Neutral Citation Number: [2026] EAT 165

Case No: EA-2021-000922-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 October 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

- -

Between:

MR E UKWU

Appellant

- and -

TRITAX MANAGEMENT LLP AND OTHERS

Respondents

- -
- -

The **Appellant** in person
Mr T. Welch, of Counsel (instructed by **Kennedys Law LLP**) for the **Respondents**

Hearing date: 27 October 2026

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JUDGMENT

SUMMARY

Practice and procedure; strike out

The Tribunal struck out the appellant's complaints of direct race discrimination and harassment related to race because of his failure to comply with a case management order and, in the alternative, on the basis that the complaints and no prospect of success. The case management order was made following the appellant's stated intention to rely at trial upon approximately 20 hours of recordings without explaining the relevance of them to his case. The order required the appellant to identify the sections of the recordings that were relied upon and to explain to which of his complaints the identified sections related. The appellant responded by stating that all of the recordings were relevant to all of his claims. The Tribunal concluded that such a response was a failure to comply with the order, and was vexatious and unreasonable such that strike out was the only appropriate response. In the alternative, it concluded that it was inevitable that the appellant would fail to prove his assertions about the respondent's motives for subjecting him to detriments and that, in consequence, his claims of race discrimination and harassment had no prospect of success.

Held: The Tribunal had erred:

(1) Even where there has been a breach of a case management order, it is still important for the Tribunal to consider what alternative steps, short of strike-out, might reasonably be taken, having regard to the particular default of the party concerned (**Bailey v. Aviva Employment Services Limited** [2025] EAT 109). The Tribunal was entitled to to reject the appellant's submission that all of the recorded material was relevant to his claims, and was also, therefore, entitled to accept the submission that his refusal to specify the matters referred to in the case management order was both vexatious and unreasonable. The Tribunal did not, however, consider an obvious alternative to strike-out. In exercising its general case management powers, it could simply have refused to allow the recordings to be admitted into evidence at the trial. Excluding the recordings would have addressed any concerns about the fairness of the trial process following the appellant's default, but that option was not considered.

(2) On the issue of prospects, proof of motive was not a necessary element of the race discrimination and harassment complaints.

THE HON. LORD FAIRLEY, PRESIDENT

Introduction

1. This is an appeal against a Judgment dated 27 May 2021 in which the appellant's claims of direct race discrimination and harassment related to race were struck out.

Procedural history

2. The appellant presented a claim form (ET1) on 27 April 2019 in which he made complaints against 14 respondents under the **Employment Rights Act, 1996** ("**ERA**") of whistleblowing detriment, and under the **Equality Act, 2010** ("**EqA**") of race discrimination and harassment related to race. He also made a complaint against the first respondent of automatically unfair dismissal contrary to section 103A **ERA** (dismissal for the principal reason of whistleblowing).

3. Following a Preliminary Hearing on 12 May 2021, the claims against the 11th and 14th respondents were dismissed on the basis that they had been brought out of time. All of the claims against the 1st to 10th, 12th and 13th respondents were struck out on the alternative grounds that (i) the appellant's conduct of the proceedings before the Tribunal had been unreasonable and vexatious (rule 37(1)(b) of the **Rules of the Employment Tribunals, 2013**); and, in any event, (ii) the claims had no reasonable prospect of success (rule 37(1)(a)). A Judgment containing those decisions was dated 27 May 2021. A corrected version of the Judgment and reasons was issued on 6 July 2021.

4. In early July 2021, the appellant presented a Notice of Appeal against those decisions. The proposed grounds were lengthy and wide-ranging. Following an extensive sift process (which involved a rule 3(7) decision and, thereafter, a conjoined rule 3(10) hearing and Preliminary Hearing) HHJ Tucker issued an Order dated 5 February 2024 permitting a single ground of appeal to proceed to this full hearing. That ground relates only to the Tribunal's decision to strike out of the appellant's complaints of race discrimination and harassment related to race.

5. There is, therefore, no ground of appeal before me today in relation to either (a) the dismissal of the appellant's claims against the 11th and 14th respondents on the basis of time bar; or (b) the strike out of the various whistleblowing complaints under sections 47B and 103A **ERA**.

6. It is important, however, to note three unusual features of the whistleblowing complaints by way of relevant background. First, in his case before the Tribunal, the appellant maintained that he had been subjected to acts of race discrimination and harassment related to race in order to hide the

fact that the true reason for the allegedly detrimental treatment of him (including his dismissal) was that he had made protected disclosures. Secondly, the appellant maintained that the protected disclosures relied upon by him had been made by him several years before the alleged acts of detriment to a party which is not a respondent to these proceedings. Thirdly, the Tribunal concluded that there was no evidence that any of the respondents to these claims knew, prior to any of the acts of detriment complained of, that such protected disclosures had been made.

