EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000029/2023

Held in Chambers on 12 September 2023

Employment Judge P O'Donnell

Ms Michelle Dawson	**Claimant** **Represented by:** **Ms C McMillan -** **Lay Representative**
Galactic Media Group Limited	**Respondent** **Represented by:** **Mr C Maclean -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim is struck-out under Rule 37(1)(b) on the basis that the conduct of the case by, or on behalf of, the claimant is scandalous, vexatious or unreasonable and under Rule 37(1)(d) on the basis that the claimant was not actively pursuing the claim.

REASONS

1. In this case, the Tribunal is, of its own motion, considering whether to strike out the claim under Rule 37(1)(b) on the basis that the conduct of the case by, or on behalf of, the claimant is scandalous, vexatious or unreasonable. In addition, strike-out is also being considered under Rule 37(1)(d) on the basis that the claimant was not actively pursuing the claim.

2. The Tribunal considers that a short summary of the procedural history of this case would assist in setting out the context in which the Tribunal came to the view that it should be considering strike-out of its own motion:

a. The claimant lodged her ET1 on 18 January 2023 bringing claims for unfair dismissal (in respect of public interest disclosures) and various payments due at the end of her employment.

b. The ET3 was to be lodged by 20 February 2023. It was not and the case was listed to proceed as undefended to a final hearing.

c. By email dated 27 February 2023, the claimant sought what she described as a "default judgment" against the respondent (more properly, this would be described as a judgment under Rule 21).

d. By email dated 1 March 2023, the respondent made an application under Rule 20 for an extension of time to lodge their ET3. The claimant opposed this by emails of the same date.

e. The correspondence of 27 February and 1 March came before the present Judge on 2 March 2023. Directions were made for a hearing to be listed to determine the applications being made by both parties.

f. The claimant was not content with this decision and lodged an appeal with the Employment Appeal Tribunal (EAT) on 8 March 2023. The proceedings in the ET were sisted as a result.

g. By a decision dated 9 May 2023, the EAT rejected the appeal at the sift stage.

h. The present Judge decided to lift the sist and proceed to re-list the hearing to determine the applications made by the parties in February and March 2023.

i. The claimant was unhappy with this decision. She has since engaged in extensive correspondence with the Tribunal regarding the proceedings and it is this correspondence which has led to the Tribunal considering striking out the claim. The Tribunal will set out the relevant detail of this correspondence below.

j. There was a hearing listed on 8 September 2023 to determine the applications. This had been listed further in time to allow the claimant

the opportunity to exercise her right to seek a hearing from the EAT which she had indicated she had intended to seek. To the best of the Tribunal's knowledge, the claimant has not sought such a hearing from the EAT.

k. The hearing on 8 September was discharged by the Tribunal to avoid putting the respondent to unnecessary time and expense in attending the hearing in circumstances where the Tribunal was considering striking out the claim.

3. 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) …

(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) that it has not been actively pursued;

(e) …

4. 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.

5. The question of what amounts to scandalous, vexatious or unreasonable conduct is not be to 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*).

6. Rule 37(1)(b) was considered in Bennett v London Borough of Southwark [2002] IRLR 407 and a number of principles can be identified:

   a. The manner in which proceedings are conducted by a party is not to be equated with the behaviour of the representative but this can provide relevant evidence on this point.

   b. Sedley LJ observed that the Rule was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process.

   c. It can be presumed that what is done in a party's name is done on their behalf but this presumption can be rebutted and so a party should be given the opportunity to distance themselves from what the representative has done before a claim or response is struck-out.

   d. 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).

   e. Fourth, 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*).

7. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37(1)(b) was summarised by Burton J, in *Bolch v Chipman [2004] IRLR 140*:

a. The Tribunal must reach a conclusion whether proceedings have been conducted by, or on behalf of a party, in a scandalous, vexatious or unreasonable manner.

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.

8. Before dealing with the detail of the correspondence, there is a one preliminary point to be addressed. The bulk of the correspondence was sent directly by the claimant but, latterly, the correspondence has been sent by a Carol McMillan on behalf of the claimant.

9. The exact status of Ms McMillan is not clear. She has expressly said she is not the claimant's representative but that correspondence related to the claim should be sent via her. The correspondence sent by Ms McMillan is, in terms of the volume, tone and content, almost identical to the correspondence sent directly by the claimant. The Tribunal infers from this that Ms McMillan is simply the "mouthpiece" of the claimant, sending correspondence in terms dictated by the claimant, and that the correspondence from her should be treated as being the claimant's correspondence rather than that of Ms McMillan.

10. The Tribunal has also noted that Ms McMillan has purported to be sending the correspondence on behalf of the claimant's unnamed "legal counsel" or "legal team". The claimant, in her direct correspondence, has also made reference to unnamed legal advisers. The Tribunal considers that it is very unusual for any lawyer to be authorising someone to write on their behalf given the potential risks to the lawyer. It is certainly not something which the Judge, in his thirty years of practising law, has ever seen before.

