

Neutral Citation Number: [2026] EAT 145

Case No: EA-2024-001321-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 September 2026

Before :

HER HONOUR JUDGE JOFFE

Between :

MR R SHARMA

Appellant

- and -

UNIVERSITY OF NOTTINGHAM

Respondent

Mr R Sharma the **Appellant** appeared in person
Mr F Currie (instructed by Freeths LLP) for the **Respondent**

Hearing date: 2 September 2026

JUDGMENT

SUMMARY

Practice and Procedure

The claimant's claims were struck out for unreasonable conduct, alternatively on the basis they had not been actively pursued. The claimant had mental and physical impairments. He had previously made an application for reasonable adjustments and some months later wrote to the Tribunal informing the Tribunal of his non-availability for the following six months, which period encompassed the dates listed for the full merits hearing. The reasons included health reasons but also included his son's wedding, planned travel for further wedding ceremonies, a visit from his sister and a visit from a friend. The claimant did not attend several hearings at which those applications would have been discussed and did not explain his non-attendance at the hearings.

On appeal, the claimant contended primarily that the EJ erred in law in failing to address his previous applications for reasonable adjustments before striking out his claims and that this failure materially affected the EJ's assessment of his culpability in relation to non-compliance with orders and her prediction of his future conduct for the purposes of identifying whether there was a measure short of strike out which would have made a fair trial possible.

Held: There was no error by the Tribunal in not determining the application for reasonable adjustments before considering strike out. The EJ had appropriately considered the claimant's disability on the basis of the available evidence when assessing whether strike out was appropriate.

HER HONOUR JUDGE JOFFE:

Introduction

1. This is an appeal against a decision of EJ Broughton, sent to the parties on 5 September 2024, in which she struck out the claimant's claims under rules 37(1)(b) and 37(1)(d) of the Employment Tribunals Rules of Procedure 2013 then in force.
2. For clarity, I refer to the parties as claimant and respondent as they were before the Employment Tribunal.
3. I should record that a number of adjustments were made to the appeal hearing based on medical evidence the claimant had provided about his impairments. In particular, the claimant attended remotely and had support from his wife and son. We started the hearing at 12 noon and the claimant had permission to use software which converted the audio of the hearing to text in real time but which did not retain any recording of the hearing either on the claimant's device or elsewhere. The claimant was able to ask for breaks when he needed them and Mr Currie, counsel for the respondent, spoke slowly and repeated submissions as necessary.
4. The claimant's first language is not English and he had a Hindi interpreter who provided assistance. The claimant only required a few parts of counsel's submissions to be interpreted.

Background

5. It is necessary to an understanding of the EJ's decision to set out the procedural history in some detail.
6. On 27 January 2023, the claimant presented his first claim form. He had been employed as a contract and supplies manager by the respondent university from 9 August 2021 until 22 August 2022. He brought claims of age, race and disability discrimination and unfair dismissal. In his claim form he made reference to his health conditions; he had experienced anxiety and depression and had undergone open heart triple bypass surgery. The claimant presented a second claim form on 19 May

2023 for post-employment victimisation arising from the fact that the claimant had not been shortlisted for a further role he applied for with the respondent.

7. On 12 September 2023, there was a case management preliminary hearing in front of EJ Shore. By this stage the claimant was represented by solicitors and counsel. EJ Shore listed a public preliminary hearing for 30 November 2023 to consider amendment applications, the issue of whether the claimant was disabled at material times, and strike out or deposit orders; detailed case management directions were given to take the proceedings to a full merits hearing listed for 23 September - 4 October 2024. The public preliminary hearing was ultimately postponed to 30 April 2024 as the claimant was out of the country for the original date. At that hearing, at which the claimant was again represented by counsel, a number of decisions were made by the EJ, including a finding that the claimant was not disabled at material times. A further public preliminary hearing was listed for 14 June 2024 to consider, amongst other things, any strike out or deposit order applications the respondent pursued in writing. The EJ listed a judicial mediation for 25 June 2024 and revised the directions for the final hearing.

8. On 29 May 2024, the claimant wrote to the Tribunal and the respondent to say that he would now be representing himself due to his unhappiness with his solicitors. That same day, he sent a further email to the Tribunal with a long list of adjustments he was applying for both in respect of case preparation and for the hearing itself.

