Neutral Citation Number: [2026] EAT 66

Case No: EA-2023-000873-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 May 2026

Before:

ANDREW BURNS KC
DEPUTY JUDGE OF THE HIGH COURT

Between:

MR R TEDD

Appellant

- and –

SURREY COUNTY COUNCIL

Respondent

- -

David Stephenson (instructed through Advocate) for the **Appellant**
Christopher Howells (instructed by Surrey County Council Legal Services) for the **Respondent**

Hearing date: 23 April 2026

- -

JUDGMENT

SUMMARY

This appeal concerns the approach of an employment tribunal in striking out a claim on the grounds that it is not being actively pursued in light of *Rolls Royce v Riddle* [2008] IRLR 873. The ET in this case found that the Claimant had deliberately misled the ET and the Respondent in respect of supposed medical reasons for not complying with ET orders to provide particulars or attendance at a hearing. The Claimant appeals on the basis that the ET failed to apply the well-known two stage test in considering whether to strike out the claim, failed to properly consider the discretionary part of its decision and failed to take into account the Claimant's late substantial compliance. The EAT decided that the ET had applied the two-stage test, exercised its discretion and had taken permissible matters into account.

The ET was entitled in exceptional circumstances to strike out a claim where a party has been found guilty of intentional and contumelious default in failing to progress his claim and where it would not be fair and just to allow the claimant to continue to access the tribunal's system of public justice.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This appeal concerns the approach of an employment tribunal (the "ET") in striking out a claim on the grounds that it is not being actively pursued. The ET in this case found that the Claimant had deliberately misled the ET (and the Respondent) about supposed medical reasons for failing to comply with an ET order and his attendance at a hearing. The Claimant appeals on the basis that the ET failed to apply the two stage test in considering whether to strike out the claim, failed to properly consider the discretionary stage of its decision and failed to take into account the Claimant's late substantial compliance with the order.

Factual Background

2. The Claimant was employed by the Respondent as a project manager within the Surrey Fire and Rescue Service on a one-year fixed term contract from 27 April 2020. He resigned with immediate effect in January 2021. He claimed constructive dismissal on the ground that he had made protected disclosures and had suffered disability discrimination. The Claimant relies on having cardiac conditions, PTSD and severe recurrent depression as his disability.

3. There was a preliminary hearing for case management on 7 December 2022 before EJ Dyal. EJ Dyal took careful steps to identify the issues in the claim from the 30-page particulars of claim including a 'Chronology of Events and Outline Statement' and a lengthy 'Timeline and Scott Schedule'. Reasonable adjustments were made during that hearing due to the Claimant's serious health conditions.

4. EJ Dyal recorded a table of the alleged protected disclosures which related to various procurement practices. The order recorded the list of alleged detriments which contained a number of particulars for the Claimant to supply including dates, emails, roles, jobs and meetings. This format made it straightforward for the Claimant to provide the additional information. He was ordered to provide it by 26 January 2023. A further preliminary hearing was listed for 7 March 2023.

5. The Claimant applied for a further six weeks to comply saying he had suffered a heart attack over Christmas 2022. The Respondent consented and the date for particulars was extended until 9 March 2023. The further preliminary hearing was therefore adjourned until 30 May 2023.

6. The Claimant then told the ET that he could not attend the hearing in person and also applied for a 2-hour lunch break in any CVP hearing claiming to have an endocrinologist appointment booked on that day. He said this meant that he could only attend until midday and then after 2.00pm. The ET wrote to the Claimant asking for proof of this medical appointment, but none was supplied.

7. The Claimant attended the preliminary hearing before EJ Bromige on time and via CVP. He said that he was unwell following a medical emergency on 26 May 2023. EJ Bromige noted that he gave a different account to that set out in his various emails prior to the hearing. The Claimant had not provided the further information in the format ordered by the ET but had sent 30 emails to the Respondent on 4 May 2023 containing numerous attachments. These were contained in the 262 page bundle. EJ Bromige decided not to wade through the attachments to try to derive the further information that had been ordered. Providing emails and documents did not comply with the ET order to provide further information in a specific format. EJ Bromige recorded that there was no explanation from the Claimant except that he was unrepresented and had been suffering from poor health. The Judge commented that this was not an adequate explanation for his default in particularising his claim.

