630 and **Emuemukoro v Chroma Vigilant (Scotland) Limited** [2022] ICR 327 (EAT), as well as other authorities. The tribunal described in detail, the litigation history, of which I have given a more summary account.

18. After summarising both parties' submissions on the strike-out application, the tribunal referred to what it called the **Bolch** criteria. It concluded, first, that the claimant's conduct had been scandalous. At [129] the tribunal said this:

> **"By application of the first of the Bolch criteria, the Tribunal concludes that the claimant has conducted the proceedings in a scandalous manner. This encompasses the conduct on 16, 18 and 19 January 2024. By way of reminder, in paragraph 27 of Bennett, Sedley LJ defined**

> **"scandalous" as the misuse of the privilege of legal process to vilify others; and giving gratuitous insult to the Court during such process. In our judgment, the claimant's conduct meets both definitions. There has been vilification of the Employment Tribunal panel members, the respondent's legal team and HMCTS staff. There has been gratuitous insult in accusations towards the Tribunal of racism and corruption without foundation. The claimant has produced no evidence in support of her allegations (even with procedural safeguards in place in the form of a private hearing). She cannot do so because (the Tribunal is confident) that there is none. It cannot excuse such conduct that there is a subjective belief. If that were the case, then such would be a license for a disgruntled party to level any kind of allegation. The test must be an objective one of whether in the minds of the reasonable person, such accusations are scandalous as defined by Sedley LJ in Bolch. Such is the case here as there was no basis for any of the claimant's accusations."**

19. The tribunal added that it considered that this same conduct on the part of the claimant was also unreasonable conduct. The tribunal continued:

> **"131. The next question then is whether a fair trial is possible. With great regret, the Tribunal concludes that it is not.**
>
> **132. As has been said, the claimant's complaint is one of direct discrimination upon the grounds of the protected characteristics of sex and race and of victimisation. The claimant's case may be characterised essentially as one where the respondent's witnesses have conspired and colluded together with a view to derailing the claimant's career with them from the outset. She says that much of the impugned conduct was pursued after she did protected acts complaining of race discrimination and sex discrimination on 27 and 28 April, 5 May, and 13 May 2022. Her case has been advanced on the premise that the respondent is improperly seeking to defend her claim, that the Employment Tribunal is improperly corrupting the proceedings to enable them so to do and that in so doing the Employment Tribunal is also discriminating against the claimant alongside the respondent.**
>
> **133. Her allegation therefore in summary is that the respondent has suborned the Tribunal into acting in concert with them to defeat the claimant's legitimate case.**
>
> **134. Such a serious allegation places the Tribunal in an invidious position. The claimant's stance effectively puts the Tribunal in the position of having to sit in judgment of itself. How, it may be asked rhetorically, can the Tribunal make findings of fact about the alleged collusion between the respondent's solicitor and the Tribunal in which the Tribunal is directly implicated? How can the Tribunal make findings of fact that it is not infected with racism yet remain impartial? How can the Tribunal be disinterested where they have an interest in exoneration of themselves and the respondent in a conspiracy? The simple answer is that it cannot. The pursuit of such allegations by the claimant places the Tribunal in the position of sitting in judgment of its own cause. It is a cardinal principle that no one can sit on judgment of their own case. The claimant's allegations against the Tribunal and the respondent of a joint conspiracy and of collusion and racist conduct can only lead to the conclusion that is impossible for the Tribunal to conduct a fair trial. We will return to this issue and the implications of this finding at paragraph 145 et seq below.**
>
> **135. To use the words of Chadwick LJ in Arrow Nominees, this Tribunal hearing has been hijacked by the need to investigate the claimant's contention that there is a conspiracy afoot between the respondent and the Tribunal. (The claimant is familiar with this principle as she cited paragraphs 55 and 56 of Arrow Nominees herself in her strike out application dated 12 September 2023). As matters progressed, the hearing has become less about the alleged acts of discrimination and victimisation contrary to the Equality Act 2010 and more about the claimant's wish for there to be a public inquiry into the conduct of the respondent and the conduct of the Employment Tribunals. The Tribunal process has been abused such that the real point of the case (and the matter lying within the Tribunal's jurisdiction) became subordinated to wider issues of alleged corruption on the part of the respondent and institutional corruption and bias towards large respondents on the part of the Tribunal.**
>
> **136. As a further point, the Tribunal's trust in the claimant been greatly harmed. The Tribunal**

