



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000057/2023

Held in Chambers in Glasgow on 13 July 2023

Employment Judge D Hoey

Mr B Duffy

**Claimant
In Person**

Scotsman Group plc

**Respondent
Represented by
Ms Kaur
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for strike out of the response is refused and the case shall proceed to the final hearing fixed with a 3 hour in person case management preliminary hearing to be fixed to deal with case management and how the parties will work together to ensure the hearing can progress in line with the overriding objective.

REASONS

1. The claimant lodged a claim on 7 February 2023. The claim ran to 187 paragraphs on 29 pages and was in narrative form. The specific claims being made had not been clearly set out and the form had been completed without the benefit of legal advice. The claims arising appeared to comprise unlawful sex and sexual orientation discrimination.
2. The respondents lodged a response form denying that there had been any unlawful conduct. There were also potential time bar issues arising.

3. At a telephone case management preliminary hearing on 6 April 2023 the Employment Judge had noted that there had been a lack of clarity as to the precise claims and issues and given the large number of claims that appeared to be made the parties were directed to focus matters in writing. The Judge issued a number of case management orders at that hearing to ensure the parties worked together to focus the issues and to ensure the hearing could proceed fairly.
4. A final hearing has been fixed for 10 days in September and October to determine all issues.
5. It is not clear whether or not the final issues have been agreed in this case.

Claimant's application for strike out of the response

6. On 13 June 2023 the claimant wrote to the Tribunal seeking strike out of the response on the basis of the conduct of the respondent (in fact the respondent's agent) arguing that their actions were frivolous, vexatious and an abuse of process. He argued that his ability to progress his case had been impeded. In essence he was submitting it was not possible for him to have a fair hearing because of how the respondent's agent had acted in his view.
7. The claimant's application was based upon the fact the respondents had denied events and claims in their response but "not provided any evidence to support their denials". It was also alleged that the respondent had made a number of unsubstantiated allegations against him which suggested (to the claimant) that the respondents were not interested in resolving the dispute through the Tribunal process and may instead have been trying to harass and intimidate him. It was also alleged the respondent submitted a document to the Tribunal in compliance with an order following the preliminary hearing but the person who submitted the document had no authority to do so and so the claimant alleged the order had not been complied with. This was because the person who submitted the document (who was from the respondent's agent's business, and in fact the owner, was not the named representative.

8. It was also alleged that the respondent had selectively disclosed evidence, withheld crucial emails and lied. It was asserted that the attempt to justify selective disclosure (by relying upon legal privilege) was frivolous and vexatious. It was alleged that the failure to disclose crucial emails was a breach of rule 31 and the respondents' request that the claimant ask questions of a witness directly at a hearing rather than provide information in advance undermined his ability to present his case fairly.
9. The claimant set out some further specifics of the foregoing actions arguing the respondent's conduct was "egregious" and seriously undermined his ability to present his case fairly.
10. The claimant asserted that "striking out the respondent's case is not only an appropriate remedy but necessary step to uphold the principles of fairness and justice".
11. The claimant's email of 13 June 2023 was sent at around 10pm and had followed an email that was sent by the respondent's agent at around 4:30pm. The respondent's agent in their email had alleged the claimant was "displaying unacceptable and unnecessary behaviour towards the respondents and a witness". Actions of the claimant were set out noting that if the claimant were to continue to act in the way he had done, an application for strike out of the claim would be made.
12. On 15 June 2023 the claimant sent a further communication to the Tribunal making further representations as to why the response should be struck out.
13. In particular the claimant addressed 2 specific incidents. The first was calls he had made to the respondent's agent's office which he argued were necessary and the second was that the respondent's agent in response to an email he had sent had replied stating "definitely add this email to the tribunal emails!" which the claimant said was unprofessional and intimidating. He argued that the unprofessional and intimidating nature of the communications justified striking out the response to "uphold the integrity of the proceedings".

