EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001290/2026

Preliminary Hearing held by video conference call in Edinburgh on 5 August 2026

Employment Judge A Kemp

Ms I Taneva	**Claimant** **In person**
The University of Edinburgh	**Respondent** **Represented by:** **Ms A Smith,** **Counsel** **Instructed by:** **Ms E McLeod,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal

(i) **refuses the respondent's application to strike out the Claim under Rule 38 of the Employment Tribunal Procedure Rules 2024; and**

(ii) **dismisses the claims of discrimination on the protected characteristic of sex, and harassment related to sex, under sections 13 and 26 of the Equality Act 2010 respectively, on withdrawal of the same by the claimant, under Rule 51 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. The respondent alternatively applied for either a deposit order or an unless order, which are matters dealt with by separate Note, as are matters of case management.

Background - applications

2. The respondent had applied for an order to strike out all or part of the Claim, which failing to grant an unless order, by email dated 14 July 2026 with accompanying document. The claimant opposed the same by email of 15 July 2026 and a document setting out her position fully sent on 19 July 2026.

3. The Tribunal issued case management orders on 27 July 2026. In accordance with the same the respondent provided a skeleton submission on 3 August 2026. In that skeleton submission the respondent sought for the first time a deposit order as a further alternative to strike out.

4. The claimant wrote to the Tribunal on that date and on 4 August received a reply with regard to the present hearing, after which the claimant provided a statement and documents in support of her position. The claimant argues that the respondent's applications should be refused.

5. The respondent in its argument also set out an expenses warning. Expenses have not however been sought, and until an application is made nothing is required to be decided in that regard by the Tribunal at this stage.

6. This Judgment deals with the issue of strike out, which if granted would end all or part of the claim, and the withdrawal of claims the claimant made, with other matters addressed in a Note issued of even date.

7. Ms Smith made a submission of conspicuous quality. The claimant as a party litigant made an impressive submission both orally and in writing, although some of the concepts she did not I consider fully grasp, as is understandable in the circumstances. The matters raised in this Judgment and the accompanying Note are very far from straightforward. I am grateful both to Ms Smith and the claimant, and the instructing solicitors who I am informed prepared the skeleton submission for the respondent, for the manner in which they put forward their arguments.

The first claim

8. The present Claim is the second claim between the parties. The first one has case number 8002111/2025 ("the first claim"). It was presented on 28 August 2025. The Claim Form did not have a tick against any of the

boxes for what claims were being made, but had a very lengthy paper apart which referred to claims of whistleblowing, being a claim for having suffered a detriment for having made a protected disclosure, pursued under section 47B of the Employment Rights Act 1996, and "discrimination on the basis of race (nationality)." The ACAS Early Conciliation Certificate showed a date of notification of 16 June 2025, and a date of issue of 28 July 2025. It was presented on 28 August 2025.

9. The Response Form denied the claims. It referred to the claimant appearing to rely on two disclosures, the first a conversation with her manager in June 2024 and the second a grievance dated 17 June 2024. The respondent did not accept that either was a qualifying disclosure under section 43B of the 1996 Act, or that there had been any detriment for doing so. It denied the allegations of race discrimination, responded to a claim for direct discrimination under section 13, and called for further particulars. It raised an issue of jurisdiction for events prior to 29 May 2025, although its submission did not address early conciliation.

10. A Preliminary Hearing took place before EJ Sangster on 1 December 2025, and after that case management orders were issued. A 10 day Final Hearing was fixed to commence on 18 May 2026, to be held in person before an Employment Judge sitting alone. Revisals to a list of issues were to be made by the parties, with further specification of matters required of the claimant. The claimant provided an amended list of issues, and the respondent provided amended grounds of resistance.