11. Turning to the correspondence itself, there was a considerable volume of emails sent by and on behalf of the claimant. In almost all cases, a number of emails were sent on the same date within a very short period of time:

    a. On 19 May 2023, the claimant sent 18 emails to the Tribunal between 11.23 and 15.15 raising her objections to the listing of a hearing to determine the February and March applications.

    b. On 31 May 2023, the claimant sent 4 emails to the Tribunal between 14.55 and 15.43.

    c. On 5 June 2023, the claimant sent 2 emails at 17.46 and 17.48 then further emails at 19.33 and 23.27.

    d. On 8 June 2023, the claimant sent 7 emails between 10.35 and 11.32 then a further email at 15.31.

    e. On 15 June 2023, the claimant 4 emails between 12.38 and 13.51.

    f. On 3 July 2023, the claimant sent 4 emails between 14.59 and 16.14.

    g. On 7 July 2023, the claimant sent 4 emails between 15.01 and 15.33.

    h. On 18 July 2023, the claimant sent 6 emails between 15.13 and 16.10.

    i. On 23 August 2023, 12 emails were sent on behalf of the claimant between 15.04 and 18.25. by Carol McMillan.

    j. On the same day, 3 emails were sent by the claimant between 15.27 and 17.00.

    k. On 24 August 2023, 3 emails were sent on behalf of the claimant by Ms McMillan between 15.40 and 16.25.

    l. On 4 September 2023, 6 emails were sent on behalf of the claimant by Ms McMillan between 10.33 and 11.28.

    m. On 5 September 2023, 8 emails were sent on behalf of the claimant by Ms McMillan between 14.34 and 16.25.

12. The volume of correspondence, in itself, would not be sufficient to satisfy the test under Rule 37(1)(b). Rather, it is the combination of this, the tone and the content of the correspondence that is the issue in this case.

13. Much of the correspondence is highly repetitive with the claimant raising issues that had already been addressed in earlier correspondence. The Tribunal does not intend to set out the correspondence line-by-line but would summarise the various themes and issues as follows:

    a. The claimant repeatedly stated that the hearing which had been listed was "refused", "rejected", "dismissed" or otherwise stated that the hearing would not be proceeding. It is not for any party to unilaterally decide that a hearing cannot proceed and this is a decision for the Tribunal. A party can apply for a hearing to postponed and the claimant's correspondence was treated as such. The Tribunal refused to postpone the hearing as there was no good reason set out in the correspondence. Despite this, the claimant repeatedly insisted that the hearing would not be proceeding and the reasons given by her were essentially the same in every piece of correspondence.

    b. The claimant also repeatedly insisted that the present Judge was "removed" or "dismissed" from the case. She also stated that her lawyer and her doctor had said that the Judge was dismissed form hearing the case. Again, it is not in the gift of a party (or their advisers) to unilaterally decide this. A party can make an application for a judge to recuse themselves from the case and it is for the particular judge to decide on that application. These comments were treated as an application for the present Judge to recuse himself and this was refused on the grounds that the claimant had presented no reason for recusal other than that the Judge had decided to list the September hearing. Again, despite this, the claimant repeated her comments about the Judge being removed.

c. The correspondence also contained repeated allegations that the Judge had denied the claimant her "legal" rights. It is not clear what rights the claimant considered that she had been denied.

   i. On a plain reading of the correspondence this could only be read as a reference to her seeking a Rule 21 judgment.

   ii. It was pointed out to the claimant by the Tribunal that there was no absolute entitlement to such a judgment and it was a matter for the Tribunal's discretion, the claimant confirmed that she understood this position.

   iii. It was also explained that no decision had been made on the question of a Rule 21 judgment and that this would be determined the September hearing. The claimant had not, therefore, been denied anything.

   iv. Despite this, the allegations continued to be made by the claimant that she had been denied her legal rights without any explanation of what this meant.

d. The claimant complained repeatedly that receiving correspondence from the Tribunal and, in particular, the present Judge was causing her stress. She did not recognise that the correspondence from the Tribunal was necessary to either progress her claim or to respond to her correspondence.

e. At the same time, the claimant raised an issue about the fact that her case had not been progressed as quickly as she wanted it to be. There was no recognition that much of the delay arose from her conduct of the case; she appealed to the EAT (which she was entitled to do) but that meant that no progress could be made until the appeal was resolved; she stated that she intended to challenge the rejection of her appeal and so the September hearing was listed on a timescale to allow her to do so.

f. The correspondence also included repeated threats of legal action against the Tribunal service and the present Judge for alleged failures in the progress of the case. The Tribunal considers that these threats were made with the intention of intimidating the Judge into making decisions in the claimant's favour or to force him to recuse himself. Latterly, the threat of legal action was extended to individual members of the Tribunal administrative staff.

g. The correspondence also made repeated comments about the competency and honesty of the present Judge, the President of the Employment Tribunals in Scotland and the Tribunal service generally.

h. None of the correspondence was copied to the respondent's agent despite the Tribunal repeatedly making it clear that this should be done.

