EMPLOYMENT TRIBUNALS

Claimant: M Sykes

Respondent: Coanda Aeronautical Turbines Limited

JUDGMENT

1. The judgment made on 5 August and sent to the parties on 21 August 2024 is revoked.

2. There shall be a rehearing of the claimant's claim before a new Tribunal (comprising an Employment Judge). The parties will be sent a date for the hearing.

3. The order striking out the response is set aside.

REASONS

4. The claimant made a complaint of unlawful deductions from wages contrary to section 13 ERA 1996. At a hearing on 5 August 2024 Employment Judge McGregor:
   4.1 Struck out the respondent's response.
   4.2 Upheld the claim and gave judgment in favour of the claimant.

5. The respondent appealed those decisions. The appeal was referred to The Honourable Lord Fairley (President) in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended). He expressed the opinion that grounds of appeal 1 to 3 disclose no reasonable grounds for bringing the appeal. Ground 4 was stayed in accordance with an Order made on 3 March 2025.

6. Ground 4 of the appeal is set out as follows:

4. Procedural Fairness: Striking Out the Respondent's Defence

• Key Issue: The Tribunal's decision to strike out the respondent's

defence due to procedural breaches, specifically delays and non-attendance.

• Potential Error: If the Tribunal failed to consider reasonable justifications for the respondent's non-attendance or procedural issues (e.g., misinterpretations of hearing schedules or orders, poor communication from lawyers appointed to represent Coanda Aeronautical Turbines, Insufficient funds too purchase an air ticket to return to the UK), this could be considered an error in judgment. Striking out a response is a serious measure that should only be applied when procedural breaches are severe and unjustifiable.

• Legal Basis for Appeal: Employment Tribunal Rules of Procedure allow for leniency if procedural breaches are minor or if the respondent has made good-faith efforts to comply. If the respondent's delays were due to misunderstandings or were not wilful, this then constitutes a legal error by the Tribunal.

7. The EAT's Order of 3 March 2025 requested that the Employment Tribunal give its answers to certain questions 'unless it were to decide of its own initiative pursuant to Rules 68 to 71 to reconsider its decision.' The questions set out in the Order are as follows:

> a) in making its decision to strike out the response under rule 37, which specific failure(s) to comply with case management orders did the tribunal take into account?
>
> b) what explanation was given on behalf of the respondent for any such failures?
>
> c) what was the effect of any such failures?
>
> d) what other steps – short of strike out – did the tribunal consider? And
>
> e) having regard to the issue of proportionality, why did the tribunal reject those?

8. That Order was referred to EJ McGregor who responded on 14 March 2025. In her response EJ McGregor said, amongst other things:

> *'the Tribunal considers that it is appropriate to reconsider the decision to strike out, on its own initiative. In accordance with rule 68(2), the judgment under consideration should therefore be revoked.'*

9. In light of that response, Regional Employment Judge Robertson told the parties that the Tribunal proposed to reconsider its decision which is the subject of Ground 4 of the appeal. Because EJ McGregor is no longer in office he asked me to deal with the matter.

10. Ground 4 concerns two decisions:

10.1 the decision to strike out the response, which is a case management order rather than a judgment; and
10.2 the subsequent judgment made in the following terms:

> *1. The Claimant's complaint of unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded. The Respondent made unauthorised deductions from the Claimant's pay in respect of the period 9 th November 2023 – 26th February 2024.*
>
> *2. The Respondent shall pay the Claimant the sum of £39,619.00 (being the gross amount owed) within 14 days of the date of this judgment.*

11. The Tribunal's ability to reconsider a judgment is set out at Rules 68 to 71 of the Employment Tribunal Procedure Rules 2024. Rule 68 provides as follows:

> ***68.**—(1) The Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so.*
>
> *(2) A judgment under reconsideration may be confirmed, varied or revoked.*
>
> *(3) If the judgment under reconsideration is revoked the Tribunal may take the decision again. In doing so, the Tribunal is not required to come to the same conclusion.*

12. The procedure to be followed in respect of reconsiderations of the tribunal's own initiative is set out in rules 70 and 71.

