Neutral Citation Number: [2024] EAT 41

Case No: EA-2023-000152-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 March 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MS RAMANDEEP KAUR **Appellant**

- and –

SUN MARK LTD (1)
LORD RAMINDER SINGH RANGER (2)
SEA, AIR AND LAND FORWARDING LTD (3)
HARMEET SINGH AHUJA (4)

Respondents

- -
- -

Susan Chan *pro bono* (instructed by Cameron Clarke Lawyers, Solicitors) for the **Appellant**
Suzanne McKie KC and Lucas Nacif (instructed by Keystone Law, Solicitors) for the **Respondents**

Hearing date: 5 March 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 21 March 2024

SUMMARY

Practice and procedure – striking out – rule 37(1)(b) Employment Tribunal Rules 2013

The claimant had succeeded (in part) on her claims of sexual harassment, discrimination and victimisation. A hearing on remedy was stayed pending an earlier appeal, which had resulted in the victimisation claims being remitted for reconsideration. At that stage, during May 2021, the respondents had requested re-inspection of a notebook, disclosed by the claimant during the original liability hearing, and a mobile 'phone, on which the claimant said she had recorded a conversation which formed part of her claim of discrimination and victimisation. Although resisting the respondents' requests and applications for re-inspection of the notebook and 'phone, the claimant did not seek to suggest that those items had been destroyed until 30 October 2022, when she said she had in fact destroyed the notebook and 'phone in December 2020. Considering the claimant's explanation in this regard, the ET concluded that she had either destroyed these items in late October 2022, upon realising that there was likely to be an order for inspection, or was lying about having done so. Finding this was conduct falling within rule 37(1)(b) **ET Rules**, the ET further concluded that it was no longer possible to have a fair trial of the remedy claim, and that it was proportionate and appropriate that that claim should be struck out. The claimant appealed.

Held: dismissing the appeal

The ET had applied the correct tests, as laid down in the case-law, and had been entitled to find that the claimant had either destroyed the evidence in issue in late October 2020 or was lying about having done so. In any event, it had permissibly concluded that the evidence was relevant, or potentially relevant, to the continuing conduct of the proceedings and that the claimant's behaviour, in preventing further inquiry, was designed to frustrate the doing of justice. It had been open to the ET to hold that it was no longer possible for there to be a fair trial of the remedy claim and that, notwithstanding the draconian effect of striking out that claim, dealing with the case justly meant that it was both proportionate and appropriate for the remedy claim to be struck out.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises questions about the approach to be adopted by an Employment Tribunal ("ET") when exercising its power to strike out a claim under rule 37(1)(b) of schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), on the basis that the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious, or that it is no longer possible to have a fair hearing.

2. In giving this judgment, I refer to the parties as the claimant and respondents, as before the ET, save where it is helpful to distinguish between the respondents, by name. This is my determination of the claimant's appeal against a decision of the Watford ET (Employment Judge Hyams sitting alone on 9 and 10 January 2023), sent out on 8 February 2023. By that decision, the claimant's claim for a remedy for breaches of the **Equality Act 2010** ("the EqA") was struck out.

3. Representation on 9 and 10 January 2023 was as it has been on this appeal, save that Ms McKie KC is now assisted by Mr Nacif.

The Factual and Procedural Background

4. From 2 January 2018, the claimant was an accounts manager employed by Sea Air and Land Forwarding Limited ("SALF"). Early on in her employment, the claimant was seconded to another company SARR Management Ltd ("SARR"), a hotel management business. Sun Mark Limited ("Sun Mark") was an export company, owned by SALF, Lord Raminder Ranger (its Chairman) and his wife, Lady Ranger. Lord Ranger was regarded as the overall boss of Sun Mark and SALF; he was also an investor in SARR. Mr Harmeet Ahuja, the son-in-law of Lord and Lady Ranger, was director and group CEO of Sun Mark and SALF; he was also a director of SARR. Mr Kapil Sharma was head of finance at Sun Mark, but had also had temporary oversight of SARR's finance function.

5. By an ET claim presented on 8 November 2018, the claimant made complaints of direct sex discrimination; harassment related to her sex; sexual harassment; and victimisation. After a full merits hearing of all liability issues, at which the claimant was represented by counsel (although not Ms Chan), and which took place between 7 and 18 September 2020 before Employment Judge Smail and two lay members ("the

Smail ET"), the claimant's claims were upheld in the following respects: (1) contrary to sections 26(1) and/or 26(3) **EqA**, by repeated requests for a sexual relationship from early July 2018 until the end of September 2018, Mr Sharma subjected the claimant to unwanted sexual attention, which had the effect of creating an offensive environment for her; (2) in breach of section 27(1) **EqA**, Mr Ahuja victimised the claimant when, on 1 October 2018, he sought to dissuade her from pursuing a complaint of sexual harassment; (3) contrary to sections 13, 26(1) and 27(1) **EqA**, Lord Ranger directly discriminated against the claimant, harassed and victimised her in the course of a telephone call on 5 October 2018; (4) Sun Mark and SALF were jointly and severally vicariously liable for Messrs Sharma and Ahuja.

6. Prior to the liability hearing, at a preliminary hearing before EJ Hyams on 24 April 2020, the parties had been directed to give disclosure of:

> "5 … any documents relevant to the issues identified … This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they (1) assist the party who produces them or any other party, or (2) appear to be neutral.
> …
> 7 … if despite [the parties'] best endeavours, documents come to light (or are created) after [the date for disclosure], then those documents must be disclosed as soon as practicable in accordance with the duty of continuing disclosure."

7. Notwithstanding that direction, it was only during the claimant's cross-examination at the liability hearing that the existence of the following items was disclosed: (1) a notebook, in which the claimant said she had contemporaneously recorded events and her thoughts between July and October 2018 (the period over which the alleged harassment and discrimination occurred); and (2) a second mobile phone, containing a recording of the claimant's conversation with Lord Ranger on 5 October 2018. A transcript of the recording of 5 October 2018 had, however, been disclosed by the claimant at an earlier stage and the respondents had not sought to inspect the mobile 'phone on which it had been recorded. As for the notebook, when the claimant disclosed this during the liability hearing, it was put to her in cross-examination that it was, at least in part, a fabrication and she had deliberately removed pages from it; the respondents did not, however, seek an adjournment to obtain expert evidence in this regard.

