Neutral Citation Number: [2026] EAT 163

Case No: EA-2024-000122-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 August 2026

Before :

HIS HONOUR JUDGE BARKLEM

- -

Between :

OLUWATAYO ADEYANJU

Appellant

- and –

BARTS HEALTH NHS TRUST

Respondent

- -
- -

Mr Jamie Fireman for the **Appellant**
Mr Adam Ross (instructed by Bevan Brittan LLP) for the **Respondent**

Hearing date: 20 August 2026

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JUDGMENT

SUMMARY

Practice and procedure

The claimant had, over a lengthy period, failed to comply with directions made by an ET over five hearings which had sought to clarify her claims and to identify heads of disability. The date for a full hearing had to be vacated and it was evident to the ET that several more hearings would have to be held, involving the expenditure of considerable costs by the respondent, ET time and resources and delay to any eventual trial.

The EAT held, taking the ET's decision as a whole, that this was a justified decision which had been carefully reasoned, and that a strike out was merited. It also noted that the ET's award of costs based on counsel's fee alone for an earlier hearing at which she had failed to attend without good reason was justified.

HIS HONOUR JUDGE BARKLEM:

1. This is an appeal from the judgment of an Employment Tribunal sitting at East London, EJ Reid sitting alone. The hearing took place on 28 November 2023 and written reasons were sent to the parties on 13 December 2023. I shall refer to this as "the decision". The outcome of the hearing was that the claimant's claim was struck out in its entirety under rules 37(1)(b) and 37(1)(c) of the Employment Tribunal Rules as they then were. A costs order was made in relation to a hearing which the claimant had failed to attend.

2. In this judgment, I will refer to the parties as they were below. The claimant represented herself at the hearing under appeal. The respondent was represented by Mr Ross of counsel who also appeared before me. The claimant was represented before me by Mr Fireman of counsel who acted under the auspices of the Advocate Scheme.

3. I am grateful to both counsel for their full and helpful skeleton arguments and oral submissions. In order that this decision may be delivered before I finish my current stint at the EAT at the end of this week and thus avoiding a lengthy delay, my summary of their submissions will be relatively brief. I have had regard to all points made and to all authorities to which I was directed.

4. The appeal was allowed to proceed to this full hearing by an order of HHJ Auerbach under rule 3(10) of the EAT Rules on amended grounds drafted by counsel who had appeared under the ELAAS scheme.

5. The background can be set out quite briefly. The claimant began working for the respondent as a medical systems specialist in June 2018. She brought proceedings in the Employment Tribunal in 2021 relating to arrears of pay. That claim was settled in May 2022. In August 2022 the claimant brought the present claim alleging disability discrimination and unauthorised deductions from wages. A discursive 15 page document was attached to the ET1 but it was not forwarded by the Tribunal to

the respondent which was therefore not aware of it when settling the ET3.

6. A preliminary hearing was conducted by EJ Burgher in October 2022. That hearing proceeded without the 15 page attachment being referred to. In the decision, the Tribunal noted the fact that the claim had not got off to a good start and that this was "not entirely the fault of the claimant". This seems to me to have been a reasonable comment given the claimant's failure to alert the employment judge to the fact that nobody was referring to **a**, if not **the,** key document relating to her claim.

7. Orders were made at that hearing noting two disabilities identified by the claimant in the ET1 and requiring the exchange of documents relating to disability by 5 December 2022. An impact statement was required to be served by the claimant on the same date. The respondent was required to state its position on disability by 11 January 2023. An agreed list of issues was required by 11 January 2023 with a further PH set for 14 February 2023 and a final hearing listed for three days from 20 March 2024.

8. The decision records at paragraph 61 that the claimant provided some medical information in December 2022 but saying (presumably in a letter which I do not have) that she "should send more after this". She then went on to provide two further instalments of medical evidence in January and February 2023, the latter comprising extracts of a 126 page summary of GP records which were taken in full in two brown envelopes to the hearing.

