Appeal Nos. UKEATS/0002/20/SS
UKEATS/0003/20/SS
UKEATS/0004/20/SS
UKEATS/0005/20/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 8th December 2020

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

MR RIANN DUVENAGE — APPELLANT

NSL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	In Person
For the Respondent	Ms Assunta Del Priore (of Counsel) Instructed by: Mr Anthony Fox Napthens LLP 7 Winckley Square PRESTON Lancashire PR1 3JD

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SUMMARY

PRACTICE AND PROCEDURE – Strike out, requirement for oral hearing, variation of case management orders.

JURISDICTIONAL POINTS – Contract claim; Extension of Jurisdiction (Scotland) Order 1994.

1) Does a Claimant who makes an application for strike out under Rule 37(1) have the right, in terms of Rule 37(2), to insist upon that application being considered at an oral hearing in public?
2) Did the Tribunal, in any event, err in law (a) in directing that the Appellant's application for strike out should be determined only on the basis of written submissions; and thereafter (b) in refusing to vary that case management direction?
3) Did the Tribunal err in law and / or fail to give adequate reasons for refusing the Appellant's application to strike out the Respondent's ET3?
4) Did the Tribunal err in law and / or fail to give adequate reasons for striking out the Appellant's claim of damages for breach of contract?

All four questions were answered in the negative, and the Appeals were refused.

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THE HONOURABLE LORD FAIRLEY

Introduction

1. These four appeals all arise out of the same claim by Mr Riaan Duvenage ("the Appellant") against his employer, NSL Limited ("the Respondent") to the Employment Tribunal. The appeals were heard together at a sitting of the Employment Appeal Tribunal in Edinburgh on 8 December 2020. The Appellant appeared in person. The Respondent was represented by Ms Del Priore of the English Bar.

2. The appeals all relate to the strike out procedure contained in Rule 37 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013** ("the ET Rules").

Overview and Procedural Background

3. The Appellant commenced employment with the Respondent in December 2016. At all times material to the appeals, he remained in that employment. On 10 December 2018, he presented an Employment Tribunal claim form (ET1) in which he claimed that the Respondent had breached sections 1, 3, 4 and 47B of the **Employment Rights Act 1996** ("**ERA**"), and sections 13, 26 and 27 of the **Equality Act 2010** ("**EA**"). In addition, he claimed damages for an alleged breach by the Respondent of the implied contractual term of trust and confidence which was said to have arisen, amongst other matters, from a redeployment which was said to have constituted a unilateral variation of his contract. The ET1 was full, comprehensive and well-structured. The paper apart to section 8.2 of the ET1, setting out details of the claims, extended to 23 pages and was divided into numbered paragraphs corresponding to the different claims.

4. The Respondent lodged its response form (ET3) on 10 January 2019. A document entitled "Grounds of Resistance" attached to the ET3 as a paper apart was similarly full, comprehensive and well structured. It ran to 80 paragraphs over 15 pages. The Respondent raised a jurisdictional defence to the Appellant's claim for breach of contract, submitting that since the Appellant remained in its employment, the breach of contract claim was excluded by Article 3(c) of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**. The Respondent also pled that certain of the claims under the **EA** were time barred. In addition to those two preliminary points, the Respondent also pled substantive defences in fact and law to all of the cases pled against it in the ET1.

5. On 22 January 2019, the Appellant made a written application under Rule 37 to strike out the whole of the response. He submitted that the response was scandalous, vexatious and without reasonable prospect of success, that the manner in which the proceedings were being conducted by the Respondent was scandalous, unreasonable or vexatious, and that a fair trial was no longer possible. The application for strike out was again structured in numbered paragraphs extending over eight pages. In summary, the Appellant submitted that the preliminary issues taken by the Respondent were vexatious in light of the fact that his ET1 had been accepted by the Tribunal. He submitted that the Grounds of Response consisted of no more than bare denials. He also took issue, however, with the Respondent having made averments of the facts which it offered to prove. Finally, he challenged the relevance in law of the averments of fact that were made. He submitted that the Respondent had "wilfully or negligently" misrepresented the effect of Article 3 of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** and disputed the proposition that Article 3 operated as a bar to his claim for breach of contract being considered by the Tribunal. He described as

"scandalous" the Respondent's reservation of its position in relation to costs and its entitlement to seek strike out of all or parts of his claim. Finally, he submitted that the ET3 was so defective that a fair hearing was no longer possible.