8. The Smail ET addressed this evidence in its liability judgment, as follows:

> "<u>The telephone conversation with Lord Ranger on 5 October 2018</u>
> 4.35 We have listened to the tone of this conversation on several occasions, reading at the same time the jointly instructed translator's translation. The Claimant started to record her conversation with Lord Ranger some minutes into the conversation. She

> recorded it on a second mobile phone, we understand. No point has been taken about admissibility. The Claimant was speaking in a very fast and loud fashion. Lord Ranger is plainly angered by what she is saying. They speak over one another. Bits of the translation were put to Lord Ranger. Where he disagreed with the translation, he gave his version. …"
>
> "The personal notebook
> 4.61 On the first day of her evidence the Claimant was asked whether she kept a diary. No diary had been disclosed. The Claimant responded that she did keep personal notes. That was a matter of surprise to all in the Tribunal because nothing had been disclosed. The Claimant was resistant to the idea that she should produce it because as far as she was concerned it was personal to her and not meant for public consumption. The Tribunal finds as a fact that this was a genuine position on her part. She had no intention of producing what was in the notebook to anyone. Nonetheless, we ordered its production. She asked whether she could edit the amount disclosed by taking pages out. We made it clear that this was not possible and on day 2 of her evidence she produced the notebook, which is a 200 page Pukka Jotter Pad. Not all 200 pages remain but there were a number of pages written in Punjabi in different coloured inks suggesting they were written at different times containing material relevant to the allegations the Claimant makes.
> 4.62 As far as we can tell, the entries were not in chronological order. Some of the entries were irrelevant being shopping lists and the like but otherwise there was relevant material in it. We do not know precisely when the entries were made. It is not a diary, it is a notebook with observations made in it, but we are clear on the balance of probability that this document was not manipulated by the Claimant for the purposes of these Tribunal proceedings. It amounts to a genuine notebook in which she has recorded her thoughts. To that extent there is some evidential value in what she has said. Some of the entries are addressed to the Claimant's mother, not perhaps with the intention of her mother reading them but in terms of the mode of dialogue adopted by the Claimant. Some passages are consistent with the Claimant's evidence that she considered suicide. …"

9. More generally, while accepting elements of the claimant's evidence, the ET found she was not an entirely reliable witness, concluding:

> "5.2 The Claimant exaggerates considerably, in our judgment, what happened. She seeks to put a far more sinister interpretation on what happened, which is not credible. It is not credible because if the allegations happened as she said, she would have raised the problem much earlier than she did.
> 5.3 If there was no amorous pursuit on the part of Mr Sharma that would mean the Claimant has invented the entire story from start to finish. We do not think that is likely, either. That is implausible. She has however exaggerated matters considerably - exaggerated and distorted matters. That may be because she felt vulnerable as an Indian person being in this country on a visa only, hoping, eventually, to receive indefinite leave to remain. That may well have been an element to her exaggerations. We find the following proved on the balance of probability."

10. On 15 October 2020, a further hearing took place before the Smail ET, at which the draft liability judgment was presented to the parties and representations were received regarding the restricted reporting order then in place. An anonymised judgment was sent out on 27 November 2020; the restricted reporting order was lifted in April 2021; the unredacted judgment was promulgated on 12 April 2021.

11. Meanwhile, on 22 October 2020, notice of remedy hearing had been issued by the ET, listing the remedy hearing for 6 May 2021. At that stage, the claimant's schedule of loss (dated 5 November 2019) stood at £673,055.65; although the claimant was still employed by SALF, it was her case that her mental health had been impaired by reason of the respondents' conduct, impacting on her future ability to work.

12. On 3 December 2020, Mr Sharma, Mr Ahuja, Lord Ranger, Sun Mark and SALF appealed against the Smail ET's decision, which led to a stay of the ET proceedings relevant to remedy.

13. Following a preliminary hearing, Mr Sharma's appeal was dismissed but the remaining appeals were permitted to proceed to a full hearing. That hearing took place before His Honour Judge Shanks on 16 December 2021, and by his reserved judgment, handed down on 25 February 2022, the appeals were allowed in part, the EAT holding that the Smail ET's findings on victimisation were to be reconsidered.

14. In addressing the victimisation claim relating to Lord Ranger and the telephone call of 5 October 2018, HHJ Shanks summarised the submissions made in support of the appeal, and set out his conclusions, as follows:

> "25. Ms McKie challenges the tribunal's findings that Lord Ranger victimised, harassed and discriminated against Ms Kaur in the course of their telephone conversation on 5 October 2018.
> 26. The challenge in relation to victimisation is … based on the proposition that the tribunal failed properly to consider Lord Ranger's case that the reason for his conduct during the call was the *manner* in which Ms Kaur raised her complaints about Mr Sharma with him rather than the fact that she raised them ... In this context Ms McKie relied on evidence that Ms Kaur had telephoned Lord Ranger "out of the blue", had shouted and argued with him and (as she apparently accepted in cross-examination) had made statements at the outset of the call before she started to record it which were false and inflammatory (in particular that Mr Sharma had sexually assaulted her, that Mr Ahuja had lied and failed to protect her and that no woman was safe in Sun Mark Ltd). …."

15. To the extent the appeal was allowed, HHJ Shanks directed that the matter should be remitted to the same ET (to the extent that remained practicable) for reconsideration; observing it would be a matter for the ET to decide what (if any) further evidence it would require.

16. For completeness, I note that Mr Sharma applied for permission to appeal against the dismissal of his appeal by the EAT but that application was refused by the Court of Appeal.

17. Returning to the earlier chronology, although the claimant had remained in her employment at the time of the liability hearing, on 11 December 2020, she was notified that her role was redundant; on 14 December 2020, she was dismissed by reason of redundancy. On 2 March 2021, the claimant submitted a second ET claim, complaining of unfair dismissal, harassment and victimisation; on 12 May 2021, she commenced a third

claim, raising complaints of post-termination harassment and victimisation.

18. On 21 May 2021, those acting for the respondents wrote to the claimant's representative, requesting disclosure of the notebook and second mobile 'phone. It was explained that the respondents wished to have the notebook forensically examined (saying this had not been possible at the liability hearing), as it was relevant to issues of remedy and to the claimant's second ET claim. As for the mobile 'phone, again this was sought for forensic examination and was said to be relevant to the second claim and, potentially, to the appeal. In responding the same day, the claimant's representative referred to these requests as a "*baseless fishing expedition for disclosure*"; the response did not say that either item had been destroyed.

19. On 16 June 2021, the respondents applied to the ET for an order for inspection of the second mobile 'phone and the notebook. That application came before the ET (Employment Judge Wyeth) on 16 November 2021, when directions were given for the progression of the second and third claims (still extant at that stage). EJ Wyeth expressed disquiet as to the timing of the application, noting that the claimant had produced the notebook at the liability hearing and photocopies of its pages had then been supplied to the respondents. As the issue might be considered once the appeal had been determined and/or in the usual course of disclosure in the further ET proceedings, EJ Wyeth made no order on the application at that stage.

20. A preliminary hearing had been listed for 24 February 2022 in relation to the second and third ET claims; this took place in person before Employment Judge Tobin, when the respondents sought to renew their application for inspection of the claimant's notebook and second mobile 'phone. Responding to that application, in her written submissions, the claimant's then counsel (who had also represented her at the Smail ET liability hearing) resisted the contention that those items had any evidential value for the subsequent claims but, in any event, submitted that the application was premature as inspection could take place as part of standard disclosure. In the event, EJ Tobin made no order for inspection, but it is relevant to record that, at that hearing, nothing was said on the claimant's behalf to the effect that the notebook or the second 'phone had been destroyed. Subsequently, it was the claimant's evidence that she had not understood that her counsel was saying that her notebook and second 'phone might later be made available for inspection; she accepted, however, that she had seen her counsel's written response for the hearing on 24 February 2022, and had been present and able to follow the discussion regarding the respondents' application.