9. Of relevance to this appeal, these proposed adjustments included a ‘minimum three month extension of all deadlines’. Various reasons were set out as to why this extension was required. The claimant said he needed to get his documents from his former solicitors and to research the Employment Tribunal system, processes and procedures in a context where he had: ‘Physical and Mental Impairment and Disabilities with constant body pain, and severe stress, anxiety and depression and Obstructive Sleep Disorder (Obstructive Sleep Apnoea) and adverse effects of strong medications.’

10. The claimant also relied on his status as a litigant in person and a person for whom English

was not his first language. He said that he also needed to seek help from various voluntary organisations.

11. Amongst the list of proposed adjustments, the claimant also asked generally for time limits to be extended and for a ‘longer time’ to be allowed for hearings.

12. On 30 May 2024, the claimant wrote to the Tribunal again to say that he was having a cataract operation on 4 June 2024 and would not be accessing emails or contactable for six to seven weeks afterwards, as that was the anticipated recovery time. He also referred to a need to not exacerbate his mental health conditions during his recovery. He said:

‘I would, therefore, request you to kindly reschedule / adjust the arrangements of any matters in my Employment Tribunal Case, including discussion regarding my Request for Reasonable adjustments as in my earlier email on Wednesday, May 29, 2024 at 9:14AM.’

13. On 11 June 2024, the Tribunal sent a letter to the parties; the claimant’s recent correspondence had been referred to EJ Heap who directed that the issues raised by the claimant could be discussed at the end of the upcoming judicial mediation if time allowed, otherwise at a further preliminary hearing. The letter continued:

‘However the content of the Claimant’s email of 30th May 2024 suggests that he is not going to be fit to participate in the claim for a period of six to seven weeks. He is asked to confirm by return if he is applying for the Judicial Mediation to be postponed and relisted after the end of that period of time.’

14. There was no further correspondence from the claimant and the judicial mediation remained listed. It was allocated to EJ Broughton, who recorded what happened on 25 June 2024 in her subsequent strike out judgment:

‘The claimant did not write to confirm that he would not attend the Judicial Mediation and therefore the day remained allocated however, he did not attend. I was allocated to conduct the Judicial Mediation and at my request, attempts were made by the tribunal clerk to contact him by telephone on the numbers set out in his claim form. I also asked that the clerk read Employment Judge Heap’s letter of the 11 June 2024 to the claimant over the telephone if he answered. The clerk informed me that a woman had answered the telephone but then terminated the call when the clerk explained who she was. The mediation was abandoned.

33. I then wrote to the claimant on 25 June 2024, I explained the attempt to contact him by telephone and that he must provide the Tribunal with a suitable telephone number which would enable contact to be made (given that he had stated he would not be answering accessing emails) as a matter of urgency. The letter set out that the claimant had failed to provide a schedule of loss, comment on the draft list of issues or supply his documents to the respondent.

34. It was further pointed out that the claimant was not actively pursuing his claim by not

complying with the case management orders and that the case management orders remained in place (except the order for the respondent to provide a joint bundle which was stayed).

35. I then decided to list the case for an urgent preliminary hearing. I was concerned that the final hearing was due to take place in approximately 12 weeks and the parties were yet to have an agreed bundle or exchange witness statements. The final hearing was at risk unless there was cooperation from the claimant to comply with the case management orders in time. I listed the case for a date after the end of the period of 6 to 7 weeks after his cataract operation. The claimant had stated that he would not be accessing his emails only during this period of recovery. I wanted to ensure that the claimant was aware of the urgent hearing and thus it was not listed until 12 August 2024.

36. I headed the letter 'urgent' to ensure that the claimant understood the urgency and made the following point: "Should the claimant not attend the next telephone case management hearing, his claim may be struck out for a failure to actively pursue his claim. The claimant cannot simply decide not to comply with case management order., If for whatever reason he cannot comply, he must make a formal application and submit any relevant medical evidence in support of that application."

15. Also on 25 June 2024, the parties were sent a notice of hearing for a judicial mediation to be conducted on 29 August 2024.

16. The claimant made contact with the Tribunal again by email on 29 July 2024. He did not refer to the correspondence from the Tribunal but said that he had had his post cataract surgery assessment and he was ready to take his case further:

'I would, therefore, request you to kindly reschedule / adjust the arrangements of any matters in my Employment Tribunal case, starting with initial discussion regarding my Request for Reasonable Adjustments as in my earlier email below on 30th May, 2024.'

17. The claimant then set out in detail what he described as his 'non-availability for the next 6 months for scheduling' in a passage which merits being set out in full, given its importance to the EJ's decision to strike out. It is notable that the claimant was 'informing' the Tribunal of his non-availability. He did not refer to the missed judicial mediation, the correspondence from the Tribunal, or any of the upcoming hearings.

