Case Number: 3306088/2023

EMPLOYMENT TRIBUNALS

Claimant: Q.R.

Respondent: The G.I. Group Limited

Heard at: Watford Tribunal **On:** 11 May 2026
in chambers 12 May 2026

Before: Employment Judge Cowen

REPRESENTATION:

Claimant: Mr Kohanzad (counsel)
Respondent: Ms Musgrave- Cohen (counsel)

RESERVED JUDGMENT

1 The Claimant must pay the Respondent £8,000 in costs
2 The Respondent's applications to strike out are dismissed
3 A video listing hearing for 1 hour will be held to list a final hearing.

REASONS

The Tribunal recognises and apologises for the significant delay in providing this judgment. The Tribunal is experiencing unprecedented levels of workload and this is having a significant impact on capacity to complete reserved judgments. Any inconvenience to the parties is deeply regretted.

Costs application

Background

1. This case returned to the Tribunal, having been considered by the Employment Appeal Tribunal. The Tribunal had made a costs order of £10,100 against the

Claimant. This was appealed. The EAT in their summary said;
"Costs: on the facts, the employment judge's conclusion that the procedural applications stood no reasonable prospect of success was centrally relevant to whether the claimant acted unreasonably for the purpose of rule 76(1)(a) of the Tribunal Rules 2013. The employment judge was entitled to make a costs order under that rule owing to the unreasonable conduct of the claimant or her representative, and there was no sufficient cause for concern that the claimant's representative was not acting on her behalf. However, the employment tribunal erred in its decision as to the amount of costs because (i) in applying rule 84, it did not focus on the claimant's ability to pay but instead looked at the joint income of the claimant and her husband; and (ii) the tribunal did not give adequate reasons for the decision to award £10,100 in costs."

2. The Tribunal noted that the Claimant's first four grounds of appeal in relation to the costs order were dismissed. The only parts of the costs order which were returned by the EAT to the Tribunal were as a result of grounds 5 and 6. The EAT found that the Tribunal had erred in not taking into account how much of the Claimant's husband's income was attributable to her, when considering how much the award of costs should be and not explaining the calculation of the amount awarded in any detail.

3. The EAT found that (paragraph 60) it was not in dispute that the Tribunal under rule 84 had a discretion to have regard to the Claimant's ability to pay and did so in their Judgment with regard to the costs order and that the Tribunal may have regard to the resources of a third party. However it was made clear that this should only be taken into account to the extent to which it affects the paying party's ability to pay. The EAT's view was that the Tribunal had not set out how the Claimant's husband's disposable income impacted on the Claimant's ability to pay.

4. Similarly in paragraph 68, the EAT said that it was not clear why that figure had been reached – whether it was a proportion of the whole based on the time taken, the amount of time spent dealing with the applications and whether it took into account the means of the Claimant and her husband.

5. The award of costs of £10,100 was overturned (paragraph 71) and the EAT set out its reasons for returning to the case to the same Tribunal as "I have only allowed the appeal on two points and have upheld the other aspects of the costs judgment under challenge. I accept the real human risk that any employment judge may want to reach the same conclusion on remission, but I consider this is not sufficient to outweigh the presumption that the EJ will deal with the matter professionally and fairly in light of the guidance in this judgment. Finally, there is another important consideration: in the absence of a written judgment on the reasons for the refusal of the applications made by the EJ, it is unlikely that another employment judge will understand the background, context and reasons that led to the EJ dismissing the applications in the first place. That, too, is a

further reason for remittal to the same EJ."

Submissions by the Claimant on costs

6. Mr Kohanzad on behalf of the Claimant submitted, in addition to his written submission, that the whole of the decision on costs had been overturned. He suggested that it was not true to say that because you succeeded at the EAT on one or two grounds, it was only those aspects which needed to be revisited.

7. Mr Kohanzad also submitted that the Claimant's representative at the time was a struck off solicitor. He suggested that the Claimant merely followed what she was told by her representative and that it was relevant to this hearing that a wasted costs order would have been more appropriate. Mr Kohanzad went on to submit that to say that the Claimant can take action against her representative for negligence is unrealistic and should be relevant and should therefore stop the Tribunal from making the order.