21. The appeal in relation to the first ET proceedings having been determined, and the victimisation claims

remitted for reconsideration, on 9 August 2022, a further preliminary hearing took place by telephone before EJ Tobin. Shortly before this, the second ET claim was withdrawn. The claimant was not represented on 9 August 2022 and I understand that she did not attend the hearing (albeit the record of that hearing suggests she did). In any event, Ms McKie attended for the respondents and renewed the application for inspection. Noting the large claim for compensation, EJ Tobin directed that the application would be considered at a further preliminary hearing (listed for 31 October 2022), stating the inspection sought:

> "7. … may be relevant and the substantive information is not otiose. … there remains a credible argument as to why the claimant should allow inspection of the second mobile ['phone] and her notebook, in particular, …"

Further noting:

> "If the order is made both parties accept the need for … a joint expert (or individual experts, if not agreed …) in respect of the authenticity of the notebook."

22. On 13 August 2022, the claimant's former solicitors came off the record. New solicitors came on the record from 28 September 2022 to 25 October 2022. During that period, the claimant withdrew her third claim. It was also her evidence that, on either 25 or 27 October 2022, those solicitors provided her with a copy of the record of the hearing before EJ Tobin on 9 August 2022.

23. On Friday 28 October 2022, the claimant wrote to the ET seeking a postponement of the hearing listed for Monday 31 October 2022. That was resisted by the respondents and refused by the ET.

24. At 18:59 on Sunday 30 October 2022, the claimant sent a witness statement to the ET (copied to the respondents) in which she stated that neither the notebook nor the second 'phone were available, as the former had been burnt by her husband and she had discarded the latter. Her explanation in this regard was as follows:

> "I was not made aware that I needed to retain the note book along with the second mobile phone. I was not made aware of the importance or implications of retaining both items, especially after winning case at tribunal in 2020.
> Therefore, I was surprised to be told by the respondents to produce these two items after such a long time and why they didn't ask for it during and after the trial.
> In relation to the journal, back in 2020 while it had been enormously helpful, it was also a daily reminder of what I had had to go through. In fact, events that had at one point led me to contemplate suicide. At the time my fiancé, Mr Raivinder Singh (we are now married and are expecting our first child) was deeply concerned about my mental and physical health.
> But I had hidden the journal away because it contained information that was at once deeply sensitive and troubling. One day my husband happened to find it and read the contents of the journal and became so upset that he burnt it.
> He was determined to help me move forward with my life and the journal was a huge impediment to that.
> However, the court, my former legal representatives as well as the respondents have scanned copies of the notebook.

> With regards to the second mobile phone, it was a very old iPhone model which I also discarded because it contained intimate pictures and memories about me and my husband (boyfriend/fiancé at the time) because in our religion and culture we are not allowed to have physical relationships before marriage."

25. The hearing on 31 October 2022 was listed before EJ Hyams. The claimant represented herself and Ms McKie again appeared for the respondents. By this stage, the claimant had withdrawn her claims of victimisation in the original proceedings, so there was no longer any reason for those matters to be reconsidered by the ET. As for the outstanding application for inspection of the claimant's notebook and second mobile 'phone, EJ Hyams recorded what he was told by the claimant on that occasion, as follows:

> "12.1 When she had "discarded" the "very old iPhone model", she had broken it up and thrown it into the river at Hayes. It had had a SIM card provided by Lyca Mobile in it, and she had left that SIM card in the telephone when she had thrown it in the river.
> 12.2 That SIM card was not registered to anyone, so that Lyca Mobile would not have any record of any mobile telephone number in her name.
> 12.3 She could not remember the (telephone) number of that Lyca Mobile SIM card.
> 12.4 She had used the mobile telephone with the Lyca Mobile SIM card in it only up to the point when she started to be absent from work on account of sickness, which was in October 2018, and she had used it only (or at least mainly) to speak to her mother in India. After then, she used the "calling over wifi" function on her (other, main) mobile telephone to speak to her mother in India.
> 12.5 Her husband had destroyed the notebook in her presence in December 2020, after the original ET's judgment had been promulgated. He said to her that he wanted to destroy it and she said: "Okay"."

EJ Hyams' note also included the following account by the claimant:

> "The claimant said that she discarded the phone after the hearing in 2020.
> She said that she did so as she was distressed and suicidal. That was after she had received the judgment and she was made redundant.
> She said that she did not know that the phone was material evidence.
> She said that she was dismissed on 14 December 2020 for redundancy.
> She said that she told her solicitor in May 2021 that she had destroyed the phone.
> The claimant said that she did not understand fully what I was saying."

In respect of the final sentence, I note that there was no interpreter available at the hearing on 31 October 2022 and, accordingly, EJ Hyams had not taken the claimant's account as evidence under oath; her comments were made in the course of the discussion at the hearing.

26. Observing that the destruction of evidence could be regarded as unreasonable conduct, impacting on whether it was possible to have a fair trial of the remaining issues in the proceedings, EJ Hyams directed that this matter should be listed for hearing on 9 and 10 January 2023. For the purposes of that hearing, at the request of the respondents (not resisted by the claimant), it was further ordered that:

> "Lyca mobile must by 4.00pm on Friday 9 December 2022 disclose to the respondents

> all contracts and documents in Lyca Mobile's possession or control relating to the claimant … from 1 July 2018 to the 31 October 2022. …"

(EJ Hyams later noted (in his record of the hearing) that there was some question over the relevant contact details for Lyca Mobile).

27. Subsequent to the hearing of 31 October 2022, on 9 November 2022 the claimant emailed Lyca Mobile providing her name and address, and asking as follows:

> "I would like to request any data held and number by Lyca mobile about me against a phone number I don't remember but may have been registered under above details. This is for a legal battle I am fighting in the court against a member of the House of Lords. Therefore it's crucial for me to get this information.
> I used to have a Lyca mobile number between 2018 and 2022 although I don't remember registering it with Lyca but just in case I did, it would be really helpful if you can share the details with me along with the data of calls during that period."

28. On 14 November 2022, the claimant served a further witness statement, which she sent to the ET (copied to those acting for the respondents), testifying, in relation to the second 'phone:

> "I used a mobile phone sim card from a company called Lyca Mobile which is used mainly by migrants to make cheaper calls back home. It's a number that can be purchased over the counter ….
> There is no requirement for the number to be registered under someone's name and can be used simply using a scratch card. I used this sim to call my mother in India between 2018 till September 2018. When I discarded my old phone, I discarded the sim with it. … "

29. On 9 December 2022, new solicitors went on the record for the claimant, and sent to the ET (and the respondents) an additional statement, in which the claimant addressed the application for inspection as follows:

> "7. The Tribunal is in receipt of two separate witness statements dated 30 October 2022 and 14 November 2022 relating to the request for specific disclosure of a notebook and telephone. I have explained in those statements why I am no longer in possession of these original items. However, I would like to add that both the Tribunal and the Respondents have copies of the notebook. I was instructed to produce the original notebook by the Judge during the hearing of my claims. The Judge ordered that the entire notebook was translated and Aplomb produced a transcript of the entire notebook for all parties including the Tribunal.
> 8. The Respondents also appear to be suggesting that I produced only part of a recording during the original Tribunal hearing. Again, this is incorrect. The entire recording was produced for the hearing of my claims. It was some significant time after the conclusion of the hearing that the Respondents made any request to inspect the phone on which I had made the recording. I believe the Respondents are merely seeking a re-trial of the issues that have already been determined by the original Tribunal on liability. I have in no way concealed or destroyed evidence that was relevant to the proceedings. The Respondents had the opportunity to inspect my original notebook and the phone on which the recording was made at the original hearing but failed to do so.
> 9. Since all parties had copies of the note book and recording, I did not think I would need to keep the original notebook which contained very sensitive and traumatic material relating to the events that took place during my employment with the

> Respondent, nor did I think that I needed to keep the phone. In any event, I do not see how either the phone or original notebook will assist the Tribunal deal with the issue of remedies. The Respondents' strike out and/or costs application for failure to produce these items is simply unjust and unfair. The constant threat of costs and strike out is adding to the stress and mental illness that I am suffering."