11. A Preliminary Hearing took place before EJ d'Inverno on 16 April 2026 after which further case management orders were made. The Final Hearing was postponed, on joint application, after that hearing. Revised dates for compliance with orders were set out by letter dated 13 May 2026. New dates for a Final Hearing were set out in a Notice of the same, with it to commence on 3 December 2026. In due course a List of Issues was, I understand, agreed. The parties jointly approached the Tribunal to argue that the 10 days fixed were not sufficient, and that the hearing length should be increased to 13. The Notice was then amended so as to start on 30 November 2026 and last for 13 days, ending on 17 December 2026.

The present claim

12. The present Claim has a paper apart dated 2 June 2026. The Claim was presented that day. The Early Conciliation (EC) Certificate is dated 8 May 2026 and states that EC commenced on 7 May 2026. The claimant in that paper apart refers to the first claim, and states that the present claim should be read alongside and in conjunction with her first claim. She requested that they be considered jointly, which was taken to mean having the two cases combined. She also referred in her paper apart to a List of Issues drafted for the first claim and the protected acts and disclosures referred to there. The claimant further seeks to rely on additional protected

acts and disclosures. The first is in relation to differential treatment of two students she says was raised orally on 12 December 2024 and then by email on 2 February 2025. The second was in late 2024 and early 2025 in relation to an SGPE course. She further refers to the commencement of Early Conciliation (EC) for the first claim, which obviously pre-dated that Claim, and the first Claim itself.

13. The paper apart also has a heading of "detriment since 16 June 2025". That was the date on which EC started, although it appears to me that the relevant date for present purposes must be the date of presentation of the first claim, which is 28 August 2025. The paper apart does not specifically state that the claimant claims victimisation or whistleblowing detriment for having made the first claim, but she clarified in her oral submission that that is what she had sought to do. She said that she believed that it was not right to do so in that first claim itself as it arose out of that first claim which is why she presented the present and second claim. In her Schedule, referred to further below, she identified the first claim as the last of six protected acts, together with (in that sixth act) the earlier commencement of EC prior to the first claim such that there are seven protected acts or protected disclosures founded on.

14. The claimant is still in employment with the respondent. The claims she seeks to pursue in the present claim, as she confirmed during the hearing, are under sections 13, 26 and 27 of the Equality Act 2010 and section 47B of the Employment Rights Act 1996. She founds on the protected characteristic of race for the discrimination and harassment claims.

15. She confirmed during the hearing that she did not seek to pursue any claim of sex discrimination, although that had been included in her Claim Form for the present claim. I have therefore dismissed the section 13 and 26 claims on the protected characteristic of sex on withdrawal.

16. The claimant's pleadings are unduly lengthy, and have rather more quantity than clarity. It is not therefore always clear on what basis the claims are pursued despite their length. She is a party litigant. Although it is clear from her submissions in writing and orally that she is highly intelligent, capable of researching matters, and feels strongly about matters, distilling events into separate claims in law which are succinctly and clearly expressed has proved difficult for her. That comment is to be seen however against what is a complex factual background and matters of law that are in several respects at least also complex.

17. In its Response Form the respondent argues that the present claim is an abuse of process. It addresses protected disclosures relied on in the present claim which were not included in the first claim despite their pre-dating the presentation of the first claim. It refers to the principles in *Henderson v Henderson* which is a case decided under English law, addressed below. It argues that there is no jurisdiction for any matter prior

to 8 February 2026. It argues that there is no conduct extending over a period under section 48(3)(a) of the 1996 Act or section 123(3)(a) of the 2010 Act, that it is not just and equitable to extend jurisdiction under section 123, nor was it not reasonably practicable to have presented the section 47B claim timeously. The disclosures are denied as meeting the section 43B test. The respondent also denies that there were detriments because of such protected acts or disclosures if made. It refers to putting the claimant to strict proof, although that is not an appropriate term to use as it is not one of Scots Law, and whether it is consistent with the 1996 Act is at least open to debate, as addressed below.