14. On 19 June 2023 the claimant sent a third application adding further comment and grounds to his application arguing the respondent has failed to provide a substantive response to the claims, failed to comply with an order and made fabricated representations. It reiterated points made before.
15. The claimant argued that the respondent had falsely accused him of aggression and issuing threats. He argued this was fabrication and an attempt to undermine his case. He also argued the ET3 had failed to set out any substantive response and his claim had not been properly responded to. Those matters, it was alleged, justified strike out of the response.
16. On 19 June 2023 the respondent's agent had written to the Tribunal again noting conduct of the claimant and arguing that the claimant's approach to the litigation has been "disproportionate, overly aggressive and encroaching on vexatious".
17. The claimant responded on 20 June 2023 arguing that the respondent's agent's approach amounted to a failure to comply with the rules.

Respondent's response to the application

18. The respondent set out in a 23 paragraph submission its substantive response to the claimant's application for strike out of the response, having been asked for comment. The author of the document is a solicitor.
19. The respondent argued that there had been no failures by the respondent to comply with the orders and the points made by the claimant did not justify striking out the response. The response noted that the claimant on 20 June 2023 argued the respondent had a duty to provide all relevant documents relied upon "under UK employment law". The respondent's agent argued the claimant was seeking a large number of irrelevant and disproportionate communications and that some of the communications were subject to legal privilege.
20. The submission refers to various communications of the claimant arguing that the claimant was seeking to threaten and intimidate a witness. It was also alleged that attempts to seek documents was unnecessary and expensive

with some emails being sent directly to the respondent not involving the respondent's agent.

21. In short, the respondent's agent argued that the claimant's approach was disproportionate to the issues that require to be determined.
22. With regard to the specific points the claimant had made, the respondent's agent argued that the document submitted to the Tribunal was submitted with the authority of the respondent. It was the owner of the respondent's agent's business that submitted the document.
23. It was denied there was any selective withholding of information. A subject access request had been complied with. An email had been withheld as it was subject to privilege (containing legal advice and identifying other individuals) and an explanation given for this. The specific email to which the claimant referred had ultimately been disclosed and supported the respondent's position. The submission stated that the document was provided to the claimant by the respondent as part of standard disclosure and there was no legal obligation to provide the document sooner.
24. It was denied that there had been any failure to provide documents. In any event the document had been provided.
25. The respondent's agent also argued that it was reasonable for the claimant to be advised that it was proper to put questions to a witness rather than seek information in advance and that is a common feature of litigation.
26. The respondent argued that strike out is a draconian remedy and should not be used where there are disputes of fact. It was denied there was any ground to support the application and in fact the claimant's conduct, including the application for strike out, was an example of his conduct to date in putting the respondent to further cost, harassment and disproportionate expense.

Matter to be determined in chambers

27. Both parties confirmed that they wished the claimant's application to be considered in chambers without the need for a hearing, both parties having provided their written submissions.

Claimant's further submission in support of striking out the response

28. On 30 June 2023 the claimant provided a further 8 page document reiterating the application to have the response struck out. The respondent's agent objected to the email arguing that there was no need for any further communication and this was "typical of the claimant trying to have the final word". The respondent noted the further time and expense required in dealing with this matter further.
29. In the claimant's additional submission, it was alleged there had been a consistent disregard for procedural rules, a failure to provide a substantive response to the claims and a continuous attempt to undermine the integrity of the proceedings. It was asserted that there had been a pattern of misconduct raising serious concerns of the respondent's credibility and commitment to upholding fairness and justice wasting valuable time.
30. It was alleged the respondent failed to engage with the claim and contains a blanket denial. That demonstrated "a lack of credibility and warrants consideration for striking out the respondent's case".
31. The claimant asserted that the respondent mishandled his complaint and failure to follow proper procedures. The respondent had sought advice from a law firm before investigating the claimant's complaint which the claimant said raised concerns about the respondent's impartiality and undermined the integrity of the proceedings
32. It was alleged that the respondent's agent had lodged a document with the Tribunal without authority. The person from the respondent's agent's business (its owner) was alleged by the claimant not to have authority (as she was not the named representative) and so her actions should be ignored. Reference was made to another case involving the respondent's agent.
33. The claimant then referred to the email from the respondent's agent which the claimant said was unprofessional and intimidating. It was alleged this undermined fairness and impartiality. Explicit reference to the Tribunal "can be interpreted as a threat" and such behaviour was intimidation and hostile.

