

Neutral Citation Number: [2026] EAT 50

Case No: EA-2023-001458-NK
EA-2024-000786-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 April 2026

Before:

HIS HONOUR JUDGE AUERBACH

Between:

ANTHONY BOATENG

Appellant

- and -

MOSS BROS GROUP LIMITED

Respondent

Daniel Hallström (instructed via the Free Representation Unit) for the **Appellant**
Paul Smith (instructed by Gordons LLP) for the **Respondent**

Hearing date: 3 February 2026

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Strike out; Postponement

The claimant was dismissed in 2019. In 2020 he began a claim including multiple complaints of discrimination during employment going back to 2017, and unfair dismissal.

Progress of the tribunal litigation was substantially delayed by the Covid-19 pandemic and a period during which the respondent was subject to a CVA. At a preliminary hearing in 2023 the tribunal struck out the discrimination complaints on the basis that they were no longer capable of a fair trial. In the particular circumstances of this case the tribunal did not err in doing so. This decision considers how a tribunal should approach the “fair trial” issue in the context of a strike-out application.

Shortly before the start of the full merits hearing, the respondent applied for a postponement, having regard to the claimant having appealed the decision to strike out the discrimination claims. That was refused. At the hearing itself the claimant made such an application, which was also refused. The tribunal did not err in concluding that there had been no material change of circumstances, nor, in any event, in its other substantive reasoning in support of its decision to refuse that fresh application.

HIS HONOUR JUDGE AUERBACH:

Introduction and Litigation Background

1. The respondent in the employment tribunal, and now to this appeal, is the well-known retailer specialising in formal attire for men. The claimant began working for the respondent at its Strand store on 9 January 2017 as a Sales Adviser. On 23 June 2017 he transferred to the Stratford branch. He was promoted on 1 April 2018 to the role of Hire Manager. On 23 July 2019 there was an incident involving the claimant and a number of colleagues at the Stratford branch. That led to his dismissal by reason of conduct on 28 October 2019. An internal appeal against dismissal was unsuccessful.

2. On 6 February 2020, having completed the ACAS EC process, the claimant presented his claim form. He was a litigant in person. His complaints included a number of **Equality Act 2010** complaints about various alleged treatment, going back to 2017, by reference to the characteristics of race and religion, a complaint of unfair dismissal and a holiday pay claim. The claimant appeals from (a) a decision taken at a Preliminary Hearing (PH) in 2023 to strike out the **Equality Act** complaints as being no longer capable of a fair trial; and (b) a decision taken at the start of the full merits hearing of the unfair dismissal and holiday pay claims in 2024, refusing his application to postpone it.

3. The litigation history, in a little more detail, is this.

4. Following issue, the claims proceeded in the London South tribunal. Further particulars of the claim were provided in October 2020 and of the response in November 2020. On 15 December 2020 the respondent entered a CVA. Because of that a preliminary hearing (PH) listed for March 2021 was vacated, as was a full merits hearing listed for October 2021. The claimant submitted a proof of debt and received a partial payment. On 31 March 2022 the CVA was completed. On 12 July 2022 the tribunal sought an update. The claimant responded that he wished to pursue his claim.

5. In June 2023 the respondent applied to strike out the claim. At a PH that month directions

were given. At a further PH held by CVP on 11 September 2023 before EJ Abbott the tribunal struck out all of the **Equality Act** complaints on the basis that a fair hearing of them was no longer possible. It declined to strike out the unfair dismissal and holiday-pay complaints. A full merits hearing was listed to open on 5 February 2024.

6. In December 2023 the claimant began his appeal against the strike-out decision. On 9 January 2024 the respondent applied to the tribunal for a stay, and postponement of the full merits hearing, while the appeal was progressing. On 10 January the claimant emailed opposing that application. On 18 January, following the EAT notifying that the strike-out appeal had been directed to proceed to a PH, the respondent emailed with further submissions in support of its postponement application. On 26 January 2024 the tribunal wrote that EJ Wright had refused that application, and so the full merits hearing would proceed in February. On 28 January the claimant emailed seeking a postponement in light of the ongoing strike-out appeal, referring to issues about the bundle and asking for the full merits hearing in February to be replaced with a case-management hearing on the first day.

7. The full merits hearing came before EJ Heath by CVP opening on 5 February 2024. At the start the claimant applied for the proceedings to be stayed and the substantive hearing postponed. The respondent opposed that application. The claimant’s application was refused. The hearing proceeded and at the conclusion the unfair dismissal and holiday pay claims were dismissed on their merits.

