



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4112082/2021**

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**Held in Chambers on 6 January 2023**

**Employment Judge P O'Donnell  
Members Mr I Ashraf and Ms LJ Taylor**

10 **Mr Paulius Serelis**

**Claimant**

15 **Quarriers**

**Respondent**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The unanimous judgment of the Employment Tribunal is that the Respondent's application for strike-out is refused.

### **REASONS**

1. The Claimant has brought complaints against his former employer alleging unfair dismissal and detriment arising from having made protected disclosures. These complaints are resisted by the Respondent.  
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2. A final hearing of the case commenced in August 2022. It was not possible to hear all the evidence on the dates originally listed and a further 3 days were listed in November 2022 for the hearing to continue. Again, this proved insufficient to hear all the evidence and a continued hearing was listed for 30  
30 January 2023 to hear the evidence of the Respondent's final witness.
3. On 25 November 2022, the Respondent made an application for the Claimant's case to be struck-out. The grounds of the application will be set out below.

4. The Claimant was given multiple opportunities to comment on the application but he did not do so. The last correspondence to the Claimant from the Tribunal inviting his comments made it clear that if he did not respond by the deadline set out in that correspondence then the Tribunal would proceed to consider the application on the basis of the information available to it at that time.

### **Respondent's application**

5. The Respondent's application is made under Rule 37(1)(a), either that the claim is scandalous and/or vexatious or that it has no reasonable prospects of success.

6. The application sets out a brief history of the proceedings setting out the dates of the various continued hearings. It highlights, in particular, that the first day of the hearing in August 2022 was concerned with dealing with a number of preliminary matters including the Claimant's request for additional documents to be added to the joint bundle and the Claimant's application for the response to be struck-out.

7. It then turns to various criticisms of the evidence led by the Claimant in respect of the whistleblowing element of the claim. In summary, it is said that the Claimant has not led sufficient evidence in respect of fundamental aspects of this element of the claim.

8. Submissions are then made regarding the time bar issue relating to the whistleblowing claim. It is pointed out that the Claimant had the benefit of professional advice and had not given any adequate explanation why he had not lodged his claim in time.

9. It is submitted that the Claimant has made a number of serious allegations in the course of his evidence that were not set out in his ET1.

10. Turning to the unfair dismissal claim, it was pointed out that there was an unexplained delay between the last straw and the Claimant's resignation; there was nothing to indicate that he considered himself to no longer be employed by the Respondent until his resignation.

11. Submissions were made regarding various warnings given by the judge to the Claimant regarding the relevancy of the questions he was asking of the Respondent's witnesses which it is said were ignored by the Claimant.
12. Reference was also made to a further request for documents made by the Claimant during the November diet. It was submitted that some time had been spent at the very outset of the hearing in August dealing with the Claimant's request for documents.
13. It is submitted that the Claimant has set out to cause the Respondent as much inconvenience and expense as possible. The case is based on objectively unreasonable allegations. Reference was made to the various complaints that the Claimant made to a number of organisations such as the Care Inspectorate before commencing the present proceedings which the Respondent considers to be a continuation of the Claimant's attacks on them.
14. The Claimant is aware that, win or lose, the Respondent will be put to legal costs in defending the claim.
15. In terms of prospects, it is submitted that the whistleblowing claims are out of time with no explanation why they were lodged late. Even if the claim was in time, the alleged disclosures do not amount to protected disclosures and there was no evidence that other employees knew that the Claimant had made any disclosures.
16. It is submitted that the unfair dismissal claim must also fail given the delay between the last straw and the Claimant's resignation.
17. The Respondent submits that granting the application would be in line with the Overriding Objective as it would bring to an end to the improper use of the Tribunal's time as well the cost and inconvenience to the Respondent.
18. The application also included an application for expenses. The Tribunal has previously indicated to parties that it considers that it is more appropriate for that to be dealt with once a final judgment is issued. It has reserved its decision on that application in the meantime.

**Relevant Law**

19. The Tribunal has power to strike-out the whole or part of claim under Rule 37:

*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).*

20. The process for striking-out under Rule 37 involves a two stage test (*HM Prison Service v Dolby [2003] IRLR 694, EAT; Hasan v Tesco Stores Ltd UKEAT/0098/16*). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.

21. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

22. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, the House of Lords was clear that great caution must be

exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

23. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).
24. The question of what amounts to scandalous, vexatious or unreasonable conduct is not to be construed narrowly. It can be matters which amount to abuse of process but can involve consideration of wider matters of public policy and the interests of the justice (*Ashmore v British Coal Corpn [1990] IRLR 283*).
25. A number of helpful principles can be identified from *Bennett v London Borough of Southwark [2002] IRLR 407*:-
- a. The word 'scandalous' in the rule is not used in the colloquial sense that it is 'shocking' conduct. According to Sedley LJ, it embraces both '*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*' (para 27).
  - b. It must be such that striking out is a proportionate response to any scandalous, vexatious or unreasonable conduct. The Tribunal needs to assess whether, in light of any conduct found to fall into the relevant description, it is still possible to have a fair trial (see also *De Keyser Ltd v Wilson [2001] IRLR 324*).
26. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37 was summarised by Burton J, in *Bolch v Chipman [2004] IRLR 140*:
- a. The Tribunal must reach a conclusion whether one of the grounds under Rule 37(1) has been made out.

