



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4106974/2023**

**Held in Glasgow on 10 June 2025**

**Employment Judge P O'Donnell  
Tribunal Member P O'Hagan  
Tribunal Member S King**

**Ms R Somerville**

**Claimant  
Represented by:  
Mr A Drummond -  
Lay Representative**

**Govan Housing Association Limited**

**Respondent  
Represented by:  
Ms G White -  
Solicitor**

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

The unanimous judgment of the Employment Tribunal, given orally at the hearing, is the manner in which the proceedings have been conducted on behalf of the claimant was scandalous, unreasonable and vexatious rendering a fair trial no longer possible. The claim is, therefore, struck out under Rule 38(1)(b) of the Tribunal Rules of Procedure 2024.

### **REASONS**

#### **Introduction**

1. The claimant has brought a complaint of disability discrimination under the Equality Act 2010. A final hearing was listed for 10-12 June 2025.
2. On 9 June 2025, the respondent made an application to strike-out the claim on the basis of how the claim was being conducted by, or on behalf of, the claimant. The Tribunal heard this application at the outset of the hearing on 10 June 2025.
3. The following facts relevant to the application to strike-out are not in dispute:

- a. The claimant's representative had been trying to contact a potential witness, Paula McCann, for some time with a view to calling her to give evidence.
- b. Ms McCann has left the respondent's employment and has a new job.
- 5 c. On 3 June 2025, the respondent's representative confirmed to the claimant's representative that the respondent was calling Ms McCann to give evidence and would be the respondent's only witness (being the person who made the decision to dismiss the claimant).
- d. On 4 June 2025, two letters, dated 2 June 2025, were hand-delivered  
10 to premises of Ms McCann's new employer; one addressed to Ms McCann and one addressed to the new employer.
- e. The letter to Ms McCann narrates the attempts by the claimant's representative to contact her about giving evidence and informs her that he will seek a witness order to compel her attendance the Tribunal  
15 but that he hopes this is not necessary.
- f. The letter to Ms McCann's new employer also states that the claimant's representative has been attempting to contact Ms McCann, without success, about the case. However, it goes on to state the following:
  - 20 i. That Ms McCann appears to have terminated the claimant's employment *"wrongfully"*.
  - ii. That there are *"important and quite serious allegations"* about Ms McCann's conduct which relate to *"alleged discrimination and other unacceptable conduct"*.
  - 25 iii. That the claimant's representative may seek a Witness Order in respect of Ms McCann and that if this proves necessary it will *"reflect badly on her and her current employment"* as will the allegations being made against Ms McCann.

- 5                   iv. That the claimant's representative is *"simply warning you that if your employee has to be forced to give evidence and she maintains her alleged conduct was harmless and that evidence is found to be not credible then such allegations may well badly reflect on your Association"*.
- v. That if Ms McCann can agree that the treatment of the claimant was not acceptable then this would reflect better on her.
- vi. That if the new employer was not aware of the matter then the claimant's representative urged them to speak to Ms McCann.
- 10    4.       Ms McCann remains willing to give evidence but Ms White has indicated that she is distressed by the terms of the letter sent to her new employer and concerned about further action being taken by the claimant or her representative. It was submitted by Ms White that the respondent considers that there is a real risk that Ms McCann's evidence could be negatively
- 15       impacted by this conduct. Mr Drummond disagrees with these submissions and considers that there was nothing untoward in the letter to Ms McCann's new employer that would have the effect described.

### Relevant Law

- 20    5.       The Tribunal has power to strike-out the whole or part of claim under Rule 38 which provides as follows:

*"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—*

...

- 25       (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;*

...

6. The process for striking-out under Rule 38 involves a two stage test (*HM Prison Service v Dolby* [2003] IRLR 694, EAT; *Hasan v Tesco Stores Ltd* UKEAT/0098/16). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.
7. The question of what amounts to scandalous, vexatious or unreasonable conduct is not to be construed narrowly. It can be matters which amount to abuse of process but can involve consideration of wider matters of public policy and the interests of the justice (*Ashmore v British Coal Corpn* [1990] IRLR 283).
8. Rule 38(1)(b) was considered in *Bennett v London Borough of Southwark* [2002] IRLR 407 and a number of principles can be identified:
- a. The manner in which proceedings are conducted by a party is not to be equated with the behaviour of the representative but this can provide relevant evidence on this point.
  - b. Sedley LJ observed that the Rule was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process.
  - c. It can be presumed that what is done in a party's name is done on their behalf but this presumption can be rebutted and so a party should be given the opportunity to distance themselves from what the representative has done before a claim or response is struck-out.
  - d. The word 'scandalous' in the rule is not used in the colloquial sense that it is 'shocking' conduct. According to Sedley LJ, it embraces both 'the misuse of the privilege of legal process in order to vilify others', and 'giving gratuitous insult to the court in the course of such process' (para 27).

