

Neutral Citation Number: [2025] EAT 157

Case No: EA-2023-001138-NK
EA-2024-001239-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9th October 2025

Before:

HIS HONOUR JUDGE WAYNE BEARD

Between:

MR M SHUBITA

Appellant

- and -

(1) THE UNIVERSITY OF LEEDS BECKETT
(2) UNIVERSITY OF WARWICK
(3) DAN DERRICOTT
(4) ROSIE DRINKWATER

Respondents

Mr R Kohanzad for the Appellant

Mr M Rudd (instructed by Clarion Solicitors) for the Respondents

Hearing date: 9th October 2025

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The ET conducted a Strike Out hearing in circumstances where the claimant had not been forewarned. The guidance in **Cox v Adecco** and in **Hassan v Tesco** informs the correct approach to the position to be taken at that stage. This litigant in person was required to consider complex facts and to discover and apply unfamiliar and difficult legal concepts and attach them to those facts at a hearing unprepared. This was following a hearing notice which indicated that case management only would be dealt with. Rule 37 ET rules 2013 require that reasonable notice is given for a strike out. In the circumstances of the case allowing discussion at the hearing did not constitute reasonable notice.

HIS HONOUR JUDGE BEARD:

1. I shall refer to the parties as “claimant”, as he was before the Employment Tribunal, and for the respondents I shall use the shorthand of “Leeds”, the 1138 case, and “Warwick”, the 1139 case, the latter to include individuals who are also respondents.
2. The claimant was employed by Leeds in 2022. He applied for promotion but was not shortlisted. The shortlisting was done solely by a Ms Alison Kennel; adopting that approach breached the University policy. The claimant had previously made protected disclosures (whistleblowing) about financial and academic irregularities at the University. Following complaints the claimant made about the internal process in relation to shortlisting, Leeds arranged an external review of the claimant’s application.
3. A Ms Di Drinkwater, of the Leeds Human Resources Department, contacted her sister, Ms Rosie Drinkwater, at Warwick University, where she worked. She recommended that a Mr Derricott, an academic at Warwick, should be appointed to assess the application. Mr Derricott assessed the application and came to the conclusion that he would not have shortlisted the claimant.
4. The claimant later, through a subject access request, discovered the family connection between the Drinkwater sisters along with the informal selection process used in appointing the new assessor. This raised his concerns as to the integrity of that process.
5. The claimant brought an Employment Tribunal claims. The first, perhaps unsurprisingly, was against Leeds; a claim for race discrimination and whistleblowing detriment. The second claim brought was against Warwick and the following individuals were also named as respondents: Rosie Drinkwater and Dan Derricott. That claim was brought on the basis that these had, between them, allowed a discriminatory outcome.

6. It is important to note that the external assessment was not to allow the claimant an opportunity to be shortlisted for the post but was, in a sense, a test on the original process for the purposes of dealing with a grievance raised by the claimant.

7. The second claim was struck out by Employment Judge Wade as having no reasonable prospects of success. The claimant then sought to amend the first claim to include allegations against Di Drinkwater. That application was refused by Employment Judge Cox.

8. The Warwick ET1 brought by the claimant set out the various connections. However, it did not, in terms of its detail, outline any specific statutory basis upon which the claim was made other than that the claim was of discrimination on the grounds of race. The details in part 8.2 of the ET1 set out that the connections that existed and the means by which the process of appointing the assessor was undertaken. The references within the ET1 are, first of all, the familial relationship between Di and Rosie Drinkwater, the suggestion about Dan Derricott being an assessor, using the phrase “supposedly” as an independent external assessor, setting out that it did not follow a proper process. It sets out that there was a confirmation of the original decision. It does not, however, then do anything other than say this:

“To avoid duplication, I have an overlapping Tribunal case against my employer which you may combine with the current issue to reinstate my rights. I am asking you to accept my case and will provide further information at the next stage.”