The Strike-Out Appeal

The Strike-Out Rule

8. What was rule 37 of the **Employment Tribunal Rules of Procedure 2013**, headed “Striking out”, (rule 38 of the **2024 Rules** is in materially the same terms) provided as follows:

“(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.”

The Tribunal's Decision

9. At the PH before EJ Abbott the claimant appeared in person and the respondent was represented by Paul Smith of counsel. The tribunal heard unchallenged evidence from Louise Passey, the respondent's Head of People, and submissions from both parties.

10. The tribunal described the litigation history. Following a self-direction as to the law it made a number of findings. The claimant complained of approximately 30 individual alleged acts of discrimination, harassment or victimisation. The majority of people identified – 22 individuals – no longer worked for the respondent, including all bar one of the individuals said to have perpetrated such acts. Of those, 17 were either uncontactable or had been contacted but were not willing to cooperate. The tribunal said at [22] that “[t]here is no realistic prospect of any of these individuals being able to provide evidence for the purposes of this case.” The tribunal continued at [22(c)]:

“The other 5 are:

- i. an HR Business Partner who is said to been involved with “various incidents during [the Claimant's] tenure”;
- ii. a Store Manager alleged to have perpetrated a single act of discrimination / harassment / victimisation in April 2018, who also conducted the misconduct investigation into the Claimant that ultimately led to his dismissal;
- iii. a Store Manager alleged to have perpetrated (or been involved in) two acts of discrimination / harassment / victimisation in April 2019;
- iv. a Senior Sales Advisor alleged to have perpetrated two acts of discrimination / harassment / victimisation in April and July 2019 and who was a part of the incident that led to the Claimant's misconduct dismissal; and

v. a Team Leader not specifically alleged to have perpetrated any acts of discrimination / harassment / victimisation but who was a witness to the incident that led to the Claimant's misconduct dismissal."

11. The claim had been presented in February 2020 and would come to a final hearing in February 2024. The core reason for the delay was the period of the CVA. The pandemic had also contributed. The tribunal said that none of this was the claimant's fault, but it was very relevant to the respondent's situation and why the case was out of the norm. Some of the allegations went as far back as early 2017, so would be coming to trial around 7 years later. The tribunal went on to conclude as follows:

"30. It is not straightforward, but in my judgement, a fair trial is no longer possible of the Equality Act claims because of the inability of the Respondent to call witnesses to defend its interests, as a consequence of the business turmoil suffered by the Respondent and the ensuing insolvency process which substantially (but necessarily) delayed progress of the case and resulted in many potential witnesses being 'lost' to the case. The prejudice to the Respondent of having to defend itself in these unusual circumstances outweighs the prejudice to the Claimant of not being able to pursue his claims. I accept the submission that there is no real alternative, it being impractical and unrealistic to artificially carve up the claim based on witness availability.

31. In reaching that conclusion, I note that the Claimant has already received some compensation in respect of his claims through the CVA process (since his Schedule of Loss accepted by the Supervisors covered all claims, not just those that are founded on breach of contract), so he is not left with nothing – although, of course, it is not the full amount he seeks."

12. The tribunal took a different view in relation to the unfair dismissal and holiday pay claims, as the investigation and dismissing officers were available to give evidence, and having regard to the likely available documentary evidence. The tribunal declined to strike out those complaints.

The Grounds of Appeal

13. There is one ground of appeal, but it has a number of sub-strands. In summary, the tribunal is said to have erred by failing to consider whether a fair trial was possible at all, rather than whether there was a significant risk that a fair trial could not take place, and in particular:

- (a) By failing to consider whether the attendance of witnesses who had left the respondent's employment could be secured by making a witness order;
- (b) By failing to consider the extent of the contemporaneous documentary record in relation to the discrimination claims;

- (c) By failing to consider whether any of the five available witnesses could give evidence on aspects of the discrimination complaints;
- (d) By failing to consider the impact of section 136 of the **2010 Act** and the possibility of deciding complaints on an application of the burden of proof in the absence of material witnesses;
- (e) By concluding that it was impractical and unrealistic to “carve up” the complaints, rather than asking whether it was possible to have a fair trial of some complaints; and/or
- (f) By taking account of, or placing too much weight upon, the fact that the claimant had successfully proved for a debt in the CVA process.

Argument, Discussion, Conclusions

14. Mr Hallström accepted that the tribunal had cited rule 37(1)(e) and used its language when setting out its conclusion. But the ground contends that it had not, in its substantive reasoning, taken the correct approach to the “fair-trial” issue under that specific provision. This doctrinal issue was canvassed in Leeks v University College London Hospitals NHS Foundation Trust [2025] ICR 87, but it did not need to be determined in that case. I heard extensive argument upon it.