> **can place no faith in the claimant's assurances that the vilification of others involved in the case and the gratuitous insult to the Court will not be repeated. She flouted the clear warning against the repetition of such conduct issued on 16 January. The EAT held in Chidzoy that the flouting a Tribunal's instruction or warning may lead to loss of trust such as to render a fair trial impossible. The claimant clearly continues to believe that there is corruption and racism afoot against her on the part of the respondent and the Tribunal. She has simply refused to unequivocally withdraw her allegations. These have caused upset to the members of the Employment Tribunal. Principles of integrity and equality lie at the heart of the Tribunal's jurisdiction and form much of the panel members' life work. While the Tribunal was phlegmatically able to shrug off these untoward comments made on 16 January 2024, their repetition on 18 January (and the claimant's refusal to resile from them on 19 January) has been damaging of the trust which the Tribunal may place in the claimant. Per Sud, this has undermined the trust the Tribunal has in her veracity. Her apologies were insincere and disingenuous as she was seeking to hedge her position by preserving her right to raise the issues elsewhere. The Tribunal can have no confidence that they won't be repeated where a warning was flouted, the allegations were repeated on 18 and 19 January and the claimant announced her intention to reduce her thoughts to writing in her diary going forwards. The Tribunal can have no faith that such writings will be kept to herself.**
>
> **137. Indeed, they have not been kept to herself. Matters have now been compounded by the application which the claimant made on 20 February 2024 for the recusal of the Employment Judge. The allegation of race discrimination is repeated at paragraph 29 of that application. This is contrary to the claimant's assurance given on 19 January 2024 that such thoughts would be confined to making entries in her diary.**
>
> **138. Per Tesco Stores Ltd and Edmondson, the Tribunal can have little faith that the claimant will cooperate with the Tribunal to achieve the overriding objective to deal with the matter fairly and justly by refraining from vilifying others involved in the case and giving insult."**

20. The tribunal went on to consider the fact that the claimant had maintained that she had documents in her possession "pointing against the respondent" but she had refused to disclose these. It concluded as follows:

> **"141. The claimant's position is unsatisfactory. However, the Tribunal adopts a real world view and proceeds on the basis that the claimant has nothing to disclose. As we said in paragraph 129, she had not disclosed anything because the Tribunal can be confident that she has nothing. An adverse inference may be drawn against her upon the issue of credibility for contending that she has something which she does not have and seeking to mislead the Tribunal.**
>
> **142. In contrast, the position in Sud, Chidzoy, and Arrow Nominees was that there was positive evidence of a taint (or the real possibility of a taint) in the evidence of the offending party. In Sud, medical evidence had been tampered with. In Chidzoy, the claimant's evidence was possibly tainted by her discussing her evidence with another while she remained under her oath. In Arrow Nominees, falsified documents were produced. All these impugned actions led to a risk of the court being a party to an injustice by deciding a case based on falsified or tainted evidence. Loss of faith in the complainant was not enough of itself- it was coupled with interference with evidence., In the instant case, significantly, all we have is an improbable assertion by the claimant that she has material pointing to corruption on the part of the respondent and a conspiracy between them and the Employment Tribunal. There is nothing to disclose to support this as there can be nothing. Therefore, there is no positive case of the corruption of evidence. This is of significance to the issue of proportionality of strike out notwithstanding that a fair trial is no longer possible. It is to that question that we now turn."**

21. The tribunal then turned to what it described as the third **Bolch** criterion, of proportionality. It said that it asked itself whether there were alternatives to striking out the claimant's claim where

a fair trial was no longer possible. It cited extensively from the observations of Sedley LJ in **Blockbuster**, particularly his discussion of the need to consider the proportionality of striking out a claim, having regard to the right to a fair hearing, particularly in a case which had reached the point of the start of a trial; and the need to keep in mind the purpose of the strike-out rule.