30. On 4 January 2023, the claimant provided a fourth witness statement, referring again to the destruction of the notebook and mobile 'phone:

> "5. With regards to the original notebook and phone that the Respondents are seeking disclosure of, I disposed of these items in December 2020 following the conclusion of the liability hearing and oral judgment that was delivered in October 2020. I was engaged during this period and the case was putting pressure on my relationship (with my now husband) to such an extent that I had thought of taking my own life. The circumstances of the case were particularly difficult for my partner to deal with as they involved harassment by another male. After succeeding with my claims in October 2020, I wanted to progress with my personal life and get married. The notebook was a constant reminder of the events and suffering that I had endured at the hands of the Respondents. My husband therefore destroyed the notebook (with my agreement) by burning it as he thought it would help me forget the difficult events that l had endured and that it would help us both move on with our lives.
> 6. I also discarded the phone in December 2020 as the phone itself was old and had a cracked screen. There were also intimate pictures on the phone of my now husband and I. I did not wish anyone to see those images prior to our marriage as in Indian culture, intimacy prior to marriage is forbidden and can result in being cast out from the community. The community is extremely close knit and I was worried that the images may have been discovered before I was married. I therefore discarded the phone by throwing it in the river whilst I was in Hayes."

31. At the hearing before EJ Hyams, on 9 January 2023, the claimant (assisted by an interpreter) gave oral evidence in the following terms:

> "Q: When did you get married?
> A: September 2021.
> Q: So why did you destroy your mobile phone in December 2020?
> A: Because I wanted to get married to my fiancé.
> Q: But if the only photographs on the phone were of you and your fiancé what was the problem?
> A: As we were not married at that time.
> Q: But if the only photos were of you and your fiancé what was the embarrassment?
> A: In the Sikh religion it is not a good thing to have photographs and stuff with anyone; and love photographs before getting married is a huge thing.
> Q: When did you get engaged?
> A: 2014.
> Q: So you retained intimate photos for 6 years?
> A: Yes.
> Q: And you were expecting to get married from 2014 onwards?
> A: At that time I did not have indefinite leave to remain; it would take 10 years.
> Q: At the last hearing you said that it was redundancy that prompted you to destroy the evidence; is that not the case now?
> A: That happened after I destroyed the phone.
> Q: You said it last time?
> A: No. You have misunderstood.
> …

> Q: You accept that the date you give for destruction occurred before you were made redundant?
> A: I would like to say I had said that I had destroyed the phone when there was a discussion around my redundancy as you asked me when I had destroyed the phone; and those were the dates I could remember.
> Q: Who did you expect to be able to find these photographs?
> A: The photos on the phone; if my fiancé had withdrawn from getting married or I had, he could have leaked those photos.
> Q: The phone was password protected?
> A: No.
> …
> Q: Did your then fiancé have access to the phone or not?
> A: I never put the phone in front of him.
> Q: Did he know of the existence of the phone?
> A: Yes
> Q: Was he the one who took the photos?
> A: I do not want to answer this very private question.
> Q: How would he have access to the phone?
> A: As he could find it with any search of my stuff.
> Q: But he had taken the pictures?
> A: I do not want to answer this question as it is part of my private life.
> Q: You used the possibility of him finding the photos as a justification for destroying the phone?
> A: I have not come here to discuss the matter of the sexual affairs of me and my husband. I said that only because of the phone's destruction.
> Q: Why not destroy the pictures?
> A: I chose to destroy the phone.
> Q: Did your fiancé send these photos to himself?
> A: I did not come here to discuss my private life.
> Q: Did he sent them to his phone?
> A: I was the only one who had access to the phone.
> Q: You said earlier that he had access to it too.
> A: We had a very small house. He could search for anything in it.
> Q: You say you destroyed it by smashing it to pieces?
> A: The screen was already broken so I destroyed the rest.
> Q: Did you drive to the river?
> A: ... I walked.
> Q: How badly did you destroy the phone; was it in pieces?
> A: I broke it and then threw it in the river.
> Q: Why was it necessary to throw it in the river if you had already destroyed it?
> A: I have been suggested by someone … that an iPhone can be backed up but I do not know what that means so I broke it down and threw it into the river. …
> Q: Did you ever give the phone to your solicitor?
> A: No."

32. As EJ Hyams recorded, during her evidence, the claimant also accepted that her (then) fiancé had been present at the Smail ET liability hearing. She explained that he had stormed out during questioning about the notebook, although accepted he had been present for about half of that part of her cross-examination.

The ET's Decision and Reasoning

33. In considering the claimant's various accounts of what had happened to the notebook and the second

mobile 'phone, EJ Hyams concluded that the explanations provided were not credible.

34. In relation to the notebook, he considered the suggestion that the claimant's fiancé had found the notebook in December 2020, and was so upset by the content that he burnt it, seemed to be a fabrication, given that it was only in September 2020 that the claimant disclosed the notebook and her fiancé had been aware of its existence and content by virtue of being present at the liability hearing. EJ Hyams further noted that, if the explanation was true, and the notebook was destroyed in December 2020, that would have been shortly after the respondents had lodged their appeal; so it would still have been material evidence. He found, however, that the claimant's accounts were inconsistent: initially she said it was her fiancé who destroyed the notebook because he was upset by its content; later she said that it was because she wanted to get on with her life that her husband burnt the notebook, a decision in which she had been involved. EJ Hyams further noted that the claimant had said nothing about the destruction of the notebook during the entire period when she knew the respondents were seeking to inspect it, from (at the latest) June 2021 until 30 October 2022.

35. As for the second mobile 'phone, EJ Hyams observed that the primary reason for destroying this item had changed from the fact it contained "*intimate pictures and memories*", to (whilst still also referring to the pictures) the fact it was old and had a cracked screen. To the extent the claimant was saying she had destroyed the 'phone because she "*wanted to get married to [her] fiancé*", he found that was contradicted by her evidence that she was concerned that her fiancé might leak the photographs, and was, in any event, a nonsense: her fiancé must have known the photographs had been taken, but, in any event, they would plainly not deter him from marrying her as they merely confirmed what he already knew. The claimant had been openly living with him since 2018 and they had had pre-marital sex, and the claimant's refusal to answer questions about her fiancé's knowledge of the photographs was evasive (her explanation made no sense, as information about her private photographs was already in the public domain). EJ Hyams further found that the claimant had given contradictory evidence as to when the 'phone was destroyed: initially saying it was after she was made redundant, but then saying it was before. Furthermore, having said she had stopped using the 'phone after October 2018, and destroyed it in December 2020, EJ Hyams noted she had then written to Lyca saying she had had a Lyca mobile number between 2018 and 2022. He also observed that, as with the notebook, the claimant had made no suggestion that the 'phone had been destroyed prior to 30 October 2022.

