EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000903/2025

Held in Glasgow on 4 September 2025

Employment Judge M A Macleod

Mr J Holland	**Claimant** **In Person**
Enigmatic Smile Ltd	**Respondent** **Represented by:** **Mr M Landels -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for strike out of the claimant's claims should be refused; and that the respondent's application for a deposit order as a condition of the claimant being permitted to continue with his claims should also be refused.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 15 April 2025, in which he complained that he had been automatically unfairly dismissed on the grounds that he made a protected disclosure, and discriminated against on the grounds of race and religion or belief.

2. The respondent submitted an ET3 response in which they resisted the claimant's claims, and attached an application for strike out of the claimant's claims on a number of bases, together with a "draft Order" suggesting wording of an Order to be issued by the Tribunal. The ET3 was initially rejected as it appeared to have been presented after the statutory deadline; however, at a Preliminary Hearing which took place on 27 June 2025, Employment Judge O'Donnell allowed the ET3 to be received.

3. The purpose of the Preliminary Hearing listed to take place on 4 September 2025 in the Glasgow Employment Tribunal was to determine the respondent's

application for strike-out of the claim. The claimant appeared on his own behalf, and Mr Landels appeared for the respondent.

4. The parties made submissions, following which I advised that I would reserve Judgment and issue it to parties in written form once I had had the opportunity to consider carefully the submissions and relevant documents.

5. The respondent prepared a bundle of documents, to which reference was made by both parties, and also a bundle of authorities, to some of which reference was made by the respondent.

Submissions - Respondent

6. For the respondent, Mr Landels set out the relevant law, and sought to explain the basis of the application. I clarified with him at the conclusion of his submission that while the respondent's application for strike out (53ff) proceeded on four grounds, he was only insisting upon one ground, namely that the claims have no reasonable prospect of success. Mr Landels confirmed this to be the case.

7. With regard to the claimant's claim of automatically unfair dismissal, Mr Landels pointed out that the claimant lacks the minimum qualifying experience upon which to base a claim of ordinary unfair dismissal, and that the detail provided in relation to this claim in the ET1 is very scarce. The allegation made by the claimant is that the respondent fabricated the reasons given for dismissal in their letter of dismissal (166). He alleges that he sent an email on 24 January 2025 in which he made a protected disclosure.

8. He submitted that the claimant's dismissal was on the grounds of gross misconduct, which took place the day before he submitted his email. The respondent's position is that the reason for dismissal was plainly stated in the letter of termination and that a fair and thorough process was followed in reaching the decision to dismiss the claimant.

9. Mr Landels argued that there has been no protected disclosure in terms of section 43B(1) of the Employment Rights Act 1996, and that the claimant has no reasonable prospect of proving that he made such a disclosure. He does not offer to prove any form of qualifying wrongdoing.

10. This amounts, he said, to a vexatious attempt to damage the respondent's reputation. The respondent runs a perfectly legitimate business.

11. It cannot be the case, he argued, that all the claimant has to do, when lacking 2 years' service, is to claim that he made a protected disclosure and was dismissed for doing so.

12. He referred to the letter of dismissal, as well as to the witness statements produced by the respondent, which were taken as part of the investigation which led to the decision to dismiss him. He has failed to provide any cogent grounds on which he could show that the reason for dismissal was that he had made protected disclosures.

13. The conduct for which the claimant was dismissed took place before the alleged protected disclosure. Mr Landels emphasised that the decision to dismiss was taken by an entirely different manager to the one who dealt with the disclosure investigation.

14. With regard to the claimant's claim of discrimination on the grounds of race, the ET1 is completely unparticularised in relation to this complaint. The claimant has sought to expand upon this in his response to the application for strike out, at 125, where he refers to being of Irish nationality, and speaks about a conversation in which he made reference to the connection between Ireland and the island of Monserrat. Mr Landels argued that it is completely unclear what the claimant is alleging here, and it is not known what detriment the claimant is relying upon. If it related to dismissal, that would contradict the claimant's complaint that the principal reason for his dismissal was that he had made protected disclosures.

15. He said that the comment was not the reason for dismissal, but was only mentioned in the letter of dismissal for context.

