



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

Case No: 4102665/2018

Employment Judge: M A Macleod (sitting alone)

10

Ms Ruth Seymour

Claimant  
Represented by  
Ms M Porteous  
CAB Volunteer

15

Lochinvar Developments Ltd

Respondent  
Represented by  
Ms D Robertson  
Solicitor

20

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

25

The Judgment of the Employment Tribunal is that the respondent's application for strike out of the direct discrimination claim is refused; and that the claimant's application for strike out of the response is refused.

### **REASONS**

30

1. Following a Preliminary Hearing before Employment Judge Buzzard on 28 June 2018, the Tribunal issued Orders requiring both parties to provide information to the Tribunal and to each other by certain dates set out clearly in the Orders.
2. On 9 August 2018, the respondent's agent submitted an application for strike out of the claim of direct discrimination on the grounds of disability

35

under Rule 37(1) of the Employment Tribunals Rules of Procedure 2013, on the grounds that:

1. *“The claimant has still not described a relevant hypothetical comparator;*
2. *The claimant’s direct discrimination claim remains unspecified and irrelevant, as previously narrated, and as such, has little or no reasonable prospect of success.”*
3. In the alternative, the respondent sought a deposit order under Rule 39(1).
4. On 23 August 2018, the respondent’s agent requested that the application for strike out or deposit order be dealt with by the Tribunal by way of written submissions.
5. On 2 September 2018, Ms Porteous, for the claimant, asserted that the claim for direct discrimination was not ill-founded and sought that the Tribunal allow a preliminary hearing before deciding whether to grant such an Order.
6. On the same date, the claimant’s representative intimated an application for strike out of the respondent’s response under Rule 18(7)(c) (a reference to the 2004 Rules of Procedure) on the grounds of a representative’s “scandalous and unreasonable conduct”. She attached a complaint about the representative’s conduct during the course of a visit to the respondent’s premises undertaken by the claimant and her representative.
7. Ms Porteous then wrote to the Tribunal on 6 September to confirm that the claimant was content that the respondent’s application for strike out should be dealt with by way of written submissions.
8. Accordingly, the Tribunal considers the terms of each application.

25

### **Respondent’s Application**

9. In the course of the Note following the Preliminary Hearing of 28 June 2018, the Order set out at paragraph 1 read as follows:

5 *“By no later than **12 July 2018** the claimant shall confirm to the respondent and the Tribunal whether the claimant wishes to withdraw her claim of direct disability discrimination. In the event that the claimant elects to continue this claim, the claimant shall send to the respondent only the following specific information:*

*a. A full description of the hypothetical comparator which the claimant will construct to support her claim of direct discrimination; and*

10 *b. A list of each act, or omission, which the claimant will contend amounted to less favourable treatment than the hypothetical comparator would have been subjected to.”*

15 10. The respondent’s solicitor made the application for strike out on 9 August, no description of the hypothetical comparator having been provided by the claimant to that date. The application was made under Rule 37(1), though no further specification of which sub-paragraph of 37(1) was relied on was provided. However, it appears that the application was made under Rule 37(1)(a), *“that it is scandalous or vexatious or has no reasonable prospect of success”*, and in particular that it had no reasonable prospect of success.

20 11. It is noted, at this stage, that the application was not made on the grounds that the claimant had failed to comply with an Order of the Tribunal (37(1)(c)).

12. The application is confined to the direct discrimination claim.

25 13. On 2 September Ms Porteous, for the claimant, confirmed that she opposed the application for strike out, and denied that the claim for direct discrimination was ill-founded or vexatious. She then went on to refer to evidence upon which the claimant would rely in support of her assertions about the removal of 2 metal sills and the hazardous conditions in which the claimant was required to work.

14. She also said that the claimant did not have the ability to pay costs at that time as she was suffering financial hardship. This appears to be a reference to the deposit order applied for in the alternative by the respondent, as there is no application for costs or expenses before the Tribunal in relation to this aspect of the case.

15. Parties were then invited to provide to the Tribunal any further submissions which they wished to make, but from a review of the correspondence, nothing seems to have been added. It may be that the claimant's application for strike out superseded this application in the parties' minds but the submissions are, as I understand it, to be taken from the letters referred to above.

### **Decision**

16. Strike out of a claim is a draconian sanction, only to be taken in the most extreme of circumstances.

17. The basis upon which the application is sought here is that in the absence of the detailed description of a hypothetical comparator, the claim for direct discrimination has no reasonable prospects of success.

18. The respondent does not make the application on the basis that the claimant has failed to comply with the Tribunal's Order. As it turns out, the claimant has indeed failed to comply with the Tribunal's Order. Even since the application for strike out was made there has been no attempt by the claimant to define the hypothetical comparator which the Tribunal ordered her to describe in its Order.

19. Essentially, the application proceeds on the basis that without that further specification of the claim, it lacks any reasonable prospect of success.

20. A party may not simply disregard a Tribunal's Order with impunity. It may well be that the claimant's representative has misunderstood the nature of the application by the respondent for strike out, though it is understandable that she has made reference to vexatious conduct as that is contained within Rule 37(1). However, she has not provided to the Tribunal the

information which she was ordered to produce by the Tribunal's Order of 19 July 2018. She has not provided any reason why she has not supplied that information, other than to argue that the claim does have good prospects of success.

5 21. Having reflected upon this matter, it is my conclusion that it would not be in the interests of justice to strike out the claim of direct discrimination at this stage on the basis that it has no reasonable prospects of success. The issue here is fundamentally the failure of the claimant to comply with the Tribunal's Order of 19 July 2018, at paragraph 1.