22. The tribunal then referred to **re Pinochet** [1999] UKHL 52 in which Lord Browne-Wilkinson discussed there being two categories of case in which it might be said that there was apparent bias by a judge sitting as a judge in his own cause. The tribunal considered that the present case fell into both categories, because the claimant was alleging a direct financial interest on the part of the tribunal, because of alleged corruption; or at the very least, it was alleged that there was partiality towards the respondent and collusion. So, it said, the conclusion that the tribunal would have to sit in judgment on itself inexorably followed; and the fact that these allegations were completely baseless did not detract from that conclusion.

23. However, the tribunal then went on to say this:

> **"148. In summary, the claimant's conduct has been scandalous and unreasonable. For the reasons given, a fair trial is no longer possible. However, in the Tribunal's judgment it is not proportionate to strike out the claim as the situation is retrievable.**
>
> **149. This is because the Tribunal can adopt the position that (in contrast to Sud, Chidzoy, and Arrow Nominees) there is little if not no risk that the claimant's evidence is tainted such that a ruling in her favour upon the issues which arise for adjudication under the 2010 Act may be unsafe because of contamination of the evidence due to suppression of documents or concealment of evidence. As has been said, the Tribunal is very confident that there is simply no evidence of corruption involving the Tribunal and the respondent. Had there been, we are sure the claimant would have disclosed it. The claimant's evidence upon the issue of corruption can therefore be taken at face value and judged accordingly. The Tribunal can of course consider the baseless allegations which she had made in our assessment of her credibility. These cases may be distinguished accordingly.**
>
> **150. The Tribunal can also bear with broad shoulders the unfounded allegations of race discrimination and Tribunal corruption. The Tribunal must sit in judgment of itself on these, hence a fair trial not being possible. However, they are baseless. It would be disproportionate to recuse ourselves upon the basis of having to adjudicate upon these unfounded allegations with the result that the trial is abandoned and put off to another tribunal in circumstances where they can be simply disposed of as unmeritorious and effectively put to one side (save for the impact of the allegations upon her credibility). The Tribunal can then focus on the merits of the case itself. This is even more so given the amount of Tribunal resource occupied by this case already, and that we are now towards the end of the trial. Weighing in the balance the cost to the Tribunal service and the parties of starting afresh on the one hand against the invidious position in which the Tribunal has been put by the claimant's allegations (in having to judge itself) on the other gives of only one answer. To recuse based on unfounded allegations with the consequences that would follow is a disproportionate course and not one which this Tribunal is prepared to take.**

151. There can also be little guarantee that the claimant will not repeat her conduct before a different tribunal: she has, after all, doubled down on the discrimination allegations in the recusal application. However, the Tribunal can approach matters phlegmatically even if called upon the sit in judgment of our own conduct. Further, the Tribunal is confident that it can retain its impartiality to fairly judge the case even though the Tribunal's confidence in the claimant has been badly shaken as there is no corresponding taint in evidence was there was to be found in Arrow Nominees, Sud and Chidzoy.

152. As was the case in Sud and Chidzoy, the claimant's conduct in this case has given rise to a fundamental problem in terms of trust. Any new Tribunal (should this Tribunal recuse itself and remit the case to a fresh Tribunal) will be aware of the reasons why this hearing has been aborted. Nothing can be done to prevent a second Tribunal from being aware of these reasons. It is likely that the claimant would continue with her animus towards the Tribunal. She has after all raised allegations of institutional bias by Employment Tribunals against claimants. A second Tribunal would still find itself having to sit in judgment upon the question of whether the respondent is corruptly acting in concert with the Tribunal to defeat the claimant's claim and pass judgment effectively on itself consequently. The issue of institutional racism would also loom large. That being the case, all the remission to a new panel would achieve is to significantly drive up the costs of the case and the resources allocated to it. A new panel would face adjudicating upon the same issues anyway. Having got a significant way through the trial, it would be a disproportionate course to take to strike out where there is a less draconic alternative of dismissing as fanciful the corruption and discrimination allegations. While the claimant has placed the Tribunal is this invidious position, the purist approach of recusal is not a proportionate one to take.

