Neutral Citation Number: [2025] EAT 139

Case No: EA-2024-000543-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 September 2025

Before :

JUDGE STOUT

- -

Between:

MISS P MALLIK

Appellant

- and -

ARRIVA KENT AND SURREY LIMITED

Respondent

- -
- -

MR MICHAEL UBEROI and **MS ELIZABETH GRACE** (through Advocate) for the **Appellant.**
DR MIRZA AHMAD (instructed by Arriva PLC) for the **Respondent.**

- -

JUDGMENT

- -

SUMMARY

EQUAL PAY

The Employment Tribunal had erred in law by striking out an equal value claim on the basis of a job evaluation report, without identifying whether it was proceeding under rule 37(1)(a) (no reasonable prospect of success) or paragraph 3(1)(a) of Schedule 3 to The Employment Tribunals (Constitution Rules and Procedure) Regulations 2013 (as amended and in force at the relevant date). The decision was inadequately reasoned. As the Tribunal appeared objectively to have purported to proceed under paragraph 3(1)(a), the decision was also materially unfair as a result of a failure to give the claimant notice of the matters required by paragraph 3(4) prior to striking out under paragraph 3(1)(a) so that the claimant had not had a reasonable opportunity to make submissions on the relevant matters. The decision of the Employment Tribunal on the equal value claim was set aside and that part of the claimant's claim remitted for further hearing before a fresh tribunal.

A second ground of appeal relating to a failure by the Employment Tribunal to include a particular issue in the list of issues for the final hearing was dismissed.

JUDGE STOUT:

1. This is an appeal by Miss Mallik, who was the claimant below (and I will refer to her as such) and she was employed by the respondent from 9 September 2018 until she was dismissed in around December 2022. The appeal is against decisions made by Employment Judge Wright and recorded in a case management order following a preliminary hearing held (according to the order) in private on 27 March 2024. This is a corrected transcript of my judgment given orally.

2. The proceedings below comprise three joined claims brought by the claimant against the respondent. The case has, since the decision that I am concerned with, proceeded to a final hearing which took place between 17 and 21 February 2025 before Employment Judge Fowell, when the claimant's claims for unfair dismissal, breach of contract, unlawful deduction from wages of holiday pay and various claims under the Equality Act 2010 were dismissed. One equal pay claim was successful, the respondent effectively having conceded a like work claim early on in the proceedings and paid the claimant £5,168.84 in August 2022. The Tribunal at the final hearing granted her a declaration in respect of that claim.

3. The claimant below was unrepresented and acted as a litigant in person. Before me she has been fortunate to have the benefit of representation by Mr Uberoi and Miss Grace acting *pro bono*. The respondent is represented by Dr Ahmad. He represented the respondent at the final hearing below, but not at the prior case management hearing with which this appeal is concerned.

4. The present appeal to the Employment Appeal Tribunal was sifted direct to a preliminary hearing by HHJ Shanks. At the preliminary hearing the claimant had the benefit of assistance under the ELAAS Scheme. HHJ Auerbach allowed the appeal to proceed on two amended grounds as follows:

> "**GROUND 1**

2. The Employment Tribunal erred in law in striking out the Claimant's equal pay claim based on equal value. In particular:

2.1. The Tribunal was not sufficiently clear as to whether it was striking out the claim pursuant to rule 37(1)(a) (Schedule 1) ETs Rules of Procedure 2013 or rule 3 (Schedule 3) (in conjunction with s.131(6) Equality Act 2010).

2.2. The Tribunal failed to give sufficient notice of its intention to consider striking out the claim (either under rule 37(1)(a) (Schedule 1) or, alternatively, that the notice requirements of rule 3(2) (Schedule 3) were not complied with), and/or that the Claimant did not have a fair opportunity to put her case to the Tribunal in relation to the same.

2.3. The Tribunal should not have relied on a Job Evaluation Study created after the date on which the Claimant's equal pay claim was issued in order to strike out the claim under rule 3(2) (Schedule 3) / s.131(6) Equality Act 2010.

2.4. Insofar as the Tribunal struck the claim out pursuant to rule 3(2) (Schedule 3) / s.131(6) Equality Act 2010, it failed to give consideration to or address the two matters in s.131(6)(a)-(b) Equality Act 2010.

2.5. Insofar as the Tribunal struck out under rule 37(1)(a) (Schedule 1), it failed to consider whether the high threshold for striking out a discrimination claim on the basis of having no reasonable prospect of success was met.

GROUND 2

3. The Employment Tribunal erred in failing properly to identify the claims emerging from the Claimant's ET1 forms. In particular:

3.1. The Tribunal failed entirely to identify and include in the list of issues a claim of disability-related harassment in relation to an alleged remark about her mental health.

3.2. The Tribunal failed entirely to identify and include in the list of issues a claim of failure to make reasonable adjustments in relation to toilet facilities.