15. The broad context is the Article 6(1) Convention right. Two general features may be noted. The first is that the right is one, of all parties, to a fair hearing within a “reasonable time”. The second is that, as the ECtHR has expounded, each party should have a reasonable opportunity to present their evidence “under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent” (Dombo-Beheer B.V. v The Netherlands (A/274-A) (1984) 18 EHRR 213 at [33].) The tribunal also has a duty, when deciding such an application, to give effect to the overriding objective (rule 2 of the **2013 Rules**; rule 3 of the **2024 Rules**) which, consistently with Article 6, includes so far as practicable “ensuring that the parties on an equal footing” and “avoiding delay, so far as compatible with a proper consideration of the issues.” It is also instructive to consider how the rules have

evolved, alongside the key authorities.

16. Rule 12 of both the 1980 and 1985 **Rules of Procedure** conferred upon an industrial tribunal the power to do various things “if it thinks fit”, including to strike out a pleading on the grounds that it was scandalous, frivolous or vexatious, or an application “for want of prosecution”. In **Executors of Evans v Metropolitan Police Authority** [1993] ICR 151 the Court of Appeal held that the latter power was not wholly at large. Rather, where a party seeks to revive a claim a period of inactivity, the principles in **Birkett v James** [1978] AC 297 apply, so that, if the default was not “intentional and contumelious” it would be necessary, in support of a strike-out, to show that the delay was “inordinate or inexcusable” or would give rise to “a substantial risk that it is not possible to have a fair resolution of the issues” or “has caused, or is likely to cause, serious prejudice to the respondent.”

17. Rule 13 of the **1993 Rules** contained similar provisions, but with the additional power to strike out a pleading on the ground that a party had conducted the proceedings in a scandalous, frivolous or vexatious manner. Rule 15 of the **2001 Rules** was in similar terms. Rule 18(7) of the **2004 Rules** modernised the language of the existing grounds, and added two new grounds: of non-compliance with an order or practice direction, and where the chairman or tribunal considers that it is “no longer possible to have a fair Hearing in those proceedings”. That list reappeared in the **2013 Rules**, with non-compliance with a rule or order replacing non-compliance with an order or practice direction.

18. The jurisprudence has long recognised that, where one party is at fault, if their conduct is of a sufficiently reprehensible nature, that may warrant their claim or response being struck out without the additional requirement for it to have had an impact on the tribunal’s ability to hold a fair trial. But such cases are exceptional, and involve extreme conduct. See, for more discussion: **T v Royal Bank of Scotland Plc** [2023] EAT 119 at [38] and following. In other cases the tribunal needs to consider what the position may be, in terms of whether there is serious prejudice to the ability of the other party to get a fair hearing, or of the tribunal to conduct a fair trial of the issues more generally.

19. Where there has been significant delay, the passage of time may itself result in serious prejudice to the ability of a respondent fairly to defend itself, whether because important witnesses or documentary evidence are no longer available, or because of the impact of the passage of time on the ability of witnesses to recall events. In **Evans** Steyn LJ observed at [14] that it will be “sometimes possible to infer prejudice from the circumstances in which the cause of action arose and the length of the delay” and Hoffmann LJ said at [18] “I accept that in the ordinary case the nature of the prejudice will usually be obvious”; but in other cases, of which **Evans** was itself one, the prejudice cannot be inferred or assumed without some particular further investigation by the tribunal and specific relevant information or evidence going to that issue being presented to it.

20. More recent authorities emphasise that the tribunal must identify some basis for its conclusion that the passage of time has led to some serious prejudice to the ability of a respondent to defend itself (**Daly v Northumberland and Tyne and Wear NHS Foundation Trust**, UKEAT/0109/16 at [28]), or discuss the sort of factors that a tribunal may need to consider in such a case in general terms (**McMahon v Axa Icas Ltd** [2025] EAT 8 at [65]), or where the difficulty is said specifically to be that a significant potential witness no longer works for the respondent (**Leeks** (above)). But what inferences the tribunal might properly draw, or what matters might need to be supported by specific information or evidence, will be sensitive to the particular nature, and circumstances, of the case.

