



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 6017719/2024

**Preliminary Hearing held partly in person and partly remotely at Dundee
on 16 April 2025**

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Employment Judge A Kemp

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Mr O Nnamuchi

**Claimant
In person**

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Ms D McGuire

**Respondent
In person**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal

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1. strikes out the Claim as:

- (i) it is vexatious,**
- (ii) it has been conducted in a way which is vexatious, and**
- (iii) it has no reasonable prospects of success,**

**under Rule 38(1)(c), having regard also to Rule 3, of the Employment
Tribunal Procedure Rules 2024; and**

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2. refuses the claimant's application for an order for expenses.

REASONS

Introduction

1. This was an open Preliminary Hearing held for the purposes of addressing applications for strike out which failing deposit order, to combine the case with another claim and for any other application made. Orally the claimant applied for an award of expenses. The claimant and respondent are each party litigants.

Background

2. The procedural history of this case, and the background to it, is not straightforward. This case (which for clarity I shall also refer to as “the first 2024 case”) was originally presented in Nottingham, and has since been transferred to Scotland. This is the first Preliminary Hearing in the first 2024 case, arranged to address the matters set out above after applications by the respondent. The present hearing was fixed and intimated by letter dated 21 February 2025, supplemented by message from the Tribunal to the parties on 11 April 2025. That was as there are two cases involving the claimant and the same respondent, the second being under number 8001954/2024 in which the present respondent is the third respondent (“the second 2024 case”). The two cases were heard sequentially on the same day, with this case, being the first 2024 case heard first. The second 2024 case is dealt with by separate Judgment.
3. The claimant had earlier pursued a claim under number 8000171/2022 against his employer myCare Tayside Limited (“the original case”). The respondent in the first 2024 case had represented the respondent myCare Tayside Ltd in that original case. The respondent in the first 2024 case is a solicitor, and employed by Croner Consulting Ltd. Croner Consulting Ltd are the advisers to myCare Tayside Limited, which had been the employer of the claimant.
4. The original claim was partly struck out by EJ Mackay on 24 May 2023. The remaining claims were struck out by me after a hearing on 4 November 2024 at which the claimant did not appear, which itself

followed an earlier Preliminary Hearing before EJ Beyzade on 6 September 2024 at which the claimant did not appear.

Claims

5. The claimant in the first 2024 claim has referred to matters in relation to the original claim, both initially and by Further Particulars which had been sought by the Nottingham Tribunal and which the claimant provided on 25 November 2024. They extend to 30 pages. They are prolix and diffuse, and particularly difficult to follow, but they appear at their highest to seek to raise claims as to direct discrimination, indirect discrimination, harassment and victimisation under sections 13, 19, 26 and 27 of the Equality Act 2010.
6. The respondent has argued that the present claim is an abuse of process, vexatious and has no reasonable prospects of success, and has sought a strike out under Rule 38, separately if not granted a deposit order.
7. There is also the second 2024 claim in which the claimant pursues claims against Anthony Price, myCare Tayside Limited and Ms McGuire. That claim the respondent argues should be combined with the present claim, if not struck out, but for reasons addressed in this Judgment that was not considered. The fact of there being two such claims is a matter referred to below.
8. The claimant in his submission to the Tribunal orally asked the Tribunal to award him expenses for the transfer of the proceedings from Nottingham to Scotland. That was opposed by the respondent.

Submission for respondent

9. The following is a basic summary of the submission made by Ms McGuire. The primary argument was for strike out and if not for a deposit order. The background was referred to. It was explained that the respondent had in error taken a date listing letter blank form sent by the Tribunal and used it. She had not copied that to the claimant, but had not considered that doing so was required, and the Tribunal had emailed her to state that. The first 2024 claim was an attempt to litigate the issues in the original claim, which the claimant had not succeeded with. The Tribunal had no jurisdiction. The

respondent was the solicitor acting for the respondent in the original claim, and was not the employer. It was an abuse of process, had no reasonable prospects of success and was vexatious. It should be struck out under Rule 38. The respondent could not instruct her client.

5 **Submission for claimant**

10. The following is again a basic summary of the submission. Early conciliation had commenced on 23 September 2024 well before the strike out of the original claim. It was an entirely separate case stemming from the date listing letter. The claimant argued that the claim had reasonable prospects of success. The date listing letter was his intellectual property. It had been abused, and the reason was his religion. He had provided further particulars of his claim as ordered by the Nottingham Tribunal. The claimant was still employed by myCare Tayside Limited, and the respondent had a contract with that party. He sought reinstatement, as he argued that the respondent could instruct that party to do so.