3.3. The Tribunal mischaracterised a claim concerning welfare checks as being of harassment related to disability when it was arguably (alternatively or instead) a complaint of failure to comply with the duty to make reasonable adjustments"

Regarding ground 2 as there set out, HHJ Auerbach in his reasons made the following observation:

> "The arguable error in relation to the three matters relating to the scope of the disability discrimination issues may be capable of resolution by dialogue between the parties and the Tribunal ahead of that hearing; and indeed if so the EAT should be notified if that part of the appeal no longer needs to be considered at the full Appeal Hearing".

5. As a result of the process that HHJ Auerbach envisaged, grounds 3.1 and 3.3 have fallen away, but ground 3.2 remains for me to consider at this hearing.

6. I take grounds 1 and 2 in turn, dealing with them separately as there is no overlap between them.

Ground 1 – Strike out

Legislative framework for ground 1

7. So far as ground 1 is concerned, that concerns the equal value claim under the Equality Act 2010. The relevant legislative provisions in relation to this ground of appeal are as follows. These are the provisions that deal with the equal value claims and also with their strike out on the basis of job evaluation reports such as that the respondent obtained in these proceedings from an organisation called "Make UK Legal Services".

8. Section 65 of the Equality Act 2010 provides as follows:

> **"65 Equal work**
>
> (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
>
> (a) like B's work,
>
> (b) rated as equivalent to B's work, or
>
> (c) of equal value to B's work.
>
> (2) A's work is like B's work if—
>
> (a) A's work and B's work are the same or broadly similar, and
>
> (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
>
> (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—
>
> (a) the frequency with which differences between their work occur in practice, and
>
> (b)the nature and extent of the differences.
>
> (4) A's work is rated as equivalent to B's work if a job evaluation study—
>
> (a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
>
> (b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.
>
> (5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is—

(a) neither like B's work nor rated as equivalent to B's work, but

(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making".

9. Section 131 of the Equality Act 2010 provides as follows:

"131 Assessment of whether work is of equal value

(1) This section applies to proceedings before an employment tribunal on—

(a) a complaint relating to a breach of an equality clause or rule, or

(b) a question referred to the tribunal by virtue of section 128(2).

(2) Where a question arises in the proceedings as to whether one person's work is of equal value to another's, the tribunal may, before determining the question, require a member of the panel of independent experts to prepare a report on the question.

(3) The tribunal may withdraw a requirement that it makes under subsection (2); and, if it does so, it may—

(a) request the panel member to provide it with specified documentation;

(b) make such other requests to that member as are connected with the withdrawal of the requirement.

(4) If the tribunal requires the preparation of a report under subsection (2) (and does not withdraw the requirement), it must not determine the question unless it has received the report.

(5) Subsection (6) applies where—

(a) a question arises in the proceedings as to whether the work of one person (A) is of equal value to the work of another (B), and

(b) A's work and B's work have been given different values by a job evaluation study.

(6) The tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study—

(a) was based on a system that discriminates because of sex, or

(b) is otherwise unreliable.

(7) For the purposes of subsection (6)(a), a system discriminates because of sex if a difference (or coincidence) between values that the system sets on different demands is not justifiable regardless of the sex of the person on whom the demands are made.

(8) A reference to a member of the panel of independent experts is a reference to a person—

(a) who is for the time being designated as such by the Advisory, Conciliation and Arbitration Service (ACAS) for the purposes of this section, and

(b) who is neither a member of the Council of ACAS nor one of its officers or members of staff.

(9) "Job evaluation study" has the meaning given in section 80(5)".

10. The definition of "job evaluation study" in s.80(5) is as follows:

> **"80 Interpretation and Exceptions**
>
> (5) A job evaluation study is a study undertaken with a view to evaluating, in terms of the demands made on a person by reference to factors such as effort, skill and decision-making, the jobs to be done—
>
> (a) by some or all of the workers in an undertaking or group of undertakings, or
>
> (b) in the case of the armed forces, by some or all of the members of the armed forces".

11. The Tribunal Procedure Rules that were in place at the time that we are concerned with were The Employment Tribunals (Constitution Rules and Procedure) Regulations 2013 (as amended and as in force at the time of the decision under appeal). Paragraph 3 of Schedule 3 to those Rules of Procedure provides as follows:

> **Conduct of stage 1 equal value hearing**
> 3.—(1) Where there is a dispute as to whether one person's work is of equal value to another's (equal value being construed in accordance with section 65(6) of the Equality Act), the Tribunal must conduct a hearing, which must be referred to as a "stage 1 equal value hearing", and at that hearing must—
> (a) strike out the claim, or the relevant part of it, if in accordance with section 131(6) of the Equality Act the Tribunal must determine that the work of the claimant and the comparator are not of equal value,
> (b) determine the question or require an independent expert to prepare a report on the question,
> (c) if the Tribunal has decided to require an independent expert to prepare a report on the question, fix a date for a further hearing, which must be referred to as a "stage 2 equal value hearing", and
> (d) if the Tribunal has not decided to require an independent expert to prepare a report on the question, fix a date for the final hearing.
> (2) Before a claim or a part of it is struck out under sub-paragraph (1)(a), the Tribunal must send notice to the claimant and allow the claimant to make representations to the Tribunal as to whether the evaluation contained in the study in question falls within sub-paragraph (a) or (b) of section 131(6) of the Equality Act. The Tribunal is not required to send a notice under this paragraph if the claimant has been given an opportunity to make such representations orally to the Tribunal.
> (3) The Tribunal may, on the application of a party, hear evidence and submissions on the issue of defence of material factor contained in section 69 of the Equality Act before determining whether to require an independent expert to prepare a report under paragraph (1)(b).
> (4) The Tribunal must give the parties reasonable notice of the date of the stage 1 equal value hearing. The notice must specify the matters that are to be, or may be, considered at the hearing and give notice of the standard orders in rule 4.