13. The tribunal has power to vary or set aside an earlier case management order on its own initiative under rule 30 where that is necessary in the interests of justice.

14. The Employment Appeal Tribunal held in the case of Serco Ltd v Wells [2016] ICR 768 that a case management order should only be revisited where there has been either a material change of circumstances or where the order has been based on either a misstatement (of fact and possibly, in rare cases, of law) or an omission to state a relevant fact.

15. The tribunal must seek to give effect to the overriding objective in rule 3 when reconsidering a judgment or deciding whether it is in the interests of justice to vary or set aside a case management order. The interests of justice must be considered from the point of view of both parties. This includes giving due weight to the legitimate expectation that decisions made by tribunals will be final. The wider interests of justice may also be relevant, including giving weight to the public interest in the finality of litigation. That said, it is a well-established principle that one of the circumstances in which it may well be appropriate to set

aside an earlier decision is where a party has not had a fair opportunity to present their case on a matter of substance.

16. Both parties expressed a preference for the reconsideration to be conducted without a hearing. Both parties have made written respresentations.

Background

17. At various stages in these proceedings both the claimant and even the respondent's representatives have suggested the respondent in these proceedings is Mr Andrews. He is not. The only respondent is, and always has been, Coanda Aeronautical Turbines Limited.

18. The claimant's case is as follows:

    18.1 He entered into and worked under a contract with the respondent that was either a contract of employment (ie a contract of service) or was a contract of a type falling within limb (b) of the definition of worker.
    18.2 He worked under that contract from 9 November 2023 until 26 February 2024.
    18.3 It was a term of that contract that he be paid a salary of £120,000 per annum. In accordance with that contract term, the respondent should have paid him the following amounts:
        18.3.1 £6,333 for November 2023
        18.3.2 £10,000 for December 2023
        18.3.3 £10,000 for January 2024; and
        18.3.4 £9,286 for February 2024.
    18.4 It was also a term of that contract that he be paid a starting bonus of £4,000. The claimant says is that the original agreement was for a starting bonus of £10,000 but they agreed to vary the contract to reduce the bonus to £4,000. He is only seeking to recover the £4,000.
    18.5 The respondent has not paid the salary payments and starting bonus referred to above.

19. The respondent was required in its ET3 form to set out the grounds on which it opposes the claim. That form appears to have been completed by Mr Andrews. He simply stated: 'No contract. No agreement. Pure fantasy.' Notwithstanding the scant detail, it is apparent that the respondent's case is that the claimant was not a worker because there was no contractual relationship between the claimant and the respondent company.

20. In accordance with the Tribunal's usual practice for this type of claim, when the claim was received the complaint was listed for a final hearing with a time estimate of two hours, and standard directions were issued. Those standard directions, dated 14 March 2024, required the respondent to send to the claimant by 25 April 2024 'copies of all its relevant documents and evidence'. They also required the respondent to prepare a file of its own and the claimant's documents and send a hard copy to the claimant. No date was specified for that, although the parties were directed to send a copy of the file to the tribunal at least seven days before the final hearing.

21. Ahead of the final hearing (which was due to take place on 14 June 2024) the claimant sought to have the response struck out on the grounds that the respondent was 'not complying with the Tribunal's disclosure orders', had filed a response which lacked detail, had named a solicitor representative on the response form who, the claimant said, 'did not represent Mr Andrews [sic] in this matter', and the respondent (or Mr Andrews) was engaging in 'intimidation tactics'. The claimant's application was refused by Employment Judge Arullendran. The parties were told of that decision by letter of 6 June 2024, which said the following:

> *'The claimant's application to strike out the response is refused as it is still possible to have a fair hearing on the evidence produced by the claimant. Any party who has failed to send documents and/or witness statements to the other side in accordance with the Tribunal orders, will not be permitted to rely on such evidence at the final hearing without the permission of the presiding Judge.*
>
> *The hearing is still listed to take place on 14 June 2024 and the parties must comply with the order to provide electronic and paper documents. The parties must ensure all documents are legible.'*

