EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000057/2023

Held in Glasgow on 18 April 2024
Deliberations: 19 April and 8 May 2024

Employment Judge D Hoey

Mr B Duffy	**Claimant** **In Person**
Scotsman Group plc	**First Respondent** **Represented by:** **Mr T Merck - Counsel** **[Instructed by: Messrs Holly Blue Employment]**
Mr Ross Deanie	**Second Respondent** **- as above**
Mr Ali Alifailey	**Third Respondent** **- as above**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's agent's application to strike out the claim because the manner in which the proceedings have been conducted by the claimant has been scandalous and unreasonable sent under cover of email dated 26 January 2024 is granted. The claim is struck out.

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 complaints 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 case management preliminary hearing on 6 April 2023 I 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 parties were to work together to focus the issues and to ensure the hearing could proceed fairly.

4. The claimant subsequently argued the respondent's agent's conduct was such as to justify strike out of the respondent and a lengthy application was raised by him. I dismissed the application as I did not accept the claimant's assertions. This was a case whereby the relationship between the parties had not progressed properly. This is not a matter for which either party was solely responsible. The claimant issued a number of lengthy and detailed communications, often repeating earlier and irrelevant points. The respondent's agent had become frustrated at the claimant's failure to focus on the issues in this case.

5. I stated that it was 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. The parties were directed to work together and ensure the claim was progressed expeditiously by working together in a collegiate way with due regard to cost and proportionality.

6. Both parties were 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. I observed that the parties did not require to like each other but they must work together. They are clearly capable of doing so.

7. At a case management preliminary hearing in September 2023, I emphasised that correspondence should only be sent when necessary and in a succinct form. The parties were again reminded of the need to work together to ensure the hearing progressed and the overriding objective, of dealing with matters fairly and justly, was achieved.

8. My direction was not followed and the respondent now seeks strike out of the claimant's claim on grounds that the manner in which the proceedings had been conducted by the claimant has been scandalous, unreasonable or vexatious and that it is no longer possible to have a fair hearing. The application was made under cover of an email of 26 January 2024 and given the amount of correspondence and issues arising in this case had not been considered until this hearing had been fixed.

9. The claimant disputed the application setting out his position in detail.

10. Other matters were discussed at the preliminary hearing, but I decided to hold off issuing my decision in relation to those matters (and the Note relating to the hearing) until I had determined the strike out application. Given the issues arising and consequences of the application, I have taken considerable time to carefully consider the facts and issues and the claimant's response.

The application

11. The respondent's agent argued that the claimant's conduct included directly discriminatory remarks and threatening and intimidating behaviours, instances of blackmail and unnecessary and repeated voluminous correspondence which was an abuse of process and included attacks on individuals or attempts to relitigate matters already determined which aim to cause deliberate inconvenience and cost.

12. The respondent's agent noted that 96 emails had been received from the claimant, each going beyond the merits of the case. The sheer volume of communications was said to show how unreasonable the claimant's conduct had been which attempted to create an "environment of undue inconvenience

and suggesting a deliberate strategy to wear down the patience of those involved in the case".

13. With regard to direct discrimination, in an **email of 26 September 2023** to one of the respondent's agent's solicitors (Ms Kaur Gill) the claimant said: "with the greatest of respect …, I became suspicious when a Sikh lady from Kent used the phrase "Ought to take heed". I've asked the Tribunal to order your attendance at the PH It would be nice to finally meet you".

14. The respondent's agent advised that "attacks on respondent representatives have remained steadfast with the claimant consistently expressing his position since initiating the claim". It was said the claimant had articulated several allegations, none of which was true or demonstrated any relevance to the core of the claim.

15. The respondent's agent referred to a communication of 24 January 2024 which ran to 32 pages with a significant portion of that correspondence not being relevant and focussed on the claimant's views with inaccuracies. The claimant had made false accusations about the respondent's agent's business and those instructed. The communication focussed on allegations against the representative which was unconnected to the case.

16. The respondent's agent also argued that the claimant did not accept decisions made by the Tribunal. Thus he reapplied to have grounds added to his claim which had been withdrawn by him at the preliminary hearing, and sought to raise matters from another case against a different employer making allegations about the representative. The claimant's list of issues was another attempt to raise matters that had already been decided and having been told to work together and focus issues, the claimant responded with a 10 page document, which had led me to say that this was another example of the claimant providing a detailed and lengthy communication which was not germane to the issues. I had told the claimant to focus his claim and ensure any response was proportionate. The claimant's response was to send a lengthy and detailed document not focussing the issues.

17. It was also alleged the claimant conducted himself in a disruptive and unruly manner veering away from the substantive merits usually seeking a settlement. The communications were said to carry a threatening tone. The claimant had listed celebrities as witnesses, including Lady Gaga, a high profile sports star and that he had sought assistance of the ruling family of Qatar. He continued to seek settlement despite being told this was not of interest to the respondent.

18. The respondent's agent also noted a number of inconsistencies in the claimant's communications and pleadings and it was suggested the claimant seeks to place an unfair interpretation upon evidence and that his position is contradictory. It was asserted that there was little chance of the claimant's position being accepted on the balance of probabilities given the likely interpretation to be placed upon the facts.