21. The addition of category (e) to the strike-out rule in 2004 recognised that the issue of whether it is no longer possible to have a fair hearing may sometimes present itself, even though no party is in any sense to blame for the circumstances giving rise to the issue. The two most obvious and commonly encountered such scenarios, are where the passage of time is said to have impacted on the ability of a respondent effectively to defend itself, notwithstanding that the claimant is not in any way to blame for the delay, and where a claimant’s ill health (whether or not related to the subject matter of their claim) means that they are not fit to participate effectively in a hearing.

22. There may be some such cases in which the tribunal can properly be *sure* that a fair trial, at any future time, is simply no longer possible, as, for example, in **Chidzoy v BBC**, UKEAT/0097/17. But, perhaps more usually, the tribunal will have to assess whether the risk, or probability, that the ability of the tribunal to try the matter fairly, or of there being material prejudice to the other party's ability fairly to present their case, is sufficiently high or serious to warrant a strike-out. In **Arrow Nominees Inc v Blackledge** [2000] EWCA Civ 200, for example, it was alleged that the possibility of a fair trial had been put in to question by one party having tabled documents that were in fact forged. In that context Chadwick LJ spoke of the need to consider whether there was a "real risk" that that would render the further conduct of the proceedings unsatisfactory or a "significant risk" that the effect of the conduct was that a fair trial could not take place.

23. Similarly, because the underlying right is to a fair trial within a reasonable period, it may not be a sufficient answer, in a case which, because of non-compliance with tribunal orders, is not trial ready at the scheduled start, that it might, with sufficient time and effort, be made trial ready at some future point: **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2002] ICR 327. Similarly, in a case where a claimant is presently unable to participate in a trial owing to long-term ill health, it may be proper to strike out the claim where the tribunal properly concludes that there is no sufficient prospect of them being well enough to participate within a reasonable time. See, for example, **Peixoto v British Telecommunications Plc** [2008] UKEAT/0222/07.

24. The draconian nature of a strike-out means that, if there is some practical way that that the situation can be addressed short of doing so, then strike-out would not be a proportionate step to take. The discussion in **Bolch v Chipman** [2004] IRLR 140, read literally, would appear to suggest that the tribunal should *first* consider whether a fair trial is no longer possible, and even if it is not, still *then* consider whether strike-out is a proportionate response. But, as was pointed out in **Peixoto** at [49], if the tribunal has truly properly concluded that a fair trial is simply no longer possible, it could

not be right to direct that the matter should nevertheless proceed to a trial which would not be fair. Rather, the tribunal should *first* consider, as part of its consideration of the impact of the circumstances on the ability for there to be fair trial, whether steps can and reasonably should be taken, which would sufficiently address, or mitigate, the risk, so enabling a fair trial to proceed.

25. In **Blockbuster Entertainment Limited v James** [2006] EWCA Civ 6843; [2006] IRLR 684, for example, on analysis the matter ultimately turned on what the tribunal could have done about the fact that the claimant had arrived at the start of a hearing with various new evidential material, which had not previously been disclosed. The Court of Appeal pointed out that a possible solution to the potential impact of this on the fairness of the trial, instead of striking out the claim, would have been simply for the tribunal not to permit the claimant to rely on that evidential material; and it would then have been fair to both sides to proceed with the trial on that basis. See, further, the discussion in **Bailey v Aviva Employment Services Limited** [2025] EAT 109 at [41] – [49].

26. I conclude from the foregoing survey that the appropriate approach to the fair-trial issue is highly fact-sensitive and will depend upon the particular nature of the problem, and circumstances of the case, whichever particular sub-paragraph or sub-paragraphs of the rule are being invoked.

27. In some such cases there may be conduct of such a serious nature that a risk to the ability of the matter to be fairly tried is not a precondition to the strike-out power being exercised. In other cases there may be conduct which is found itself to have irreparably made a fair trial impossible. In still others the nature of the conduct, and the possibility of its recurrence, may properly bear upon the tribunal's consideration of the probability or prospects of the matter ever coming to a fair trial. There may also be cases where the tribunal can properly strike out a complaint because it properly concludes that it has simply been abandoned and is no longer being pursued at all. In some cases, delay or the passage of time may give rise to circumstances affecting, or putting at risk, the ability of a respondent effectively to defend itself, whether the claimant is found to bear some blame (under (d)) or the matter

falls to be considered (only) under (e).

28. Rule 37(1)(e) also enables a claim or response, or part of one, to be struck out if “the tribunal considers” that it is no longer possible for the claim or response to be fairly tried. That recognises the evaluative nature of the judgement which the tribunal may often be called upon, and will be best placed, to make. (See **Peixoto** at [48].) There may be some cases where the tribunal has erred in striking out under (e), by, for example, failing to adopt an obvious alternative solution that would have defused the risk to a fair trial, and would not have unreasonably imposed on either party. But, in a case calling for an evaluative judgment, in which the tribunal has taken into account the relevant considerations, the EAT may only interfere if it has reached a conclusion which no reasonable tribunal could have reached: **Riley v Crown Prosecution Service** [2013] EWCA Civ 951; [2013] IRLR 966.