16. With regard to the claim of discrimination on the grounds of religion or belief, Mr Landels argued that the ET1 lacks any particularisation of this complaint. Again, in the claimant's response to the strike out application, at 125 and 126, he makes reference to his belief that Palestine should have the right to self-determination, as a philosophical belief. Mr Landels said that the claim is not particularised, and describes a deeply held political belief. In any event, it is not clear what detriment arose from his belief, and it runs contrary to his claim that he was dismissed by reason of having made a protected disclosure.

17. The respondent's position is that the claimant was dismissed for no other reason than that he committed an act or acts of gross misconduct at an event prior to making his protected disclosure.

18. The claimant will have to show that his dismissal was not based on the witness statements drawn from 9 different employees, and was not for the reason expressly set out in the letter of dismissal.

19. He must show, said Mr Landels, that the disciplinary process did not happen, that all 9 witnesses were conspiring against him, and that the statements were contrived even though the events which were the subject of the statements took place before the disclosures were made. Alternatively, the

claimant will have to show that the events did happen but were not truly the basis for John Cohen's decision to dismiss him, despite the fact that the disclosures were investigated by a separate person to the one who dismissed him.

20. It is of no benefit to anyone to allow a hopeless case to proceed to a final Hearing, and this is a hopeless case, in Mr Landels' submission.

21. In any event, the claimant has not specified his claims sufficiently clearly.

22. In the alternative, Mr Landels submitted that the claims have little reasonable prospect of success, and that a deposit order should be granted as a condition of allowing the claimant to continue with this claim. As part of consideration of this application, the Tribunal must have regard to the financial means of the claimant.

23. The Tribunal has discretion as to the level of deposit to be awarded.

Submissions – Claimant

24. The claimant submitted that the claims should be allowed to proceed in this case.

25. He argued that the investigation which was carried out was supposed to be into the email making the disclosures, but the respondent solicited a number of statements from people. He maintained that this was a "witch-hunt" against him.

26. At the work event, he said, Bish Smeir spoke to the entire staff body and referred to the claimant in negative terms. He also told staff they would be entitled to bonus payments. The claimant regarded this as a clear incentive for staff to lie in order to find favour with senior management, and that Bish's statement effectively announced to staff that he was "damaged goods".

27. He stands by everything he said in his email of 24 January 2025. He maintained that the respondent was in breach of a multitude of financial rules, and that they have been guilty of fraud, a criminal offence, and also of failure to comply with legal obligations, in terms of section 43B of the Employment Rights Act 1996.

28. This, he said, is in the public interest, as the respondent is a "Ponzi scheme", in the claimant's view. Many people have lost considerable amounts of money to the scheme. The respondent is associated with people who are known to run Ponzi schemes, the claimant alleged.

29. The respondent is not, he said, registered with the Financial Conduct Authority, as it should be if acting as an online Bank.

30. On the event of the event in January, nobody had complained about his behaviour until the respondent approached a number of people to give witness statements. He said he was given the opportunity to go to bed (the event took place in a hotel) or to go home. Clearly, he maintained, the respondent did not consider his behaviour to be so bad as to require him to be sent home, either then or the following day, or to be suspended. This is inconsistent with the respondent's assertion that the claimant was guilty of gross misconduct on that evening.

31. With regard to the termination letter, it cannot be separate out into background/context and decision. It is "the sum of its parts". The respondent felt the need to refer to remarks about Monserrat and Palestine, and to a Serbian colleague, while now suggesting that those remarks, which were taken out of context and did not amount to gross misconduct, were not actually taken into account in the decision. He also denies that he was aggressive to people, and has a recording of a conversation which took place in the hotel lobby. The allegations against him, he maintained, are completely false.

32. The statements contain false assertions and contradictions.

33. After he made his disclosure, the respondent changed its attitude towards him, suspended him and asked him to return his laptop. He believes that being asked to return his laptop meant that the decision had already been made to dismiss him.

34. The investigation, he asserted, was a sham.

35. The claims of race and religious discrimination are based, respectively, on his Irish nationality and his belief that Palestine should have the right to self-determination as a state.