34. It was also alleged that withholding a document which was said to be legally privileged infringed on the claimant's right to a fair hearing and made it more difficult for him to succeed.
35. The claimant alleged the respondent falsely accused the claimant of aggression and threats to witnesses but the evidence did not support that. The fabrication of this was said to undermine the claimant's case and prejudice proceedings; it was frivolous and vexatious.
36. The claimant denies making excessive contact with the respondent's agent's office. He asserted he had only made 3 calls which were appropriate. This wasted valuable time and resources. The respondent's conduct was frivolous and vexatious. It was unreasonable and harassing of the respondent's agent to behave in such a manner.
37. It was argued the respondent's case was frivolous, vexatious and an abuse of process. The refusal to provide any substantive response to the claims indicates a lack of genuine interest in resolving the dispute and focussed on harassment and intimidation. Secondly making baseless allegations without evidence undermined his reputation and credibility and finally the respondent's behaviour was said to be unreasonable and disruptive throughout the process.
38. The claimant referred to the respondent's agent's suggestion that questions were asked of the witness during a hearing rather than in advance which the claimant said prevented him from conducting a fair hearing.
39. The claimant also relied upon the respondent's agent's email stating that communication would only follow if ordered by the Tribunal. It was alleged this breached rule 20 which he said required parties to communicate with each other.
40. The claimant also referred to an offer that was made with a threat of costs if it not was accepted which the claimant argued was coercion.
41. The claimant argued that it is not correct to characterise his emails as excessive, unnecessary or disproportionate. The claimant set out each email

and the explanation for it together with the context. The claimant was engaging in detailed preparations for his case and wished as much information as he could obtain from the respondent's agent.

42. The claimant takes issue with the respondent's agent providing a document by the owner of the respondent's business rather than the named individual who had previously acted. He argued this was done without consent.
43. The claimant also takes issue with the suggestion that the document the respondent withheld was subject to privilege and he argues the email supports his position. It is alleged there were no good reasons for failing to provide the documents. The claimant argues there is a duty to provide the document as part of his subject access request. The refusal to provide the document was said to breach rule 31(1)(b) which the claimant said required the email to be disclosed. The claimant also refers to rule 32 which the claimant said prevented restricting the parties' ability to ask questions.
44. The claimant also said previous actions of the respondent's agent is relevant to show their behaviour which should be taken into account.

Another submission from the claimant

45. On 11 July 2023 the claimant submitted a further submission running on this occasion to 23 paragraphs and 8 pages with detailed attachments. The submission reiterates the existing grounds and provides the evidential basis. Thus the submission deals with the alleged inadequate response to the claims, the alleged mishandling of the discrimination and harassment complaint, the alleged unauthorised submission to the Tribunal by the owner of the respondent's agent's business, an intimidating email from the respondent's agent, communications of the parties, attempts to limit cross examination, ceasing communication without reasonable excuse and selective disclosure of evidence. The points made and evidence submitted reiterates the issues made in previous correspondence and provides a little more detail. These points have been considered in full in reaching the decision below.

Law

46. A Tribunal is required when addressing matters such as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, rule 2 of which states as follows:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, 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. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

Strike out

47. Rule 37 provides as follows:

“(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—...

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or response has been scandalous, unreasonable or vexatious.”