The Tribunal's reasons for strike out

7. As I have already noted, there were two reasons for the Tribunal's decision to strike out the race discrimination and harassment complaints. The first was that the conduct of the proceedings by the appellant had been vexatious or unreasonable (rule 37(1)(b)). The second was that the complaints had no reasonable prospect of success (rule 37(1)(a)). It is necessary to examine these two reasons separately.

Unreasonable or vexatious conduct – rule 37(1)(b)

8. The context for this aspect of the strike out decision was that from and after August 2020, the appellant had repeatedly expressed an intention to put into evidence thirteen audio recordings which, cumulatively, comprised over 20 hours of recorded material. The appellant had sent the respondents a list of those recordings on 14 August 2020. Thereafter, on 25 August 2020, eight of the thirteen recordings – amounting in total to approximately thirteen hours of material – were disclosed to the respondents without any explanation of their suggested relevance to the appellant's case. In correspondence to the respondents' agents at that time, the appellant stated:

> "*I am not required to explain to you at this time why parts of the recordings are relevant to my case.*"

9. Understandably, therefore, at a case management hearing on 25 September 2020, the respondents' representatives sought further information about the recordings. They submitted that the relevance of the thirteen hours of recorded material was not understood and that it was unduly burdensome to expect them to listen to all of that material without the any indication from the appellant as to what its relevance might be. Correctly, the Judge (EJ Brown) agreed and ordered the appellant, in accordance with the over-riding objective, to provide a brief description of what was on each of the audio recordings, a note of the times on each recording at which relevant material

arose, and an explanation of the disputed issues in the case to which each of those sections related (see ET § 59 to 62).

10. On 9 October 2020, the appellant again provided a list to the respondents of the thirteen audio recordings upon which he said he intended to rely. He did not, however, identify any sections of the recordings on which he relied or the claims to which the recordings (or any parts of them) were said to relate.

11. At a Preliminary Hearing on 12 May 2021, the respondents submitted that the claims should be struck out *inter alia* on the basis that the appellant had not complied with the directions given by EJ Brown on 25 September 2020 and had indicated that he had no intention of doing so. The appellant is recorded as having submitted, in reply, that the respondents' contention that he had failed to disclose the evidence on which he intended to rely in support of his claims was "misconceived" (ET § 75). He submitted that reliance on the recordings was no different to reliance on a company handbook. He was adamant that he could not point to any specific parts of the recordings that were relevant to his complaints. Instead, he submitted that the whole of each recording was relevant to all of the complaints advanced. He maintained, therefore, that it would be necessary for the Tribunal and the respondents to listen to and consider all twenty hours of the recordings at a hearing on liability and remedy. I pause to note that such a course would have taken four full days of Tribunal time. The appellant undertook, however, to produce a transcript of each recording within a month (ET § 81 to 86).

12. At ET § 89 to 101, the Tribunal stated:

> *89. I decided that the Claimant had breached my order of 25 September 2021. He had failed to state which [of his allegations] the recordings related to and he did not provide the Respondents with the time point within the recordings at which the relevant statements occurred. He had simply said that all 20 hours' worth of recordings were relevant to all aspects of his claims.*
>
> *90. At this hearing, the Claimant continued to insist that he could not and would not comply with my order, other than to repeat that the whole recordings were relevant to all claims.*
>
> *91. I did not accept what the Claimant said. If there were relevant parts to the recordings, I considered he should be able to identify them, by time point in the recording, and specify to what claim they were relevant. He could do this, even if he relied on numerous parts of the recordings. Furthermore, even if this would have been a lengthy task for him, I had given him until 16 October 2020 to comply with my order, at his request. It was now more than*

seven months since the order had been made. The Claimant had had more than ample time to undertake the relevant exercise. He was still refusing to do so

93. I did not accept that his disclosure of recordings, without specifying the relevant parts, was akin to disclosure of a large company handbook. The relevant parts of a company handbook are usually easily identified from the nature of the claims - the disciplinary procedure in a misconduct unfair dismissal case or, for example, the sickness procedures in a disability discrimination dismissal case.

94. in any event, where the relevance of a large tranche of disclosure is not clear, it is open to a party to apply for an order, requiring identification of the relevant part of a document and the allegation to which it relates. I had decided that such an order was necessary in this case.