29. Mr Hallström also criticised the citation by the tribunal at [19] of a passage in **Elliott v Joseph Whitworth Centre**, EAT/0030/13, referring to the balance of prejudice. He submitted that considering the balance of prejudice, of deciding either way, is not the correct approach, in the strike-out context. However, it seems to me that, though perhaps it might have been better expressed, the point being made in that passage in **Elliott** was exactly that. Where a respondent is relying on prejudice to it if a complaint is not struck out, the tribunal needs to consider whether there would be some prejudice other than the mere fact that it will not be relieved of the obligation to defend the complaint at all. In so far as Mr Hallström contended that missing witnesses could not ever be alone sufficient to give rise to such prejudice supporting a strike-out, I do not agree.

30. I turn then to the substantive criticisms of the present tribunal’s decision to strike out all of the **Equality Act** complaints raised in this case.

31. The tribunal had before it a significant body of specific information and evidence, about the impact of the delay on the respondent’s ability to defend itself. It noted that the complaints had been

identified at the June 2023 PH. That included, for each instance, the nature of the alleged conduct, to whom it related, and when it was said to have occurred, going back to 2017. It also had the respondent's schedule listing the witnesses who no longer worked for it, with dates of departure, where known, and identifying to what matters their evidence would be relevant. It also had a table identifying the five who Ms Passey said were available to give evidence, and her comments on their roles. The tribunal also recorded at [26] that "Mr Smith took me through the allegations." This material was plainly all considered by the tribunal, and the respondent's case subjected to scrutiny.

32. The first criticism, however, is that the tribunal failed to take into account whether, in respect of witnesses who had left, but for whom the respondent did have some contact details, their attendance could have been secured by a witness order. Mr Hallström noted that in Leeks this was one of the factors that it was said generally ought to be considered in such cases.

33. But that does not mean that issuing a witness order will be a fair, or simple, solution in every such case. Where there is evidence that a witness is unwilling, or un-cooperative, then there may be uncertainty as to whether they will comply with a witness order. If they do come, they may not give evidence-in-chief along the lines anticipated, and it may be little comfort to the party that obtained the order, that, if the witness proves "hostile", they can seek permission to cross-examine them.

34. Mr Hallström submitted that these were points that the tribunal could have made, but it did not, expressly, do so. However, it did find was that the witnesses who had been contacted were "unwilling to co-operate". It also accepted that "[b]est efforts have been exhausted"; and concluded that "[t]here is no realistic prospect of any of these individuals being able to provide evidence for the purposes of this case." What the tribunal also knew, of course, was the nature of the individual allegations, of various kinds of discrimination. Given that, and given that I think it fair to infer that the tribunal understood the basic procedural context that I have set out, I do not think that it erred by not expressly addressing whether issuing witness orders might provide a simple solution.

35. Secondly, it is said that the tribunal erred by failing to consider the extent of the documentary record in relation to the discrimination claims. But the tribunal knew the nature of the alleged treatment in each case. As Mr Smith fairly submitted, these included alleged oral remarks, or such matters as allegations of delay or inaction, adjudication of which would have required inferences to be drawn as to whether, for example, inaction was materially influenced by race. These were not allegations based, purely, for example, on the words in an email, that might be a matter of record.

36. That the tribunal had in mind the general question of the extent to which relevant documentary evidence might be available, and mitigate the problem, is also demonstrated by the fact that it considered that the likely availability of such evidence was a factor in its decision not to strike out the holiday pay and unfair dismissal complaints. All of that being so, once again, I do not consider that this tribunal erred by not referring expressly to the question of whether the availability of documents might provide a satisfactory solution to the problem of the unavailability of witnesses who stood accused of discriminatory treatment as described in the list of issues.

37. I will take next the criticism that the tribunal erred by failing to consider the impact of section 136 **Equality Act 2010** and the possibility of deciding complaints on an application of the burden of proof in the absence of material witnesses. As to section 136, in my judgment this lent weight to the *respondent's* case that the unavailability of key witnesses supported a strike-out. The respondent was on risk that, if the tribunal found, in relation to a given incident, that the burden passed to it, and it could not call the person accused, as a witness to give evidence about the matter, it would be unable to discharge that burden, and so the complaint would succeed.