153. We should add that in Hargreaves v Evolve Housing Support and another [2023] EAT 154 the Employment Tribunal held that a fair trial was not possible as the proceedings had been weaponised by the claimant's wish to use them for political gain. The Tribunal in Hargreaves concluded that consequently the respondent's witnesses had been intimidated. This was held by the EAT to be surmise on the part of the Tribunal. The claimant had by the time of the EAT hearing ceased to be in politics and just wanted his "day in court." That being the case, the EAT held that strike out of the claim was disproportionate as a fair trial is possible.

154. Applying the ratio of Hargreaves to the facts of this case, these proceedings have been hijacked or weaponised (either epitaph describes the position) by the claimant's references to the respondent's alleged corruption and her wish for this to be exposed at a future public inquiry of some kind. The complainant in Hargreaves vested the EAT with confidence as to his future conduct by the way he had conducted himself before them. The Tribunal cannot place as much faith in the claimant's future conduct given the contents of the recusal application and our finding that a fair trial is not possible. However, for the reasons given however we have concluded that it is disproportionate to strike out the claim as, with proper case management and a phlegmatic real-world approach, it is possible to conclude proceedings in relatively short order in the context of the days already devoted to the matter.

155. The Croma Vigilant principle is of little applicability here as the trial window was extended to include dates in April 2024. The question posed in that case was whether a fair trial is possible in the trial window. In our case, the loss of effectively all but one day of the January 2024 trial window has not caused a fair trial to be impossible for that reason, given the extension of the trial window to April 2024.

156. The fourth Bolch criteria is a consideration of the consequences of strike out. The consequence is that the claim shall now proceed as listed."

24. Accordingly ultimately the decision of the tribunal was *not* to strike out the case, and that the full merits hearing would continue and conclude on further dates.

25. The tribunal went on to consider the claimant's application that the Employment Judge be

recused, working through all of the various criticisms that she had raised, in particular concerning aspects of how the Employment Judge had conduced and managed various particular developments during the course of the hearing thus far. For reasons it set out, the tribunal refused that application.

26. What I have summarised and set out extracts from, thus far, are the tribunal's written reasons. The tribunal expressed its written judgment in the following terms.

> **"1. The claimant's conduct before the Tribunal on 16, 18 and 19 January 2024 was scandalous and unreasonable.**
>
> **2. A fair trial of the action is no longer possible.**
>
> **3. It is not proportionate to strike out the claim.**
>
> **4. Accordingly, the respondent's application for an order pursuant to Rule 37(1)(b) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the claimant's claim be struck out is refused.**
>
> **5. The claimant's application dated 20 February 2024 that the Employment Judge shall recuse himself from hearing the case is refused."**

27. The claimant, again acting as a litigant in person, put in a Notice of Appeal. In paragraph 3, where she was asked to identify the judgment from which she was appealing, she set out the wording of the text of paragraphs 1, 2 and 5 of the tribunal's judgment.

28. In the Notice of Appeal as originally presented there were eight grounds of appeal. Ground 1 complained that the claimant had not been on an equal footing as required by the overriding objective. Grounds 2 to 6 challenged in various ways the tribunal's conclusion that the claimant's conduct had been scandalous and unreasonable. Ground 7 challenged the refusal of the claimant's application that the Employment Judge recuse himself. All seven of those grounds were considered by the judge who considered the Notice of Appeal on paper not to be arguable. The one ground that was permitted to proceed to this full appeal hearing, ground 8, was expressed in the following terms:

> **"*That a fair trial of the action is no longer possible.**
>
> **Ground 8 - The Tribunal's ruling has failed to consider the fact that I have actively pursued my case, even in circumstances where there have been excessive delays, resulting in undue stress.**
>
> **Having made submissions that I have not intentionally or otherwise behaved in a scandalous, unreasonable or vexatious manner on the aforementioned dates, I am confident that a fair trial is still possible, under a different Employment Judge and Panel."**

29. The claimant wrote in her Notice of Appeal that, should the appeal succeed, she was asking the EAT to "send back the whole of the case for a new decision to a different Employment Tribunal."