'1. My wife Krishna Sharma who is my Carer, had her Cataract Surgery for her right eye on 9th July 2024 and is still recovering from her Cataract Surgery. Please find attached Letter of her Cataract Eye Surgery, as evidence.

2. My Son, Ruchit Sharma, who is supporting me in my Employment Tribunal Case is getting married on 30th July 2024 at the Bridgford Hall, West Bridgford - Registration Office Nottingham NG2 6AT. Please find attached email confirmation from Nottinghamshire Registration Services, Nottinghamshire County Council, as evidence.

3. Ruchit is then away on holiday for his honeymoon until 11th August 2024.

4. We are still in the process of arranging his Marriage Ceremony in India with our family and friends in India. We are yet to finalise the dates for this. We will be travelling to India for this ceremony in India.

5. As the Bride has her parental family and friends in Sri Lanka, they are also planning to arrange her Marriage Ceremony in Sri Lanka. They are yet to finalise the dates for this. We

will be travelling to Sri Lanka for this ceremony as well.

6. My elder Sister Dr Neerja Sharma, who is 72 years old, is currently visiting us from Bhopal (India) for the marriage of our Son Ruchit. She is visiting us in the UK after 19 years. She will be with us until 26th September 2024 while on holiday and travelling with us within the UK. Please find attached a copy of her return flight tickets, as evidence.

7. She has retired after working for over 40 years at Bhopal University in India, as Professor and Head of the Department and had been Acting Vice-Chancellor of the University. She had been on Commonwealth Fellowships and various Bursaries, had worked with and visited various UK Universities, including University of Nottingham at least 2-3 times during her high profile academic career in India.

She had huge regards and holds very high opinion of the highest quality of education that the prestigious UK Universities provide.

8. I have hidden from her my negative experiences at the University of Nottingham, both as an International Scholar as well as a Senior Staff, including my recent Employment Tribunal Case of Discrimination against the UoN. I am highly concerned of the utter shock and how extremely appalled she would be if she gets to know how unfairly I have been treated and discriminated at the UoN, which will be a huge disgrace not only to the UoN but to the wider UK Universities in the Indian academic circles as well as to the UK as a Great Nation.

9. I have been advised by my GP and the Community Psychiatric Nurse, with my current mental, emotional and physical impairments and disability, I must be very careful not to take too many things at one time to prevent further exacerbating my deteriorating severe stress, anxiety and depression risking my well-being and even life with frequent suicidal thoughts.

10. Please find attached a Letter from my GP to support my Request for Reasonable Adjustments for my Employment Tribunal Case.

11. I have also attached a letter from Community Psychiatric Nurse with the outcome of his assessment and their plans regarding further support to me from the Local Mental Health Team.

12. Furthermore, I am also awaiting a Letter from my Community Psychiatric Nurse to support my Request for Reasonable Adjustments for the Employment Tribunal Case. I will forward the same when I receive it, nearer the time.

13. Also, one of our family friends is visiting us from Chicago, the United States of America, after 46 years, from 11th October 2024 to 17th October 2024.

Therefore, I will not be available now until 26th September 2024, and then again from 11th October to 17th October 2024. I will not have access to my emails and will not be contactable during these periods.

Also, once the dates for the Marriage Ceremonies of my Son Ruchit in India and Sri Lanka are finalised, I will inform the Employment Tribunal accordingly of the dates of our travels when I will not be available.

I genuinely hope and trust that the Employment Tribunal would appreciate that the "serious lifelong discrimination trauma" that I suffer has already seriously caused me life-threatening and life-changing damages, broken relationships with mental, emotional and physical health issues including severe pain which have forced me "not being capable to work any longer". All of these disastrous detriments have been caused due to the discrimination and discriminatory environment at the University of Nottingham. The racial, disability and age discrimination and microaggression on a daily basis at the University of Nottingham, since joining them on 9th August 2021, has totally ruined my bright global professional career of 42 years and seriously damaged my personal life affecting my relationship with close family including my wife, sons and grandsons, sisters and friends, here in the UK, India and across the other parts of the world.

As I have already repeatedly stressed enough the adverse disastrous impact all this has on me and my family and friends, I would not like it to totally halt my normal day to day life; and totally control and ruin my family's professional and personal lives by taking away their joys and pleasures by not only supporting me with my deteriorating mental, emotional and physical impairment and disabilities but also whilst trying to support me with my Employment Tribunal Claims Case.'