8. In light of the Claimant's potentially inconsistent explanations to the ET about his medical appointments and his failure to comply with the ET's case management order, EJ Bromige listed a hearing on 7 July 2023 to consider whether to strike out the Claimant's claim under rule 37 of the Employment Tribunal Rules of Procedure 2013 (as then in force).

9. EJ Bromige ordered the Claimant to provide by 23 June 2023 medical evidence as to his failure to comply with the order for particulars and to explain his reasons for not being able to attend all of the preliminary hearing. The Judge directed him to provide the further information as ordered

and in the format ordered by 30 June 2023.

The Strike Out Hearing

10. The matter came before EJ Barker on 7 July 2023. The ET recited in its judgment the circumstances of the previous case management hearings and orders. The ET considered the medical evidence provided by the Claimant for the hearing and found at paragraph 30:

> "None of the documents disclosed by the claimant support his assertion that he had an appointment either in a hospital or with an endocrinologist or between the hours of 12 and 2pm on 30 May 2023, such that he would have been unable to attend the hearing with EJ Bromige and such that the hearing needed to be adjourned and re listed."

11. The ET examined the Claimant's explanation about why he had not disclosed any document showing a medical appointment during the hearing on 30 May 2023. The ET found that the Claimant was evasive, inconsistent and not credible in his answers. The ET said at paragraph 37:

> "The conclusion I have reached is that it was simply not true of the claimant to say before the hearing on 30 May that there was an endocrinology, or any other hospital appointment at that time on that day, or indeed any medical appointment at any time during the hearing on 30 May, that meant that he was unable to attend."

12. The ET accepted that the Claimant had complex health conditions but sought evidence and submissions from him on the extent to which this meant he was unable to comply with the order to particularise his claim. The Claimant referred to his diagnosis, his caring duties for elderly parents and supporting his partner in a legal issue whilst working for the NHS The ET found that none of these explained his default.

13. The ET noted that when the Claimant was challenged on a point or asked a direct question that he felt was difficult, he claimed to be having an angina attack or that he needed to dial 999. The ET regarded that as evasion and not genuine.

14. The ET noted that the Claimant had relied on his GP records which did not support any inability to provide particulars or progress his claim. When this was pointed out by the Respondent, the Claimant told the ET that his GP records were misleading and inaccurate. He said that he had

consultant and hospital information which contradicted them. The ET asked the Claimant to provide such documents and gave him an adjournment in which to do so. The ET then reviewed the documents supplied by the Claimant. Most of them were already in the bundle. None of them contradicted the GP notes or suggested that the Claimant was not medically capable of providing particulars as ordered or taking other steps (such as applying for an extension of time).

The ET Judgment

15. In its judgment the ET directed itself that the power to strike out a claim must be exercised in accordance with reason, relevance, principle and justice. It directed itself that a claim may be struck out for contumelious conduct even where a fair trial is still possible (citing **Rolls Royce plc v Riddle** [2008] IRLR 873). It also noted that where a claim is to be struck out for non-compliance with an order, a tribunal must have regard to the overriding objective. This required the ET to consider all relevant factors, including the extent and the magnitude of the non-compliance, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response to the disobedience (citing **Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371).

16. The ET concluded at paragraphs 66 and 67 that the Claimant had been untruthful in claiming to have an endocrinologist appointment on 30 May 2023. It found that he had given unsatisfactory and contradictory explanations about why he did not comply with the order. The ET found that the Claimant did not cooperate with the Respondent or the ET and that there was no reasonable excuse for his conduct. At paragraph 74 it found the explanation he gave to the ET to be 'highly unlikely' and said his behaviour had been "un-cooperative and caused additional Tribunal time and resources to be spent on determining the respondent's application, in that the hearing finished without a decision being delivered."

