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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101149/2016 & Others

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Held in Glasgow on 4 September 2019

Employment Judge: F Eccles

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Ms H Brady & 90 Others

**Claimants
Represented by:
Mr G Booth, Consultant**

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North Lanarkshire Council

**Respondents
Represented by:
Mr S Miller –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for strike out of the claims shall be refused.

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E.T. Z4 (WR)

REASONS

BACKGROUND

1. The claimants are represented by DM Legal Claims Ltd. They claim equal pay. It is the respondent's position that the manner in which the proceedings have
5 been conducted by DM Legal Claims Ltd on behalf of the claimants has been scandalous, unreasonable and vexatious. The respondent applied for strike out of the claims under Rule 37(1)(b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("Rules of Procedure 2013") on 15 January 2019. The claims were combined by Order dated 25 July 2019 for the
10 purposes of considering the above application.

2. At a preliminary hearing held on 1 August 2018, the respondent raised concerns with the tribunal about comments made about them by Donna-Marie Gray, Managing Director of DM Legal Claims Ltd. It was not in dispute that Ms Gray referred to the respondent as "bastards" on Facebook. The tribunal
15 reminded parties of its power to strike out claims and responses when the manner in which proceedings have been conducted is unreasonable. The tribunal recorded the position in its note of the preliminary hearing. Ms Gray subsequently apologised in an e mail to the tribunal dated 31 August 2018 for any offence she may have caused to the respondent. Referring to the tribunal's
20 note of the preliminary hearing, Ms Gray wrote;

"I fully admit to writing this angry post and using the disgusting derogatory word. I understand it was wrong and so unprofessional. It will never ever happen again".

3. On 4 January 2019 Ms Gray made the following comment on the Facebook
25 page of DM Legal Ltd about an article concerning the respondent;

"Ooofttt Happy New Year from NLC!!! Absolute joke of a Council and embarrassment of a North Lanarkshire organisation!! I will enjoy writing my opinions on this article in a few days when I feel better!".

5 The respondent, concerned that Ms Gray's opinions on the article (which did not relate to equal pay) might include derogatory remarks about them, wrote to DM Legal Claims Ltd on 8 January 2019 describing the comments posted on 4 January 2019 as "*unacceptable, particularly made against the background of ongoing legal proceedings*". The respondent reminded DM Legal Claims Ltd of correspondence following Ms Gray's previous posting and her undertaking that there would be no repetition. The respondent informed DM Legal Claims Ltd that they felt they had no option but to disclose the Facebook post to the tribunal and their unhappiness that the claimants' representative continued to show such disrespect towards them.

10 4. On 9 January 2019, Ms Gray, apparently undeterred by the respondent's letter of 4 January 2019, posted the following on Facebook;

15 *"Right as expected I've had my warning letter from your local authority about my language on my social media. (6 laughing emojis) Got to say I do enjoy the use of profanity especially the words "FUCK OFF and/or FUCK YOU" !! Therefore I will not be changing any time in the near future!"*

20 5. On becoming aware of the above post, the respondent made an application to the tribunal for strike out of the claims on the basis that the proceedings are being deliberately conducted in a scandalous, unreasonable and vexatious way in the mistaken belief that this will advance the prospects of settlement. The respondent sought a hearing to allow the claimants' representative an opportunity to make representations to the tribunal.

25 6. A preliminary hearing was listed to consider the application for strike out. Ms Gray attended the hearing to give evidence if required. The claimants were represented by Mr Gavin Booth, Consultant. The respondent was represented by Mr S Miller, Solicitor.

RELEVANT LAW

30 7. In terms of Rule 37(1)(b) of the Rules of Procedure 2013 a claim or response may be struck out if "*the manner in which the proceedings have been*

conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious". Guidance on the scope of the Tribunal's power to strike out a claim in response to the conduct of a claimant's representative can be found in the case of **Bennett v London Borough of Southwark 2002 IRLR 407** where the Court of Appeal identified the factors requiring consideration by the tribunal such as the nature and significance of the conduct in question; the extent to which the conduct is attributable to the claimant and whether strike out is a proportionate response. In **De Keyser Ltd v Wilson 2001 IRLR 324** the EAT also clarified that in most cases a claim should not be struck out in response to the conduct of a party (or that of a representative), unless a conclusion is made that a fair trial is no longer possible.