18. The GP letter was from Dr Rod Addis and was dated 1 July 2024. The letter set out the claimant's various impairments: 'a combination of chronic conditions, including ischaemic heart disease, constant body pain, severe stress, anxiety, depression, and obstructive sleep apnoea.' It was said that the claimant's cataract operation had also had an impact on his ability to carry out day-to-day tasks. Dr Addis then set out the adjustments the claimant had asked for in his previous application and said that those were 'in line with his medical needs and supported by my professional opinion.' The minimum three month extension of time was referred to, although it was unclear whether the requested extension was from the date when the claimant had originally asked for this adjustment or from the date of the report. Dr Addis described the adjustments as 'essential' to ensure the claimant's fair participation in the tribunal process. I note that there were 21 separate adjustments proposed and that some were unlikely to be considered reasonable by a judge, such as a request for 'balanced BAME and White British' membership of the Tribunal and permission for the claimant to refer to notes during cross examination.

19. There was also a report dated 23 April 2024 from a community psychiatric nurse, which gave some description of the claimant's impairments but did not contain any recommendations for adjustments.

20. On 2 August 2024, the Tribunal informed the parties that the urgent preliminary hearing listed for 12 August 2024 would proceed and that the claimant's application of 29 July 2024 would be dealt with at that hearing.

21. On 5 August 2024, the respondent sent an application to strike out the claim to the Tribunal and the claimant.

22. The claimant neither attended the hearing on 12 August 2024 nor told the Tribunal that he would not be attending. EJ Butler suspended the case management orders and directed that the judicial mediation listed for 29 August 2024 be cancelled; in its place there would be a preliminary hearing to consider the respondent's strike out application. EJ Butler referred to the claimant's application of 29 July 2024 but made no order in respect of it. The EJ did not refer to the application for reasonable

adjustments. These orders were sent to the parties on 14 August 2024.

The decision appealed

23. The EJ's reasons set out the background I have just described in detail. On the subject of the claimant's letter of 29 May 2024, the EJ commented that the claimant did not indicate in that letter when he had applied for or expected to obtain his files from his solicitor and did not submit any medical evidence in support.

24. As to the 30 May 2024 letter and the claimant's compliance with orders, the EJ said:

‘27. Other than a photocopy of an appointment card for an appointment on 4 June at 3pm (it did not state what the appointment was for) from NHS Community Eyecare, the claimant did not include any other medical evidence. There was no medical evidence about the period of recovery and the potential impact on his ability to prepare the case during that period.

28. The claimant had not provided the respondent with a schedule of loss by 24 May 2024 as ordered. The date for compliance predated the date of his surgery. It also appeared from his letter, that it was not his intention to comply with the directions to comment on a list of issues by 12 June 2024 or send his documents by 21 June 2024. He made no reference to those orders or what preparation he had so far carried out.’

25. As to the 29 July 2024 letter, the EJ raised issues about the information provided. The claimant had not explained how his wife's cataract operation would affect his ability to prepare for and attend the final hearing. He did not explain why he had not told the Tribunal earlier about his son's honeymoon, when the arrangements were made, and why the claimant could not attend the final hearing if his son was returning by 11 August 2024. He did not say when his sister's plans had been made.

26. As to his own medical situation:

‘The claimant refers to his health and being advised by his GP and community psychiatric nurse that he must be very careful not to take on too many things at any one time. He does not say he will not be well enough to attend the hearing and did not attach any medical evidence to that effect. He attached a letter from his GP about adjustments for the hearing.’

27. The EJ gave consideration to Dr Addis' letter:

‘The claimant attached a letter from Doctor Addis dated 1 July 2023 stating that the claimant needs a minimum extension of 3 months for the tribunal proceedings to transition from his previous solicitors and become familiar with the tribunal; proceedings and that this was ‘crucial due to his impairments which include constant body pain, severe stress, anxiety and depression’. It provides no further detail as to why the claimant's health conditions would necessitate the extension. A 3 month extension would cover the period up to end September

2024. In any event, the claimant was not asking for a 3 month extension, he was now saying in his letter, that he will be unavailable for 6 months (and the Tribunal note that this could potentially be substantially longer depending on his travel arrangements). The letter also lists 20 other types of adjustments he would require.’

28. On the subject of the claimant saying he would not have access to his emails and would be uncontactable until 26 September 2024, the EJ said that it was reasonable to infer that ‘he has simply chosen not to be available because he is entertaining his sister and then his friend’ as the claimant had not explained why he would not be able to access emails.

