Neutral Citation Number: [2026] EAT 167

Case No: EA-2025-000024-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 November 2026

Before:

ANDREW BURNS KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MS A BYCZKO

Appellant

- and –

MANCHESTER UNIVERSITY NHS FOUNDATION TRUST

Respondent

- -
- -

The **Appellant in person**
Louise Quigley (instructed by HF Ltd) for the **Respondent**

Hearing date: 7 October 2026

- -

JUDGMENT

SUMMARY

Practice and Procedure

The Claimant brought claims of disability discrimination, failure to make reasonable adjustments, constructive unfair dismissal and whistleblowing following her resignation from the Respondent NHS Trust. The ET held a succession of preliminary hearings over more than two years in an unsuccessful attempt to identify and clarify the claims and issues to be determined. Employment Judges made numerous case-management directions, afforded extensive assistance to the Claimant as a litigant in person, and implemented a range of adjustments to address her asserted disabilities and even devised a draft list of issues for her to consider and amend. She refused to engage with the list of issues and the ET decided that a fair trial was no longer possible, no lesser measure would suffice and it was proportionate to strike out the claims

On appeal, the Claimant contended that the ET should itself have imposed a list of issues, that it failed to consider the seriousness of her non-compliance, that a fair trial remained possible through alternative case-management measures, that insufficient reasonable adjustments had been made, and that the ET failed to determine amendments in what she called her 'second claim'.

The appeal was dismissed. The ET has a duty of fairness to assist unrepresented or disabled litigants, but it remains an impartial tribunal within an adversarial system. It may take reasonable steps to clarify claims and identify the issues for determination, but it must not formulate a party's case for them. The ET must have regard not only to fairness between the parties but also to proportionality and the proper allocation of limited tribunal resources among all litigants. Where extensive judicial assistance has already been provided, the overriding objective does not require repeated hearings to remedy a party's failure to identify or articulate claims. To do so would unfairly delay the cases of other litigants awaiting access to the ET. The ET correctly directed itself as to the applicable legal principles and was entitled to conclude that, despite extensive judicial assistance and repeated opportunities to clarify the claims, the Claimant had failed to engage with the process and a fair trial was no longer possible. The ET properly considered reasonable adjustments and alternatives to strike-out. It was proportionate to strike out the claims.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This is the Claimant's appeal against the Judgment of the Employment Tribunal ("the ET") sitting at Manchester (Employment Judge Dunlop) sent to the parties on 25 November 2024. The ET struck out the Claimant's claims pursuant to r.37 of the Employment Tribunal Rules of Procedure 2013 (now r.38 of the 2024 Rules).

2. The Claimant, who was a litigant in person in the ET, worked as a part-time theatre nurse at the Respondent NHS Trust from 2017 to 2022. She had periods of ill health absence and surgery in 2020. After she returned to work, she raised concerns about doing manual handling duties. Following further periods of absence, she applied for and was appointed into a fixed term role as a clinical advisor in the Covid-19 response team. She raised informal complaints about her manager in late 2021, had a further period of ill health absence and submitted a formal grievance in January 2022 against her second line manager.

3. The Claimant resigned in March 2022 and brought complaints including disability discrimination, failure to make reasonable adjustments, constructive unfair dismissal, automatic unfair dismissal for whistleblowing and whistleblowing detriment. The Respondent said it was not able to serve a proper response as it was unclear what facts and matters were relied on in support of each complaint. It requested particulars.

4. After five preliminary hearings and two adjourned attempted hearings over 18 months, the ET concluded that the Claimant had failed to comply with orders requiring her to take steps to identify and clarify her claims in a draft list of issues prepared by the ET. The ET concluded that it was not possible for a fair trial to take place. It struck out the claims under rule 37(1)(c) of the 2013 Rules for non-compliance with the ET orders.

5. By order of DHCJ Bowers KC, grounds 2, 3, 5 (in part) and 9 of the Amended Grounds of Appeal were permitted to proceed to this full hearing. Following a hearing under r.3(10) of the EAT Rules 1993 before HHJ Auerbach, ground 8 was also permitted to proceed.

6. In summary the permitted grounds are:
    a. whether the ET erred in striking out the claim rather than imposing or adopting its own list of issues,

b. whether it properly assessed the seriousness of the Claimant's non-compliance,
c. whether striking out the claims was a proportionate response or whether lesser alternatives were available,
d. whether the ET failed adequately to consider reasonable adjustments for the Claimant, and
e. whether it erred in declining separately to determine what the Claimant described as her "second claim".

The Tribunal's Duty to Assist Litigants

7. At its heart this appeal concerns the question of the extent to which the ET is required to assist parties who do not comply with case management orders designed to ensure that claims can be heard at effective and proportionate final hearings. At present a very large number of claimants and respondents are waiting many months or years to have their employment claims resolved or even to have case management or preliminary hearings. If there are multiple case management hearings in some cases that could unreasonably add to the backlog.

8. The overriding objective requires the ET to deal with cases fairly and justly, which includes dealing with cases in ways which are proportionate to the complexity and importance of the issues. The ET must have regard to the impact of the case in question on other cases and other litigants. The overriding objective in the Civil Procedure Rules explicitly lists allotting to a case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. Although the ET Rules do not use the same words, effective allocation of tribunal resources is an integral part of avoiding delay and saving expense.

9. This appeal raises the issue of whether it is fair and just for an ET to have to take repeated, extensive steps to assist a party who is uncooperative, confused or disabled to take some necessary step in the case, particularly in the context of the limited resources of the tribunal and the adverse impact on other litigants.