95. The… Claimant's refusal to identify a single specific part of a transcript, or the relevant cause of action, also led me to believe that it was likely that there were, in fact, no relevant statements in the 20 hours of recordings. Requiring the Respondent to listen to 20 hours of irrelevant evidence was… plainly, vexatious.

96. The Claimant's conduct of the proceedings, in failing to comply with my order, is vexatious and unreasonable. It is clearly fair to the Respondent for the Claimant to identify the relevance of the audio recorded evidence. As I explained to the Claimant, if he does not, the Respondent would have the impossible task of guessing the relevance of 20 hours' worth of recordings and trying to obtain actions from witnesses about any potentially relevant comments on them. The Respondent would have to draft witness statements addressing all manner of potential arguments arising from the recordings.

97. This would put the Respondent to wholly unreasonable expense and would waste inordinate time.

98. The Tribunal would also be faced with an enormous tranche of evidence from the Claimant whose relevance was unclear. This would waste public time and money.

99. Even if a fair hearing were possible, I consider that this was one of the rare cases in which strikeout for deliberate disobedience of my order was appropriate. The Claimant's conduct in requiring the respondent to listen to 20 hours of audio tape, including wholly irrelevant… material, is egregious. It appears designed to confuse and frustrate the Respondents and to put them to considerable, pointless expense. The Claimant has misused the tribunal process.

100. Nevertheless, I also considered that the Claimant's unreasonable and vexatious conduct of the proceedings meant that a fair hearing was impossible.

101. The Claimant relies on the recordings and contends that all the recordings are relevant to all of his claims. The Respondent cannot prepare for a hearing fairly on that basis. If it fails to guess the relevance of a part of the recording, it may not adduce its own evidence in rebuttal. The Respondent would be going into the hearing "blind" and could be ambushed by the Claimant. The Tribunal would also have to guess at the relevance of the evidence and would have great difficulty in managing the proceedings fairly.

13. At ET § 102 the Tribunal concluded that an Unless Order "*would be pointless because the Claimant was clear that he had no intention of complying with the order*" and that strike out was therefore the appropriate course.

No reasonable prospects of success

14. The Tribunal then considered the alternative ground on which strike out was sought: the issue of prospects of success (rule 37(1)(a)). Having given accurate self-directions that the power to strike out a claim as having no reasonable prospects of success should be exercised only in rare circumstances, and not where there were disputed issues of fact, the Tribunal noted, correctly, that discrimination cases should only be struck out in the very clearest of circumstances (**Anyanwu v. South Bank Student Union** [2001] ICR 391).

15. In relation to the whistleblowing complaints, the Tribunal noted that the appellant's position was that his protected disclosures had been made to a third party some years prior to the allegedly detrimental treatment. The appellant was unable to point to any positive evidence that any of the respondents even knew of the disclosures he said he had made. In the absence of such evidence, he intended to try to extract evidence of such knowledge in cross-examination of the respondents' witnesses ((ET § 113). Understandably, in these circumstances, the Tribunal concluded (at ET § 114) that the whistleblowing claims had no reasonable prospect of success:

> *There is currently no evidence to support the Claimant's contention that the Respondents knew of the protected disclosures. There is no reasonable prospect that he will extract such evidence from cross examination, when he has no positive, specific case to put to witnesses.*

16. That conclusion is not subject to challenge in this appeal, and was manifestly correct.

17. At ET § 115, the Tribunal then turned briefly to consider the race discrimination claims, stating:

> *The Claimant's race discrimination and harassment claims are put on the basis that he was subjected to such discrimination and harassment "in order to conceal the reason or principal reason for his dismissal" - which was allegedly his protected disclosures. If the Respondents did not know of the protected disclosures, the basis for the alleged discrimination and harassment claims also falls away. There is no reasonable prospect of them succeeding in the way they have been put by the claimant.*