6. On 4 February 2019, a preliminary hearing for the purpose of case management took place by telephone before Employment Judge Hendry. The Appellant joined the call in person, and the Respondent was represented by a solicitor. The Judge's Note of that hearing records that, at the suggestion of the Appellant, the Employment Judge directed that the Appellant should produce a Scott Schedule within 21 days identifying the factual material upon which he relied in support of each of his substantive allegations. The Respondent was allowed a further 14 days to respond. After further - apparently productive - discussions about the arrangements which would be necessary for a full hearing on the issues arising from the ET1 and ET3, the case management discussion then moved on to consider the arrangements for consideration of the Appellant's strike out application. The Respondent did not seek an oral hearing in terms of Rule 37(2). The Employment Judge ordered the Respondent to lodge a written response to the strike out application within 14 days and directed that the application for strike out would be considered only on the basis of parties' written submissions. Although the Judge's Note of the hearing records that both parties consented to that course, the Appellant disputes that he ever gave such consent.

7. On 11 February 2019, the Appellant applied in writing for variation of the case management direction of 4 February 2019 that his strike out application would be determined only on the basis of written submissions. He asked, instead, for a hearing to be fixed.

8. On 18 February 2019, the Respondent lodged and intimated its written submissions resisting the application for strike out. On 4 March 2019, the Appellant lodged and intimated

A further written submissions in response. On that same date, the Appellant also renewed his written request for variation of the case management direction of 4 February 2019 and again invited the Tribunal to list an open preliminary hearing on the strike out application. The request to vary the case management direction of EJ Hendry was intimated to the Respondent for comment. The Respondent opposed the request.

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9. The Appellant's variation requests of 11 February and 4 March were placed before a different Employment Judge (EJ Hosie) who, on 14 March 2019, refused to vary EJ Hendry's case management direction of 4 February 2019 and refused to list an open hearing on the Appellant's strike out application. His basis for refusal was principally that it would be contrary to the overriding objective to vary the earlier case management direction.

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10. On 18 March 2019, the Appellant wrote again to the Tribunal. He submitted that Rule 37, when read with Rules 53 and 56, entitled him, upon request, to a public hearing of his application for strike out. Such a request having been made by him, he contended that a hearing was mandatory. The Appellant's correspondence of 18 March 2019 was again placed before EJ Hosie who treated it as an application for reconsideration in terms of Rules 70 and 71 and rejected it, primarily on the basis that the case management direction of 4 February was not amenable to reconsideration under Rule 70, but also on the basis that the Appellant's interpretation of the Rule 37(2) was, in any event, not correct.

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11. Thereafter, on 21 March 2019, EJ Hosie considered the written submissions lodged by parties in relation to the Appellant's application for strike out. In a Judgment dated 1 April 2019 and sent to parties on 3 April 2019, he refused the application to strike out the response. In the course of giving Reasons for that decision, EJ Hosie questioned the competence of the

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breach of contract claim, and ordered the Appellant to make further representations within 14 days as to why that part of his claim should not be dismissed.

12. The Appellant did not request a hearing on the potential dismissal of his claim for breach of contract, but made further representations by e mail on 4 April 2019. Having considered those further representations, EJ Hosie issued a second Judgment dated 16 April 2019 dismissing the Appellant's breach of contract claim. His reason for doing so was that it was common ground that the Appellant was still employed by the Respondent, and the Tribunal accordingly did not have jurisdiction to hear his claim for breach of contract because of the terms of Article 3(c) of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**.

The Grounds of Appeal

13. The Appellant now appeals against (a) the case management decision to determine his strike out application without an oral hearing; (b) the refusal(s) to vary that decision; (c) the substantive decision not to strike out the response; and (d) the decision to dismiss that part of his claim in which he sought damages for breach of contract. His appeals, though initially refused permission to proceed in terms of Rule 3(7), were allowed to proceed in an amended form following a Rule 3(10) hearing before the President of the Employment Appeal Tribunal on 4 March 2020.

14. The amended grounds of appeal that were allowed to proceed at the Rule 3(10) hearing were in the following terms:

> **<u>Ground 1</u> – The Tribunal erred in law in deciding that it had jurisdiction to a) exclude the public from a hearing that must take place in person; b) to refuse a public hearing**

in respect of a Rule 37 matter, and c) to refuse the Appellant as a litigant-in-person, a hearing in public.