10. A tribunal can regulate its own procedure and must conduct any hearing in the manner it considers fair, having regard to the overriding objective. It may question the parties so far as appropriate in order to clarify the issues. However it is an adversarial rather than an inquisitorial system. A tribunal must not make a case for a litigant. It must remain impartial even where the litigant is disabled (**McNicol v Balfour Beatty Rail Maintenance Ltd [2002]**

IRLR 711 and **Woodrup v London Borough of Southwark [2003] IRLR 111**). A tribunal's duty to be fair to both sides means it cannot enter the contest on behalf of either one, no matter what difficulties or disabilities that party might be facing.

11. A list of issues is a useful case management tool developed by the tribunal to bring a measure of order, structure and clarity to proceedings. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge (**Parekh v Brent London Borough Council [2012] EWCA Civ 1630** at para 31). Lists of issues are not mandatory but are now an important and very commonly used case-management tool, particularly in complex discrimination claims. Active case management in accordance with the overriding objective will often involve the identification of a list of issues. That list of issues will generally be used to form the basis of the management of the case, of the scope of disclosure and inform the preparation of factual and expert evidence for trial (**Bailey v GlaxoSmithKline [2019] EWCA Civ 1924**).

12. The ET's role is to determine the claims arising from the pleadings. Parties must know the case they have to meet. The main purpose of a list of issues is to summarise the existing pleadings not to amend them and so it can be departed from where necessary to do justice. In **Moustache v Chelsea and Westminster NHS Foundation Trust [2025] ICR 1231** Warby LJ said:

> "…the ET's role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party's case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT."

13. Although the tribunal at the pre-hearing stage may have to 'roll up its sleeves' to determine whether an arguable case exists, even if it is not clearly pleaded (**Cox v Adecco [2021] ICR 1307**) it cannot cross the line between clarifying what a party is saying and suggesting claims to a party. A tribunal is only entitled to cut across the parties' submissions or agreement about what is or is not in issue if the true issues are obvious or 'shouted out' from the pleadings:

Mervyn v BW Controls Ltd [2020] IRLR 46 or where something so well-established that a tribunal should consider it as a matter of course. A tribunal can assist a litigant in person by suggesting a legal label for a complaint that is already clearly in the claim, but it must not go digging for claims or issues. Tribunals "are not bloodhounds who have to sniff out potential grounds…" (**Radakovits v Abbey National plc [2010] IRLR 307** at para 22).

14. The authorities were recently reviewed in **Nagra v Unipart Group Ltd [2026] EAT 157** in which the employment judge raised a possible claim with a litigant in person who chose not to reformulate his claim in that way. The EAT held that the judge was not required to press the point further as that would have risked crossing the line between appropriate assistance and entering the arena. A judge may not infringe a litigant's autonomy to decide the case he wants to litigate. It is not for a tribunal to make a case for a litigant.

15. In this case the ET found that at earlier points in the process an employment judge had both 'rolled up their sleeves' and 'delved deeply' to try to assist the Claimant to clarify the issues in an appropriate list.

The Procedural History of the Claim

16. The Claimant commenced proceedings on 14 June 2022. Her ET1 and continuation sheet consisted largely of dense narrative material which made it difficult or impossible to discern the ingredients of the legal claims and issues relied upon. It was clear that she had claims of unfair dismissal, disability discrimination, whistleblowing detriment, automatic unfair dismissal and failure to make reasonable adjustments. However, the legal elements of those claims or what facts were relied upon were obscure.

17. The ET, in a way which is becoming increasingly common, held preliminary hearings with the primary purpose of discovering the nature of the claims and identifying the issues for determination, so that the parties could fairly progress to the next stages of preparing for the dispute to be resolved at a final hearing. The Claimant also sought to rely upon a second ET1 and continuation sheet served later. That related to events occurring after the original claim had been presented. The ET found that these documents further complicated the task of identifying the claims and issues and were themselves difficult to analyse.

18. The ET said that although it was possible to pick out certain complaints, it was hard to understand the ingredients of those complaints among the narrative background set out in the

claim. The ET rightly observed that there is nothing unusual about that. It is usually possible through directions for further particulars or information or lists of issues for the parties (and the ET) to clarify and then understand complex claims. They can then be properly prepared and efficiently determined at a final hearing.

19. On 9 November 2022 the Claimant applied for a range of reasonable adjustments on the basis that a mental health condition affected her ability to carry out tasks, process information, concentrate, remember details and complete activities within ordinary timescales. She requested that all ET communications be sent by email rather than post, that hearings be conducted remotely (by CVP) to reduce her anxiety and facilitate participation, and that she be allowed additional time to review documents, prepare responses, answer questions and recall information. She also asked that decisions and orders be communicated in writing to assist her understanding and compliance with ET directions.

20. The Claimant requested short breaks during hearings and that documents be provided in Microsoft Word format. The latter was not because of her disability, but because she did not have ready access to PDF software or scanning equipment.

21. Throughout the procedural history of this claim, the ET took reasonable steps to make these adjustments, as I tried to do during the hearing of this appeal. The Claimant requested that a preliminary hearing on 15 November 2022 be postponed as she was not fully prepared and wanted to apply to amend her claims. EJ Holmes postponed on that basis and the hearing was duly re-listed on 4 January 2023 with a longer time estimate as an adjustment. In December 2022 the Claimant sent her 'second' ET1 claim form and continuation sheet. However she made clear that it was not a second claim, but an amendment to the original claim.

22. The ET recorded that at the first preliminary CVP hearing on 4 January 2023 EJ Horne proposed a process intended to enable the parties and the ET to identify the issues requiring determination. EJ Horne had encountered significant difficulties in understanding the Claimant's case and recorded that when he sought to summarise the points the Claimant had made, she frequently disagreed. That left the parties and the ET in a difficult situation. A tribunal cannot make directions to resolve a complex series of claims if it and the parties are simply unable to understand what it is that a claimant is claiming. EJ Horne attempted to overcome this by giving the Claimant time to think about how to clarify her claims and giving her the opportunity to give information about her alleged disclosures and alleged detriments.