36. EJ Hyams concluded that the claimant had not in fact destroyed the notebook or second 'phone in

December 2020; if they had been destroyed, that was only done in October 2022, after the claimant received the record of the hearing before EJ Tobin on 9 August 2022. He explained his reasoning, as follows:

> "59. … The above inconsistencies in the claimant's evidence and its objective implausibility were in themselves a sufficient basis for concluding, as I did, that (1) whatever were the claimant's abilities in regard to understanding and speaking the English language, she understood fully what was being sought by the respondents by way of inspection from June 2021 onwards and that the respondents were pressing for such inspection, and (2) if she had destroyed those things in December 2020 then she would not have stood by and let the respondents press their applications for the inspection of those things and her counsel respond to those applications on the basis that those things were still available. ...
> 60 If, however, that was not the case, then the claimant consciously permitted the respondents to press for the inspection of the mobile telephone and the notebook, and to spend much time and money in doing so, despite knowing that the applications were bound to be fruitless. That, if it had occurred, would have been unreasonable and vexatious conduct on the claimant's part.
> 61 However, I concluded that if the claimant had actually destroyed the notebook and the mobile telephone, then she did so only after receiving the record of EJ Tobin …, which was … at the latest on 27 October 2022. That, I concluded, was the first time that the claimant realised that there was a real chance that the tribunal might order the re-inspection of the notebook and the inspection of the mobile telephone. Therefore, I concluded, the claimant told a deliberate untruth either about the date of their destruction, or about the fact of their destruction. Thus, either the claimant destroyed the notebook and the mobile telephone in October 2022 in the knowledge that there was a real chance that their inspection might be ordered, or she lied about the fact of their destruction. Whichever of those two things she did, it was designed to prevent an order for the inspection of the mobile telephone or the notebook being made or, if it was made, having any effect.
> 62 The fact that at the time of the telling of that deliberate untruth or that destruction, the claimant knew that the notebook and the telephone might be disclosed, suggested strongly that the claimant knew that if the respondents obtained the expert evidence about those things then the respondents would find something which (1) would justify an application to the original tribunal to reconsider its findings on liability and (2) would at the very least undermine the claimant's evidence about the effects on her of the acts of the respondents which the original tribunal had concluded had occurred and which had not been overturned on appeal."

37. EJ Hyams further rejected the claimant's argument that neither the notebook nor the recording of the conversation on 5 October 2018 had any relevance to the issues of remedy; in this regard, he reasoned:

> "77 … there is at least a possibility that things said by or on behalf of a respondent which were harassing within the meaning of section 26(1) of the Equality Act 2010 could properly (i.e. lawfully) be held to have had less of an impact on the claimant's feelings if they were said in response to deliberate provocation by the claimant than if they were not said in response to such provocation. … That factor was relevant to an analysis of the impact of the claimant's refusal to make available, or her deliberate destruction of, the mobile telephone.
> 78 In addition, and more importantly, if there was anything which had been (1) written in the notebook and then removed from it, or (2) written in it after the event with a view to bolstering the claimant's case about the impact on her feelings and/or her mental health of the things that the original tribunal concluded had in fact been said or done by the relevant respondents, then that would be of considerable importance in determining the level of the compensation which the claimant should receive.

> 79 However, the fact that the recording of the telephone conversation of 5 October 2018 was made on a second mobile telephone was not at all material. In addition, the fact that the recording was not a complete recording was known by the respondents long before the liability hearing, and the respondents could have asked to inspect the mobile telephone (whichever one it was) on which the claimant had recorded the conversation long before that hearing, but did not do so. However, there was no ostensibly good practical or legal reason why the respondents should not have had an opportunity to inspect the telephone, i.e. now, for the first time.
> 80 Similarly, it could be said that … it would not be fair to the claimant to raise again the issue of the provenance of the notebook and to look into the possibilities that (1) it had been tampered with and (2) entries in it were falsified. Against that, however, it could be said … that (1) the claimant's failure to disclose the notebook before the liability hearing was in breach of the orders which … I had made on 24 April 2020, and (2) the fact that the respondents did not seek to adjourn the hearing in order to obtain expert evidence in relation to the notebook had to be seen against the background of the fact that they had not had a fair opportunity at that time (since they were not informed until the middle of the claimant's evidence of the existence of the notebook) to find out whether or not there was such evidence available. In addition, all that was sought in regard to the notebook was another opportunity to inspect it. …"

38. Given his findings of fact, EJ Hyams concluded that the claimant's conduct was scandalous, unreasonable, and vexatious, within the meaning of rule 37(1)(b) of the **ET Rules**. He acknowledged, however, that striking out the claimant's remedy claim would be a draconian step, particularly as she had partially succeeded on liability, observing that, although the circumstances were exceptional, and the ET had a discretion whether or not to strike out the claim, any such discretion had to be exercised judicially and it was necessary to determine, as a matter of judgement, what the just result was. In that regard, although not conclusive, EJ Hymans noted that he was required to decide whether it was no longer possible to have a fair hearing in respect of the claim to a remedy; he concluded that it no longer was, reasoning:

> "83.1 It was by no means a fanciful possibility that the claimant had in fact recorded the whole of the conversation of 5 October 2018 and deliberately disclosed only part of it. Thus her refusal to permit inspection of the device on which the recording was made so that the possibility could be assessed by an expert, stood in the way of the doing of justice to the respondents in that it meant that the tribunal could make no meaningful order for the inspection by the respondents of the telephone.
> 83.2 Even though the respondents had failed to take the opportunity to seek an adjournment of the liability hearing in order to obtain an expert examination of the notebook, the claimant's late disclosure of the notebook had put the respondents in a difficult position and the notebook was now going to be of significant evidential weight in the determination of the impact on the claimant's feelings and mental health of the unlawful conduct which the original tribunal had concluded had occurred. Precluding an inspection of the notebook so that the copies of it which were in existence had to be taken by the respondents (and therefore the tribunal) at face value had the result in my judgment that a fair hearing of the remedy claim was no longer possible. That was for the following reasons.
> 83.2.1 Even though the respondents had already had an opportunity to inspect the notebook, that was under the enormous pressure of time in the liability hearing.
> 83.2.2 The claimant should have disclosed the notebook before the liability hearing.

> 83.2.3 There was no practical reason why the claimant should not have made it available again.
> 83.2.4 Even though it was by no means clear that an expert examination of the notebook would have revealed something of value to the respondents, they had now been precluded from obtaining such an examination when … there was good reason to think that such an examination might well have been fruitful as far as the respondents were concerned.
> …"

39. EJ Hyams further noted that the claimant's conduct – in destroying the evidence or in not telling the truth to the ET – supported the view that expert examination of the notebook would have been fruitful.