29. The EJ recorded that the claimant did not attend the hearing nor write to the Tribunal to say that he was not attending and nor did he comment on the strike out application:

‘50. It may be presumed that the claimant, after what he had written on the 29 July 2024, has simply chosen not to engage in any communication with the respondent or the Tribunal or take part in these proceedings and has not looked at, or otherwise decided not to respond to, any communication from the Tribunal, until it is convenient for him to do so (i.e. after his sister’s visit and before and after his friend’s visit).’

30. The EJ then carefully and in detail set out the principles to be derived from the applicable authorities on strike out for unreasonable conduct and in circumstances where a claim has not been actively pursued.

31. In her conclusions, she did not consider that the claimant’s conduct was scandalous or vexatious, but she did conclude that it was unreasonable; there had been a deliberate and persistent disregard of required procedural steps. He had, without sufficient medical evidence in support, ceased communication from 30 May 2024 and had then failed to attend the 12 August 2024 hearing, although it was listed after his stated recovery period. The claimant had not complied with case management orders and, the EJ concluded, it was clear that he did not intend to comply with those orders and had made a decision not to attend the final hearing.

32. She characterised his conduct further in this way:

‘85. He did not attend today’s hearing, because he has deliberately chosen not to engage in these proceedings until it is convenient for him to do so.

86. The claimant has deliberately flouted tribunal orders. It amounts to wilful, deliberate and contumelious conduct.

87. The claimant has known that the case would be heard in September 2024 since September 2023. The final hearing, because solely of the claimant’s default, has now been vacated. The claimant is patently not willing to even read correspondence from the tribunal or be contactable until after his sister leaves the UK on 26 September and then he intends to engage and be

contactable only for a limited time before his next visitor arrives in October. He does not ask the tribunal to communicate with someone on his behalf, such as his son, he has simply decided not to cooperate until it suits him to do so.

88. The claimant does not explain (if indeed this were to be alleged), why the operation his wife has undergone, should have prevented him attending the hearing on 12 August. His wife according to the medical evidence, was prescribed medication only until 9 August 2024. He also refers to his son assisting him, but his son was due to return from his honeymoon the day before the 12 August hearing. If he needed more time to prepare, the claimant did not ask for a short adjournment of that hearing.

89. This attitude toward the tribunal and the respondent is discourteous and impertinent. Entertaining family and friends, is something the claimant has decided to prioritise without regard to the impact on the respondent, its witnesses and without regard to the resources of the tribunal and other users.’

90. The claimant has not produced any medical evidence which suggests that he is not fit to pursue his claim. In his letter of the 29 July he said he was ready to pursue his claim, subject to the dates he has when has other commitments which he intends to put first.’

33. In respect of the parallel application under rule 37(1)(d), the EJ concluded that there had been inordinate and inexcusable delay in dealing with directions. The existing trial dates would be lost. There was serious prejudice to the respondent in terms of the cost of two preliminary hearings which the claimant did not attend, but also because of the forensic prejudice caused by the fading of witnesses’ memories.

34. The EJ said that there was good reason to believe that the ‘disruptive and uncooperative’ behaviour would continue, given what the claimant had said about his travel plans. The case might not be heard until late 2025 or 2026.

35. A fair trial was not possible in the existing trial window, or in the foreseeable future given the procedural history.

36. The EJ then considered proportionality and whether there was a lesser step than strike out which would be appropriate:

‘However, I consider that issuing an Unless Order to compel compliance with the case management orders would be futile. The claimant has made it clear that he is not even prepared currently to access communications from the tribunal.’

Legal framework

Strike out

37. Rule 37 of the 2013 Rules provides:

‘Striking out

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

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;
 - (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
 - (c) for non-compliance with any of these Rules or with an order of the Tribunal;
 - (d) that it has not been actively pursued;
 - (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
- (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.’

38. The authorities set out the structured approach Tribunals should take when considering strike out under ground (b). In the usual case, per Burton J in **Bolch v Chipman** [2003] UKEAT 1149, there will be three steps in considering an application to strike out a claim:

- (1) There must be a conclusion by the tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.
- (2) Although there are circumstances where conduct may lead straight to strike out (eg where is there 'wilful, deliberate or contumelious disobedience of the Order of a court', in ordinary circumstances, there will also have to be a finding that a fair trial is not possible.
- (3) ‘... there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion.’