19. With regard to the submission that a fair hearing is not possible, the respondent's agent argued that there is significant prejudice to the respondent if the proceedings are allowed to continue. More than a year had passed and the claimant continues to seek to amend his claim and refuse to cooperate with the respondent's agent to focus matters despite considerable judicial input. It is not in accordance with the overriding objective to expect a respondent to continue to face proceedings conducted in such a manner. The claimant has frustrated progress of the case and is likely to continue to do so.

20. It was also alleged that the claimant's behaviours "can be characterised as stalkerish and harassing". For example the claimant said he had watched a named individual outside the respondent's venue subsequent to postponement of the hearing and enlisted individuals to confirm the position. The claimant had engaged in unwanted intrusions into the respondent's agent's private life analysing her IP address with communications about where the representative lives, which is a breach of privacy and creates discomfort and concern.

Claimant's response

21. On 1 March 2024 the claimant responded arguing that "it completely flies in the face of justice that an unregulated party telling a parcel of complete lies gets a discrimination hearing before the claimant does. He said the respondent has "done nothing but impugn the judge and the Tribunal". The claimant referred to CPR 3.4(2)(b) and (c) (which does not apply in Scotland).

22. The claimant alleged there was no "voluminous document spanning 32 pages" submitted on January 24, 2024. He said the strike out application was opportunistic not necessary particularly given "the tribunal's judgement of the claimant is that he is intelligent and articulate and understands the legal elements of his claims".

23. The claimant said he had analysed the allegations about an excess of correspondence and argued "volume of correspondence alone does not necessarily equate to deliberate procedural non-compliance".

24. The claimant noted that on 20 November 2023 the tribunal wrote to parties seeking an urgent response from the respondent regarding the claimant's 12 November submission of his list of issues. There was no response until 4 January 2024. The claimant stated that the principal agent alleged her employee had resigned, and did not have access to the company email which was "lies" because there was evidence of the email being used.

25. With regard to the argument the claimant was attempting to relitigate matters already decided, the claimant referred to witnesses and their proposed attendance which the claimant said was "demonstrable behaviour of misleading the claimant and the tribunal and proves the respondents' submissions are founded upon deceitful tactics and amount to a clear abuse of the tribunal process. Such conduct seriously jeopardises any remaining fairness in proceedings and is clearly designed to force the claimant to contact the tribunal and then complain of his communications in a strike out applications based on "excessive correspondence" and "intentionally creating undue inconvenience". The respondent's conduct is designed to inflict prejudice upon the claimant".

26. The claimant reminded the tribunal of his disability through mental health and submitted the respondent "knowingly aware of the constraints associated with his disability, are seeking to ambush the claimant and take advantage of the gaps in mental capacity and focus". It was submitted that the respondent's conduct amounted to a clear abuse of the tribunal process. He said "they are taking advantage of disability to defeats justice. The respondent's conduct itself is clearly coordinated to create undue inconvenience and prejudice the claimant. It does not align with proportionality and cost and distracts the focus and need to progress matters expeditiously".

27. The claimant observes that the respondent made an allegation of discrimination from a September 2023 matter. The claimant cited **Nolan v Devonport** [2006] All ER (D) 83 where an application to set aside a default order was struck out on the basis the defendant had delayed too long in making the application. The claimant said he could not reasonably understand why the respondent waited over 5 months before formally addressing it through this application. This substantial, unexplained delay itself was said to cast doubt on the credibility and materiality of the discrimination allegation. If it was genuinely impairing fair process to an irreparable degree, logically it would have been acted on much sooner. The timing instead suggests opportunism, not necessity.

28. The claimant also relied on **Smith v Tesco** [2023] EAT 11 that strike out "should not be seen as a green light for routinely striking out cases that are difficult to manage...Strike out is a last resort, not a short cut. For a stage to be reached at which it can properly be said that it is no longer possible to achieve a fair hearing, the effort that will have been taken by the tribunal in seeking to bring the matter to trial is likely to have been as much as would have been required, if the parties had cooperated, to undertake the hearing". Even in a case of deliberate, knowing wrongdoing by a party, striking out may well not be warranted if a fair hearing is still possible.

29. The claimant referred to issues he had with what the respondent's case was and issues as to documents which he said "calls into question their genuine

efforts in accordance with the overriding objective and the claimant's rights to a fair hearing".

30. With regard to the claimant missing deadlines, as a litigant in person, some procedural missteps may happen but this does not preclude a fair hearing. The Tribunal has powers to control correspondence or give directions if needed.

31. The claimant maintains a fair hearing is possible and none of the exceptional factors can be evidenced. While the volume of correspondence presents challenges, these challenges are "purposely created by the respondent". Several other options exist to facilitate fair proceedings. It cannot reasonably be said cooperation is outright impossible when it is the respondent who is obstructive. Strike out cannot be used as a mechanism to bypass proper adjudication. It is not in the interest of justice to delay proceedings further. The significant delay and undue stress imposed by the respondent is seriously exacerbating the claimant's disability and general wellbeing.

