Neutral Citation Number: [2024] EAT 199

Case No: EA-2023-000061-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 December 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT
MISS NATALIE SWIFT
MISS EMMA LENEHAN

Between :

MS S FOX

Appellant

- and -

SOUTH ESSEX ACADEMY TRUST

Respondent

- -
- -

Jennifer Danvers (instructed via Advocate) for the **Appellant**
No appearance for the **Respondent**

Hearing date: 3 December 2024
- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 20 December 2024

SUMMARY

Practice and procedure – *rule 37(1) schedule 1 of the* ***Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013*** *– striking out an application for costs*

The ET had previously found the claimant was a disabled person for the purposes of the Equality Act 2010 and had upheld a claim of disability discrimination by reason of a failure to make reasonable adjustments. After the remedy hearing, the respondent had made an application for costs, which had led the claimant to make her own costs/preparation time application. The claimant had made clear the difficulties she continued to experience arising from her disability, and had sought accommodations in the form of early clarification of the respondent's position and additional time for her to respond. Delays had, however, occurred in obtaining clarification that the respondent would not be relying on without prejudice documents before it then withdrew its application for costs. Faced with a truncated period for organising the ET bundle, the claimant had said she was unable to deal with this. At the hearing, the claimant had not prepared the bundle as directed and, having refused her application for a postponement, the ET found she had persistently failed to comply with ET orders, and proceeded to strike out her application for costs. The claimant appealed.

Held: allowing the appeal

The ET had failed to make any finding as to whether the claimant's failure to comply with ET orders was wilful or deliberate. Had it engaged with that question, there were a number of relevant matters to which it would have needed to have regard, which provided explanations for the claimant's failings. Moreover, given the nature of the application it had to decide, there was no reason to think that the possibility of further delay should be determinative, particularly as it might have been possible to postpone the hearing to the second day of the two-day listing (and the documents to be considered at that hearing would already have been known to the respondent). There were also other alternative courses that the ET might have taken, which would also have been less draconian than a strike out. It had, however, failed to consider the relevant legal principles or to carry out the assessment required.

Similarly, the ET had failed to demonstrate any engagement with the claimant's requests for accommodations in preparing for the hearing. Had it done so, there were (again) a number of less draconian steps it might have taken, which would not have caused a substantive unfairness to the respondent.

Whether viewed through the guideline principles relating to the striking out of a substantive issue in the case, or through the prism of fairness, having regard to the impact of the claimant's health difficulties, the ET's decision failed to show that it had engaged with the assessment required. That was an error of law, such that the decision to strike out the claimant's application must be set aside.

The Honourable Mrs Justice Eady DBE, President

Introduction

1. The appeal in this case raises the question whether the Employment Tribunal ("ET") erred in law in striking out an application for costs, contrary to the provisions of schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** (the "ET Rules") and the guidance provided in the relevant case-law.

2. In giving this judgment we refer to the parties as the claimant and respondent, as below. This is our unanimous ruling on the claimant's appeal against the judgment of the East London ET (Employment Judge Elgot, sitting with Mr Ross and Ms Long, on 15 December 2022). By that judgment, the claimant's application for a postponement was refused and her application for a costs order struck out and dismissed.

3. Before the ET, the claimant appeared in person, assisted by her daughter; for the purposes of this hearing, and since an earlier hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, the claimant has had the benefit of representation from Ms Danvers of counsel, acting pro bono. The respondent appeared by counsel before the ET but does not resist this appeal and has not played any active role in the appeal proceedings.

4. It is right that we start by acknowledging the enormous assistance that we have received from Ms Danvers; we are very grateful to her, not least as she has acted in this matter without charge.

The background and the procedural history

5. The claimant was employed by the respondent as a primary school teacher from September 2011 until she resigned on 15 May 2017. On 8 June 2017, she presented a claim to the ET, complaining of disability discrimination and harassment, (constructive) unfair dismissal and unauthorised deductions from wages. A liability hearing took place in September 2018 (before EJ Ross, sitting with Mr Ross and Ms Long), with the ET providing its reserved decision on 13 November 2018, upholding the unauthorised deductions claim but dismissing all other complaints. After a successful appeal to the EAT, the matter was remitted to the same ET and a second liability hearing took place in January and February 2021, leading to a further judgment (sent out on 22 March 2021), which upheld the claim of disability discrimination by reason of a failure to make reasonable adjustments, but otherwise dismissed the claimant's claims. It is not irrelevant to note that the

failure to make reasonable adjustments related to the respondent's failure to provide the claimant with documentary evidence prior to a grievance hearing.

6. On 28 May 2021, a remedy hearing took place, and (following a successful reconsideration application by the claimant (as to which, see further below)) the claimant was awarded the sum of £6,733.32.

7. The claimant's claim of disability discrimination had related to impairments she suffered arising from anxiety and stress. Although the respondent had not conceded the question whether the claimant was disabled, she was not cross-examined as to the accuracy of her evidence in this regard and the ET's first liability judgment set out a full description of the impact on her day-to-day activities. In particular, the ET noted that the claimant had a reduced ability to absorb information, and experienced difficulty ordering her thoughts, which impacted on her ability to communicate, about which she worried excessively, and she preferred to communicate in writing, although this caused her anxiety and took longer because she took a substantial time planning and editing (see the ET's first liability judgment at paragraph 26). The ET had "*no hesitation*" in concluding that the claimant was disabled for the purposes of the **Equality Act 2010**, observing:

> "363. ... It is regrettable that the Respondent refused to concede this issue, particularly after her oral evidence on this issue went unchallenged. This wasted time and caused at least some extra stress for the Claimant. ..."

8. Although those findings on disability related to the claimant's employment, she had continued to report suffering difficulties as a result of her underlying health problems throughout the ET proceedings, and various adjustments were made at both the original liability hearing and on the remitted hearing. In advance of the remedy hearing, on 25 May 2021, the claimant wrote to the ET saying she was having difficulties preparing for the forthcoming hearing, referring to suffering symptoms of post-traumatic stress disorder ("PTSD") and attaching a letter from her GP which confirmed she was reporting having similar difficulties in obtaining documents as in her employment grievance, leaving her feeling frustrated and stressed. In its subsequent remedy judgment, the ET noted the claimant was visibly anxious at the outset of the hearing and it recorded various adjustments made to better enable her participation.

9. On 7 July 2021, the claimant made an application for reconsideration of the remedy decision. One point she raised related to the calculation of interest on the award. Upon its initial consideration of that application, as confirmed by letter of 2 August 2021, the ET acknowledged that it appeared there had been an error, directing that the respondent state its position on whether this might be agreed without the need for a

hearing.

10. Meanwhile, on 16 July 2021, those acting for the respondent made an application for costs against the claimant on the basis that she had acted unreasonably in the proceedings. In a further letter the same day, marked "*without prejudice save as to costs*", terms on which the respondent would withdraw that application were set out; reference was made to a possible appeal by the claimant, and the letter continued:

> "... our instructions are from our client that they would be willing to withdraw the costs application if you are agreeable to accept that this matter has concluded as per the [remedy] Judgment ...
> If you decide to proceed with any appeal, we will make a further application for costs to recover any further costs."