9. In response, in the ET3, at the attached document, as a rider setting out the grounds of resistance for Warwick, at paragraph 24 it is said:

“The Respondents have never employed the Claimant, nor has the Claimant ever made an application for employment with the Respondents and, further, the Respondents had no knowledge of the Claimant’s race at the material times. The Claimant has failed to provide any explanation at all in his claim form as to why he alleges any of the Respondents have committed any acts of race discrimination or owe him any payments.”

In paragraph 23 of the particulars Warwick indicated that it would seek a strike out of the claimant's claim. Presumably, the respondent was seeking in that response to argue that the claim ought to be struck out in its entirety.

10. It is clear to me from the documentation, particularly the notice of the preliminary hearing, that there is no indication from the Employment Tribunal that the issue of a strike out would be considered on 17 August 2023. In addition, in an email sent to the Leeds Employment Tribunal, and copied to the claimant, the respondents' lawyers indicated that the case management hearing should be used for case management purposes. This email did not pursue the question of a strike out.

11. It is clear from that documentation that the claimant would not have been aware that a strike out would be considered at this hearing. It would have appeared, it seems to me, that the documentation would have shown in general that there was an issue about the agreed consolidation of the claims and, once consolidation was undertaken, the case management orders for the consolidated claim would be dealt with.

12. The judgment of Judge Wade indicates that she explained to the claimant that the judge was required to read a claim and the response and then assess where the contentions have prospects of success. On that basis she would hear from him about that in connection with the Warwick claim, taking into account the respondent's application to strike it out. The indication was the claimant had been ordered to clarify complaints but that he had not done so, for reasons which he explained on that day.

13. The judge then indicated that she could see there was the basis of a claim in law in the claim against Leeds, but went on to say this at paragraph 13:

“I explained to the Claimant that part of my role as an Employment Judge, where a litigant in person has acted without a lawyer, was to identify the applicable law and whether I could discern arguable complaints which, through an Act of

Parliament, the Employment Tribunal has jurisdiction to determine. I also explained that before I could consider whether there was a time limit issue in relation to the claim against Warwick, I needed to be clear which Act was relied upon because different Acts have subtly different time limit provisions. The Claimant understood the three months minus a day rule but I explained that I needed first to understand what the allegations against Warwick were.”

She went on then in paragraph 14 to say this:

“As the Claimant was not at any time a worker or employee of Warwick’s, I could not see an Employment Rights Act claim against Warwick in these circumstances (much less Ms Drinkwater/Mr Derricott). I could see that they may be acting as agents for Leeds and, as such, their actions could potentially contravene the Equality Act but, in further discussion, the Claimant did not and could not tell me how or on what basis he alleged their conduct was arguably race discrimination or even that he believed it to be so. He referred to having applied to Warwick in the past but that is contained nowhere within his claim form.”

14. It seemed to me clear from that that the judge initiated the discussion of the strike out, albeit that it was contained in the ET3. The Order for this hearing had not included an indication that it might lead to a strike out and there was no warning given to the claimant that this issue was to be part of the discussion.

15. Having had the claim against Warwick struck out, the claimant appealed. His grounds of appeal were deliberated upon by HHJ Auerbach at the rule 3(7) stage. He did not consider that there were arguable grounds of appeal. The appellant exercised his right to an oral hearing, at which he obtained the services of Mr Kohanzad, who represents him today and produced grounds of appeal for that hearing. HHJ Tariq Sadiq allowed the following grounds of appeal to proceed. Grounds 1(a) and 1(b) argue that there were procedural errors in that the ET failed to give proper notice under rule 54 before striking out the claim or that the claimant was denied a reasonable opportunity to make representations under rule 37. I am not, for reasons which I will explain, going to deal with ground 2, which was again broken up into two parts, because of the decisions that I have made in respect of ground 1.

