

Neutral Citation Number: [2026] EAT 160

Case No: EA-2023-SCO-000032-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 15 October 2026

Before :

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

Between :

MS D

Appellant

- and -

GREATER GLASGOW

Respondent

Ms D the Appellant

Mr Brian Napier KC (Instructed by NHS Central Legal Office) for the **Respondent**

Hearing date: 15 October 2026

JUDGMENT

SUMMARY

Strike out

Where a claimant had PTSD which was exacerbated by the legal proceedings she had brought and there was no reasonable prospect of her attending a final hearing in the foreseeable future, it was appropriate for the tribunal to strike out her claim. There was no prospect of a fair trial. There was no error of law in the tribunal's reasoning.

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT:

1. This case raises the issue of whether it was appropriate to strike out a claim because it is very unlikely ever to come to a hearing. Associated with this is the question of the correct approach to appeals to the EAT against such strike out decisions.
2. An order has been made for the anonymisation of the claimant's name. This hearing was conducted on the papers only as had been the hearing below.
3. The claimant in the employment tribunal, who is now the appellant but whom I will call the claimant, was employed by the respondent from 2015. She began a period of ill health absence in October 2016, and the respondent applied its sickness absence management procedure to her. This culminated in her dismissal in April 2019.
4. In May 2019 the claimant presented a very long set of complaints to the employment tribunal, including unfair dismissal, disability discrimination, race discrimination, and whistleblowing detriments. The claimant has been diagnosed with PTSD. She also has other mental ill health issues and also IBS.
5. The EJ gives in the Written Reasons a masterly and detailed review of the procedural history of this matter and I will not repeat it here but only point to those key features which are necessary to understand the strike out.
6. In the employment tribunal, although the claimant was represented for a period initially, she was after September 2019 a litigant in person. She gained some assistance at some points from a friend who was not a lawyer.
7. The claimant's severe mental ill health has had a major impact on the course and conduct of the litigation. There have been what are described as periodic "flare-ups" in her condition which were occasioned by developments at different times in the litigation. The claimant's general case is that both the respondent's representatives and the tribunal itself are responsible for this. A note from Dr Usher quoted in paragraph 15 of the Tribunal Reasons summarised that the claimant's health "is

affected severely by trying to work through these proceedings, in large part triggering her PTSD. The anxiety involved is in trying to fit around short notice deadlines and changes are also making her PTSD, depression and chronic fatigue worse.”

8. By a decision sent to the parties in February 2023, the tribunal refused the claimant’s application to strike out the response but decided to strike out the claim under rule 37(1)(e) of the **ET Rules** on the basis that the matter was no longer capable of a fair trial. It is against this decision that the appeal is brought.

9. There were many incidents during the tribunal process of which the Claimant complained: for example that her main witness was approached by the respondent; what she claimed was the respondent’s failure to properly answer her complaints; and that, as she put it, she “lost my solicitor soon after Mr James [the respondent’s then legal representative] spoke to him”. She was more generally very concerned by the lack of independence of the tribunal process as she saw it. She also expressed concern that the tribunal had accepted what she described as “such [a] defective and incomplete ET3 which fails to explain why the respondent is defending this case, other than to be vexatious and undermine my own claim”. She says that “Between November 2019 and October 2020, although I would have liked the case to proceed to a hearing, I felt under pressure to engage with the Judicial mediation process, especially after feeling coerced to do so by Judge Eccles during Preliminary Hearing of June 2020.” The Notice of Appeal includes the claim that “The tribunal has behaved as the respondent’s representative throughout this entire case, and they have blocked every single request I made for additional information from the respondent.” This summary however merely gives a flavour of the many concerns expressed by the claimant at different stages of the tribunal process.

10. As to her health at paragraph 133 of the Tribunal Reasons there is recorded an e mail from the claimant to the effect that “My health has worsened significantly in the last year, because of the biased manner in which the legal case has been conducted and I would like to make a public statement that if my health deteriorates further, if I die or become otherwise unable to take part in this case (due to

a lack of capacity and/or finances) I hold not only the respondent and the CLO [of the Respondent] responsible but also Judge Eccles who has led me to struggle in mental anguish for the third Christmas in a row.” (similar sentiments can be seen expressed in paragraph 145 and elsewhere).