38. The more general submission was that the tribunal erred in not considering that, even in the absence of a witness, a factual dispute could be resolved by applying the general burden of proof. Mr Hallström cited the discussion in **Hovis Ltd v Louton**, UKEAT/2020/973, of authorities in which it was said that, if the court genuinely found the conflicting evidence from each party on a disputed

issue of fact to be equally and oppositely balanced, then it could resolve the issue by applying the burden of proof. I do not see how that shows that the present tribunal erred in considering that the respondent would be at an unfair disadvantage because of the unavailability of key witnesses.

39. The more general point in **Louton** was that, there, the tribunal erred by concluding that the claimant's account in evidence of a disputed incident, *must* be accepted, because the respondent could not call a witness in person to contradict it, as it would have been open to it to conclude that there was other, hearsay, evidence that was more convincing. But that does not mean that the present tribunal erred by considering that the respondent would be at a material disadvantage, because of the absence of key witnesses. For similar reasons, the fact that there may have been records of what some missing witnesses had said in the course of internal investigations of grievances raised by the claimant at the time, does not mean that the tribunal was wrong to conclude that the respondent would be under a material disadvantage by being unable to call them to give evidence in person.

40. I address next the contention that the tribunal erred by taking account of, or placing too much weight upon, the fact that the claimant had successfully proved for a debt in the CVA process. The background, in a little more detail, is this. There was an initial application by Mr Smith to strike out the complaints on the basis that they had been compromised by the CVA process. But, as the tribunal recorded at [10], at the hearing he confined that argument to the notice and wages claims, which, having heard his argument, the claimant withdrew. It was in that sense that Mr Smith was recorded as conceding that the **Equality Act** claims were "not covered" by the CVA, which is why the tribunal went on to consider the rule 37(1) application in relation to them.

41. However, what the tribunal also found, at [6], was that the claimant had presented a schedule of loss in the CVA process in the sum of £61,790.54 covering "all of his heads of claim". The supervisors of the CVA agreed the claim in that amount and the claimant in due course received £10,249.02, representing a first and final dividend of 16.59% of the adjudicated allowable claim.

Unusually, therefore, the claimant had already received a part (albeit only about one sixth) of the financial remedy that he was seeking, and he had done so without having in fact to secure a finding in the tribunal process that the **Equality Act** complaints were meritorious.

42. It is contended that this was, however, irrelevant to the question of whether the complaints were capable of a fair trial, so the tribunal should not have placed any weight on it in deciding that question. However, standing back, on a fair reading, I do not think that the tribunal did place any material weight on this aspect. The opening words of [31] – “In reaching that conclusion ...” – must be read in the context of the whole paragraph, and the relevant passage. I think it is clear that the tribunal reached the conclusion that these complaints should be struck out for the reasons that it had set out in this section of its decision up to the end of paragraph [30]. The sense of paragraph [31] was merely to add that, while these complaints had been struck out, the effect, unusually, was that the claimant was “not left with nothing – although, of course, it is not the full amount he seeks.”

43. The final two, related, criticisms, are that the tribunal erred by failing to consider whether any of the five available witnesses could give evidence on at least some aspects of the discrimination complaints; and that it erred by concluding that it was impractical and unrealistic to “carve up” the complaints, rather than asking whether it was possible to have a fair trial of at least some of them.

44. It is clear that the tribunal specifically considered who these witnesses were, and what was said to have been their involvement, at [22(c)]; and, while they were not named in the tribunal’s decision, I was shown that, on the materials before the tribunal, it was clear who each of them was.

45. Mr Smith submitted that this was a case where the claimant was seeking to paint an overall picture, that he was working in a generally discriminatory environment, and to build that picture, using earlier incidents as background to later ones, and potentially thereby to overcome the obstacle of time points. The respondent in turn would have potentially wanted to rely on the evidence of the

“missing” witnesses to give the lie to that general picture, and so also further to undermine the claimant’s case in relation to particular incidents, even if the protagonist in a given incident, as such, might be available. Mr Hallström’s answer was to the effect that, had the claimant simply dropped all of the complaints involving “missing” witnesses, or reliance on those incidents as background, it would have been wrong to strike out the remainder. He submitted that, at the very least, the tribunal needed to give more reasons to explain its conclusion that a “carve-up” would not be fair.