36. With regard to the application for a deposit order, the claimant said that he has obtained new employment, following a lengthy period of unemployment during which he came to be in arrears with his mortgage payments. He has two mortgages, and between them he is approximately £1,000 in arrears. His position is that while he is working now, he would be unable to afford to pay any deposit required of him by the Tribunal.

37. The claimant opposed both the application for strike-out and the application for a deposit order.

The relevant law

38. Rule 38(1) of the Employment Tribunals Rules of Procedure 2024 provides:

"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 prospect of success…"

39. Rule 38(2) provides:

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

40. The respondent's solicitor referred the Tribunal to a number of authorities, which have been taken into consideration by the Tribunal.

41. The well-known case of **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 CA** provides helpful guidance in considering whether to strike out a claim involving whistleblowing allegations, and said that the same approach should be taken in such cases as requires to be taken in discrimination claims, which require an investigation to be conducted into why an employer acted in a particular way. It was stressed that only in an exceptional case will a case be struck out as having no reasonable prospect of success where the central facts are in dispute.

42. Sedley LJ, in **Bennett v Southwark LBC [2002] ICR 881**, considered the question of proportionality in the context of that appeal, which primarily dealt with allegations of scandalous or vexatious conduct: *"But proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the descriptions scandalous, frivolous or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution…."*

43. In **Ahir v British Airways PLC [2017] EWCA Civ 1392,** Lord Justice Underhill said (paragraph 16):

"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… Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

44. I have quoted more extensively from that paragraph than the part referred to by Mr Landels.

45. The case of **Balls v Downham Market High School & College [2011] IRLR 217**, Lady Smith made clear that Employment Tribunals may take into account the surrounding circumstances from the available evidence.

46. In **Cox v Adecco & Others UKEAT/0339/19/AT (V),** the EAT set out a number of general propositions arising from the authorities which they reviewed, *"some generally well-understood, some not so much:*

    (1) No-one gains by truly hopeless cases being pursued to a hearing;

    (2) Strike out is not prohibited in discrimination or whistleblowing cases, but especial care must be taken in such cases as it is very rarely appropriate;

    (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

    (4) The Claimant's case must ordinarily be taken at its highest;

    (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

    (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

    (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable case must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

    (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

47. At paragraph 30, the EAT went on: *"There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is not claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment."*

Discussion and Decision

48. This case comes to the Tribunal for determination of an application to strike the claim out at a very early stage in the proceedings. The application was presented with the ET3, and was accompanied by a "Draft Order" which it appears the respondent wished to invite the Tribunal to sign. The Order was not in terms which could be adopted by the Tribunal, but the application was raised at the subsequent Preliminary Hearing, and this Hearing was the result.

49. It should be noted that there has been no case management in this case as yet. The initial Preliminary Hearing, before Employment Judge O'Donnell, focused on 2 main issues: firstly, whether the ET3 was presented late, and if so, whether it should be allowed to proceed; and secondly, what steps should be taken in order to deal with the respondent's application to strike out the claims. No discussion took place in detail about the nature and particulars of the claims being made.

50. The claimant makes three claims, and it is appropriate, as did the parties, to address each of these in turn.

51. The first claim made by the claimant is that he was automatically unfairly dismissed by the respondent contrary to section 103A of the Employment Rights Act 1996, on the basis that he made a protected disclosure in his email of 24 January 2025 to the respondent.

52. The claimant's position is that he does not accept that the respondent's stated reason for dismissal is in fact the real reason. The respondent says that they followed a fair and thorough process, and that the claimant will not be able to overcome the terms of the letter of dismissal, which confirmed that the reason for dismissal was gross misconduct.

53. He was dismissed by letter dated 3 February 2025 (166ff). Mr Landels argued that it was significant that the disclosure email was sent after the claimant's misconduct had occurred, for which he was dismissed; however, it is equally significant, in my judgment, that the decision to dismiss the claimant took place after the disclosure on 24 January 2025. The claimant is not prevented from arguing that his disclosure was an important factor in the respondent's decision to dismiss him.

54. The respondent argues that the thorough investigation carried out was evidence that the decision was made purely for the reasons given in the letter of dismissal; and that the separation of the investigation into the disclosure from the disciplinary investigation demonstrates that there was no connection between the two matters.

