

Neutral Citation Number: [2026] EAT 126

Case No: EA-2023-SCO-000094-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh, EH3 7HF

Date: 20 August 2026

Before:

JUDGE BARRY CLARKE

Between:

MR PATRICK HENRY MCAULEY

- and -

ETHIGEN LTD

Appellant

Respondent

Mr Patrick Henry McAuley, the Appellant
Mr Graham Millar, for the Respondent

Hearing date: 19 March 2026

JUDGMENT

SUMMARY

Practice and Procedure

The claimant was an agency worker assigned by an employment agency to work for the respondent. Following the termination of his assignment, he brought three complaints to the Employment Tribunal (ET). At a preliminary hearing, the ET held that it lacked jurisdiction to determine two of the complaints. It struck out the third complaint (detriment under the **Agency Workers Regulations 2010**) under rule 37(1)(b) of the **ET Rules of Procedure** on the ground that the claimant had conducted the proceedings in a scandalous, unreasonable or vexatious manner. In doing so, the ET relied substantially on correspondence that the claimant had sent the ET. Following a rule 3(10) hearing, the claimant's appeal was limited to a single ground: that the ET's reliance upon that correspondence – not contained within the hearing bundle and said not to have been put to him during the hearing – deprived him of a reasonable opportunity to make representations as required by rule 37(2) of the **ET Rules of Procedure**.

Held:

1. The claimant's correspondence with the ET formed part of the conduct of the proceedings which was the subject of the respondent's strike out application. The ET was entitled to consider that correspondence when determining whether rule 37(1)(b) was met.
2. The claimant was not deprived of a reasonable opportunity to make representations under rule 37(2). The strike out application had been identified in advance; the correspondence was an obvious component of that conduct; the claimant was the author of the correspondence; the ET indicated at the hearing that it would consider it; and the claimant was questioned about its contents and responded. Applying the fact-sensitive approach described in **Staffordshire County Council v Lowers** [2024] EAT 110 and **Oyebisi v Hyde Housing Association Ltd** [2024] EAT 124, the claimant had an adequate opportunity to address the point.
3. The ET's consideration of the claimant's correspondence did not amount to impermissible judicial investigation into the facts of the case. The principles in **Thompson v Glasgow Corporation** [1962] SC (HL) 36 and **East of England Ambulance Service NHS Trust v Sanders** [2015] ICR 293 were not engaged; the ET was not conducting its own research but evaluating the claimant's conduct of the proceedings.
4. The decision to strike out under rule 37(1)(b) therefore disclosed no error of law. The appeal was dismissed.

JUDGE BARRY CLARKE:

Background

1. This appeal is about whether an Employment Tribunal (ET) erred in law when striking out part of a claim brought by Mr McAuley, the appellant. His appeal is resisted by Ethigen Ltd. I will refer to the parties as claimant and respondent, as they were before the ET.
2. The respondent is a pharmaceutical supply company. Faced with an anticipated increase in work, it contracted with an employment agency to supply agency workers. The claimant was on the agency's books. The agency assigned him to work in the respondent's warehouse as a "picker packer". The engagement lasted for 13 days, from 30 June 2022 to 12 July 2022.
3. The disputed circumstances in which the engagement came to an end can be briefly stated. The claimant contended that he was instructed to carry out "bin work" (that is, disposal of rubbish) that fell outside the terms of his engagement and, furthermore, without basic personal protective equipment. He said he did the work under protest and that, in retaliation to his complaints, the respondent terminated his assignment. The respondent disagreed, saying that it terminated his assignment due to his poor attitude and performance.

The case before the ET

4. These contrasting accounts were set out in an ET1 claim form and an ET3 response form. The claimant's complaints were in due course articulated under three heads: harassment under the **Protection from Harassment Act 1997** ("PHA"), automatic unfair dismissal of an agency worker with employee status under Regulation 17(1) of the **Agency Workers Regulations 2010** (SI 2010/93) ("AWR") and detrimental treatment under Regulation 17(2) AWR.
5. These complaints never reached a full hearing.
6. There were two preliminary hearings held for case management purposes, on 16 March 2023 and 30 May 2023. Both came before Employment Judge O'Donnell. The orders following

those hearings recorded the judge's concerns about whether the ET had jurisdiction to consider two of the complaints. The judge decided that a further preliminary hearing was needed to consider whether the ET had jurisdiction to determine the claimant's complaint under the **PHA** and, by reference to his employment status, whether it had jurisdiction to determine his complaint of unfair dismissal under Regulation 17(1) **AWR**. There was no dispute about the ET's jurisdiction to determine the detriment complaint under Regulation 17(2) **AWR**, for which status as an employee was not a prerequisite; however, the respondent argued that this complaint had no reasonable prospect of success.

7. There were other points in dispute. The claimant applied to strike out the response. The respondent applied to strike out the claim. The claimant applied to amend his claim to include complaints about discrimination under the **Equality Act 2010** ("**EqA**") and whistleblowing detriment.
8. The judge listed these applications for consideration alongside the jurisdiction points at a preliminary hearing on 21 and 22 August 2023. The judge permitted the parties to adduce evidence at that hearing but explicitly limited its scope to the issue of the claimant's employment status.
9. That preliminary hearing came before the same judge. By that stage, as paragraph 3 of his subsequent reasons explained, the respondent's application to strike out the claimant's claim encompassed two grounds: no reasonable prospect of success and the way in which the claimant had conducted the case.

Rule 37

10. At the relevant time, the ET's powers to strike out a claim or response were contained within rule 37 of the **Employment Tribunals Rules of Procedure 2013**, as set out at Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (SI 2013/1237). Insofar as material to this appeal, rule 37 provides 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;

...
- (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.

11. These provisions are now found in near-identical terms at rule 38 of the **Employment Tribunal Procedure Rules 2024** (SI 2024/1155).

The ET's judgment

12. In his reserved judgment, Judge O'Donnell decided as follows:

- 12.1 The ET had no jurisdiction to consider the claimant's complaint under the **PHA**. This was because it was a creature of statute only able to determine complaints that the UK Parliament had empowered it to determine. Parliament had not empowered the ET to determine harassment claims under this statute.
- 12.2 The claimant was not (on the evidence) an employee. The ET therefore had no jurisdiction to consider his complaint of unfair dismissal under Regulation 17(1) **AWR**.
- 12.3 The detriment complaint under Regulation 17(2) **AWR** was struck out on the ground that the claimant had conducted the proceedings in a scandalous, unreasonable or vexatious manner. In doing so, the judge made comments about the tone and content of his correspondence to the ET. I shall return to this shortly; it is the focus of this appeal.