The letter did not address the outstanding issue regarding the calculation of interest.

11. On 21 July 2021, the claimant made her own application for costs, relating to both the respondent's costs application and to the costs of the claim; the claimant said the respondent had acted unreasonably, causing her to have to obtain ad hoc legal advice, and taking up significant amounts of her time. Referring to the impact the respondent's application had had on her health, and her ability to respond, the claimant explained:

> "... I appreciate it is not well presented but it really is the best I can manage (I have written about 100 pages of notes since the Respondent's application ..., and this is my attempt to make sense of that and summarise my thinking) ..."

12. On 2 August 2021, EJ Ross directed that both parties were to confirm if the costs applications could be dealt with on the papers and to provide a statement of means.

13. On 16 August 2021, the claimant emailed the ET, confirming that she was content for the costs applications to be dealt with on the papers, but seeking clarification as to the basis for the respondent's application, asking whether it was able to rely on without prejudice correspondence. The claimant also made requests for reasonable adjustments, explaining that her,

> "previous diagnosis of anxiety and depression might in fact have comorbidities with ASD (Autism Spectrum Disorder – Asperger Syndrome) and PTSD/CPTSD ..."

giving examples of difficulties that she suffered, including taking longer to understand information and liking to plan things carefully before doing them, and asking that she be given:

> ". As much time as possible between communication and requirement to act
> . Keeping requirements such as case management instructions together as far as possible
> . Requiring the respondent to be as clear as possible in their Grounds in advance so that I can properly address and try to stick to the issues. This may require clarification for a lay person as sometimes things that may seem straightforward to the tribunal or respondent's representatives are not immediately clear to me

. ... that clarification be provided before my defence is properly expected ..."

The claimant's email of 16 August 2021 also made clear that she was content for her reconsideration application (dealing with the calculation of interest on her remedy award) to be dealt with on the papers.

14. Receiving no response, the claimant wrote chasing emails to the ET on 15 October 2021 and 8 November 2021. Meanwhile, although the respondent had been directed to state whether it agreed that the interest needed to be re-calculated, it would seem its response had been limited to saying that instructions were being taken.

15. Correspondence relating to the costs applications (including the claimant's email of 16 August 2021) was not put before EJ Ross for some time. In the interim, a hearing had been listed for 15 June 2022, which – on reviewing the file – EJ Ross directed (by case management order on 30 May 2022) should be converted to a preliminary hearing to address the future case management of the costs applications and the outstanding reconsideration application relating to the calculation of interest on the remedy award.

16. A hearing duly took place on 15 June 2022, with the ET's case summary and various case management orders being sent to the parties on 21 July 2022. The ET recorded that the respondent now agreed the claimant's interest calculation in her application for reconsideration and the remedy judgment was amended to reflect that. We pause to observe that it had taken nearly a year for this correction to be made; whether that delay was due to the ET or the respondent, it is clear that the claimant was not to blame. The ET went on to summarise the issues raised by the costs applications. It was recorded that the respondent was relying on three particular communications to the claimant; two of these had been marked "*without prejudice*" and one "*without prejudice save as to costs*". As for the claimant's application, that was observed to be put on four bases: (i) in relation to the respondent's costs application, which the claimant said was unreasonable and vexatious and had not been made in good faith; (ii) in respect of a failure to agree a list of issues, leading to a second preliminary hearing on 20 December 2017; (iii) arising from failures in respect of disclosure, resulting in more communications, the obtaining of legal advice, and a further preliminary hearing; and (iv) in respect of the respondent's refusal to concede disability. The ET further made case management directions, relevantly, as follows:

(1) by 13 July 2022, the claimant was to set out the costs/preparation time she claimed;

(2) also by 13 July 2022, the respondent was to provide a first draft chronology and, absent agreement,

would file a final version, with the claimant's points marked up, by 25 August 2022, the ET observing:

> "36.2 The purpose of an agreed chronology was to provide an agreed summary of the facts, so that the length of the bundle and the hearing could be kept within manageable proportions."

(3) by 27 July 2022, the respondent would send the claimant a proposed bundle index, and by 11 August 2022 the claimant would indicate whether that was agreed or propose her revisions;

(4) by 25 August 2022, the respondent would send a final copy of the bundle to the claimant, marking up the index to indicate disagreement as to the relevance of any documents;

(5) the claimant would be permitted to file and serve a witness statement dealing with issues pertaining to the respondent's application for costs and her means;

(6) that the costs applications would be considered at a two day hearing, with dates to be fixed.

17. On 29 June 2022, the claimant wrote to the ET stating that, since the preliminary hearing, she had received legal advice to the effect that (contrary to the understanding on which that hearing had proceeded) without prejudice offers could not be admitted. The claimant did not receive a response to that communication and sent a further email on 27 September 2022.

18. On 7 October 2022, the costs hearing was listed for 15 and 16 December 2022, and the parties were duly notified.

19. The Acting Regional Employment Judge ("REJ") wrote to the parties on 14 October 2022, responding to the claimant's correspondence, agreeing that the question of admissibility needed to be resolved prior to the costs hearing and giving directions in this regard.

20. On 24 October 2022, those acting for the respondent updated their position to make clear that it would only rely on correspondence marked "*without prejudice save as to costs*", attaching the documents in question. As the materials provided by the respondent's lawyers (and its application) still included references to "*without prejudice*" negotiations, however, on 31 October 2022 the claimant again wrote to the ET suggesting these be redacted, and, given that EJ Ross had had sight of the without prejudice material at the preliminary hearing, that a new EJ should be appointed. Referring back to the earlier case management directions, the claimant pointed out that the respondent had never prepared a draft chronology, albeit this was identified as a necessary step to keep the bundle in manageable proportions; she further queried whether, given the narrowing of the respondent's costs application, a witness statement was still required.

21. Responding to the claimant's correspondence, on 4 November 2022, the Acting REJ indicated her intention to order any references to "*without prejudice*" materials be redacted and to direct that a new EJ hear the applications, albeit with the same lay members as before. She also set out proposed new case management orders for the costs hearing, including a direction that the respondent prepare a chronology (by 18 November 2022) and the final bundle (by 2 December 2022), that the claimant provide a schedule of costs/preparation time (by 25 November 2022), and that, by 9 December 2022, the parties were to serve any witness statement on which they intended to rely (albeit this did not strictly answer the query the claimant had raised in this regard). The parties were given until 11 November 2022 to raise any objections to those proposals.