22. I conducted that hearing on 14 June. The claimant attended and the respondent company was represented by counsel, Mr Price-Rowlands. At 4.10pm on the day before the hearing the respondent's representatives had applied for a postponement of the hearing on various grounds, including that Mr Andrews was said to be overseas. I refused the application. However, I did consider it necessary to postpone the hearing for a different reason. That was because, notwithstanding EJ Arullendran's direction, several of the documents contained in the evidence bundle prepared by the claimant were not legible, both in the hard copy bundle and the pdf version. I relisted the final hearing for 5 August 2024; identified the disputed issues that the tribunal would need to decide at the final hearing; extended the time allocated to the final hearing to a day; and made certain directions.

23. I identified that, unless the respondent applied for and obtained permission to amend its response, the issues to be decided at the final hearing would be as follows:

    1. *Was there a contract in existence between the claimant and the respondent between 9 November 2023 and 26 February 2024?*

    2. *If so was that contract*

        2.1. *a contract of service; or*
        2.2. *any other contract whereby the claimant undertook to do or perform personally any work or services for the respondent and by virtue of which the respondent was not a client or customer of any profession or business undertaking carried on by the claimant?*

3. *If so, was it a term of that contract that the claimant be paid:*
   3.1. a salary of £120,000 per annum, payable monthly;
   3.2. *a starting bonus of £4,000?*

24. The directions I made included the following (I have emphasised in bold text the parts that are particularly pertinent to the matter I am now considering):

> ## *File of documents*
>
> 4. *The claimant must prepare a file of documents for the final hearing with an index and page numbers. He must send a hard copy to the respondent by 5 July 2024. The file must contain any documents he wishes to use at the final hearing and any documents the respondent sends to the claimant in accordance with the Order below.*
>
> 5. ***If the respondent wishes to rely on any documents at the final hearing the respondent must send copies of those documents to the claimant, with a request that they be included in the file of documents, so that he receives them no later than 28 June 2024.***
>
> 6. ***Except with permission from a Judge, the respondent may not rely on any documentary evidence at the final hearing other than documents it sends to the claimant in accordance with the Order above (and any other documents the claimant includes in the file of documents).***
>
> *…*
>
> ## *Witness statements*
>
> *9. The claimant and the respondent must prepare revised witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.*
>
> *10. …Witnesses will not be allowed to add to their statements unless the Judge agrees.*
> *…*
>
> ***13. The claimant and the respondent must send each other and the Tribunal copies of all their revised witness statements by 19 July 2024.***
>
> ***14. If a party does not send to the other party a witness statement for a witness by this date, that party will not be able to rely on evidence from that witness at the final hearing without permission from a Judge.***
> ***…***

25. I also said the following about witness statements (again, I am emphasising in bold font certain parts that are particularly pertinent):

> 46. The claimant is to prepare a revised file of documents for the final hearing in accordance with the Orders above. The parties then need to prepare revised witness statements directed at the issues identified above. **Any matters that are not germane to those issues must be omitted from the statement.**
> 47. The claimant applied for an Order under rule 50 to prevent disclosure of certain matters referred to by Mr Andrews in his witness statement. **Given that I have directed both parties that their witness evidence must be confined to matters that are relevant to the issues I have set out above, Mr Andrews needs to remove all references to irrelevant matters (just as the claimant must remove any irrelevant material from his witness statement).** An Order under rule 50 is neither necessary nor appropriate.

26. The reference to Mr Andrews 'removing' references to irrelevant matters came about because although the respondent had not filed any documents described as witness statements, Mr Andrews had (on 29 May 2024) sent an email which appeared to set out matters that Mr Andrews intended to rely on in evidence and which included personal information about the claimant that appeared not to be relevant to the issues the tribunal would need to decide.

27. In accordance with the Orders I had made:

> 27.1 On 28 June the respondent's representative sent certain documents to the claimant.
> 27.2 The claimant then prepared a revised file of documents.
> 27.3 The claimant sent a revised witness statement to the respondent on 19 July.