11. When asked why he had not addressed any issue of the date listing letter in the original claim within the context of that claim, the claimant argued that he was entitled to raise the present claim. The respondent in the first 2024 claim was acting for the benefit of the respondent in the original claim.

12. When asked to outline the basis of the claims he made, the claimant did not articulate any claim that I was able to understand. In so far as a direct discrimination claim was concerned the claimant argued that the use of the date listing letter was because of his religion but why that was or why that might have been the reason for the action of the respondent he did not explain, at least in a manner I could understand. His argument appeared to be largely based on the assumed belief of the respondent. In so far as it was his own belief he said that he was a Pastor, but how that might have affected the conduct of the respondent I could not understand from his comments.

13. There was no suggestion of any provision, criterion or practice for an indirect discrimination claim. I could not understand why his perception that the treatment of the date listing letter was unwanted conduct was

related to the protected characteristic, but even if it was it appeared to me that there was no prospect of the claimant successfully arguing that his perception of the conduct was reasonable given the circumstances. When asked about the protected act founded on for the victimisation claim he did not point to anything I could understand. He had referred to his contract of employment with myCare Tayside Limited and a provision as to their having copyright, which he believed the respondent had some form of responsibility for.

14. He argued that the claim had been properly taken in Nottingham, and he sought expenses for the transfer to Scotland.

The Law

15. A Tribunal is required when addressing applications such as the present to have regard to the overriding objective, which is found in the Employment Tribunal Procedure Rules 2024 which almost entirely replaced those found in Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. For present purposes the changes made by the 2024 Rules are not material, and case law from earlier iterations of the Rules remains valid.

16. The overriding objective is now in Rule 3. It states as follows:

“Overriding objective

3.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) 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.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules, or

(b) interprets any rule or practice direction.

5 (4) The parties and their representatives must—

(a) assist the Tribunal to further the overriding objective, and

(b) co-operate generally with each other and with the Tribunal.”

17. Rule 38 provides as follows:

10 **“38 Striking out**

(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim or response on any of the following grounds—

15 (a) that it is scandalous or vexatious or has no reasonable prospect of success

(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

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

25 *No reasonable prospects of success*

18. As a general principle, discrimination cases should not be struck out on the argument that there are no reasonable prospects of success except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of
30 Lords, Lord Steyn stated at paragraph 24:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest

cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

19. Lord Hope of Craighead stated at paragraph 37:

"... discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

20. In ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603*** the Court of Appeal there considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits. The following remarks were made at paragraph 29:

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence."

21. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

"Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (***Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the

most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (***ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51***, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (***ED & F Man ... ; Ezsias ...***). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (***Ezsias ...*** Maurice Kay LJ, at para 29)."

22. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

23. A particular instance of a case that might be struck out is where on the case as pleaded, there is no more than an assertion of a difference of treatment and a difference of protected characteristic which indicate merely the possibility of discrimination. Such matters are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination: ***Chandhok v Tirkey [2015] IRLR 195***, citing ***Madarassy v Nomura International plc [2007] ICR 867***. Whether or not to strike out such a case, or to allow time for an amendment for example, is part of the exercise of discretion addressed below.

24. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated that

"Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a

conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.”

- 5 25. The Court also made the following comments about the claims of fact made by the claimant in that case, which were in the context of his admitting to having falsified his CV which the respondent stated was the reason for the dismissal:

10 “in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.....

15 The employment judge did indeed, and wholly unsurprisingly, find that there was no reasonable prospect of an Employment Tribunal accepting the basis on which the appellant’s case was being advanced. That was partly because of its inherent implausibility, which is no doubt what he had in mind by the reference to
20 likelihood, and partly because the appellant could point to no material which might support it.....”

26. In ***Twist DX Ltd v Armes [2020] UKEAT/0030/20*** the EAT stated:

25 “The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts.”

- 30 27. The corollary of that is that if the claim or contention does not have a legal basis for the Tribunal to have jurisdiction over it at all the claim may be struck out. Similarly, if it is not possible for the claim to succeed on the legal basis put forward it may be struck out – ***Romanowska v Aspiration Care Ltd UKEAT/0015/14***.

28. A summary of the law as to strike out was provided by the EAT in **Cox v Adecco and others [2021] ILEAT/0339/19**. It referred to the level of care needed before a claim was struck out, particularly where the claimant was a party litigant.

5 *Vexatious*

29. What is vexatious has been considered in authority also. In **ET Marler Ltd v Robertson [1974] ICR 72** the following was said by the National Industrial Relations Court:

10 "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee ..."