22. On 11 November 2022, the claimant replied, raising questions regarding the preparation of the chronology and observing that the bundle presently prepared by the respondent did not include any documents relevant to her application. She also expressed concerns relating to one of the ET lay members, who she considered had not demonstrated an understanding of her health difficulties, particularly given the loss of an EJ who had shown awareness in this regard. The claimant again explained her difficulties, stating:

> "... my condition is likely Autism Spectrum Disorder (ASD) with a Pathological (read as "extreme") Demand Avoidant (PDA) profile and I am happy to expand upon this if needed to ensure suitable adjustments are made and my participation can be maximised."

23. On 18 November 2022, those acting for the respondent withdrew its application for costs, asking that the case management orders be varied so it would be the claimant who had to prepare the chronology (due from the respondent that day) and bundle, the respondent proposing that she produce the first iterations of these by 25 November. The respondent further proposed that the two day listing be reduced to one day.

24. On 25 November 2022, as directed by the ET, the claimant submitted her costs schedule, noting that the time pressure was difficult for her to manage under stress and with "*constant changes*". The claimant sent a further email on 28 November 2022, setting out the recent chronology and how this had impacted on her ability to prepare, stating that the time-table the respondent had suggested gave inadequate time for her to complete the tasks required. She ended her email by saying:

> "I therefore ask the tribunal to determine whether the hearing scheduled for 15 and 16 December should be postponed to allow time for case management/preparations and/or to request that I be given adequate time to produce the chronology, bundle and my witness statement even if this means only doing so shortly before the hearing if it continues in December 2022."

25. On 2 December 2022, the Acting REJ refused to postpone the hearing and, declining to replace the lay

member referenced by the claimant, directed the claimant to provide "*all relevant documents, chronology and statements*" to the respondent by 4 pm on Friday 9 December 2022.

26. Just after 4pm on 9 December 2022, the claimant emailed the ET noting that she had been working on these documents but was suffering significant health problems and had not been able to get these completed. In the early hours of the morning (2 am) on 10 December 2022, the claimant again emailed the ET as follows:

> "I have tried my very best to meet the expectations set but it is making me quite unwell. I have[n']t slept properly in days and have not had time to collect my medication which is all beginning to affect me and I have reached the point where I cannot concentrate any longer without a break for sleep. I am very sorry that I have not been able to get all of my paperwork ready for earlier today (yesterday now). I will keep trying to get this done after I have rested and managed my medication. I hope that I can get this all done over this weekend and sent over to the respondent's representative before the next working working *[sic]* day at least.
> I was concerned at how I would manage these tasks without plenty of time but the reality of having a time limit I am struggling to cope with is that my progress is so very slow despite my best efforts and I don't know what I can do but just keep trying. It might seem easier when I've slept and can focus a bit better.
> I will update the tribunal and the respondent's representative at the end of the weekend."

27. In the early hours of Monday 12 December 2022 (at around 4.40 am), the claimant again emailed the ET, explaining that she had been unable to make any progress on Saturday 10 December, due to ill health, but had worked on the documents throughout Sunday and into the Monday morning, but was still:

> "... working frustratingly slowly due to stress, effects of disability and the fact that there are over five years of dates, documents and detail to go over with five preliminary hearings at the ET; two final hearings at the ET, a remedy hearing; two reconsideration requests; an appeal to the EAT and considerable volumes of communisations [sic] surrounding the costs issue, much of that is relevant to my costs/preparation time application"

The claimant pointed out the time it had taken to obtain clarification at various stages in response to her emails to the ET, the changes that had occurred in the respondent's position, and that the burden of preparing for the hearing had only shifted to her at a very late stage. Emphasising that she would not want it to be:

> "... assumed that I do not wish to proceed or that the lack of completed preparations is any indication of lack of commitment to, or effort in trying to produce all the different pieces for the hearing. ..."

the claimant further explained that it had taken her over an hour just to write her email, and asked that:

> "any assistance can be provided or delays accepted for provision of all of the preparations as far as possible ..."

28. Later the same day (at 4.10pm) the claimant forwarded confirmation of a personal independence payment ("PIP") award from the Department of Work and Pensions, which, as she pointed out, was at the

higher, enhanced rate due to the "*severe impact*" of her condition. She added:

> "If I can be informed whether it will be allowed for the paperwork for the hearing to be produced the day before/day of the hearing if necessary as the hearing cannot be postponed, I would be very grateful."

29. By email sent shortly after 7pm that day, the respondent's lawyers made clear its objection to the claimant being allowed to produce the papers, bundle and witness statement on the day before, or the day of, the costs hearing, continuing:

> "If the Claimant is unable to further prepare her case, we respectfully ask that the Tribunal consider a) dismissing the application for costs or b) postponing the costs hearing."

30. The claimant responded to that email at 1pm on 13 December 2022, pointing out that she had received disclosure from the respondent during the course of the first hearing, and that it was the respondent's "*oppressive and vexatious conduct*" and errors by the ET that had:

> "... led to the phenomenal pressure upon me, as a disabled litigant in person to prepare all paperwork in substantially less time than the respondent was given despite them being fully represented with access to the means to produce bundles much more speedily."

concluding:

> "I can prepare for this case if I am given sufficient time but cannot in a timescale too short for me to manage. I therefore echo the respondent's representative's request that a postponement is considered."

31. At around 9:40 am on 14 December 2022, the Acting REJ wrote to the parties, saying further delay would not be in accordance with the overriding objective, and directing the claimant to provide all documents on which she wished to rely by 2pm that day. At just after 2.15pm, the claimant emailed to say she had been sending documents to the respondent (albeit a change in the identity of the solicitor dealing with the case had caused some delay) but had been told she was also expected to provide ET documents, which she could only do by forwarding electronic copies from her emails and these had frozen (providing evidence that this was the case); she explained she would bring the documents – all of which were listed in her email to the respondent's solicitors and the respondent had previously seen - to the ET the following day.

32. At 2.30 pm, the same day, those acting for the respondent sent both the claimant and the ET a bundle of documents for use at the hearing. At 2.48 pm, the claimant noted that the respondent had now provided a bundle, without having indicated it was going to do this, which included reference to "*without prejudice*" discussions. At around 3.15pm, explaining that the respondent had been trying to assist the ET and the parties

for the hearing, albeit that the file handler was off sick, those acting for the respondent withdrew the bundle.

33. Subsequently, at around 5.15 pm, the respondent's lawyers wrote to the claimant and the ET to say they were re-serving the bundle, asking that the claimant indicate which documents she objected to. About half an hour later, the claimant emailed the ET to say she could not go through the bundle highlighting each issue, and noting that it did not include the documents she had sent to the respondent. She concluded:

> "There is so much wrong at this point it is so difficult to cope. It feels like that might be the desired effect."

Shortly before 3.00 am the following day, the claimant emailed the ET to say:

> "My progress tonight has been to make some notes, overview and organise the documents I need to bring tomorrow but I am exhausted and need to be awake to get ready and travel in a few hours and so I am going to have to pause for now. Perhaps tomorrow the judge will be able to get to what matters and if some extra preparation time is required, I can do that ready for the next day?
> Please can this email go to the judge for tomorrow because I will unlikely remember to raise anything I say now tomorrow!"