17. The ET took into account the Claimant's health explanations for his failure to actively pursue his claim. It found that this explanation was not supported by the Claimant's own medical records. It concluded at paragraph 76:

"However, many parties are not in good health when conducting Tribunal proceedings. The fact that the claimant is not in good health is not of itself a reason for the Tribunal to be limitlessly tolerant of delays. It is open to him to request an extension of time, supported by relevant medical evidence, in the proper manner. It is not appropriate or reasonable to do so in the middle of a hearing. This is not a reasonable use of Tribunal time or resources, causes delay and also inconveniences the respondent."

18. The ET went on to conclude:

"78. The Employment Tribunal is responsible for the administration of workplace justice for claimants with disabilities. The Tribunal hears claims and responses from gravely ill parties and makes adjustments to allow their participation in hearings. The Tribunal frequently allows generous extensions of time when requested, and indeed this was done for the claimant. However this does not wholly excuse a party from compliance. The Tribunal must also, as per the overriding objective (Rule 2 of the Employment Tribunals Rules of Procedure 2013), deal with cases fairly and justly. This means doing what is fair and just for both parties. This includes avoiding delay and saving expense. The parties themselves are required by Rule 2, to assist the Tribunal to further the overriding objective and "in particular shall co-operate with each other and the Tribunal".

79. In relation to the issue of why the claimant did not comply with the order of EJ Dyal by 4 May, and then did not comply appropriately, I conclude that the claimant was able to do so, but chose not to. In that sense, his default was intentional. He chose, in the time he had available, to prioritise other matters. He has not demonstrated that this was something he had no choice over. There is insufficient medical evidence that he was so adversely affected as a result of his health issues that he could not comply. This has caused delay, expense and prejudice to the respondent. It caused delay to the Tribunal and meant that the case management hearing on 30 May 2023 could not be effective. This resulted in a waste of Tribunal time and resources.

80. In relation to the claimant's assertion that he was unable to attend the hearing on 30 May because of a medical appointment that was scheduled for during the hearing, I find that there was no misunderstanding of the claimant's position as stated by him when he applied to have that hearing vacated. His position was perfectly clear – he had an appointment with an endocrinologist on 30 May, during the latter part of the hearing, that he could not reschedule. This position is unsustainable on the evidence before me today. No such appointment existed. There is no evidence of this appointment whatsoever in the extensive medical evidence supplied by the claimant and he cannot credibly explain the absence of this.

81. The claimant has, I find, deliberately misled the Tribunal and the respondent as to the reason why he could not attend for the full duration of the hearing on 30 May. No reason presents itself on the evidence as to why he has misled the Tribunal and the respondent in this way. I can only conclude that he simply did not wish to attend, possibly because he considered that he had better things to do.

> 82. In the words of Lady Smith in *Rolls Royce v Riddle*, "…it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures."
>
> 83. The claimant should have realised that by starting his claim, he had started a process that affects the Tribunal and the use of its resources, and affects the respondent. He has failed to actively pursue his claim, by attempting to adjourn the hearing on 30 May and by failing to comply properly with the order of EJ Dyal for further information, both without good reason. He has done so in a manner that shows he has disrespect for the Tribunal and its processes, and disrespect for the respondent. His default was both intentional and contumelious.
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> 84. The claim is therefore struck out under Rule 37(1)(d), as it has not been actively pursued. As the grounds for doing so have presented themselves clearly during this hearing on the evidence before me, I have not gone on to consider whether the claim would also be struck out under Rule 37(1)(c), as it is not proportionate to do so."