8. Mr Kohanzad submitted a witness statement on behalf of the Claimant. He said initially that she was not willing to either take the oath to enter the statement as evidence, nor to be cross examined, as she was not fit to do so and had medical evidence in support. He said this was due to her current mental health status. He later changed this to offer that the Claimant be sworn to confirm her witness statement, but remained of the position that she was too ill to be cross examined.

9. The medical evidence provided included a letter from the Claimant's GP dated 10 March 2026 which said that she was experiencing "an acute mental health crisis relapse". The GP indicated that "in my opinion, she is not medically fit to participate safely in a hearing on 18 March 2026 as participation would pose a significant risk of escalating her mental health crisis. A postponement and review of litigation fitness once her relapse has stabilised would be recommended". However, Mr Kohanzad represented the Claimant throughout the hearing, with the Claimant watching proceedings all the way along. He did not request a postponement and did not pursue the Claimant's application for a stay of proceedings.

10. It was submitted that the Claimant's financial circumstances had altered since the first hearing as she and her husband had separated and that this was important in distinguishing the husband's available money to the Claimant. Mr Kohanzad invited the Tribunal to find that the Claimant was impecunious and that no costs award should be made. Alternatively he suggested that £1,000-2,000 would compensate the Respondent, and would send a signal to a party, but was not improper. He also said that the lower the award the more likely the Claimant was to pay. He responded to my question about whether the award should reflect the costs incurred by the Respondent, to say that the award did not have to correlate with the conduct. He also acknowledged that the Tribunal was not obliged to take into account the Claimant's means.

The Respondent's submissions on costs

11. The Respondent's submissions, in addition to their skeleton argument, set out that the remit of the Tribunal was set down by the decision of the EAT, who did not criticise the Tribunal's application of discretion.

12. The Respondent submitted that at the first hearing the Claimant's evidence had been that she was wholly financially dependent on her husband since her termination of employment. The Respondent also relied on evidence to show that the Claimant had some savings in a separate account, which has not been disclosed and that she has had some employment. The Respondent highlighted that the Claimant has still not disclosed those additional accounts. They also pointed out that the Claimant had continued to contribute to the mortgage and credit cards, but had shown no accounts for these. They did so in order to support the submission that the Claimant was not impoverished as she claimed, and had not been forthright in disclosure of her finances, either at the first hearing, or since.

13. Ms Musgrave- Cohen submitted that noting had changed since the first hearing about the Claimant's husband's finances. No additional disclosure had been made. She reminded the Tribunal that his evidence at the first hearing was that he had £200-250 disposable income per month and that he would take on the responsibility for the Claimant.

14. Ms Musgrave – Cohen also noted in her submissions that although the Claimant's evidence submits that the Claimant and her husband parted in September 2025, he was present with her at the EAT. She also referred to the fact that both the Claimant and her husband still live in the property (it is noted that the Claimant's husband spoke of owning another property at the first hearing). They also pointed out that some 8 months after the statement was made, there is no evidence of any steps to take divorce proceedings. Ms Musgrave- Cohen used this as the basis for her submission that the Respondent did not accept that the Claimant and her husband had in fact separated.

15. The Respondent also referred to a number of authorities which indicate that a third party's resources can be taken into account, including OMOOBA and ABAYA. The Respondent asked the Tribunal to set out in detail why the husband's resources should be taken into account and how that affects the Claimant's ability to pay a costs award.

16. With regard to the amount, the Respondent set out that the Claimant was first aware of the Respondent's costs in March/April 2024 and was told on 12 April 2024 that it was approximately £20,000. This was prior to the schedule being serviced on 8 May 2024.

17. The Respondent referred to correspondence in which the Claimant was told that it was a nonsense to assert that unsigned witness statements do not amount to valid evidence. The Respondent asserted that the Claimant's failure to listen to their fair warnings increased the time and correspondence which was required. Ms Musgrave- Cohen submitted that it was this unreasonable conduct which caused the award of costs to be made.

18. She completed her submissions with a plea that the Claimant has failed to pay the award, despite it having been made over 2 years ago. The Respondent also indicated that they consider that the award should be made taking account of the facts as they were then and not now. The Respondent's submission was that a token figure risks making a further error and that both the Claimant and her husband's incomes remain relevant.