48. In **Bennett v London Borough of Southwark** [2002] IRLR 407 the Court of Appeal observed (at paragraph 26) that the underlying mischief to this area of the rules is the notion of abuse – has there been conduct of proceedings which amounts to abuse of the Tribunal's process. Elias LJ summarised the approach to be taken in **Abegaze v Shrewsbury College of Arts** [2010] IRLR 236 at paragraph 15: *“In the case of a strike out application it is well*

established that before a claim can be struck out, it is necessary to establish 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.' This approach has been approved in by the Court of Appeal in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630.

49. The first question is whether there has been scandalous, unreasonable or vexatious conduct of the proceedings. If so, the second is whether a fair hearing is no longer possible. If that is fulfilled the third is whether strike out would be a proportionate response to the conduct in question.
50. With regard to **whether there has been scandalous, unreasonable or vexatious conduct**, there must be a conclusion by the tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on their behalf in such a manner
51. The conduct in question may be that of the party's representative as well as the party themselves. In **Harmony Healthcare plc v Drewery** UKEAT/866/00 a party was held to be fixed with the conduct of their representative who assaulted the other party's representative in the tribunal waiting room. It is relevant to note that in **Harris v Academies Enterprise Trust** [2015] IRLR 208 the Employment Appeal Tribunal upheld a Tribunal's ruling that the conduct of the representative and the party may be distinguished in an appropriate case. The employment judge was held entitled to conclude that the representative's actions were not a reflection of the instructions given and the prejudice of not allowing a full hearing of the discrimination claims would be significant.
52. Care should therefore be exercised when the conduct in question is that of a party's representative. As indicated, in some, but not all, cases, that conduct can be visited on the relevant party leading, potentially, to a strike out of their

claim or response. In **Bennett** the Court of Appeal stated that what is done in a party's name is 'presumptively, but not irrebuttably' done on his behalf.

53. 'Scandalous', was considered by the Court of Appeal in **Bennett**. It is not a synonym for 'shocking' but embraces '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'. The Court of Appeal noted the claimant had been 'difficult, querulous and uncooperative in many respects' but was not prepared to assume that this met the definition.
54. 'Vexatious' can include anything that is an abuse of process.
55. One possible form of scandalous, unreasonable or vexatious conduct is the wilful disregard of tribunal orders. It is not any breach that will meet the threshold. The Court of Appeal in **Blockbuster** described the 'deliberate and persistent disregard of required procedural steps' as a cardinal example of conduct which would meet the definition.
56. The second factor that must be considered if scandalous, unreasonable or vexatious conduct of proceedings has been found, is **whether a fair hearing is still possible**. When striking out a party's case, the Tribunal must explain why a fair hearing is no longer possible or why the case falls within the exceptional circumstance where the fairness of the trial is not a consideration
57. In **Bolch v Chipman** [2004] IRLR 140 the Employment Appeal Tribunal described the reasoning behind the 'no fair trial' factor by stating that a striking out order is not, first and foremost, a tool to punish scandalous, unreasonable or vexatious conduct of proceedings. Rather, it is to protect the other party (and the integrity of the judicial system) from such behaviour which results in it no longer being possible to do justice. A party that acts scandalously, unreasonably or vexatiously in the conduct of proceedings should not thereby gain an advantage of any kind in the judicial process. The court in **Bolch** approved the High Court decision of **Logicrose Ltd v Southend United** (1988) 5 March, in which Millett J had observed that the deliberate and successful suppression of a material document '*was a serious abuse of the process of the court and might well merit the exclusion of the offender*

from all participation in the trial' because it rendered a fair trial impossible, but that if the threat of striking out the claim or defence resulted in the production of the missing document, this might require the lifting of that strike out threat. Once the document had been produced there should only be a strike out 'if, despite its production, there remained a real risk that justice could not be done. That might be the case if it was no longer possible to remedy the consequences of the document's suppression despite its production', adding 'It would not be right to drive a litigant from the judgment seat, without a determination of the issues, as a punishment for his conduct, however deplorable, unless there was a real risk that the conduct would render further proceedings unsatisfactory'.