- 12.4 In the alternative, the judge held that the detriment complaint under Regulation 17(2) **AWR** would have been struck out as having no reasonable prospect of success. The judge noted that the legislation required a detriment to have been done on one of the grounds specified in Regulation 17(3). The claimant argued for two detriments. The first was being asked to carry out bin work. The judge held that, as this detriment happened before the grounds relied on in Regulation 17(3), it could not logically have been caused by them. The second was the termination of the assignment. The judge held that none of the grounds specified in Regulation 17(3) existed.
- 12.5 For completeness, the judge refused the claimant's application to amend his claim to include complaints of discrimination under the **EqA** and of whistleblowing detriment. He also refused the claimant's application to strike out the response.

The appeal

13. The claimant brought two appeals before the EAT. In the first (EA-2023-SCO-000067-DT), he challenged the lawfulness of the judge's case management orders made at the preliminary hearing on 30 May 2023. In the second (EA-2023-SCO-000094-DT), he challenged the judge's judgment following the preliminary hearing on 21 and 22 August 2023.
14. Following a hearing held on 11 August 2025 under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, the Honourable Lord Fairley (President) allowed one ground to proceed from the second appeal. He reformulated it in these terms:

The Employment Tribunal erred in law in relying upon correspondence that was:

- (a) not included within the agreed bundle of documents for the preliminary hearing on 21 and 22 August 2023; and**
- (b) not put to the appellant or referred to during that hearing as a basis for striking out the appellant's complaint(s) of detriment under regulation 17(2) of the Agency Workers Regulations 2010 under rule 37(1)(b).**

The appellant was thereby deprived of his right under rule 37(2) to a reasonable opportunity to make submissions at the hearing on 21 and 22 August 2023 as to why the correspondence in question did not merit strike-out.

What this appeal is and is not about

15. I will return to this point later in this judgment, but it is one worth making at the outset: the limited scope of this ground of appeal means that it is not open to the claimant to contend that the judge made an error in his understanding of the appropriate legal test when deciding whether to strike out his claim under rule 37(1)(b). Indeed, it is not open to him to contend for any other errors of law beyond the one permitted to proceed.
16. As to the relevant test for striking out a claim, the judge set out the applicable case law at paragraphs 71 to 77 of his judgment, referring to established authorities including Hasan v Tesco Stores Ltd (EAT/0098/16), Anyanwu v South Bank Student Union [2001] ICR 391, Bennett v London Borough of Southwark [2002] IRLR 407, Bolch v Chipman [2004] IRLR 140 and De Keyser Ltd v Wilson [2001] IRLR 324.
17. The judge followed the structured four-stage test confirmed by these authorities:
 - 17.1 At the first stage of the test, the judge recognised that he was not simply deciding whether the claimant had *behaved* scandalously, unreasonably or vexatiously; he was deciding whether he had *conducted the proceedings* in the proscribed manner. The judge set out the offending behaviour at paragraphs 79 to 88 of his judgment (repeated in full below) and concluded, at paragraphs 89 and 90, that the first stage was met.
 - 17.2 At the second stage of the test, the judge had to decide whether a fair trial was still possible notwithstanding the scandalous, unreasonable or vexatious conduct of the proceedings. The judge concluded, at paragraphs 91 to 96, that the second stage was met; a fair trial was no longer possible because the claimant's behaviour was unlikely to improve.
 - 17.3 At the third stage, the judge reminded himself that, even where a fair trial was not possible, he should only strike out a claim where it was a proportionate response to the offending behaviour. The judge concluded at paragraph 97 that no lesser penalty

was properly available to him and that striking out the claim was therefore proportionate.

17.4 The fourth stage did not arise for consideration on the facts of the case. This step requires an ET to consider the consequences of its order. It is generally relevant where the ET is contemplating striking out a response rather than a claim, since it may still be appropriate to allow a respondent to participate in (say) a remedy hearing.

18. The claimant's challenge to the judge's judgment – now expressed as the single ground reformulated by Lord Fairley – is narrower. The only contention that the claimant has been permitted to take forward to this appeal is that the judgment is vitiated by a procedural irregularity that denied him a fair hearing; namely, that the judge struck out his claim in reliance upon correspondence that was not in the hearing bundle and the terms of which were not put to him or referred to him during that hearing; in consequence, the judge's decision failed to afford the claimant a reasonable opportunity to make submissions.

The conduct for which the claim was struck out

19. I now set out in full the conduct of the claimant that the judge characterised as scandalous, unreasonable and vexatious when striking out the complaint under Regulation 17(2) AWR. As I have noted, his analysis was at paragraphs 79 to 88 of his judgment. I have reproduced it because the nature of the claimant's correspondence provides important context to the decision the judge ultimately reached. The emphasis is in the original text. In the passage that follows, Mr Millar is the solicitor who represented the respondent before the ET and in this appeal, while DG and SW are abbreviations used by the judge for the respondent's two witnesses on the issue of employment status, Mr Goracy and Mr Walker.

79. This is a case which has generated a considerable amount of correspondence entirely at the instigation of the claimant who has, in effect, sought to litigate by correspondence. Much of the correspondence from the claimant was lengthy, discursive and repetitive.