The Law

19. Rule 74 Employment Tribunal Rules 2024;

> **"74.**—(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.
>
> (2) The Tribunal must consider making a costs order or a preparation time order where it considers that—
>
> (a)a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings, or part of it, or the way that the proceedings, or part of it, have been conducted,
>
> (b)any claim, response or reply had no reasonable prospect of success, or
>
> (c)a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins."

20. Rule 82 Employment Tribunal Rules 2024;

" In deciding whether to make a costs order, preparation time order, or wasted costs order, and if so the amount of any such order, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

21. The purpose of costs is to compensate and not to punish; Lodwick v Southwark London Borough Council [2004]ICR 884, CA. The amount of costs should reflect those which are reasonably and necessarily incurred.

22. The Tribunal may take into account the party's ability to pay but that needs to be balanced against the need to compensate the other party who has unreasonably been put to expense Howman v Queen Elizabeth Hospital Kings

Lynn EAT 0509/12. The amount awarded should be proportionate and reasonable.

23. The Tribunal is allowed to take into account the resources of the paying party, this may include the resources of a third party, when considering the Claimant's ability to pay; Omooba v Michael Garrett Associates [2024] IRLR 30. In Abaya v Leeds Teaching Hospital NHS Trust UKEAT/0258/16,, " A person who is a party to an Employment Tribunal case may have ready access to funds from a third party source, whether by way of loan or by other means. In appropriate cases, an enquiry may have to be undertaken about what those means are. However, as Mr Crozier submits - correctly, in my judgment - the ultimate purpose of such an enquiry is to determine what the party's ability to pay is and what impact therefore the third party's position may have on his or her ability to pay, if any." The purpose of the enquiry was to determine what impact such third party resources had on the paying party's ability to pay, as that is the test in the Tribunal rules.

Decision

24. In light of the passages of the decision of the EAT which are referred to above, the Tribunal was satisfied that the EAT were asking the Tribunal to consider afresh, the Claimant's ability to pay a costs award (taking into account her husband's financial impact on her) and to provide details of the reasons for the amount awarded. The Tribunal accepted that this may, if appropriate, include a reconsideration of the amount awarded.

25. The Tribunal noted, as set out in the submissions of the Respondent, that had the Claimant been uncertain about the extent of the issues to be considered, it was open to them to ask the EAT for a fuller explanation, but they did not do so.

26. The Tribunal did not accept the Claimant's submission that the whole issue of whether to allow an application for costs had been returned to the Tribunal by the EAT. It was clear from the EAT decision that they accepted that the Tribunal had correctly applied its discretion to make an award. The issue was only one of considering the Claimant's resources in the discretionary decision of her ability to pay.

27. Furthermore, the Tribunal did not accept the Claimant's submission that the actions of her representative should not give rise to costs, as she may not be able to obtain recourse against him in another jurisdiction. The submission that the Claimant would have to succeed on both negligence and causation cannot be permitted to interfere in the Tribunal's application of its rules. In any event, there are no other reasons why the Claimant has been made to pay costs, other than the inappropriate applications which were made by her representative.

28. The Tribunal was therefore satisfied that firstly. the EAT had not overturned the discretion appropriately applied by the Tribunal previously and secondly, there remained sufficient evidence and the interests of justice support the making of a

costs order in this case

29. The Tribunal considered the Claimant's witness statement; it was not able to give full weight to the Claimant's witness statement as it was not confirmed under oath/affirmation and not subject to cross examination. That is not to say that the Tribunal did not take some account of the contents of it, as the Claimant's assertions. However, it was untested. The Claimant's medical evidence said that she was unwell, such that the hearing ought to be postponed, but neither the Claimant, nor Mr Kohanzad thought that the appropriate application to make. It seems that their position on 11 May 2026 was not as difficult as it had been in March 2026. The medical evidence did not provide any reason why the GP had reached the conclusion that the Claimant was not fit to give evidence, nor any explanation of what the effect of cross examination would be on the Claimant. Nor did he suggest any steps which might have ameliorated any difficulty for the Claimant, but still ensure that her evidence could be tested by the Respondent and Tribunal. It was therefore unclear what the basis for his conclusion was and was not therefore considered to be reliable, hence the conclusion that the weight of the statement must be reduced.