EJ Horne did not subject her to an order to do this but instead listed a further preliminary hearing on 9 February 2023 reserved to him.

23. He proposed to use that hearing to help the parties define the issues and work out what matters needed an amendment of the claim and whether such amendment should be permitted. This was a sensible attempt to progress the claims and a reasonable adjustment from simply ordering the Claimant to provide particulars or agree the issues with the Respondent. Unfortunately, that hearing never took place because the Claimant was ill and requested a stay of proceedings while she recovered. This was granted and the hearing was vacated.

24. There was then lengthy and extensive correspondence in which the Claimant disputed EJ Horne's sensible and pragmatic approach. That than agree the issues, she insisted that the ET first hear disclosure applications and that it order the Respondent to answer data subject access requests which were not within the ET's jurisdiction. The Claimant did send further details about her alleged disclosures including new material, but nothing clarifying her alleged detriments. The Respondent responded by providing some requested documents about some of the alleged disclosures to assist her and make some progress. It pointed out that many of the matters she was requesting did not relate to pleaded disclosures.

25. The next preliminary hearing was by CVP before EJ Ross on 24 January 2024. A year had passed since EJ Horne's attempt to identify the issues. This was largely due to the stay needed by the Claimant. EJ Ross undertook a detailed review of the original ET1 and continuation sheet. She started to prepare a draft List of Issues designed to encapsulate what she considered to be the claims contained in the original proceedings. At about noon on the day of the hearing EJ Ross emailed a draft list of the whistleblowing issues to the parties in Word format (which the Claimant had requested as an adjustment). EJ Ross asked the parties to return to the video hearing at 12.30pm. The Claimant later claimed that she had been disconnected and had been denied the assistance of her McKenzie Friend who attended the CVP hearing with her.

26. In its strike-out judgment, the ET described EJ Ross as having "rolled up her sleeves and delved deeply into the material provided … to try to understand the original claim". The draft list she prepared went beyond was could be reasonably expected of a tribunal. It identified protected disclosures, alleged detriments, complaints supporting constructive dismissal and an alleged failure to make reasonable adjustments. The EJ Ross attempted to formulate a coherent and manageable statement of the claims (arguably straying into even assisting the

Claimant unfairly) and tried to discuss those with the Claimant during the second part of the hearing.

27. Further progress was not made at the hearing as the Claimant wanted more time to consider the draft list when the CVP hearing resumed. EJ Ross therefore ordered the Claimant to review a full 10-page draft list prepared by the Judge and provide any amendments by 4 March 2024 in advance of a further preliminary hearing on 6 March 2024 reserved to the same Judge for continuity. EJ Ross postponed the final hearing to a 10-day hearing in September and October 2025. This gave a fair and reasonable opportunity for the claim to be clarified, prepared and heard.

28. Despite this, the Claimant rejected the draft List of Issues prepared by EJ Ross and did not engage with it in the manner required. Instead, she wrote lengthy letters which raised other matters rather than focussing on completing the task she had been given. She said she needed several weeks to respond to the draft list.

29. For this reason, the third preliminary hearing (reserved to EJ Ross on 6 March 2024) also failed to make progress in clarifying what was in dispute in the claim. EJ Ross recorded the tortuous case history and noted that it was not an easy hearing. In her case management summary and order sent on 13 March 2024 EJ Ross said:

> "(14) The Tribunal cannot hear a claim unless the List of Issues have been identified. I explained again to the claimant what is required. I have made an order about this below.
>
> (15) The claimant has a mental health impairment and says she requires extensive time before complying with any Case Management Orders. I have therefore granted her a period of almost three months to provide this information. **The claimant must now comply. It is important that the claimant understands that failure to do so will be a serious matter.** It could result in application to strike out the claim.
>
> (16) The delay in the claimant providing what is required is causing this case to become old.
>
> (17) Once the claimant has clarified the List of Issues for the original claim, there will need to be a further preliminary hearing to determine the issues in the claimant's application to amend sent to the Tribunal on 21 and 28 December 2022 and to determine whether the claimant should be permitted to amend her claim."
> (**emphasis** in the original)

30. EJ Ross urged the Claimant to seek legal advice saying "The claimant appears to struggle to understand the Employment Tribunal processes despite the attempts of Employment Judge Horne and Employment Judge Ross to explain them to her. There is a real concern that at the present rate, the case will not be ready for a final hearing in September 2025. An advice leaflet is attached from where the claimant may be able to find help."

31. The Claimant was given yet more time in which to amend the draft List of Issues in writing (having explained her disability-related difficulty in doing that orally during a hearing). The ET therefore went to extremes in listing a fourth preliminary hearing to finally identify the issues and then a fifth preliminary hearing to determine any amendment application she might have. It once again recorded the reasonable adjustments which the Claimant requested be made by the ET.

32. The Claimant had been warned by EJ Ross that the delay in agreeing the List of Issues was prejudicing the claim and that a failure to comply with the ET's orders would be a serious matter and could result in an application to strike out the claim. That warning was not heeded.

33. EJ Ross' order of 13 March 2024 also ordered the Claimant to provide a disability impact statement by 1 May 2024 and went on (with the **emphasis** in the original):

> "2.1 Employment Judge Ross drafted a List of Issues arising from the claimant's complaints. The claimant must consider this list to make sure that it accurately records the complaints and issues to be determined at the final hearing arising from the claimant's **original claim form and attachment presented to the Tribunal on 14 June 2022 only**.
>
> 2.2 If not, the claimant must notify the Tribunal and the respondent by **4.00pm on 5 June 2024 by amending the List of Issues, attached to this document at Appendix A, what is inaccurate**."