80. For example, after the May case management hearing, the claimant made multiple applications for the Tribunal to vary the issues to be determined at the present hearing to restrict this to only the issue of his strike-out application (in particular, the issue relating to the absence of CCTV footage). These were made to both the Judge managing the case and the President of the Tribunal.
81. The claimant also made no less than five applications to postpone the present hearing on different grounds, all of which were refused.
82. However, the volume of correspondence, in itself, would not be sufficient to satisfy the test under Rule 37(1)(b). Rather, it is the combination of this and the terms in which the correspondence was couched that is the issue in this case. In particular, the claimant sought to attack and offer gratuitous insult to one of the respondent's witnesses, the respondent's agent, the legal profession in general, the judge managing the case and the entire Scottish and UK judiciary.
83. The Tribunal would highlight the following matters in relation to the terms of the claimant's correspondence:
 - a. In an email dated 14 June 2023, the claimant states that he considers that case management decisions were being made by an *"institutionally racist Judge in favour of an institutionally racist member of the Law Society of Scotland [a reference to the respondent's agent], a society who have been severely violating the human rights of Scots Law Graduates for decades"*. A similar comment regarding the judge and the respondent's agent being institutionally racist had previously been made by the claimant in an email of 12 June 2023.
 - b. In the same email of 14 June, the claimant goes on to state that he *"knew from the offset in this matter with EJ O'Donnell belittling my LLB & Diploma in Legal Practice calling me a lay person because I was not a member of a racist human rights violating company like the utterly despicable Law Society of Scotland that he was an oppressor who was going to act the bully-boy with me, and I knew he did not properly respect the history, integrity & prestige of Scots Law as an objective discipline"*.
 - c. In an email of 19 June 2023, the claimant stated the judge managing the case was acting as a *"bully"* towards the claimant. The basis for this assertion was that the judge had not granted the claimant's applications to vary the issues to be determined at the present hearing.
 - d. In an email of 14 July 2023, the claimant describes the Law Society of Scotland as a *"Neo-Nazi cabal & cartel"* and that the requirement to have carried out a traineeship in order to become a solicitor as a *"criminal legal trading requirement"*.
 - e. In an email dated 18 July 2023, the claimant made the following comment *"this is believed to have been such clear & deliberate falsifications EJ O'Donnell perpetrated about the Claimant, to maliciously & falsely make him look stupid, that this is believed to have reached the degree of being blatant cheating constituting misconduct in public office by EJ O'Donnell"*. This is a reference to an issue dealt with by the Judge where the claimant had misrepresented certain matters and this will be addressed further below.
 - f. In an email dated 19 July 2023, the claimant made the following comment *"Why is there no mention of the Respondent being the one who started this? Why am only I mentioned? Is this Judge obsessed with me? I am not surprised that EJ O'Donnell has decided to defame me over this rather than Mr Millar however - it is very clear what EJ O'Donnell's M.O. is, although perhaps that was just the M.O. he learned at"*

Thompson's law firm - in a racist Law Society of Scotland, in which West of Scotland Roman Catholics of Irish descent, particularly those with Irish names, are disproportionately under-represented and discriminated against, the M.O. of some other people of Irish descent is to make up lies about Roman Catholics, maybe Jock Stein as well for example, to appease the Anglo-Saxon Presbyterian paymasters & Orangemen in the Law Society. History never changes, it only repeats, and we know what people with this M.O. are called in the Irish history books". The email in question came in the middle of a number of emails from the claimant in relation to various case management matters and the comment in question was prompted by an email from the Tribunal indicating that the Judge did not consider that a response was required to a previous email from the claimant.

- g. In an email dated 21 July 2023, the claimant made allegations against one of the respondent's witnesses, DG, to the effect that the witness had sexually assaulted the claimant by ordering him to carry out bin duty on 12 June 2022.
- i. This is a serious allegation of criminal behaviour which is simply not borne out by the facts; DG was not, even on the claimant's own pled case, the person who directed him to carry out the work in question.
 - ii. Further, being asked to pick up boxes or empty bins comes nowhere close to being an allegation of sexual assault.
 - iii. The claimant goes on to state in the same email *"if people disagree it is presumably because they themselves do things like that too & are a pervert as well"*. The Tribunal considers that this was directed at any judge considering the email.
 - iv. The email concludes by alleging that the judge managing the case is subjecting the claimant to harassment under s26 EqA by requiring him to be in the same building as DG for the purposes of the hearing.
 - v. The Tribunal notes that the claimant had, prior to this email, made an application to postpone the present hearing on the basis that he wished to carry out a criminal background check on DG (although he had not indicated an intention to do the same for SW).
- h. In an email of 28 July 2023, the claimant makes the comments listed below. This email from the claimant was a response to an email from the Tribunal itself replying to an earlier email from the claimant asking questions about the procedure to be followed at the hearing.
- i. *"Lord Carloway's Scottish Judges [a reference to the judge managing this case] seemingly able to undeterred make up blatant lies about representatives and falsify that they referred to personal injury statutes in their ET1 [this is a reference to the Judge managing the case asking the claimant at the March case management hearing whether or not he sought to pursue a claim under the Management of Health & Safety at Work Regulations given that it was a listed authority in his ET1]"*.
 - ii. *"Lord Carloway & EJ O'Donnell are not following on the lead of the other Scottish Judiciary Presidents before them in recommending the criminalisation of Scots Law Graduates for practising legal services in the market place without completing a traineeship; Lord Carloway is a shocking human-rights violator in recommending this who is disgracing all the great Scots Law Judges of the past, as the Scots Law Judges of the past recommended a traineeship as being a legal*

requirement for those with an LLB in completely different circumstances where there were legitimate holes in their legal knowledge from the LLB - I hope Lord Carloway and the Scottish Parliament will come to their senses on this, admit that they have made a mistake in regards to this (as anyone can) & stop criminalising Scots Law Graduates & violating their human rights”.

- i. In an email of 9 August 2023, the claimant stated that he intended to make a complaint to his MP, MSP and Police Scotland that the respondent’s agent and the Judge managing the case were “*seeking to pervert the course of justice by falsifying evidence*”.
 - i. This is a very serious allegation to make against a member of the legal profession and a member of the judiciary.
 - ii. The claimant set out no detail of this allegation.
 - iii. The allegation was made as part of correspondence in which the claimant was seeking a postponement of the hearing and a reconsideration of the Tribunal’s decision to refuse to grant a postponement. The Tribunal considers that this threat can only have been intended to influence its decision.
 - iv. During the course of the claimant’s oral submissions at the hearing, it became clear that this was a reference to the fact that one page in the joint bundle had not been photocopied clearly.
 - j. In an email of 18 August 2023 sent to the Tribunal (copied to the respondent’s agent and the EAT), the claimant describes the Scottish and British courts as a “*fascist time warp overseen by tyrants*”, that the judges in the courts are “*a complete & utter disgrace*”, that there is a complete disregard for human rights by the judiciary and that this is a disgrace to British soldiers who died in WW2.
84. The Tribunal should be clear that the matters listed above are only examples of the way in which the claimant couched his correspondence. All of his correspondence was written in similar terms, often being intemperate. In particular, the reference to the Law Society of Scotland, the legal profession and the judiciary being racist or institutionally racist was a regular feature of the claimant’s correspondence.
85. The Tribunal does pause to note that the claimant’s correspondence, on the face of it, indicates that he considers “racism” to mean a difference of treatment between solicitors and non-solicitors rather than the meaning normally given to the term, that is, a difference in treatment based on colour, national or ethnic origins (for example, the definition set out in s9 EqA). The reason that the Tribunal says this is that he uses the term in comparing his treatment with that of the respondent’s agent which he says arises from the fact he is not a solicitor and Mr Millar is, rather than any difference in race between them.
86. The claimant also sought to misrepresent what had been said by the respondent’s agent or the Tribunal on a number of occasions:
- a. In correspondence dated 7 June 2023, the claimant sought to have the response struck-out under Rule 37(1)(c) on the basis that EJ Eccles (who had previously case managed the proceedings) had issued an Order for disclosure with which the respondent had not complied.
 - i. No such Order had ever been issued; the claimant had sought an Order; EJ Eccles sought comments from the respondent; comments were provided and