10 22. However, notwithstanding that I have decided to refuse the respondent's application for strike out of that part of the claim, I am not prepared to absolve the claimant of responsibility to provide the further specification required of her in that Order.

15 23. As a result, I have concluded that the most appropriate course of action is to reissue the Order (paragraph 1 only), by way of an Unless Order, with a timescale for compliance, taking account of the imminent Christmas and New Year holidays, of Friday 25 January 2019. The claimant should be well aware that if she fails to comply with that order the direct discrimination claim will be struck out without further consideration. The consequences of non-compliance are therefore now entirely clear and the claimant must  
20 comply with the Order by that date.

24. The Unless Order is set out in a separate Order to be issued with this Judgment.

### **The Claimant's Application**

25 25. Ms Porteous applied for the response to be struck out. Her reference to Rule 18(7)(c) is taken to be a reference to Rule 37(1)(b), that the claim or response may be struck out on the grounds 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*".  
30

26. In advancing her application, she attached a letter of complaint to the respondent's agent dated 9 August 2018 setting out her serious concerns about the manner in which she had conducted proceedings during the claimant's visit to the respondent's premises on 7 August. Having not  
5 received a response, she considered that the respondent had not addressed her complaint. She also wished to advise the Tribunal that the respondent's representative "adopted an unnecessarily rude and condescending tone when questioning the claimant and instead of acting with the integrity expected of a legal representative she merely seized the  
10 opportunity to unfairly question the claimant."

27. She went on to summarise the main concerns. She complained that during the site visit the claimant was not granted any privacy as members of staff were present during the visit. No attempt was made by the respondent's representative to maintain confidentiality, and she allowed a potential  
15 witness, Charles McAleavy, to be present while continually and aggressively questioning the claimant on crucial points related to the failure to make reasonable adjustments.

28. Ms Porteous further alleged that the respondent's representative interrupted conversations between the claimant and her representative in a humiliating  
20 and rude manner.

29. She sought, finally, to suggest that due to the scandalous, harassing and unreasonable conduct of the respondent's representative it is no longer possible to have a fair hearing.

30. Ms Robertson, the respondent's solicitor, set out her response, and  
25 opposition, to this application in her letter of 13 September 2018.

31. She submitted that the site visit meeting was not a part of the proceedings before the Tribunal, but simply an informal meeting. She argued that "proceedings" means what goes on in the confines of the Tribunal process itself. The application was therefore unfounded and should be refused.

32. However, she went on to say that if the Tribunal were prepared to consider the application, there were no grounds for granting it. She observed that the site visit was unsatisfactory for a number of reasons, including the claimant's representative "making a spectacle" of the visit, loudly making inflammatory remarks" both about the respondent and their premises. She alleged that the claimant's representative sought to put words in the claimant's mouth by pointing out physical changes to her, and made a show of taking photographs and video of absent physical features and decried the respondent for having removed them.

33. Ms Robertson went on to suggest that when she sought to "keep matters in hand" – the claimant's conduct itself being entirely appropriate – she sought to check where exactly the claimant alleged the physical features to have been. She did not observe the claimant having suffered any distress or upset at the time.

34. It was not accepted that the conduct of Ms Robertson was scandalous, harassing or unreasonable nor that it is no longer possible to have a fair hearing before the Tribunal.

35. Ms Robertson then addressed the legal tests for scandalous, unreasonable or vexatious conduct by referring to the well-known authorities on the matter.

### **Decision**

36. The first issue for the Tribunal to address relates to whether the alleged conduct of the respondent's representative amounted to "the manner in which the proceedings have been conducted". The complaint concerns a site visit which related to the proceedings. It amounted, it appears (on the information available to me), to an opportunity for Ms Porteous and Ms Robertson to attend at the respondent's premises together, presumably on an agreed basis, to gather information and understanding about the locus within which the claimant worked.

37. As such the site visit formed part of the preparations for the proceedings. In one sense, it had nothing to do with the Tribunal at all. It was simply a visit to the premises. In another sense, "proceedings" being undefined within the Rules of Procedure, it seems to me that it is as much part of the proceedings as a meeting between a representative and a witness to take a statement. If an allegation were made that during the course of such a meeting a representative were, say, to threaten a witness, or act abusively or insultingly towards them, it is my conclusion that that would be conduct of the proceedings, since it is so fundamentally linked to the proceedings that it must have an impact upon them.

38. However, in my judgment, what has happened here is that two versions of the same, unsatisfactory, meeting have been presented to the Tribunal, without any way of my resolving them. What is apparent is that a degree of animosity has developed between the parties, and possibly more significantly the representatives, and that manifested itself during the course of that meeting and the subsequent correspondence.

39. I do not find that this amounted to scandalous, harassing or unreasonable conduct on the part of Ms Robertson (though, interestingly, she is not mentioned by name in the application). As a result, I am not prepared to take any draconian step resulting in the strike out of the response.

40. There is no basis, further, for me to conclude that a fair trial is not possible in this case. Robust and sometimes hostile confrontations between representatives are not unknown in cases before the Tribunal. Parties and their representatives are reminded that the Tribunal expects them to conduct themselves in a professional and respectful manner, but it is recognised that there is a dispute between the parties here, both factual and legal, and therefore conflict within acceptable boundaries is inevitable.

41. Accordingly, it is my conclusion that I cannot properly make any findings about what happened during the site visit on the basis of what has been provided to me; that I cannot therefore conclude that there has been unreasonable or scandalous behaviour on the part of the respondent's



representative; and that there is no reason before me to believe that a fair trial of this case is no longer possible.

42. The claimant's application for strike out of the response is therefore refused.

**Employment Judge: Macleod**

5 **Date of Judgment: 31 December 2018**

**Entered into the Register: 03 January 2019**

**And Copied to Parties**