58. The third factor which must be considered is that of **proportionality**. Simler P (as she then was) in **Arriva London North v Maseya** UKEAT/0096/16 at paragraph 27) said: *'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 if there has been scandalous, unreasonable or vexatious conduct of proceedings and a fair trial is not considered possible, the tribunal must still examine the proportionality of striking out the claim or response and must consider other, less seismic orders because, as Sedley LJ put it in **Blockbuster** the power to strike is 'a Draconic power, not to be readily exercised'.
59. In **Blockbuster** the Court of Appeal (at paragraph 21) said: *"it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing'.*
60. In **Blockbuster** the claimant had in breach of orders failed to give adequate particulars of his claim, refused to allow the respondent to photocopy his documents, attended on the first morning of the hearing with unseen

documents and made changes to his witness statement without prior notice to the respondent. The Court of Appeal upheld the Appeal Tribunal's decision that the Tribunal had been wrong to strike out the claim. While acknowledging that the claimant had been 'difficult, querulous and uncooperative', the Court of Appeal said that the courts are open to the difficult as well as the compliant.

61. The proportionality consideration requires an assessment by the tribunal of any alternative, lesser sanctions, for the conduct in question and a balance requires to be struck.

Decision

62. The Tribunal considered the claimant's application carefully in light of the authorities. Each aspect is dealt with in turn. The Tribunal firstly considered whether the conduct stated by the claimant to exist had been established (and whether it amounted to scandalous, unreasonable or vexatious conduct).

Engaging with the claim

63. The first matter relied upon was whether the respondent had failed to engage with the claim which the claimant said demonstrated "a lack of credibility and warrants consideration for striking out the respondent's case". The Tribunal did not consider that a fair summary of the position. Regrettably the narrative style of the claim form makes it difficult to distil the precise basis of each claim. The respondent's position, which is a common approach in the Employment Tribunal, is to deny that the conduct occurred and that there was any unlawful actions. In other words the claimant is put to proof. It is for the claimant to establish his claims. The conduct of the respondent in this regard is in accordance with normal practice. It did not amount to unreasonable, scandalous or vexatious conduct.
64. Nevertheless it is important that the issues in this case are fully focussed. A case management preliminary hearing will be fixed to ascertain the extent to which the legal issues in this case have been agreed and what issues are outstanding. The parties will be required to work on a statement of agreed facts and disputed issues that will assist both parties in understanding what

is agreed and what is disputed, thereby ensuring the hearing is properly focused.

Respondent's approach in managing matters during employment

65. The claimant asserts that the respondent mishandled his complaint (during his employment) and failed to follow proper procedures. This was said to occur because the respondent had sought advice from a law firm before investigating the claimant's complaint which the claimant said raised concerns about the respondent's impartiality and undermined the integrity of the proceedings. Whether or not legal advice is sought and when it is sought is not a concern of the claimant and cannot be used as evidence as to the veracity of the claimant's (or respondent's) position. It is entirely irrelevant to that issue. The conduct of the respondent that gives rise to the claim cannot be a relevant consideration in determining strike out, which refers to the way the proceedings were conducted. It is that conduct which is considered.

Lodging a document without authority

66. It was alleged that the respondent's agent had lodged a document with the Tribunal without authority. The person from the respondent's agent's business (its owner) was alleged by the claimant not to have authority and as such her actings should be ignored.

67. The respondent's agent (who is a solicitor) explained that the person who lodged the document was the owner of the respondent's agent's business. That by itself is sufficient to explain why that person lodged the document. The claimant's focus on explicit authority is misplaced and the approach of the respondent's agent was appropriate.

68. Reference to other cases involving the respondent's agent's business and personnel is entirely irrelevant to the issues in this case.

