EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000238/2025

Held in Dundee via Cloud Video Platform (CVP) on 9 July 2025

Employment Judge A Kemp

Mr J Oosthuizen	**Claimant** **In Person**
Metaltech UK Ltd	**Respondent** **Represented by:** **Mr C Berman - Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal refuses the application to strike out the Claim under Rule 38(1) of the Employment Tribunal Procedure Rules 2024.

REASONS

Introduction

1. This was an open Preliminary Hearing held for the purposes of addressing an application for strike out, to which the respondent sought initially to add for a sist, and failing strike out a deposit order. The claimant is a party litigant and the respondent is represented by Mr Berham.

2. There had been an earlier Preliminary Hearing on 25 March 2025 before EJ Sutherland, after which case management orders were made. Claims were identified of unfair dismissal, breach of contract and race discrimination under sections 13, 26 and 27 of the Equality Act 2010. After that hearing the claimant withdrew the unfair dismissal claim for which he did not have the necessary continuous service.

3. The claimant in the orders had been required to provide further particulars of his claim if he wished to amend those details of the claims that were set out in the Note. He did not do so within the time specified. He was also required to provide a Schedule of Loss, but has not, it appears from the file of papers before me, done so.

4. On 12 May 2025 the respondent applied for strike out of the claim in writing. The claimant responded on or around 14 May 2025 to oppose that application. A Notice of Preliminary Hearing was sent to the parties on 28 May 2025 in respect of the present hearing.

5. On 8 July 2025 the respondent provided a skeleton argument, documents and copy authorities. In the argument there was also reference to a sist, and to a deposit order, but during the course of the discussions the respondent withdrew both of those matters for this hearing, such that strike out was the only issue before me. Also during discussion the respondent confirmed that Rule 38(1)(a) was relied on, not (b), (although the skeleton argument had relied on the latter) and an argument that a fair trial could not be held.

6. A Final Hearing has not yet been fixed although arrangements for that were set out in the Note of the earlier Preliminary Hearing.

Submission for respondent

7. The following is a very basic summary of the submission made by Mr Berham. He argued that the claimant had been aggressive and intimidatory during his employment, that he had sent social media messages which could be inferred to be directed to the respondent, had a conviction for a matter of violence, and that the present claim was in effect an attempt to secure payment not due. He referred to a Bundle of Documents which had been sent earlier but which was passed to me during the hearing, and the Supplementary Bundle provided on the day before the hearing. Reference was made to various authorities in the skeleton argument. Reference was also made to documents as to pension from which it appeared that as at the date of the presentation of the Claim contributions had not been made, but they were made by about 31 March 2025. It was also stated that there was no agreement with the Council about the claimant such that his argument on breach of contract could not succeed, and reference was made to emails in the Bundle.

8. The argument on fair trial was made on the basis of statements from Mr Verral and Mr Crockart, both of whom Mr Berham had spoken to, and both of whom fear reprisals from the claimant of some kind, either personal in nature or from social media, such that they do not wish to give evidence. He stressed the strength of their views on that.

Submission for claimant

9. The following is again a very basic summary of the submission. The claimant denied the allegations. He explained that he had evidence in the form of video footage, and an email both of which he will send the Tribunal and respondent. He denied that the social media posts were directed to the respondent. One he stated was directed to his parents, and the other to a person in South Africa

with whom he is in dispute. He believes that the conviction is spent. He has had no other convictions. He denied other allegations against him. He noted that Mr Crockart was not listed as a witness at the first Preliminary Hearing but stated that he was still friends with him on Facebook. He set out his position on the merits of the claims, and referred to evidence from a witness in addition to that referred to above.

The Law

10. 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.

11. 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.

(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."

12. Rule 38 provides as follows:

"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—

(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

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

(d) that it has not been actively pursued;

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

(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….."

Vexatious

13. 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:

"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 …"

14. The intimidation of a party was considered in ***Bolch v Chipman [2004] IRLR 140*** which emphasised the need for a staged process of determination, firstly of whether the conduct had been scandalous, secondly whether a fair trial

was possible, thirdly as to the exercise of discretion and fourthly, if the claim or response is struck out, what further consequences might follow from the strike out (in that case of a response). For the first that is the conduct of proceedings, but that can include matters outwith the Tribunal itself.