28. On 23 July 2024 the respondent's representative sent a witness statement in Mr Andrews' name to the tribunal and the claimant. This was four days after the date set out in my Orders. The effect of this late production of the witness statement was as set out at paragraph 14 of my Orders ie the respondent would not be able to rely on evidence from Mr Andrews at the final hearing without permission from a Judge. The respondent's representative did not seek such permission ahead of the final hearing.

29. By email of 23 July 2024 the claimant took issue with the late submission of the witness statement and certain matters referred to in the statement, which he said had been included in breach of my direction to exclude irrelevant material. The claimant applied for orders striking out in its entirety Mr Andrews' revised witness statement and strike out the respondent's defence. The parties were told the matter would be discussed at the final hearing.

Final hearing – 5 August

30. The final hearing took place before Employment Judge McGregor on 5 August 2024. The claimant attended the hearing. The respondent was represented by Miss Anderson from Croner. Miss Anderson asked that the hearing be postponed, giving as the reason Mr Andrews being abroad and unable to attend. EJ McGregor refused the application.

Striking out of response

31. Having refused the postponement request, EJ McGregor went on to consider the claimant's application for an order striking out the response.

32. EJ McGregor struck out the response under rule 37(1)(c) of the Employment Tribunal Rules of Procedure 2013. Rule 37 provided as follows:

> ***37.***—*(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.*
>
> *(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*

33. In a preamble to the written record of the judgment that was subsequently sent to the parties EJ McGregor said she had struck out the response on the ground that the respondent had 'repeatedly failed to comply with orders of the tribunal'. Written reasons were subsequently requested for the judgment upholding the claimant's claim, but not for the decision to strike out the response. In those written reasons EJ McGregor indicated that she struck out the response not because she believed the respondent had failed to comply with orders but

because she considered the respondent had failed to comply with the Tribunal Rules. She said at paragraphs 4 to 6:

> *'4. The Respondent's witness Mr Andrews failed to attend the hearing. The Tribunal were informed that Mr Andrews was in Hong Kong and meant no deliberate discourtesy to the Tribunal. He had misread the Case Management Order of the 14th of June 2024. The Respondent's representative requested a postponement. This was the second request for a postponement based on the Mr Andrews being abroad, unable to attend a hearing and misunderstanding Tribunal orders.*
>
> *5. Mr Andrews' witness statement had been filed and served late on the 23rd of July 2024, in breach of the Order of the 14th of June 2024 for service by the 19th of July 2024. This was the second time that the Claimant had attended court in the matter. On the previous occasion adjournment was only granted because the court bundle was illegible in format. It was not granted because of Mr Andrews' difficulties.*
>
> *6. Having heard submissions from both parties, the Tribunal dismissed the application to postpone the hearing and considered that the Respondent had failed to comply with the Employment Tribunal Rules of Procedure 2013 ("the Rules"), and in accordance with rule 37 and the overriding objective of the Rules, the Respondent's response was therefore struck out.*

34. In her response to the EAT, EJ McGregor clarified that she struck out the claim because she believed the respondent had failed to comply with Orders. She said the 'breaches relied upon by the Tribunal [were] mainly concerned with the late statement and non-attendance at the hearing.' I address those matters in turn below.

35. Notably, although EJ McGregor referred to 'repeated' non-compliance with orders, she did not say in her response to the EAT that she had concluded that the repeated non-compliance was deliberate or wilful. She did, however, say she 'considered that there was now a pattern of a lack of regard to Tribunal orders and process' and 'the Tribunal identified that late service of evidence and failure to attend as a pattern of disrespect to court orders.' That conclusion was influenced by EJ McGregor's belief that Mr Andrews was in breach of orders in not attending the hearings in June and August, which belief was incorrect for reasons explained below.

<u>Non-attendance</u>

36. With regard to non-attendance at the hearing EJ McGregor said in her response to the EAT's questions:

> *'With regards to strike out of the response, it is accepted that within the Tribunal's reasons, the Tribunal relied upon the Respondent having failed to attend the hearing on the date and time within the order of the 14th of June 2024 as a breach of order. The Tribunal accepts that in*

hindsight the Respondent was not compelled to attend the hearing by virtue of a witness attendance order.'