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8. In the case of **Bolch v Chipman 2004 IRLR 140**, a tribunal struck out a response on the grounds that the employer had threatened the claimant with physical violence. Overturning the tribunal's decision, the EAT identified steps that a tribunal should ordinarily take when deciding whether to strike out a claim or response under what is now Rule 37(1)(b) of the Rules of Procedure 2013. The tribunal must firstly find that a party or representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings. If such a finding is made, the tribunal must then – in accordance with **De Kyser Ltd v Wilson** - decide whether a fair trial is possible. If a fair trial is still possible, the case should be allowed to proceed. If a fair trial is not possible, the tribunal should still consider whether strike out is proportionate or whether a lesser penalty such as an award of expenses is more appropriate in the circumstances. In the case of **Blockbuster Entertainment Ltd v James 2006 IRLR 630**, the Court of Appeal identified the "two cardinal conditions" for exercising the power of strike out in response to unreasonable conduct as either (i) the conduct has taken the form of deliberate and persistent disregard of required procedural steps or (ii) the conduct has made a fair trial impossible. Even when either of these two conditions are met, it remains necessary, according to the ruling in **Blockbuster**, to consider whether strike out is the proportionate and fair response for the tribunal to take.

SUBMISSIONS

9. Mr Miller for the respondent emphasised that the application for strike out is made in response to the conduct of the claimants' representative as opposed to anything done by an individual claimant. He described Ms Gray's use of gratuitously offensive language as threatening to undermine the obligation on parties to co-operate with each other and assist the tribunal to give effect to the overriding objective. Mr Miller submitted that while the respondent considers Ms Gray's postings on Facebook to amount to scandalous and unreasonable conduct, it recognises that the tribunal is unlikely to conclude that a fair trial is not possible or for that matter decide that strike out is a proportionate response. There are genuine concerns on the part of the respondent however that without the tribunal's intervention, Ms Gray will persist in her conduct and further undermine the possibility of co-operation between the parties.
10. In addition to his written submissions, Mr Booth submitted that the message posted on Facebook on 9 January 2019 was best described as a "personal comment" by Ms Gray, unrelated to either the respondent or the current proceedings. The remarks made in the above post should not be characterised as a "direct insult" but a reasonable response to an attempt by Ms Gray to comment on unrelated issues raised in an article about the respondent. DM Legal Claims Ltd did however wish to give the tribunal an undertaking that they would make no further posts about their clients' equal pay proceedings on Facebook and that future communications about the equal pay proceedings would not be by social media.

DISCUSSION & DELIBERATIONS

11. I am not persuaded that the post on Facebook of 9 January 2019 is unrelated to the respondent or the tribunal proceedings. The comments in the post were made in response to the letter from the respondent of 8 January 2019 which was sent in relation to these proceedings and in particular to an earlier undertaking made by the claimants' representative in the proceedings. The

post of 9 January 2019 included offensive and derogatory language which I am satisfied the respondent is entitled to conclude is directed at them or is at least indicative of how the claimants' representative intends to conduct proceedings. I agree with the claimants' representative that the post on 5 January 2019 does not relate, at least directly, to these proceedings. However, having made the comments in the later post on 9 January 2019, the claimants' representatives left themselves open to criticism of scandalous and unreasonable conduct. Representatives in legal proceedings are expected to conduct themselves in a reasonable manner, in particular in relation to the tribunal and each other. This expectation has already been brought to the attention of the claimant's representative who the tribunal is informed has a law degree and has completed the Diploma in Legal Practice. It cannot therefore be unknown to her that referring to one's opponent on Facebook as "bastards" and use of the terms "fuck off" and "fuck you" when referring to communications between parties falls far short of the standards expected of a representative in tribunal proceedings.

12. I am in all the circumstances satisfied that the conduct of the claimants' representative can be described as scandalous within the meaning of Rule 37(1)(b). It is abusive of the other side in proceedings. It is unreasonable in the context of the undertaking given by the claimants' representative to avoid offensive language when referring to the respondent. It is however the conduct of the claimants' representative and not the claimants themselves. There does come a point at which the claimants have to accept that those they are instructing are behaving in a manner that jeopardises a fair trial and therefore risks the prospect of their claims being struck out. We are not at that stage in these proceedings however.

