



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103082/2023**

**Held in Chambers in Glasgow on 3 November 2023**

**Employment Judge D Hoey**

**Mr M Kheder**

**Claimant**

**Bakers Delights Ltd**

**Respondent**

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

The respondent's agent's application for strike out of the claim is refused and the case shall proceed to the final hearing already fixed.

#### **REASONS**

1. The claimant lodged a claim on 28 May 2023. The claim included a claim for unfair dismissal and sexual orientation discrimination. The respondent disputed the claims. At a case management preliminary hearing the claims were discussed and further specification was sought and some case management orders were issued.
2. The claimant confirmed that the claims proceeding were in respect of unfair dismissal and sexual orientation discrimination. There is a dispute over the claimant's dates of service and an alleged interruption as to continuity.

#### **Respondent's agent seeks strike out**

3. On 5 October 2023 the respondent's agent asked that the Tribunal strike out the claimant's response.
4. It was argued that the claim should be struck out on the following grounds:

- a. That the claim was scandalous or vexatious or has no reasonable prospect of success (rule 37(1)(a));
  - b. Because of the manner in which proceedings conducted has been scandalous, unreasonable or vexatious (rule 37(1)(b));
  - c. non-compliance with the Tribunal's orders (rule 37(1)(c));
  - d. the claim has not been actively pursued (rule 37(1)(d)); and/or
  - e. it was no longer possible to have a fair hearing (rule 37(1)(e)).
5. The respondent included with that application a 35 paragraph document purporting to support the strike out application.
6. It was argued that it was consistent with the overriding objective for the claim to be struck out.
7. The document the respondent submitted that purported to support the strike out application was in fact an amended response form which sought to deal with the claims the claimant had confirmed were being advanced following the case management preliminary hearing.
8. With regard to unfair dismissal the respondent argued that there was a fire and the claimant's employment had ceased for a period of time and during such a cessation the claimant's continuity of employment was broken. That is disputed by the claimant and is a matter that requires evidence.
9. With regard to the claim in respect of sexual orientation discrimination, it was denied that the claimant's sexual orientation was known by the respondent and that the respondent's treatment of the claimant changed. Again such matters are facts which are disputed by the claimant and require to be determined by the hearing of evidence.
10. The respondent also argued that the claimant had failed to comply with case management orders as it was argued the claimant had not sent the respondent documents the claimant intended to rely upon, despite the respondent requesting exchange of documents.

11. The respondent had not made it clear as to why, specifically, each of the grounds relied upon were said to have justified a strike out of the claim but the Tribunal has considered the entirety of the claim and approach taken in assessing each of the grounds relied upon.

**Claimant's response to the application**

12. On 17 October 2023 the claimant's agent responded to the points made by the respondent's agent. The claimant's agent set out in detail the law as to each ground of strike out and argued that none had been satisfied.
13. It was said that all orders of the Tribunal had been followed. Documents had not been provided as the claimant was relying upon verbal statements and witness statements were being sought from the relevant witnesses.
14. Each of the incidents relied upon by the claimant were linked and there were a number of specified acts which the claimant relied upon. These were disputed by the respondent but can only be determined by the leading of evidence.
15. The submission concluded that no grounds had been satisfied and the claims that had been set out and noted at the Preliminary Hearing should proceed to the hearing that had been fixed.

**Matter to be determined in chambers**

16. 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.

**Law**

17. 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**

18. 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—*

*(a) that it is scandalous or vexatious or has no reasonable prospects of success;*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent has been scandalous, unreasonable or vexatious;*

*(c) for non compliance with any of the Rules or with an order of the Tribunal;*

*(d) that it has not been actively pursued; or*

*(e) that the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”*

19. With regard to the **claim or response being scandalous or vexatious or having no reasonable prospects of success**, care requires to be taken to apply the statutory wording. ‘Scandalous’ means irrelevant and abusive of the

other side. It is not to be given its colloquial meaning of signifying something that is 'shocking'. A 'vexatious' claim or defence has been described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive or to include anything that is an abuse of process.

20. To strike out because the Tribunal considers there to be no reasonable prospect of success' requires a tribunal to form a view on the merits of a case, and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.
21. The Employment Appeal Tribunal gave guidance in **Cox v Adecco** 2021 ICR 1307, where the Employment Appeal Tribunal stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are.
22. With regard to striking out because of the manner in which proceedings have been conducted, 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.

23. 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.
24. 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
25. 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.
26. 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.
27. '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.
28. 'Vexatious' can include anything that is an abuse of process.

29. 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.
30. 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
31. 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'.*

32. 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'.
33. 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'.*
34. 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.
35. 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.