The Appeal and Cross Appeal

19. By Amended Grounds of Appeal sealed 7 February 2025 the Claimant appealed on 3 grounds following a hearing before DHCJ Pilgerstorfer KC under rule 3(10) of the EAT Rules 1993. These replaced the initial grounds in the Notice of Appeal which had been found to be unarguable by HHJ Tayler under rule 3(7). The three amended grounds permitted to this full hearing were:

> a. Ground 1: The ET adopted the wrong approach when considering whether to strike out the Claimant's case under r.37(1)(d) by failing to apply the two-stage test and/or failing to exercise its discretion properly or at all.
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> b. Ground 2: The ET failed to consider legally relevant factors including proportionality and alternative responses to non-compliance when considering whether to strike out the Claimant's claims.
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> c. Ground 3: The ET failed to appreciate the Claimant had in substance complied with EJ Bromige's order to supply particulars by 30 June 2023 and failed to take into account the extent of that compliance when considering whether to strike out his claims.

20. The Respondent served a detailed Answer noting that the Amended Grounds of Appeal did not challenge the finding that the Claimant had failed to actively pursue his claims and that his failure was intentional and contumelious. The Respondent accepted that there is a two-stage process but contended that the ET had followed that and exercised its discretion taking into account the overriding

objective, proportionality and all the circumstances of the case.

21. In summary it is agreed that the ET has properly determined that there was conduct which fell within rule 37(1)(d) of the ET Rules, but it is disputed whether the ET exercised its discretion or exercised it properly.

Legal Principles

22. The power to strike out was provided for by rule 37 of the ET Rules 2013 (now rule 38 of the ET Rules 2024). In the two-stage test, the ET must first consider whether there has been conduct falling within the rule that gives rise to the discretion to strike out ("the threshold conduct") and, if so, then exercise the discretion to consider strike out having regard to all relevant factors ("the discretionary decision").

23. The different types of threshold conduct are: (a) that the claim 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 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).

24. The discretionary decision involves dealing with cases fairly and justly and so takes account of the overriding objective set out in rule 2 (now rule 3 of the ET Rules 2024). Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

25. It is mandatory for parties to assist the ET to further the overriding objective and in particular parties must co-operate generally with each other and with the ET.

26. Striking out is a draconian power. Even where there has been unreasonable conduct involving deliberate and persistent disregard of required procedural steps and where a fair trial is impossible, it is still necessary to consider whether, even so, striking out is a proportionate response (**Blockbuster Entertainment Ltd v James** [2006] IRLR 630 at paragraph 5). In considering proportionality courts and tribunals must bear in mind that they are open to difficult litigants as well as the compliant, so long as they do not conduct their case unreasonably. A fair trial is not one which is possible "if enough time and resources are thrown at it" but one which is conducted without undue expenditure of time and money and with proper regard to the demands of other litigants and the finite resources of the court (**Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327).

27. As HHJ Tayler recently noted in **Kamphues v Venator Materials UK** [2025] EAT 30, a tribunal is likely to fall into error if it does not adopt a two-stage approach. It is an error of law to jump from determining that there has been threshold conduct to strike out without taking the discretionary decision. He also noted that whichever form of threshold conduct is established, consideration of whether a fair trial is possible will nearly always be a component of the discretionary decision.

28. I think that he says 'nearly always' to take account of the application of the two-stage test to a strike out under rule 37(1)(d) as explained in **Rolls Royce v Riddle**. Both parties relied on this case. In it the claimant requested an adjournment of a full hearing saying he was medically unfit to attend. He failed to provide medical evidence. The hearing proceeded and he did not attend, but he claimed to have posted a medical certificate. This turned out to be merely a GP note to refrain from work for four weeks due to depression. At a later hearing to consider striking out his claim, the claimant admitted that he had in fact been fit to attend. However the tribunal refused to strike out his claim as there was no excessive delay. The respondent appealed.

29. The EAT allowed the appeal and held it was inevitable for a tribunal to strike out a claim in these circumstances. In paragraph 18 Lady Smith said:

> "Where a motion is made under this rule, the tribunal requires, accordingly, to begin by asking itself whether the claimant has failed to actively pursue his claim. It would not usually be difficult to conclude that where a claimant has failed to appear at a full hearing of which he has been notified, that amounts to a failure to actively pursue his claim. Then, the tribunal requires to ask itself whether, taking account of the whole circumstances, it ought to exercise its discretion so as to strike out the claim. The rule provides for a general discretion to strike out if the tribunal is satisfied that there has been a failure to actively pursue a claim."