Email of 11 January 2024

32. The respondent's agent referred to an email the claimant sent on 11 January 2024. That had been following previous emails in which the claimant had said: "Believe it or not enquiries are being made to see if Lada Gaga can come and ask me my questions when giving evidence given her royal figure in the LGBT world…. Please don't mistake my confidence for arrogance. I'm the guy who goes out in London on Saturday nights and eats in restaurants myself. I also the guy that used to turn up to work at your client's venues on Saturday night on my electric scooter".

33. The claimant then said: "So it's looking like a pro LGBT celebrity appearance to make my closing arguments isn't a no, rather it'll come down to a fee. Theres also discussion about Instagram posts to raise awareness (the use to being on your knees and the your people text messages (sic))… I think your client should consider the risks of living in a day and age when companies get cancelled. I'm open to settlement until 5pm tomorrow afterwards I'll signal to my good friend the Shiek that I'm happy for him to pay for assistance in raising

awareness. I have been true to every single word I have said to you from the beginning".

34. The claimant accepted he had sent these emails and said the respondent had been unreasonable. He explained that he "suffers mental health problems and things build up and come to the surface". He said he tried to manage it and on occasion was unable to control his episodes. The claimant apologised for the emails and accepted they were unprofessional and unreasonable.

Claimant is disingenuous on 29 February 2024

35. Counsel then referred to an email of 29 February 2024 when the claimant had advised the Tribunal (copying same to the respondent's agent) that there were no objections to an amendment when he knew the respondent had objected and set out its objection in writing. The claimant had been disingenuous as he had known the respondent's agent objected to the amendment the claimant was seeking to make.

Claimant's threatens police on 1 March 2024 unless strike out is withdrawn

36. On 1 March 2024 (at 08.30) the claimant sent the respondent an email headed "Withdraw your strike out application". In the email he stated: "Your strike out application if a parcel of lies. I call upon you to withdraw the application as you are clearly abusing the process and abusing the courts. I have concrete evidence that you and your daughters and your organisation have committed fraud, attempted to cover up money laundering, tax evasion and unlicensed operations of alcohol sales. I am inclined to contact the police… If you withdraw the strike out application by 4.30pm I will not contact the police. If you continue to pursue the application then I will go to my nearest police station today and make complaints and present every piece of evidence that I have. Please let me know how you want to proceed."

Claimant sends inappropriate communication on 3 March 2024

37. Counsel also referred to an email the claimant sent to the respondent's principal agent on 3 March 2024 headed "I pray for you". The email stated:

"Today at mass I said a prayer to St Therea and lit a candle for you. I am a Eucharistic minister… I pray that God and the Holy Spirit will guide you to find peace and contentment in your life and will lead you to represent the power of good rather than the devil who currently controls you. I also prayed for your father who in spirit world (sic) and asked him to help guide you to find faith and peace in your life. I will keep him in my prayers as I attend Mass everyday this lent… I have a special set of rosary beads which were personally blessed by Pope John Paul when he visited Glasgow. I would like to send them to you if you could provide me with an address that they will reach you. Yours in Christ". He also attached a picture of the Virgin Mary and candles (which looked like a picture he had taken from within a church).

38. The claimant apologised for sending the message which he accepted was inappropriate which he said was a "gesture of peace".

Further evidence arises – Email of 12 April 2024

39. At the hearing, counsel for the respondent noted that there had been correspondence from the claimant that further demonstrated that the claimant's conduct had been scandalous, vexatious and unreasonable.

40. In an email of 12 April 2024 the claimant stated to the respondent's agent that: "You are in contempt in every case you represent. You have committed fraud by false representation and you have unlawfully recorded a remote hearing and quite frankly you deserve 2 years in prison".

41. The claimant's response to the email was that he now regretted sending it. He said he felt passionately about his case and accepted the email was not professional. The claimant said he had previously apologised but accepted he had sent further emails of a similar nature following his apology.

The claimant's position

42. The claimant was asked if he accepted there had been a pattern of emails which appear to be unacceptable and unprofessional. He denied that there was a pattern and accepted that he should not have sent some of the emails and would give more thought before issuing communications.

43. The claimant said that there were responses from the respondent which he said had “fanned the flames” and had been blunt and regretted some of his responses. He also said that he had apologised at the time for emails.

44. The claimant undertook not to send any further emails which could be considered unprofessional or potentially offensive and he would force himself to stop and ask someone else to proof read before sending them. He said if he felt stressed or anxious, he would refrain from issuing correspondence until he had calmed down.

45. Counsel for the respondent was not aware of the emails the claimant had sent apologising for the communications and wished to take instructions as to whether the application for strike out was being maintained given the claimant’s undertaking going forward. It was agreed the claimant would send the emails in which he had apologised and the respondent’s agent would seek instructions to determine whether the application was being maintained.

Respondent maintains its position

46. Prior to close of business on the date the claimant was to send the emails (at 4.16pm) the respondent’s agent wrote to the claimant and the Tribunal noting no emails had been received by the claimant but “more fundamentally, the respondent’s representatives can confirm no written apologies were received following any of the abusive, threatening, and disconcerting emails to which the tribunal were drawn, in the manner that the claimant has said to the tribunal”.