- 15 30. Vexatious proceedings can include what in England and Wales is described as an abuse of process under the rule in Henderson v Henderson, for example in the context of sample claims, and multiple litigation pursued by different groups of claimants, in **Pady and others v His Majesty's Revenue and Customs and others [2024] EAT 73** which included a review of authority from the English courts on when continuing to litigate may become an abuse of process in the absence of the application of the concept of estoppel.
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31. The equivalent position in Scotland is different, at least to some extent. *Res judicata* is the broadly equivalent concept as applied in the civil courts in Scotland. Roughly translated it means that the issue has been judicially determined. The Inner House addressed the issue in **McCluskey v Scott Wilson Construction Ltd 2024 CSIH 24** holding that the concept of *res judicata* need not be with same parties, but includes where the interests of the parties are the same, and confirms that there is a separate argument to *res judicata* on the basis of abuse of process in Scotland, although as a last resort only.
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32. In an employment case heard at the Inner House **British Airways plc v Boyce [2000] IRLR 157** the court had earlier held that

“we see no reason whatever why the principle underlying *res judicata* – being the principle expressed by the brocard *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa* – should not in some way be applied to proceedings before administrative tribunals such as those involved in the employment tribunal system....We consider that the proper approach is encapsulated by the question, 'What was litigated and what was decided?'We would, however, go further and say that in the tribunal system the *media concludendi* should in general be taken as covering everything in the legislation, both in its legal and its factual aspects, which is pertinent to the act or acts of the employer made the subject of complaint – here the act of the employer in refusing the respondent's job application on allegedly racial grounds. And, as for the matter of what was decided, we are of the opinion that it should in general be presumed that an industrial tribunal, by its decision, has reached a 'proper judicial determination of the subject in question' – that, as we understand it, being the underlying requirement for a decree of absolutor vide McLaren, *Court of Session Practice* p.396. What we have said does, however, admit of exceptions for special circumstances of a wholly unforeseen nature or for a situation (quite unlike the present) in which the tribunal has made it clear that no final decision was intended.”

33. In the EAT case of ***Lynch v East Dunbartonshire Council [2010] ICR 1094*** the following comments were made in the context of other litigations, in which what is now the power in Rule 38 was stated to be how to address the matter rather than specifically pleas in the civil courts:

“The nature and purpose of the plea of *lis pendens* (where the prior litigation is pending in the same court) or *lis alibi pendens* (where the prior litigation is pending in another court in the same jurisdiction) was explained by Lord Neaves in ***Cochrane v Paul (1857) 20 D 178, 179***, as follows:

“There is always an equitable power and duty of control in each tribunal to see that there is not on the whole an

improper and oppressive accumulation of litigation or diligence.”

Parties are not entitled to use the litigation process to act improperly or oppressively and the need to control and prevent such conduct is, accordingly, what lies at the heart of the plea of *lis pendens*.”

Discretion

34. The EAT 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. That is necessary but not sufficient. If it is established the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or take some other action. 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.”

35. A Tribunal should be slow to strike-out a claim where one of the parties is a party litigant (using Scottish terminology, the equivalent in England and Wales being a litigant in person) given the draconian nature of the power: ***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***. It is appropriate to consider whether other options less draconian than strike out are appropriate which was raised recently for example in ***Rainwood v Pemberton Capital Advisers LLP [2025] EAT 51***. The power under the Rule (38) requires to be exercised having regard to the overriding objective in Rule 3.

25 *Expenses*

36. Rules 72 -82 make provision for various forms of orders as to expenses, as costs are referred to in Scotland. It is a discretion that the Tribunal has, which it exercises in accordance with the overriding objective in Rule 3.

Discussion

30 37. I am satisfied that the high hurdle for striking out a claim has been met in this case. That is for a number of reasons, each sufficient in themselves, and with that being all the more compelling as a cumulative effect.