The second part of Ground 1 is that the Tribunal erred in law in refusing the Claimant's application to strike out all or part of the Respondent's response and ought to consider this matter at a public hearing.

<u>Ground 2</u> – In respect of reconsideration, the Tribunal erred in law in that its refusal to reconsider the wrongful decision / case management order on the purely formalistic basis that it was not a judgment is unconstitutional and in violation of the right to a fair trial.

<u>Ground 3</u> – The Tribunal erred in law in that its decision to strike out the Claimant's claim for breach of contract failed to identify with precision those paragraphs of the claim that fell to be struck out.

Issues

15. Both parties lodged substantial skeleton arguments for the appeal hearing. Based upon the amended grounds of appeal, the Respondent's Answer to those Grounds and parties respective skeleton arguments, I sought to formulate succinctly the specific questions which arose for determination by me. These were provided to parties in draft and were refined in discussion with the parties during the appeal hearing. By the conclusion of the hearing, the agreed list of questions was as follows:

a) Does a Claimant who makes an application for strike out under Rule 37(1) of the ET Rules have the right, in terms of Rule 37(2), to insist upon that application being considered at an oral hearing in public?

b) Did the Tribunal, in any event, err in law (i) in directing that the Appellant's application for strike out should be determined only on the basis of written submissions; and thereafter (ii) in refusing to vary that case management direction?

c) Did the Tribunal err in law and / or fail to give adequate reasons for refusing the Appellant's application to strike out the Respondent's ET3? and

d) Did the Tribunal err in law and / or fail to give adequate reasons for striking out the Appellant's claim of damages for breach of contract?

Submissions

16. The Appellant submitted that Rule 37(2) should be read as affording to him the right to an oral hearing in public upon his Rule 37 application for strike out. That was in accordance with the common law principle of open justice referred to in **Scott v. Scott** [1913] AC 471, as well as being consistent with Article 6 of the **European Convention on Human Rights**. It was also, he submitted, an inevitable conclusion of reading Rule 37 together with Rules 53 and 56. He submitted that Rule 56 took precedence over Rule 37 and made a public hearing mandatory on all strike out applications, if sought by either party. He drew my attention to the equivalent provision under the 2004 ET Rules and submitted that it had not changed under the 2013 Rules. He had not waived his right to a hearing. On the contrary, he had asserted the right to an oral hearing in public on his application for strike out of the response. In relation to his applications for variation of the case management order of 4 February 2019, he submitted that the Tribunal's interpretation of Rule 37(2) was wrong. He also founded on the fact that he had immediately sought to correct EJ Hendry's record of the case management hearing on the issue of his absence of consent to his application being dealt with on the basis only of written submissions. He confirmed that, aside from the issue of whether or not a public hearing should have been held, his challenge in relation to the substance of EJ Hosie's refusal to strike out the response was principally that the reasoning was inadequate. He also, however, directed me to paragraph 78 to 80 of the "Grounds of Resistance" in which the Respondent reserved its rights on costs and to seek strike out, and submitted that this was inappropriate conduct. In relation to

A the strike out of his breach of contract claim, whilst he accepted, that he could point to no document from him requesting a hearing he again submitted that a hearing was nevertheless mandatory in terms of Rule 37. He also submitted that it was not clear from EJ Hosie's Judgment and Reasons which part of the claim had been struck out.

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17. For the Respondent. Ms Del Priore submitted that the submissions for the Appellant incorrectly conflated the separate issues of open justice and the right to a hearing. She

C submitted that the Judgments of the Tribunal were all public documents, and that the requirement of open justice was met. In any event, she submitted that the clear terms of Rule 37(2) were destructive of the right for which the Appellant contended (**Baber v. The Royal Bank of Scotland plc** UKEAT/0301/15 and UKEAT/0302/15; **Manuel v. Eldon Technology**

D **Limited** UKEAT/0323/15/BA). She highlighted the difference between the former Rule 18 of the 2004 Rules and the terms of Rule 37(2) of the 2013 Rule. In particular, she noted that the right formerly given to either party under the former Rule 18 to request a hearing on an

E application for strike out had not been carried forward by Parliament into the new Rule 37(2). She submitted that whilst there may be circumstances where, in light of the issues raised by an application, it could only properly be determined after a hearing – for example where disputed