nothing further occurred. It would be plain to anyone reading the correspondence that no Order had been issued. This was confirmed to the claimant in a letter from the Tribunal dated 12 June 2023 refusing the application for strikeout.

- b. In an email dated 12 June 2023 in response to the Tribunal's correspondence of the same date referenced above, the claimant asserted that the Judge managing the case had stated that the respondent ignoring an Order for disclosure was not a material issue. This wholly misrepresents what was said in the Tribunal correspondence of 12 June which was that there was no Order made at all.
 - c. In a further email of 12 June 2023, the claimant asserted that the respondent's agent had "*refused*" to give the name of one of the witnesses they intended to call at the present hearing. This was not correct; at the May case management hearing, the respondent's agent could not recall the surname of this witness, only the first name. The full name was subsequently confirmed to the Tribunal and the claimant, although the Tribunal notes that the respondent's agent had to be chased for this confirmation.
 - d. In an email of 13 July 2023, the claimant asserted that the respondent had falsely referred to DG as "Mark Kelly" in their ET3. He gave no basis for this assertion and it was clear from the pleadings that Mr Kelly was a wholly separate person from DG; he was, in fact, the manager of DG and SW. This was borne out by the evidence heard at the present hearing.
 - e. In correspondence dated 18 July 2023, the claimant asserted that the Judge managing the case had "*falsified that the Claimant never carried out a disclosure process with Vice President Eccles*" which is a reference to the Tribunal correspondence of 12 June 2023 explaining that no Order had been made. What is said by the claimant is simply wrong; all that had been said was that no Order had been made and not that the claimant had not sought such an Order.
 - f. In correspondence dated 16 August 2023, the claimant stated that, in the Note of the May case management hearing, the Judge had indicated that if there was an appeal to the EAT then he would "*very strongly consider*" postponing the present hearing. No such words were used in the Note nor could such an inference be drawn from what had been said. The Note recorded the claimant seeking a delay in the listing of the present hearing to allow him to report the respondent to the police in relation to the CCTV issue. This was refused and all that was said was that if something arose in the future which either party considered required a postponement then they were at liberty to make such an application.
 - g. The claimant repeated this assertion in correspondence to the EAT dated 17 August 2023 (copied to the Tribunal).
87. The pattern of the claimant asserting that someone involved in the proceedings had said something which they had not continued at the present hearing. There were a number of instances during the claimant's cross-examination of the respondent's witnesses when either Mr Millar or the Judge had to intervene when the claimant had put to a witness that they had said something in their evidence which they had not said.
88. The Tribunal considers that the claimant's conduct in this regard cannot be excused as a simple misunderstanding given the nature of what was said and frequency with which this occurred. In each instance outlined above, what was said by the other person was clearly not what the claimant later asserted it to be and could not reasonably have been interpreted in the way in which the claimant had done so. The Tribunal considers that

the claimant simply asserts whatever suits his position regardless of how divorced that is from the facts.

20. In summary, the judge concluded that the claimant had conducted the proceedings in the manner proscribed by rule 37(1)(b). The judge decided that the claimant's conduct extended beyond the volume of his communications to the ET to intemperate, gratuitous and offensive allegations directed at the respondent's representative, its witnesses, the legal profession, the judge and the judiciary more generally. The judge noted how the claimant repeatedly accused him and other judges and lawyers of racism (as he defined it), fascism/neo-Nazism, misconduct, dishonesty, bullying, corruption, human rights violations, misconduct in public office, falsification of evidence and attempts to pervert the course of justice, without any proper factual foundation and in circumstances where the allegations bore no relation to the matters in issue.
21. The judge identified a recurring pattern in which the claimant misrepresented what others had said or done: asserting that judicial orders had been made when they had not; alleging that judges had expressed views they had never expressed; attributing refusals, admissions or statements to the respondent's representative that were unsupported by the evidence; a groundless accusation of sexual assault against one of the respondent's witnesses; and accusing others of falsifying facts when the underlying documents did not support such accusations. The same pattern was said to have emerged during the preliminary hearing itself: the judge recorded a number of occasions during cross-examination when the claimant put assertions to witnesses on the basis that they had said something which, in fact, they had not said.
22. The judge concluded that this conduct could not reasonably be explained as misunderstanding. Given the frequency of the incidents and the clarity of the underlying material, the judge concluded that the claimant habitually asserted propositions that were inconsistent with the factual record and attributed statements to others which they had not

made. His assessment was that the claimant demonstrated a persistent willingness to advance allegations and factual assertions which suited his case regardless of whether they were borne out by the evidence.

23. By an application dated 28 August 2023, the claimant asked the judge to reconsider his judgment. The judge's detailed refusal to reconsider was contained within a letter from the ET to the parties dated 12 September 2023. I reproduce an extract below because it provides some additional context, including the judge's reply to some of the criticisms now being made:

Even if the Judge was to reconsider the decision to strike-out under Rule 37(1)(b) then it would make no difference to the judgment as a whole; the claim under the Protection from Harassment Act 1997 and the claim for unfair dismissal would still be dismissed for want of jurisdiction; the claim for detriment under the Agency Workers Regulations 2010 would still be dismissed under Rule 37(1)(a) as having no reasonable prospects of success; the application to amend would still be refused; the claimant's application for strike-out of the response would still be refused.

In these circumstances, the claim would be at an end regardless of whether or not the decision to strike-out under Rule 37(1)(b) was revoked.

In any event, the judge does not consider that the application as set out in the correspondence of 28 August 2023 provides any basis on which the decision to strike-out under Rule 37(1)(b) [sic].