30. That clearly follows the two-stage approach. Lady Smith continued in paragraph 19:

> "Those show an expectation that cases of failure to actively pursue a claim will fall into one of two categories. The first of these is where there has been 'intentional and contumelious' default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent: *Birkett v James* [1977] 3 WLR 38. The *Birkett* principles were applied in the industrial tribunal context in the case of *Executors of Evans v Metropolitan Police Authority* [1992] IRLR 570."

31. Lady Smith explained the two routes to striking out a claim for not being actively pursued under rule 37(1)(d). Both routes adopt a two-stage approach. For intentional and contumelious default, the questions are:

a. Has the claimant failed to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures?

b. If so, it is just to allow the claimant to continue to have access to the tribunal for his claim?

For cases of inordinate and inexcusable delay the questions are:

c. Has the Claimant been guilt of inordinate and inexcusable delay so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on?

d. If so, can there still be fair trial and should the claim be prevented from going any further?

32. Although this approach does introduce some complexity into the rule 37(1)(d) test, it

essentially reflects what discretionary factors are crucial in the different circumstances. Where the failure to pursue the claim is accidental or negligent and there has been inordinate and inexcusable delay, the crucial discretionary question is whether there can still be a fair trial despite that delay. In contrast, where the failure to pursue a claim is intentional and shows disrespect and contempt to the tribunal, the question is whether it is just to allow that claimant to continue having access to the tribunal and the justice system to resolve his claim. The different approach also reflects that it may be inherently impossible to have a fair trial where one party is willing to intentionally flout the tribunal process and shows contempt rather than respect for the justice system.

33. **Rolls Royce v Riddle** was a case of intentional default rather than excessive delay. At paragraph 33 the EAT examined "the quality of the claimant's conduct in failing to actively pursue his claim". It took into account his knowing misrepresentation and his lack of candour which was "evident of considerable disrespect for the tribunal" (see paragraph 35) as well as "the whole facts and circumstances". The phrase 'all the circumstances' suggests the EAT had in mind proportionality even though the term is not expressly mentioned. Normally this will involve (a) the nature and magnitude of the non-compliance; (b) whether the failure was the responsibility of the party or their representative; (c) the extent to which the failure causes unfairness, disruption or prejudice and (d) whether some lesser remedy would be an appropriate response to the disobedience in question.

34. After allowing the appeal the EAT held that it was able to substitute its own conclusion for that of the tribunal. The EAT was following the approach (now set out in **Jafri v Lincoln College** [2014] IRLR 544) that it can only substitute an outcome where there is only one possible decision that the tribunal could properly reach or only one way in which the tribunal could exercise its discretion. Lady Smith said at paragraph 36: "Had the tribunal properly considered the whole facts and circumstances it is inevitable that it would have reached the view that the motion for strike out ought to be granted".

Submissions

35. Both parties took Grounds 1 and 2 together in oral submissions. I am very grateful to Mr Stephenson, acting pro bono for the Claimant, for his concise and clear submissions. He submits that:

> a. Having concluded that the Claimant's conduct met the threshold under rule 37(1)(d), the ET struck out his claim without any consideration of the discretionary stage. The ET failed to expressly set out the two-stage test and did not mention alternative sanctions.
>
> b. The ET failed to consider proportionality and particularly the proportionality of lesser sanctions and whether a fair trial was still possible.
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> c. The ET failed to consider a relevant matter, namely the Claimant's email dated 29 June 2023 sending his particulars to the ET shortly before the strike out hearing.

36. He submits that strike out was only inevitable in **Rolls Royce v Riddle** because the claimant in that case had reached the final hearing and was "at the end of the line". In contrast he said the Claimant in this appeal was "boarding the train" and so it would have been proportionated for the ET to make an unless order or strike out only part of his claim.