14. The most recent correspondence sent from or on behalf of the claimant makes it clear that she does not intend to participate in the Tribunal process. The correspondence makes reference to there no longer being a case for the Tribunal to deal with and that the case will now be dealt with by a higher court. The Tribunal is not aware of any new appeal being raised with the EAT.

15. The correspondence suggests that the claims will now be dealt with by the Court of Session. It is unclear whether the claimant intends that the present claim against the respondent is to be dealt with by the Court of Session or whether this is a reference to legal action against the Tribunal. If the former then there is no mechanism to transfer these claims to the Court and, in any event, the Tribunal has exclusive jurisdiction at first instance. If the latter then this still leaves the present claim live and needing resolved.

16. Equally, however, the claimant has made it clear that she does not intend to withdraw the present claim. She has been asked to clarify if that is what she meant when she has said in correspondence that the present claim is not proceeding and she has expressly said that her claim is not being withdrawn.

17. This leaves the respondent in the invidious position of legal proceedings being raised against them in circumstances where the claimant is not intending to actively pursue those proceedings. The proceedings need to resolved and the respondent is being put in the position of having to spend time and expense in going through the motions of dealing with a case that the claimant has no intention of pursuing. This cannot be in the interests of justice or in keeping with the Overriding Objective.

18. The Tribunal considers that the position adopted by the claimant is intended to create the maximum amount of inconvenience and disruption for both the Tribunal and the respondent. Indeed, the Tribunal considers that the manner in which the claimant has conducted the proceedings since May 2023 has been with this intention; she has sought to exclude the respondent from correspondence; she raises the same matters in the same terms again and again, knowing that the Tribunal has already ruled on these; she seeks to intimidate the Tribunal by threat of legal action.

19. The Tribunal considers that this conduct, taken as a whole, amounts to scandalous, vexatious and unreasonable conduct of the proceedings. In particular, the claimant's clear position that she will not withdraw the claim but, at the same time, will not participate in proceedings is wholly unreasonable.

20. Further, the claimant is not actively pursuing her claim. This is her stated position but, even then, the Tribunal considers that the correspondence from the claimant does not amount to active pursuit of the claim but, rather, was simply the claimant seeking to cause inconvenience to all the others involved in the proceedings.

21. The claimant had been given a strike-out warning in advance of this judgment being issued with the opportunity to respond. This generated the 8 emails from Ms McMillan of 5 September 2023 referred to above. These emails did not specifically address the issue of strike-out but, rather, repeated much of what had been set out in previous correspondence as summarised above. The emails are, themselves, repetitive as they effectively say the same thing

in different ways in setting out complaints about the manner in which the proceedings have been conducted.

22. In particular, the emails stated that the present Judge was no longer dealing with the case and that the strike-out warning was "rejected". There was a repeat of the threat of legal action against the Judge and the allegation that the claimant's "legal rights" had been breached (without any real explanation of what rights were being referenced and how they had been breached beyond the inference that this is a reference to the claimant not being given a Rule 21 judgment).

23. There is a broad denial of wrongdoing by the claimant but no indication that the claimant will participate in the proceedings if the case continued.

24. In summary, there was nothing said in response to the strike-out warning which indicates that the claimant will participate in the proceedings or otherwise change her approach to the case. These emails sent on behalf of the claimant only confirm that Tribunal's view of the claimant's conduct.

25. The respondent was also given the opportunity to comment of the issue of strike-out. Although they had not entered an appearance (with the Rule 20 application still outstanding), the Judge had exercised his discretion under Rule 21(3) to permit them to participate in the proceedings for the purposes of the issue of strike-out.

26. Comments were lodged by the respondent and these have been noted. The Tribunal does not intend to repeat them in detail for the sake of brevity and, in particular, these comments are reflected in what the Tribunal has set out above.

27. The claimant sent four emails in response to the respondent's comments. These repeated themselves and repeat what the claimant has said in the past. In particular, the claimant has repeatedly insisted that the respondent has no right to any involvement in the proceedings and ignores the Tribunal's discretion under Rule 21(3).

28. The Tribunal has considered whether some lesser sanction would be appropriate but does not consider this to be the case. The Tribunal cannot compel a party to withdraw a claim nor can it compel a party to participate in proceedings. This is not a case where some form of case management order would be capable of resolving matters.

29. In these circumstances, the Tribunal concludes that the claim should be struck-out under Rules 37(1)(b) and (d) for the reasons set out above.

Employment Judge: **P O'Donnell**
Date of Judgment: **13 September 2023**
Entered in register: **15 September 2023**
and copied to parties