12. Paragraph 3(4) includes a notice requirement that refers to the standard orders in rule 4, which are as follows:

> **Standard orders for stage 1 equal value hearing**
> 4.—(1) At a stage 1 equal value hearing a Tribunal must, unless it considers it inappropriate to do so, order that—
> (a) before the end of the period of 14 days from the date of the stage 1 equal value hearing the claimant must—
> (i) disclose in writing to the respondent the name of any comparator, or, if the claimant is not able to name the comparator, disclose information which enables the respondent to identify the comparator, and
> (ii) identify to the respondent in writing the period in relation to which the claimant considers that the claimant's work and that of the comparator are to be compared,
> (b) before the end of the period of 28 days from the date of the stage 1 equal value hearing—
> (i) where the claimant has not disclosed the name of the comparator to the respondent under sub-paragraph (a)(i) but the respondent has been provided with sufficient detail to be able to identify the comparator, the respondent must disclose in writing the name of the comparator to the claimant,
> (ii) the parties must provide each other with written job descriptions for the claimant and any comparator, and
> (iii) the parties must identify to each other in writing the facts which they consider relevant to the question,
> (c) the respondent must grant access to the respondent's premises during a period specified in the order to allow the claimant and the claimant's representative to interview any comparator,
> (d) the parties must before the end of the period of 56 days from the date of the stage 1 equal value hearing send to the Tribunal an agreed written statement specifying—
> (i) job descriptions for the claimant and any comparator,
> (ii) the facts which both parties consider are relevant to the question, and
> (iii) the facts on which the parties disagree (as to the fact or as to the relevance to the question) and a summary of their reasons for disagreeing,
> (e) the parties must, at least 56 days before the final hearing, disclose to each other, to any independent expert or other expert and to the Tribunal written statements of any facts on which they intend to rely in evidence at the final hearing, and
> (f) the parties must, at least 28 days before the final hearing, send to the Tribunal a statement of facts and issues on which the parties agree, a statement of facts and issues on which the parties disagree and a summary of their reasons for disagreeing.
> (2) The Tribunal may add to, vary or omit any of the standard orders in paragraph (1).

13. The Tribunal Procedure Rules also of course provide a power to strike out for no reasonable prospects of success under rule 37(1)(a).

14. Under the 2013 rules, a hearing to consider strike out under rule 37 had to be held in public by virtue of rule 53(1)(c) and rule 56. There was no express stipulation that the stage 1 equal value hearing had to be held in public. The position is the same in the 2024 rules that are now in force.

15. Under the 2013 rules as they stood at the date of the decision under appeal, 14 days' notice also needed to be given of any hearing involving preliminary issues, which includes strike out under rule 37.

Ground 1: factual background

16. As already noted, the respondent early in the proceedings effectively conceded the claimant's like work claim, but she also had an equal value claim. In response to the claimant's grievance and her claim, the respondent commissioned a job evaluation report by Make UK Legal Services. There is a copy of it in the bundle before me, it is dated 22 April 2022. This was considered by Employment Judge Wright at what was supposed to be a public preliminary hearing on 27 November 2023, although the case management order records that it took place in private.

17. The judge noted at paragraphs 33.7 to 33.8 of that case management order that the respondent had effectively conceded the like work claim but that there was still an equal value claim to be considered (see paragraph 33.9).

18. The case management order notes that it was unclear how the claimant was putting her equal value claim, but that a public preliminary hearing listed to take place by video on 27 and 28 March 2024 could include a stage 1 equal value hearing. The judge made directions (at paragraphs 57 to 60 of her order) requiring disclosure by the respondent of the job evaluation report and also requiring the parties to set out their positions in relation to the equal pay claim, with the claimant being subject to a word limit of 750 words.

19. The respondent then did disclose the Make UK report together with an accompanying submission about why the respondent relies on it, and that was on 18 December 2023. The respondent submitted that the Make UK report could be relied on and taken as establishing that the claimant's comparators were not undertaking work of equal value to her role. The respondent argued that the

report was thorough, fair, and that there were no reasonable grounds for suspecting that the report was unsuitable or should not be relied upon.

20. The respondent invited the Tribunal to list the equal claim for a stage 1 equal value hearing at the next hearing on 27 and 28 March 2024 to enable the Tribunal:

> "…to consider whether, pursuant to s.3(1)(a) of the Sch.3 of the ET Regulations, the 'equal value' claim should be struck out pursuant to s.65(2) of the Equality Act because, as set out in the Make UK report, the comparator's roles are not of equal value".