34. The fourth preliminary hearing was listed for 8 July 2024. Rather than cooperate, the Claimant challenged EJ Ross' order in a reconsideration application on the mistaken basis that EJ Ross had rejected her 'second claim' which she said had been permitted by EJ Holmes. In fact, the proposed amendments to the original claim remained (as had always been the case) to be determined once the original claim had been understood and clarified. EJ Holmes had merely postponed a preliminary hearing because the Claimant indicated that she needed more time

and wanted to amend her claim. EJ Ross directed that the orders should be complied with and said that any issues should be raised at the July hearing.

The Breach of EJ Ross' Order

35. On 5 June 2024 the Claimant produced a 37-page document entitled "Claimant's List of Complaints and Issues". That did not even attempt to comply with EJ Ross' order to amend her draft List of Issues. The Claimant explained why she had not followed the ET's directions on how to identify the issues. She said:

> "I had a trouble finding Complaints and Issued listed by Judge Ross on 6th March 2024 in annex A in my original ET1 form and attachment submitted 14/6/22, too much information was changed, removed or omitted in the Annex dated 6/3/24 sent to me by Employment Tribunal.
>
> "I had already presented a chronology of events; I included what happened/when/who did it in my original documents ET1 form/ET1 continuation form I had submitted on 14/6/2022. Employment Judge Horne decided on 1st PH in January 2023 that I would not need to re-write my Claim, however Judge Ross had changed this decision in March 2024. I was very difficult for me to work in the format ordered by Judge Ross because in the document prepared by Employment Tribunal on 6/3/24 too many of my complaints were deleted or changed, I could not find them in my forms. I have tried to reiterate that it was much easier to work with my ET1 and ET1 continuation form submitted on 14/6/2022 without the need for me to re-write my chronology of events into a different format, which requires multiple repetitions.
>
> "Same entry/complaint often represents more than one legal issue which means that I would need to repeat the same text under different headings several times during this document.
>
> "I would still like to apply for Employment Tribunal to consider working with Claimant's ET1 and ET1 continuation forms, possibly with annotations made to them by claimant, instead of ordering the Claimant to completely change the format, against Claimant's requests for reasonable adjustments. I am a self-representing Claimant, during illness, without any admin support. I experience an enormous difficulty with re-writing the same information endlessly according to Respondent's wishes, which resulted only in obstructing and delaying my Claim and Hearings from March 2024 to September 2025, to my detriment. If presenting the list of issues and complaints was indeed necessary in a different format, that could have been ordered on 1st PH in January 2023, not in 2024."

36. Instead of complying with the order as required, the Claimant continued to insist that the ET consider her original ET1 claim form and continuation forms which would have taken the ET

back to square one. She suggested having to re-write the same information 'endlessly' when she had been asked to do it once. She says it was 'according to the Respondent's wishes' but knew it was actually the ET which was ordering her to clarify her claims. This letter shows she was capable of writing long and complex documents objecting to the ET's attempts to get her to engage with its process. It is regrettable that she was not able to put the same effort into amending EJ Ross's draft List of Issues.

37. On a fair reading of the letter, the Claimant was refusing to engage with the ET's attempts to identify the issues on the basis that this was what the Respondent wanted. She was not a lawyer and English was not her first language and so it is understandable that she may have struggled to understand why her claim had been broken down into all the constituent elements of the claim as required by the statutes. Rather than accepting the ET's considerable assistance, she rejected it. She was suspicious that the ET's draft was agreed by the Respondent and so refused to accept it herself. This was being uncooperative and adversarial in her approach. By July 2024 she had refused to accept the ET's multiple attempts over more than 18 months to identify the issues. This was a process with which she was required to cooperate in accordance with the overriding objective.

38. The ET commented in its strike-out judgment that the Claimant did not attempt to amend the List of Issues prepared by EJ Ross or properly comply with the order. Instead, her lengthy document introduced substantially different material, expanded the alleged protected disclosures and detriments, reverting to the same narrative presentation of the claim which multiple judges had said was unhelpful to identifying the issues. The document made the legal and factual issues more difficult to discern and added complexity and uncertainty to how the claim could be properly determined. There were now 32 supposed protected disclosures compared to the 4 - 6 identified at the earlier preliminary hearings. Many of these alleged protected disclosures did not actually involve the Claimant disclosing or reporting anything, but appear to confuse disclosures with complaints of acts or omissions on the part of the Respondent.

39. The document contains 67 alleged "protected disclosure detriments, whistleblowing detriments" set out in a table with various labels indicating that they also constitute other claims. Some detriments were said to be also "failure to make reasonable adjustments/disability discrimination", some were alleged to be constructive dismissal and some were said to be "automatic unfair dismissal after whistleblowing". There then followed

a separate table of 40 "examples of Failure to make reasonable adjustments/disability discrimination" many of which were labelled as also as constructive dismissal and nearly all were said to be "automatic unfair dismissal after whistleblowing".

40. The Claimant's document was not only a complete failure to comply with EJ Ross' order but was completely unmanageable as a tool to identify what needed to be decided at a full hearing. It was legally incoherent as it confused detriments with reasonable adjustment failures and with elements of constructive dismissal and dismissal for making a qualifying protected disclosure. If the Claimant had engaged with the ET's repeated efforts to identify the issues simply and effectively, a fair trial would probably have been possible. It is difficult to see any reasonable grounds for her refusal to cooperate with the assistance offered by multiple judges over the previous 18 months.

The Strike-out Application

41. At a fourth preliminary hearing on 8 July 2024 EJ Ross concluded that the Claimant's document did not provide a usable list of the issues in the claims and directed that a public preliminary hearing be listed to consider a strike-out application. On 29 July 2024 the Respondent formalised its application to strike out the claim on grounds of non-compliance with Tribunal orders and unreasonable conduct.