34. This was thus the relevant background context before the ET hearing on 15 December 2022.

The ET hearing and decisions

35. The claimant attended the ET on 15 December 2022, accompanied by her daughter. EJ Elgot was also present in the hearing room but the two lay members and the respondent's counsel attended by CVP. At the outset of its judgment, the ET made the following observations:

> "2. We wish to record that the Claimant exhibited signs of anxiety, distress and tearfulness as symptoms of her mental health impairments but was able to listen to the Tribunal's explanations, understand the points made by Mr Williams on behalf of the Respondent and certainly after the break between 12.20 and 12.40 pm was calm and less agitated. We are satisfied that every reasonable adjustment was made to address the substantial disadvantage caused by a formal tribunal hearing. In particular as notified to the Claimant on 4 November 2022, in a letter sent by Acting Regional Employment Judge Russell, a new judge with no prior involvement was allocated to this case. Employment Judge Elgot made it clear to the Claimant that she has not read any part of the without prejudice correspondence which has been deemed inadmissible."

We pause to note that the allocation of a new EJ had not been a "*reasonable adjustment*", but was to address any possible prejudice arising from the fact that EJ Ross had previously considered "*without prejudice*" material which should not have been put before the ET.

36. The ET also clarified that it had not read the contents of the bundle produced by the respondent the previous day, noting that the claimant strongly objected to it, albeit that she was unable to say why. The ET

recorded that, in any event, the respondent had withdrawn the bundle and did not seek to rely on its contents.

37. Referring back to the preliminary hearing of 15 June 2022, the ET considered that, given the claimant was responsible for agreeing the bundle index for the costs hearing, she ought to have known that she had needed to search for, and disclose, all relevant documents by 11 August 2022, but "*did not apparently do this*". Additionally, the ET noted that exchange of witness statements had been ordered by 8 September 2022, but the claimant had "*not taken any such step*". Referring to the subsequent directions given by the Acting REJ on 4 November 2022, the ET observed that the claimant had failed to send her witness statement to the respondent, albeit she had said she intended to give evidence in support of her costs application; it also remarked that she had failed to identify the documents in the bundle that she required to be redacted.

38. Acknowledging that the respondent had withdrawn its costs application "*shortly after 4 November 2022*" (we observe that this was in fact on 18 November 2022), the ET referred to the further directions given by the Acting REJ on 2 December 2022, which made clear that, if the claimant was pursuing her own costs application, she would need to ensure "*all relevant documents, chronology and statements*" were provided to the respondent by 9 December 2022. The ET did not accept, however, that that gave the claimant only one week to comply, stating:

> "13. ... She was on notice of the necessity to take these steps by reason of the orders of the Tribunal on 15 June 2022 and 4 November 2022."

39. The ET recorded that the claimant "*applied again for a postponement*" (this seems to be a reference to the claimant's email of 13 December 2022, in which she said she was echoing the respondent's request that a postponement be considered), which had been refused by the Acting REJ on 14 December 2022, albeit that time had been extended for her to provide all the relevant documents on which she wished to rely to 2 pm that day. It found, however, that the claimant had failed to comply with the orders of 2 and 14 December 2022.

40. The claimant made a further application for a postponement at the hearing but that was refused on the basis that it would lead to a further delay of at least four months before a new listing, the ET reasoning:

> "15. ... The Claimant has had ample time and forewarning of her case management obligations in relation to her own costs application."

41. Considering the materials produced by the claimant at the hearing, the ET recorded:

> "16. The Claimant produced a small bundle of miscellaneous paper work today, no chronology and no witness statements. It is unclear which parts of it have been sent to the Respondent. The non-legal members do not have a copy. The file of paperwork she has sent to the Tribunal at 13:08 on 14 December 2022 is not compliant with

> previous orders. It makes extensive cross-reference to 'tribunal papers' and states that these will not be sent 'as you clearly have copies'. There is then a list of documents not all of which are readily identifiable which it would require the Tribunal and the Respondent to search their existing files to discover. The Claimant requires certain of those documents to be redacted but does not say how. We anticipate that any such exercise would take at least 4-6 hours to search the relevant files. Those documents include, using the Claimant's own description, an unfinished chronology (work in progress), unfinished statement (work in progress), notes for statement (work in progress). The Claimant concludes 'I cannot be sure this is everything I would include with more time but in this short time is the best I can do'."

42. Given its findings as to the procedural history, the ET concluded that the claimant had failed to comply with previous orders, stating that the documents she had made available were both incomplete and unusable in the format in which they were provided, and there was no witness statement. Noting that those acting for the respondent had previously requested that the claimant's costs application be dismissed (although it observed "*This application was not robustly pursued by Mr Williams today*"), the ET, of its own initiative, determined that, the claimant having "*persistently failed to comply properly or at all*" with ET orders, the costs application should be "*struck out and dismissed*".

The claimant's appeal and submissions in support

43. Pursuant to the permission granted by His Honour Judge Tayler at a hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993**, the claimant's appeal is pursued on four (overlapping) bases, contending: (1) the ET failed to make reasonable adjustments and/or follow a fair procedure; (2) the ET erred in refusing to postpone the hearing; (3) the ET erred in striking out the claimant's application for costs; (4) the ET erred in dismissing that application.

44. Addressing the first ground of appeal, it is the claimant's case that the ET failed to make reasonable adjustments and/or follow a fair procedure, by: (a) failing to consider the documents she had provided; (b) failing to allow final preparation to take place on 15 December 2022, and then hear the costs application on the second day of the hearing; (c) refusing to postpone the hearing; and/or (d) dismissing/striking out the costs application due to non-compliance with orders.

45. As for the second ground, and the claimant's contention that the ET erred in refusing to postpone the hearing, it is submitted that the ET: (a) failed to apply relevant legal principles, including the need to give effect to the overriding objective and, given a refusal of a postponement would be determinative of a substantive issue, to the parties' rights to a fair trial and to the wider public interest; (b) failed to have regard

to relevant considerations, including (i) whether the respondent opposed the application, (ii) the impact on the claimant, (iii) the full chronology, and (iv) the impact of the claimant's disabilities and the need to make reasonable adjustments; and (c) perversely exercised its discretion to refuse the postponement (i) when the only matters pointing away from postponement were costs and inconvenience to the respondent, and/or (ii) in the light of the claimant's disabilities and the full procedural chronology.

46. In support of the third ground of appeal and her contention that the ET erred in striking out the costs application, the claimant argues that the decision: (a) did not fall within rule 37(1)(c) of the **ET Rules**; (b) arose from a failure to apply the correct legal principles, namely (i) the need to give effect to the overriding objective, (ii) the requirement to consider the factors set out in **Weir Valves & Controls (UK) Ltd v Armitage** [2004] ICR 371, (iii) the need to consider whether striking out the application was a proportionate step, and (iv) absent exceptional circumstances such as to justify this most stringent sanction; and (c) demonstrated a failure to have regard to relevant considerations, namely: (i) a fair determination of the costs application was still possible, (ii) the issues to be determined were well-defined (set out in the case summary of EJ Ross of 15 June 2022) and likely to turn on documentary evidence available to both parties; (iii) the impact of the claimant's disabilities; (iv) the reasons for delay/non-compliance by the claimant; (v) what actual unfairness or prejudice had been caused to the respondent; (vi) whether a lesser sanction might have been appropriate.