21. The respondent submitted that if the Tribunal did not consider it appropriate to strike the claim out, the Tribunal should consider whether to instruct an independent expert to produce a further report.

22. The claimant responded by way of submissions dated 22 January 2024. In her submissions she argued that the Make UK report was not reliable, in part because of the questions about the identity and jobs of staff members that had been interviewed and how they had been interviewed, and which dates staff members were in various roles. She asserted that there was sex discrimination in her pay and that the difference in pay was not explained by her working in Maidstone, as apparently asserted by the respondent.

23. She argued that the respondent's case should be,

> "…struck off [as] this case cannot be heard with false and inconsistent information [and nor with] redacted and altered financial documentation".

24. She also subsequently sent charts, which are now at pp.12 to 18 of the supplementary bundle detailing pay and length of service of comparators of other matters.

25. The hearing on 27 March 2024 before Employment Judge Wright then apparently took place in person rather than by video as envisaged in the previous case management order, and the case management order from that hearing also states that it took place in private, despite having been listed for a public hearing.

26. Neither party has been able to produce a notice or order specifically listing the hearing on 27 and 28 March or ordering any conversion of that hearing to a private in person hearing, as seems to have happened.

27. The case management order from the hearing deals, first, with the like work claim and notes that the claimant is maintaining that claim despite the respondent having effectively conceded it and paid her some money as noted previously. The order then deals with the equal value claim as follows:

> "12. A claim of equal value had also been identified. The respondent suggested the claimant had identified the following comparators (page 439):
>
> 2.1.1. Storekeepers
>
> 2.1.2. Relief Inspectors
>
> 2.1.3. Duty Inspectors 2.1.4 Cleaner – Ms R Hibbitt
>
> 13. The first observation made was that to advance an equal value claim, the claimant needs to identify an actual male comparator. The claimant said that she did not rely upon Ms Hibbitt as a comparator.
>
> 14. Ms Royal took instructions, and she confirmed that the job titles of Duty Inspector, Duty Manager and Relief Inspector are used inter-changeably.
>
> 15. The claimant was asked to name her comparators and she referred to Billy Renyolds – Storekeeper and Matt Betteridge – Duty Manager (also Duty Inspector/Relief Inspector).
>
> 16. In response, the respondent referred to the Job Evaluation Report Which Make UK Ltd undertook and which was dated 22/4/2022 (page 142). That report evaluated four roles, that of Engineering Administration Assistant (the claimant's role although the claimant did not participate in the audit), Duty Manager, Storekeeper and Payroll Administrator.
>
> 17. In short, the roles were evaluated and scored as follows: Duty Manager – 600 Storekeeper – 465 Payroll Administrator – 380 Engineering Administrations Assistant – 280
>
> 18. The Tribunal has considered this independent report. Potentially, the Tribunal could order a further report from an independent expert (such as appointing Acas) under the provision of Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (Rules).
>
> 19. The respondent invites the Tribunal to strike out this claim on the basis that as a result of the Make UK Ltd report, the claim has no reasonable prospects of success (Rule 37). When exercising any power under the Rules, the Tribunal shall seek to give effect to the overriding objective, which includes proportionality and saving expense.

> 20. The Tribunal is prepared to accept the Make UK Ltd report as a report prepared by an independent expert and is not prepared to order that a further report be prepared. The Tribunal is also prepared to accept the report and to accept the finding that the claimant's role is not of equal value to that of Duty Inspector/Duty Manager/Relief Inspector. Furthermore, the claimant's role is not of equal value to that of Storekeeper. For the sake of completeness, although the claimant did not advance a claim in respect of the Payroll Administrator at the hearing, her role was not of equal value to that role.
>
> 21. That therefore disposes of the first claim, save that the claimant is entitled to a declaration in respect of the like work claim."

28. The appendix list of issues for that case management order was then provided by the respondent following the hearing, and in the list of issues, the issues in relation to the equal value claim are all "struck through".

29. Dr Ahmad at this hearing suggested that the strike through was done by the judge, but that seems to me to be unlikely as the list was supplied (as appears from paragraphs 3 and 4 to the order) by the respondent's representative. Although we cannot be certain who struck through the issues relating to equal value, I proceed on the basis that it was not the judge but the respondent.

Ground 1: discussion and analysis

30. I now address the various sub-grounds of appeal raised in relation to ground 1, taking them in the following order:

31. First, as to notice requirements, which is sub-ground 2.2. If this was a strike out under rule 37 of the Tribunal rules, then it required to be a public preliminary hearing with 14 days' notice given of the same. On the other hand, if it was a strike out under paragraph 3 of Schedule 3, by paragraph 3(4), the notice needed to specify the matters that were to be or might be considered at the hearing, and also to give notice of the standard orders in rule 4. This did not happen, so far as we can tell.

32. A Tribunal will err in law if it makes an error of procedure that has a material effect on the fairness of the hearing or the outcome. The issue for me in relation to this ground is whether what

appears to be an error in terms of complying with notice requirements had a material effect on the fairness of the hearing or its outcome.