37. Mr Howells for the Respondent said that the Claimant failed to actively pursue his claim by choosing not to comply with the case management order and misleading the ET about why he could not attend all of the 30 May 2023 hearing. He said the ET directed itself to its discretion by using the word 'may' and considered discretionary factors throughout its reasons. It applied the **Rolls Royce v Riddle** in paragraph 83 of its reasons.

38. Mr Howells pointed out the approach to the discretionary decision at paragraph 20 of **Rolls Royce v Riddle**. He highlighted the different discretionary factors between a case of intentional and contumelious default and where there has been inordinate and inexcusable delay. He said that the ET knew that there had been belated and partial compliance with the case management order, but the real focus was the Claimant's misrepresentations about his default, not the late compliance itself.

Discussion and Conclusions

Grounds 1 and 2

39. It is common ground that the ET found that the threshold test was met. This can be seen in

paragraphs 79 and 81 when the ET explained that the Claimant had not actively pursued his claim by failing to comply with the order to give particulars and in misleading the ET about his reasons for partial attendance at the hearing.

40. There is no appeal against the finding that the Claimant met the threshold test. I note that the Claimant cannot be accused of doing nothing at all since 7 December 2022. He had applied for a postponement due to ill health, disclosed some emails on 4 May 2023, corresponded with the ET in late May 2023 and attended the preliminary hearing on 30 May 2023 (albeit saying he had to leave at noon). On one view this is an unusual case to apply to strike out using the 'not actively pursued' threshold test. However, I can see some similarities between this case and the facts in **Rolls Royce v Riddle**. There was a relatively short period of inactivity between the claim being presented in November 2006, the warning about strike out on 19 March 2007 and the strike out order on 9 July 2007. In any event, as I say, there is no appeal about the finding that there was an intentional and contumelious failure.

41. The ET directed itself to the two-stage test both in respect of rule 37(1)(c) and (d) in paragraphs 54-62 of its judgment. It applied **Rolls Royce v Riddle** where the two-stage approach was followed. The ET clearly considered the overriding objective. In paragraph 78 it took into account that it is responsible for the administration of workplace justice for claimants with disabilities, must deal with cases fairly and justly and said "This means doing what is fair and just for both parties. This includes avoiding delay and saving expense". It noted the parties' obligation to abide by the overriding objective. Those factors are relevant to the discretionary decision.

42. In paragraph 79 the ET took into account the delay, expense and prejudice to the Respondent - also relevant to the discretionary decision. It took into account the delay to the ET and the consequences of the default: a case management hearing was not effective and resulted in a waste of ET time and resources. The ET noted in paragraphs 12-16 that it had previously taken steps to assist the Claimant, granted him more time to comply and arranged a second case management hearing.

43. I agree with Mr Howells that those factors show that the ET considered that the Claimant was a "fair way down the track" in his claim rather than just "boarding the train" as Mr Stephenson suggested. Those are all matters which expressly show that the ET considered the discretionary stage and weighed up whether it was proportionate to strike out in all the circumstances.

44. The ET repeated this discretionary consideration in paragraph 82 by applying the words of Lady Smith to the Claimant's circumstances. In a case where the Claimant had shown disrespect or contempt for the tribunal and/or its procedures it was not a major factor, if at all, whether a fair trial at some point in the future was possible. This was because the ET concluded that the Claimant had forfeited his right to have his claim resolved by the ET by his deliberate behaviour.

45. The ET took into account discretionary factors when it held that the Claimant had failed to actively pursue his claim "without good reason". The ET concluded in paragraph 84: "The claim is therefore struck out under Rule 37(1)(d), as it has not been actively pursued". The "therefore" must refer to the preceding paragraphs which address both the threshold conduct and the discretionary decision. It is plain from a fair reading of the judgment that the ET did carry out the two-stage test. Using clear labels for the two-stage test in a judgment is helpful to avoid errors of law (see **Kamphues** at paragraph 39). However it is not an error of law in itself to fail to use the label, as long as both aspects of the test are considered by the ET in substance.