47. It was noted that the claimant had attributed “some” of the abuse to have arisen from mental health issues but does not, even now, acknowledge the specific emails the claimant claimed to have apologised for as he said he did at the hearing yesterday. Given the timing it is submitted that apology yesterday should be given minimal weight in assessing and weighing unreasonableness and proportionality of strike out.

48. It was argued the emails were “intentionally and fundamentally dishonest as well as constituting scandalous and unreasonable behaviour. Taken together

with the previous emails of abuse and blackmail (etc), and having already previously been forewarned by the tribunal that he must desist from unreasonable behaviour, it was submitted the claimant's misrepresentation, in the course of a strike out hearing on the basis of unreasonable behaviour no less, constitutes the height of scandalous and unreasonable behaviour such as to warrant the strike-out of the entirety of this matter as to be entirely proportionate and necessary. Further it was submitted that said behaviour and the repetitive nature of similar behaviour (upon which the latest misrepresentation is on one view an escalation) also render a fair hearing to be not realistically possible and this constituted a ground for strike out.

Claimant's response

49. Around 30 minutes later (and before close of business on 19 April) the claimant responded by email saying he attached the emails apologising and "made it perfectly clear yesterday that I did not want to mislead you and expressed that I did not apologise to every single one individually, however I did apologise for unintended offence regards to the police and followed up with a general apology encompassing all conduct. I understand the respondents comments this afternoon however I maintain that I have been seeking cooperation from the outset and being falsely accused of being a stalker and a harasser and standing outside the tribunal demanding precise personal home addresses only exacerbates my mental health difficulties. Nonetheless, I stand by my commitments I made yesterday."

50. The emails the claimant sent comprised an email of 4 March 2024 which was said to include the words: "While I apologise if any content gave unintended offence" and an email sent on 18 April 2024 to the respondent's agent headed "Letter of Apology" which said: "Dear Ms Barnett, I am writing this email to you to express my sincere and wholehearted apologies for any offence or upset that I have caused to you as a result of my conduct in the proceedings of Duffy v Scotsman Group. Whilst I am accountable for my own actions, mental health is attributable to some of the emails you presented in your bundle and this case has seriously took its toll on my life. However, I am a professional person

and there is no excuse for some of the content of some of my emails. I hope that you can accept my apology and we can move forward".

51. The claimant also referred to an email of 11 August 2023 when he said: "Finally, I wish to apologise wholeheartedly for any personal offence or upset that I may have caused either of you throughout the proceedings. It certainly wasn't my intention, and I was simply pursuing my claims with limited resources, but you both strike me as very strong and resilient women. So, to that end, I would be extremely grateful if you could both reach out to your clients today and make them aware of my position and the gesture I am offering. Despite our differences, I hope we can bring an end to matters soon."

52. He also referred to an email of 23 November 2023 which he said noted: "As a side note, I don't feel that I demanded to know your location and I'm sorry if that's the impression you got. I just wondered if you could help me understand why yourself, [and others] all originate from where you allege to be currently".

Respondent's response

53. On 24 April 2024 the respondent gave its response, maintaining their position on the strike-out application and disputing the claimant's claim that these emails accurately represent what he communicated to the Tribunal.

54. The email dated 11 August 2023 precedes all the emails cited as evidence of misconduct in the strikeout application. The claimant's apology on 4 March was addressed to the Tribunal, not the respondent's agent, and the apology email sent on the day of the strikeout application was said to be insufficient and belated as "it fails to constitute a genuine apology despite his use of the phrase "I sincerely apologise"." It was said not to be sincere and was disingenuous.

55. The respondent's agent noted that just 36 minutes after receipt of his email of apology, the claimant followed up that email with another 'without prejudice' email seeking settlement to his claims and citing his survival to the claim and issuing of a "yellow card". It was said the claimant's continued course of

conduct in sending unwanted emails despite the respondent's position being made clear is emblematic of unreasonable and scandalous behaviour.

Claimant's response

56. The claimant's response was that the respondent's agent's "continued refusal to set aside differences and focus on what really matters... is a good example of what I have been up against from the outset. The respondent isn't actively pursuing their case, they are pursuing me. I reaffirm my commitments that I made I am fully prepared to move forward with this case in a respectful and professional manner."

57. The claimant then sent a further lengthy email to the Tribunal noting that he is not legally represented and has tried to comply with the directions. He said the respondent stated that he sends several emails; "however, these emails are not irrelevant or useless. Rather, they are professional, respectful, and diligent efforts to work together and progress my case and the issues at hand. From the outset, I have sought to work with and cooperate with the respondent to progress matters. Unfortunately, the vast majority of these attempts are ignored. The respondent has undergone three changes in representation, leading to lengthy periods of non-responsiveness and delays. I understand that I may come across as passionate about my case, which is now 14 months old, and when met with a persistent refusal to work together, this has unfortunately caused me frustration and exacerbated my long-term mental health difficulties. I acknowledge and take full accountability for the emails that may have caused offense to the respondent".

58. The claimant referred to further emails and what he considered a lack of cooperation by the respondent. The claimant again said he took "full accountability and sincerely apologise for the emails that have caused offense to the respondent, despite my best efforts in this case, the respondent has consistently levelled baseless accusations against me, labelling me as a stalker, harasser, aggressive, abusive, a discriminator, a thief, and someone who misleads the tribunal. These allegations are entirely untrue and

unsubstantiated. I do not seek apologies from the respondent, rather I seek the progression of my case".