36. Strike out can also be ordered where there has been **non-compliance with the Tribunal's orders** (rule 37(1)(c)). In considering failure to comply with orders, the Tribunal should ensure the decision is proportionate. Hence in **Ridsdill v D Smith and Nephew Medical** UKEAT/0704/05 it was held to be disproportionate to have struck out a claim for failure to provide witness statements and schedules of loss where a less drastic means of dealing with the non-compliance was available, such as unless orders and costs orders.
37. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (**Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371) which requires the Tribunal to consider all the circumstances, including 'the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible' (see paragraph [17]). The Tribunal must consider the matter objectively and weigh the factors in the balance on an assessment of fairness. A sanction short of strike out may be appropriate.
38. In **Harris v Academies Enterprise Trust** [2015] IRLR 208, the Employment Appeal Tribunal (at [26]) referred to the fact that 'A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that', but the Employment Appeal Tribunal noted that if the failure was an 'aberration' and unlikely to re-occur, that would weigh against a strike out. At [33] the Employment Appeal Tribunal described another relevant principle as 'each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing'.
39. Consideration of a striking out order under rule 37(1)(c) must include consideration of whether a fair hearing is still possible. Proportionality, and consideration of whether there are alternative orders to a strike out that would

better address the breach of Rules or orders, will be a necessary consideration before the power under r 37(1)(c) is exercised by a Tribunal.

40. It is also possible to strike out a claim where the **claim has not been actively pursued** (rule 37(1)(d)). This can be where there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.
41. The final situation where strike out can be ordered is where it is **no longer possible to have a fair hearing** (rule 37(1)(e)).
42. In general, the Employment Appeal Tribunal has held that the striking out process requires a two-stage test in **HM Prison Service v Dolby** [2003] IRLR 694, and in **Hassan v Tesco Stores Ltd** UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the 25 second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit.
43. Striking out is not automatic and care is needed given the draconian nature. In **Hasan** the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified, and the absence of any application on the part of the respondent for striking out.
44. Ultimately a Tribunal should exercise caution before striking out a claim, particularly where facts are in dispute and it is possible to hear evidence to determine the issues.

## Decision

45. The Tribunal considered the claimant's application carefully in light of the authorities. While the respondent had not set out what the facts were that were said to have justified strike out, the Tribunal carefully considered the approach taken by the claimant (and the claimant's agent) together with the pleadings and case that had been advanced and the context of this case in assessing the application under each heading. Each aspect is dealt with in turn.

**No reasonable prospects of success**

46. This case involves disputed facts. The claimant asserts that once the respondent learned of his sexual orientation he was treated badly. While the respondent disputes knowledge of the characteristic and the treatment, taking the claimant's case at its highest, it cannot be said there are no reasonable prospects of success. Evidence is required to determine the issues arising.
47. It cannot therefore be said that the claim is scandalous or vexatious or that it has no reasonable prospects of success. The claim has raised *prima facie* claims which require to be determined having heard evidence.

**Manner proceedings conducted**

48. It also cannot be said that the manner in which the proceedings have been conducted has been scandalous unreasonable or vexatious. The claimant has set out what the acts are that are said to be unlawful. The respondent disputes the acts and the dispute can be resolved by hearing evidence. The claimant's agent has sought to engage with the Tribunal process. There is no reasonable basis upon which it can be said that the proceedings have not been conducted reasonably.

**Non compliance with orders**

49. While the claimant has not provided documents to the respondent's agent, the claimant's agent argues that the case is based upon witness testimony. On that basis there has been no breach of the order. If the claimant

subsequently seeks to rely upon documents, the claimant will require to explain why these were not produced in good time and runs the risk such documents might not be permitted to be introduced.

50. As matters presently stand the claimant says the orders have been followed and the information the respondent has been given is the information on which the claimant seeks to rely, together with oral evidence. On that basis there has been no noncompliance with orders.

**Claim not actively pursued**

51. No basis has been set out by the respondent as to in which way the claim was not being pursued. The claimant's agent has been engaging with the process and a hearing has been fixed. The claim is being actively pursued.

**Fair hearing not possible**

52. It is possible to have a fair hearing. There is no basis for the respondent suggesting a fair hearing cannot proceed. The respondent understands the basis for the claimant's claims. The claimant's agent has explained matters require oral evidence. The disputes in this case are clear and can be determined by evidence. The hearing should accordingly proceed.

**Taking a step back**

53. The Tribunal took a step back to consider the respondent's application in light of the full factual matrix and how the claimant and the claimant's agent has acted. The Tribunal did not accept the respondent's bald assertion that it is in the interests of justice to strike out the claim. It would not be proportionate to strike out the claims. None of the grounds that allow strike out to be granted have been satisfied in the circumstances of this case and it is not proportionate or just to strike out the claim.
54. It is in the interests of justice to progress this case to the final hearing that has been fixed. That was a decision reached having taken a step back to assess the approach the claimant and the claimant's agent has taken in bringing this

case, in terms of the case that has been brought and in terms of the approach to this litigation generally.

**Moving forward**

55. The parties should 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.
56. 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.
57. The claim is not struck out and the final hearing shall proceed with the parties working together to achieve the overring objective.
58. **Employment Judge: D Hoey**
59. **Date of Judgment: 3 November 2023**
60. **Entered in register: 3 November 2023**
61. **and copied to parties**