46. I accept that the ET does not expressly use the word 'proportionality' in its reasons. The ET discusses alternative responses only when directing itself to **Weir Valves** in relation to striking out under rule 37(1)(c), which it said it did not need to consider. Once again, although it can be helpful to go through a list of potentially relevant factors in its reasons, the question is not whether the ET labelled its decision correctly, but whether it used the correct legal approach in substance and permissibly exercised its discretion.

47. The ET expressly had fairness and justice in mind as it directed itself to exercise the power in accordance with "reason, relevance, principle and justice". It expressly took into account the nature

and magnitude of the non-compliance and the fact that it was deliberate. It took into account that the failure was the responsibility of the Claimant and the extent to which the failure caused unfairness, disruption or prejudice to the other party and to the tribunal system.

48. The act of deliberately misleading the ET was so serious that in **Rolls Royce v Riddle** the EAT went so far as to say that it was 'inevitable' that the claim would be struck out. I accept Mr Stephenson's submission that what made **Rolls Royce v Riddle** a clear-cut case was the claimant's misleading conduct about his non-attendance occurred at a full hearing. The EAT says in paragraph 35 that his claim would have been inevitably dismissed under rule 27(5) of the then ET Rules. That rule provided that if a party fails to attend at the full hearing "the tribunal may dismiss or dispose of the proceedings in the absence of that party…" That is a power only available at the full hearing at the "end of the line". It is not inevitable for claims to be struck out at earlier stages even if there is intentional disobedience of orders (as can be seen from the approach in **Blockbuster**.

49. If it is still reasonably practicable to get a claim back on track and have a fair hearing, it should only be struck out in exceptional circumstances. The availability of a proper path to a fair hearing should normally be a powerful discretionary consideration against striking out a claim. However, it is exceptional for a party to mislead a tribunal about the reasons for not progressing a claim. The ET found the Claimant guilty of really serious misconduct.

50. In these exceptional circumstances, the ET did not need to explore lesser sanctions such as an unless order or a partial strike out. Neither was appropriate where the misconduct was not the default in complying with ET orders, but the intentional misleading of the ET. It would plainly be a nonsense to impose an unless order that a party must stop misleading the ET. In these exceptional circumstances, the ET took into account the relevant factors in concluding it was appropriate to apply the ultimate sanction of striking out the whole claim.

51. I therefore dismiss the appeal on Grounds 1 and 2.

Ground 3

52. Ground 3 is that the ET failed to appreciate the Claimant had in substance complied with the case management order and failed to take into account the extent of that compliance when considering whether to strike out his claims.

53. It is correct that the Claimant complied in part with the order of EJ Bromige to provide the further information by 30 June 2023. The Respondent conceded in its strike out skeleton argument that most of the information was provided (although not all the information as one or two of the requests remained unanswered). If the ET had decided not to strike out the claim, that information would have been useful for working out the list of issues and then listing the claim for an appropriate main hearing, so I can understand why it was ordered.

54. The ET properly focused on the Claimant's conduct up to and including 30 May 2023 (when the ET directed that there should be a strike out hearing). It acknowledged that there had been partial compliance with the order in paragraph 39. It did not expressly mention his further compliance in providing a table of particulars on 29 June 2023, but that was not in dispute and can be inferred that it was properly taken into account.

55. In any event, the fact that the Claimant had finally provided this ordered information the week before the strike out hearing was not a significant factor in the discretionary decision as this was not a classic case where one of the main issues is whether a fair trial is still possible. The fairness and justice of the Claimant continuing to have access to the justice system for this claim was assessed by the factors in **Rolls Royce v Riddle**. In those circumstances it was not relevant whether or not the Claimant had taken late steps to remedy his default. The ET was entitled to focus on his intentional and contumelious conduct, the seriousness of the conduct, the impact it had and the other discretionary factors I have mentioned. In those circumstances the ET was entitled to regard the late (if substantial) compliance as a matter to which little or no weight should be attached and it would have made no difference. For those reasons Ground 3 is also dismissed.