59. The claimant concluded by saying: "Respectfully, while the respondent and I do not have to like each other, we must work together and focus on progressing the case in accordance with the tribunal's orders and the overriding objective. It is my belief that the respondent's submission of April 24, 2024 dissecting apologies, and the consistent refusal to set aside their differences and focus on achieving the overriding objective, exemplifies the hostility I have faced from the inception of this case. It appears that the respondent is not actively pursuing the case but rather pursuing me personally. I humbly request you consider the entirety of the circumstances in your deliberations, recognising my genuine efforts to comply with all orders and directives and the progress that I have made in my case thus far, despite the numerous challenges and obstacles. I reaffirm my commitments I made at the PH and I want to progress to judgement in a professional and respectful manner".

Law on strike out

60. 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 of response (or the part to be struck out).”

61. 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.

62. 'Scandalous', was considered by the Court of Appeal in **Bennett v Southwark** 2002 IRLR 407. 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.

63. 'Vexatious' can include anything that is an abuse of process.

64. 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

65. 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'.

66. 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'.

67. 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'.'

68. 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.

69. 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.

70. 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** 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 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.

71. 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.

72. 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.

Law on without prejudice communications

73. In general, documents prepared for negotiations, whether or not specifically written without prejudice, are protected from recovery and being relied upon but, in **Unilever v Procter & Gamble** the court noted that there is an exception if not allowing reliance on the material would 'act as a cloak for

perjury, blackmail or other unambiguous impropriety', an expression used in an earlier case. The test is one of unambiguous impropriety.

74. Having reviewed the authorities which considered the 'unambiguous impropriety' exception, the court in **Ocean on Land Technology (UK) Ltd v Land [**2024] EWHC 396 said that consideration should be given to where the without prejudice rule is being used to cloak wholly improper conduct (for example, the making of unambiguously improper threats, such as to commence criminal proceedings and seeking to conceal that fact from the court). The court said: 'Conduct or statements which do not go beyond the bounds of what is to be expected in negotiation are not within the scope of the exception'.

Decision on strike out

75. Having case managed this case and conducted the preliminary hearings I was able to assess the application within the context of the conduct of the litigation. I considered the respondent's application carefully in light of the authorities and considered each of the detailed submissions of both parties. The facts were not in dispute given the claimant accepted that he had sent the communications on which the application was based.

76. Firstly I considered that the material relied upon by the respondent in support of their application was material that I was entitled to take into account. The respondent's agent was concerned that the way in which the claimant had conducted himself and this litigation was unreasonable and vexatious and went beyond being reasonable and professional. It was necessary to consider the terms of the correspondence to assess the position. I did not take into account the correspondence that was genuinely sent with a view to settlement of the claim and considered only correspondence that fell within the exception set out above for the purposes of considering the application. It is relevant that the claimant accepted he had sent each of the communications (which related to personal issues pertaining to the respondent or their agent).

77. Next I considered the specific conduct relied upon. The respondent's position was that there were discriminatory remarks from the claimant and threatening

and intimidating behaviours and blackmail and this was commonplace and repeated behaviour. I can, however, only consider the specific correspondence to which my attention has been brought. It is understood that the correspondence relied upon is only a snapshot of the type of correspondence sent and I do not doubt that over 96 emails were sent from the claimant. I cannot, however, determine that the claimant' actions were, from that alone, unreasonable. The application is therefore determined on the basis of the specific communications to which I was referred in context of the conduct of the litigation which I have managed.

The claimant's actions

78. I then considered the **specific actions** of the claimant to which my attention was drawn.

79. Firstly I considered the email of 26 September 2023 when the claimant referred to the respondent's agent as a "Sikh lady from Kent". I found that description to be inappropriate and discriminatory. It was unprofessional. The claimant's submission that this email was historic did not detract from the seriousness of his conduct.

80. Next I considered the communication of 24 January 2024. The respondent alleged this communication was sent by the claimant and ran to 32 pages with much of the material being irrelevant containing many inaccuracies. The claimant denied any such document was sent.

81. The respondent had not included any document dated 24 January 2024 in the productions relied upon. Having checked the Tribunal file, the claimant sent a lengthy document, running to 52 numbered paragraphs (with pictures) on 4 January 2024 which is the document referred to. The paragraph numbers referred to match the references in that document.

82. I considered the file and the email the claimant sent was in response to the respondent's agent's email of the same date. The respondent's agent had been asked to comment upon the claimant's email of 19 December where he

had included a list of issues and alleged the respondent's agent was not speaking with him.