9. The respondent conceded disability in January 2023 within the timeframe directed. This was based solely on the ET1 without the attachment. As is apparent from the record of the preliminary hearing, or PH, which took place on 3 July 2023, the existence of the 15 page attachment was provided to the respondent in February 2023. At that PH, the Tribunal attempted to précis the 15 page attachment, noting that multiple disabilities beyond those raised in the form ET1 itself as identified at the first PH were now identified and that the claimant was now saying that she wished to raise further health issues as well as a claim for holiday pay dating back to 2020/2021 and 2021/2022.

10. The Tribunal noted that it was not possible to finalise a list of issues that day given the time available and in the light of the confusion and the changing nature of the claimant's claim. It also noted that the claimant had struggled with the hearing and its complexities and that after two hours was unable to concentrate further. The record of the hearing also noted that the claimant was advised that if she wished to add new claims to her claim not already contained in the documents, she had to set that out in full and seek permission from the ET. Relevant guidance was given as to external information that was available. A further PH was booked for 6 September 2023 for a whole day.

11. The claimant sought but was refused an adjournment of the 6 September hearing. The record of that hearing noted that when about half of the claimant's claim had been gone through to clarify what was in issue, at around 2.20 in the afternoon the claimant became unwell. An ambulance was called but after being checked over, the claimant simply went home. The Decision says as follows regarding this at paragraph 17:

> "The day before the hearing at 5.23 pm the claimant sent the respondent 10 documents… but saying there would be more. She had previously said they were only draft. I discussed the problem of 'drip feeding' with the claimant at the hearing and summarised that advice at para 49 of the summary of this hearing.
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> 18. The claimant unfortunately became unwell in the afternoon. By this point I was clarifying item 27 out of 62. The next two preliminary hearing dates therefore had to be fixed in her absence – the first (19 October 2023) to complete the clarification of her claim and the second (28 November 2023) to deal with other strike out issues (now overtaken by this strike out application). These dates were fixed so that the next steps in the claim could be dealt with sequentially and in order."

12. The Tribunal had been able to make a number of orders which were intended to progress matters before the hearing was to be resumed on 19 October 2023 at which further clarification would be undertaken and any amendment application determined. One of the orders made was that the claimant must by 18 October 2023 send to the respondent relevant parts of her GP and other medical records relevant to whether she had the disabilities at the time of the events the claim was about along

with any other evidence relevant to whether she had the disability at that time. It was noted that the respondent was considering whether to revisit its earlier concessions to disability in the light of the 15 page attachment which indicated a period of claimed disability dating back to 2018. A final disability impact statement was also ordered to be provided by 18 October.

13. A further preliminary hearing was listed for 28 November 2023 to deal with the strike out application relating to the claims which had been brought earlier on what is known as **Henderson v Henderson** grounds and whether some of the claims now advanced should have been made at the time of the earlier claim. The record of the 6 September meeting carried an express warning as to the consequences of what the Tribunal described as "drip feeding" of the evidence and by providing draft documents only, saying that she would provide the rest later. Paragraph 51 made clear that the Tribunal could strike out the claim if the orders were not complied with.

14. Unfortunately, the claimant did not attend the hearing on 19 October. As the Decision records at paragraphs 21 to 26:

> "The next hearing for 19 October 2023 was listed and the claimant was informed of the date… A separate note to her on the front page of the preliminary hearing summary of 6 September 2023 was included to alert her to the new date and the fact that she needed to ask for her GP records promptly. A separate notice of hearing was sent to her on 16 September 2023. The claimant said at this hearing she was not aware of this new date because she was not checking her emails but she was able on 20 September 2023 to send in a GP fit note so was accessing her emails and she sent this after those documents were sent to her by the Tribunal; if she did not open and read them she was ignoring something obviously from the Tribunal. Even if she was not aware of the date as claimed it was because she was choosing not to open the emails from both the Tribunal and the respondent's solicitors she could see in her inbox and/or not logging in regularly even though she knew she had a Tribunal claim to progress and knew that she needed to know the next steps.
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> 22. The claimant did not say why she was sending the GP certificate or applying for a postponement but I find it to be a precursor to a decision not to attend, consistent with not

replying to the respondent's solicitors emails dated 20 September 2023 or 12 October 2023… which also referred to the next hearing date. That spanned the period of 22 days the claimant was saying she was not checking her emails, after sending in the GP certificate – she was failing to check her emails for a prolonged period.