37. EJ McGregor also referred to the fact that Mr Andrews did not attend the hearing in June 2024.

38. EJ McGregor was wrong to regard Mr Andrews' absence from hearings as a breach of an order and to take that absence into account in deciding to strike out the response for non-compliance with an order of the tribunal: there was no order that required Mr Andrews to attend the tribunal hearings, whether to give evidence or for any other reason. Nor was Mr Andrews' non attendance a breach of the Tribunal Rules.

39. As an aside, I note that EJ McGregor refers to 'the Respondent' having failed to attend. This suggests that EJ McGregor had incorrectly treated Mr Andrews and the respondent company as one and the same. But even if Mr Andrews had been the respondent, his absence would not have contravened any of the Tribunal Rules. The Rules do not require that a party attends a hearing. Still less do they require that a corporate party be represented at a hearing by a specific individual.

Lateness of witness statement

40. The 'late statement' referred to by EJ McGregor is a reference to the fact that Mr Andrews' witness statement was sent to the claimant four days later than the date set out in my orders of 14 March 2025.

41. It is not clear whether, at the time the witness statement was served, it was the respondent's intention that Mr Andrews would give live evidence at the final hearing: certainly that was what was implied by the fact that the witness statement was served, albeit late.

42. The effect of the late service was that the claimant received the witness statement 13 days before the hearing instead of 17 days before the hearing; so the claimant had four fewer days to consider it ahead of the hearing, and prepare his cross-examination of Mr Andrews, than he would have had if the statement had been served in accordance with my Orders. However, the Order itself contained a sanction for late or non-compliance in that it provided that, in the event of non-compliance, a witness would not be able to give live evidence at the hearing without the tribunal's permission. Any prejudice to the claimant is a matter that would have had to be considered if the respondent had sought to lead live evidence at the hearing from Mr Andrews. In the event, however, the refusal of the postponement application meant that the respondent was no longer seeking to rely on live evidence from Mr Andrews. That did not preclude the possibility of the respondent seeking to adduce the statement as documentary hearsay evidence, with the tribunal according the untested evidence such weight as it considered appropriate (which may have been very little weight).

Content of witness statement

43. In responding to the EAT EJ McGregor also referred to the content of the witness statement prepared by/for Mr Andrews, saying the following:

> *'Within that witness statement, the Respondent continued to rely upon irrelevant information about issues including disabilities of the Claimant, despite the Order of EJ Aspden requesting that irrelevant matters be removed.'*

44. It appears that, in deciding to strike out the response, EJ McGregor also took this into account as a failure to comply with the tribunal's orders.

45. In this regard the claimant appears to suggest in his submissions that, in the June hearing, I made a ruling as to which parts of the evidence Mr Andrews might wish to rely on were admissible and which were not. I did not. However, I infer that EJ McGregor considered that certain parts of Mr Andrews' statement were indeed irrelevant and not admissible (although she has not identified the precise parts of the statement she had in mind).

Other matters

46. In her response to the EAT EJ McGregor says that by the time of the June hearing 'Witness statements and documents had not been exchanged by the Respondent (in breach of the order of the 14th of March 2024).'

47. Although the Order of 14 March did require the respondent to disclose documents it did not require the parties to prepare witness statements. Therefore it was wrong to regard the failure to produce a witness statement ahead of that hearing as a breach of that Order.

48. Mr Sykes refers to the respondent's failure to prepare a file of documents ahead of the June hearing as a breach of that Order. There is no reference to that in EJ McGregor's response to the EAT.

49. Mr Sykes also suggests that Mr Andrews' witness statement was 'procedurally defective' because it was unsigned, undated and submitted in editable Word format. There is nothing in EJ McGregor's response to the EAT to suggest that these matters had any bearing on her decision to strike out the response. It would have been surprising if they did as there was no requirement in any order that the statement be signed or dated or submitted in an uneditable format; nor is there any such requirement in the Rules.