83. The respondent's agent noted that "the claimant consistently exhibits a pattern whereby each communication results in an extensive, repetitive, and reworded presentation of the same complaint, often with the intent of advancing or introducing new arguments. The Tribunal has directly experienced this in their own correspondence with the claimant. It is asserted that these actions are intentional on the claimant's part, demonstrating a purposeful failure to confine matters strictly to those relevant to his case. Only this week, the claimant has engaged in direct communication with senior counsel, the respondent's in-house solicitor, and myself, utilizing unprofessional and inappropriate emails that are more of a nuisance and bear absolutely no relevance to his claim. Consequently and regretfully, communication with the claimant is deliberately limited to issues of substance only, given that initial attempts to agree on a list of issues were hindered by the claimant consistently veering away from the pertinent matters as the initial draft list of issues was first sent to the claimant on the 19th October 2023, he was granted further time to respond to the proposed list but ultimately the claimant refused to agree its content and in his usual manner the communications he did have were diverted to other matters. Whilst it is wholly recognised that it is less than ideal, the respondent contends that finalizing an agreed list of issues at the outset of the hearing may be the most prudent course of action."

84. The claimant's response to that email was voluminous and detailed. No response was needed but his response was personal and detailed, with material about the respondent's agent's business and analysis the claimant had undertaken. The response contained many inaccuracies and had limited relevant material. The respondent's agent's criticisms made of the claimant's detailed communication were, by and large, accurate.

85. Thirdly I considered the email of 11 January 2024 in which the claimant alleged he was asking Lady Gaga to appear in his case. There was also an indirect threat to the respondent's business by referring to "companies getting

cancelled" which refers to the impact negative publicity can have. The claimant also made reference to the "my good friend the Sheik" whom he was offering to pay to raise awareness. His email ended with a note of how serious the claimant was about matters.

86. This email was clearly unnecessary and lacking in professionalism, which the claimant accepted. It included an indirect threat to the respondent's business. The claimant apologised for that email, recognising it was inappropriate and unprofessional.

87. I then considered the email the claimant sent on 1 March 2024 (headed "Withdraw your strike out application") in which he threatened to contact the police about allegations against the respondent's agent unless the strike out application was withdrawn. The respondent's agent denied any wrongdoing whatsoever. The claimant was making threats about the respondent's agent's organisation that were related to the case in an attempt to influence how the respondent's agent conducts their defence. It was a personal attack on the respondent's agent. That was unreasonable conduct of the claimant.

88. Fifthly I considered the email of 3 March 2024 headed "I pray for you". This was a religious email sent to the respondent's agent. The claimant alleged the devil was controlling the agent. The email was entirely inappropriate and unprofessional. There was no reason why that should have been sent and could be regarded as a veiled threat. Again the claimant apologised for this email which he recognised was entirely inappropriate. He alleged it was a "gesture of peace" which was difficult to understand given the reference to the devil and the insulation contained within it.

89. I took into account the claimant's submissions. The claimant himself repeated my previous observation that the claimant was intelligent and articulate. He is clearly able of deciding what is appropriate and what is not. He is clearly able to decide what communications are professional and which are not. He makes a choice when he sends the emails and communications he does.

90. The claimant also knows and understands the Tribunal Rules and the authorities (and there was no evidence he did not know of the position when

he decided to send the communications). He has been able to set these out clearly and in detail and has previously responses to a strike out application. The claimant knew that where a party conducts their case in a way which is scandalous, unreasonable or vexatious, the claim (or response) may be struck out.

91. The claimant had not provided any medical evidence but asserted that his mental health had, at least in part, been responsible for some of his communications. The claimant's mental health has been fully taken into account. It is also relevant the claimant confirmed that he is able to control matters and would take a deep breath before sending any communication and if there was a risk of it being unprofessional or unnecessary, would seek the view of someone else or wait until the next day before sending. Despite previous warnings, he had not done this.

92. I also take into account the apology that the claimant issued and the undertaken he has given not to issue any further communications which could be regarded as inappropriate or professional.

93. I considered the respondent's agent's response to that and in particular the allegation that the claimant's apology was insincere but I can only proceed on the basis of the information before it, but does note the seriousness of the matter and the conduct of the claimant to date.

94. It is relevant to bear in mind the directions that have already been issued to both parties, and in particular the claimant, as to the requirement to work with the respondent's agent to ensure matters can progress. Those warnings had gone unheeded given the amount of correspondence issued and the amount of irrelevant and inaccurate material the claimant has submitted. Repeated warnings have been issued to the claimant to ensure his communications were professional and that the parties worked together. The claimant has not done so and opted for personal attacks on the respondent's agent and indirect challenges to the respondent if the claim proceeds.

95. I take into account the fact the claimant has repeated the behaviour on a number of occasions despite those warnings. The claimant knew how he had

to conduct himself but chose to respond in a personal way. I also take into account the risk set out by the respondent's agent that the claimant could continue to issue lengthy emails of a personal nature or containing irrelevant or inaccurate information despite warnings not to do so. The fact the emails amount to personal attacks on the respondent's agent and the impact this has had have been placed in the balance.

96. It is an important consideration that the claimant is not legally represented, albeit he is an articulate and capable person, clearly able to understand complex legal issues and present cogent arguments (and case law). His most recent correspondence is noted but it is also relevant that the claimant considers his conduct in part to be justified because of the respondent's agent and the claimant firmly believes the respondent's agent is engaged in some personal campaign against the claimant. I have seen no evidence that could reasonably support that conclusion and the reality is that the respondent's agent has genuine concern about the claimant's approach and comments made, particularly the deeply personal and offensive remarks.