47. As for the fourth ground, and what is said to be the ET's error in dismissing the costs application, the claimant argues that the ET: (a) wrongly purported to dismiss the application under rule 37(1)(c) **ET Rules**; alternatively, (b) failed to apply the correct legal principles, in particular: (i) whether the conditions for making a costs order were met and, if so, whether to exercise its discretion to make an order and to what extent; (c) further failed to follow a fair procedure and to consider the claimant's documents and allow the parties to make submissions; (d) reached a perverse decision, namely that the application should fail due to non-compliance with orders; (e) acted outside its case management powers and failed to apply the relevant principles.

The legal framework

48. Proceedings before the ET are governed by the rules contained in the schedules to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** (the "ET Rules"); for present purposes, we are concerned with the rules within schedule 1.

49. The application before the ET was for a costs and/or preparation time order, made pursuant to rule 76(1) **ET Rules**, which provides that the ET may make such an order, and shall consider whether to do so, where it considers that (a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably, either in bringing the proceedings (or part) or in the way the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success. We further note that the ET is also given the power, under rule 76(2), to make a costs or preparation time order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party. By rule 77, it is provided that a party can apply for a costs or preparation time order up to 28 days after the promulgation of the judgment finally determining the proceedings, but the ET can only make such an order if the paying party has first had a reasonable opportunity to make representations either at a hearing or in writing. Rule 78 then makes provision for the amount of any award.

50. By rule 29 **ET Rules**, the ET is afforded broad powers of case management. The ET's general case management powers clearly enable it to postpone a hearing, albeit specific provision is also made in this regard under rule 30A, in particular:

> "(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
> (a) all other parties consent to the postponement and— (i) ...; or (ii) it is otherwise in accordance with the overriding objective;
> (b) the application was necessitated by an act or omission of another party or the Tribunal; or
> (c) there are exceptional circumstances.
> (3) …
> (4) For the purposes of this rule—…
> (b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability."

51. In **Phelan v Richardson Rogers Ltd** [2021] ICR 1164, the EAT (His Honour Judge Auerbach presiding) was concerned with the approach to be taken to an application for a postponement on medical grounds. Referring to the guidance provided in a number of Court of Appeal decisions on this issue, including **Teinaz v London Borough of Wandsworth** [2002] ICR 1471, **O'Cathail v Transport for London** [2013] ICR 614, and **Riley v Crown Prosecution Service** [2013] EWCA Civ 951 [2013] IRLR 966, the EAT observed as follows:

> "75. ... where the application is to postpone a trial or other Hearing, the outcome of which may dispose of the claim, or some other material substantive issue in the case, the applicant's Article 6 and common law rights to a fair trial will be

> engaged. Because of the serious consequences of refusing a postponement, it should, in such cases "usually" be granted. If what sits on the other side of the scales is simply the inconvenience and cost to the other party of the matter going off, then any Tribunal properly carrying out the balancing exercise would be bound to grant the application, and a decision not to do so is liable to be overturned, applying *Wednesbury* principles. That is the point of Peter Gibson LJ's dictum in **Teinaz**. Because of what is at stake for the applicant in such cases, a failure properly and fairly to appraise the medical evidence with due care will also vitiate the exercise of the discretion, as was found to have occurred in ... **Teinaz** ....
> 76. However, as the foregoing authorities also plainly establish, the potential impact on the other party's fair trial rights, and the wider public interest, do also fall to be placed in the scales on the other side, and, if sufficiently weighty in the given case, may be properly found to tip the balance against the grant of the application. That is the point of Mummery LJ's observations in **O'Cathail**, especially at [47], and Longmore LJ's closing observation in **Riley**.
> ...
> 78. ... In principle, the question of whether to postpone a trial on grounds of medical unfitness, and that of what adjustments may be necessary to enable fair participation in litigation or a trial, arise from different scenarios. But in practice there may sometimes be features of both present, or the situation may otherwise require some careful scrutiny, to enable the Tribunal to see clearly what is truly at issue."

52. Although the EAT in **Phelan** was concerned with a postponement decision where the application was on medical grounds, the point made is capable of wider application. Where the decision to refuse a postponement will effectively dispose of the claim, or some other material substantive issue in the case, the applicant's right to a fair trial, pursuant to article 6 **European Convention on Human Rights** and common law, will be engaged. That does not mean the application must be granted: the potential impact on the fair trial rights of other parties, and the wider public interest, also fall to be placed in balance. The requirement on the ET is, however, to engage with that question and undertake the necessary balancing exercise. On appeal, while keeping in mind the deference due to the conclusion reached by the ET as the first-instance tribunal, the task for the EAT is to consider critically whether the decision demonstrates the requisite engagement with that balancing exercise.

53. More generally, in interpreting or giving effect to any power provided by the **ET Rules**, the ET is required to seek to give effect to the overriding objective, as provided by rule 2:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

Rule 2 also imposes a corresponding duty on the parties to:

> "assist the Tribunal to further the overriding objective and in particular ... cooperate generally with each other and the Tribunal."

54. Although, an exercise of judicial discretion in the case management of ET proceedings is excluded from the scope of the **Equality Act 2010** (see paragraph 3 of schedule 3 to the **Equality Act 2010**, and the observations of Underhill LJ at paragraph 33 **J v K (Equality and Human Rights Commission intervener)** [2019] IRLR 723 CA), as such an exercise of discretion must take into account all relevant considerations, the ET would still need to have regard to any disadvantage that might be caused by a litigant's disability, and the reasonable steps that might alleviate that; see **J v K**. In **Rackham v NHS Professionals Limited** UKEAT/0110/15 it was emphasised that the overall aim must be to overcome the barriers caused to the individual by their disability so that they can "*give the full and proper account that they would wish to give to the tribunal, as best they can be helped to give it*" (per Langstaff J at paragraph 36). Practical guidance on how best to achieve this is given by the **Equal Treatment Bench Book** issued by the Judicial College.

55. As for the role of the EAT, the starting point is provided by section 21 **Employment Tribunals Act 1996**, which limits the jurisdiction of this appellate tribunal to questions of law. A question of law will only arise in relation to the exercise of a case management discretion where there is an error of legal principle, a failure to take account of a relevant matter or taking account of an irrelevant one, or perversity in the outcome: **O'Cathail v Transport for London** [2013] ICR 614 CA per Mummery LJ at paragraphs 43-45. That said, where the complaint is made that the consequence of the ET's case management decision was to deny the appellant a fair process, that will be a relevant matter that the EAT will need to determine for itself: **R (on the application of Osborn) v Parole Board** [2014] AC 1115 at paragraph 43. Fairness, however, still needs to be assessed in the round, having regard to the interests of all parties (see **J v K** at paragraph 39(3)).