42. The Respondent said that the ET had made adjustments as requested by the Claimant, but there was no satisfactory medical evidence suggesting that the Claimant was medically unable to comply with the ET's order. It pointed out that she was capable of writing detailed letters relating to the proceedings.

43. The Respondent relied on the breach of EJ Ross' order, failing to provide copies of all her relevant medical evidence relating to the disability issue as ordered on 25 January 2024 and a failure to attend on time on 8 July 2024 due to the unavailability of her McKenzie Friend. The Respondent contended that, in the absence of medical evidence showing the Claimant was incapable of complying with the orders due to her stated disability, the claim should be struck out under rule 37(1)(c), alternatively 37(1)(b), of the ET Rules 2013.

Legal Principles for Striking Out

44. Rule 38 of the ET Rules 2024 provides:

> (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).

45. It is well established that a two-stage test must be used (**Tedd v Surrey CC [2026] EAT 66**). First, whether one of the grounds for strike-out in r 38(1)(a)–(e) has been established on the facts ("the threshold conduct") and, secondly, whether it is just and proportionate to strike out in all the circumstances, including whether lesser measures might suffice ("the discretionary decision"). The second stage is a fundamental cross check and takes into account the overriding objective. Where the conduct is such that there is no prospect of a fair hearing a strike-out must follow, but in other cases steps short of strike-out may address the conduct but allow the case to proceed (**Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371**).

46. This is because striking out of the whole claim is a last resort. It is a draconian power not to be readily exercised. Courts and tribunals are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will rarely be necessary to strike out a whole claim where a fair trial is still possible as in every case it is necessary to consider whether striking out is a proportionate response (**Blockbuster Entertainment Ltd v James [2006] IRLR 630**). Where a fair trial is possible it will often be appropriate to make an unless order instead of striking out because sanctions for breaches of orders are designed to secure compliance rather than being punitive (**Forrest v Amazon Web Services EMEA Sarl UK Branch [2025] IRLR 656**).

47. A fair trial in this context is not a fair trial at any cost and without consideration of the impact on the ET or the wider impact upon other users of the ET system. A fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court (**Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167**). That was echoed in **Emuemukoro v Croma Vigilant**

(Scotland) Ltd [2022] ICR 327 where it was noted that 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…"

48. The principle becomes even more acute at a time when the ET system is under particular strain and the waiting times for hearings are very substantial because of the large increase in cases and the backlog in dealing with them. It is all the more important to deal with individual cases proportionately so that all litigants can achieve justice. In these circumstances, although ETs should not conclude too readily that a fair trial is no longer possible and should strive to keep the proceedings alive if it is reasonably feasible to do so, that should not be regardless of any detriment to other litigants.

49. A trial is not rendered unfair merely by delay – even a long delay with consequences for the hearing. If a litigant consistently refuses to cooperate such that the ET is unable to make proper progress in resolving the claim, that can make a fair trial impossible. HHJ Tayler addressed the relevant factors in a similar strike-out case in **Smith v Tesco Stores Ltd [2023] EAT 11.** In that case the claimant repeatedly failed to cooperate with the ET's attempts to identify and finalise the issues in his case through a series of preliminary hearings. He sought to introduce extensive new allegations and amendment applications and despite clear directions from two Judges, he failed to provide the clarification necessary to complete the list of issues. He did not identify which parts of the draft list he disputed. After failing to comply with the ET's order requiring him to provide information needed to finalise the list of issues, he faced a strike-out hearing at which he refused to engage with the ET. The ET held this was unreasonable and vexatious conduct and demonstrated that no lesser measure would secure compliance or permit a fair trial. The claim was struck out.

50. HHJ Tayler commented that the overriding objective also applies to litigants in person, who should do all they can to help the ET clarify the claim. The ET can only be expected to take reasonable steps to identify the claims and issues. He held that the ET was right that there could not be a fair trial because the claimant refused to cooperate with the respondent and the ETl. The great difficulty in identifying the issues was part of a course of conduct in which the claimant had shown that he was "not prepared to cooperate with the tribunal process". He would not abide by his obligation to assist in achieving the overriding objective and this was likely to be repeated.

51. HHJ Tayler held that "the claimant would not work towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. Preparation was moving backwards, not forwards. There was every reason to believe that the lack of cooperation would persist."

The ET's Judgment and Conclusions

52. After going in detail through the procedural history of the Claim, the ET concluded that the Claimant had not complied with EJ Ross's order. The ET concluded that she had not engaged with the draft List of Issues prepared for her and had failed to amend that list as ordered. The ET said at para 81 "She did not want, or consider that she needed, help from EJ Ross in clarifying the claim. She did not try to engage with EJ Ross's attempt, for example by correcting names or date within it."

53. The ET concluded at para 68 that:

> "68. Both EJ Horne and EJ Ross had put a huge amount of effort into trying to 'translate' Ms Byczko's claim into a usable form, but that process had ended up back at square one, with their efforts being rejected by Ms Byczko and a (new) long and confusing narrative claim being put forward. I formed the view that there is nothing to suggest that any other Judge would have any more success in trying to clarify the claims."