30. In respect of the Claimant's ability to pay - At the hearing on 8- 10 May 2024, the Claimant gave evidence in relation to her means. She said she was looking for work via a number of recruitment agencies which she had registered with and said she applied every day for work. When asked about what money she had, she said that she had used up her savings and was running out of money and that she was using her husband's income. She also admitted that she had a savings account. She said that there was a mortgage which she could not contribute to at that point. She also told the Tribunal that her husband paid for a car lease and that he had another property which was outside London. When she was asked questions about this and whether it was rented out, she replied that her husband should be asked about it.

31. The Claimant's husband was sitting in court and was asked by the Claimant to give evidence, which he did under oath. He gave details about his work and his income and outgoings. He told the Tribunal that he made a small transfer to the Claimant of £45 or £130 out of his net income each month. When asked what would happen if the Claimant could not contribute to the mortgage he said they may have to sell their property in Finchley which was a 3 bed house with a £200,000 mortgage. The Claimant's husband confirmed his salary as £75,000 per annum, with bonuses based on profit. He said that the property in Norfolk was 12 months away from completing refurbishment and he was paying those costs. He told the Tribunal he had £250-300 of disposable income left each month.

32. All of this evidence was therefore available to the Tribunal on the last occasion and it was taken into account when considering what means the Claimant had, as the Tribunal considered that the Claimant's ability to pay was reliant on her dependence on her husband. The Tribunal took it into account once

again at this hearing.

33. The Tribunal were also shown an up to date witness statement from the Claimant, who indicated ultimately that she was prepared to swear to this statement (the Tribunal said it would accept it as though it were sworn, in order to avoid the Claimant being placed under any stress to do so in Tribunal). The weight attributed to the statement was therefore less than it would have been if she had been tested on this statement, in the usual way.

34. The claimant's witness statement indicated that she was currently in receipt of benefits, that she volunteered in a limited capacity for a local charity and that she continued to look for work, despite the fact that she said that the DWP did not currently require her to work.

35. She indicated that her "separated spouse has therefore taken responsibility for the mortgage, in part to protect his significantly greater financial interest in the property". However, she did not expand on this to explain how much she believed she was entitled to from the equity in the property, or why that division would arise.

36. The Claimant also said that she did "not have reliable access to my separated spouse's income to satisfy a costs order". She did refer to there being a divorce, but no evidence was provided of any court proceedings. In any event, the Tribunal can take judicial notice of the fact that the starting point in any divorce settlement would provide the Claimant with an entitlement to claim a portion of her husband's assets, income and pension, as a dependent spouse.

37. Given this additional information, the Tribunal appreciated that the Claimant's domestic circumstances had altered since the last hearing. However, the Tribunal did not consider that her financial position had significantly altered. The Claimant may now be in receipt of benefits, which she did not have in 2024. However, she remained reliant on her husband to pay a number of her outgoings, including the whole of the mortgage payment for the property in which the Claimant lives. Her witness statement was silent as to the amount that she received from him each month, but did not say that he has stopped paying her entirely. It said on that she did not have " reliable access" to his income.

38. The Tribunal found on balance, that the Claimant continued to obtain a significant financial support from her husband, ensuring that she can use her benefits to pay for her own personal items and food. His contribution also ensured that their property will provide both parties equity when/if it is sold in any divorce proceedings. The Claimant's husband's financial support of the Claimant is therefore ongoing and highly relevant to her ability to pay a costs award. My previous finding that the Claimant's husband had disposable income which he could afford to provide to the Claimant to assist her to pay a costs order, as he does with other expenses, remains relevant. To put it clearly and bluntly, the

Tribunal considered that the Claimant's husband continues to financially support the Claimant, allowing the Claimant to therefore have funds, or access to funds in order to pay a costs order.

39. The Tribunal considered rule 74(2) to take into account the Claimant's ability to pay, whilst noting that costs are the exception rather than the rule and that they are compensatory not punitive. Taking all the circumstances into account the Tribunal remained of the view, as outlined on the last occasion, that the actions of the Claimant's representative and therefore of the Claimant, were such that they warranted the exercise of discretion in making an award. Conduct such as was displayed in pursuing these applications must be marked by the Tribunal as highly inappropriate and a waste of Tribunal resources and the Respondent's time and costs.