30. The full merits hearing concluded in May 2024. The tribunal reserved its decision which was promulgated on 22 July 2024. All of the claimant's claims were dismissed. She then put in a further appeal against that decision. That was considered by a judge of the EAT on paper not to be arguable under rule 3(7). The claimant was notified of that in December 2024. She did not then seek a rule 3(10) hearing in relation to that second appeal; so that appeal came to an end.

31. This appeal from the March 2024 judgment was listed by the EAT in August 2024 to be heard today. The claimant has not attended. I am told that the administration have checked and no communication has been received from her. The administration called her, the call went to voice mail and a message was left asking her to call back. So far as I am aware she has not done so.

32. The last communication the EAT received from the claimant was in August 2024 when she informed the listing team that she had no dates to avoid for a hearing of this appeal in 2025. The notice of hearing was sent to the address that the EAT has for her. She did not respond to that or to subsequent emails about preparations for this hearing. As I have noted, she did not respond to the letter from the EAT in December 2024 regarding the second appeal. Ms Niaz-Dickinson of counsel, who appears for the respondent today, told me at the start of the hearing that its solicitors had sent the claimant a bundle for today, and a copy of counsel's skeleton argument, but had received no response. The last that the respondent's solicitors heard from the claimant was when she sent them a copy of her second notice of appeal at around the time when she submitted it to the EAT.

33. Ms Niaz-Dickinson submitted that in these circumstances, it would not be appropriate for me to postpone this hearing, but nor did she invite me to dismiss the appeal without considering it on its merits, given that the claimant had not been warned that it might be struck out on the basis that

it was not being actively pursued, or otherwise. I have considered the appeal on its merits. I have taken into account all the information available to me, and the relevant parts of the claimant's notice of appeal. I had a skeleton argument and heard oral submissions from Ms Niaz-Dickinson, and, in view of the absence of the claimant, I put some further points to her for her response.

34. I have already set out how the tribunal expressed its judgment, that the claimant indicated that she was challenging paragraphs 1, 2 and 5, and that the live ground before me relates, solely, to paragraph 2 of the judgment, which stated that a fair trial of the action is no longer possible. This gives rise to two immediate issues, which were raised by Ms Niaz-Dickinson.

35. First, the tribunal, in substance, decided two applications: the respondent's application to strike out the claimant's claim, and the claimant's application for the judge to be recused. Both applications were refused. Those substantive outcomes are recorded at paragraphs 4 and 5 of the judgment. What paragraphs 1 – 3 of the judgment record are conclusions that the tribunal reached as part of its *reasoning* leading to its decision to reject the respondent's strike-out application. But that *decision* on the strike-out application, as recorded in paragraph 4, was in the claimant's favour; and, as I have noted, the claimant did not seek by this appeal to challenge that outcome.

36. Ms Niaz-Dickinson makes the point, therefore, that even if, which she does not accept, there was some error in the tribunal's reasoning regarding whether the matter was capable of a fair trial, it could not make any difference, because the substantive decision was, in any event, in the claimant's favour. Another way of making the same point is to say that, notwithstanding how the tribunal framed its judgment, this appeal is in substance a purported challenge not to the tribunal's substantive determination, but to an aspect of its reasoning; and generally, it is not possible to bring an appeal only in respect of some aspect of a tribunal's reasons, as opposed to the substantive determination which those reasons supported.

37. Potentially that is a complete answer to this appeal. It may be said, however, that it is to some

degree understandable that the claimant took the approach that she did, when advancing her appeal, given that the tribunal decided specifically to include within the framing of its written *judgment*, certain of the conclusions that it had reached in the course of its written *reasons*, as paragraphs 2 and 3 of the judgment, rather than simply confining its judgment to recording the *outcomes* of the two applications, which it set out in what were paragraphs 4 and 5. In addition, as I have noted, the claimant identified in her Notice of Appeal that the outcome she was seeking from this appeal, was that the matter be remitted to a different employment tribunal panel, on the basis that a fair trial was still possible, provided that it was before another panel.