54. The ET explored alternatives to striking out the claim which it regarded as the last option. As it appeared that the Claimant's refusal to co-operate was linked to her disability, the ET explored obtaining an intermediary assessment for the Claimant. It reserved its decision on strike-out until that had been explored. It said at paras 69 - 72:

> "69. Holding in mind the principle that striking out a claim should always be the last option, I decided to try to seek an intermediary assessment for Ms Byczko. Intermediaries are communication specialists, who can be engaged by the Tribunal in much the same way that interpreters can be engaged when a litigant does not speak English well enough to participate in a hearing. Intermediaries are fairly new in the Tribunal, and I do not know whether the possibility was considered by either EJ Horne or EJ Ross. I considered that if an intermediary report indicated that an intermediary may be able to assist with helping Ms Byczko to understand the requirements of the

> Tribunal, then it might be appropriate to give Ms Byczko another opportunity to respond to EJ Ross's List of Issues in the way that had been envisaged by EJ Ross. I therefore decided to write to Ms Byczko and propose an intermediary assessment, reserving my decision on strike out until that possibility had been explored.
>
> 70. Before I had the opportunity to do so, Ms Byczko wrote to the Tribunal on 18 September 2024 raising issues about the content of the bundle that had been before me at the preliminary hearing, and asking for time (until 30 October 2024) to make further submissions.
>
> 71. Given that I had already decided to delay my judgment and explore the option of an intermediary, I considered that there was no reason not to allow Ms Byczko the opportunity to make the further representations that she sought. I wrote to both parties on 25 September [2024] outlining the next steps, and including information about intermediaries, and why I had formed the view that an intermediary assessment might be appropriate in this case.
>
> 72. In a letter dated 4 October [2024], Ms Byczko told me that she did not want to have an assessment with an intermediary."

55. On 30 October 2024 the Claimant sent a 16-page letter suggested that she has complied with all ET orders, that the ET had failed to make reasonable adjustments and that the Respondent was behaving scandalously and concealing documents. The ET considered these further submissions. It noted that these allegedly "missing" documents were actually in the bundle, that the Claimant made "sweeping complaints about EJ Ross's conduct of the preliminary hearings" and attached duplicative documents which were irrelevant to the strike-out decision.

56. The ET directed itself to rule 37 (now r.38) and the legal principles in **Cox v Adecco** and **Amber v West Yorkshire Fire and Rescue Services [2024] EAT 146**. It considered the duty to delve deeply in case management type hearings and require the parties to co-operate in considering and agreeing lists of issues so that cases are properly understood.

57. The ET directed itself to consider the magnitude of the non-compliance; who is responsible, as between a party and their advisor, for the default; what disruption, unfairness or prejudice has been caused; whether a fair hearing is still possible; and whether strike-out is proportionate – a claim should not be struck out where a lesser sanction is sufficient to address the party's default (directing itself to **Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371**).

58. The ET concluded at paras 84-85 that:

> "84. The first and second factors are not particularly relevant in this case. I find that Ms Byczko has tried her best to comply. I do not know whether she has taken advice from one or other of the 'McKenzie friends' which might have been unhelpful, but it is clear that the overall approach to the case, as maintained in correspondence and at hearings over a long period of time, is one led by Ms Byczko herself.
>
> 85. The third factor requires me to consider the disruption, unfairness or prejudice caused. I accept the respondent's submission that the delay in clarifying the issues in this case and progressing to a final hearing has caused obvious prejudice. Considerable costs have been expended in conducting this litigation, without making any material progress. The respondent was right to draw attention to the passages of the Equal Treatment Bench Book referenced in its application. This is a case where there is a risk that, in attempting to accommodate the claimant and mitigate the difficulties that she is undoubtedly facing, the Tribunal could lose sight of the need to treat both sides fairly."

59. The ET considered the unfairness and prejudice to the Respondent. It rejected the submission that the Respondent as a public body should be in any different position from any other employer but found "Where the manner in which a claim is conducted results in excessive costs to a respondent due to the volume of documentation, correspondence, repeated applications and failures to comply with orders I consider that can properly be viewed as prejudice." It focussed on the breach of EJ Ross' order rather than other non-compliance raised by the Respondent in its application.

60. The ET considered whether a fair trial was no longer possible. The EJ held that a fair trial was not possible as if the claim was permitted to proceed the legal and factual issues remained impossible to ascertain. That was the case notwithstanding extensive judicial assistance where the previous employment judges had "delved deeply" and produced a cogent articulation of the original claims. The Claimant had rejected that formulation entirely and repeatedly made it plain that she was not willing to proceed on that basis. The ET found that there was no realistic prospect that another judge would be more successful in clarifying the claims. It noted that there was a 'huge range' of other procedural disputes between the parties.

61. The ET rejected the option of making orders for disclosure and witness statements without the Respondent knowing what case it had to face as proper disclosure and preparation of

evidence in a complicated case is defined and limited by the issues. It would be disproportionate to have to disclose and produce evidence on an unfocussed, wide-ranging and incomprehensible claim.

62. The ET took into account the fact that the Claimant's refusal to agree a List of Issues was not the only procedural impediment to a trial taking place within a reasonable timescale. The other disputes including over the medical evidence added to the impracticability of a trial proceeding in September 2025.

63. The ET finally considered proportionality and whether there was some lesser action which would be a proper alternative to strike-out. It had tried to explore using an intermediary. It considered proceeding by requiring the Claimant to use the List of Issues identified by EJ Ross but the Claimant refused to proceed on that basis. The ET considered striking out part of the claims and permitting constructive dismissal to proceed. However the Claimant's 5 June 2024 document purported to expand significantly the dismissal claim so that even that required significant further clarification which the ET had held was impossible given the Claimant's approach to her claims.

64. The ET struck out the claim accepting that the Claimant suffers from a likely disability based on the limited medical evidence and the ET's interactions with her. The ET assumed it had a duty to make reasonable adjustments and had to apply the guidance in the Equal Treatment Bench Book. The ET said there was no reasonable adjustment which could address the difficulties that it had identified. It was required to act in the interests of justice and take account of the position of both parties to the case.

65. The ET therefore concluded that strike-out was a proportionate response under r.37(1)(c). It said in para 92 that, in the alternative, it would also have struck out the claim under r.37(1)(b) because although the Claimant was not deliberately unreasonable in the way she has conducted this case, she had acted unreasonably, even if that was not her intention. It held that the only realistic response to her unreasonable conduct was for her claim to be struck out.