16. In respect of the Leeds case there was also an appeal. That appeal relates to the employment judge's refusal of a stay application, in circumstances where the Warwick case had been allowed to proceed to a full hearing on appeal. Mr Bowers KC, sitting as a Deputy High Court Judge, allowed only one ground of appeal to proceed to this hearing; whether it was an error of law to refuse that stay. I am treating that ground of appeal as academic in the circumstances because, as has been explained, the case in any event did not go ahead and it is important, it seems to me, that I do not fetter the discretion of the Employment Tribunal in any way.

17. Rule 37 provides:

“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

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

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

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

(d) that it has not been actively pursued;

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

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

18. Rule 54 provides:

“A preliminary hearing may be directed by the Tribunal on its own initiative following its initial consideration (under rule 26) or at any time thereafter or as the result of an application by a party. The Tribunal shall give the parties reasonable notice of the date of the hearing and in the case of a hearing involving any preliminary issues at least 14 days' notice shall be given and the notice shall specify the preliminary issues that are to be, or may be, decided at the hearing.”

19. I am not going to deal with aspects of the Equality Act relied upon by the claimant in respect of ground 2.

20. Dealing with the issue of procedural fairness, I have been referred to a number of cases. The first of these is **Stewart v Cleveland Guest (Engineering) Limited** [1996] IRLR 535. That is a decision at the Employment Appeal Tribunal with Mummery J as the lead judge. That is a case where the details are of less importance than the decision to be found at page 542 at G, where the judgment says this:

“This Tribunal should only interfere with the decision of the Industrial Tribunal where the conclusion of that Tribunal on the evidence before it is "irrational", "offends reason", "is certainly wrong" or "is very clearly wrong" or "must be wrong" or "is plainly wrong" or "is not a permissible option" or "is fundamentally wrong" or "is outrageous" or "makes absolutely no sense" or "flies in the face of properly informed logic".

Mummery J taking those various forms of phraseology from a number of earlier cases. The importance of that approach is that, albeit that this is a strike out, it is nonetheless a case management decision that is really under review. That is because the judge made the decision to hear the case on 17 August without previous notice being given to the claimant.

21. The next case I have been referred to is **Drysdale v The Department of Transport** [2014] EWCA Civ 1083, [2014] IRLR 892. The case demonstrates that the approach of the Employment Tribunal should be careful when dealing with individuals who are unrepresented. In that case there was a withdrawal by the claimant and the Court of Appeal thought it important to recognise that the withdrawal should have been treated with more caution than the Tribunal gave it because the claimant was a litigant in person.

22. The more recent case of **Baber v Royal Bank of Scotland** [2018] UKEAT/0301/15/JOJ, deals with the approach to striking out and particularly how reasonable and proper notice of that

needs to be given. It is indicated that a notice does not need to be given particularly by the Tribunal but at paragraph 48 the judge says:

“I accept Mr Campbell’s submissions in relation to the proper construction of Rule 37(2). It is not prescriptive in any way, either by reference to the time to be permitted to make representations, or as to who or how the invitation to make representations is made. It does not expressly require notice to be given by the Tribunal, in contrast to Rule 72(1), as Mr Campbell submits.

49. Nonetheless, Rule 37(2) is an important procedural safeguard. It seems to me that what is required is for the affected party to be given reasonable and proper notice however that is done. Moreover, because a strike out has such serious consequences, it is essential that the Tribunal assures itself that the affected party is aware of the opposing party’s application and has in fact had a reasonable opportunity to make representations. Tribunals should not act hastily and it should be clear to a Tribunal that proceeds to address a strike out application, that the affected party is aware of it and has had the requisite opportunity to respond.”