40. Having determined that a fair trial of the remedy claim was no longer possible, EJ Hyams considered whether it was proportionate and appropriate to strike out that claim. In concluding that it was, he explained:

> "84. … I took into account the fact that the respondents had had an opportunity before the liability hearing to inspect the mobile telephone and during the liability hearing could have asked for an adjournment to ask an expert to inspect the notebook but chose not to do either of those things. In addition, the original tribunal had already come to a conclusion on the reliability of the entries in the notebook. Those were powerful factors which weighed quite heavily against the striking out of the remedy claim. However, those factors were in my judgment significantly outweighed by the claimant's conduct ….
> 85 That conduct was in my judgment inimical to the doing of justice in that it was designed to frustrate the doing of justice. Even if the claimant panicked and there was nothing which an inspection of the notebook or the mobile telephone could have revealed which would have weakened her case in regard to remedy or justified a reconsideration of the liability judgment (and whether or not that was the case was of course not capable of being known now), her deliberate destruction of those things, or lying in saying that she had destroyed them, was intended to prevent the respondents and the tribunal from considering further material which could have affected the outcome of the proceedings in a significant way."

41. Seeing this case as analogous **Arrow Nominees v Blackledge** [2001] BCC 591, EJ Hyams concluded that, by reason of the claimant's conduct, he was bound to strike out her claim to a remedy. In any event, and to the extent that he was not so bound, he considered it clear that the only just result would be for the claimant's claim to a remedy to be struck out on the basis that her conduct was scandalous, unreasonable and vexatious, as plainly designed to stop any further enquiry into the reliability of evidence relevant to that claim.

The Legal Framework

42. By rule 37(1) of schedule 1 of the **ET Rules**, it is provided that:

> (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).

43. The ET found that the circumstances of the present case fell within rule 37(1)(b): the manner in which the proceedings had been conducted by the claimant had been scandalous, unreasonable or vexatious. The predecessor to this provision (under the **ET Rules 2004**) was considered by the Court of Appeal in **Abegaze v Shrewsbury College of Arts & Technology** [2009] EWCA Civ 96, [2010] IRLR 236; drawing upon earlier guidance in **Blockbuster Entertainments Ltd v James** [2006] EWCA Civ 684, [2006] IRLR 630, **Arrow Nominees v Blackledge** [2000] EWCA Civ 20, [2001] BCC 591, and **Bolch v Chipman** [2004] IRLR 140 EAT, Elias LJ held that, when considering a strike out on such grounds, an ET must be satisfied:

> "15. … that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed."

44. In the present case, the claimant places particular reliance on the decision of the EAT (Burton P presiding) in **Bolch**, in which (albeit in the context of a strike out of a respondent's response) four questions were identified, as follows:

> "55. …
> (1) There must be a conclusion by the tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.
> …
> (2) Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question … what is required before there can be a strike out … is a conclusion as to whether a fair trial is or is not still possible. … The reason for the need for that question to be asked, … is that a striking out order is not (or at any rate not simply) regarded as a punishment.
> …
> (3) Once there has been a conclusion, if there has been, that the proceedings have been conducted [unreasonably] …, and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even in the absence of a conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the [party] … from the judgment seat … may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty.
> (4) But even if the question of a fair trial is found against such a party, the question still arises as to consequence. …. The effect of a notice of appearance being struck out is of course that there is no notice of appearance served. …[but] even a party who has not put in a notice of appearance … is entitled to probe the case for the applicant.

> … [A]ny tribunal making an order, in the circumstances in which this Tribunal made its order, must ask the question as to what the appropriate consequence is. … a respondent who has not entered an appearance is not entitled to take any part in the proceedings. But that does not prevent the tribunal, pursuant to its case management powers … to make appropriate and proportionate orders. An option in such a case as this would have been for the tribunal to debar the respondent from taking any further part in liability but not necessarily to debar the respondent but rather to permit him to take part and at the very least probe the case for the applicant on the question of compensation."

45. For the respondents, reliance is placed on the decision in **Logicrose Ltd v Southend United Football Club Ltd (1988) Times, 5 March** (cited with approval in **Arrow Nominees**), in which Millett J held:

> "The deliberate and successful suppression of a material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe**.** But if the threat of such exclusion produces the missing document, then the object … is achieved. ..."

46. Addressing the destruction of documents, in **Active Media Services Inc v Burmester, Duncker & Joly GmbH & Co Kg & Ors [2021] EWHC 232 (Comm)**, Calver J held that:

> "303. The starting point in a case of deliberate destruction of documents is that if a fair trial of the action cannot then take place, the destroying party's case should be struck out. And of course, the later that the destruction take place, the worse the position; it may make a fair trial of the action less likely."

Noting that the very late destruction of documents in that case had meant that the other parties had little or no time to properly investigate the position, Calver J cited, with approval, paragraph 11-16 of ***Hollander, Documentary Evidence (13th Edn)***, which states:

> "… where the defaulting party has been less than candid about the destruction exercise, the court may consider it cannot be sure exactly how widespread the destruction has been, and what its effect will be, and thus may find it more difficult to reach a conclusion that a fair trial is still possible."

But further observed:

> "308. …. in a case where the trial has concluded the position is … somewhat different. Indeed, it is for this reason no doubt that as Hollander goes on to state: "*it would be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way* ". I agree."

Going on to hold that the appropriate course might be to draw adverse inferences as to what the destroyed documents were likely to have shown on the issue in question.

47. As Simler P (as she then was) observed in **Arriva London North Ltd v Maseya** UKEAT/0096/16 (12

July 2016, unreported):

> "27. … There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles. Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any tribunal considering the sanction of a strike out is whether the party's conduct has rendered a fair trial impossible: see *Bolch*, where Burton P cited *De Keyser Ltd v Wilson* [2001] IRLR 324 EAT and *Arrow Nominees Inc & Anr v Blackledge & Ors*[2000] EWCA Civ 200. Those cases make clear that even where conduct is held to be scandalous, unreasonable or vexatious in relation to the conduct of proceedings, before making a strike out order a tribunal must consider whether a fair trial is possible. If a fair trial remains possible, the case should generally be permitted to proceed because the sanction of strike out is not regarded as simply punitive. Even where a tribunal concludes that a fair trial is not possible, it is necessary to consider whether a lesser remedy that does not bar the defendant from defending the claim in its entirety is a more proportionate and available course to adopt. (See also *James v Blockbuster* to similar effect, where Sedley LJ recognised the draconian nature of the strike out power and said that it is not to be readily exercised and that even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether that sanction is a proportionate response in the particular circumstances of the case.)."

48. In **Arrow Nominees**, the conduct in issue related to the forging of documents that were then relied on in the proceedings. Although the judge at first instance had declined to refuse to strike out the claim, the Court of Appeal disagreed, reasoning (per Chadwick LJ, with whom the other members of the court agreed):

> "54. … where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

49. Supporting the conclusion thus reached by Chadwick LJ, Ward LJ recognised the draconian consequence of the strike out but was clear that this result was consistent with the overriding objective, to deal with the case justly:

> "73. The attempted perversion of justice is the very antithesis of parties coming before the court on an equal footing. …
> 74. This was … a flagrant and continuing affront to the court. Striking out is not a disproportionate remedy for such an abuse, even when the petitioners lose so much of the fruits of their labour…."

50. In applying its power under rule 37(1), an ET must also seek to deal with the case before it fairly and justly, which means (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 **ET Rules**).