56. Turning then to the ET's ability to strike out a costs application, the starting point must be the provision made under the **ET Rules**. By rule 37(1), it is provided that, at any stage of the proceedings, and either on its own motion or on the application of a party, the ET may strike out all or part of a claim or response, for (relevantly) non-compliance with the **ET Rules** or with an order of the ET (rule 37(1)(c)). An issue raised by this appeal, however, is whether rule 37(1) can apply to an application for costs: is an application (or, more specifically, an application for costs) "*part of a claim*" for these purposes?

57. On this point, our view is that an application for costs can indeed fall under rule 37(1), as being "*part*

of a claim". This is consistent with the **ET Rules**, whereby, when defining what a "*judgment*" is, rule 3(1) provides that this is:

> "... a decision, made at any stage of the proceedings ... which finally determines- (i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); ..."

And that would also seem to be allowed by rule 1(1), where a "*claim*" is defined as:

> "any proceedings before an Employment Tribunal making a complaint"

when a "*complaint*" means:

> "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal"

In the present case, the ET was concerned with an application made under its costs jurisdiction (as conferred by sections 13 and 13A **Employment Tribunals Act 1996**), which formed part of the proceedings before it. That, it seems to us, would mean that it was properly to be characterised as "*part of a claim*".

58. If we were wrong in our approach to rule 37(1), however, we would not see that as fatal. In our judgement, the power to strike out an application that would otherwise fall within one of the scenarios envisaged by rule 37(1) must otherwise be provided by the ET's general case management powers at rule 29, which expressly provides that the particular powers identified in later rules do not restrict the ET's more general power under that rule.

59. Acknowledging the arguments in favour of such a power under the **ET Rules** (whether under rule 37(1) or rule 29), Ms Danvers nevertheless suggested that the reference to a "*claim*" or "*response*" might suggest an intention not to extend the ET's strike out power to applications. We are unable, however, to see any policy reason for limiting the ET's power in such a way, and consider that the language of the **ET Rules** – in particular, the reference to "*part of a claim or response*" (emphasis added) - would not support such a restriction.

60. Thus proceeding on the basis that the ET had the power to strike out the claimant's costs application, the exercise of such a power would still have been a matter of judicial discretion (hence the use of the word "*may*" in rule 37(1)). The real question on this appeal is whether the ET correctly approached its task in exercising that discretion.

61. In **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684, it was stated that there were two cardinal conditions for the exercise of the power to strike out:

> "5. ... 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."

62. A relevant question will therefore be whether the party in default can properly be said to be guilty of a deliberate and persistent failure to comply with orders of the ET. If so, the ET will be entitled to give less weight to the effect that the failure to comply had had, or to the impact that the grant of relief would have – factors that will (conversely) be far more important in the context of a case of non-deliberate or partially excusable non-compliance: see **Governing Body of St Albans Girls' School v Neary** [2009] EWCA Civ 1190, [2009] IRLR 124, per Smith LJ at paragraph 62. Even in the case of deliberate failures, however, a relevant consideration will be whether a fair trial is still possible and whether strike out is a proportionate response or whether some lesser sanction may be imposed: see **Baber v The Royal Bank of Scotland** UKEAT0301/15 and UKEAT0302/15, per Simler P (as she then was) at paragraphs 12-13. Ultimately, the guiding principle must be that provided by the overriding objective, that is, to deal with the case fairly and justly; as the EAT (His Honour Judge David Richardson presiding) observed in **Weir Valves & Controls (UK) Ltd v Armitage** [2004] ICR 371:

> "16. ... The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order...
> 17. But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

63. Where these principles are in play, the ET's reasons should demonstrate that it has weighed the factors affecting proportionality and reached a tenable decision; **Neary** paragraph 52. As Smith LJ observed (at paragraph 49 **Neary**), this involves:

> "... not so much an exercise of discretion as an exercise of judgment."

Albeit:

> "... this may be a distinction without a difference in that, in both cases, there is a duty on the judge to decide the case rationally and not capriciously and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. In both cases there may be two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal. Whereas with the exercise of discretion, the question will be whether the judge's decision was permissible on the

> evidence, with an exercise of judgment, the question will be whether his decision was fair. But provided that the judge has met these requirements, his judgment should not be impugned merely because the appellate court would or might have reached a different conclusion."

64. The role of the EAT is, therefore, to consider critically whether the decision reached can, in all the circumstances of the case, be said to be fair. Although we bear in mind that, as rule 62(4) **ET Rules** makes clear, the reasons given for any decision are to be proportionate to the significance of the issue, if the ET does not mention the relevant principles, it cannot, however, simply be assumed that it has taken them into account: **Collins v Ultimate Finance Group Ltd** [2021] UKEAT 2019-1272 at paragraph 18. Moreover, absent an application by a party, where the ET moves to strike out of its own motion, it would need to explain why it was adopting the exceptional course of imposing a more stringent sanction than had otherwise been sought; **Otehtubi v Friends in St Helier** [2017] UKEAT-0094-16 at paragraph 21.

Analysis and conclusions

65. It is helpful to start our analysis by setting out our understanding of the decision made by the ET.

66. By its formal judgment, the ET stated as follows:

> "1. The Claimant's application for a costs order against the Respondent is struck out and DISMISSED under Rule 37(1)(c) of the 2013 Rules.
> 2. The Tribunal strikes out the application of its own initiative on the ground that the Claimant has not complied with the orders of the Tribunal.
> 3. The Claimant was given a reasonable opportunity at this hearing to make representations. Her application to postpone today's hearing was refused."

67. Although the judgment thus stated that the claimant's application was "*dismissed*", it seems to us to be clear that the ET was in fact striking out the application. As the claimant's fourth ground of appeal points out, a dismissal would have implied some determination of the application on its merits (in particular, whether the conditions for making a costs or preparation time order were met and, if so, whether to exercise its discretion to make an order); it is plain, however, that the ET did not do that. Thus, to the extent that the ET was purporting to dismiss the claimant's application, we would, in any event, uphold the fourth ground of appeal; the ET's decision demonstrates no consideration of the issues identified under rule 76-78 **ET Rules**, and its reasoning provides no basis for a dismissal of the application.

68. For the reasons we have explained in setting out the legal framework relevant to this appeal, we consider that the **ET Rules** provided the ET with the power to strike out a costs application; the real question

is whether it erred in its exercise of that power. In answering that question, however, there is a lack of clarity as to the approach taken. Although the ET plainly considered the claimant had "*persistently failed*" (ET, paragraph 18) to comply with ET orders (thus engaging rule 37(1)(c) **ET Rules**), it made no finding that such failure was deliberate or wilful. That is a significant omission: absent such a finding - if the claimant's default was not deliberate and/or was partially excusable – greater weight would need to be given to the effect that failure had had, and to the impact that the grant of relief would have (see **Neary**, and **Weir Valves**). We can accept that, in some cases, the wilful character of the default may be obvious from the procedural history; we do not consider, however, that that is the position in this case.