F factual issues arose – this was not such a situation. An application to strike out a response on the grounds which had been relied upon by the Appellant was one which could perfectly properly be considered only on the basis of written submissions, and the Employment Judge had not been in error in determining that it could be so considered and determined. Nor, she

G submitted, was the refusal of EJ Hosie to alter that case management direction one that could be faulted (**Serco v Wells** [2016] ICR 768). There had been no material change of any substance following 4 February 2019, and the main thrust of the Appellant's variation requests was that

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A the Tribunal was wrong in its interpretation of Rule 37(2). The reasons given by EJ Hosie both in relation to his refusal of the Appellant's application and the strike out of his breach of contract claim were clear and **Meek** compliant.

B **The relevant sections of the ET Rules**

18. Rule 37 states:

> ***37.*—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
>
> **(d) that it has not been actively pursued;**
>
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**
>
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.**

19. Rule 21 states:

> **21.—(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.**
>
> **(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.**
>
> **(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.**

20. Rules 53 and 56 state:

> **53.—(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—**
>
> **(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);**
>
> **(b) determine any preliminary issue;**
>
> **(c) consider whether a claim or response, or any part, should be struck out under rule 37;**
>
> **(d) make a deposit order under rule 39;**
>
> **(e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).**
>
> **(2) There may be more than one preliminary hearing in any case.**
>
> **(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).**
>
> **…**
>
> **56.--- Preliminary hearings shall be conducted in private, except that where the hearing involves a determination under rule 53(1)(b) or (c), any part of the hearing relating to such a determination shall be in public (subject to rules 50 and 94) and the Tribunal may direct that the entirety of the hearing be in public.**

21. Rule 1(3) states:

> **1(3) An order or other decision of the Tribunal is either—**
>
> **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or**
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or**
>
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue).**

22. Rule 29 states:

> **29. --- The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.**

23. Rule 70 states:

> **70.--- A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.**

Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

24. Article 3 of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** states:

> **3.---Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—**
>
> **(*a*) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;**
>
> **(*b*) the claim is not one to which article 5 applies; and**
>
> **(*c*) the claim arises or is outstanding on the termination of the employee's employment.**

Decision and Reasons

Question 1

25. It is clear that if an application for strike out is to be considered at a preliminary hearing, that hearing must – subject to certain limited exceptions – be held in public (ET Rules 53(1)(c) and 56). It is equally clear from the terms of Rule 37(2), however, that an application for strike out need not necessarily be dealt with at a preliminary hearing, and may be dealt with instead on the basis of written submissions. The first question raised by these appeals is whether a Claimant who has applied for strike out of a response has a right, in terms of Rule 37(2), to demand that there be an open preliminary hearing on that application.

26. Rule 37(2) states that a claim or response may not be struck out unless "the party in question" has been given a reasonable opportunity to make representations, either in writing or, "if requested by the party", at a hearing. In my view, "the party in question" referred to in Rule 37(2) is the party against whom the application for strike out is made. That same person is also "the party" who may insist upon an oral hearing. Such an interpretation, as well as being the natural reading of Rule 37(2), is also entirely consistent with previous judicial consideration of this Rule.

27. In **Baber v. The Royal Bank of Scotland plc** UKEAT/0301/15 and UKEAT/0302/15, Simler J, considered the purpose and effect of Rule 37(2) and stated:

> **"Rule 37(2) is an important procedural safeguard. It seems to me that what is required is for the affected party to be given reasonable and proper notice however that is done. Moreover, because a strike out has such serious consequences, it is essential that the Tribunal assures itself that the affected party is aware of the opposing party's application and has in fact had a reasonable opportunity to make representations. Tribunals should not act hastily and it should be clear to a Tribunal that proceeds to address a strike out application, that the affected party is aware of it and has had the requisite opportunity to respond."** (paragraph 49)

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It is clear from this passage that Simler J viewed Rule 37(2) as being a safeguard for "the affected party" – that being another way of describing the party against whom a strike out application has been made. The case of **Manuel v. Eldon Technology Limited** UKEAT/0323/15/BA is similarly supportive of such an interpretation. The general rule – which, as discussed below, may require to yield to the circumstances of particular cases – is that only the party *against whom* the application has been made may insist upon a hearing in terms of Rule 37(2) as a matter of right. The party making the application has no such automatic right to a hearing in terms of Rule 37(2).