Response in an email by the respondent

69. The next issue is the respondent's agent email which the claimant said was unprofessional and intimidating. It was alleged this undermined fairness and

impartiality. Explicit reference to the Tribunal “can be interpreted as a threat” and such behaviour was intimidation and hostile.

70. While it may not be a satisfactory response by the respondent, the Tribunal did not consider the conduct of the respondent’s agent to be such as to justify criticism when viewed objectively in context. It was clear that the relationship between the parties dealing with this matter was not operating properly. It was clear that the respondent’s agent was becoming concerned and frustrated with the amount of emails and communications from the claimant and this further email was another example. It is regrettable that the claimant was not able to be more focussed in his communications. The approach taken in his written submissions on strike out exemplifies his approach. The claimant has chosen to submit 3 different submissions, reiterating many of the same points, rather than being more focused and succinct. The approach the claimant has taken has resulted in more time being required to deal with the issues. That was the context in terms of the claimant’s approach that led the respondent’s agent to send the email. The respondent’s agent’s conduct was not such as to justify striking out the response. Both parties require to adjust how they conduct themselves to find a better way of working together.
71. These issues require to be dealt with at a case management preliminary hearing. It is necessary that the parties are reminded of the need to work together and to act professionally towards each other. Rather than focussing on procedural issues and the issues forming part of this lengthy procedural process, the parties’ energy would be far better spent agreeing the issues to be determined, what facts are agreed and what is in dispute. The focus needs to be on finalising the arrangements and documentation for the hearing, which both parties are clearly capable of doing.
72. As a result of the way in which the relationship between the claimant and the respondent’s agent has developed, the overriding objective has been forgotten by both parties. The parties have lost the ability to work together to achieve a just and fair result and as a result the parties’ positions have become entrenched, focussing on the current matter rather than the key issues in this case. That requires to change.

Failure to provide an email

73. It was also alleged that withholding a document which was said to be legally privileged infringed on the claimant's right to a fair hearing and made it more difficult for him to succeed.
74. The Tribunal did not consider that a fair criticism of the respondent's agent. The respondent's agent ultimately did provide the email and initially did not disclose it, believing there to be a legitimate reason not to do so. The respondent's agent is entitled to take a view and change their position. There was no obfuscation. The respondent's agent acted reasonably.
75. The Tribunal did not accept the claimant's characterisation as to how the respondent's agent dealt with this as supporting his application. Regrettably the claimant's perception as to how the respondent's agent acted had become masked by his belief that the agent was seeking to hinder the claimant in the pursuit of his case. As a consequence of the nature of the relationship, the respondent's agent had equally found it difficult to communicate with the claimant, given their belief in the claimant's desire to cause additional costs by making disproportionate demands in repeatedly lengthy communications.
76. The authorities as set out above also make it clear that the fact the document has been provided now is relevant and there is no real prejudice in terms of progressing to a final hearing. It is not uncommon in exchanging documents for there to be differences of opinion as to documents and their status. The respondent's approach was not such as to justify strike out.

Calls to respondent's agent

77. The claimant set out the calls he made to the respondent's agent and his belief that he calls were genuine. The issue in this matter is the breakdown in working relationship between both sides and the failure of both sides to see the other party's position. That prevented matters from fairly progressing. It is not fair to characterise the respondent's approach as frivolous and vexatious nor of being unreasonable and harassment. It was a regrettable consequence of the breakdown in working relationship.

Respondent's approach said to be unreasonable

78. The Tribunal did not accept the claimant's assertion that the respondent's case was frivolous, unreasonable, vexatious and an abuse of process. The claimant has been put to proof as to the large amount of claims he has made. The failure to provide a point by point response to each of the lengthy issues raised does not show a lack of genuine interest in resolving the dispute as alleged nor does it support the assertion the respondent's agent is focussed on harassment and intimidation. The claimant has raised a large number of matters which require to be determined in evidence, unless parties agree specific facts which will be progressed at a preliminary hearing.
79. The Tribunal does not accept the respondent made "baseless allegations without evidence" and thereby undermined the claimant's reputation and credibility. The respondent's agent found the claimant's manner of working and the way he conducted his preparations as challenging and the respondent's agent believed the claimant was seeking to create excessive demands. That was a consequence of both parties' approach. The Tribunal does not consider that the respondent's agent's behaviour was unreasonable, vexatious or disruptive. It is clear that the breakdown of the parties' relationship led to the entrenched position of both parties and prevented matters being progressed properly. Both parties must take responsibility for this.