38. The first issue is why the present matters were not ventilated in the original claim against the employer. That was the obvious set of proceedings in which to do so. The claimant said that the date listing letter about which he complained, which was for that original case, was received in June 2024. There were hearings in September and November 2024, neither of which he attended. The respondent had written to the Tribunal about the original claim on 4 October 2024 and the claimant had responded that day. He had simply thought that it was better to raise the issue against the current respondent in a separate claim.
39. Given the wide definition of what is res judicata in **Boyce** it appears to me that there is no answer to that point and that if there was an issue over the date listing letter for the original claim it should have been raised within that original claim. It is not sufficient that the claimant is a party litigant. A measure of allowance can be made for that, but that does not extend, in my view, to explaining this present claim being taken as it has been. If there was an issue over the date listing letter in the original claim, it ought to have been ventilated then and in that claim. It appears to me that the allegations made are vexatious as that term is used in Rule 38.
40. Separately, the claimant has done so in the context of his not succeeding with the original claim, and then pursuing two separate claims against the respondent, being this one and the second 2024 claim where the respondent (in the first 2024 claim) is the third respondent. He did so in two different jurisdictions initially. That background it appears to me is within the definition of vexatious, such that pursuing this claim is vexatious.
41. I also considered that the manner in which the claimant has conducted these proceedings has been vexatious. The manner of its conduct includes allegations that the respondent has been dishonest, and involved in some form of improper conduct in relation to the date listing letter, amongst other matters. There has been no specification of it, and I have not been able to discern any basis on which such an argument is properly made either from the documentation or the discussion with the claimant at the hearing.

42. I sought separately to elicit from the claimant whether any aspect of this claim had any reasonable prospects of success. The Claim Form does not identify anything. The Further Particulars document is very lengthy, but does not give notice of anything that might conceivably be a claim. The claimant has not provided anything else in written form.
43. I therefore sought to ask the claimant what his claims were and why, as noted above. I have concluded that in law there is no claim in respect of intellectual property rights which is for the civil courts as the Employment Tribunal does not have jurisdiction over such an issue. There is no prospect in my view of any of the claims he referred to under the 2010 Act succeeding. It is far from sufficient for him to state that he is a Pastor, as he stated to me. There is nothing to link the action of the respondent to the claimant's belief, or which could conceivably do so in a manner that falls within the Act, in my view. Whilst the facts of this case and those of **Ahir** are different, in my view even if something could be discerned from the claimant's position it is inherently implausible that there could be any basis on which discrimination of some kind could be concluded.
44. The difficulty with the claimant's position is made more clear by his argument that the respondent should re-instate him. She is not the employer. She is the solicitor of the employer. The suggestion that she can direct the employer what to do is fanciful, as is the argument that because the claimant had a contract with the employer and the respondent is contracted to the employer she can instruct the employer. The respondent does not have a contract with the employer, Croner Consulting Ltd do. That is an example of the manner in which the proceedings have been conducted being unreasonable and vexatious, in my view.
45. The matter about the date listing letter is somewhat bizarre. Date listing letters are used to ascertain availability for a hearing, and are printed forms sent by the Tribunal itself. The suggestion made in the Claim Form that there is something unlawful in relation to what the respondent did in relation to the date listing letter has in my view no basis in law. The other aspects, from the Further Particulars document, are close to being incoherent in setting out what the claim is said to be and why. The

discussion at the hearing did nothing to elucidate what the claims could competently be before the Tribunal.

46. I then considered the question of the discretion under the terms of Rule 3. I took into account that the claimant was a party litigant, and that the
5 remedy of strike out, prior to hearing any evidence, is a draconian one. But I have concluded that in the circumstances of this case it is the appropriate step to take. The claimant has been given an opportunity to set out what his claim is both in the Claim Form and the Further Particulars documents, and then before me when I asked him to summarise what the
10 claims were. Even if I were to allow an opportunity for further amendment I do not consider that that would have any practical effect other than to increase the expense for the respondent, and the time and trouble the present proceedings are taking for her. The respondent was stressed during the hearing before me, as was entirely evident, and it was clear that
15 the claim against her imposed a mental toll. That was apart from the time and expense of defending the present proceedings.
47. These factors I took into account in deciding that in all the circumstances it was in accordance with the overriding objective to strike out the claim, rather than take any form of lesser action.
- 20 48. I have therefore concluded that it is appropriate to strike out the Claim under Rules 38 and 3. In light of that there was no requirement to address the issues of deposit order or combining the claims.
49. The claimant sought an order for the expenses of the transfer from Nottingham. The Tribunal had jurisdiction in Nottingham, from the
25 respondent's address, and it was a matter for that Tribunal to consider a transfer, which it then granted under the relevant Rule. There was an obvious reason for doing so, given the history of the original claim and the second 2024 claim, and I can find no basis on which it would be appropriate under the overriding objective to award the claimant the
30 expenses for that issue that he seeks. Nothing she did can be said to be unreasonable. The respondent made the application for transfer, as she was entitled to, which the Nottingham Tribunal granted, such that there

was in effect approval for what the respondent had sought, not the reverse. The application for such expenses was therefore refused.

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Date sent to parties

07 May 2025