33. Both rule 37(2) and also paragraph 3(2) of schedule 3 provide that a party may be given a reasonable opportunity of saying why their case should not be struck out orally at a hearing, not necessarily in writing. In this case, it seems to me that the claimant had some opportunity to make representations, both in writing before the hearing and orally at the hearing, because the respondent's response had raised the issue of strike out. However, it seems to me that what she did not get a reasonable opportunity to respond to were the specific grounds on which the claim could be struck out. The respondent's response had not identified these, and nor did the notice of hearing. Although the respondent had referred to the possibility of strike out under section 65(2) of the Equality Act 2010, there was no reference to rule 37 of the Tribunal Procedure Rules, or to the need to address a reasonable prospects of success test. Nor was there any reference to the specific matters identified in section 131(6) of the Equality Act 2010 which would need to be considered before the claim could be struck out on either basis.

34. Accordingly, what we do not see in the claimant's submissions responding to the respondent's submissions, is any direct addressing of those statutory tests. Further, because we do not see those statutory tests set out anywhere in the Employment Tribunal's own decision, it seems to me that I cannot safely assume that the claimant had a proper opportunity to address those points orally either. So, for those reasons it seems to me that the failure to give proper notice of the strike out hearing and what was going to be considered at that strike out hearing did deprive the claimant of the reasonable opportunity that she should have had to make representations as to why her claim should not be struck out.

35. I would add that it seems to me that the judge herself would have benefited from a notice of hearing properly identifying the issues that needed to be decided as the judge's decision could have

used that as a framework for her own decision. In short, there was an error in the notice requirements for this hearing, and it was in my judgment a material error because it deprived the claimant of a fair opportunity of responding to the proposal to strike out her claim at that hearing.

36. I add that the failure to conduct the hearing as a public hearing was also potentially a significant failing, but as that was not one of the specific grounds of appeal, it does not form part of my reasons for allowing this ground of appeal.

Sub-grounds 2.1 and 2.4

37. I move on now to deal with sub-grounds 2.1 and 2.4, both of which relate to the adequacy of the Tribunal's reasons. Sub-ground 2.1 is that the Tribunal was not sufficiently clear as to whether it was striking out the claimant pursuant to rule 37 or under paragraph 3 of Schedule 3.

38. Sub-ground 2.4 is that the Tribunal, if it was proceeding under paragraph 3 of Schedule 3, failed to provide reasons addressing the specific matters in section 131(6)(a) and (b). Again, I agree with the claimant in relation to these grounds of appeal.

39. As can be seen, the judge refers at paragraph 19 of the case management order to strike out under rule 37 on grounds of no reasonable prospects of success, but then at paragraph 20 sets out reasons that in my judgment can only sensibly be understood as the Tribunal deciding to strike out the claimant under section 131(6) of the Equality Act 2020, as permitted in principle by rule 3(1)(a) of Schedule 3 to the Procedure Rules. The judge states simply that she is prepared to accept the Make UK report and thus to accept the findings of that report that none of the claimant's comparator roles are of equal value to hers. The consequence of that acceptance as provided for in section 131(6) and paragraph 3 to Schedule 3 is that the claim comes to an end.

40. I do acknowledge that much the same reasoning could also justify a decision striking out a claim on grounds of no reasonable prospects of success. But that is not how the judge frames her reasons. She does not say, for example, that the claimant stands no reasonable prospect of

establishing that the job evaluation study is unreliable or discriminatory: she simply says that she accepts the report, and it seems to me that that is an indication that what she had in mind was section 131(6), pursuant to which, if the report is accepted, the Tribunal "must" determine that the work is not of equal value.

41. The difficulty with the judge's reasons, if she did act under section 131(6) of course, is that the reasons do not anywhere address what the Tribunal made of the claimant's submissions as to the Make UK report. At the very least, in my judgment, the claimant in her written submission had raised arguments to the effect that the study was unreliable and also – possibly, given the references to discrimination – that it was based on a system that discriminates because of sex for the purposes of that section 131(6)(a). In other words, she had identified arguments that could be classified under both (a) and (b) of section 131(6).

42. A Tribunal will err in law if it fails to give adequate reasons for its decision which enable the parties to understand why they have won or lost and the appellate tribunal to assess whether an error of law has been made. These are the basic Meek requirements following the judgment of the Court of Appeal in **Meek v Birmingham City Council** [1987] IRLR 250. There have been multiple authorities on the matter since that date, but that is all that needs to be said for the purposes of this case.

43. The claimant in her submissions has also referred to a number of the well-established authorities in relation to strike out on the grounds of no reasonable prospect of success. As it seems to me that this was not the basis for this strike out decision, I say only this about it: it is well established that the general principles to apply are those summarised by HHJ Tayler at paragraph 28 of the **Cox v Adecco** case. Among other things, those principles require the claimant's case to be taken at its highest at the strike out stage under rule 37. Accordingly, if this was a strike out under rule 37 (contrary to my reading of the decision), the claimant's case as to the unreliability of the

respondent's job evaluation study should have been front and centre of the judge's decision and its prospects of success assessed by identifying the claimant's case in that respect at its highest. As it was, the judge did not even mention it.