The Claimant's Appeal; Submissions; Discussion and Conclusions

51. By her first ground of appeal the claimant contends EJ Hyams' failure to follow the four-stage approach laid down by the EAT in **Bolch** led to a decision that was unjustifiably draconian, disproportionate and perverse, given: the original evidence sought was of minimal or no relevance to remedy; all parties had been in possession of copies of that evidence since the liability hearing; the ET had not ordered or made clear that the original evidence should be preserved once the liability hearing ended; the respondents had only sought the original evidence on 21 May 2021, some eight months after the liability hearing and six months after the Smail ET's oral judgment; at the time the claimant had discarded the materials in question (whether that was in December 2020 or October 2022), there had been no order in force that she should produce the original evidence. More specifically, in considering the first of the **Bolch** questions, EJ Hyams failed to ask whether there had been unreasonable conduct "*of the proceedings*": if the evidence was destroyed in December 2020, the proceedings were not then being actively conducted. The second **Bolch** question was addressed by the fourth ground of appeal. As for the third question, although EJ Hyams had used the word "*proportionate*" (ET decision, paragraph 84), there was no indication he had carried out the relevant balancing exercise; had he done so, he could not reasonably have held it proportionate to find the destruction of the notebook and second mobile 'phone more deserving of censure than the sexual harassment, discrimination, and victimisation the claimant had suffered. Finally, the claimant says EJ Hyams demonstrated no engagement with the fourth **Bolch** question, whether an alternative consequence (short of striking out) was appropriate.

52. On a fair reading of the reasons provided by the ET in this case, I do not accept the opening premise of this first ground of appeal. It seems to me clear that EJ Hyams had the relevant case-law well in mind, and went on to consider each of the questions identified in **Bolch**. As the respondents have submitted, my approach to the reasoning of the ET should not be "*hypercritical*" (see **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 per Popplewell LJ at paragraph 57), and, while accepting that **Bolch** was not expressly cited in the decision, it is nevertheless clear that EJ Hyams had regard to the relevant principles (citing the relevant passages in

Blockbuster Entertainment, **Arrow Nominees** and other authorities), which he then applied in determining what course to adopt. Thus (and allowing for a degree of overlap in the consideration of each of these questions), it can be seen that **Bolch** (1) was addressed at paragraph 81; **Bolch** (2) at paragraph 83; **Bolch** (3) at paragraph 84; and **Bolch** (4) at paragraphs 82, and 85-87.

53. Turning to the substantive criticisms made under this ground, the assertion that the evidence in issue was of minimal or no relevance to remedy fails to engage with EJ Hyams' reasoning at paragraphs 77-80 (see as set out at paragraph 37 above): examination of the second mobile 'phone might have disclosed further evidence relevant to the impact of Lord Ranger's comments on the claimant (ET, paragraph 77), and the entries in the notebook had been relied on as supporting the claimant's case as to the effect on her of the treatment she had experienced and were thus likely to be material to the determination of remedy (ET, paragraph 78). The opportunity for those acting for the respondents to have obtained an expert evaluation of the second mobile 'phone and/or the notebook had been limited, as the existence of those items was only disclosed during the course of the claimant's evidence, and, in respect of both, EJ Hyams was entitled to draw an adverse inference from what he found to be the unsatisfactory explanation for why they could no longer be made available for inspection (see the observations in **Active Media**).

54. As for the suggestion, that the conduct in issue was not "*in the course of the proceedings*"; I disagree. First, because EJ Hyams was clear: the conduct (whether it was the destruction of the evidence or the lies told about its unavailability) occurred in late October 2022, when the question of re-inspection was very much "*in the course of the proceedings*". In this regard, I bear in mind that EJ Hyams made a clear finding of fact that the claimant did not (as she claimed) destroy the notebook and second mobile 'phone in December 2020; rather, she was either lying about having destroyed that evidence or she had destroyed it in late October 2022, after receiving the record of the hearing before EJ Tobin, when she realised there was a real chance that re-inspection of the notebook and 'phone might be ordered (ET decision, paragraph 61). Given the fact that the respondents had been seeking re-inspection since May 2021, and the many opportunities the claimant had thus had to disclose that these items had already been destroyed, it was plainly open to EJ Hyams to reject the account she gave for the first time on 30 October 2022. Second, however, even if the destruction had been in December 2022, it would have been apparent to the claimant and her legal advisers that any evidence relevant to remedy would be material to the on-going proceedings (notice of the remedy hearing having been sent out

on 22 October 2020). On the claimant's own case, that would include the notebook (relied on to support her evidence as to the effect of the treatment she had experienced), but which, on the respondents' case, would also include the claimant's opening remarks in her conversation with Lord Ranger on 5 October 2022. On this latter point, as the respondents had filed their appeals on 3 December 2020 – including a challenge to the findings relating to the conversation with Lord Ranger on 5 October 2018, and what was said to be the claimant's provocation at the outset of that exchange – it should similarly have been clear that the second mobile 'phone remained at least potentially relevant to those proceedings.

55. As for the contention that EJ Hyams failed to carry out the required proportionality assessment, that seems to me to fail to engage with the reasoning provided and the substance of the findings made. Having taken into account the factors that weighed against striking out the claimant's remedy claim (in particular: the findings made in her favour on liability; the question whether expert examination would have revealed something of value; the respondents' earlier failure to take more proactive steps to inspect the notebook and 'phone (ET decision, paragraphs 82-84)), EJ Hyams concluded that her conduct (as he had permissibly found) had been "*designed to frustrate the doing of justice*", such that it would be unjust to permit the case on remedy to proceed. Again, as has been pointed out on behalf of the respondents, the claimant had relied on entries in the notebook as supporting her contention as the effect of the discriminatory conduct of which she complained (and, as noted at paragraph 4.61 of the liability judgment, some of the passages on the pages that had been disclosed were consistent with the claimant's evidence in this regard). EJ Hyams found, however, that the claimant's conduct had ensured there could be no expert examination of the notebook, so it could no longer be known whether further inspection would have weakened her case on remedy or even (possibly taken together with expert examination of the second mobile 'phone) provided grounds for an application for reconsideration of the liability decision. EJ Hyams was not simply weighing in the balance the need to demonstrate disapproval of the claimant's conduct vis-à-vis that of the respondents; the sanction of strike out is not purely a question of punishment (see **Bolch** (3), and **Maseya**), but requires an assessment of the appropriate and proportionate response, consistent with the need to deal with the case fairly and justly, in accordance with the overriding objective. In this regard, given his findings of fact, EJ Hyams' conclusion was one that was entirely permissible.

56. As for **Bolch** (4), and the question whether some lesser sanction might have been imposed, the

claimant contends this might have been achieved by the making of an award of costs or by holding that she could not pursue a claim for aggravated damages. For the respondents, however, it is objected that such alternatives would not address EJ Hyams' finding that it was no longer possible to proceed to a just and fair determination of the remedy claim. That, in my judgement, is correct: the remedy claim was founded upon the claimant's case as to the impact of the respondents' conduct on her mental health (and, therefore, her ability to earn), and the injury to feelings and personal injury that she claimed as a result. Whilst the Smail ET had already cast some doubt on the claimant's credibility (see the passages cited at paragraph 9 above), EJ Hyams had found as a fact that she had been dishonest in her conduct of the proceedings, either lying about whether evidence had been destroyed, or about when it had been destroyed. More than that, however, he had concluded that she had deliberately ensured that the evidence in issue could no longer be examined so as to further test the credibility of her case. In the circumstances, he was entitled to take the view that there was no other proportionate response: justice would not be achieved by imposing a lesser sanction such as a costs award or limiting the strike out only to the claim of aggravated damages.