23. The case of **Hassan v Tesco Stores Limited** UKEAT/0098/16, before Lady Wise, also deals with rule 37. At paragraphs 13 and 14 the following is set out:

“Dealing first with procedural unfairness, there is, in my view, a clear distinction between the discrimination and other payments claims on the one hand and the whistle blowing and unfair dismissal claims on the other. There was no notice whatsoever that the striking out of the former was to be considered at the Preliminary Hearing, while there was 11 days’ notice in relation to the latter. In my view, the decision to strike out the discrimination and other payments claims was made in clear breach of the provisions of Rule 37. Rule 37(2) requires a party to be given a reasonable opportunity to make representations when consideration is being given to striking out. The opportunity must be adequate, and that necessarily includes notice so that oral or written representations can be prepared. I do not consider that **Catton**¹ is distinguishable, on the basis that the ground for striking out was conduct where the facts were not intimated prior to the hearing. In any event, it was known in this case that the Claimant was a litigant in person. It was procedurally unfair in the extreme to expect him to address the issue of striking out of the discrimination and other payments claims when he had been given no prior notice that they could be dismissed at the hearing. The warning issued at the outset of the hearing was insufficient to overcome that unfairness. It was accepted that the idea of considering striking out the discrimination and the payments claims was raised at the hearing by the judge himself and not by counsel for the Respondent. Had it been raised for the first time by counsel for the Respondent at the hearing, the only fair course would have been to refuse to deal with it in the absence of notice. The unfairness in the circumstances that arose in this case was aggravated by it being the decision-maker himself who decided it

¹ *Catton v Hudson Shribman and Anor* [2002] All ER (D) 143

should be discussed without notice. I am entirely satisfied that the decision to strike out the discrimination and other payments claims cannot stand as a result of the failure to give the Claimant a reasonable opportunity to make representations.

14. So far as the procedural unfairness argument relates to the other claims, the position is rather different. There is no specified period of notice required for a striking out claim. The Claimant was given 11 days' notice of the decision to canvass striking out the whistle blowing and unfair dismissal claims. While I am satisfied that fair notice of a hearing at which striking out will be considered is essential, it would be inappropriate and perhaps incompetent for me to try to "read into" Rule 37 any particular notice period. What is reasonable in any given case depends on the circumstances. While the Claimant's circumstances, including lack of legal representation and a first language other than English, are relevant, they are not sufficient for me to conclude that there was no reasonable opportunity for him to make representations about the possibility of these other claims being struck out. The Tribunal can expect even litigants in person to read and digest information sent to them or to seek assistance if they do not understand what the documentation conveys. The importance of advance notice of a striking out claim is that it allows a party to consider what may occur. The letter of 5 October 2015 from the Tribunal is in clear and simple terms. I conclude that the Claimant did have a reasonable opportunity to consider his position and prepare representations in relation to the intellectual property, public interest disclosure and unfair dismissal grounds against a background of notice that it might be decided at the hearing that they had no reasonable prospect of success."

24. I then consider **Cox v Adecco** [2021] ICR 307. HHJ Tayler, in dealing with that case, reviewed a number of cases and, at paragraph 28, drew the following propositions from the case law:

- "(1) No-one gains by truly hopeless cases being pursued to a hearing;
- (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
- (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
- (4) The Claimant's case must ordinarily be taken at its highest;
- (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
- (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.”

25. At paragraph 29, HHJ Tayler says this:

“If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide B C D E F G H additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one’s sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant

contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.”

26. **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185, [2024] IRLR 470 dealt with an issue as to the nature and scope of the Employment Tribunal’s duty to identify and determine issues in the proceedings where the parties had agreed a list of issues. In terms, the Court of Appeal indicated that the proceedings in the Employment Tribunal are adversarial.

“The range of claims that may be brought and the range of substantive or procedural answers that may be raised to those claims are defined by law, principally by statute. In any given case the primary onus lies on the parties to identify, within those ranges, which claims they wish to bring and which answers they wish to advance.”

Paragraph 37 sets out this:

“... the ET's role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party's case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage.”

27. I was referred to a number of other cases, which I have taken account of in coming to my conclusions in these matters, but the particular quotations above seem to me to sum up the correct approach to be taken.

28. Mr Kohanzad argued that there is a simplified approach I should take to this case and that the correct approach, if I find procedural unfairness, was to be found in **Jafri v Lincoln College** [2014] EWCA Civ 449, where Laws LJ, at paragraph 21, said this:

“I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in *Dobie*. It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully

made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal.”