46. This aspect of the challenge has given me some pause. Two of the five departed, but still available, witnesses were not themselves alleged protagonists in any incident, one being an HR manager, and another a bystander. The tribunal could properly conclude that them giving evidence would not be an adequate answer to the prejudice caused by the unavailability of missing protagonists. But three were said to be the protagonists in certain incidents; and it appears that there was one other alleged protagonist who was still in the respondent’s employment. Nevertheless, the context was a case involving a very large number of alleged incidents, in respect of which only a handful of alleged multiple protagonists were available. It was not wrong, as such, for the tribunal to have regard, as it did, to the overall picture. Further, as was noted at [14], *all* the incidents occurred four or more years earlier. I cannot say that it was plainly wrong to conclude that a “carve up” was impractical and unrealistic and did not offer a fair alternative to striking out all the complaints.

47. Mr Hallström’s fall-back position, as I have noted, was that the decision was not *Meek*-compliant in this respect.

48. As to that, the bigger point of the authorities is that, while the prejudice to a respondent caused by delay and the passage of time, may in some cases be obvious or readily inferred, in “missing witness” cases the tribunal will often need to interrogate the position, and what options may be available, more closely. In this case, the reasons demonstrate that the tribunal did not fail to do that. It did not simply and uncritically accept the respondent’s case without examination. It demonstrated

that it understood the issue; it had the relevant information and evidence; it was taken through it; it identified the particulars, as well as reflecting upon the overall picture, itself recognising that the issue was “not straightforward”; and it came to a conclusion that it was entitled to reach. Though the tribunal could have given more detail to support that conclusion, I conclude that the reasons were sufficient. Ultimately, therefore, this aspect of the challenge also fails.

49. For all of these reasons, I conclude that the appeal against the strike-out decision fails. Mr Hallström accepted in the course of argument that, were I so to conclude, the postponement appeal would have no independent purchase. But I will nevertheless consider it.

The Postponement Appeal

The Tribunal’s Decision

50. Before EJ Heath the claimant again appeared in person and the respondent was represented by Adam Willoughby of counsel.

51. The tribunal referred to the **Equality Act** complaints having been struck out, and the appeal in that respect to the EAT. It set out the list of issues in respect of the complaint of unfair dismissal. It referred to the recent history of stay and postponement applications. It noted that the claimant had resumed his postponement application on day one, contending that there was substantial overlap between the unfair-dismissal complaint and the discrimination complaint, so that the former could not be heard fairly without the context of the latter. The respondent opposed the application, contending that the case was now prepared, it was a 2020 case, and there was no way of knowing what, if any, grounds of appeal the EAT might in due course entertain or uphold.

52. The tribunal continued:

“6. In an oral decision I decided that these proceedings would not be stayed. In short:

a. The tribunal had made a case management decision on 26 January 2024 not to stay proceedings. Although this was on the respondent’s application, and the application before me was from the

claimant, I did not consider that this was a sufficient change of circumstances warranting revisiting that case management order. No further compelling arguments were made that it was in the interests of justice to revisit it.

b. I did not agree with the claimant that he was unable to present any discrimination arguments in running his unfair dismissal appeal. He could challenge the reasoning of decision-makers and argue that discrimination undermined the reason advanced for dismissal, for example, or that it tainted the process. What I would not be able to do, if the case proceeded, was to determine discrimination claims.

c. There was the possibility that this tribunal could make findings of fact and conclusions that might impact a future tribunal considering a remitted discrimination claim. However, there were so many hypotheticals and variables at play. The scope of the grounds of appeal was still not settled. It could not be known what kind of case might come back to the tribunal from the EAT even if the claimant was successful.

d. This was a claim relating to a dismissal in 2019. If I postponed the case there would be no chance of it being relisted before late 2025. The likelihood would be that the listing team could not put in train listing this case until the outcome of the appeal, which itself could take a considerable amount of time. The strong likelihood was therefore that a hearing date in 2026 would be more likely.

e. It was not in the interests of justice to postpone (or stay) on the basis of such variables and hypothetical difficulties. If the claimant succeeded at the EAT, any remitted discrimination claim could be case managed so that any findings of fact or conclusions of this tribunal were properly taken into account.”

53. The tribunal went on to set out its decision in relation to the unfair dismissal claim. In briefest summary, there was an incident involving the claimant and a number of colleagues at the Stratford store which led to an investigation, to the claimant being suspended, and then a disciplinary process. The allegations were of conduct on the claimant’s part amounting to bullying, and of failure to comply with reasonable requests from his line manager, relating to the disciplinary investigation. Following a disciplinary hearing the claimant was dismissed. He unsuccessfully appealed.