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28. The terms of Rule 37(2) of the ET Rules which have applied since 2013 may also be contrasted with what was formerly Rule 18 of the ET Rules of 2004 which applied between 2004 and 2013. The latter made the convening of a hearing on a strike out application mandatory "if one of the parties has so requested". Rule 37(2) contains no such provision.

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29. The Appellant relied strongly upon the common law principle that justice should be administered in public. Another principle of constitutional importance, however, is the sovereignty of the Westminster Parliament which, in enacting Rule 37 of the ET Rules, expressly provided that applications for strike out may be dealt with on the basis of written submissions and granted a right to a hearing, on request, only to the party against whom strike out is sought.

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30. It was also submitted by the Appellant that the refusal to afford him a hearing on his application for strike out breached his rights under Article 6 of the **European Convention on Human Rights** by denying him a public hearing. In the particular circumstances of this case, I am unable to accept that submission. The European Court of Human Rights has stressed that

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A Article 6 is not engaged by procedural or interlocutory matters which are not themselves determinative of civil rights (see, for example, the Judgment of the Grand Chamber in **Micallef v. Malta** *Application no. 17056/06* – 15 October 2009). In that regard, it is important to recognise that the effect of a successful application by a Claimant to strike out the whole or part of a response is simply to limit the extent to which the Respondent may play a further part in the proceedings: see Rule 21 of the ET Rules. As is clear, therefore, from the terms of Rule 21, even a successful application to strike out a response would not, of itself, determine any civil right of the Appellant or entitle him to any of the remedies which he seeks.

31. Finally – though this point was not stressed in oral argument – I am not persuaded that the Appellant's status as a litigant in person should have any effect upon this construction of Rule 37(2).

32. For all of these reasons, the Appellant had no right in terms of Rule 37(2) to demand a hearing upon his application for strike out. The first of the four questions is, therefore, answered in the negative. The next question which arises is whether, notwithstanding the absence of any right to a hearing in terms of Rule 37(2), an oral hearing was, in any event, necessary in the particular circumstances of this case. That is the issue which is focussed by Question 2.

Question 2

33. As has already been noted above, where the potentially affected party requests a hearing on a strike out application, Rule 37(2) states that a hearing must be fixed. Aside from that situation, however, Rule 37(2) does not assist in answering the question of whether or not a hearing on a strike out application may be necessary in the circumstances of any particular case.

A Situations may arise where it is obvious that a strike out application cannot properly and fairly be considered without an oral hearing. One such example might be where there were disputed factual allegations of witness intimidation on which the Tribunal required to hear evidence before deciding whether or not a fair hearing was still possible. Such situations would have to be considered on their own circumstances and on a case by case basis with hearings being ordered, where appropriate, by the Employment Judge.

C 34. In this case, however, the basis on which strike out was applied for related wholly to the terms in which the ET3 was framed. That is a paradigm example of a matter that may properly be determined solely on the basis of written submissions. The decision of EJ Hendry to direct that it should be determined by such a procedure cannot be faulted.

D 35. The subsequent decisions of EJ Hosie in which he repeatedly refused to vary the case management direction of 4 February 2019 were similarly correct in law. Nothing in the submissions made to him by the Appellant came close to meeting the test set out **Serco v. Wells** [2016] ICR 768. The Appellant's submissions to EJ Hosie proceeded primarily on the basis of an interpretation of Rule 37(2) which, as I have already noted, was wrong in law. EJ Hosie was correct to note that case management orders and directions are not subject to reconsideration under Rules 70-72. Whilst he may not specifically have mentioned the power to review case management decisions under Rule 29, reading the correspondence as a whole, he was plainly correct to conclude that no good reason had been shown to vary EJ Hendry's case management direction of 4 February 2019. Again, I am not persuaded that the Appellant's status as a litigant in person should have any effect upon these conclusions.

36. For these reasons, the second question is also answered in the negative.

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37. For completeness, I would not have been able to determine the Respondent's waiver argument without a much fuller description of what precisely was said at the case management hearing on 4 February 2019. In light of the conclusions that I have reached on Questions 1 and 2, however, I do not need to consider the issue of waiver further.