69. Looking then at the reasoning provided, it is apparent that the ET considered the claimant had failed to take steps to comply with orders made at the preliminary hearing on 15 June 2022 regarding the hearing bundle and her witness statement, but it failed to then consider whether that failure was deliberate or without excuse. Had the ET engaged with that question, it would have needed to take account of the fact that the first step directed by EJ Ross was for the respondent to provide a first draft of the relevant chronology, a document that was intended to "*provide an agreed summary ... so that the length of the bundle ... could be kept within manageable proportions*". It would also have had to take account of the fact that on 29 June 2022, before any deadline had passed, the claimant had received legal advice that suggested that a significant part of the respondent's application for costs was based on without prejudice materials that could not be disclosed to the ET. That was a point that impacted not only upon any preparation of the hearing bundle but also on the claimant's witness statement, as, other than dealing with her means, that was to be limited to issues arising from the respondent's application. Notwithstanding the claimant having made clear her view that this point needed to be resolved, and having sent further chasing emails to the ET about this, it was only on 14 October 2022 (over three months later) that the ET acknowledged this question of admissibility needed to be dealt with; and it was only then (ten days after the ET's letter) that those acting for the respondent made clear that no reliance would be placed on the without prejudice material to which objection was taken. Even then, however, the documents that the respondent said it was continuing to rely on still included references to the objectionable without prejudice material (as did its costs application) and it was again the claimant (still acting in person) who had to raise the question of redaction, while also pointing out that the respondent had still failed to comply with the first of EJ Ross's directions, to provide an initial draft of the chronology.

70. For completeness, we note that the ET acknowledged that the Acting REJ's directions of 4 November 2022 (confirming that redactions would need to be made to the documents the respondent still relied on, and – as a result of the respondent's acceptance that it could not rely on without prejudice materials – reducing down the list of issues arising from its application) impacted on the scope of the claimant's witness statement. What the ET failed to reference, however, was the fact that these further directions had to be given because the claimant (acting as a litigant in person, who had made plain her need for clarity) had raised a legitimate concern about the basis for the respondent's costs application. Moreover, although the point in question had clear implications for the case management of the proceedings, and had been identified by the claimant only 14 days after the preliminary hearing, neither the ET nor the respondent had then engaged with her correspondence on this issue for over three months.

71. Although the ET then referred to the further case management directions proposed by the Acting REJ on 4 November 2022 – specifically, that the parties were to exchange any witness statement on which they intended to rely, and that the claimant was to identify the documents which she required to be redacted – those were clearly impacted by subsequent events. Significantly, while the first step that the Acting REJ had directed was for the respondent to produce an initial draft of the chronology by 18 November 2022, it was only on that date that the respondent withdrew its application for costs. Although the claimant complied with the direction that she submit her costs schedule by 25 November 2022, she made clear she was experiencing difficulties from these "*constant changes*" and applied to the ET, by her email of 28 November 2022, either for a postponement and re-listing of the costs hearing or for "*adequate time*" to complete the remaining case preparation. While the Acting REJ appears to have had some sympathy with the claimant's position – making a direction on 2 December 2022, extending the deadline for "*all relevant documents, chronology and statements*" to 9 December 2022 - in determining to strike out the claimant's application, the ET judged her default not in terms of the seven days following this variation to the directions but in light of the entire period following the initial directions on 15 June 2022, again ignoring the (non-claimant generated) delays arising from the failure by the ET and/or the respondent to adequately address legitimate points that the claimant had raised.

72. Turning then to the failings identified by the ET following the deadline of 9 December 2022, it is apparent from the claimant's emails during this period that, while acknowledging she was unable to meet the

required time-table, she was saying that this was due to the exacerbation of her health problems as a result of the stress she was suffering. Although the claimant did not provide evidence from a medical practitioner, corroboration of what she was saying was available: (i) from the original findings as to the impact of her disability, and from the record contained within earlier ET decisions, referring to the claimant's difficulties in dealing with the proceedings; (ii) from the information the claimant had provided in her correspondence with the ET regarding her health problems, including evidence confirming her PIP award at the higher, enhanced rate; and (iii) from the timing and content of the claimant's emails, which, if nothing else, evinced that she was working through the night in the run-up to the ET hearing. Focusing on the claimant's failings during this period, the ET makes no reference to the explanation she provided, or to the evidence that was available to it to support the claimant's account of why she was unable to comply with the time-table.

73. Pausing at this stage in our review of the ET's reasoning, we note the reference to the claimant having "*applied again for a postponement*" (ET, paragraph 14). That is, it seems to us, to be a somewhat less than neutral way of describing the request made by the claimant's email of 13 December 2022, in which she asked for "*sufficient time*" to prepare, failing which she "*would echo the respondent's representative's request that a postponement is considered*".

74. Returning to the ET's findings relevant to its decision to strike out the claimant's application for costs, the conclusion it reached was that the claimant had "*persistently failed to comply properly or at all*" with ET orders (ET, paragraph 18). Even if that was a conclusion open to the ET in the context of the procedural history we have recorded, it does not answer the further question as to whether all or part of such persistent failure was wilful or whether it was non-deliberate and/or partially excusable. As Ms Danvers observed in oral argument, had the ET concluded that the claimant's default was wilful, that would have been a finding that should have been made clear; it is, in our judgement, certainly not something that can necessarily be inferred from the procedural history in this case.

75. Absent such a finding, a crucial question for the ET was, therefore, whether a fair hearing of the claimant's costs application was still possible. That, however, is not an issue with which the ET engaged. Indeed, other than referring to the further delay that would arise if the hearing was postponed, the ET demonstrated no engagement with the principles laid down in cases such as **Blockbuster v James**, **Weir Valves**, or **Neary**.

76. In referring to the potential further delay, the ET seems to have paid no heed to the nature of the only application left for it to determine. This was not a case where issues of liability were outstanding (where the fading recall of witnesses might well be an important consideration); the claimant's costs application (as clarified by EJ Ross at the 15 June 2022 preliminary hearing) would require the ET to decide whether its costs/preparation time jurisdiction was engaged by the respondent's conduct in respect of: (i) its costs application; (ii) what was said to have been its failure to agree a list of issues; (iii) alleged failures of disclosure; and (iv) its refusal to concede disability. It is notable that the ET's proposal had originally been to decide the application on the papers (a course the claimant had agreed); and, even when setting the issue of costs down for a hearing, the first directions had only envisaged oral evidence being given in relation to the application made by the respondent. On the face of the claimant's application, it would thus seem that the ET would largely be concerned with the parties' communications regarding the list of issues and disclosure, the respondent's application for costs, and the earlier findings and observations made at the liability stage relating to the question of disability. In context, it is hard to see how the question of delay could be determinative.