57. By her second ground of appeal, the claimant contends that, in dismissing her fears of the distribution of intimate photographs on her 'phone, EJ Hyams failed to have regard to her ethnic, cultural and religious background as an Indian Sikh woman. It is submitted that when concluding that this explanation was "*a nonsense*", EJ Hyams, as a non-Indian, non-Sikh male, erred in law by considering the matter only from his personal cultural perspective, and failed to show any sensitivity, awareness or understanding that the claimant could hold a potentially different viewpoint from his own, due to her ethnic, cultural and religious background and fear of the community's societal disapproval towards such matters, or that women in particular, will particularly fear distribution of intimate photos for reasons of privacy and modesty.

58. As has been pointed out on behalf of the respondents, however, this argument fails to engage with the fundamental reason for EJ Hyams' rejection of the claimant's evidence, namely her failure (at least prior to 30 October 2022) to disclose that the notebook and 'phone had been destroyed, and, therefore, that the respondents' requests and applications for inspection since May 2021 had been rendered academic. Given the procedural history set out at paragraphs 18-23 above, and the opportunities that had been available to the claimant to make clear that neither the original notebook nor the second mobile 'phone were still available, EJ Hyams was entitled to conclude that the account the claimant had provided after receiving the record of the

hearing before EJ Tobin (which made clear that an order for inspection was a real possibility) was untrue (see paragraphs 60-61 of his reasoning, set out at paragraph 36 above). His further findings as to the inconsistencies of the claimant's various accounts, as provided on and after 30 October 2022, merely provided additional support for that conclusion. As for the particular finding made in relation to the claimant's stated concerns about the images on her second mobile 'phone, I do not read EJ Hyams' reasoning as reflecting a particular cultural perspective, rather than providing his (permissible) assessment of the internal contradictions within, and implausibility of, the claimant's account (as reflected, for example, in the record of her evidence set out at paragraph 31 above).

59. Similar considerations arise in relation to the claimant's third and sixth grounds of appeal (addressed together in argument), whereby it is contended that EJ Hyams failed to have regard to relevant considerations when drawing adverse inferences on the notebook and second mobile 'phone evidence. In particular, the claimant says: (1) there was no real inconsistency in her accounts as to the destruction of the notebook; (2) although her husband had been present during part of the liability hearing, he had stormed out during her cross-examination about the notebook so would not have been fully aware of its content; (3) she had merely said the date of destruction of the 'phone was "*around*" her redundancy, so whether it was just before or just after was not material and would not mean she was lying; (4) the dates given in her request to Lyca mobile reflected the dates identified by the respondents.

60. The general answer to these objections is that they again fail to engage with the issue at the heart of EJ Hyams' reasoning; that is, that the claimant had failed to say that this evidence had been destroyed until such time as it would have been apparent to her that the respondents' requests for inspection were likely to be granted. In any event, however, the matters identified do not suggest that EJ Hyams' conclusions on the evidence were other than permissible. As for (1) and (2), and the inconsistencies found in relation to the claimant's accounts relating to the alleged destruction of the notebook (see as summarised at paragraph 34 above), it was open to EJ Hyams to see it as significant that the details had changed over time, and had failed to acknowledge what would have been known to the claimant's (then) fiancé through his attendance at the liability hearing. In relation to (3), EJ Hyams was entitled to give weight to the change in the claimant's evidence, from destroying the 'phone when feeling distressed *after* she was made redundant (as recorded in the passage cited at paragraph 25 above), to destroying it *before* then (see the passages cited at paragraph 31).

As for (4), however the respondents had put their request (see as set out at paragraph 26 above), EJ Hyams was entitled to find the claimant's email to Lyca Mobile was inconsistent with her own account of when she had destroyed the sim card (and see the passages in the evidence and findings, cited at paragraphs 27-28, and 35 above).

61. Finally, by the claimant's fourth ground of appeal (the fifth ground was withdrawn prior to the oral hearing of the appeal), it is argued that the conclusion that a fair trial was "*impossible*" was perverse and based on no evidence. Specifically, the claimant says it was entirely speculative that the evidence in issue could have relevance or significance to remedy issues; further, as at December 2020 (when the claimant says she destroyed the evidence): (1) the respondents had never raised any issue about the authenticity of the notebook or 'phone recording during the liability hearing; (2) the respondents had been in possession of a copy of the transcript of the 'phone recording before the liability hearing and had the opportunity to inspect the notebook when its existence was revealed during that hearing; (3) both the 'phone recording and notebook were accepted as genuine by the Smail ET; (4) as at December 2020, there had been no order by the ET, or request by the respondents, that the claimant should preserve the original notebook and second 'phone; and (5) the respondents made no attempt to challenge the recording or notebook's authenticity in their liability appeal.

62. Once again, the difficulty with the claimant's case under this ground is that it fails to engage with the findings and reasoning that lie behind EJ Hyams' decision. Thus, the criticisms made largely depend upon an acceptance of the claimant's assertion that the notebook and second mobile 'phone were destroyed in December 2020, but that was not what EJ Hyams found. By late October 2022 – the point at which, as EJ Hyams permissibly found, the claimant either destroyed the notebook and 'phone or started to lie about having done so – questions about the recording and about the entries in the notebook had been raised, and an entirely legitimate request made for inspection. Further, and in any event, given the fact that the proceedings were still live, an obvious question would arise as to why the claimant should then seek to destroy evidence on which she had previously relied to support her case before the ET. In this regard, although the respondents had not immediately sought to have the claimant's second mobile 'phone examined when they learned of its existence during the liability hearing, issues had been raised regarding the translation of the recording she had relied on. Moreover, as was made clear in argument before the EAT (see the passage cited at paragraph 14 above), it was the respondents' case that the exchange between the claimant and Lord Ranger on 5 October 2018, prior to the

start of the recording, had included false and inflammatory remarks on her part, which gave relevant context to his responses; if it were possible to demonstrate that a recording of that earlier part of the exchange had been deleted, that would still be potentially relevant to questions of remedy and, more generally, might be material to the remission of any issue if the respondents were successful on their appeal. As for the notebook, the circumstances in which it came to be disclosed had given rise to practical and logistical limitation

63. ns on the options initially open to the respondents and the fact that they had not then sought an adjournment of the liability hearing, so as to try to seek an expert examination of the notebook, did not mean it was not open to them to apply to re-inspect the original document at a later stage in the proceedings. EJ Hyams had been entitled to find both items to be potentially relevant to the continuing conduct of the proceedings, and to draw the inference that the claimant's conduct was deliberately designed to prevent further investigation.

64. In those circumstances, it was open to EJ Hyams to reach the conclusion that a fair hearing of the claimant's remedy claim was no longer possible. Her actions (whether in destroying evidence or in lying about having done so) meant that relevant evidence could no longer be investigated, either to test whether it really did support her case, or to examine it to see whether it might in fact weaken that case. The decision reached cannot be said to be perverse; rather it reflected the permissible findings of fact made, and an entirely proper assessment as to whether there could still be a fair determination of the remaining aspects of the claim. EJ Hyams was conscious of the draconian effect of the strike out at this stage of the proceedings but was clear as to the injustice of adopting any other course. That was a conclusion that was open to him in the particular, and unusual, circumstances of this case. For all the reasons provided, this appeal is therefore dismissed.