- 5 e. Fourth, it must be such that striking out is a proportionate response to any scandalous, vexatious or unreasonable conduct. The Tribunal needs to assess whether, in light of any conduct found to fall into the relevant description, it is still possible to have a fair trial (see also *De Keyser Ltd v Wilson* [2001] IRLR 324).
9. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 38(1)(b) was summarised by Burton J, in *Bolch v Chipman* [2004] IRLR 140:
- 10 a. The Tribunal must reach a conclusion whether proceedings have been conducted by, or on behalf of a party, in a scandalous, vexatious or unreasonable manner.
- b. Even if there is such conduct, the Tribunal must decide whether a fair trial is still possible.
- 15 c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.
- d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

### Decision

- 20 10. The first question for the Tribunal is whether the conduct of the proceedings has been scandalous, unreasonable and vexatious in light of the letter sent to Ms McCann's new employer.
11. The Tribunal has no hesitation in concluding that the letter in question was scandalous, unreasonable and vexatious conduct of the proceedings. The letter in question was wholly unnecessary; if, as suggested by Mr Drummond, the purpose of the correspondence was to make contact with Ms McCann to discuss calling her as a witness then this was achieved by the letter sent to her. There was no need for the claimant to send any correspondence at all to Ms McCann's new employer. If Ms McCann did not reply then the claimant
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had the option to seek a Witness Order (an option which was clearly known to her and her representative given the reference to it in the correspondence).

12. However, it is not just the fact of the letter to the employer but also the terms of that letter. If the letter had simply asked the new employer to pass a message to Ms McCann to contact Mr Drummond, then the test for scandalous, unreasonable or vexatious conduct would not be met. However, the terms of the letter goes far beyond that and makes allegations about Ms McCann's conduct in relation to the present case and the effect this would have on the new employer. It is clearly an attempt to put pressure on Ms McCann, by way of her new employment, and influence her evidence; there is no reason to make the comment about Ms McCann agreeing that her conduct was unacceptable other than to suggest what evidence Mr Drummond wanted her to give.
13. Further, the reference to how Ms McCann's evidence would reflect on the new employer was clearly intended to influence both the new employer and Ms McCann.
14. The Tribunal considers that any reasonable person having sight of such correspondence would be rightly concerned about what was being said and how it would impact on them.
15. It is wholly disingenuous for Mr Drummond to suggest that this letter was simply seeking to inform the new employer why Ms McCann was going to be out of the office for three days (even assuming that this was a proper thing to do) or that it was simply explaining why a Witness Order may be required (again, even assuming this was a proper thing to do). The contents of the letter go beyond that and the Tribunal considers, on a plain reading of the letter, it was an attempt to influence the evidence which Ms McCann would give.
16. Mr Drummond had a complete lack of insight and awareness that the letter was scandalous, unreasonable or vexatious conduct of the proceedings. He clearly considered that he had done nothing wrong. Whilst Mr Drummond is not a solicitor (and so not subject to the rules of professional conduct laid

down by the Law Society of Scotland), he is acting as a professional representative rather than someone assisting a friend or family member. The Tribunal, and parties, are entitled to expect an acceptable level of conduct by professional representatives and the letter in question falls far below what the Tribunal would expect of a professional representative.

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17. The lack of insight and awareness by Mr Drummond gives the Tribunal no basis on which it could conclude that such conduct would not continue in the future. Although Mr Drummond asserted that no action was intended against Ms McCann, the Tribunal cannot accept this at face value given that Mr Drummond very clearly has no concept of any wrongdoing on his part.

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18. The Tribunal bears in mind that the correspondence was sent by Mr Drummond and not by the claimant. The Tribunal starts from the presumption that anything done by a representative is done on the instruction of or approval by the party. Mr Drummond did say that the claimant did not know, at the time, the letter was being sent but she does know now and has not sought to distance herself from Mr Drummond's actions. The Judge specifically asked whether the claimant intended to continue to instruct Mr Drummond and it was said that she did. In these circumstances, the claimant has to be treated as condoning the conduct in question and so bear the consequences of that conduct.

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19. The Tribunal now turns to the question of whether the conduct in question renders a fair trial no longer possible. The Tribunal does consider that the terms of the letter in question would create a real risk of an adverse effect on the quality of the evidence which Ms McCann would give; she may be more likely to accept things put to her in cross-examination for fear of repercussions if she seeks to defend the decision to dismiss or become so defensive that the reliability of her evidence is adversely affected.

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20. Given that Ms McCann is the sole witness for the respondent then any negative impact on her evidence is a significant prejudice to the respondent. Although Mr Drummond submitted that it was the respondent's choice to only call Ms McCann, the Tribunal considers that this has no weight; Ms McCann

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made the decision to dismiss the claimant (which is the only act of alleged discrimination) and so she is clearly the principal, if not only, witness that can speak to that decision.

21. The Tribunal does not consider that there is any other sanction which could  
5 address the issue. Neither party suggested any other case management Order which would make a fair trial possible; Ms McCann's evidence is so fundamental to the issues to be decided in this case that the real risk to the quality of that evidence cannot be alleviated.

22. In these circumstances, the Tribunal considers that the manner in which the  
10 proceedings have been conducted on behalf of the claimant was scandalous, unreasonable and vexatious rendering a fair trial no longer possible. The claim is, therefore, struck out under Rule 38(1)(b) of the Tribunal Rules of Procedure 2024.

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**Date sent to parties : 23 July 2025**