23. I find that the claimant was aware of the date of the next hearing on 19 October 2023. Even if I accepted her account that she was not opening emails from the Tribunal (or the respondent's solicitors) at this time that would have amounted to a clear failure to co-operate with the Tribunal by ignoring correspondence from the Tribunal.

24. The claimant has not provided medical evidence to support an inability to open her emails, read them and reply to emails as required; although she may have some restrictions in her health, she is not at work and can take breaks when dealing with an email or documents and is not required to spend prolonged time every day dealing with her claim but can do things in stages if necessary. The only evidence she referred to at this hearing which she said supported her inability to progress her claim and deal with correspondence was she said advice from three doctors to rest but that would not preclude dealing with her claim including checking her emails, reading what is sent to her and responding where required.

25. The claimant knew or should have known the importance of this hearing. Her attendance was critical given that the previous hearing had ended early without completion of the clarification of her claim. Although that hearing had been hard work for her, it had demonstrated the importance of her identifying what she said the respondent had done wrong, even if needing assistance with putting legal labels on the elements of her claim.

26. The claimant was then ordered to provide a copy of the discharge summary from the hospital for 19 October 2023 by 2 November. She knew how to get documents from her GP if she did not have a copy herself. She had obtained a discharge summary for her A&E attendance on 1 September 2023 by 5 September 2023 when she sent it to the Tribunal. She did not provide one for the 19 October 2023 attendance by the deadline (or ever).

27. The claimant was also ordered to tell the Tribunal by 2 November 2023 whether she was saying that she was unwell in the short term or too unwell in the long term to progress her claim. This was the Tribunal giving the claimant another opportunity to explain

herself and so the Tribunal could consider the future progress of the claim which by now had been going on for around 14 months. The claimant did not respond to the deadline.

28. The respondent now had to change course regarding a strike out application… and the previous deadline set for the previous basis of the strike out had to be changed to reflect the changed situation. It was flagged up to the claimant that she had not provided her updated disability impact statement and GP records as ordered on 6 September 2023. This summary was sent to the claimant on 23 October 2023…

29. The respondent had incurred the legal costs of attending the 19 October 2023 hearing which the claimant did not attend. A day had been set aside by the Tribunal to progress her claim and sleeves rolled up to complete analysis of items 28-62 in the list which had been prepared to assist the claimant. The opportunity to complete that and establish a list of issues was lost. That had a knock on effect on the next hearing (the respondent now had to change tack) and on the final hearing which was no longer feasible."

15. At paragraph 45 of the Decision the Tribunal set out the text of rule 37 and noted that it had been referred to **Smith v Tesco Stores** [2023] EAT 11 and **Rolls Royce v Riddle** [2008] IRLR 873. At paragraphs 47 to 49 the Tribunal summarised the relevant test as follows:

"47. *Hasan v Tesco Stores* [a different Tesco Stores]... requires a two stage test namely firstly… whether the ground in rule 37 is made out and then secondly considering whether to exercise the discretion to strike out.

48. As regards unreasonable conduct, the Tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response (*Blockbuster Entertainment Ltd v James 2006 IRLR 630)*. If relying on conduct the issue was still whether if that ground is made out a fair trial is possible (*De Keyser Ltd v Wilson 2001 IRLR 324).*

49. The Tribunal also has to take into account rule 2 of the Tribunal Rules 2013, the overriding objective to deal with cases fairly and justly. This means fairness and justice to both parties. It includes consideration of dealing with cases in a way proportionate to the complexity and importance of the issues, avoiding delay and saving expense."