39. Sedley LJ in **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 6843 further elaborated on the proportionality question:

‘[21] It is not only by reason of the Convention right to a fair hearing vouchsafed by art 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1993] 1 All ER 630, [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal

to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences.'

40. In **Emeumokoro v Croma Vigilant (Scotland) Limited** [2022] ICR 327, Choudhury P said that whether a fair trial *in the existing trial window* is possible may be a highly relevant factor in deciding to strike out:

'[19] I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.'

41. The proper approach to strike out under rule 37(1)(d) was considered by Lady Smith in **Rolls Royce Plc v Riddle** [2008] UKEAT/0044/07:

'18. 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.

19. The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, as commented in Harvey, it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current Civil Procedure Rules. 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.

20. These principles appear to have been identified because of there being justifiable cause for concern about two problems of which a failure to actively pursue a claim may be indicative. The first is that 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. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. That is a distinct and different matter from the second problem which is that if a claimant has failed to actively pursue his claim to an inordinate and inexcusable extent so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on, then a question arises as to whether or not there can still be fair trial and if there is doubt about that whether the claim should then be prevented from going any further.’

Reasonable adjustments and medical evidence

42. It is well established that there is an obligation on Tribunals to make adjustments for the disabilities of those who appear in front of them. In **Heal v University of Oxford** [2020] ICR 1294 Choudhury J said:

‘[27] The effect of these provisions in the present context, read with the authorities above and the terms of s 9 of the 1981 Act, may be summarised as follows:

a. Tribunals are under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in a party's ability to participate in proceedings.

b. Where a disability is declared and adjustments to the Tribunal's procedures are requested in the ET1 form, there is no automatic entitlement for those adjustments to be made. Whether or not the adjustments are made will be a matter of case management for the Tribunal to determine having regard to all relevant factors (including, where applicable, any information provided by or requested from a party) and giving effect to the overriding objective.

c. The Tribunal may consider whether to make a case management order setting out reasonable adjustments either on its own initiative or in response to an application made by a party.

d. If an application is made for reasonable adjustments, the Tribunal may deal with such an application in writing, or order that it be dealt with at a preliminary or final hearing: see r 30 of the ET Rules...

[Emphasis added]

43. The exercise of judicial discretions must take into account all relevant considerations, including a party's mental condition or other disability: **J v K** [2019] EWCA Civ 5.

44. On this topic I referred the parties to the case of **Bryce v Trident Group Security Limited** [2022] EAT 137. In **Bryce**, the claimant's claims were dismissed for failure to comply with an unless order and his application for relief from sanction was rejected after a consideration on the papers. The claimant had a disability which affected his ability to communicate and to understand. Judge Mansfield KC (then a Deputy Judge of the High Court) concluded that the claimant's disability should have been taken into account as part of the EJ's assessment of the various factors which were relevant to the issue of whether his application should be allowed.

Grounds of appeal and claimant's arguments

45. The claimant had identified four grounds of appeal in his Notice of Appeal and Judge Walker KC allowed all four through on the sift, described more pithily in Judge Walker's reasons for allowing the appeal to proceed as follows:

‘Ground 1 - failure to make reasonable adjustments for his physical and mental

Disability

Ground 2 - failure to accommodate his Indian Hindu Brahmin Traditions, Culture,

Beliefs and religious duties and obligations (under article 9 of the ECHR)

Ground 3 - violation of his right to respect for private and family life (under article 8 of the ECHR)

Ground 4 - Procedural unfairness and failure to apply proportionality, leading to

denial of a fair hearing and placing me at a substantial disadvantage.’

46. Judge Walker in her reasons also identified what might be said to be the nub of the issues raised by the claimant:

- That the Tribunal had not addressed the request by the claimant for a three month delay nor his email of 29 July 2024 saying he was ready to proceed but not for six months;
- That the Tribunal instead carried on listing hearings and giving orders and relied on the claimant's non-attendance and non-compliance as conduct justifying strike out.

47. That analysis informed the claimant's presentation of his grounds in his skeleton and oral submissions. Ultimately what he was saying was that his applications were not determined; the failure to determine the applications meant that the issue of whether he required reasonable adjustments to effectively participate in the proceedings was not considered. That in turn led to or materially contributed to the EJ's findings that the claimant had been guilty of deliberate and contumelious or otherwise culpable conduct.