11. There had been three case management preliminary hearings in the course of the tribunal proceedings. In respect of one “The claimant also advised that the trauma and scars caused by the 22 June 2020 CMPH where she arrived to refuse judicial mediation but found herself forced to accept to take part by the manner in which the hearing unfolded at the events around 2019 are too traumatic for her to talk about without breaking down” and she could provide written submissions if given a chance (para 110).

12. At paragraph 123 the Judge says “The medical evidence indicated that the claimant will not attend a final hearing in person, either now, or at any point in the future. It was difficult to understand how a fair trial could take place in those circumstances.” Essentially the Tribunal considered that it was no longer possible to have a fair hearing in respect of the claim and struck out the claim on these grounds.

The Sift stages

13. HHJ Auerbach dismissed the claimant’s grounds of appeal as unarguable but set down the appeal for a Preliminary Hearing. This was heard by Lord Colbeck. I read the decision by Lord Colbeck on the Preliminary Hearing as only allowing through the parts of the very long Notice of Appeal which relate to the strike out decision as this is all he mentions in the Sift Reasons. In particular the extensive complaints of bias in that Notice of Appeal are not referred to by Lord Colbeck.

14. The reasoning of the EJ in the consideration of the issues relative to the respondent’s application to strike out the claim in its entirety is the subject of criticism in the sift decision on the Preliminary Hearing. Lord Colbeck subjects paragraphs 198 to 209 of the judgment to serious criticism. He says that “The EJ’s justification for her decision to strike out the claim appears to be

grounded in what is said at paragraphs [206] and [208]” and that this was arguably insufficient.

15. In paragraph 19 of his Sift Remarks he states

“The draconian nature of striking out has long since been recognised (see, for example, **Balls v Downham Market High School and College** [2011] IRLR 217). It is arguable that to proceed to strike out the claimant’s claims in their entirety, in effect, due to her disability, was an error of law. In light of what was said at paragraph [206] of the judgment, it is perhaps surprising that the EJ did not at least consider staying the proceedings to monitor whether there was any improvement in the claimant’s condition”.

Reasoning on Strike Out

16. The essential reasoning of the Judge leading to the decision to strike out is as follows:

- A. there was “no realistic prospect of the claimant being in a position to be ready for a final hearing at any point in the foreseeable future. There is no evidence that the prognosis of the claimant’s mental health is going to improve in the foreseeable future” (para 206). It was in my view correct (and indeed required) for the tribunal to consider the position as it was at the time of consideration of the strike out application and not at a later date. This assessment is perfectly appropriate and draws together much material previously referred to in the decision. This in itself might have been sufficient but there were other grounds.
- B. the claimant not only has a lack of trust in the respondent and its representatives but also “a lack of trust in the tribunal system, which she considers institutionally racist, and the judges who have considered aspects of her case so far” (para 207). This is an extreme case where the Claimant has made it very clear the lack of confidence in the process as a whole and not simply in individual Judges. I would however caution about using this as a reason to strike out in all but extreme cases.
- C. “the impact on the respondent, who has no doubt incurred expense from ongoing delays” (para 208). This was in my view a factor which it was appropriate for the Judge to take into account.

D. the impact of the delay on witnesses who have been alleged to have discriminated against the claimant. (para 208). This was an important point here given the likelihood of disputes of fact and the long period the case had already taken to proceed thus far. A fair trial involves fairness to the respondent as well as the claimant.

A hearing in writing would not be satisfactory in this case. It is notable that as the tribunal stated at para 92 “The parties are in dispute about whether many alleged events even took place let alone why any events took place.”

17. As to Ground A, the treating doctor says that

“She has struggled since the initial hearing and then subsequent mediation which was not unexpectedly a failure. D’s health condition means that she struggles to understand and follow events and conversations in a timeous way by telephone or even face to face, so she finds it difficult to reply and can find herself talked into situations she is unaware they are taking place”.