Consequences of striking out response

50. The effect of striking out the response was as set out in rule 37(3) ie the effect was as if no response had been presented, as set out (at that time) in rule 21. Rule 21 said:

> ***21.***—*(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent*

> *has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.*
>
> *(2) The Tribunal shall decide whether on the available material (which may include further information which the parties are required by the Tribunal to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Tribunal shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone….*
>
> *(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.*

51. It is clear that, having struck out the response, EJ McGregor did not simply determine the claim on the available material. Instead she went on to hear evidence from Mr Sykes and considered documents in the file prepared for the hearing. She acknowledged that the burden of proof was on the claimant to prove he was a worker. Therefore, notwithstanding that EJ McGregor had struck out the response (which as noted above simply stated 'No contract. No agreement. Pure fantasy') she still considered the argument that there was no contractual relationship between the claimant and the respondent company. Indeed it is clear that, having concluded there was a contractual relationship, she also considered the nature of that relationship ie whether it was a worker contract or something else. Furthermore, EJ McGregor gave the claimant's representative the opportunity to cross examine Mr Sykes, although she chose not to do so. Therefore, notwithstanding the strike out, EJ McGregor permitted the respondent to participate in the hearing to some extent, by giving her the opportunity to put to Mr Sykes the respondent's case that what Mr Sykes said was 'pure fantasy' and challenge his testimony as to the existence of a worker contract.

52. It is clear from EJ McGregor's response to the EAT, however, that she did not consider what she describes as 'the written evidence of the Respondent', which includes Mr Andrews' statement. Therefore, the practical effect of striking out the response was that the respondent was not able to participate in the hearing to the extent that it would have been had the response not been struck out. In particular, the respondent could have sought permission to rely on the written statement from Mr Andrews. It is apparent that EJ McGregor would have granted permission as, in her response to the EAT's orders EJ McGregor says that, had she not struck out the response she would have taken into account the written evidence of the Respondent, directing herself as to the weight that could be given to such evidence.

53. Having considered the evidence of Mr Sykes and certain documents in the file of documents EJ McGregor concluded that the claimant was a 'worker' for the purposes of section 13 ERA. In reaching that conclusion she made a finding of fact that there was a contract of employment between the claimant and the

respondent. She found that the essentials of the contract of employment were agreed verbally and in messages exchanged between the claimant and Mr Andrews.

54. Mr Andrews' unsworn and untested written statement amounted to hearsay evidence. Insofar as it is relevant to contested issues of fact, such evidence usually carries little if any weight, particularly when there is no compelling reason why the individual giving the statement has not attended the hearing so that they can be cross-examined. Significantly, however, EJ McGregor does not say that, had she considered Mr Andrews' statement, alongside other documents in the file the respondent might have wished to rely on, the outcome would have been the same. Indeed it is clear from the fact that EJ McGregor has expressed the opinion that the judgment should be revoked that she considers it is possible that the outcome could have been different had she considered the respondent's written evidence. Therefore I reject Mr Sykes' submission that consideration of the respondent's written evidence would have made no difference to the outcome.

Alternatives to strike out

55. When deciding whether to strike out a claim or response for non-compliance with an order, the tribunal must consider all the circumstances, including 'the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible': Weir Valves and Controls (UK) Ltd v Armitage EAT/0296/03, [2004] ICR 371. In considering the 'fair hearing' point, the question is whether there is a substantial or significant risk that a fair trial is no longer possible. Exceptionally, where a tribunal considers that there has been a persistent failure to comply with orders that was deliberate or wilful, it may be appropriate to strike out even if a fair trial is still possible.

56. Before striking out a claim or response it is important that the tribunal considers whether there is 'a less drastic means to the end for which the strike-out power exists': Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630. In that case the Court of Appeal said it would take 'something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial'. That was a case involving the strike out of a claim but the same principle must apply to decisions to strike out a response.