The ground of appeal

18. The single ground of appeal that was permitted to proceed to this hearing by HHJ Tucker is in the following terms:

> 1) **The Employment Judge erred in striking out the Claimant's claim of race discrimination on the grounds of unreasonable / vexatious conduct and on the grounds that it had no reasonable prospect of success.**
> i. There were relevant disputes of fact in respect of this claim.
> 1. The Claimant alleged in his ET1 that:
> (a) He was interrogated about his residence status by the Eighth and Ninth Respondents
> (b) The first, Second, Eight and Ninth Respondents refused to contact the Home Office to verify his legal status
> (c) Made 'unwelcome and offensive snide and prejudiced questions about his reasons for not having a British Passport. The comments and advice suggested that any Non-British national should make it a priority to apply for citizenship as soon as he was entitled and inferred that it was the Claimant's fault that he was being subject to such treatment.
> (d) Despite the Claimant's Biometric Card being approved as valid, the Eighth Respondent continued to "routinely demand whether the Claimant had received the Biometric Resident Card and other members of staff were still being given the impression that the Claimant's immigration status was unclear … This treatment created a stressful, toxic and humiliating environment for the Claimant".
> See the ET1 From paragraphs 34-41.
>
> 2. The Respondent disputed that the events occurred. See paragraphs 35(k) and (n) and 39-46 of the Response of the 1st-10th and 12-13th Respondents. (Although this is theoretical in light of the decision regarding the Judge's reconsideration decision, the 11th and 14th Respondents asserted that none of the allegations of race discrimination concerned them in any event.)
>
> ii. The decision about unreasonable conduct and vexatious conduct related to recordings which were said to be relevant to the public disclosure claims, not the claim of race discrimination.
> iii. In these circumstances it was an error (and contrary to the Judge's own self direction regarding the strike out on grounds of no reasonable prospects of success, set out at paras 103-106) to strike out the race discrimination claim where there was a clear dispute about relevant factual issues.
> iv. In these circumstances it was an error and disproportionate to strike out the race discrimination claim on grounds of unreasonable behaviour when the conduct in question was not relevant to that claim.

19. I have had the benefit of two skeleton arguments and I have also heard oral submission on various aspects of that ground of appeal. I intend no disrespect to the parties when I say that it is not necessary for me to rehearse all of those submissions. That is because I have concluded that the appeal can properly be determined by focussing upon two particular issues, each of which is identified in the permitted ground.

20. I begin, however, by expressing considerable sympathy for the Employment Judge who was faced with a claimant whose approach to his complaints and the evidence that was relevant to them lacked focus, and whose dealings with the Tribunal and with the respondent were not consistent with the over-riding objective. My task, however, is to set sympathy to one side and apply the law relating to strike-out.

Vexatious and unreasonable conduct

21. I will consider first the Tribunal's conclusions on the issue of vexatious or unreasonable conduct.

22. In **Blockbuster Entertainment Ltd v. James** [2006] IRLR 630, Sedley LJ noted of the power to strike out a claim before an Employment Tribunal:

> "…is a draconic power, not to be readily exercised. It comes into being if…a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."

23. As was more recently noted by HHJ Auerbach in **Bailey v. Aviva Employment Services Limited** [2025] EAT 109, an important part of the process of determining whether or not it would be proportionate to strike out a claim involves consideration of what alternative steps, short of a strike-out, might reasonably be taken, having regard to the particular conduct of the party concerned.

24. The context, in this case, was a stated intention by the appellant to try to introduce into evidence a large volume of material, the relevance of which he was either unwilling or unable to summarise or explain. The Tribunal was, in my view, entitled to treat with scepticism and ultimately to reject the appellant's submission that all of the recorded material was relevant. It was also entitled to accept the respondent's submission that the conduct of the appellant in refusing to specify the matters referred to in the case management order of 25 September 2020 was both vexatious and

unreasonable. The next necessary step, however, was to consider whether there was a more proportionate way of dealing with the breach of the September 2020 order than a strike-out of the race discrimination and harassment claims.

25. The appellant had made only broad assertions about the significance of the material. The Tribunal clearly, and understandably, did not make its own assessment of that issue by listening to the recordings. At ET § 95, however, it inferred from the appellant's inability to identify relevant passages in the recordings that it was "likely that there were, in fact, no relevant statements in [them]". Taking that inference at face value, there was, on the Judge's analysis, nothing in the recordings that was relevant to either the race or the harassment claim.

26. It is not clear to me that the Tribunal thereafter carried out any proportionality assessment, save to the extent of considering (at ET § 102) an Unless Order as an alternative to strike out. It seems instead to have proceeded upon a hypothesis that it was powerless to prevent the appellant from introducing the recorded material into evidence. That same hypothesis formed the basis of the Tribunal's conclusions that an Unless Order would serve no useful purpose and that the fairness of the trial would inevitably be compromised.

27. At the time to which this appeal relates, however, proceedings before the Employment Tribunals were regulated by **The Employment Tribunals Rules of Procedure, 2013**. Rule 2 gave a wide discretion to Tribunals to ensure that cases before them were conducted in a way that was proportionate, ensured that parties were on an even footing, avoided delay and saved expense. The general case management power under rule 29 permitted Tribunals, in appropriate circumstances, to impose restrictions on what evidence could be led by a party if the leading of that evidence would compromise the over-riding objective in rule 2.