77. In addition, when referring to delay, the ET seems to have viewed this in relation to the entire history of the proceedings, albeit then taking no account of the fact that at least some of the delay would have arisen from failings for which the claimant was plainly not responsible (in addition to the points we have already referenced, we note that the claimant had had to pursue an earlier appeal, which was upheld, and which had led to the remittal of her case for re-hearing).

78. More particularly, however, the ET failed to demonstrate any consideration of less draconian options; a failure that was all the more striking given that the respondent was not pursuing a strike out application at the hearing and the ET had determined to embark on this course of its own motion (and see the observations at paragraph 12 **Otehubi**). Although the ET did engage with the possibility of postponing the hearing, it rejected that option without engaging with the question whether, given the nature of the application in issue, that would in fact give rise to any prejudice (and apparently ignoring the fact that this had been a possibility canvassed by the respondent's solicitors in the email sent during the evening of 12 December 2022). In any event, in this instance, postponing the hearing of the claimant's costs application did not have to mean that the parties would have to wait "*at least four months*" for a re-listing; another possibility would have been to simply postpone the application until the second day of the hearing (in this regard, we note that those acting for the

respondent had already identified that the hearing of the claimant's application could take place in one day). Although the claimant had failed to produce a workable bundle for the first day of the hearing, we note that she had managed to send the respondent a list of the documents she relied on, and, given the nature of the application in question, these would all have been familiar to the respondent (the application was, after all, based on the correspondence between the parties and earlier decisions of the ET).

79. A further option would have been to re-visit the earlier proposal to determine the application on the papers, or, by way of yet further alternative, to consider whether there were parts of the application that could be dealt with at the hearing, even if other aspects were to be struck out. In this latter regard, we note that not all aspects of the claimant's application would seem to even require detailed consideration of the correspondence: the point made regarding the respondent's refusal to concede disability might, for example, be something more easily addressed by simply considering the ET's earlier reasoning on liability.

80. These are all matters that were plainly relevant in the exercise of the ET's discretion as to whether the claimant's application for costs should be struck out. In the present case, however, there appears to have been no assessment of the possible less draconian options available.

81. Thus far, we have considered the ET's approach to the question of strike out without specific reference to the claimant's health difficulties. The problems the claimant had identified, which she attributed to her disabilities, were, however, relevant factors to which the ET ought properly to have had regard. This was not a case where there was no independent medical evidence to support the issues identified by the claimant: not only had the ET found that she was a disabled person for the purposes of the **Equality Act 2010**, it had expressly held that the respondent's failure to ensure she had relevant documentary evidence prior to a grievance hearing amounted to a breach of the obligation to make reasonable adjustments. The claimant's correspondence leading up to the costs hearing had identified not dissimilar issues arising in relation to the ET proceedings, in particular the lack of clarity on particular points. To further support what she had said in this regard, the claimant had provided evidence of her enhanced PIP award, and had said she would be willing to provide further information if considered helpful. No issue had been taken with the claimant's account of the difficulties she was experiencing in dealing with the proceedings, yet no regard was then had at the hearing for what accommodations might have been necessary to address any disadvantages the claimant had suffered.

82. In saying this, we acknowledge that the ET did refer to having made "*reasonable adjustments*", but

this was in respect of what it recognised to be the "*substantial disadvantage caused by a formal tribunal hearing*", not in relation to the procedure that had been applied in advance of that hearing. Thus, in identifying the steps that had been taken in this regard (other than the erroneous reference to the appointment of a new EJ), the ET referred only to the taking of a twenty minute break (after which, as the ET recorded, the claimant was less agitated) and to its confirmation that it had not read the content of the respondent's bundle. The ET's reasons evince no consideration as to how the claimant, having regard to her specific needs (and see Chapter 4 of the Equal Treatment Bench Book), might have been placed at a disadvantage by the uncertainty over whether the respondent could rely on without prejudice materials in pursuing its costs application, or as to the impact on her of the late withdrawal of that application, with the consequential requirement that she would now be responsible for more of the case preparation. Indeed, in observing that the claimant had not identified the documents in the respondent's bundle to which she objected, the ET simply ignored the fact that this had been sent to her only the day before and that she had made plain that she was unable to cope with this. Given the issues the claimant had identified at an early stage – a need for as much time as possible between communication and requirement to act; keeping requirements together as far as possible; requiring the respondent to be as clear as possible, and that clarification be provided in good time – it is hard to see how these were not relevant considerations when determining whether a fair procedure had been adopted so as to ensure that the claimant could give the "*full and proper account*" that she would wish (per **Rackham**).

83. Having regard to the accommodations requested (clarification in good time, with some allowance for the additional time the claimant might require to respond), it does not seem to us that any significant unfairness would have been caused to the respondent if the ET took steps to seek to address the difficulties the claimant had reported. Recognising that the respondent's position (whether that was in relation to reliance on without prejudice materials, or in its subsequent decision to withdraw its costs application) had not been clarified in good time, and that this had inevitably impacted upon the time allowed to the claimant to comply with the ET's directions, there were a number of possible steps that could have been taken to mitigate the disadvantage the claimant said she had suffered. We have already identified various less draconian alternatives to a strike out that the ET might have considered, none of which appeared to be resisted by the respondent. In considering the possible postponement of the hearing (whether that was simply to the second day of the listing or to some future date), we further note the express allowance at rule 30A **ET Rules** for a late postponement to be granted

where exceptional circumstances exist, which may "*include ill health relating to an existing long term health condition or disability*".

84. Whether the ET's decision is thus viewed through the guideline principles relating to the striking out of a substantive issue in the case, or through the prism of fairness, having regard to the impact of the claimant's health difficulties, we are unable to see that it engaged with the assessment required. That, we are clear, was an error of law, such that the decision to strike out the claimant's application must be set aside.

Disposal

85. For the reasons provided, we therefore allow the claimant's appeal and set aside the ET's decision to strike out (and dismiss) her outstanding application for costs. That application must now be remitted to the ET for determination.

86. In deciding whether remission should be to the same, or a different, ET, we have had regard to the guidance provided in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT. It is the claimant's submission that remission should be to a differently constituted ET; we agree. As the claimant has observed, the grounds on which she seeks costs do not especially require that the application be considered by the same ET: the claimant is not relying on the conduct of the respondent at the liability or remedy hearing but, rather, on its conduct before and after those hearings, which will be reflected in correspondence and in the findings recorded in the ET's earlier decisions. Furthermore, no costs or time will be saved by the case being remitted to EJ Elgot and the members who sat on 15 December 2022, as they did not hear any part of the application and (in respect of the lay members) any memory of the specifics of the claimant's case are likely to have faded since the liability and remedy hearings. Moreover, we do consider this to be a case where the decision of the ET was totally flawed given the wholesale failure to properly consider the relevant legal principles when determining whether to strike out the application, and by the apparent absence of any appreciation of the possible impact of the claimant's disability on her pre-hearing efforts to comply with the ET's orders.