57. Mr Sykes submits that the alternative to strike-out would have been to adjourn the proceedings. Had that been the only fair alternative open to EJ McGregor then I agree that strike out would not have been disproportionate. However, it was not the only option available. As EJ McGregor says in her response to the EAT:

> *'18.…There was little prejudice caused to the Claimant by the late service of the witness statement. Whilst the witness statement continued to refer to information that EJ Aspden had requested be removed, the court would have been able to disregard such information, had the Tribunal considered the Respondent's evidence.*

> *…Whilst there had been breaches of previous orders of the Tribunal, in this case, it was open to the Tribunal to take the less draconian steps short of strike out, including consideration of the Respondent's evidence on the papers. Upon further consideration, the breaches relied upon by the Tribunal, having been mainly concerned with the late statement and non-attendance at the hearing, were insufficient to justify striking out the response. Such action was disproportionate to the actual breaches of court orders with respect to when and what evidence was served.'*

58. I agree with EJ McGregor that serving the witness statement four days late caused little prejudice to the claimant, if any at all. As for the inclusion of evidence that EJ McGregor considered irrelevant, a less drastic way of dealing with that would have been for EJ McGregor to disregard such evidence. Any concern about the material entering the public realm by virtue of being contained in a document considered in evidence could have been addressed by making an order under rule 50 (as it was then).

59. I infer that EJ McGregor did not consider these alternatives to strike out before deciding to strike out the claim as she has not said why she rejected those steps.

Conclusions

60. I consider that the decision to strike out the response was wrong because:
    - 60.1 EJ McGregor treated Mr Andrews' non attendance as a breach of a tribunal order when it was not.
    - 60.2 Striking out the response was disproportionate, leading as it did to the respondent being deprived of the opportunity to rely on the written statement from Mr Andrews. There were less drastic ways of dealing with any prejudice caused to the claimant by the inclusion of irrelevant material in his witness statement. It was possible to have a fair trial on 5 August without striking out the response.

61. The erroneous decision to strike out the response led to substantive unfairness in the manner in which the final hearing was conducted, in that the respondent did not have a fair opportunity to present its case by adducing written evidence. That unfairness may well have affected the decision on the merits of the claimant's case.

62. The claimant had a legitimate expectation that the decision made at the final hearing would be final. Setting aside the judgment and the strike out order will undoubtedly lead to prejudice to him by reopening the litigation. Setting aside the judgment will also affect the wider administration of justice because it will require a re-hearing, which will take up judicial and administrative resources.

63. However, I do not accept Mr Sykes' submission that the respondent will have an unfair advantage at any re-hearing because his own witness testimony has been 'tested in full' and reopening the litigation will permit the respondent to 'amend or replace their evidence'. EJ McGregor having struck out the response, the

respondent's representative opted not to test Mr Sykes' evidence by cross examining him. And whilst it appears EJ McGregor asked some questions of the claimant, I have no reason to think she stepped into the arena by cross-examining the claimant. As for the respondent's evidence, paragraphs 6 and 14 of the Orders I made at the June hearing still stand. This means the respondent will not be able to rely on any live witness evidence at the final hearing (whether given by Mr Andrews or anyone else) unless it applies for and obtains the tribunal's permission. The potential for prejudice to the claimant is a factor that will need to be taken into account should any such application be made.

64. I consider that the prejudice to the claimant of revoking EJ McGregor's judgment and setting aside her strike out order, and the adverse effects on the wider administration of justice, are outweighed by the prejudice to the respondent of allowing the judgment and strike out decision to stand.

65. I have concluded, therefore, that the interests of justice require that the decisions be set aside.

66. That being the case I revoke the judgment made on 5 August and sent to the parties on 21 August 2024 and set aside the order striking out the response.

67. There shall be a rehearing of the claimant's claim before a new Tribunal (comprising an Employment Judge). The parties will be sent a date for the hearing.

68. Given that EJ McGregor did not identify which elements of Mr Andrews' written statement she considered irrelevant and inadmissible, Mr Sykes should make a formal application without delay if he contends that parts of that statement should be redacted, identifying precisely which parts are said to be inadmissible. The respondent will then have an opportunity to respond.

69. Similarly, the respondent will need to make an application for permission without delay if it wishes to rely on live witness evidence at the final hearing (from Mr Andrews or anyone else) or documentary evidence other than that which was served ahead of the August 2024 hearing. The claimant will have an opportunity to respond to any such application.

Employment Judge Aspden

31 July 2025

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