



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms E Cockayne

**Respondent:** Obre Limited

## JUDGMENT

The Response is not struck out.

## REASONS

1. By a letter dated **29 April 2022** the Tribunal gave the respondent an opportunity to make representations or to request a hearing, as to why the response should not be struck out because:
  - a. the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious;
  - b. it is no longer possible to have a fair hearing of the response, because of the approaches made to the claimant's witness as set out in the claimant's application dated 6 April 2022.
2. The respondent provided a written Objection to the claimant's application dated 6 May 2022.

### The Application and Objection

3. The claimant's Application dated 6 April 2022 was for a strike out on the basis set out in paragraph 1 above. The Application exhibited an email chain between the owner of the respondent, Mr Smith, and a former colleague of the claimant, Mr Nash, who had provided a witness statement for the final hearing of the claim, which was postponed on 10 January 2022.
4. In the email chain (in brief)
  - a. On 5 January 2022 Mr Smith accused Mr Nash of giving a confidential email to the claimant. He demanded that Mr Nash

retract the email or face criminal and civil sanctions. This email was cc'd to the solicitor then acting for the respondent. On 6 January 2022 this threat was repeated, and Mr Smith urged Mr Nash "to seek legal advice asap". On 7 January 2022 an instruction to the solicitors to claim against Mr Nash was cc'd to Mr Nash.

- b. On 7 January 2022 Mr Nash replied that he has sought advice and would retract the emails from the evidence "stacked against" Mr Smith.
- c. On 11 January 2022 Mr Smith again emailed Mr Nash denying assertions of fact made in Mr Nash's witness statement, accusing him of lying and of revealing personal and HR information. He asked Mr Nash to "*withdraw incorrect information about me from your witness statement*" on threat of legal action. This was again copied to solicitors for the respondent.
- d. On 11 January 2022 Mr Nash responded that he had been expressing points of view and not disclosing confidential information. He suggested that Mr Smith's approach was merely a tactic to get him to withdraw his statement, which he did not intend to do, and said that he looked forward to the hearing on 12 July 2022.
- e. On 11 January 2022 Mr Smith sent two further emails in which he again took issue with Mr Nash's assertions and accused him of lying to the tribunal, which was a crime for which he will be arrested and sued. He said that he did not ask Mr Nash to withdraw "correct true information".

5. The Application submits that Mr Smith had set out to intimidate Mr Nash with threats of defamation and criminal proceedings and that such behaviour was scandalous, unreasonable and/or vexatious. It was suggested that this intimidation meant that it was no longer possible to have a fair trial.

6. The Objection denies that there was an attempt to intimidate by Mr Smith, and submitted that his behaviour on any view did not amount to scandalous, unreasonable or vexatious conduct. It was further submitted that the evidence pointed to Mr Nash not being intimidated and that a fair trial was still possible.

### **The law**

7. Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Sch 1 ("ET Rules") provides: -

*(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) ...*

*(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) ...

(d) ...

(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).*

(2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

8. The Application and Objection referred to numerous authorities. In the light of the conclusions (and with no disrespect to the respective representatives' diligence and industry) these will not all be referred to.

9. Various authorities, including *Bolch v Chipman* [2004] IRLR 140 have held that on an application for strike out brought under r. 37(1)(b) it is necessary for the tribunal to establish: -

- a. That the conduct complained of was scandalous, unreasonable or vexatious;
- b. That the result of the conduct was that there could not be a fair trial;
- c. That the imposition of the strike out was proportionate, and that a lesser sanction was not appropriate and consistent with a fair trial;
- d. If the claim or response is struck out, what further consequences might follow, for example, should the party be debarred from participating at the liability stage only.

10. In *Bolch* it was further held that, save in exceptional circumstances, there must be a conclusion that a fair trial is not possible, and that that striking out is not regarded simply as a punishment for the scandalous, unreasonable or vexatious conduct of proceedings.

11. Scandalous, unreasonable or vexatious conduct carries a notion of an abuse of the tribunal's process (*Bennett v London Borough of Southwark* [2002] IRLR 407). In *Bolch* it was observed that "*it may well be, on appropriate facts that a tribunal might find that if a threat that unless proceedings were withdrawn some course or other could be taken, that that would amount to a scandalous method of conducting those proceedings*".

## **Conclusions**

12. The Objection points out that in hindsight Mr Smith accepts that contacting Mr Nash directly was not the appropriate way of going about things, and that he apologises to the tribunal and to Mr Nash.

13. This certainly was not the appropriate to conduct litigation. The tone of the emails from Mr Smith was aggressive and accusatory and he made threats of criminal and civil sanction. On the face of it (and without subjecting things to too detailed a legal analysis) Mr Smith threats probably have little or no basis in law. However, the fact that he copied in his then solicitors and that he urged Mr Nash himself to seek legal advice persuades me that Mr Smith probably believed he had some legal basis for making the threats he did. I also note that the focus of Mr Smith's observations is on what he saw as breaches of confidentiality and putting what he asserted was untrue information before the tribunal.
14. These threats, in my judgment, fall short of the sorts of threats that, in an appropriate case, might amount to scandalous conduct (see *Bolch* para 55). I consider, however, that Mr Smith's likely belief (albeit probably misguided) that he had a legal basis for making the threats, and his focus on confidentiality and what he appeared to consider was perjury, mean that they are not scandalous. But I do find that they are very much at the borderline of unreasonable. Perhaps, again, just short of being so unreasonable as to amount to an abuse of the tribunal's process.
15. Had I found that the conduct of the proceedings was scandalous, unreasonable or vexatious I would then have considered whether a fair trial was possible.
16. I have little doubt that some witnesses would have been scared off by the sort of approach that Mr Smith adopted. However, it was evident from the face of the email chain that Mr Nash was not intimidated. He made clear that he had taken some advice on the issue, and specifically said that he was not going to withdraw his statement, and looked forward to seeing Mr Smith in court.
17. I note also that new solicitors have been instructed. It would appear that Mr Smith now accepts he did not act appropriately in corresponding with Mr Nash in this manner, and he offers his apology. A fair trial is still possible despite this ill-judged correspondence.
18. In the circumstances I do not find that the manner in which the proceedings have been conducted is scandalous, unreasonable or vexatious, and I do not find that a fair trial is no longer possible.
19. The Response (or any part of it) is not struck out.

Employment Judge Heath  
12<sup>th</sup> May 2022

JUDGMENT SENT TO THE PARTIES ON

12/05/2022.

FOR THE TRIBUNAL OFFICE