38. Taking all of that into account, and bearing in mind that she is a litigant in person, one way of reading the claimant's Notice of Appeal is therefore that she is, in substance, contending that the correct decision on the respondent's application should have been that the claim should *not* be struck out, but *nor* should it continue to be heard by the present tribunal panel. I therefore turn to consider the substance of the challenge raised by this appeal, viewed in that way.

39. Here, however, the second potential difficulty or puzzle arises. It might appear, from the passage in the reasons beginning at paragraph [131], viewed in isolation, that the tribunal had come to the view that the matter was not now capable of a fair trial. Yet the tribunal ultimately went on to reject the respondent's strike-out application. It may be said that there is a tension between those two things. It might be said that if a tribunal has truly concluded that a claim has become simply *incapable* of a fair trial, then it would not be right for it to continue with a trial that would be unfair to one or both of the parties.

40. Ms Niaz-Dickinson's short answer to that conundrum is that, reading the reasons as a whole, while the tribunal *initially* considered that the matter was, or *may not* be, capable of a fair trial, on further consideration of the options it ultimately concluded, after all, by the end of its reasons, that a fair trial *was* still possible, and so it rejected the respondent's application.

41. In considering how to read the tribunal's decision, read as a whole, in this regard, it is relevant to consider the way in which it structured its reasons and why. The structure which it avowedly followed, was to work through, stage by stage, what it called the **Bolch** criteria. This was a reference to a passage in **Bolch v Chipman** that has been cited in other authorities since, including another to which this tribunal in particular referred: **Chidzoy v BBC**.

42. In **Chidzoy**, after noting that the tribunal was bound to have regard to the overriding directive, the EAT summarised the relevant principles in this way:

> **"23. It is common ground between the parties that the striking out of a claim is a draconian measure that should not be imposed lightly, see Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA. More specifically, in Bolch v Chipman [2004] IRLR 140 the EAT (Burton P presiding) held that, where the ET is considering the possibility of striking out a claim or response due to the way in which the proceedings have been conducted, there were four matters it would need to address (I paraphrase):**
>
> **(1) There must first be a conclusion by the ET not simply that a party has behaved unreasonably but that the proceedings have been conducted unreasonably by her or on her behalf.**
>
> **(2) Assuming there is such a finding, in ordinary circumstances the ET will still need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a Debarring Order (see De Keyser Ltd v Wilson [2001] IRLR 324 EAT (Lindsay P presiding)). That might be, for example where there has been "*wilful, deliberate or contumelious disobedience*" of an ET Order, otherwise it might be where the conduct in issue is so serious it would be an affront to the ET to permit the party in question to continue to prosecute their case (see Arrow Nominees Inc v Blackledge [2000] EWCA Civ 200.**
>
> **(3) Even if a fair trial is not considered possible, the ET must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate.**
>
> **(4) And even if it determines that a Debarring Order is the appropriate response, the ET should consider the consequences of that Order (allowing that, for example, where a response has been struck out at the liability stage, it might still be appropriate to allow the Respondent to participate in any remedy hearing).**
>
> **See also observations to similar effect made by the EAT (Simler P presiding) in Arriva London North Ltd v Maseya UKEAT/0096/16 (12 July 2016, unreported).**
>
> **24. When an ET is satisfied that a Claimant has conducted the proceedings unreasonably (or scandalously or vexatiously), it should not move to strike out the claim when firm case management might still afford a solution - in some cases, the objectionable conduct may not be irreversible, see Bennett v Southwark London Borough Council [2002] IRLR 407 CA (a case in which the claim had ultimately been struck out by a second ET, the first having considered it was bound to recuse itself given the nature of the conduct in question). In order to determine whether irreparable damage has been done, the ET would need to assess the nature and impact of the wrongdoing in issue, to consider whether there was, in truth, any real risk of injustice or to the fair disposal of the case, see Bayley v Whitbread Hotels UKEAT/0046/07 (16 August 2007, unreported). It will, for example, be a very rare case in which it would be appropriate to strike out a case at the end of a trial; in such circumstances, it would, in almost all cases, be more appropriate for the Tribunal to dismiss the claim in a judgment on the merits, which could take account of the wrongdoing in issue, in the usual way (and see the observations to this effect in Zahoor and Ors v Masood and Ors [2009] EWCA**

Civ 650."