- b. Even if there is such conduct, the Tribunal must decide whether a fair trial is still possible.
- c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.
- d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

### Decision

27. Addressing the “scandalous or vexatious” element of the application first, the Tribunal is not persuaded that the Respondent has presented sufficient evidence that the claim is scandalous or vexatious.
28. The mere fact that the Claimant has raised complaints with other bodies regarding his concerns about matters which occurred during his employment is not sufficient, on its own, for the Tribunal to conclude that the claim is scandalous or vexatious as those terms apply in the context of Rule 37.
29. In particular, the Tribunal notes that those other bodies have different remits and powers to those of the Tribunal; we are concerned with whether the Claimant’s statutory employment rights have been breached whereas those other bodies are concerned with the quality of the care being provided by the Respondent to service users. The purpose of the present claim is very different from a complaint to those other bodies.
30. The Claimant has presented a statable case in his ET1 and is entitled to have that case heard and determined. Equally, the Respondent is entitled to defend that claim. There is nothing inherently vexatious or scandalous in the claim as pled and it is notable that the Respondent did not make an application under Rule 37 at an earlier stage of proceeding. If the claim was, in itself, vexatious or scandalous then the Tribunal would have expected an application at a very early stage.

31. Rather, the application is more directed towards the conduct of the case by the Claimant and the evidence that has emerged during the course of proceedings.

5 32. The former is a matter more properly falling under Rule 37(1)(b) and the application is not made under that Rule. Strictly speaking, the Tribunal is not seized of such an application but to avoid a further application being made under Rule 37(1)(b) the Tribunal considers that it should make it clear that it would have refused any application under Rule 37(1)(b) for the following reasons:

- 10 a. The Claimant is a party litigant and cannot be held to the standards of a legal representative in terms of how he has presented his case.
- b. It is a common error for parties and representatives in whistleblowing cases to think they need to prove that the matters which they have disclosed are true.
- 15 c. The Claimant did lose his representative shortly before the first diet of the hearing and so had to make his own preparations in a relatively short time. The Tribunal places no weight on the fact that his representative withdrew from acting which could have been for a number of reasons.
- 20 d. The matters which had to be addressed on the first day of the hearing in August 2022 included an application from the Respondent which had no merit. The delay in the hearing starting was not, therefore, wholly the fault of the Claimant.
- e. The Claimant's conduct of the case has not been such that it can be said that it has been scandalous, vexatious or unreasonable.
- 25 f. In any event, there is no basis on which it can be said that a fair trial was no longer possible (especially given that the hearing is all but concluded) and strike-out would not be a proportionate response where there were alternatives such as the timetabling put in place by the Tribunal during the November diet.
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33. In relation to the latter issue regarding the quality of evidence, there is an overlap with the second element of the application relating to the prospects of success and so the Tribunal will now turn to that element of the application.
34. The Tribunal considers that the Respondent is, in effect, seeking to secure a full judgment by the “back door”. As noted above, in considering an application for strike-out, the case law is clear that the Tribunal should take a claimant’s case at its highest because it is being asked to strike-out the claim without hearing any evidence. However, in the present case, the evidence has been heard in part and the Respondent is asking the Tribunal to assess that evidence and come to a conclusion about the merits of the claims. In other words, it is asking the Tribunal to do what it would do in a final judgment without actually issuing such a judgment. This cannot be in keeping with the overriding objective.
35. It is appreciated that the Respondent may be frustrated with having to defend a case which they consider lacks merits but that does not mean that they are entitled to ask the Tribunal to circumvent the legal process. There were other options open to the Respondent. For example, they could have made a submission of “no case to answer” when the Claimant closed his case. Alternatively, if they believed that the Claimant has not discharged the burden of proof (or that they have led sufficient evidence to establish their defence) then they could choose to lead no further evidence and close their case. The Tribunal would then issue a full judgment.
36. However, as matters stand, if the Tribunal is being asked to assess the prospects of success before it has heard all the evidence and be in a position to make its findings of fact then it has to do so by taking the Claimant’s case at its highest. In such circumstances, the Tribunal is not persuaded that the claim has no reasonable prospects of success.



37. For all these reasons, the Tribunal refuses the Respondent's application to strike out the claim.

**Employment Judge: P O'Donnell**  
**Date of Judgment: 9 January 2023**  
**Entered in register: 12 January 2023**  
**and copied to parties**