16. Paragraphs 50 to 56 of the Decision dealt with the law relating to costs. I need not set them out.

17. The relevant factors taken into account by the Tribunal were set out at paragraphs 57 to 66. They may be summarised as a continuing failure, even to date, to obtain GP records, meaning that the respondent could not carry out a reassessment of its earlier concession. The claimant was seeking to add further disabilities. She regarded her claim as being a moving target to which she could add disabilities as she moved along. That led to a lack of focus on the issues actually in the claim. She either chose not to attend the hearing on 19 October or ignored correspondence advising of the date without good reason. This meant that the other strike out on **Henderson v Henderson** grounds had had to be put off as well as the date for the final hearing. Medical evidence had been drip fed and she ignored a direction to apply speedily to her GP for further records. Looking forward, the Tribunal had little confidence that the claimant's approach to orders would change and she would waste significant time, increase costs and create confusion. Even at the hearing the claimant was not only producing new material but saying that she had additional material that could have been forthcoming. The Tribunal held that there would need to be at least four further preliminary hearings to complete the list of issues, deal with the amendment application, deal with a strike out application, agreeing the bundle and the exchange of witness statements on time. The respondent had set aside dates in March 2024 with witnesses ready for that hearing and the trial window had now been lost. It was not possible even at the hearing to set a new trial date because until the claim had been properly clarified, it was uncertain as to how many dates would be required. A fair trial has to be fair to both parties to the claim and due to the claimant's approach, even with ongoing careful case management the respondent was likely to be prejudiced by never knowing if the claimant had produced all relevant documents or would add others at the last minute. Finally, the Tribunal noted that the claimant had been given considerable leeway as a litigant in person and had had everything explained to her in straightforward language in preliminary hearing summaries with detailed explanations given to her

in letters sent between the various hearings.

18. The Tribunal concluded as follows:

> 67.Taking the above factors into account and assessing the situation in the round I firstly conclude that the claimant's approach to this claim falls within rule 37(1)(b) (unreasonable conduct of claim) and/or rule 37(1)(c) (non-compliance with the order dated 6 September 2023 regarding GP medical evidence, disability being a cornerstone of her case and that non-compliance being deliberate and persistent; also not complying with the duty to co-operate with the Tribunal including as regards attendance at the 19 October 2023 hearing and late/partial compliance with orders by providing documents on 28 November 2023, the day of this hearing).
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> 68. Having concluded that the relevant grounds are made out I have secondly considered whether to exercise my discretion to strike out the claim (that being a draconian step especially in a discrimination claim) taking into account rule 2 and in particular the factors of ensuring the parties are on an equal footing, dealing with cases in a proportionate way, avoiding delay and saving expense. In relation to the first factor, in this claim it is arguably in some ways the respondent who is not on an equal footing with the claimant (despite her lack of representation) because of her disruptive approach to this claim meaning she only complies with orders (if at all) shortly before a hearing and not in line with the deadlines set and has not clarified her claim despite the time being set aside for her to do so meaning it is as if the claimant is setting her own timetable and own agenda despite orders to the contrary. As to the second factor, although this is a complex disability discrimination claim spanning several years, because of the claimant's approach to her claim the Tribunal has dedicated significant time for the claimant some way beyond what a claim would ordinarily require for case management and that process has not yet yielded the result of her claim having been clarified and a list of issues produced and disability having been assessed on a complete package of evidence from the claimant. As to the third factor despite best efforts from the Tribunal and the co-operation of the respondent once the 15 page attachment was identified, the claim is stuck half clarified some 15 months after it was presented in August 2022. In relation to the fourth factor the respondent has incurred significantly higher costs than it would have done had the claimant taken a more co-operative and compliant approach and that is likely to continue based on the claimant's approach so far, even if some costs are awarded – see

costs order below.

69. I have considered alternatives to a strike out namely costs or a deposit order. The issue with a deposit order under rule 39 is that it requires the Tribunal to make an assessment of whether an allegation or argument in the claim has little prospect of success. Until the clarification of claim process is complete it is not possible in this type of claim to make that assessment (although the respondent in its alternative strike out application has identified two areas namely the previous December 2021 wages claim apparently rebrought in this claim and the abuse of process issue regarding claims which should properly have been brought in the December 2021 claim). A deposit order cannot be made on the basis of lack of co-operation and non-compliance with orders which is the current state of affairs.