Underhill LJ, at paragraph 45:

“... the fact that in a given case the EAT "is in as good a position [as the ET] to decide the matter itself" is not sufficient to justify it in taking that course. If, once the ET's error of law is corrected, more than one outcome is possible, the authorities are clear that it must be left to the ET to decide what that outcome should be, however well-placed the EAT may be to take the decision itself.”

29. Mr Kohanzad’s submissions on behalf of the claimant began with a humble apology that he had made the appeal more complicated than it needed to be. He indicated that if ground 1 was established, the only real question was then to follow the *Jafri* approach and ask whether there was only one outcome and, if not, then the matter would need to be remitted. He argued that the arguments that he had addressed in ground 2 were therefore to demonstrate that there were, indeed, a number of outcomes that were possible in the circumstances of the case.

30. He raised with me that in ground 1(a) it could be seen that there was a tension between rule 54 and rule 37 of the then Employment Rules and Procedures 2013, which were in operation at the time of this decision. Rule 54 mandates fourteen days’ notice in order that a preliminary issue can be dealt with and rule 37 is unincumbered. His argument was that the position is really that both rules need to be read together. He contended that there was a distinction to be drawn between preliminary issues. First there was the kind of preliminary issue that could be identified in advance and would lead, having been identified, to a hearing. This was to be contrasted to the kind of preliminary issue that is not identifiable in advance and which arises during the course of proceedings and needs to be dealt with there and then. He argued that the application of rule 37 needed to take

into account the requirements of rule 54 when an Employment Judge was dealing with the type of case where the preliminary issue was obvious and notice could be given. However, the wording of rule 37 was broad enough to allow the Employment Tribunal to deal with the type of case where an instant reaction was necessary and, I suppose, all stages in between those two extremes.

31. Mr Kohanzad argued that in this case the strike out was a foreseeable issue and that, therefore, the approach in rule 54 should have been adopted. His contention was that the Employment Tribunal should have given notice and that notice should have been at least fourteen days under rule 54.

32. In respect of 1(b), he argued that the case law demonstrated that, where there is a litigant in person and there is no real notice, then it becomes procedurally unfair. It is that unfairness that is shown in this case, he argued, and it is that unfairness which arises from the claimant being asked to explain what was a difficult and complex legal matter “on the hoof”, without any forewarning that that was going to be dealt with. There was no actual warning that a strike out application would be considered, even though the respondents had sought a strike out as part of the response. There was plenty of opportunity for either the respondents or the Tribunal to give the claimant notice that the application would be considered at this hearing. Fairness required that, particularly in the case of a litigant in person.

33. In response to this, the submissions in respect of ground (a) from Mr Rudd were blunt. It is clear that rule 37 applies to strike outs. Rule 54 is a separate rule and rule 37 does not require a specific notice period. The claimant had opportunity to make representations at the hearing. There is no default position, he said. There needs to be written representations or an oral hearing on notice, if requested. His position was that this is a case where the claimant was given a reasonable opportunity. He was aware that no reasonable prospects of success was in the ET3. The judge raised it and discussed matters with the claimant in respect of the Leeds claim and was able to clarify the issues there. The Judge gave the claimant all opportunities to clarify the issues in respect of the

Warwick claim, and that showed the level of fairness adopted by the judge at the hearing. The claimant could not explain his position at all. In those circumstances there was reasonable notice given to the claimant; it was not unfair for him to have to deal with the matter there and then.

34. In his reply given Mr Kohanzad argued that the fact that, in paragraph 14 of the Employment Tribunal reasons, Employment Judge Wade clearly indicated the potential that there was an agency in place, was sufficient for me to come to the conclusion that this was a case with more than one potential outcome.