43. It appears to me that from the authorities, in particular **Bolch**, **Chidzoy**, **Blockbuster** and **Emuemukoro**, the following points of particular pertinence to the present appeal emerge.

44. Firstly, there are some cases where a party's conduct of the litigation is so egregious or serious that they are properly treated as having, by their conduct, forfeited their right to have their case heard; and in such extreme cases the tribunal may properly conclude that their claim or response therefore ought to be struck out, *even though* it would still be capable of a fair trial.

45. However, putting aside such extreme cases – and the present case was never said to be in that category – in general, if the tribunal has found in the given case that the conduct of a party crosses the threshold of being scandalous, vexatious or otherwise unreasonable, then it must go on to consider whether, nevertheless, a fair trial, is, or may still be, possible. As part of that, it must also consider what alternative ways, short of a strike-out, there may be of reasonably managing, mitigating or addressing the conduct of the party concerned, or the impact which it threatens to have on the possibility of there being a fair trial, so as to avoid it having that effect.

46. This does not mean that the tribunal is bound to entertain *any* option for keeping the possibility of a fair trial at some point in the future alive. As it was put in **Emuemukoro** at [19]: "It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters."

47. This example is illustrative of the fact that, in practice, in cases where the strike-out threshold has been crossed on account of a party's conduct of the litigation, the question of whether a fair trial is still possible, and the question of whether there is an alternative proportionate measure short of strike-out that the tribunal should adopt, often go hand in hand and are intertwined.

48. It is noteworthy that **Bolch** itself was concerned with an appeal by the respondent in that case from a decision to strike out or debar its response. In a case where a claim is struck out there will be no trial (or concluded trial) because the claim is at an end. But in a case where the response is struck out the matter may continue to a trial, albeit of an uncontested claim and/or, depending on the outcome at the liability stage, to a remedy hearing. In **Bolch** the EAT discussed that in such a case there may, however, be a middle course scenario in which, for example, the respondent's ability to participate in further hearings is *restricted* on account of its conduct, but it is not entirely excluded from any further participation in any stage of the matter or by any means at all.

49. In a case where it appears that the *claimant's* conduct has potentially imperilled a fair trial there may also, in some such cases, be room for a middle course approach, falling short of striking out the claim, which proportionately manages or addresses the conduct in some other way, such as by excluding them from participation in some, but not all, aspects of the continuing process. In **Blockbuster**, for example, the matter ultimately turned on what to do about the fact that the claimant had arrived at the start of a hearing with various new evidential material that had not been shared with the respondent previously. The Court of Appeal pointed out that a possible solution to the potential impact of this on the fairness of the trial, instead of striking out the claim, would have been simply to debar the claimant from being permitted to rely on that evidential material; and it would then have potentially been fair to both sides to proceed with the trial on that basis.

50. Returning to the present case, and reading this tribunal's reasons as a whole, it appears to me that on a fair reading, and although it used the language at one stage in its reasons of stating that a fair trial was not possible, that was only a provisional or potential conclusion at that stage of its reasoning. But on further consideration, for the reasons it went on to set out, it ultimately concluded that a fair (continuation and conclusion of the) trial *was* possible; and so it ultimately rejected the respondent's application and directed that the trial continue and conclude on further dates. It indeed then did so (although in the event not on the specific dates that were envisaged at that point).