70. Turning to the recent guidance in *Smith v Tesco Stores,* the aim of the preliminary hearings and orders so far has been to identify the claims and manage them going forward (para 2). That has not been possible. Instead of asking the claimant to go through her 15 page attachment herself and pick out the actual claims in the form of a further document a list was prepared to assist her and she was specifically advised that she did not in fact have to produce a document in response to that list, to avoid the proliferation of overlapping documents… The claimant is obliged to be constructive and focus on her core claims… and while steps have been taken to assist her this should not be at the expense of the respondent taking into account that the Tribunal has limited resources… With regard to the ability to have a fair trial the undue expenditure of time and money, the demands of other parties and the finite resources of the Tribunal are relevant (para 42). There has been no avoidance of trying to get to grips with the claim by the respondent (para 43) who has co-operated with (and incurred the costs of) the (what would have been) two lengthy one day hearings to clarify the claims and get to a list of issues. The claimant's failure to co-operate with the Tribunal in particular to attend the 19 October 2023 hearing to complete the clarification of her claim, to comply with orders on time and her failure to co-operate with the respondent and the Tribunal as regards the provision of her medical evidence means that there cannot be a fair trial because the claimant has not co-operated and her approach to date makes it likely that that conduct would continue (para 45) ie she would not work towards a fair hearing, one final hearing listing already having been lost.

71. I therefore strike out of the claim in its entirety under rules 37(1)(b) and 37(1)(c) of the Tribunal Rules 2013."

19. The grounds of appeal as reformulated at the rule 3(10) hearing each summarised neatly the points of law involved and I therefore set them out in full. I shall deal only with grounds 1 to 4 at this stage as ground 5 is contingent on one of those grounds succeeding. I have omitted the opening paragraphs 1 and 2 which is why the first numbered paragraph below is 3.

"**Ground 1 – The Tribunal erred in law by misdirecting itself as to the meaning of 'deliberate and persistent' in the context of the law on striking out and/or failed properly to apply the relevant legal test**

3. Before striking out a claim for unreasonable conduct of a claim and/or for breach of the tribunal's orders or directions, the tribunal must first conclude either that no fair trial is possible or that the offending party's unreasonable conduct / breach of directions was 'deliberate and persistent': *Bolch v Chipman* [2004] IRLR 140; *Blockbuster Entertainment Ltd v James* [2006] IRLR 630. Mere oversight or negligence which is not the result of any intentional or deliberate failure to implement proper systems for case management will not amount to 'deliberate' conduct: *Emuemukoro v Croma Vigilant (Scotland) Ltd* [2022] ICR 327.

4. The only conduct that was described by the Tribunal as 'deliberate and persistent' was the Claimant's non-compliance with the order dated 6 September 2023 (paragraph 67). Properly analysed, the Tribunal's findings of fact regarding that non-compliance (at paragraph 19) amount to no more than mere oversight or negligence.

Ground 2 – The Tribunal's conclusion that the Claimant's non-compliance with the order dated 6 September 2023 was deliberate and persistent was a conclusion that no reasonable Tribunal, properly directed, could have reached on the evidence before it and was perverse

5. The Claimant relies on the following particulars of perversity:

a) The Claimant did provide a substantial quantity of medical evidence in purported compliance with the tribunal's direction for medical evidence, notwithstanding that it was provided piecemeal and after the deadline set by the tribunal.

b) The Claimant had previously been directed to disclose relevant medical evidence on only a single occasion, at the hearing before Employment Judge Burgher. The direction to disclose medical evidence dated 6 September 2023 was the first such direction made by the tribunal since the attachment to the Claimant's ET1 form was discovered. The Claimant's non-compliance was therefore a single instance of non-compliance with a single order, which order had not been repeated subsequently.