48. So far as Article 9 was concerned, the claimant made clear that he was not seeking to argue

that the EJ should have expressly considered the claimant's Article 9 rights. He accepted that he had not suggested in his application that attendance at marriage ceremonies was part of his Hindu Brahmin religious observances. He was not inviting the Appeal Tribunal to make any relevant factual findings about the ceremonies. His concern again was that his application was not expressly dealt with (by which he meant granted, refused or otherwise determined). My understanding of how he ultimately presented this ground was that he was saying that the failure to determine the claimant's application of 29 July 2024 in some way led to or contributed materially to the EJ's characterisation of the claimant's unreasonable behaviour when she said that his unavailability arose from 'various plans and private commitments' and from 'entertaining family and friends'. That failure, the claimant, suggested also led to the EJ using this characterisation as a reason for her prediction that the claimant's conduct would recur and that it would be futile to impose a lesser sanction such as an unless order.

49. Ground 3 was in essence the same; the concern was that the failure to determine the 29 July 2024 application led to the claimant's travel and family arrangements described in that application being characterised as culpable behaviour leading to strike out.

50. In support of Ground 3, the claimant was not seeking to rely on new evidence about his sister being reliant on him for health reasons (something he had relied on in his Notice of Appeal) or inviting the Appeal Tribunal to make new factual findings.

51. The claimant said he was not suggesting that the EAT should determine that there was any breach by the Tribunal of Article 8 but was suggesting that the circumstances described engaged the claimant's Article 8 rights and formed part of the context in which the procedural fairness of the treatment of his 29 July 2024 request fell to be assessed.

52. Ground 4, which depends on one or more of Grounds 1 – 3 succeeding, asserted that if there was procedural unfairness in the way the EJ assessed the claimant's conduct (Grounds 1 - 3) that also rendered unsafe the EJ's conclusion that culpable conduct was likely to recur. That would materially affect what the claimant accepted was the EJ's structured analysis of proportionality.

53. I should say that, whilst the claimant's submissions at times exhibited the sort of repetition and no doubt unintended sophistry which can be characteristic of assistance from AI, he made sensible concessions and it was ultimately clear what his real complaints were.

Respondent's arguments

54. Mr Currie's submissions on behalf of the respondent were that:

- It was not correct to say that the Tribunal had not dealt with the claimant's applications. Judges had appropriately concluded that they should be considered at a hearing and had made appropriate arrangements for such a hearing, which took into account, for example, the claimant's recovery time from his cataract operation, his wife's recovery time from her cataract operation, and the claimant's son's absence on honeymoon. The claimant serially neither attended hearings nor explained his non-attendance;
- The Tribunal was not obliged to dispose of the applications when the claimant failed to attend nor was the Tribunal obliged to say expressly that they remained extant;
- The Tribunal nonetheless considered the substance of the claimant's applications and medical evidence;
- Alternatively, there was no material failure to consider those applications and that evidence;
- The medical evidence provided did not identify what functional barrier existed to the claimant's participation in the hearings he had not attended or what adjustment would address that barrier;
- EJ Broughton directed herself in accordance with the authorities and conducted the kind of structured assessment required. She expressly considered proportionality and whether there was any option short of strike out which would render a fair trial possible. She was entitled to reach the view she did on the claimant's conduct and likely future conduct on the basis of the evidence which she had in front of her.

55. So far as the approach described in **Bryce** was concerned, the EJ had properly evaluated the

impact of the claimant's impairment on his procedural defaults insofar as that was possible based on his evidence and representations.

56. The respondent objected that the grounds which relied on breaches of Convention rights were new legal arguments involving new factual cases on appeal which should not be permitted, applying the principles in **Secretary of State for Health v Rance** [2007] UKEAT/0060/06. The new grounds would require factual findings to be made. They could not properly be explored on appeal.

57. I would have agreed with Mr Currie had the grounds been pursued as they were set out in the Notice of Appeal. Ultimately, however, the claimant was not saying that there was a breach of his Convention rights by the Tribunal and he accepted that he had not put material in front of the Tribunal which would have indicated that Article 9 was engaged.

Discussion and conclusions

58. In some respects, the claimant's complaints are ultimately complaints about form, rather than substance. It is instructive to ask the general question: where there are extant applications by a party which the Tribunal has considered appropriate for determination at a hearing, but has not been able to determine because of the party's non-attendance at listed hearings, must the Tribunal formally dispose of those applications in some way before considering strike out? The answer to that, as a general proposition, must certainly, in my judgement, be 'no'. It cannot be any kind of procedural injustice, generally speaking, for a party not to receive a determination of an interlocutory matter he or she has prevented the Tribunal from properly considering.