No reasonable prospects of success

15. 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 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."

16. 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."

17. 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."

18. 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)."*

19. 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.

20. 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.

21. 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."

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

"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."

23. 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***

24. 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.

Fair Trial

25. The EAT considered the issue in ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327*** where the relationship with the earlier sub-paragraphs of the Rule was considered. How proceedings are conducted, and the issue of a fair trial, was also considered in ***Hargreaves v Evolve Housing [2023] EAT 154*** in which the employment tribunal found that the claimant had pursued his claim by 'weaponising' the proceedings with an ulterior motive of damaging and destroying the first respondent's business and the political career of the second respondent. It found that a fair trial was no longer possible because of witness intimidation. The EAT held that the tribunal was entitled to characterise the claimant's conduct in that manner and it was scandalous and unreasonable. However, it further held that the tribunal had erred in finding that a fair trial was no longer possible as there was no evidence that any of the respondents' witnesses had been intimidated.

26. The test in (e) may be higher than other aspects as it requires that it is not possible to have a fair hearing. The relevance of a fair trial was considered in ***Leeks v University College London Hospitals NHS Foundation Trust [2025] ICR 87.***

Discretion

27. 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."

28. 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.***

29. The power under the Rule (38) requires to be exercised having regard to the overriding objective in Rule 3.

Discussion

30. I have concluded that, at this stage, it is not appropriate under the overriding objective to strike out the claim. The application was made on a number of different bases. I shall address each in turn:

Vexatious

31. The respondent argued that the bringing of the claim was vexatious, part of a form of campaign against the respondent and perhaps others, and in respect of which there had been aggression and intimidation. The respondent did not argue that the conduct of the proceedings had been vexatious, but that the claimant's nature both during employment and afterwards was such that there was in effect no merit in the claims. This is therefore in part related to the argument on prospects addressed below.

32. I did not hear evidence, but received materials in the form of documents and various witness statements. The claimant disputed matters. I cannot know what the facts are without evidence being heard. There is a core of disputed fact, including over what has happened in relation to matters both within employment and outside it. One example is the witness statement of the claimant's former partner. It is not possible to know to what extent it is correct in what it states and it is not always clear to what extent it is relevant.

33. The respondent's basic point appeared to be that the claimant is by nature someone who is aggressive and intimidates others by his conduct and reference to martial arts fights for example. They seek support from that from a conviction for domestic abuse dating from 2018. There was, I was informed, a Community Payback Order as a result of that conviction, which followed a plea of guilty. When such a conviction is spent is determined under the Rehabilitation of Offenders (Scotland) Act 1974, as amended. My reading of that Act is that the conviction was spent after 12 months. That means that it was spent before the claimant commenced employment with the respondent. The provisions as to spent convictions are complex and I did not hear argument about them, but it appears to me that as an adminicle of evidence

the fact of the conviction is a matter that the respondent can take into account and raise with me.

34. The second area where they sought support for their argument was in social media messages. I considered those produced to me, but firstly it was far from clear that they related to the respondent from their terms, secondly some matters indicated that they did not (for example the reference to llc, which is not naturally to a Scottish Company) and thirdly there appeared on the face of it to be something in what the claimant said that the first message was directed to his parents and the second to a person he was in dispute with. It appears to me that it is at least open to doubt whether there is any basis for the view the respondent had in regard to the social media posts.

35. The third area is from witness statements taken from employees. But these have not been the subject of evidence on oath with cross examination, and are disputed.

36. Against that however is not just the claimant's position refuting the allegations, but also the fact that the respondent states that its reason for dismissing the claimant was his work performance and taking unauthorised leave. It is not contended that any disciplinary action was taken against the claimant during his employment for what they now describe as intimidatory conduct or comments. That is in my view inconsistent with the position that the respondent is now taking.

37. It is also I consider relevant that the respondent does not allege that the claimant's conduct of the proceedings is vexatious, but his bringing of them, and they seek to do so from the sense of intimidation referred to as well as what they argue to be points on the merits.