97. Despite the claimant's apology it is clear that he believes his approach has in part been caused by the respondent's agent whom he believes has personal animosity towards the claimant, which the claimant considers justifies his detailed and personal responses. While accepting they are unprofessional and entirely unnecessary, he does not see the impact his communications have had, despite warnings. He has also repeated the behaviour despite knowing it was unwanted.

98. Finally I note shortly following issuing the apology he sent a further email to the respondent with regard to settlement. The respondent's position has been clear throughout this case that no settlement was being considered and this was a case that required to be determined. However, the email sent by the claimant was clearly sent on a without prejudice basis and is not itself taken into account. The respondent had made its position with regard to settlement clear, a matter ignored by the claimant and the claimant continues to send emails to the respondent as to his demands.

Claimant's conduct unreasonable and scandalous

99. I considered the material to which its attention was drawn and I am satisfied that the manner in which the proceedings have been conducted by the claimant has been unreasonable and scandalous. The correspondence is (in parts) scandalous because it is clearly misusing the privilege of legal process to vilify the respondent's agent and is, in places, gratuitously insulting and personal. The claimant's approach has become personal and offensive. There was no justification for the sending of the personal and focussed communications with regard to the respondent's agent (which are entirely unrelated to the core issues of the case).

100. The communication of 26 September 2023 was discriminatory and related to the claimant's view of the respondent's agent's religion. It was entirely unwarranted, demeaning and offensive. It had been issued despite the clear warnings at the preliminary hearing to focus on germane matters.

101. The claimant's detailed submission to the respondent of 4 January 2024 was by and large irrelevant and focussed on the respondent's agent's business. It was entirely unnecessary and a detailed personal attack on the respondent's agent's business. It had no relevance to the issues of the case.

102. The claimant's communication of 4 January 2024 contained an indirect threat to the respondent's business (about being cancelled), which is not an unreasonable interpretation of the claimant's communication.

103. The email of 1 March 2024 sought to persuade the respondent's agent to withdraw their application (in relation to strike out of the case) because the claimant said if the respondent's agent did not do so, the claimant would contact the police about matters relating to the respondent's business (which were not relevant to the case). That was an attempt to influence how the respondent's agent conducts the respondent's case and cause them concern.

104. Finally the claimant's email of 3 March 2024 suggesting the respondent's agent was being controlled by the devil and that this somehow amounted to a gesture of peace was offensive and personal.

105. The claimant admitted having sent the communications and recognised they were offensive and apologised, both at the Hearing and subsequently in writing. The correspondence referred to above was plainly inappropriate.

106. The claimant has misused the privilege of legal process to vilify the respondent's agent and the business being conducted. The claimant has used the process to issue gratuitous insults and personally offensive comments. The claimant has tried to persuade the respondent's agent to conduct the respondent's case in a way that the claimant seeks by reference to matters entirely unconnected to the case. The claimant had gone beyond being 'difficult, querulous and uncooperative' and his conduct objectively viewed, taken in context of the communications of both parties and the issues in this case, is scandalous and unreasonable.

107. The claimant's behaviour is such as to entitle me to consider whether or not strike out of his claims should be ordered given the way in which he has chosen to conduct his claim and engage with the respondent's agent despite warnings.

Is a fair hearing still possible

108. In light of the foregoing I then considered whether a fair hearing was still possible. The respondent's agent's genuine and justified concern was that the claimant would continue to act as he had previously done, despite warnings and repeated cautions to act appropriately. The respondent's agent is concerned about the personal nature of the communication and the content, tone and insinuation of the claimant's approach, particularly around the implied threats if settlement that suits the claimant is not forthcoming. There is no doubt that the respondent's agent genuinely feels concerned and there are genuine concerns that a fair hearing is at risk. It is clear that the threats were not just to the respondent's agent but to the respondent.

109. It is important the claimant is not given an unfair advantage because of his inappropriate actions and unreasonable approach in the way he has conducted his case. It is essential the parties act fairly towards each other to ensure a fair hearing is achieved. That is a warning that has been issued before. The claimant understood the warning and clearly understood the impact of unreasonable behaviour, having himself sought strike out of the respondent's case because of his (unfounded) perception of the respondent's agent's behaviour being unreasonable. The claimant had been warned as to the importance of keeping his communications fair and succinct. He has chosen to ignore those warnings and issue communications directed personally at the respondent's agent.

110. I considered this issue very carefully as there is a real risk of repetition and real risk the claimant would revert to how he has acted throughout this case, thereby seeking an unfair advantage over the respondent. The claimant's conduct and the context in which it occurred justifies a conclusion that a fair hearing is not possible. This is not a conclusion reached easily but one after considerable reflection recognising how serious strike out is upon the claimant. Equally I take into account the serious and long lasting impact of the claimant's conduct upon the respondent's agent and the respondent and the justified fear of repetition and the likely impact upon the future conduct of the case.

111. This case falls within the exceptional situations where the risk is too great and that the risk of repetition of the claimant's unacceptable behaviour impacts upon the respondent's fair defence of the claim. Previous warnings have gone unheeded and the claimant made calculated (but ill judged) decisions to send deeply offensive and personal communications.