35. Mr Kohanzad's argument that the Employment Tribunal's rule 37 is somehow confined by rule 54, in my judgment, cannot stand. Reference to Lady Wise's approach in paragraph 14 of *Hassan* demonstrates as much. It was clear there that she said that there was no way that "reasonable notice" in the rule should be read down as a particular period of notice, a proposition with which I agree. It seems to me that the claimant cannot read a particular period or a particular procedure into rule 37. I do not consider that rules 37 and 54 are in conflict. A strike out requires a particular approach by the Employment Tribunal because there are particular reasons why a strike out may be ordered. In addition, a strike out is not always a preliminary issue. It can occur at any stage of the proceedings. It requires a special rule. The position is this, that the rule itself provides for what is appropriate because what amounts to reasonable notice will differ depending on the circumstances which are being addressed by the Employment Tribunal. Disruptive behaviour in the Employment Tribunal is likely to require less notice than a complex legal argument on a statutory construction. Rule 37 provides for that by indicating reasonable notice is required. Preliminary issues can, of course, cover a much broader range of hearings. For instance, in the case where disability is disputed, a hearing might be required to decide whether a person is disabled. That would require perhaps the preparation and hearing of evidence. It is understandable why a minimum notice period would be required. But to impose such a minimum period instead of reasonable notice, which will depend on the nature of

the strike out sought, is, in my judgment, to overcomplicate matters. This is a discretionary decision for the employment judge, based on the relevant circumstances. It is on that basis that ground 1(a) of the appeal is dismissed.

36. Ground 1(b), in my judgment, should be upheld despite the admonition in the *Moustache* case to recognise that the Employment Tribunal is arbitral, not inquisitorial. The position in *Moustache* was that the process of preparation for the hearing, the identification of issues, and a full hearing on those issues was held. The Court of Appeal was dealing with circumstances where a form of rewinding all those stages had been suggested by the Employment Appeal Tribunal. This case involves the first stages of preparation, the identification of issues and, of course, the ensuring that parties are placed in a position to resolve the disputes that fall within the Employment Tribunal's jurisdiction.

37. Mr Rudd had asked me to consider the ET1 and the lack of information within it as not setting out a minimum of information which could be considered by the employment judge. However, it is important, in my judgment, that the Warwick case had been consolidated with the Leeds case by Employment Judge Wade. The claimant had, in effect, tied both claims together. In his ET1 for the Warwick case, the claimant had referred back to the ET1 for the Leeds case. There were potential connections there and it appears to me that both ET1s, therefore, would have informed the approach of the employment judge at that stage. It also appears to me that, at the very least, a complex factual picture would be presented and, with the judge actually identifying the potential for agency arising out of that factual picture, difficult legal concepts would be involved and needed to be grasped.

38. It is my judgment that it is the guidance in Cox v Adecco and in Hassan v Tesco's, which informs the correct approach to the position to be taken at that stage. To ask a litigant in person to unpack those complex factual matters, and to come to terms with unfamiliar legal concepts and attach them to the facts, would require a prodigious amount of effort on the part of the claimant. Therefore,

to ask for this to be done at a hearing where the claimant was expecting simply to deal with case management orders, does not provide reasonable notice in the circumstances of the case for such an effort to be undertaken.

39. Mr Rudd argued that the amount of notice given reflects the lack of substance of the claims in this case in any event. He gave the example of a person with insufficient service to claim unfair dismissal and how that could be dealt with by a judge at a hearing. Whilst I agree that there will be such claims, those claims will not involve the complexity in fact and law which would be involved in this case. The facts and legal concepts in this case draw this case into a different category from that sort and it is that very approach to reasonable notice in such circumstances that is, in my judgment, important.

40. What is set out about identifying the facts and matters within a relatively limited time is, in my judgment, important in the circumstances of this case. That is the Cox v Adecco judgment. I read again paragraph 28(7):

“In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing ... When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case ...”.

It seems to me that where there is a complex factual situation and the complexity of law which I have referred to, it is clearly the case that proper notice ought to be given so that the claimant is fully aware of what he is going to be asked to justify at a hearing. It would not be appropriate with that conflict being in this case.