28. There was, therefore, a less draconian and more proportionate solution to the problem created by the appellant's failure to comply with the September 2020 case management order. In particular, it was open to the Tribunal simply to direct that none of the recordings would be admitted into evidence. Such an order would fully have addressed the particular default on the part of the appellant and would have been a proportionate response to it. It would also have eliminated any potentially negative impact of the default upon the potential fairness of the trial as it would have addressed all of the concerns about fairness that were expressed by the Tribunal at ET § 96 and 101. That option does not appear, however, to have been considered.

29. The situation would, of course, have been different if the default on the part of the appellant had been a repeated failure to disclose material that might potentially have assisted the respondent in the presentation of its defence. There is, however, no suggestion of that being the position here. The appellant's sole purpose in seeking to rely upon the recordings was positively to advance his own case. Nothing in the Tribunal's reasons suggests that the respondent either needed or wanted the evidence in the recordings (or any part of them) to be led in evidence.

30. Even on the basis that there was a deliberate refusal to comply with the September 2020 order, the Tribunal did not explain why this was a case in which strike out was still a proportionate response to that. On the face of matters, a proportionate response would simply have been to exclude the evidence.

31. Mr Welch sought to persuade me that the issue of proportionality had been conclusively determined at rule 3(7) stage in this appeal, save to the extent that the recordings could be shown to have no relevance at all to the race or harassment complaints. The problem with that argument, however, is that an absence of relevant material within the recordings was the very hypothesis on which the Tribunal proceeded at ET § 95.

32. In summary, therefore, I have concluded that whilst the Tribunal was entitled to conclude that the conduct of the appellant had been unreasonable and vexatious, it erred in law by failing properly to consider whether strike out was a proportionate sanction for the particular default that was before it.

Prospect of success – race discrimination and harassment – rule 37(1)(a)

33. I turn then to consider the Tribunal's alternative conclusion on prospects of success in the race discrimination and harassment complaints (rule 37(1)(a)).

34. It was the appellant's position before the Tribunal that the respondents' motive for the alleged race discrimination and harassment of him was a desire to conceal that the "true" reason for the dismissal and the pre-dismissal detriments was that the appellant had made protected disclosures. Proof of such motive was not, however, an essential element of either the complaint of direct race discrimination or that of harassment related to race.

35. In the race discrimination complaint, the appellant required to establish "less favourable" treatment than an actual or hypothetical comparator (section 13 **EqA**). In the harassment complaint,

he had to establish "unwanted conduct" amounting to harassment that was related to race (section 26 **EqA**). There were disputed issues of fact about both of those claims. The burden of proof provisions of section 136 **EqA** applied to each of the complaints. In particular, the effect of section 136(2) and (3) **EqA** was that, if the appellant proved facts from which the Tribunal could decide, in the absence of any other explanation, that there had been a contravention of either of sections 13 or 26, the burden would then pass to the respondents to show that the treatment in question was nothing whatsoever to do with race.

36. The reasoning of the Tribunal at ET § 115 was brief: if the appellant was unable to prove that the alleged motive for the allegedly detrimental treatment of him was whistleblowing, his complaints of race discrimination would also inevitably fail. That reasoning was erroneous. Success in the race discrimination and harassment complaints did not depend upon success in the whistleblowing complaints or upon proof that the respondents had an ulterior motive. Rather, those complaints required no more than the application of sections 13 and 26 **EqA** to the facts, taking into account the burden of proof provisions of section 136 **EqA**.

37. The reasoning of the Tribunal at ET § 115 having been based upon an error of law, its conclusion that the race discrimination and harassment cases had no reasonable prospect of success was vitiated by that error.

Conclusion and disposal

38. Since the Tribunal made material errors of law in each of its alternative reasons for striking out the race discrimination and harassment complaints, paragraph 2 of its corrected Judgment of 6 July 2021 requires to be set aside. Because the strike out of the whistleblowing complaints is not before me in this appeal, I will substitute, in lieu of that paragraph, the only alternative order that is open to me, that:

> "*2. The claimant's complaints against the 1st to 10th, 12th and 13th respondents under sections 47B and 103A of the Employment Rights Act, 1996 are struck out in terms of rule 37(1)(a) on the basis that they have no reasonable prospect of success.*"

39. I will thereafter remit the appellant's complaints of race discrimination and harassment related to race to a different Tribunal for such further inquiry as that new Tribunal considers appropriate in the exercise of its case management powers.