c) The tribunal's order dated 6 September 2023 says at paragraph 18.1 that the Claimant must send to the Respondent '*copies of the parts of her GP and other medical records that are relevant to whether she had the disabilities at the time of the events the claim is about*' and goes on to say that the Claimant '*should ask her GP for a full copy of her GP records'* (emphasis added). The Claimant was therefore directed to provide relevant medical records and merely advised to ask for a full copy of her GP records. The Tribunal was wrong to criticise the Claimant for incomplete disclosure of her GP records when the Claimant acted in purported compliance with the direction to disclose relevant medical records.

d) The Tribunal made no finding of fact about the Claimant's subjective state of mind that would substantiate its conclusion that her non-compliance was 'deliberate'.

e) The Tribunal made no finding of fact about the actual effects of the Claimant's various medical conditions at the relevant time.

Ground 3 – the Tribunal erred in law by failing to consider whether a fair trial remained possible notwithstanding the Claimant's unreasonable conduct and/or breach of the tribunal's directions

6. Where the employment tribunal does not find that unreasonable conduct or breach of directions was deliberate and persistent, it must find that not fair trial is possible before striking out will be appropriate. The Tribunal found, at para 67, that only the noncompliance with the 6 September 2023 direction was deliberate and persistent. It was therefore incumbent on the Tribunal to consider the consequences of only one of the breaches of directions relied upon by the Respondent amounting to 'deliberate and persistent' conduct.

7. In those circumstances, it is averred that the Tribunal was required either to base its decision to strike out the claim only on the non-compliance that was found to be

'deliberate and persistent', or to consider the question of whether the non-compliance as found by the Tribunal was such as to render a fair trial impossible.

8. The Tribunal did not direct itself correctly as to the relevant legal test and failed to consider, adequately or at all, whether the Claimant's unreasonable conduct and/or breaches of tribunal directions resulted in a 'significant risk' that a fair trial was impossible: *Arrow Nominees Inc and anor v Blackledge and ors* [2000] 2 BCLC 167.

Ground 4 – the tribunal erred in law by failing to consider all relevant alternatives to striking out the claim including, but not limited to: (1) debarring the Claimant from relying on documents disclosed late, (2) proceeding with hearings in the Claimant's absence, (3) dismissing the Claimant's applications, and (4) making on or more unless orders

9. A tribunal considering striking out a claim must consider whether it is proportionate to do so. This requires a structured examination and the particular question to be answered is whether there is a less drastic means to achieve the desired end: *Blockbuster Entertainment Ltd v James*.

10. At paragraph 69, the Tribunal expressly only considered two alternatives to striking out, viz. making an order for costs or making a deposit order. The Tribunal erred by failing to consider other less drastic alternatives to striking out the claim. It was open to the Tribunal to take a more robust approach to managing the claim by virtue of inter alia the matters set out above, which would have provided an alternative to striking out the claim."

20. Mr Fireman expanded on the points made above in his skeleton argument and took me to the relevant authorities. As is often the case, the later authorities generally encompass the key points in the earlier ones. In **Tesco Stores** (citation above) HHJ Tayler summarised the relevant law in the following paragraphs.

"36. The EAT and Court of Appeal have repeatedly emphasised the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.

37. Anxious consideration is required before an entire claim is struck out on the grounds

that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious and/or that it is no longer possible to have a fair hearing.

38. In **Bolch** Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.

39. This approach was adopted by the Court of Appeal in **Blockbuster Entertainment Ltd v James**, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated:

> This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, 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.

40. In considering proportionality the Court of Appeal noted:

> 18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him, though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably.

41. In **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167 it was held:

> 55. Further, in this context, 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

42. Choudhury J (President) made a very important point about what constitutes a fair trial in **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327:

> 19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters."