13. In all the circumstances I am not persuaded that it is appropriate to strike out the claims. I am however persuaded that the conduct upon which the application is based was scandalous and unreasonable within the meaning of Rule 37(1)(b) of the Rules of Procedure 2013 and would strongly advise the claimants' representative and for that matter the claimants against any

repetition of such conduct, particularly given the terms of their undertaking at today's proceedings.

Employment Judge Frances Eccles

5 Date of Judgment 25 September 2019

Date sent to parties 26 September 2019

Multiple Schedule***Multiple: 5141 - EQP 2nd wave-North Lanarkshire***

<i>Case Number</i>	<i>Case Name</i>
	4101149/2016 Ms Heather Brady -v- North Lanarkshire Council
5	4101170/2016 Ms Barbara Brown -v- North Lanarkshire Council
	4101190/2016 Ms Jeanette Byrne -v- North Lanarkshire Council
	4101214/2016 Mr Christopher Carlin -v- North Lanarkshire Council
	4101253/2016 Ms Isobel Clark -v- North Lanarkshire Council
	4101280/2016 Ms Catherine Cooper -v- North Lanarkshire Council
10	4101299/2016 Ms Louise Coyle -v- North Lanarkshire Council
	4101341/2016 Ms Margaret Davie -v- North Lanarkshire Council
	4101425/2016 Ms Michele Fenton -v- North Lanarkshire Council
	4101428/2016 Ms Blanche Ferguson -v- North Lanarkshire Council
	4101504/2016 Ms Shirley Gould -v- North Lanarkshire Council
15	4101550/2016 Ms Denise Halpin -v- North Lanarkshire Council
	4101562/2016 Ms Alison Hanlon -v- North Lanarkshire Council
	4101615/2016 Ms Tracy Holmes -v- North Lanarkshire Council
	4101662/2016 Ms Evelyn Johnstone -v- North Lanarkshire Council
	4101673/2016 Ms Gillian Kavanagh -v- North Lanarkshire Council
20	4101695/2016 Ms Ann Kerr -v- North Lanarkshire Council
	4101734/2016 Ms Michelle Leckie -v- North Lanarkshire Council
	4101748/2016 Ms Elizabeth Littlejohn -v- North Lanarkshire Council
	4101749/2016 Ms David Littlejohn -v- North Lanarkshire Council
	4101784/2016 Mr Lee Marks -v- North Lanarkshire Council
25	4101786/2016 Ms Anne Marshall -v- North Lanarkshire Council
	4101795/2016 Ms Elaine Marshland -v- North Lanarkshire Council
	4101833/2016 Ms Marie McCarroll -v- North Lanarkshire Council
	4101864/2016 Ms Laura McElroy -v- North Lanarkshire Council
	4101896/2016 Ms Leanne McGraw -v- North Lanarkshire Council
30	4101942/2016 Ms Lynda McLaughlin -v- North Lanarkshire Council
	4101957/2016 Mr Alan McMahon -v- North Lanarkshire Council
	4101993/2016 Ms Fiona Merson -v- North Lanarkshire Council
	4102119/2016 Ms Joanne Paterson -v- North Lanarkshire Council
	4102170/2016 Ms Karen Reid -v- North Lanarkshire Council
35	4102174/2016 Ms Colleen Reid -v- North Lanarkshire Council
	4102189/2016 Ms Tracey Robb -v- North Lanarkshire Council
	4102219/2016 Ms Hazel Ruxton -v- North Lanarkshire Council
	4102233/2016 Ms Marie Seggie -v- North Lanarkshire Council
	4102265/2018 Ms Anna Kilpatrick -v- North Lanarkshire Council
40	4102310/2016 Ms Moira Stewart -v- North Lanarkshire Council
	4102328/2016 Ms Kathleen Taggart -v- North Lanarkshire Council
	4102366/2016 Ms Carol Ann Traish -v- North Lanarkshire Council
	4102385/2016 Ms Rosemary Walsh -v- North Lanarkshire Council
	4104066/2016 Miss Karen Somerville -v- North Lanarkshire Council
45	4104067/2016 Mrs Seonad Taylor -v- North Lanarkshire Council

Multiple Schedule

Multiple: 5141 - EQP 2nd wave-North Lanarkshire

	<i>Case Number</i>	<i>Case Name</i>
	4113224/2015	Mr William Friary -v- North Lanarkshire Council
5	4117053/2018	Miss Heather Hallford -v- North Lanarkshire Council