44. Dr Ahmad, for the respondent, argues that the job evaluation study is robust and reliable and that one can see that it is of a high quality and there is nothing on the face of it that would suggest that it suffers from either of the flaws identified in section 131(6). He may well be right on those submissions, but it is not something that I can judge from the eyrie of the Employment Appeal Tribunal. The claimant raised a case that it was not reliable and might be discriminatory and that case needed to be dealt with. In that respect, I have borne in mind the authority of **Armstrong** to which both parties have referred me, in particular at paragraph 57 where the Court of Session said this:

> "All that the claimant was required to do was to persuade the Tribunal on the basis of all the material before it that there were reasonable grounds for suspecting that the evaluation contained in the study was unsuitable to be relied upon. There is no requirement for particularly cogent evidence, nor indeed for evidence that an element of the study is actually unsuitable. All that is required is reasonable grounds for suspicion".

45. That is a proper threshold to be surmounted, and it may be that on remission the Tribunal will conclude that that threshold is not surmounted in the claimant's case. However, on the basis of what the claimant put in her submissions, it seems to me she had put forward arguments that were on their face arguments of substance about unreliability; and the point that the respondent had already accepted discrimination in relation to her like work claim added force to what she was saying about discrimination within the respondent's pay arrangements. Accordingly, the arguments that she raised were not on their face hopeless. They were arguments that needed to be dealt with, and in the absence of any reasons from the Tribunal, it is inexplicable as to why her claim was struck out. In my judgment, the decision was therefore plainly in error of law. That error was material, and this sub-ground of appeal must succeed.

Sub-ground 2.3

46. The final sub-ground in relation to the decision to strike out the equal value claim is sub-ground 2.3; that is that the Tribunal should not have relied on a job evaluation study created after the date on which the claimant's equal pay claim was issued in order to strike the claim out. As thus put, and as Mr Uberoi accepted in argument, it does not work because it is clear from the authority of **Dibro Limited v Hore** [1990] ICR 370 at 377(f) that:

> "Provided that a job evaluation scheme is analytical and a valid one (…) and is relevant to the issues which the Tribunal have to decide, it seems to us to matter not at all that it came into existence after the initiation of proceedings provided it relates to facts and circumstances existing at the time when those proceedings were initiated (…)".

47. However, Mr Uberoi's argument today is one that it seems to me the claimant intended to advance in the first place, which is that the problem is that the Make UK report does not look backwards, but appears to be addressed to the circumstances as they were roughly at the time that the report was made – or, at any event, that it is not clear that it is properly covering the period going back to the claimant's start of employment in 2018 which would be the relevant date.

48. The claimant's argument is that, as such, this was effectively a further reason why the job evaluation study was unreliable or unsuitable to be relied on as a basis for striking out the claimant's whole claim.

49. I am not going to decide whether this ground of appeal succeeds or fails for because I am already allowing this aspect of the appeal on the other grounds, and what I am not certain about in relation to this particular aspect is the extent to which the argument was really advanced before the Tribunal below. It is, however, certainly a point that will need to be considered by the Tribunal on remission, and it seems to me that that is all I need to say about it for the time being.

Ground 2 – reasonable adjustments

50. I now move on to deal with ground 2, which is that the Tribunal failed to identify and include in the list of issues the claim of failure to make reasonable adjustments in relation to toilet facilities.

Ground 2: factual background

51. Although the claimant's second claim of the joined three claims was not included in the bundle before me, we have looked at it in the course of this hearing and it is apparent from paragraph 1 of the claim particulars in box 8.2 of the claim form that the claim included the following:

> "DISABILITY DISCRIMINATION – NO WELFARE MEETINGS WERE CARRIED OUT WHEN I WAS OFF SICK – FAILURE OF DUTY OF CARE AND FAILURE TO MAKE REASONABLE ADJUSTMENTS IN MY OFFICE AND HAVE DISREGARDED INFORMATION RELATING TO PROVIDING A DISABLED TOILET ON THE LOWER LEVEL FLOOR".

52. At the case management hearing on 27 November 2023, ie the one before the one with which I am concerned in this appeal, the judge records that the claimant had made a number of applications to strike out the respondent's response which the judge at that hearing decided to treat as an application by the claimant to amend her own claim. Much of the case management order is directed to analysing what claims the claimant was seeking to advance by way of amendment and the extent to which any of those were out of time and/or should have been pleaded in earlier claims.

53. In the course of that part of the case management order, the judge said this, at paragraphs 39 to 40:

> "39. On page 199 at paragraph 3, there is a reference to use of a toilet. This allegation is undated. The claimant has referenced this in paragraph 1 of her second claim. It is then followed (on page 200) by reference to a meeting in September 2021 with Mr Farmer the new Engineering Manager. The claimant stated that she was asked if she needed anything in the office and she requested a new adjustable chair as she was experiencing back pain and a foot pedal to rest her feet on. In respect of the time limit, the claimant invites the Tribunal to consider whether it should apply and stated that it amounted to 'Bullying and Harassment and Disability Discrimination'. The date of the meeting would result in this allegation having to be pleaded in the second claim, however, it would still then have been out of time (s.123 EQA).
>
> 40. There is no definitive explanation from the claimant as to why these allegations have not been made earlier in time and why not in the second claim. The same estoppel observations made above apply."