40. The Tribunal considered how much the costs order should be. Once again the Tribunal took into account the fact that the award is to compensate the Respondent for their costs associated with dealing with the Claimant's unreasonable conduct. The Respondent's schedule of costs was considered in accordance with Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA that these should be limited to those " reasonably and necessarily incurred". The Tribunal balanced the Claimant's ability to pay against the need for the Respondent to be compensated for having been put to unreasonable expense.

41. The Tribunal noted the correspondence in April 2024 outlining the application for costs and additional costs being added to the Respondent's Schedule of costs, taking the total to £22,000 plus VAT. It was also noted that the Respondent's schedule comprised £11,500 for counsel (ex VAT) and £10,500 for the solicitors.

42. The Tribunal took into account the Claimant's ability to pay and concluded, as set out above, that although the Claimant is now receiving benefits (£221 per week) and not contributing to the mortgage, she is paying some bills and has accumulated debts in this litigation. The Tribunal took into account the fact that she has indicated that she may be divorcing her husband and that she may receive some element of his assets, income and pension. In the meantime she benefits from his income to pay her living expenses and some other money which is gifted to her, but is not specified. The Tribunal noted from Shields Automotive Ltd v Grig EATS 0024/10 that they may take into account capital and assets as well as income and hence they have done so here.

43. The Tribunal also noted a number of authorities including Vaughan v London Borough of Lewisham 2013 IRLR 713, EAT which stated that the Tribunal is not limited by the Claimant's ability to pay, as her financial situation may change. The Tribunal considered that the indication by the Claimant that she intends to divorce could lead to a change in her financial position. This is also reflected in the Presidential Guidance on General Case Management for England which says that

the Tribunal order can be made “even where a person has no means of payment”. The Tribunal considered that this reflects the fact that the impetus for a costs award is to compensate and not to punish. In essence, it is about ensuring that the additional expense which the Respondent has had to endure is compensated, at least to some extent.

44. The Tribunal also took into account Chadburn v Doncaster and Bassetlaw Hospital NHS Foundation Trust EAT 0259/14 which held that the Tribunal award of £10,000 on reconsideration was appropriate, even where the Claimant had shown that her debts were over £4,000. The Tribunal was entitled to find that her financial situation would improve. As affordability was not the only criterion to exercise discretion, it could not be said that the Tribunal had failed to take account of a material consideration.

45. In this case the Tribunal considered that almost half of the time at the Tribunal hearing was spent on the unsuccessful and unreasonable applications, and therefore the costs award should reflect that proportion of the costs schedule. However, it was also clear that some of the correspondence prior to the hearing related to the Respondent’s warning that the Breach of Contract claim would not succeed. The Tribunal therefore concluded that a proportion of the schedule of £22,000 was an appropriate award. Taking into account the fact that the unreasonable conduct of the applications took up half the time, but that costs of £20,000 were said to have arisen in relation to the initial issue for the hearing, the Tribunal has considered that the proportionate costs award relating to the time spent by the solicitors and counsel in addressing these issues was £8,000. A breakdown of costs was not available to the Tribunal at this hearing. The Tribunal concluded that this figure is a reflection of the time and money spent by the Respondent, not just during the hearing but also in the correspondence prior to the hearing, which was shown to the Tribunal.

The Strike Out applications

46. Respondent’s application for Strike out
The Respondent made an application for strike out on two different basis;
rule 38(1)(d)- that the claim is not being actively pursued, and
rule 38(1)(e) – that a fair hearing is no longer possible.

Respondent’s submission on strike out

47. The Respondent submitted that the claim was brought on 8 June 2023 and contains complaints dating back to 2011, although there is still no definitive list of issues. In their letter dated 24 February 2026 the Respondent set out that the Claimant had repeatedly delayed the proceedings by applying for postponements of hearings and directions. A helpful chronology was attached to this letter.

48. Ms Musgrave- Cohen submitted that the Claimant was able to correspond with the Tribunal repeatedly, but did not do so in order to further her claim, by e.g. clarifying issues or other substantive points. Rather, she only corresponded in order to press her health issue, anonymity request and incapacity to make submissions. They pointed out that the Claimant has been able to engage with the Employment Appeal Tribunal, the NHS and the ICO and therefore her inability to engage appears to only apply to addressing her claims in the Tribunal. The Respondent has chased the Claimant on multiple occasions and only provided her witness statement shortly before the hearing. The Claimant has not effectively carried out any work to further the fleshing out of the allegations, than has been done by the Tribunal.