Submissions on the Grounds of Appeal

66. The Claimant argues under Ground 2 that the ET erred in law by striking out the claim without first taking adequate steps to identify the issues using the Claimant's particulars. She says that she was unable to work with the ET draft List of Issues. I spent some considerable time

at the hearing trying to identify what made her unable to engage with it. The Claimant told me that she read it multiple times and could not understand it because she was not a lawyer or even a student of law. The problem was not that it was in pdf format or editable as she earlier suggested. She says the ET could itself have determined which pleaded matters constituted protected disclosures, detriments or other actionable complaints, rather than striking out the proceedings. She accepted before me that she might have mixed up disclosures and detriments in her document as she was not a lawyer and explained that she had other court cases ongoing in 2024.

67. The Respondent submits that the ET was entitled to strike out the claim after more than two years of unsuccessful attempts to identify and define the claims being pursued. It points out that multiple judges assisted the Claimant, adapted procedures and provided extensive guidance, but the Claimant consistently rejected the proposed formulations and failed to engage constructively with the process. The Respondent argues that it is not the ET's role to impose a list of issues against the Claimant's wishes.

68. Ms Quigley submits that where a claimant brings a legal claim, the issues to determine it must reflect the applicable legal principles and use appropriate statutory language. She submits that litigants normally respect and accept a broad legal structure suggested by the ET during discussions about a list of issues and says that it was unreasonable for the Claimant to insist on her claims being decided on her terms, when that did not match the statutes on which she was relying. Ms Quigley says that EJ Ross went too far and stepped into the arena by devising a list of issues for the Claimant, but I note that the Respondent did not object at the time.

69. Under Ground 3 the Claimant says the ET misdirected itself when concluding that the extent of the non-compliance was not particularly relevant. She says any breach was comparatively minor and occurred against a background of substantial compliance with other case management orders. The Claimant said that she had complied with the ET order in the way that she wanted to, rather than in the way that she had been ordered. The Respondent contends that the breach was not technical or isolated; it went to the heart of the litigation because it prevented identification of the claims and obstructed preparation for a fair trial.

70. Under Ground 5 the Claimant argues that the ET's conclusion that a fair trial was no longer possible was legally flawed because alternative case-management options remained available. She proposes that the ET either accepted her approach or listed multiple final hearings – each

to identify and then determine each head of claim discretely. The Respondent submits that the alternative approach was impractical and disproportionate and that the ET reached a permissible decision. No other option could result in a fair trial.

71. Under Ground 8 the Claimant says that the ET failed to make reasonable adjustments for her as a disabled Claimant such as additional time, assistance from a support person and greater flexibility in procedure. She says the ET wrongly focused on an intermediary. I asked the Claimant a number of times to identify the adjustment that she needed or applied for that was not made as it appeared from the orders and judgment that the ET had gone out of its way to make adjustments. The Claimant was not able to tell me what adjustment should have been made (and would have made some difference) that was not made. She mentioned wanting someone legally qualified to represent her but that was not an adjustment open to the ET. The Respondent argues that the ET made reasonable adjustments including extended periods for compliance, written communications, remote hearings, shorter hearings, breaks, use of a McKenzie Friend, Word-format documents, further written submissions and consideration of an intermediary.

72. On Ground 9, the Claimant says the 'second' claim and amendments lodged in December 2022 were not fully addressed in the proceedings. She accepts it was an amendment which still needed permission. The Respondent submits that the ET correctly treated the alleged "second claim" as an amendment application and needed to identify the existing claims before considering the amendment application.

Analysis and Discussion

73. The ET applied the legal principles on strike-out correctly and reached a permissible decision to strike out the claims. It applied the two-stage test. It found first that there were grounds for strike-out and second that it was just and proportionate to strike out as there was no prospect of a fair hearing and no lesser steps were sufficient. The ET had given the Claimant multiple opportunities to engage and had given her fair warning that she had to cooperate or face strike-out. The Claimant had shown herself impervious to last chances and so an unless order would have been pointless in these circumstances.

74. The ET conscientiously took into account the procedural history of the Claim and correctly concluded that the Claimant was in breach of EJ Ross's order. It rightly concluded that the Claimant had been given multiple opportunities to further the overriding objective by

clarifying what was in dispute and had failed to do so. It was unreasonable for the Claimant to refuse to cooperate. EJ Ross went beyond the normal role of the ET to assist litigants in person.

75. The ET rightly concluded that previous employment judges had put a huge amount of effort into trying to translate her claims into a usable form and there could be no prospect of a fair trial when the Claimant was not prepared or able to prosecute a complex claim with the legal issues structured according to the statutory tests. The ET was entitled to conclude that the Claimant would not cooperate with any future judge for her claims to be determined in a fair and proportionate way.

76. The ET correctly considered proportionality and whether there was some lesser action which would be a proper alternative to strike out. The ET rightly regarded strike-out as the last resort and took into account all the circumstances including that the Claimant was unwilling to cooperate with the offer of an intermediary, who may have been able to assist with the impediment to proper communication.

77. The ET rightly focussed on whether a fair trial was no longer possible – the factor that goes to the heart of the overriding objective **(Emuemukoro)**. In this case the Claimant had been given extensive judicial assistance and it is arguable that EJ Ross had even stepped into the arena contrary to **McNicol v Balfour Beatty Rail** by devising her own cogent articulation of the Claimant's claims. Despite this, the Claimant still rejected the assistance and refused to proceed on that basis.

78. Although the EAT has directed the ET to 'roll up its sleeves' and 'delve deeply' to try to identify the issues, this must be limited by fairness to both sides and fairness to other litigants in the tribunal system. It is proper and legitimate to assist a litigant in person in this way at a preliminary hearing and potentially at a further preliminary hearing in difficult cases. However, it will rarely be fair to other litigants in the tribunal system to tie up multiple judges in successive multiple preliminary hearings to try to clarify issues that should be readily agreed if both parties were conducting the proceedings reasonably.