Proportionality

112. This led me to the final consideration in deciding whether or not to strike out the claims due to the claimant's conduct and the risk of a fair hearing not being possible. I am required to consider the proportionality of sanction. Even if a party has acted unreasonably and even if a fair hearing is not possible, I must

still consider the proportionality of striking out and whether a less draconian sanction is possible. Strike out of the claim would result in the matter ending without an adjudication of the issues and is of the utmost seriousness. I have borne

113. Strike out is not about penalising a party for their behaviour. It is to protect the other party (and the integrity of the judicial system) from behaviour which results in it no longer being possible to do justice. The court process should not be used to seek to gain unfair advantage. I considered the authorities in this area carefully in light of the claimant's admitted conduct.

114. I considered the alternative and lesser sanctions in this case and balanced all the relevant factors. The claimant had already been told that his communications required to be fair on a number of occasions. He understood that warning. As has been said before, the claimant is clearly intelligent and capable of understanding complex issues and the applicable legal principles and understands the Tribunal Rules, including the provisions as to strike out (on which he has himself relied). The claimant knows the Rules and consequences of unreasonable behaviour.

115. While the claimant has relied in part on his mental health, he accepted that his mental health is not a bar to the claimant acting properly (and choosing to do so). The fact the claimant is not legally represented is also a consideration and the passion with which he views his case (and the complexity of his case). But the claimant's actions must be viewed in context of the warnings he had been given, his knowledge of the Rules and the deeply personal and offensive nature of his communications and their impact.

116. I take into account the apology the claimant issued and his undertaking not to send any more offensive communications and note the respondent's justified concern of a risk of repetition in light of past conduct and apologies. I also take into account the period over which the claimant's conduct took place and the claimant's frustration as to how he perceived the respondent's agent's actions were impacting upon him.

117. I also took into account that most of the behaviour by the claimant was towards the respondent's agent who ought to be capable of robustly progressing litigation. That has to be balanced with the impact of the behaviour particularly on the ability of the respondent to fairly defend the claim.

118. I considered what other proportionate ways existed to manage the issues arising. The claimant had not suggested any specific alternatives. Other than saying the conduct would not be repeated, and referring to his view of the personal nature of the respondent's agent's approach, no specific alternatives were offered. The courts are open to all parties and it is important to recognise all litigants are entitled to proceed with their claims, including those very passionate about their cases and even if acting in challenging ways. However, parties must act in a fair manner towards each other.

119. I considered whether further robust case management could ensure a fair hearing was possible, which was in essence what the claimant was suggesting, albeit with no specific suggestions as to how a fair hearing would now become possible. I concluded that given the claimant's conduct in this case and my experience in having case managed this case, it was more likely than not that no amount of further robust case management would avoid a repetition of the approach the claimant has taken and the behaviour the claimant has shown in conducting his case. When the claimant did not secure what he believed he was due by way of a response or outcome, his response was to embark on personal attacks and seek to influence the respondent's agent's conduct of the respondent's case by referring to issues not relating to the case and usually deeply personal matters pertaining to the respondent's agent. The attempts made during the progress of this case to help the parties focus matters and work together had not worked.

120. I was not satisfied the claimant's undertaking to change his behaviour and approach would genuinely alter how the claimant would conduct his case as the hearing approached and the pressure grew. I considered that there was a very real risk that the claimant would continue to perceive the respondent's agent of being unreasonable (because the claimant's position was not

accepted) and there would be a very real risk that the claimant's perception would result in him making his responses deeply personal and offensive to whomever was conducting the respondent's case, thereby seeking to influence how the respondent's agent conduct their defence and gain an (unfair) advantage. That was how the claimant had conducted his case despite having been reminded of (1) the need to work with the respondent and (2) the overriding objective and despite the claimant's knowledge of the Rules as to the effect of unreasonable conduct.

121. I considered whether an award of expenses could ameliorate the concerns in this case given the claimant's clear (and accepted) unreasonable conduct and ensure the hearing could proceed, but regrettably I concluded after considerable reflection that the risk of repetition of the claimant's unreasonable conduct was simply too great and that the risk of repetition of the claimant's scandalous and unreasonable conduct was real. I did not consider that an award of expenses would alter the position such as to ensure, so far as possible, a fair hearing could take place.

Taking a step back

122. I took a step back to assess objectively what the claimant had done (and accepted he had done), the context in which his conduct took place in light of his mitigation and explanation and when the acts happened. Having reflected upon the conduct and each of the points the claimant has made, I have concluded, after considerable reflection, that the manner in which the claimant conducted his case was scandalous and unreasonable and that the fact warnings have gone unheeded gives no confidence that the claimant's undertaking not to repeat the behaviour would lead to any change in approach. I concluded that a fair hearing is not possible.

123. I have balanced all of the relevant factors and sought to identify whether any reasonable alternatives would be justified but concluded that a proportionate (and fair and just approach) is to strike out the claim, recognising the seriousness of such a decision.

124. On balance, and having assessed all the facts together with the applicable law and having carefully considered each of the detailed points made by the claimant, I have concluded that it is just and fair that the claim be struck out as a result of the manner in which the proceedings have been conducted by him, which has been scandalous and unreasonable. The claim is struck out.

Employment Judge: **D Hoey**
Date of Judgment: **09 May 2024**
Entered in register: **13 May 2024**
and copied to parties