The claimant is correct that evidence was only being heard in relation to the issue of whether he had a contract of employment with the respondent. The various applications from both parties were being addressed on the basis of the contents of the pleadings and other correspondence with the Tribunal. The Judge considers that the claimant was on notice that the respondent was making an application to strike-out the claim on the basis of the claimant's conduct and, in particular, that this related to the comments he was making about the Judge and others. The claimant had the opportunity to address this at the preliminary hearing but he did not do so of his own volition; it was at the prompting of the Judge that the claimant made any comment about his conduct and he indicated that he did not see anything at issue with this.

In these circumstances, the Judge considers that he was entitled to review the content of the correspondence from the claimant in order to consider whether the comments being made met the test for strike-out under Rule 37(1)(b). In order to consider whether the conduct of a case is scandalous, vexatious or unreasonable, the Tribunal has to look at the actual conduct.

There was no dispute by the claimant that he sent the correspondence in question and that it says what it bears to say. Indeed, in the application of 28 August 2023, the claimant does not seek to dispute that the correspondence was sent nor what it says.

Further, he does not seek to explain or excuse the comments made. If anything, the application is a further example of the claimant's conduct in which he describes the Judge as acting towards him in a "*fascist manner*".

24. With that context, I now turn to the parties' arguments on the single ground of appeal, pertaining to the question of whether the claimant had a reasonable opportunity under rule 37(2) to address the correspondence he had sent the ET.

Submissions

25. The claimant spoke to a detailed skeleton argument. Mr Millar spoke to a shorter skeleton argument. Both responded to questions I asked of them. I mean no discourtesy to either of them by attempting to summarise their submissions only briefly.
26. For his part, the claimant relied in his appeal upon four separate legal arguments. Before developing those arguments, he reminded me of his underlying contentions in the case that was before the ET and its importance to health and safety standards across the pharmaceutical sector.
27. By his first argument, the claimant said that the judge's comments about his correspondence had been drawn from 17 emails he sent to the ET, none of which were in the bundle of documents for the preliminary hearing, and none of which were put to him during the course of the hearing so that he might explain their meaning. I was not shown the bundle that was before the ET, but I will accept what the claimant states as accurate. In arguing that the judge departed from the necessary and essential independence of his role, the claimant referred to the famous boxing metaphor utilised by Lord Thomson in Thompson v Glasgow Corporation [1962] SC (HL) 36 at 52. The fuller passage follows:

It is an essential feature of the Judge's function to see that the litigation is carried on fairly between the parties. Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term. Much may depend on the diligence of the original investigators, or on the luck of finding witnesses or on the skill and judgment of those preparing the case. As the proof itself whom to call, what to ask, when to stop and so forth are all matters of judgment. A witness of great value on one point may have to be left out because he is dangerous on another. Even during the process of the proof values change, treasured material is scrapped and fresh avenues feverishly explored. It is on the basis of two carefully selected versions that the Judge is finally called upon to adjudicate. He cannot make investigations on

his own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear. You may suspect that witnesses who know the “truth” have never left the witness-room for the witness-box because neither side dares risk them, but the most that he can do is to comment on their absence.

A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the Judge’s decision. We have rejected inquisitorial methods and prefer to regard our Judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points.

It follows from this that a party to a litigation is entitled to conduct it on the footing that the rules will be observed and that they will not be altered while the contest is in progress.

Rules of procedure of some sort are essential to the conduct of litigation on this basis. It is by the rules that the essential feature of fairness between the parties is maintained.

28. The claimant adapted that pugilistic metaphor for his case. As he put it in his submissions to me, he walked into the hearing “ready to start the next round of the boxing contest” and, before he had sat down, the judge “sucker-punched” him with the 17 emails. In so doing, the judge had effectively conducted his own investigation into his case by bringing into consideration material that was on the ET’s file rather than in the hearing bundle. In terms, the judge had departed from the impartiality exemplified by Lord Thomson’s referee.
29. The claimant additionally contended that, in so doing, the judge wrongly brought into the evidence correspondence that he had generated in private and which was therefore unavailable for a hearing held in public. He referred to rule 56 of the **Employment Tribunals Rules of Procedure 2013**; at the material time, this confirmed that preliminary hearings must be held in public where the ET was considering striking out a claim or response.
30. By his second argument, the claimant contended that the judge’s actions were contrary to the law on data protection and freedom of information. He referred me to a letter he had received from the Disclosure Team within the Ministry of Justice dated 22 September 2023. The context to this letter was this. The claimant had written to the Ministry of Justice challenging an assertion made by the President of Employment Tribunals in Scotland that there was no expectation of privacy in correspondence sent to the ET; he said this was contrary to section

37 of the **Freedom of Information (Scotland) Act 2002**. I was not shown his original correspondence to the Ministry of Justice nor any correspondence he sent to or received from the President of Employment Tribunals in Scotland; only the letter he received in response from the Ministry of Justice. He highlighted passages in that letter by which the Ministry of Justice stated that individuals had a “clear and strong expectation” that their personal data would be held in confidence and not disclosed to the public under freedom of information legislation. The claimant’s contention was that, if his correspondence to the ET was exempt from disclosure more generally, a judge had no business going behind that exemption to introduce that material into a public hearing.

31. By his third argument, the claimant relied on the **Bennett** case referred to above. He suggested that his case and the **Bennett** case were similar, in that both involved parties or representatives saying things to the ET that were “cheeky” (the claimant’s word, not mine). In **Bennett**, the claimant’s lay representative unsuccessfully applied for an adjournment of the proceedings, contending in terms that his application was treated unfavourably because he was not white and because he was not a barrister. The ET recused itself on the basis that it had been accused of racism. At a subsequent hearing before a different judge, the ET struck out the claim on the basis that the lay representative’s conduct had been scandalous. Sedley LJ considered that the ET ought not to have recused itself, stating at paragraph 26 of the judgment that, although the ET’s motives commanded respect, it “retreated prematurely from the field”. This was on the basis that the lay representative should have been given an opportunity to affirm or withdraw his allegation of racism, suggesting that he would have climbed down from his “intemperate outburst” once made aware of the impending consequences. Further, Sedley LJ suggested that “firm case management” would “afford a better solution”. In the same judgment, Ward LJ despaired at the outcome, describing the case at paragraph 42 as involving the “unfortunate capitulation” by the ET to the lay representative’s “inexcusable petulance” and “insolence”. Adopting the same analysis, the claimant contended that, in his case, there was much more

that the judge could have done short of striking out his claim, such as to tell him that he was “skating on thin ice” (his expression, not mine) or to give him a final warning to improve his behaviour.