18. Weighing all of these matters, the conclusion of the tribunal Judge was that

“If I thought there was any prospect of a hearing reaching the final stage in the foreseeable future, I would not be striking out this claim but I do not see such prospects. Throughout the claim, the Tribunal has sought to make reasonable adjustments and implement the overriding objective, bringing the claimant’s claims to a final hearing but to no avail. This is not the fault of the claimant and no blame is attributed to her for the delays and failures. The process continues to take its toll on her health. This claim has now reached the point where no lesser sanction is open for the Tribunal” (para 211).

Although this does not in terms speak of proportionality it is following that process of reasoning.

Discussion

19. I think that in approaching the decision the tribunal were alive to the draconian nature of a strike out. The Judge carefully weighed against this the low likelihood of the case coming to a hearing.

20. Clearly cases such as **Cox v Adecco and Others** UKEAT/0339/19/AT place a legal duty on both Tribunals and respondents to assist litigants in person to put their claim forward and establish facts. This is not however without limits. The tribunal is still primarily an adversarial jurisdiction and if the claimant is not going to be able to take part in such an adversarial contest for whatever reason

the proper approach is to strike out unless a lesser sanction can be devised.

21. The respondent's Skeleton Argument is commendably short and says that the main points that emerge from the case law (including the recent EAT Judgment in Tedd v Surrey Council [2026] EAT) are that striking out involves a two stage-test; where it is found that a fair trial is impossible it is still necessary to consider whether the response of striking out is proportionate. A fair trial is one which can be conducted without undue expenditure of time and money and with proper regard to the demands of other litigants and the finite resources of the court (Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327), per Chaudhury P at para. 17, approving what was said in Arrow Nominees Inc & Anor v Blackledge & Ors [2000] WL 775004).

22. The **Presidential Guidance (England and Wales) 2018** states on this point:

“10. The fact that it is no longer possible to have a fair hearing is also ground for striking out. In some cases the progress of the claim to hearing is delayed over a lengthy period. Ill health may be a reason why this happens. This means that the evidence becomes more distant from the events in the case. Eventually a point may be reached where a fair hearing is no longer possible.”

23. An important case for present purposes is Riley v Crown Prosecution Service [2013] IRLR 966. The claimant's medical condition was (as in this case) central to the question whether a fair trial was possible. The Employment Judge, the EAT and the Court of Appeal all held that there was no realistic alternative to striking out the claimant's discrimination claims where the claimant was not able to attend the tribunal at all. She had been off sick from work due to stress and clinical depression for some three years prior to the hearing date and the medical prognosis was that she would not be fit to attend a hearing or participate in the proceedings for the foreseeable future. Her medical problems were exacerbated by the very existence of the litigation. In these circumstances, it was held that the fair decision for all concerned was to conclude that a fair hearing was no longer possible. The facts of that decision are thus close to those of the present appeal

24. This tribunal's reasoning was that a fair trial was no longer possible and this was given after the extensive summary of the background facts. Notwithstanding the critique of Lord Colbeck on the sift I think that the tribunal's reasoning is adequate given the four matters set out above all of which

cohere to demonstrate that the discretion was properly exercised. The tribunal did consider alternative options so that in my view the proportionality requirement was satisfied. Although the tribunal might have stayed the proceedings to see how the claimant's health progressed the prognosis made it highly unlikely that this would have a good outcome.

25. It is also to be recognised that this is an appellate jurisdiction. In **Harris v Academies Enterprise Trust** UKEAT/0097/14/KN, Langstaff J said that

“There is a wide ambit within which generous disagreement is possible in many matters of judgment, and this is undoubtedly the case in respect of the exercise of a discretion. As it was put in the case of *Governing Body of St Albans Girls' School and Anor v Neary* [2010] ICR 473 by Smith LJ, there may be two correct answers, or at least two answers that are not so incorrect that they can be impugned on appeal”.

I see no fault in the reasoning of the Tribunal Judge and recognise that this appeal is from a matter of discretion.

26. The appeal is accordingly dismissed.