79. A list of issues is not necessary in every case. A straightforward case can proceed without a formal list of issues. Even in a complex case the ET could record its articulation of the issues in a case management order and direct the parties to cooperate in preparing the claim

according to those issues. The ET correctly rejected those options in this case. The facts and matters relied upon were not obvious – they did not shout out from the pleadings as in **Mervyn v BW Controls**. It was not for the ET to step into the arena and tell the Claimant what her case was. It would have been unfair to make orders for disclosure or witness statements without the Respondent knowing what case it had to face. An ET cannot proceed to a fair hearing knowing that one or more parties reject the formulation of the issues as proposed in a case management order and will refuse to prepare the claim on that basis. As the ET commented in para 89: "a fair trial requires the respondent to understand the claim, and the case it has to meet. This respondent would not be in a position to do that, even in broad terms, and is faced with allegations spanning several years and a number of departments. It may be feasible for some types of cases to be conducted without a prior agreement of the List of Issues but not, in my view, a case such as this." I agree.

80. It was not an error of law for the ET to strike out without spending yet more time going through the Claimant's particulars as suggested in Ground 2. It was unreasonable and disproportionate to expect the ET to use its limited resources to repeat an exercise that had been tried and had failed and it would have been unfair to the Respondent to step into the arena to compel the Claimant to accept the ET's detailed formulation. The ET was therefore entitled to conclude that it could not identify the claims to be determined and that the Respondent could not know the case it had to meet. I dismiss Ground 2.

81. I also reject Grounds 3 and 5. The ET accepted that the Claimant's breaches were not deliberate or malicious, but she was still frustrating the proper progress of the case. The magnitude of her non-compliance had to be considered in that context. If a fair trial is rendered impossible by a claimant's non-compliance then it is less significant to focus on the magnitude of the non-compliance, because the consequences of the non-compliance are so serious. The ET considered whether or not EJ Ross' order had been breached, considered the circumstances of the breach and then properly considered whether a fair trial was possible and whether it was proportionate to strike out in all the circumstances. Whilst it is correct to say that some litigation can proceed without a formal list of issues, it cannot proceed if the parties and court or tribunal cannot understand or agree what the issues are.

82. The Claimant's suggested alternative approach would not have been fair or proportionate. An ET cannot proceed with effective case management and preparation for trial when the factual and legal questions it will have to decide are entirely obscure. It would strike at the heart of

natural justice and be unworkable to list a series of staged, multiple final hearings – each for the Claimant to identify what the dispute is and then for the ET to determine it. It would not permit proper and fair disclosure and exchange of evidence and would be a disproportionate drain on the resources of the parties and the ET. It would involve unnecessary duplication. There was also no point in determining disability as a preliminary issue as that was not what was blocking the progress of the Claims. The ET reached a permissible decision that was open to it: that there was no way forward to get to a fair trial when the Claimant would not cooperate in accordance with the overriding objective. The Claimant's breach and is severity were properly and permissibly considered in that context.

83. The ET did not fail to make reasonable adjustments for the Claimant as required for fairness. On the contrary it afforded her considerable additional time, written communications, remote hearings, shorter hearings with breaks, she had assistance and even an intermediary was explored. The ET adopted an extended written process to identify the issues at the Claimant's request rather than relying only on oral discussion (which had been tried and not worked). On numerous occasions the ET gave her greater flexibility in terms of procedure and required the Respondent to incur the cost of multiple additional preliminary hearings. The ET even went so far as to devise a coherent potential list of issues out of the Claimant's documents only for that to be rejected as representing her claims. The ET is not permitted to provide a party with legal assistance or representation as that would plainly lack impartiality. The Claimant, in her submissions and medical evidence, put forward no adjustment which would have overcome her inability to engage with the issues so that there could be a fair trial. She told me that her problem with the draft List of Issues as ordered was that she was not a lawyer or a student of law. It was not any aspect or consequence of her disability that caused her inability to engage with the draft. Ground 8 is dismissed.

84. Ground 9 discloses no error of law as her 'second claim' in fact consisted of proposed amendments lodged in December 2022. The Respondent did not need to respond with a ET3 response form because the Claimant had made clear that it was an application to amend. That application did not need to be addressed and determined until the Claimant cooperated with the ET's steps to help her identify the existing claims. Only when the existing claims were known could the ET properly consider whether to permit the Claimant to amend her Claims (applying the test in **Selkent Bus Co Ltd v Moore [1996] ICR 836** and other cases).

85. Standing back and considering the judgment as a whole and all the grounds of appeal, I find no error of law in the decision to strike out the Claims and so the appeal is dismissed.

86. I finish by echoing the words of HHJ Tayler in para 47 of **Smith v Tesco Stores**. Although ETs must be robust in identifying issues and case managing claims in a proportionate way which avoids unnecessary delay and injustice to other tribunal users, this judgment is not a green light for routinely striking out cases that are difficult to manage. Strike-out remains a last resort and not a short cut. In complex claims the ET should normally attempt at a preliminary hearing (and potentially at a second) to identify issues with the parties so that proportionate case management directions can be made. However, the ET should not expend disproportionate time in multiple long preliminary hearings trying to persuade a party to agree the issues or identify their claims. That is not fair to other parties or other litigants in the ET. A party must cooperate and abide by the overriding objective and the ET's orders in agreeing the issues (or agreeing to abide by the ET's preliminary determination of what the issues are). If, after a reasonable opportunity, a party fails or refuses to cooperate, that may be an indicator (in an appropriate case) that it will not be possible to achieve a fair hearing when those issues have to be finally decided. In such circumstances, strike-out may be the last resort.