49. The Respondent also highlighted that the Claimant was given notice of their application to strike out on the time bar point in September 2025 and it took her until shortly before this hearing to make representations about it, despite knowing that she had the right to reply immediately. The Respondent presented this as a further example of the Claimant's reluctance to engage with the substantive issues of the case.

50. Ms Musgrave- Cohen submitted that the actions of the Claimant and her failure to progress the claim placed the Respondent at a disadvantage, as the list of issues is not yet finalised and the Respondent therefore cannot be sure of the case it must meet. The Respondent criticised the Claimant as not engaging on the substance of the claim, which is required in order for the parties to have a fair hearing. She reminded the Tribunal that this is case which will turn on the oral evidence of the parties, as the issues which have been identified do not turn on documentation. The fading recollection of witnesses is therefore a crucial issue. She also pointed out that the fact that the Claimant is not well enough to face cross examination places the Respondent at a disadvantage if the case goes ahead, without the opportunity to challenge her evidence. She referred to the fact that it cannot be appropriate or fair to conduct a final hearing without the opportunity to challenge the Claimant's evidence in some way.

51. Mr Musgrave- Cohen highlighted that whilst the Claimant has ill health, the Respondent's too have disability in the family, which means that attendance at hearings has to be planned and causes difficulty. The repeated nature of this is awkward for the Respondent.

52. Ms Musgrave- Cohen reminded the Tribunal that the reality of the claim not being heard at this point is that it will inevitably be pushed into at least 2027 due to the Tribunal backlogs. She said that the case was due to be heard in December 2025, that disclosure and witness statements were complete, save for limited issues which can be quickly resolved. She said that to wait until 2027 to see how the Claimant's health is, is not a reasonable position to take. She also highlighted that the Claimant relied on the fact that it was the

litigation which was making her ill. In which case, the Respondent asserted the Claimant will never be well enough to address the claim. She pointed out that if it is heard in 2027, that will be 16 years after the first complaint. She concluded by saying that there was no medical evidence to support a hearing within a reasonable time frame.

53. The Respondent criticised the Claimant for suggesting that she has actively progressed the claim, when there have been five preliminary hearings and the parties do not have a final list of issues.

54. The Respondent defended the allegation by the Claimant that the Respondent has made costs threats, applications, opposed anonymity and safeguarding. They said that they have never tried to harm the Claimant and are not aware of a safeguarding issue. They opposed anonymity as they were entitled to do.

55. Ms Musgrave-Cohen concluded by saying that either way, the conclusion of the Tribunal is that a fair hearing is not now possible within a reasonable period. She pointed out that Boateng says this may be a position where strike out can occur, even though there is not fault attributable to either party.

56. The Respondent made an alternative application that the claims were out of time and that there is no continuing act/ not reasonable to extend time on a just and equitable basis.The Respondent relies on the fact that many of the allegations now before the Tribunal were not contained in the Claimant's internal grievance.

57. The Respondent asserts that claims (i) to (xxxiii) are out of time. Complaint number (xxxiii) dated 6 December 2022 ought to have been brought by 22 April 2023 but was not issued until 8 June 2023. The majority of matters now complained about do not form part of the victimisation claim and were not in the grievance (specifically complaints (i)- (xxii), (xxv), (xxviii) and (xxix)".

58. Item (xxiii) is not part of a course of conduct with anything in time.

59. Items (xxvi), (xxx) and (xxxi) were in the grievance but not linked to indirect sex discrimination, direct sex or race discrimination or harassment, so there can be no course of conduct.

60. Items (xxxii) and (xxxiii) postdate the grievance.They do not form part of a course of conduct.

61. The Respondent also asserted that they did not form part of the reason for constructive dismissal and were not mentioned then. They asserted these should be struck out as out of time.

Claimant's submissions on strike out

62. The Claimant's submission in response to these applications suggested that the Claimant's disability was being used against her.

63. Mr Kohanzad accepted that some months previously the Claimant had not been actively pursuing her claim, but that she was now doing so. He suggested that the rules are really there to apply to a Claimant who does not respond or attend the Tribunal. He asserted that the Claimant had attended all the hearings and responded to all orders.