21. Mr Ross for the respondent argues that the claimant's submissions isolate and treat in a vacuum parts of the Tribunal's Decision ignoring central parts of the reasoning. He submits that this was a case in which there had been five preliminary hearings, including the hearing, by which time the claimant's claim had still not been clarified, nor the issues defined. He points out that the consequences of not complying with Tribunal orders were set out in each of the sets of orders that were given for the failings after each preliminary hearing. Notes were attached to these giving her advice as to how to go about getting the information concerned. From past experience, it was clear that the claimant knew how to obtain relevant documents from her GP but chose not to do so. Rather than providing explanatory documents as ordered by the Tribunal, the claimant obfuscated and

provided other documents. Despite having been ordered by the Tribunal to seek her GP notes in September, she had done so only two weeks before the November hearing and had then been told it would take three weeks to provide them.

22. Beyond the cases already cited in **Tesco Stores**, Mr Ross took me to the very recent case of **Tedd v Surrey County Council** [2026] EAT 66, Mr Andrew Burns KC sitting as a deputy judge, and in particular to paragraphs 22, 24 and 25 which read:

> "22. The power to strike out was provided for by rule 37 of the ET Rules 2013 (now rule 38 of the ET Rules 2024). In the two-stage test, the ET must first consider whether there has been conduct falling within the rule that gives rise to the discretion to strike out ('the threshold conduct') and, if so, then exercise the discretion to consider strike out having regard to all relevant factors ('the discretionary decision').
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> 24. The discretionary decision involves dealing with cases fairly and justly and so takes account of the overriding objective set out in rule 2 (now rule 3 of the ET Rules 2024). Dealing with a case fairly and justly includes, so far as practicable — ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.
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> 25. It is mandatory for parties to assist the ET to further the overriding objective and in particular parties must co-operate generally with each other and with the ET."

23. Mr Ross submits that the claimant's arguments ignore the findings of fact and conclusions regarding the claimant's failure to attend the October hearing, an ongoing failure to provide various forms of documentation, including the disability impact statement as well as evidence to means in relation to the costs application. As to the latter, Mr Fireman pointed out that she had been told only that the ET could have regard to such documents as to means which she provided, there was no order for production as such. Dealing with the question whether a fair trial remained possible, Mr Ross pointed out the Tribunal correctly directed itself to the applicable test and reached the permissible

conclusion that it did. He points to the detailed reasoning of the Tribunal in the Decision.

24. As to ground 4, Mr Ross submitted that the alternatives proposed in the grounds of appeal were not relevant alternatives and that considerations as to a fair trial must include accounting for the expenditure of time and money and, indeed, the resources, the finite resources, of the Tribunal. He referred me to the decision in **Emuemukoro** cited above in **Tesco Stores**.

25. I deal with grounds 1 and 2 together. The claimant had brought a claim for disability discrimination. It was incumbent on her to disclose all relevant documentation relevant to that issue and the standard direction to that effect was made at the first preliminary hearing directed at both parties. The duty to disclose is one of information which tends to be adverse to, as well as supportive of, a claim. The claimant chose not to comply but, rather, to drip feed, as the Tribunal put it, documentation. She was also required to provide a written statement or statements in the specified form and was referred to by the employment judge at the first PH to the relevant part of the presidential guidance on general case management. The consequence of failure to comply was clearly spelled out in the order follow that first hearing.

26. The Tribunal noted at the second PH that the claimant had failed to provide full disclosure of medical records and had not produced a compliant disability impact statement. The record of that PH was lengthy and used clear language in expressing what the obligations on the claimant were going forward. Following the September PH, the record of hearing had a clear note in italics at the front:

> "Ms Adeyanju – before the next hearing on 19 October 2023 you need to provide all your evidence of the currently claimed disabilities – see para 17 and 18 below. You should make the request for your medical records from your GP promptly."

27. Paragraphs 17 and 18 made further orders not identical to those at the first PH but tailored to the situation as it by then was. I note Mr Fireman's submission that paragraph 18 said that the claimant "should ask her GP for a full copy of her GP records, not just a summary, this therefore being advisory rather than a direction". I respectfully disagree. It is clear from the note mentioned

above at the start of the document that the claimant was being told to obtain those records and told to do so promptly.