54. The tribunal found that it was the upholding of the allegation of bullying which in substance was the reason for dismissal. The respondent had a genuine belief, reasonably held, following a reasonable investigation. Dismissal for the bullying conduct found was within the band of reasonable responses. The tribunal gave further short reasons for dismissing the holiday pay claim.

The Grounds of Appeal

55. In the grounds of appeal as tabled the 5 February decision to refuse to postpone the full merits hearing is challenged on the basis that (a) it was perverse to conclude that there had been no change

of circumstances, since the decision by EJ Wright on the respondent's earlier application, as the claimant had opposed that earlier application. His position had changed; (b) the judge failed to take into account relevant matters. In particular, in the words of the grounds of appeal

“(i) He failed to explain the apparent tension between R’s view, set out in an email of 9 January 2024 [60], recording its view that the findings of the EAT “will” affect the final listed hearing, C’s position that the issues raised by the EAT appeal were “intrinsic[ally] linked” [59] with those of unfair dismissal, and his conclusion that there was only a “possibility” of overspill [16§6c].

(ii) While he speculates about the possibility of case management to “take into account” his conclusions on the unfair dismissal claim, he does not deal with corollary of that issue: i.e. that relevant and necessary findings of the ET on the unfair dismissal claim embodied in C’s arguments about a dismissal which C said amounted to direct race religion discrimination and victimisation would limit potential consideration of those claims, and if not, why not.

56. A third strand, (c), is that the reasons given in relation to (ii) above were not *Meek*-compliant.

Argument, Discussion, Conclusions

57. The decision challenged by this ground of appeal was a discretionary case-management decision. In his skeleton argument Mr Hallström indicated that the claimant did not pursue the suggestion that the decision was perverse in the sense that no reasonable tribunal, properly applying the law, could have decided to proceed to hear the unfair dismissal claim in February 2024.

58. Bringing the grounds further into focus, his skeleton argument contended that the tribunal had erred by failing to take into account the following relevant matters: (a) the parties' shared view that the issues raised by the discrimination claims would have a bearing on the unfair dismissal claim; (b) the impact of the doctrine of *res judicata*; and (c) the disadvantages that the claimant would face when advancing discrimination arguments in the context of an unfair dismissal complaint, given that section 136 **Equality Act** would not apply, the tribunal would not have evidence before it in respect of earlier alleged acts of discrimination and there would not be a three-person tribunal panel.

59. In this case the tribunal had already once been asked to postpone the February hearing of the complaint of unfair dismissal, on account of the appeal against the strike-out decision. That had been

refused by EJ Wright. The application considered at the start of the hearing in substance invited the tribunal to revisit that decision and reach a different decision. Determining it called for a principled exercise of discretion, and it was properly relevant to consider whether that had been any material change of circumstances, or any other compelling reason to depart from the previous decision. If it was open to the tribunal to take the view that this was not such a case, the EAT ought not to intervene (See: **Liverpool Heart and Chest Hospital v Poullis** [2022] ICR 785 at [42] and [43].)

60. I note, that, by the time EJ Wright took her decision, it was known that a PH in the strike-out appeal had been directed. There was no further material development, or change, in that respect, between then and the consideration of the fresh application by EJ Heath. I do not think that the judge erred by failing to consider that the fact that the first application had been made by the respondent, and the second by the claimant, was a material change of circumstances. The judge was right to focus on the substance. That is, in principle, a complete answer to this ground. The judge would have been entitled to dismiss this application for that reason alone.

61. But in any event it is also a clear that the judge understood that it was common ground that there was factual overlap between the unfair dismissal complaint and the **Equality Act** complaints, and that the claimant's case was that the latter provided context for the former. The judge referred to this context, and went on to consider it. He also understood, and considered, the argument that findings of fact made at this trial might "impact a future tribunal" – see para [6(d)].

62. Nor I am I persuaded by Mr Hallström's points about section 136 or the advantages of a three-person panel in a discrimination trial. Though not specifically advanced by the lay claimant, these are points with which it can be assumed the tribunal was familiar. Section 136 is also not concerned with the process of fact-finding, as such, but with the implications of what certain facts, once found, may or may not be, in the context of a discrimination complaint. Nor would the hearing and determination of the unfair dismissal complaint have, as such, prevented the claimant from adducing

evidence, at any later **Equality Act** trial, about any earlier alleged incidents in respect of which factual findings might not have been made in the decision on the unfair dismissal complaint.

63. I consider that the tribunal's reasons for rejecting this application were sufficiently explained.

64. For all of these reasons the challenge to the postponement decision also, in any event, fails.

Outcome

65. Both appeals are dismissed.