Question 3

38. Turning to the substance of the Appellant's strike out application, I have considered very carefully the terms of the ET1 and the ET3 and can see no error of law in the decision by EJ Hosie to refuse the Appellant's application under Rule 37, nor any lack of clarity in his reasons. I do take full account of the fact that the Appellant is representing himself, and I do not mean to be unduly critical of him in saying that, in all material respects, his application for strike out was without merit. My reasons for coming to that conclusion are essentially the same as those given by EJ Hosie.

39. The fact that the Appellant's claim form (ET1) was accepted by the Tribunal as being in proper form does not prevent the Respondent from raising preliminary matters of jurisdiction, including objections based upon time-bar. Such objections are a common and entirely legitimate feature of proceedings before the Employment Tribunals. The factual averments made by the Respondent in its "Grounds of Resistance" constitute, in all respects, a proper and relevant response to the claims made against it. If the Appellant requires further specification of any aspect of the Respondent's defence, there are appropriate and proportionate procedures within the ET Rules by which he may apply *inter alia* for further and better particulars and recovery of documents. Whilst the Appellant may not agree with certain of the averments of fact made by the Respondent, the Respondent is entitled – and, indeed, is expected – to make

such averments to give the Appellant fair notice of what it offers to prove in its defence and of any issues of law upon which it proposes to rely. For reasons to which I will turn shortly, the Respondent was also perfectly entitled to raise the issue of jurisdiction in relation to the claim of damages for breach of contract. Finally, I saw no merit whatsoever in the Appellant's suggestion that a fair hearing of the claim was no longer possible unless the response was struck out. The core purpose of Employment Tribunal proceedings is to focus and, ultimately, to resolve disputed issues of fact and law. The ET3 which was lodged in this case was an entirely legitimate contribution to that process.

40. For these reasons, the third question is also answered in the negative.

Question 4

41. Turning, finally, to the part of the Appellant's claim in which he sought damages for breach of contract, it is common ground that the Appellant remained in the employment of the Respondent on 10 December 2018 when his ET1 was presented to the Tribunal. Neither in his Grounds of Appeal, nor in his submissions to me did the Appellant suggest that EJ Hosie had dismissed his breach of contract claim under Rule 27 of the ET Rules. The submissions of both parties accordingly proceeded on the basis that that EJ Hosie had struck out the breach of contract claim under Rule 37 and that strike out under Rule 37 was, in principle, an appropriate procedure for determining an issue relating to jurisdiction. In the absence of argument to the contrary, I have approached matters that basis. The Appellant's position again, however, was that EJ Hosie had erred in striking out his breach of contract claim without a hearing. That argument does not feature in the third Ground of Appeal that passed sift at the Rule 3(10) hearing, but may be part of Ground 1. I have, therefore, considered it, standing the fact that the Appellant was, in this instance, "the party in question" for the purposes of Rule 37(2).

42. As has been noted above, the Appellant tendered written submissions on the proposal to strike out the breach of contact claim. He did so by e mail to the Tribunal dated 4 April 2019 timed at 21.35 hours. That e mail makes no reference to a request for a hearing. Very properly, the Appellant accepted in the course of discussion of this appeal that he could point to no other document in which he had requested a hearing under Rule 37(2) on the proposal to strike out of that part of his claim and agreed that he had not in fact made such a request. In these circumstances, and standing the terms of Rule 37(2) there can have been no requirement for there to have been such a hearing.

43. Article 3(c) of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994** is clear in its terms and excludes the jurisdiction of the Employment Tribunal over his claim of damages for breach of contract in circumstances where his employment with the Respondent was ongoing at the date of presentation of the ET1 (see **Southern Cross Healthcare Co. Limited v Perkins & Others** [2011] ICR 285 at para. [2] in relation to the identical English provision). Again, therefore, I can find no error in the decision of EJ Hosie to strike out this part of the Appellant's claim.

44. Finally, the Appellant also submitted that EJ Hosie's reasons were defective to the extent that they failed precisely to identify which part of his claim had been struck out. That was a surprising submission, not least because paragraph 4 of the paper part to section 8.2 of the Appellant's ET1 is headed "Breach of Contract". That section of the ET1 then sets out in numbered paragraphs 4.1 to 4.4 (and various relative sub-paragraphs) the detail of the breach of contract claim. It is quite clear from EJ Hosie's reasons that it was that section of the Appellant's claim that he struck out due to an absence of jurisdiction.

45. For these reasons, question 4 is answered in the negative.

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Conclusion

46. The combined effect of these conclusions is that all of the appeals fail and are refused.