54. As can be seen, what the judge says at paragraph 39 is to refer to one of the claimant's applications to strike out the respondent's response. I note that there is in that a reference to use of the toilet and that this allegation is undated. The judge then notes that the claimant has referenced

this in para.1 of her second claim, which seems to me to be a reference to the passage from that claim form that I have just quoted. The judge then goes on to deal with other matters in paragraph 39.

55. In paragraph 40, as I read this order, what the judge is saying is that there is no explanation from the claimant as to why the allegations not included in the second claim form were not made earlier in time and why not in the second claim.

56. The judge, it seems to me, is not in paragraph 40 dealing with a claim that is in fact in the second claim. Nor it seems to me is she saying anything about time limits, because in the absence of a date on the allegation about the toilet, she could not possibly tell whether it was in time or not. Moreover, at paragraph 46 of the case management order she goes on to explain why she is not permitting the claimant to amend her claim, and of course that cannot be a decision about anything that was already in the claim because that would not require an application to amend.

57. The judge then goes on, at paragraph 49, to set out the claims that she says the claimant is permitted to pursue. All I need to say about that for the present purpose is that it does not – so far as I can tell – say anything about the claim in relation to the toilet, although, on the other hand, neither does it include everything that subsequently went on to be included in the list of issues.

58. At the end of that case management order the respondent was directed to produce a draft list of issues which the respondent appears to have done possibly in multiple versions between then and the case management order of 27 March 2024 which, at paragraphs 3 through to 6 makes reference to what has happened with the list of issues as follows:

> "**Claims and Issues**
>
> 3. The respondent had provided three draft lists of issues in respect of the three claims. Some information was missing (particularly in respect of the second claim) and Ms Royle made notes in order that she could update the drafts. That was with a view to the Tribunal reviewing the drafts and approving them as final documents.

4. Ms Royle did subsequently sent her draft to the Tribunal and it is appended to this Order.

5. The respondent is to date the undated allegations in section 16.2, within 21 days.

6. The claims and issues, as discussed at this preliminary hearing, are included in the list of issues appended. If a party thinks the list is wrong or incomplete, it must write to the Tribunal and the other side within 14 days of the date this Order is sent by the Tribunal. If not, the list will be treated as final unless the Tribunal decides otherwise."

59. As can be seen from that case management order, it appears that there was some discussion at the hearing about the contents of the draft list of issues because there is reference to some information being missing, particularly in respect of the second claim and the respondent's representative agreeing to go and update the draft. There is also reference to the respondent subsequently sending the draft to the Tribunal and then that being appended to the case management order.

60. Paragraph 6 of the case management order, as can be seen, directs the parties to write to the Tribunal and the other side within 14 days of the date the order if the list is thought to be wrong or incomplete. It may be that the claimant did send something in response to that. There was a suggestion that this might have happened in the course of argument before me though I have not been provided with any document in that regard. What we do know happened, because that list did not include reference to the toilet issue, was that the claimant raised it as part of her notice of appeal in these proceedings. What she says in this notice of appeal about that, which appears on p.16 of the core bundle for this hearing is, and I summarise, that the Employment Judge failed properly to discuss the full draft of list of issues with the claimant at the hearing, but had sent it out making it look as if it had been discussed when it had not been.

61. One of the matters the claimant subsequently raised in this appeal was the toilet issue, which of course HHJ Auerbach then listed for consideration at this hearing as being a point that had arguably

been wrongly omitted from the list of issues. HHJ Auerbach granted permission to appeal at the hearing on 28 August 2024.

62. The next significant event was that the Employment Tribunal proceedings came on for the final hearing before Employment Judge Fowell. The respondent's position at that hearing as it has been in this appeal was that the toilet claim had been dismissed by Employment Judge Wright in that November 2023 case management order that I have just set out. The respondent's case was that it had been dismissed effectively as being out of time.

63. What happened at the hearing before Employment Judge Fowell, as I understand it from the parties, is that HHJ Auerbach's order was put before Employment Judge Fowell together with a revised list of issues that included the other two points in respect of which HHJ Auerbach had granted permission, but not the toilet issue. That seems to have happened because of the respondent's position about the toilet issue having been dismissed. It is not wholly clear to me whether it was flagged to the Tribunal that the toilet issue had been left out. Certainly, what one gets from Employment Judge Fowell's written reasons, as published online following that final hearing, is that Employment Judge Fowell was under the impression that all issues in respect of which HHJ Auerbach had granted permission had been included in the list of issues and that that was an agreed list. One gets that from paragraphs 5 and 6 of Employment Judge Fowell's decision, which are as follows:

> "5 One consequence of the appeal was that the Employment Appeal Tribunal (HHJ Auerbach) reviewed the list of issues in this claim and suggested some additional points which should have been included. Those points were included by agreement at this hearing, and I will work through the completed list in due course.
>
> 6 There was one further minor amendment: Miss Mallik's claim alleged various disabilities, only some of which were admitted: (a) arthritis, (b) IBS and (c) stress, depression and anxiety. An imbalance in her ears was mentioned in her impact statement as a further potential impairment but not conceded and so that remains a live issue".