41. As in Hassan, this is a case where in reality the strike out issue was raised by the judge at the hearing. The inclusion of that application in the ET3 was insufficient, in my judgment, to say that the claimant was under some form of notice from the receipt of the ET3. That is made clear by the way in which the hearing was being prepared for by the respondent. It seems to me that the email

which I have seen and referred to shows that the respondent was preparing for a case management hearing and not for legal argument on strike out. In the circumstances, it seems to me that there was insufficient notice given and that, therefore, in terms of rule 37(2) of the 2013 Rules, the judge was in error by not giving reasonable notice.

42. That leads me to this conclusion, that the *Jafri* approach is directed at circumstances where a final decision has been made and evidence heard. This is a case where I have decided that there was a failure to give reasonable notice. That means that the strike out that was made at that hearing must be overturned. However, that does not mean, in my judgment, that a strike out is not possible. This is in reality in the nature of a case management decision as to whether or not to deal with the question of strike out at a preliminary hearing or whether to deal with that question of the depth of the law at a full hearing. Such case management decisions are uniquely within the discretion of the employment judge. Even in appeals to this Tribunal where a decision on case management has been made subject of an appeal, the discretion of the employment judge is said to be particularly wide and interference by this Tribunal limited because that discretion is so wide.

43. That breadth of discretion means that, although the strike out decision must be overturned and the matter remitted to the Employment Tribunal, if I were to engage with ground 2(a) and (b) there is a likelihood that I would be in some way at least engaging in matters which ought to be decided properly by the Employment Tribunal. This is particularly in circumstances where it may be the case that the respondents seek a strike out when the matter is remitted or that the claimant seeks an amendment when the matter is remitted. Those are matters which ought to be left entirely to the Employment Tribunal. It seems to me that I could not possibly say that there is only one outcome to the case management decision as to how any strike out or amendment application would be dealt with. On that basis, I am loathe to take any further decision which might impinge on the application of that discretion.

44. As I indicated, in terms of ground 6 of the Leeds case, which was the only ground permitted to move to this appeal, again it seems to me that that would be academic but, again, coming to any sort of conclusion on that, given that the matter is to be remitted, would also have a potential effect on decisions to be made by employment judges and I am, in some ways, of a mind to say that it would be improper for me to go further than say that this matter is to be remitted.

45. Reasonable notice was not given before the decision to strike out, when such reasonable notice was not given, it must therefore be overturned. The appeal is successful in respect of ground 1(b). It is dismissed in respect of 1(a) and I make no decision on ground 2 and no decision on ground 6 of the Leeds appeal.

46. Mr Kohanzad, on behalf of the claimant, asks that this matter does not return to Employment Judge Wade. His argument is that there would be a natural human inclination, with a second bite of the cherry, not to make the decision afresh. The judge, he argues, arrived at what was a strong conclusion, striking out the matter, so it would be wrong to go back to the same judge and, pragmatically, it would make more sense for the matter to be sent back to be heard by any other judge.

47. In response to that, Mr Rudd says there is no reason why Judge Wade should be excluded.

48. I agree with Mr Rudd. It seems to me that we rely on the professionalism of judges to treat matters appropriately. This is a legal issue and is partly down to a decision where the claimant was unable to explain the legal issue to the judge below. It is not surprising, in those circumstances, where that was not explained at all, that the judge might come to a conclusion that there was no case, albeit then she was wrong to do so in circumstances where she had not given sufficient notice so that the claimant could have given proper thought to what explanation to give.

49. It is on that basis that it seems to me that the reasons for excluding a particular judge set out in **Sinclair Roche v Temperley** do not apply in the circumstances of this case. I also agree that this is a pragmatic decision and the matter should not be remitted directly to Employment Judge Wade but remitted to the Leeds Employment Tribunal for an allocation by the Regional Employment Judge as resources permit.