64. Mr Kohanzad pointed out that it was the Claimant who had prompted the original preliminary hearing and had then prompted an appeal and a costs hearing. He asserted these were the main reasons for delay, whereas the Claimant's health had not been the main cause. He accepted that the anonymity applications had also caused some delay, but said none of them should lead to strike out. He concluded by saying that disclosure has occurred and the witness statement should have been done by now.

65. In response to the issue of whether a fair hearing remains possible - Mr Kohanzad said that memories fade in all cases and that there needs to be more than delay to warrant this type of application. He referred to Leeks v UCH NHS Foundation Trust [2024] EAT 134 and said that this case does not meet the criteria set out there. He urged the Tribunal to apply 'intense scrutiny' to the application.

66. Mr Kohanzad said that the height of the Respondent's application is that memories will fade. He said that the Respondent had failed to give specific examples and what was said and to indicate whether it can be covered by documents and whether other witnesses can cover for those who might be missing.

67. Mr Kohanzad then submitted that the Claimant would resile from her requests for reasonable adjustments to be made, if her case was going to be struck out. He said she would prefer not to be struck out than not to be cross examined.

68. The Claimant asserted that the delays were no-one's fault. He asked the Tribunal to make the orders and put the matter to trial, saying that the Claimant would have to comply, but urged that it was not proportionate to strike out.

69. In respect of the application to strike out due to the claims being out of time – Mr Kohanzad reminded the Tribunal that this was not an application on time bar – it was an application that the Claimant did not have a reasonable prospect of time being extended on just and equitable grounds. He suggested that matters of time bar are usually dealt with at a final hearing and this case

should be no different.

70. Mr Kohanzad referred to E v X,L and Z UKEAT/0079/20 and said that this claim was no where near showing no reasonable prospect of proving a course of conduct. He said it is a matter which should be put off to the final hearing. He urged the Tribunal that this was not the time to look into the grievance or the resignation, those were matters for evidence at the final hearing.

71. Mr Kohanzad reminded the Tribunal that in constructive dismissal the Tribunal is not looking for a band of reasonable responses, but in having to establish the facts of the resignation. He noted that the Respondent had been on notice of the claim for a long time.

The Law

72. Rule 38 Employment Tribunal Rules 2024;
"**38.**—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

(a)…..;
(b)…….
(c)……..
(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, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

73. The Tribunal also has a duty when considering such an application to apply the overriding objective and (rule 3, 2024 Rules) including;
    a. Ensuring the parties are on an equal footing, and
    b. Avoiding delay, so far as compatible with proper consideration of the issues,

74. The case of Boatang v Moss Bross Group Limited [2026] EAT 50 sets out that although it is highly fact sensitive, the Article 6 right to a fair hearing, is a hearing within a reasonable time and under conditions where a party is not at a substantial disadvantage. Where that is no longer possible, even if not the fault of either party, it is possible for the Tribunal to strike out the claim.

75. The Tribunal must show a basis for its conclusion that the passage of time has led to serious prejudice ; Daly v Northumberland Tyne and Wear NHS Foundation Trust UKEAT/0109/16.

76. In a case where the Claimant is presently unable to participate, due to illhealth, it may be proper to strike out where the Tribunal concludes there is no sufficient prospect of them being well enough to participate within a reasonable time; Peixoto v BT plc [2008] UKEAT/0222/07.

77. Riley v Crown Prosecution Service 2013 IRLR 966, CA, the EAT upheld the Tribunal decision to strike out the discrimination and whistleblowing claim, where the Claimant suffered from depression, finding that a fair hearing was no longer possible. The Tribunal had taken into account that there was no prognosis of when the Claimant would be fit to participate and the balance of prejudice for each party. The Court of Appeal said it would be wrong to put a trial date into the Tribunal's diary when there was a probability that the Claimant would not be fit to attend. It was said that where there is no realistic prognosis of sufficient improvement within a reasonable time and the case deals with matters which are already in the distant past, then strike out is an option.