64. There is no specific reference in Employment Judge Fowell's judgment to the claimant raising the toilet claim and no acknowledgement that this issue was not included in the list of issues, or that the claimant still had a live appeal in relation to it, so that she could not, it seems to me, be assumed

to have abandoned it. However, neither does it appear to me that the toilet point was specifically raised to Employment Judge Fowell at that hearing, or (at least on the basis of the material before me) I cannot see that that happened.

65. The claimant's appeal to the Employment Appeal Tribunal against that final judgment is on foot and is due to be heard at a preliminary hearing in mid-2026. I have looked at the claimant's grounds of appeal against that final judgment, and ground 10 does raise the issue of the failure by Employment Judge Fowell to accept as issues those that had been identified by HHJ Auerbach in his grant of permission in this appeal, but ground 10 does not specifically refer to the toilet point.

Ground 2: discussion and analysis

66. So far as the legal principles that apply in relation to the putting together of lists of issues in the Employment Tribunal and their relationship to the claim form, they are most conveniently set out in the recent judgment of the Court of Appeal in **Moustache v Chelsea & Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185 in particular at paras.33 to 40 of that judgment. There is no need to set those out in full in this judgment, I have had careful regard to them. The paragraph that is of particular importance in this case is this one, at para.36:

> "Thirdly, where a party seeks the ET's ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue. This is the core function of the tribunal. That does not mean that the ET has to resolve every issue that is raised in a case. Sometimes a party will not press all the claims that have been pleaded; the ET is not obliged to address those which are raised but later abandoned: see *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531. And the ET needs only decide enough to reach a conclusion on the claims that have been pressed. Subject to these points, however, I would accept the broad submission of Ms Monaghan KC, that the ET does not have a discretion not to consider and determine a claim that has been brought before it".

67. The question for me in this appeal is whether Employment Judge Wright erred in law in making the decision that is under appeal, and that decision is (and is only) the case management order made following the hearing on 27 March 2024 and sent to the parties on 23 April 2024 together with the appendix which was the list of issues put together by the respondent.

68. I am not satisfied that Employment Judge Wright has made an error of law by not including the toilet claim in the list of issues at that stage in these proceedings. That is because I am not satisfied that the claimant at the hearing before Employment Judge Wright, or at any point before the judge sent out her order on 23 April 2024, pressed the point with her. In other words, I am not satisfied that the claimant put forward to Employment Judge Wright that she wished specifically to pursue the claim that she identified in paragraph 1 of her second claim in relation to the toilet.

69. It may be that she did not do that because Employment Judge Wright did not give her an opportunity to do so, or because the respondent did not give her an opportunity to do so, but what matters in relation to a list of issues is that at the final hearing all the issues that should be considered by the Tribunal are considered. In my judgment, a judge does not error in law if at the case management stage an issue such as this is left out of an order for a list of issues. That really is very much the purpose of the provision that the judge made in the order for the parties to come back to the Tribunal and alert the Tribunal if a point has been omitted. If a party does not then alert the Tribunal to a point that has been omitted, I do not consider that it can be said that the judge erred in law in not including the point.

70. I can see that in this case the claimant may well have come back to the Tribunal and sought to alert the Tribunal to the toilet point being omitted; but, if so, any error in not including it is not an error in this decision that that is under appeal; it is an error in the subsequent response to the claimant raising it with the Tribunal. In particular, there was clearly a further opportunity to put the point before Employment Judge Fowell at the final hearing.

71. I have endeavoured in this judgment to set out what I understand of what happened at the hearing before Employment Judge Fowell. The picture that I have is evidently not complete. I do not have statements from each party detailing what happened at that stage. I do not have the Tribunal's notes or comments on the point. If there was a record of the hearing, I do not have it, and

nor should I because I am not dealing with an appeal against the final judgment, I am dealing with an appeal against this earlier case management order. And, as I have explained, it seems to me that there was no error of law at that stage. There is, however, clearly a claim sitting on the face of the claim form in relation to the toilet and a claim for a reasonable adjustment that has not in the end been determined at the final hearing. Whether or not the Tribunal erred in law in failing to determine that claim will need to be decided, if at all, and only if it has been properly raised in that appeal, in the appeal against the final judgment.

Conclusion

72. So, for those reasons, I am allowing the appeal on ground 1 but dismissing the appeal on ground 2. As to the appeal on ground 1, both parties are agreed that if it succeeds the case needs to be remitted to the Tribunal to deal afresh with the equal value claim, and both parties are agreed that it should go back to a different Tribunal, in other words, not to Employment Judge Wright. I order accordingly.