28. When the claimant failed to attend on 19 October, the Tribunal staff telephoned her but were unable to get through. She later called and said that she was at A&E and had forgotten the hearing date. She had not complied with the orders at paragraphs 17 and 18 of the previous PH as mentioned above. It was directed to explain her absence and to provide a discharge note from A&E. At paragraph 16 of the case management order following the aborted hearing on 19 October when it became clear that the respondent intended both to seek a strike out under rule 37 as well as make a costs application, the claimant was directed at paragraph 16 that because the Tribunal could take into account the claimant's inability to pay any costs award she "should provide any relevant documents such as bank statements and pay slips".

29. Mr Fireman submits that her failure to provide other documents should not be regarded as a breach of order because it was something that the Tribunal "could take into account and in the event that nothing was provided, the Tribunal would go ahead in any event". I see the force in the argument but it is unarguable that having been told what she should do, the claimant chose to ignore it at a hearing where her failure to comply with other orders was the main consideration. However, this is a minor point and essentially one of semantics.

30. It is incumbent on me to read the Tribunal's Decision as a whole and not to be pernickety when so doing. In my judgment, it is implicit from the language of the Decision that the Tribunal's explanation why the claimant's failure to comply with the various orders which were made was deliberate (see for example the comments at paragraph 63 of the Decision which the Tribunal noted that it had little confidence that the claimant's approach will change regarding complying with orders on time). The reason for the finding at paragraph 67 that non-compliance was deliberate and persistent are, in my judgment, self-evident from a fair reading of the lengthy and detailed findings

of fact.

31. I therefore reject grounds 1 and 2. The Tribunal was entitled to form the view that it did having correctly identified the relevant test and self-directed itself. There was, in my judgment, nothing perverse as to the findings made. The Tribunal made clear that there was no medical evidence to explain the matters on which the claimant relied to explain her failure to comply with orders.

32. Ground 3 argues that the Tribunal erred in law in failing to consider whether a fair trial remained possible. Having considered carefully the relevant part of the Decision, I reject this ground. As was made clear from the passage in **Tesco Stores** which referred to Choudhury J's comments in **Emuemukoro v Croma Vigilant (Scotland) Ltd**, the mere fact that a fair trial might theoretically be possible given unlimited resources and funds, that is not what is required. The Tribunal pointed to the lost hearing date and as the previous fixture was about 17 months from the first PH, it can be reasonably inferred that no less a delay would be involved once it was possible to assess the likely length of the final hearing. The costs borne by the respondent which is also entitled to have a fair trial had already been heavy compared to a run-of-the-mill claim and that was likely to continue to be the case given the claimant's conduct to date. The impact on the Tribunal's resources was also a valid consideration. I concluded that the tribunal carried out a proper analysis of the relevant factors and reached the permissible conclusion.

33. Ground 4 asserts an error of law in failing to consider alternative of strike out such as debarring the claimant from relying on further documentation, limiting the scope of the claim, or making unless orders. I accept Mr Ross' submission that in a disability claim, failing to require a claimant from disclosing further relevant documents could indeed prejudice the respondent. Given all the history of non-compliance, ignoring or failing to look at emails and failing generally to co-operate with the Tribunal taken together with the matters set out above in relation to time, resources and costs, in my judgment this justified the Tribunal's conclusion that a fair trial was no

longer possible and that no alternative measures would be viable.

34. As I understand it, having found against the claimant in relation to each of the four grounds, ground 5 falls away and if I am wrong about that, I note that the costs order was limited to counsel's fee for a whole day hearing which putting it at its highest the claimant forgot to attend despite correspondence before the hearing, which again putting it at its most favourable from her point of view, she decided to ignore. She claimed to have been at A&E but never evidenced this. In my judgment, this was plainly unreasonable conduct of the proceedings. With the material as to means which the Tribunal had - and I note that the claimant was still employed by the respondent at that time - the costs order cannot fairly be impugned as a matter of law. Consequently, in relation to each of the grounds of appeal, the appeal fails.