51. Because the tribunal rigidly structured its reasons in line with what it described as the **Bolch** criteria, it first, on the face of it, made a finding that a fair trial was not possible, and *then* went on to consider the proportionality question, ultimately leading to its decision to refuse the application, But, as I have said, in practical reality these two ostensibly separate stages are often, in cases concerned with conduct, intertwined. Reading this decision as a whole, so it was here, with the initial conclusion being a potential or provisional conclusion, and ultimately the conclusion was that the tribunal *could* fairly resume and conclude on later dates for the reasons that the tribunal set out.

52. In particular, the tribunal properly recognised that this was not a case, like **Chidzoy**, or certain other cases to which it referred, where the nature of the conduct in question had fundamentally tainted the reliability of the evidence on which the claimant relied, in a way that was *irreparable*, making it inherently impossible for the substantive issues in the case to be fairly tried. Rather, in the present case the sources of the tribunal's concerns were twofold.

53. The first was that the claimant's conduct involved allegations of impropriety against the tribunal itself, which the tribunal initially considered may put it in the impossible position of having to adjudicate on such allegations in its own cause. But ultimately the tribunal's conclusion was that it could properly and fairly dispose of, and reject, those allegations. That was on the basis that, despite the claimant having been given the chance to do so, she had put forward nothing of substance in support of her allegations of, for example, corruption, or improper connections between the respondent and any tribunal judiciary or the tribunal service, which might need to be considered; and that other suggestions made by her, such as calling in to question whether difficulties had in fact been caused by a real flood at the hearing centre, were plainly and obviously untenable.

54. The second source of concern raised by the tribunal was that the claimant's conduct had undermined the necessary relationship of trust between her and the tribunal. But again it ultimately concluded – properly – that her conduct was not such as to mean that it could not fairly adjudicate

her claims on their merits; and that the proper context for considering the conduct in that respect was as a matter that might potentially be weighed in the balance as affecting her credibility.

55. It seems to me, therefore, stepping back, and notwithstanding the way in which the tribunal formally broke its reasoning down into separate stages, and that it – unhelpfully – broke its judgment down into five numbered paragraphs, the first three of which corresponded to three different stages of its reasoning on the way to the outcome, where the tribunal ultimately came to rest was that the matter *was* still capable of a fair trial, which is why the strike-out application was refused.

56. I return then to the fact that the claimant was seeking in her Notice of Appeal the outcome from this appeal that this tribunal panel should have stepped away, on the basis that – on her case – the matter was not capable of a fair trial continuing before *this* tribunal panel, but would have been capable of a fair trial before *another* tribunal panel. That challenge, however, faces two difficulties. The first is that there is no live appeal against the tribunal's decision on the claimant's own application for the judge to be recused. The only original ground of appeal specifically relating to that decision was rejected when the appeal was first considered on paper.

57. The second is that the tribunal's reasons for ultimately concluding that, notwithstanding the claimant's conduct, and the accusations that she had levelled at the tribunal itself, the tribunal was, as presently constituted, able to continue fairly to hear, conclude hearing, and adjudicate, her claims, were sound. I have considered what the claimant has written in ground 8, there being no other substantive material from her before me, she having not put in a skeleton argument nor attended the hearing today. She says there that she had not, intentionally or otherwise, behaved in a scandalous vexatious or unreasonable manner; and she says that she had actively pursued her case, even in circumstances where there had been excessive delays resulting in undue stress.

58. But all of the facts and circumstances of, and surrounding, her conduct over the course of the various stages of the trial thus far were in fact fully examined by the tribunal, including

consideration being given to submissions she made at more than one point about the fact that she was on anti-depressants and the potential effects of those on her behaviour; and to requests she had made for adjustments in that regard, all of which, as the tribunal records, were accommodated.

59. The tribunal also fully considered the claimant's submissions and stance at various points about the reasons why she had made the allegations that she did, the terms of apologies that were volunteered by her at one point, and other aspects of her changing stance about these matters from time to time during the course of the hearing. Nothing in these aspects, or the tribunal's consideration of them, shows that it was wrong for this tribunal panel to have concluded, as it did, that it was still in a position to continue to preside at the hearing, and complete it, fairly, and to give the claimant (as well as the respondent) a fair adjudication of her claims.

60. For all of these reasons I have come to the conclusion that this appeal must be dismissed.