32. By his fourth argument, the claimant contended that the judge gave inadequate reasons for his decision; as the claimant put it, his reasoning was “unintelligible”. The first aspect of this contention was that the judge had issued a case management order to the effect that evidence at the preliminary hearing was to be limited to the issue of the claimant’s employment status; yet he then disobeyed his own direction, without any explanation or variation of his order, by introducing into the mix the 17 emails referred to above. The second aspect of the claimant’s contention was that the judge applied the wrong legal test under rule 37(1)(b); instead of applying a disjunctive test (whether the conduct was scandalous, unreasonable *or* vexatious) he wrongly applied a conjunctive test (whether the conduct was scandalous, unreasonable *and* vexatious). The third aspect of the claimant’s contention was that he did not understand paragraph 140 of the judge’s judgment, which he said made no sense. As the claimant put it, the judge had developed a severe dislike of him and allowed his emotions to get the better of him, and therefore misused the hearing to deliver the “sucker punch” he had earlier described.
33. For the respondent, Mr Millar focused on what he described as the core of the appeal: whether the judge had given the claimant a reasonable opportunity to respond to the respondent’s application to strike out his claim on the basis of his conduct of the proceedings and reasonable notice that this would involve consideration of the emails he had sent the ET. He emphasised that the judge had made clear at the outset of the preliminary hearing that he would be considering those emails when determining that application.
34. Mr Millar referred me to the EAT’s judgment in **Staffordshire County Council v Lowers** [2024] EAT 110. In that case, the proceedings had been prejudiced by a number of factors that could properly be blamed on the respondent: months of inactivity, multiple breaches of directions and occasions of purported compliance very shortly before preliminary hearings

which required those hearings to be postponed (including, relevantly, late disclosure of relevant documents). The ET eventually struck out the response due to this unreasonable behaviour, concluding that a fair trial was no longer possible. Judge Keith upheld the respondent's appeal on a different point. For present purposes, what matters is his consideration of the respondent's appeal on whether it had been given notice of the fact that the application to strike out the response would involve consideration of its late disclosure and whether it therefore had a reasonable opportunity to address the point. Mr Millar emphasised Judge Keith's acceptance at paragraph 30 of his judgment that an analysis of whether a reasonable opportunity has been given in a case is an "intensely fact-specific" one, which tests whether "an adequate chance" has been given to respond to the application.

35. Mr Millar made the following additional points:

- 35.1 The claimant had mischaracterised his own emails to the ET as "evidence". These emails were not evidence in the sense commonly understood, as material casting light on what had happened between the parties in their underlying factual dispute. They were documents that the claimant had himself generated in his interactions with the ET. That being so, they were not subject to the usual rules on advanced disclosure. His intimate knowledge of them could safely be assumed (by virtue of him being their author).
- 35.2 The claimant's description of his correspondence as "cheeky" understated its flavour.
- 35.3 If the judge failed to distinguish between the conjunctive and disjunctive elements of the test set out in rule 37(1)(b), it was immaterial. His conclusion did not mean that he had applied the wrong legal test; it only meant that he was satisfied that all three epithets were justified by the claimant's conduct.
- 35.4 Even if the judge had been wrong to strike out the remaining complaint under Regulation 17(2) **AWR** for the claimant's conduct of the proceedings, he had alternatively confirmed that he would strike out that complaint as having no reasonable

prospect of success. Given that the judge had provided a sound alternative basis for a judgment to the same practical effect, the claimant's appeal was effectively academic.

Analysis and conclusion

36. Earlier, I commented on what this appeal is about and what this appeal is not about. The claimant was permitted to pursue a single ground of appeal. That single ground was that the judge's reliance upon the claimant's correspondence to the ET (which the claimant says, in terms, was entirely unexpected) deprived him of a reasonable opportunity to make submissions about whether his remaining complaint under Regulation 17(2) **AWR** should be struck out under rule 37(1)(b). The proper focus of my judgment can only be on that single ground. That single ground cannot form the basis for different attacks on the judgment.
37. The only one of the claimant's four arguments that appears properly to engage with the single ground of appeal is the first. I will return to that argument shortly. But it means that the second, third and fourth arguments he has pursued cannot be sustained. I will deal with each of them on their merits briefly, on an *obiter* basis, so that the claimant can be assured that his points have not simply been ignored.
38. The claimant's second argument is that the judge's actions were contrary to the law on data protection and freedom of information. This was not a permitted ground of appeal. It must fail on that basis.
39. In any case, while not necessary to my judgment, I will say that I consider this argument to be misconceived. The legislation identified by the claimant operates so as to enable members of the public to access recorded information held by public authorities about their activities. Judges (including the judiciary of the reserved tribunals in Scotland) are independent of the Ministry of Justice. The claimant was treated as a member of the public applying for disclosure of court records relevant to his case; a letter from the Ministry of Justice refusing such access, in reliance upon the exemption that operates for court records, says nothing of

relevance about the ability of a judge to take account of a party's abusive correspondence to the court or tribunal when deciding whether or not to strike out a claim or response. Indeed, the letter itself stated that the ET could "lawfully process data in the public interest in the administration of justice". Disclosure to the public of such material is conceptually distinct from its judicial consideration during litigation.

40. Even if the claimant's correspondence to the ET was not automatically available for disclosure to the public, that would not advance his case. The question is not whether members of the public were entitled to see the correspondence under freedom of information principles. The question is whether the judge was entitled to consider it when determining an application based on the claimant's conduct of the proceedings. Those are different matters. Correspondence generated by a party in the course of litigation may be relevant to an assessment of that party's conduct irrespective of whether it is available for wider public inspection.
41. The claimant's third argument contends that it was an error of law for the judge not to give the claimant an opportunity to improve his behaviour by issuing him with a final warning or some other opportunity to affirm or withdraw his allegations, as happened in **Bennett**. The question of whether a party has been given a reasonable opportunity to make submissions about a possible strike out does not encompass the separate question of whether they ought to have been given a chance to withdraw their outburst (or, as it may sometimes be expressed, to purge their contempt). This was not a permitted ground of appeal. It must fail on that basis.
42. In any case, while not necessary to my judgment, I will say that I do not consider that the Court of Appeal's judgment in **Bennett** assists the claimant. There are two crucial differences between **Bennett** and the claimant's case. First, the lay representative in **Bennett** engaged in an intemperate outburst in the heat of the moment, which merited a "cooling off" opportunity before the ET recused itself. In the claimant's case, by contrast, he engaged in a sustained series of written attacks over several months upon the judge, and the judicial system and legal

