

Stop in the name of (Employment law) love: unreasonable conduct in the Employment Tribunal

Gillian Crew and Matthew Timm

Introduction

- The Employment Tribunal and litigants in person
- Strike out for unreasonable conduct is available, but it is exceptional
- Increasing unreasonable conduct?
- Themes from recent case law

Rule 38 of The Employment Tribunal Procedure Rules 2024

(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds –

...

(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;

...

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out)

Hasan v Tesco Stores Ltd UKEAT/0098/16

- The EAT held when considering strike out, the tribunal must:
 - (1) consider if a Rule 38 ground is established; and
 - (2) decide whether to exercise its discretion to strike out, given the permissive nature of the rule.

Scandalous or unreasonable conduct

- “Scandalous” includes the misuse of the privilege of legal process in order to vilify others, and giving gratuitous insult to the court in the course of such process (*Bennet v London Borough of Southwark [2002] EWCA Civ 223* per LJ Sedley)
- But improper conduct will not always justify strike out if the situation is still retrievable.
- By contrast, extreme disruptive and abusive conduct by a representative may justify strike out where the hearing can no longer continue fairly (*Edmondson v BMI Healthcare and anor EAT 0654/01*).

Bolch v Chipman [2004] IRLR 140

- The EAT held that, before making a strike out order, the tribunal should:
 - 1) find that a party or their representative has behaved scandalously, unreasonably or vexatiously.
 - 2) consider whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.
 - 3) even if unachievable, consider whether a lesser penalty would suffice.

Proportionality

- The Court of Appeal held that only in a very unusual case would it be justified to strike out on procedural grounds (*James v Blockbuster Entertainment Ltd* [2006] EWCA Civ 684 IRLR 630)
- The tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response.
- For example, a claimant discussing her case with a journalist despite having been repeatedly warned not to discuss her evidence during an adjournment whilst under oath (*Chidzoy v BBC (UKEAT/0097/17)*)

Rule 38(1)(b)-(d) and 38(1)(e)

- Where conduct falls within Rule 38(1)(b)-(d) the likelihood of recurrence is relevant to the possibility of a fair trial, however a claim could be struck out under Rule 38(1)(e) where there has been no blameworthy conduct.
- There may be a lesser test under Rules 38(1)(b)-(d) such that it requires a “significant risk” that a fair trial could not take place, whereas Rule 38(1)(e) requires that it has been established that it is “not possible” to have a fair trial (*Leeks v University College London Hospitals NHS Foundation Trust 2024 EAT 134*).

Trial Window

- The question is not whether a fair trial is possible in absolute terms.
- The EAT have made clear that the tribunal must consider whether a fair trial is possible in the trial window (*Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327*).
- That assessment can properly include delay, cost, pressure on tribunal resources, and prejudice to the other party.
- In practice, once the strike out threshold has been crossed, the fair trial question and the search for lesser measures are often intertwined (*Bailey v Aviva Employment Services Ltd EAT 109*).

Recent EAT themes

- The EAT continues to stress that strike-out remains exceptional, even in cases that are difficult to manage and where delay has occurred (*Smith v Tesco Stores Ltd 2023 EAT 11*).
- Proper weight needs to be given to a party's disability and their unreasonable conduct (*PP v GG Ltd [2025] EAT 65*).

How is the fair trial test applied? Rule 38(1)(e) cases

- It is a high hurdle to establish that a fair trial is not possible.
- The EAT held that strike out may be justified where medical evidence shows no realistic prognosis for participation in a hearing within a reasonable time (*Peixoto v British Telecommunications plc* EAT 0222/07).
- The Court of Appeal confirmed that the tribunal is not required to adjourn substantial hearings indefinitely in the hope that health may improve. If there is no realistic prognosis of sufficient improvement within a reasonable time, striking out must be an available option (*Riley v Crown Prosecution Service* 2013 IRLR 966, CA).

Passage of time

- Bare assertions that memories fade are usually insufficient. There must be something more.
- For example, no potential witness remaining employed by the Respondent, five to seven years having elapsed, and the Respondent only being able to locate a few relevant documents (*Whelpdale v Moorfields Eye Hospital NHS Foundation Trust ET Case No.2200336/18*).
- Strike out is more likely where there is specific evidential loss, such as 30 allegations of discrimination and 17 unavailable witnesses (*Boateng v Moss Bros Group Ltd EAT 50*).

Important limits

- But the tribunal must stay focused on whether a fair hearing is possible, not simply whether the case has become slow, difficult, or burdensome (*Osonnaya v South West Essex Primary Care Trust EAT/0629/11*).
- The EAT held that it was wrong to strike out because the tribunal thought that ending the claim was in the claimant's best interests. Unless a party lacks capacity, they are entitled to exercise their own judgement on questions such as whether to continue or withdraw a claim (*Mukoro v Independent Workers' Union of Great Britain and ors EAT 0128/19*).

Lack of evidence

- Before striking out for a lack of recollection or availability of evidence, the Tribunal should first identify what evidence will be necessary to determine the claim and whether the extent to which the quality of the evidence has diminished means that a fair hearing is no longer possible.
- The tribunal should identify what the case actually is, which witnesses are needed, what they remember, and what contemporaneous documents or other evidence exists (*McMahon v AXA ICAS Ltd EAT 8*).

Summary

- Unreasonable conduct alone does not automatically lead to strike out.
- The real battleground is the fair trial question which is a high hurdle in both unreasonable conduct cases and Rule 38(1)(e) cases.
- Common themes: trial window, medical prognosis, lack of evidence.
- Given the EAT's approach, strike out for unreasonable conduct will continue to be rare.
- Tribunals will continue to have to roll up their sleeves and get on with things even in the face of unreasonable conduct.

Questions