Question of a witness

80. The claimant is unhappy that the respondent's agent suggested that the claimant put questions to a witness rather than seek information in advance. That is a common approach taken in litigation and it is for each party to determine how best to prepare for their case.
81. The claimant's reference to the rules was not accurate and did not set out the precise terms of the rules set out in the current Rules. Rule 32 simply sets out the power to order a witness to attend to give evidence.

82. The Tribunal did not consider that the initial refusal to provide the document was a breach of the rules. In Scotland it is for each party to provide the material on which they intend to rely. There was no conduct of the respondent (or more accurately their agent) that could fairly be regarded as scandalous, unreasonable or vexatious in their conduct of these proceedings.

Threat of expenses

83. The claimant also referred to an offer that was made with a threat of costs if it not was accepted which the claimant argued was coercion. The approach of the respondent was not such as to be scandalous, unreasonable or vexatious. It would not justify strike out of the response. The claimant is clearly intelligent and articulate and capable of deciding whether or not to accept an offer and to meet any consequences of doing or not doing. The warning letter was not unreasonable.

Ceasing communication without reasonable excuse

84. The claimant alleges that the respondent's agent's decision not to communicate with the claimant unless ordered by the Tribunal is scandalous, unreasonable or vexatious. The Tribunal considers this to be an example of the consequence of the professional relationship between the parties not operating properly. The respondent's agent has reached the position that it considers the claimant to be seeking to frustrate the process by disproportionate communication and is seeking to focus only on what is absolutely necessary to progress matters.
85. The Tribunal does not consider this to amount to scandalous, vexatious or unreasonable conduct in context but does consider it regrettable. It is for that reason that a case management preliminary hearing is essential to ensure both parties understand the need for proportionality and working together. The final submission of the claimant follows an earlier submission which reiterated much of the same points and evidence. The claimant must seek to understand the consequence of production of lengthy and detailed correspondence, particularly where much of the content has already been provided. It is far

better to be succinct and clear and focus on the key issues. That is a matter that both parties need to understand to ensure the case can proceed proportionately and with due regard to cost.

Taking a step back

86. The Tribunal took a step back to consider the claimant's application in light of the full factual matrix and how the respondent's agent has acted and reacted. The Tribunal did not consider the claimant's assertion that the respondent's agent's approach exhibited a pattern of behaviour that justified strike out given the legal test and the authorities in this area. This was a regrettable case whereby the relationship between the parties had not progressed properly or professionally. This is not a matter for which either party was solely responsible. The claimant provides a number of lengthy and detailed communications, often repeating earlier points. The respondent sees this as a way to seek to frustrate the process by increasing the cost and time needed which the respondent's agent does not consider proportionate or fair.
87. The claimant viewed the actions of the respondent's agent through the prism of his firm belief that the intention was to block his attempt to fairly progress his case. Regrettably that made his position become more entrenched. The actions of the respondent were all considered an attempt to prevent the claimant from having a fair hearing. That was misinterpreting what the respondent's agent was doing, which was by and large seeking to keep matters within reasonable bounds in terms of cost and time. The parties' positions diverged and continued to do so. The relationship is not working.
88. Looking at matters as a whole, there was no conduct of the respondent that satisfied the test to justify striking out the response. Having stood back and considered each of the claimant's submissions and the respondent's conduct, the Tribunal is satisfied that there was no conduct which is properly characterised as scandalous, unreasonable or vexatious and the respondent has materially complied with the Tribunal orders. The Tribunal has not gone into forensic detail in relation to each of the points the claimant has made in his most recent submission. This is because the submission is based on

essentially the same premise as summarised above. The key themes are the same and the Tribunal is satisfied none of the points made by the claimant justifies characterisation of the respondent's agent's conduct as scandalous, unreasonable or vexatious. The points arise as a result of the relationship between the parties breaking down and both parties being unable to see an objective way forward that is ironically in both parties' interest. There are no matters within the most recent submission that change