59. The claimant pointed out in his oral submissions that both the Court of Appeal and this Appeal Tribunal had been able to deal with applications he made for reasonable adjustments promptly and on paper, in support of a contention that the Employment Tribunal could similarly have decided his applications. That submission fails to recognise the significant difference in the ambit and effect of the adjustments which were being sought in the Employment Tribunal proceedings. Adjustments to the conduct of a single hearing are one matter. Adjustments to the whole shape of proceedings,

including building in significant delays, disrupting existing hearing dates, and varying existing case management orders are a very different matter. The Tribunal hearing such an application needs to understand, on the basis of evidence, what the specific effects of the impairment are and what disadvantage a particular proposed adjustment is aimed at ameliorating. It needs to consider the effect of the adjustment on the conduct of the proceedings more generally and to weigh up whether making the adjustment is in accordance with the overriding objective. Discussion at a hearing allows for exploration of what measures are reasonably required, which discussion may result in some proposed adjustments being accepted and others rejected or indeed in new adjustments or combinations of adjustments emerging.

60. The Tribunal in the circumstances of this case was, as various judges had implicitly concluded, not in any position to make substantive orders based on either application by the claimant without further exploration and evidence and, most importantly, without significant further assistance from the claimant. By the time the matter arrived with EJ Broughton at the strike out hearing, it seems to me that all she could have done further was to record that it had not been possible to determine those applications before the matter was struck out. Her failure expressly to record a position which was obvious from the account she had given of the proceedings is certainly not an error of law.

61. EJ Broughton was in no better position to determine the applications without a hearing than previous judges had been. She did record in terms that Dr Addis' letter did not support an extension (effectively a stay) of three months, much less a six month extension.

62. Furthermore, EJ Broughton was not obliged to decline to consider strike out on the basis that those applications remained extant in circumstances where it had not been possible to decide them due to the claimant's unexplained absences and failures to engage. It should be noted that judges of the Tribunal had done everything that could reasonably have been done to attempt to hear the claimant's applications in good time before the full merits hearing.

63. A further question, however, which goes to substance, is whether, in considering strike out, the EJ had the appropriate regard for the claimant's disability which Judge Mansfield KC identified

in **Bryce**. The claimant's more nuanced point ultimately seemed to be that it was the material contained in the applications and supporting evidence which the EJ failed to have regard to in reaching her conclusions on strike out.

64. The EJ conducted a conspicuously carefully structured analysis entirely in accordance with the authorities on strike out. Were her conclusions on the culpability of the claimant's conduct an error of law because of a failure to take disability into account in assessing his past defaults and the likelihood of future default if appropriate adjustments were put in place? Again, in my judgement, the answer is 'no'; the issue of disability was taken into account by the EJ to the extent it was possible to do so on the basis of the materials she was provided with.

65. The claimant had made an application for adjustments which raised many questions. The application was latterly supported by medical evidence which itself gave little concrete detail about the effect of the claimant's impairments. The claimant's further application in July 2024 largely relied on a series of family and social obligations which the claimant appeared to think would inevitably be prioritised by the Tribunal. The medical evidence, the claimant's assertions about what adjustments were required, and the claimant's own communications simply did not account for his defaults in:

- Attending hearings;
- Explaining why he was not attending hearings or informing the Tribunal that he was not going to attend hearings.

66. In any event, much of the conduct which the EJ characterised as culpable and on the basis of which she predicted future non-compliance with orders related to unavailability connected with social and family arrangements rather than to the claimant's disability. For all of these reasons, Ground 1 is not upheld.

67. So far as the claimant's Grounds 2 and 3 are concerned, I understood him to be saying essentially that the EJ should have given consideration to his right to a private and family life in her characterisation of his conduct. No doubt tribunals do regularly have regard to litigants' family and private commitments insofar as it is in accordance with the overriding objective to do so. Unless these

commitments arise unexpectedly, the time to raise them is generally when hearings are being listed. What was extraordinary about the claimant's 29 July 2024 application was the implicit assumption that other considerations, including the interests of the respondent, the Tribunal and other Tribunal users, would be subordinated to his personal arrangements. I can see no error by the EJ in her analysis of the claimant's conduct, which relied not only on his prioritisation of his family and social arrangements, but also on matters such as his non-attendance and decision not to engage with Tribunal correspondence and the attitude to the proceedings which could be inferred from these behaviours. There was no failure by the EJ to give appropriate weight to the claimant's private and family commitments and these Grounds also fail.

68. Ground 4 is parasitic on the other grounds and must also fail.

69. It follows that this appeal is dismissed.