profession more generally. The abuse continued at the hearing itself. It was therefore open to the judge to conclude that this remained the claimant's settled pattern of behaviour, supporting the conclusion at paragraph 92 of his judgment that a fair trial was impossible because the claimant's conduct would not improve. Second, the Court of Appeal was prepared to assume in **Bennett** that, once presented with an opportunity to affirm or withdraw his allegation of racism, the lay representative would have climbed down. Thus the opportunity should have been given. In the claimant's case, the opportunity was given. The judge asked the claimant whether he thought his threats of reporting him and the respondent's representative to the police were appropriate. The claimant replied in terms that they were; see paragraph 93 of the judgment. The judge permissibly inferred from this that there would be no climbing down. It was therefore open to the judge to decide that the claimant deserved no further opportunity to affirm or withdraw his stated position.

43. The claimant's fourth argument is that the judgment was insufficiently reasoned. This was not a permitted ground of appeal. It must fail on that basis.
44. In any case, while not necessary to my judgment, I will say that the claimant's criticism of paragraph 140 of the judge's judgment has no bearing on the decision being challenged in this appeal. It appears in the section of the judgment dealing with the judge's refusal, given as a matter of completeness, to allow the claimant to amend his claim. Its asserted lack of intelligibility operates upon a different part of the judgment.
45. Further, also not necessary to my judgment, I will say that I consider there to be no merit to the claimant's suggestion that the judge's conclusion is undermined by an impermissibly conjunctive (rather than disjunctive) approach to the three epithets of proscribed conduct. It is correct that the judge did not explicitly identify in his decision that conduct which he considered to merit each epithet of being scandalous, unreasonable or vexatious. He dealt with the three concepts compendiously. However, the judge clearly had the appropriate definitions in mind. He referred to the case of **Bennett** in which Sedley LJ noted that such rules were

directed towards conduct that amounted to an abuse of process; as Sedley LJ put it at paragraph 31, “abuse is the genus of which the three epithets scandalous, frivolous and vexatious are species”. Sedley LJ also confirmed at paragraph 27 of **Bennett** that “scandalous” embraced two narrower meanings: the misuse of the privilege of legal process to vilify others, and giving gratuitous insult to the court. I note that Ward LJ in **Bennett** (paragraph 53) also adopted, with approval, an older definition of “scandal” as:

... anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause: to which may be added, that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous.

46. “Vexatious” was described by Bingham LCJ in **Attorney General v Barker** [2000] 1 FLR 759 as a “familiar term in legal parlance”. He said that the hallmark of a vexatious proceeding was that it had:

... little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

47. As to what conduct is “unreasonable”, the EAT in **Brooks v Nottingham University Hospitals NHS Trust** (EAT/0246/18, at paragraph 47) referred to “a wide range of matters”, which might include “an unreasonably distorted perception of matters”.

48. I would make this observation. If a categorisation were needed, based on the judge’s own findings, the gratuitous insults made by the claimant in his correspondence would best fit the epithet of scandalous and his stated disregard for accuracy would justify the epithet of unreasonable. Ultimately, were it necessary to decide the point, I would have agreed with Mr Millar that the judge’s judgment permissibly articulated a decision that all three epithets could properly be applied to the claimant’s conduct.

49. I turn now to the claimant’s first argument.

50. The classic definition of the non-interventionist judge given in **Thompson v Glasgow Corporation** predates the creation of the Industrial Tribunals. But there is no controversy to the proposition that a judge should not embark upon his own research and then set out the fruits of that research in a judgment without giving the parties an opportunity to comment. The claimant referred to a number of case law authorities making that essential point.
51. In the specific context of Employment Tribunals, I consider that the principle was most clearly expressed by Langstaff J, when President of the EAT, in **East of England Ambulance Service NHS Trust v Sanders** [2015] ICR 293. In that case, the ET had conducted its own research about medication on the internet during an adjournment, without prior reference to the parties, and appeared to accept the outcome of that research without further scrutiny. After noting that the tribunals were, in contrast to the courts, designed to provide swift, informal justice to ensure access to justice with a degree of simplicity, the EAT emphasised that the ET was an accusatorial rather than an inquisitorial body. Langstaff J said this at paragraphs 29, 31 and 34:

... The Tribunal may, in an appropriate case, ask the parties whether they have thought about particular evidence or even, possibly, whether in an appropriate case the parties or one of them would wish an adjournment in order to obtain it. But it is not, as the Judge appeared to think, for the Tribunal itself to investigate the evidence and rely upon its own investigations. The Tribunal is, as we said at the start of this Judgment, to act as the adjudicator not as advocate. Actively seeking fresh evidence on one or other party's behalf is inevitably likely to lead towards the latter.

... it is quite likely that there will be a degree of intervention in proceedings before a Tribunal which might raise some eyebrows in civil courts. But the purposes, as we have identified them, should be kept clear. When a Judge does under Rule 41 ask questions to elicit the evidence – that is, not the evidence which the Tribunal wishes to hear but the evidence which the witness wants to give, as best the Tribunal can understand it – it is advisable that the Tribunal asks those questions in a non-leading form. That is not because form should triumph over substance. It is because non-leading questions give rise to the most reliable answers. If a Judge suggests an answer to witnesses, they are much more likely to agree with it than they would if asked an open question about the same point, and the Tribunal should be careful to avoid making a case for either party.

... In accessing the Internet, [the ET] did what in our view it should not have done. In the criminal courts, the fact-finders – jurors – are reminded at the start of every trial that they should make their decision upon the evidence which is put before them. That is why, having given an oath to do that, they may be guilty of contempt of court as these cases show if they access the Internet to attempt to uncover relevant material. The danger is that the prosecution and defence simply do not know what the information they have received which might

influence their decision. The point here is the same. It was a procedural irregularity to do it – just as in the criminal court, all evidence is (in the normal run) received in public, so (in the normal run) ought all evidence to be gathered in public in an Employment Tribunal. Article 6 talks of a hearing in public. It is not in public if it involves accessing the Internet privately.