89. Many of the points the claimant makes in his most recent submission relate to how the respondent acted during his employment (and issues with regards to Code of Practice). Those are matters to be determined at the final hearing and have no bearing on the strike out question at this stage (which relate to conduct of the proceedings). They are matters requiring evidence (or matters the respondent may be prepared to concede). The issues with regard to the respondent's conduct during their defence of the case are not issues that would satisfy the definition. The conduct of the respondent has arisen as a direct consequence of the way in which the claimant has conducted his case. As the claimant is not legally qualified the claimant is unlikely to understand the normal approach to litigation which is why a case management preliminary hearing is necessary to address both parties on preparations for the hearing and the way in which the parties must work together in a proportionate and fair way.
90. The first question in dealing with strike out is whether or not there has been conduct which can properly be described as scandalous, unreasonable or vexatious. That question is answered in the negative.

A fair hearing still possible and not proportionate to strike out

91. Even if there were such conduct, the Tribunal would not have been satisfied that a fair hearing is no longer possible such that strike out would be appropriate. The parties require to work together professionally. Both the claimant and the respondent's agent have the ability to do so. The issues in this case have arisen because of the breakdown in working relationship as set out above. Both parties must share responsibility for working together and

moving matters forward. A fair hearing can still proceed once the parties take a step back and understand how matters require to be progressed..

92. The Tribunal would also not be satisfied it would be a proportionate response to strike out the response given the fact the Tribunal would not hear the respondent's defence of the claim. That does not put the parties on an equal footing. It would be excessive to strike out given less draconian options available. The obvious way forward is to have a case management preliminary hearing to require the parties to explain their position and to require the parties to work together, as the Rules require.

Issues arising relate to agent's conduct

93. Further, the issues the claimant raise are issues as to the respondent's *agent* rather than the respondent. As the authorities above indicate, it is not every case that an agent's conduct would be ascribed to the principal. Given the specific relationship issues as between the parties in this case, this may well have been one of those cases where the actions of the representative could be distinguishable from those of the party, had it been necessary to consider this point. It has not been necessary to consider that issue given the decision.

Moving matters on

94. It is necessary that both parties finalise the issues in this case, identify what facts can be agreed and what are in dispute and what their respective positions are. That then ensures matters progress and the parties can deal with each other in a professional and proportionate manner. The parties should ensure this is progressed expeditiously by working together in a collegiate way with due regard to cost and proportionality.
95. It is in the interests of justice to progress this case to a final hearing without further delay. The parties are required to attend a case management preliminary hearing to explain whether the list of issues setting out the specific and precise issues for each claim has been agreed and if not why not and how the parties are going to focus on working together to finalise preparations for the final hearing and how they are to work together. The parties should be

expected to work on a statement of agreed facts and disputed issues in relation to each fact necessary to determine the issues in this case and work together to ensure the hearing can proceed expeditiously.

96. Both parties are reminded of the overriding objective and of the need to work together to ensure the hearing can be proceed in a proportionate and fair way. The parties do not require to like each other but they must be able to work together in a professional way. They are clearly capable of doing so. This is a case giving rise to serious issues in respect of which evidence requires to be led to determine the outcome. That should proceed without delay.
97. The response is not struck out and the final hearing shall proceed with the parties working together to achieve the overring objective.

Employment Judge: D Hoey
Date of Judgment: 13th July 2023
Entered in register: 17th July 2023
and copied to parties