38. In some respects the claimant says he has support for his position. It also appears that the respondent did not pay pensions when required, and although it has made the payments now it is not impossible that there is a remedy for the fact of the breach of contract in not making the payments when due. Whether or not that is the case I make no comment on but the point is arguable. In Scots Law it may be that there is a remedy for a breach of contract even if the loss has since then been made good.

39. The claimant argued that his probationary period was continued when it ought not to have been. He says that there was a written contract, and that he has an email in support. That contract and email was not before me. It is not yet clear to what extent such an argument is valid, but at this stage it did not appear to me that a concluded view could be formed on that matter.

40. Taking all of the matters raised it is I consider not established (from the material before me and not using that word in any evidential sense) that the

claimant's bringing of the proceedings was vexatious under the Rule. I concluded that this aspect of the Rule was not established.

No reasonable prospects of success

41. It appears to me as stated above that there is a core of disputed fact. In light of that, and the authorities above, it did not appear to me that I could hold that there were no reasonable prospects of success. In all respects the matter will require evidence to be heard. Witness statements are no substitute for evidence being heard before the Tribunal. In any event the statements produced do not conform to the Practice Direction and Presidential Guidance on witness statements in Scotland nor has any order for their use at the Final Hearing been made (on the contrary, the Note specifically confirmed that they would not be).

42. It can be stated that the grounds of the complaints for the discrimination claims which were set out both in the Claim Form, and the Note which provided further detail which the claimant has not challenged, are very brief. Whether they have little reasonable prospects of success being the test for a deposit order is another matter. But at this stage I do not consider that I can conclude that for any of the claims there are no reasonable prospects of success, which is the test for this aspect of the Rule.

43. There are some aspects of the breach of contract claim which are not at this stage ones that the claimant can be said to have reasonable prospects of succeeding with but that is not the same as concluding that there are no reasonable prospects of success for the entire claim. Matters will depend on evidence, subject to any application for a deposit order. It does appear on the face of the documents before me that the claimant's allegation that he was paid less than an apprentice welder is not true, but that is not the sole matter argued for. On the face of it the respondent did not pay pension contributions timeously, and there is the possibility of remedy for that even if later remedied.

44. In all the circumstances I concluded that this aspect of the Rule was not established.

Fair Trial

45. I considered this aspect with particular care, and it appeared to me the strongest of the respondent's various arguments. That is as two witnesses for the respondent, both of whom are material witnesses, have expressed to Mr Berham as he stated in submission, and in their witness statements, that they are in effect in fear of the claimant, and how he may react to their evidence. That is based on how he interacted with them at work, they say, but also the social media and other matters addressed above.

46. This does not require to be a matter related to the claim itself, or its conduct, but is more widely on whether or not a fair trial is possible. Although I have not heard evidence that is not I consider required at this stage, and the submission of what on their face are witness statements expressing the concerns from two obviously material witnesses for the respondent can, if appropriate, be sufficient.

47. I have concluded that despite the concerns that they have addressed it is not clear at this stage that a fair trial is not possible. Witnesses may be reluctant to attend to give evidence, which is far from uncommon, but if they are employees as I understand both remain an instruction can be given to do so. If that does not lead to them agreeing to attend, the respondent is in a position, if it wishes to, to seek a witness order. If that is sought and granted, and in the circumstances the grant of the order would be most likely, the witnesses then can apply to have that order set aside.

48. Should all that happen, and should it be the case that the Tribunal does agree to set aside the orders, or indeed if the order is not set aside but the witnesses still refuse to appear, the respondent would be in a stronger position. But that is not yet where matters stand, and it is possible that the witnesses will attend to give evidence.

49. In light of the material before me, and what was said by both parties, it does seem to me that the concerns are based on perception and not any direct threat made to either of the witnesses. Some of the perception may not be soundly based. Someone who engages in martial arts, and bare knuckle boxing, may be perceived as aggressive and intimidating, as can simple facts such as build and the way someone carries himself. But what was not placed before me was any direct threat to a witness in the case which was or could have been an attempt to prevent or dissuade the witness from giving evidence. There was the suggestion of a form of implied threat against Mr Verral, although not to him directly and made to Mr Crockart it was alleged. If was not however a direct threat, more one taken to be such, as I understand it from what was placed before me.