55. In my judgment, the claimant may face some difficulties in proving his case, but it cannot be said that there is no, or even little, reasonable prospect that he will be able to do so. It is plain that the claimant considers that the investigation was seriously flawed, and wishes to challenge the respondent's version of events in relation to how the statements came about. He also challenges the respondent's assertion that his actions amounted to gross misconduct when he was not sent home on the night in question nor the following day. He considers that the respondent's attitude towards him changed after he made the disclosure to them, as they were unhappy with the assertions which he was making.

56. The claim made by the claimant under section 103A may therefore proceed. It is axiomatic that where a claimant asserts that he was dismissed because of making a protected disclosure, the respondent's letter of dismissal which offers an entirely different explanation will require to be tested in evidence in order to determine whether or not it represents a true and sincere explanation for their actions. It would be a rare case indeed where an employer were to state explicitly that the reason for dismissal was because someone had made a protected disclosure.

57. The second claim made by the claimant is that of discrimination on the grounds of race. As Mr Landels correctly points out, the original ET1 contains very little information about this claim, but the document the claimant submitted as a response to the application for strike out contains some further details. He confirmed that he relies upon Irish nationality as his protected characteristic of race, and while it is still unclear precisely what detriment he complains of, it appears to be that he was dismissed. The letter of dismissal refers to remarks about Ireland and Monserrat, and the claimant maintains that there was no reason to refer to these remarks. Further, he argues that the comments were entirely innocuous, and that had he been of African-Caribbean origin he would not have been treated in this way. The fact that this

issue was referred to in the letter of dismissal connected it in such a way as to provide a basis for race discrimination.

58. The third claim is that of discrimination on the grounds of religion or belief. Again, while the ET1 is silent as to the details of this claim, in his response he confirms that he relies upon his belief that Palestine should have the right to self-determination as a state, as a philosophical belief.

59. Further, he maintains that the reference to the Palestine/Israel conflict, and an allegation that he had chanted “Free Palestine” and “Fuck McDonald’s”, in the letter of dismissal, once again connects his philosophical belief to the decision to dismiss him.

60. With regard to both of these claims, the respondent argues that the reason for dismissal was plainly related to gross misconduct, and that these points were merely background and context.

61. In my judgment, these are matters to be addressed by way of evidence, and it cannot at this stage be suggested that the claims have no reasonable prospect of success. The claimant wishes to advance the claim that the respondent was influenced by issues relating to his protected characteristics, and while the claims could be better advanced, it would not be in the interests of justice to strike out these claims at this early stage of the proceedings.

62. Taking all three claims together, it is plain that the authorities show that a Tribunal should be very slow to strike a claim out, particularly one involving allegations of whistleblowing or discrimination, at an early stage of the proceedings where no opportunity has been given to the claimant to clarify his claims, and where no evidence has been heard when the facts on which they are based are in such dispute.

63. I accept that the cases make clear that a hopeless case should not just be advanced to a final Hearing, but at the same time, I am not prepared to categorise these cases as hopeless. The claims require to be clarified, in my view, but that does not mean that they have no reasonable prospect of success, nor little prospect of success.

64. In summary, the application for strike-out in this case and at this stage is, at best, premature, and the claimant must be given the opportunity to clarify and provide greater specification of his claims. It cannot at this stage be suggested that a fair trial of these matters is impossible. Further case management is the way to deal with those weaknesses in the pleadings of the claimant.

65. In my view, the appropriate next step is to convene a Preliminary Hearing for the purpose of case management in order to review the claims made and give

the claimant notice of the areas where he must clarify and provide fair notice to the respondent of the complaints which he wishes to make.

66. It is therefore my conclusion that the respondent's application for strike-out of the claimant's claim on the basis that it lacks any reasonable prospect of success should be refused; and that the respondent's application for a deposit order on the basis that the claim has little reasonable prospect of success should also be refused.

67. The case should be set down for a 2 hour Preliminary Hearing for the purpose of case management on a date suitable to both parties and the Tribunal.

Date sent to parties 9 September 2025