52. The EAT then discussed how the situation would be retrievable if the ET explained what it had done and then gave the parties an opportunity to comment.
53. I agree with Mr Millar that what the judge did in this case cannot properly be characterised as conducting his own research into the underlying evidence. The claimant's correspondence with the ET was not external material discovered by the judge through his own enquiries, nor was it fresh evidence bearing upon the underlying factual dispute between the parties. It formed part of the conduct of the proceedings. The respondent's application invited the ET to determine whether the claimant's conduct of the proceedings justified strike out under rule 37(1)(b). In considering that application, it was inevitable that the judge would consider the claimant's dealings with the ET, including correspondence that the claimant had himself sent. The judge was therefore not investigating facts outside the record; he was evaluating a component part of the very conduct that the application required him to assess.
54. The context is critical. It is important not to lose sight of it. The matter had been listed for a preliminary hearing. The issues for determination at that hearing had been clearly identified in advance. They included a decision on the respondent's application to strike out the claim based on the claimant's conduct of the proceedings. An obvious manifestation of that conduct was the content and tone of his correspondence, including his correspondence with the ET. His correspondence had necessitated a number of interlocutory decisions by the judge, including on applications to postpone. The claimant was the author of that correspondence. Having only recently sent most of it, he would plainly have been familiar with what it said; that being so, it cannot realistically have come as a surprise to be confronted with it at a hearing listed to consider his conduct. Far from carrying out an independent investigation of the sort criticised in the East of England Ambulance Service case, or seeking out new evidential material, the judge was simply considering correspondence generated by the

claimant himself when interacting with the ET. Where a judge is deciding if a party's conduct of the proceedings merits sanction, attention will routinely be paid to documents already on the ET's file, including correspondence with the ET and correspondence between the parties that has been copied to the ET.

55. I reject the claimant's assertion, which I understood him to make, that he has a reasonable expectation of privacy in respect of such correspondence, such that, when the ET takes account of it, it has improperly turned a public hearing into a private one. A public hearing is simply a hearing that the public can attend. Many public hearings require consideration of private and sensitive material; while a judge can make an order for anonymisation or one which restricts reporting, his or her examination of that material does not, in and of itself, mean that the hearing is somehow not public.
56. It is rarely necessary for all correspondence between the parties and the ET to be included in a bundle of documents provided for a hearing unless relevant to the issues in the proceedings. But, even then, there is no legal rule *requiring* such correspondence to be included in a bundle of documents. If that were so, the ET would itself be obligated to prepare such a bundle when considering striking out on its own initiative, as rule 37(1) empowers it to do. The key issue is whether, as required by rule 37(2), the claimant had a reasonable opportunity to make submissions on the point.
57. This is a fact-sensitive question, considered on a case-by-case basis; see **Staffordshire County Council v Lowers** and **Oyebisi v Hyde Housing Association Ltd** [2024] EAT 124 at paragraph 36.
58. To recap: in the context as I have described it above, when attending a hearing arranged in part to consider the way he had conducted the proceedings, it cannot feasibly have taken the claimant by surprise that the judge would take his correspondence into consideration and that the judge would be familiar with it. The terms of the reformulated ground of appeal contend that this correspondence was not put to the claimant, or referred to, during the preliminary

hearing. That is not borne out by the judgment. At the start of the hearing, the judge raised with the parties that he would be considering this correspondence; it is the judge's very articulation of that intention that, in his submissions to me, the claimant portrayed as the "sucker punch" that greeted him as the hearing commenced. It was not something that greeted him only when he read the judgment at a later date. It is also apparent that the content of that correspondence came up for discussion during the hearing. Paragraphs 93 and 94 of the judgment record the judge asking the claimant explicitly about the contentions it contained:

... he was asked by the Tribunal whether he considered it was appropriate to say he was going to report the judge and the respondent's agent to the police for falsifying evidence or say that the judiciary operated a fascist state. He responded that he considered that it was and began a diatribe about the judiciary supporting the current system of regulation for the legal profession which he alleged amounted to a breach of human rights and discrimination.

The claimant showed no insight or awareness that his conduct was unacceptable. He indicated that he considered that this was how litigation was conducted ...

59. Once the context is properly scrutinised, the claimant was not blindsided by an examination of his conduct of the proceedings which included the tone and content of his correspondence. The correspondence may not have formed part of the agreed bundle, but the claimant was not thereby deprived of a reasonable opportunity to make submissions. The issue before the ET was his conduct of the proceedings. The correspondence was an obvious and substantial component of that conduct. He was aware that the application to strike out his claim was proceeding on that basis, he was questioned about the correspondence during the hearing, and he responded to those questions. In those circumstances, any omission from the bundle did not materially prejudice his ability to address the application.
60. Accordingly, the claimant has not persuaded me that the absence of this material from the bundle deprived him of a reasonable opportunity to make submissions on the point. He did have that opportunity; he had it at the hearing, and it was adequate. When he was prompted by the judge to address the point, the judge considered that he responded in a manner consistent with his correspondence rather than show insight into the impropriety of his

conduct. The judge permissibly decided against him. His decision to strike out the complaint under Regulation 17(2) **AWR** discloses no error of law.

61. The appeal is therefore dismissed.

62. I will deal briefly with Mr Millar's alternative contention that the appeal is rendered effectively academic by the fact that the judge had, in the alternative, struck out the claimant's complaint under rule 37(1)(a) as having no reasonable prospect of success. It is no longer necessary to decide the point, given my judgment, but I will say a few words about it because it was robustly discussed during the appeal.

63. Although Mr Millar's approach was superficially attractive, if it were necessary to decide it, I would not have agreed with it. This is because, at the rule 3(10) hearing, Lord Fairley refused the claimant permission to challenge that the ET's reasoning on the rule 37(1)(a) point. This was on the basis that it was not an operative part of its judgment. I understand that to reflect the fact that it was not included in the main ruling at the start of the document recording the judge's decision and so had no bearing upon it. I have heard no legal argument about whether an alternative conclusion provided in this way by an ET in its reasoning must be included in the main ruling at the start of the document in order to be susceptible to a challenge before the EAT. It suffices to say that, having been refused permission by Lord Fairley to challenge the ET's alternative decision reached under rule 37(1)(a) on the basis that it was not an operative part of the judgment, it would be unfair on the claimant to treat this alternative decision as capable of defeating his challenge to the main decision reached under rule 37(1)(b).