50. Some matters relate to what is said to have happened in employment. But there is a lack of any form of disciplinary action at the time (and that is where the witnesses in question are said to be Site Supervisors and in a position to raise that at the time, on the face of it) and I have a sense of a greater perception of threat than may be merited.

51. One aspect the respondent raised was what it said was the claimant investigating the directors of the respondent, their families and finances, but nothing concrete in that regard was produced. The claimant said that he

looked online for material about the respondent, which in my view is of itself not objectionable.

52. The respondent initially made reference to what it described as blackmail, but later withdrew that. Making such a serious claim and then withdrawing it does in my view support the conclusion of the position of the respondent being exaggerated.

53. This chapter of the allegations was, I concluded from all the material before me, not something that could properly be said to make a fair trial impossible, at least at this stage. I have therefore determined that this aspect of the Rule is not met.

54. As a result of those decisions, I have refused the application for strike out under Rule 38.

Other considerations

55. There are further comments to make. Firstly all witnesses attending before a Tribunal are entitled to be treated with respect and any actual threat to them, of whatever form, is a most serious matter. But no actual threat of such a kind against a witness during, or for the purposes of, these proceedings is alleged. The matter is more in the form of concern over the claimant's nature and behaviours at work or outside it, some of which may be unfounded for example as discussed in relation to social media comments which the respondent had thought was directed to them, but the claimant argues was not. In the event that new information comes to light, the respondent is able to make a further application under Rule 38.

56. Should it be the case that any witness or prospective witness does feel that he or she is being directly threatened in any way in future that can be brought to the attention of the Tribunal, and if necessary the police. I express the hope that such a situation does not arise.

57. Secondly it is I consider appropriate to state that even if I had considered that any of the grounds for strike out argued were established, either in isolation or in some cumulative manner as there is a degree of cross over between the grounds, it did not appear to me to be in accordance with the overriding objective to strike out the claim. It is largely but not entirely one for discrimination on the protected characteristic of race. The claimant is South African. There is a public interest as explained in authority in having such claims heard and determined after evidence. It is competent to strike out such claims, but only in very limited circumstances. It did not appear to me that this case was one of them, at least as matters stand at this stage.

58. Thirdly in the event that it transpires after any Final Hearing that the claim had no merit and never did have that, or something similar to that, all as the respondent claims, the respondent may argue that the pursuit of the claim was unreasonable and seek an award of expenses under the Rules. That is however a matter that will only be capable of being addressed after the Final Hearing, and subject to what it concludes. That there can be another way of remedying matters should the respondent's position be held to be correct is one factor to weigh in the balance when considering whether or not to take the draconian step of striking out a claim.

59. Fourthly as was discussed at the hearing the respondent is entitled to raise again an application for a deposit order. If it does, and that is opposed, another Preliminary Hearing can be convened unless parties agree that it can be determined by written submission. The claimant is entitled to a reasonable period to prepare for such a hearing, and the respondent was acting entirely properly in withdrawing its application for the hearing before me in light of the very limited notice, essentially one day, that it had given the claimant of that application. The test for that is lower than for strike out, being that there are little reasonable prospects of success.

60. Fifthly it is not clear from the file that the claimant has provided the Schedule of Loss he was ordered to. He is directed to do so, or send a copy of any earlier message which he contends did so, within **seven days** of the date on which this Note is sent to him, and if he does not do so the Tribunal may consider issuing an unless order. The respondent is entitled to know what remedy the claimant seeks, and he must therefore comply albeit late with the order granted. Should he not do so the respondent is also in a position to seek strike out for that breach of order. Whether it would be proportionate to do so is a matter that would require consideration should that application be made.

61. Finally, I have by this Note asked the clerks to make arrangements to issue the Notice of Final Hearing as soon as possible, so that the parties are aware of that and can work towards it.

Date sent to parties **15 July 2025**