78. Due to the draconian nature of strike out – it should be avoided if there are ways in which the Tribunal can address the problem without strike out, see Weir Valve v Armitage 2004

Decision

79. In relation to the failure to actively pursue, I note that the parties have disclosed documents and prepared a bundle, witness statements have been exchanged or are close to doing so. There has therefore been some progress in the claim, albeit that there remains no agreement on the list of issues.

80. The Tribunal accepts that the Claimant has complied with some, if not all of its orders, albeit in the Claimant's own time. It is correct that most of the Claimant's correspondent with the Tribunal has included reference to wanting to postpone hearings or stay the proceedings completely. It is difficult to balance this against the fact that it is said that it is the litigation itself which is exacerbating the Claimant's mental health condition. It is also noted that there does not appear to be consistency in the Claimant's ability to pursue her appeal and complaints with other agencies, but not with the Tribunal claim.

81. The Respondent too has changed some of the dates for exchange etc, but has complied ultimately. The parties are therefore both similarly placed to proceed.

82. The Tribunal has considered the history of action in the claim and can see that whilst the Claimant has not pursued the claim at an appropriate pace, it has

nevertheless progressed a little by way of the breach of contract claim having been dismissed and case management orders complied with.

83. The Tribunal therefore concluded that it would not be proportionate or appropriate to strike out the case on the basis that it has not been actively pursued. The Tribunal was of the view that there are other steps that can be taken to ensure that the Claimant complies with the progress of the case. Steps such as costs awards, as outlined above, are part of the armoury of the Tribunal to ensure that parties engage, comply and co-operate with the process.

84. With regard to the application to strike out on the basis that a fair hearing is no longer possible, the Tribunal considered the fact that the claim was issued in 2023 and no date for a final hearing is currently in place. The allegations appear to date back as far as 2011 (subject to arguments about time limits).

85. The Tribunal also noted that many of the allegations depend on the oral evidence of the witnesses as there is no relevant documentary evidence to assist. This means that the passage of time will erode the memories of all the witnesses. Although it is noted that both parties said that witness statements have been drafted.

86. The Tribunal is very aware of the fact that the ongoing litigation is a source of the Claimant's illness. It is also a source of difficulty for the Respondent, who has family issues to take care of, which makes repeated appearances at the Tribunal difficult for them.

87. The Tribunal considered that the central issue to this application was the fact that the Claimant cannot provide a time when she is going to be fit to attend and to be cross examined. She is adamant that she is not fit to be subject to cross examination at the moment, but does not provide any medical evidence which suggests that there is a reasonable timeframe in which she may be able to engage with the process in this way.

88. It is the Tribunal's view that it is fundamental to a fair and just hearing that the Claimant must be subject to challenge of her evidence. The Tribunal is obliged to give effect to the overriding objective which includes ensuring the parties are on an equal footing and avoiding delay, so far as compatible with the proper consideration of the issues. In order to ensure that the objective is met, the Claimant must be open to cross examination of her evidence. Without that, the Tribunal cannot be said to ensure fairness, nor to deal with the case which is proportionate to the complexity.

89. The Tribunal is at pains to try to ensure that the case can be brought to a final hearing and that both parties are given an equal opportunity to place their evidence before the Tribunal. If it proves to be impossible for the Claimant to participate then either then the only fair way to conclude the claims are to hear

them without the input of the Claimant, in much the same way as the Claimant's evidence in relation to the costs issue was dealt with above.

90. The Tribunal is therefore not inclined to strike out the claims, but to ensure that the claims reach final hearing as soon as possible. The Claimant strangely submitted that she would rather give evidence than be struck out, as though she has a choice. This is her claim, she instigated it. If she wishes to bring it to a conclusion, she must now come to a final hearing and put forward her side, in order that a Tribunal can make an informed decision. If she is not able to do so, then the interests of justice should allow the hearing to proceed in her absence (or absence of her cross examination and reduced weight (if any) on her witness statement).

91. To be clear, whilst the Tribunal will not make an order to strike out now, if the Claimant cannot attend a final hearing and give evidence, or have medical evidence to prove that she will be fit to engage with giving her evidence within a reasonable period of time. The hearing will have to proceed without her.

92. A date for a video, listing hearing for 1 hour will be sent with this Judgment.

Approved by
Employment Judge Cowen

24 August 2026

SENT TO THE PARTIES
25 August 2026

FOR THE TRIBUNAL