18. The claimant has provided an agenda return with additional information and a Schedule, similar to an extent to a Scott Schedule, with a summary of her claims in some respects but not comprehensively as to all matters. There remain a number of points where clarity was missing which the claimant sought to address during the hearing. As case law set out below makes clear before striking out a claim a Tribunal requires to know what the claims are particularly in the case of a party litigant, and I attempted to do so during the course of the hearing.

19. A practical issue was that although the claimant had copied the agenda to the solicitor for the respondent Ms McLeod, Ms Smith did not have it. Arrangements were made to pass that to her and time allowed both for her to consider it and take instructions.

Submissions

20. The parties supplemented their written arguments with oral submissions. The following is a very brief summary.

21. Ms Smith argued that inclusion of two protected disclosures in the present claim which were dated before the presentation of the first claim was an abuse of process which breached the Henderson rule, which latterly she argued is persuasive, and that the second claim is unreasonable and vexatious (the skeleton submission appeared to concentrate on conduct of the claim, whereas the oral submission was on the basis that the Claim itself was unreasonable or vexatious under paragraph (a), and it appeared to me that the argument should be considered to have been made on the basis of both paragraphs). The respondent argued that the claimant could and should have included the two protected acts she founded on in the present claim within the first claim, they being dated before it was presented. The argument in the skeleton argument was that these were the only protected acts founded on in the present claim. There had been a Preliminary Hearing in the first claim at which she had been asked to clarify her claims. The majority of the detriments the claimant alleges pre-date the first claim. There would be a high degree of duplication, contrary to the overriding objective.

22. The respondent argued that the claimant had no or little prospects of success in relation to timebar. Detail of the chronology was given in the skeleton argument. There was no connection sufficient to amount to an act extending over a period, as different people were involved with different events and decisions in separate time periods. On the issue of what was just and equitable there was no good reason for delay and the respondent would suffer forensic prejudice by the inevitable decay of memory from the passage of time. Documents did not show the thought process that led to decisions. For the 1996 Act the test was of reasonable practicability and it was clear that the claimant who was working full time at the material times was not able to establish that.

23. Ms Smith argued that the claims had no or little reasonable prospects of success. What had been provided was insufficient to establish a prima facie case that led to the shift of the burden of proof. The comparators proposed were not proper comparators. Why a matter said to be harassment was related to race was not set out sufficiently to succeed. After taking instructions the respondent argued that protected act 5 in relation to emails on 29 July 2024 required an amendment, but that otherwise there had been sufficient pled not to require such an amendment. The respondent's basic position was that administrative decisions were not matters of detriment, and it noted that although the claimant had not been invited to a meeting, later she was and then that meeting was cancelled.

24. In reply the claimant argued that none of the orders sought should be granted. She argued that matters were issues of fact to be determined after evidence. She had sought documents but had not had them produced. She referred to the law in relation to those orders in her written argument.

25. In relation to the claim of direct race discrimination she founded on being excluded from a meeting on 24 February 2026 when comparators were not, and what she described as a refusal by Ms McRorie to engage with her. As background she said other non-British nationals were treated differently and detrimentally, to summarise, by the respondent.

26. Those matters were also relied on for the claim of harassment related to race.

27. For the claim of victimisation she sought to rely on a list of six protected acts, with the sixth containing firstly EC and second the first claim. The first three protected acts were in the List of Issues for the first claim. The fourth was in relation to the different treatment of two students one male and one female. The fifth was the email chain ending on 29 July 2024 referred to above. The detriments she had referred to in a Schedule.

28. For the claim of detriment for having made protected disclosures she sought to rely on the eight disclosures referred to in the first claim, and two

additional ones, predating that claim but which she had not noticed until around spring 2026. She had been overwhelmed by the volume of documentation involved and suffered from anxiety. She accepted that she was at work full time since 26 June 2025. She did not agree with the respondent's characterisation of the timing of detriments. She argued that the cancellation of two meetings scheduled for 3 March and 2 June 2026, cancelled on 18 February and 25 May 2026 respectively, were within the primary period. She argued that they were part of acts extending over a period, and earlier acts should therefore be held to be within the primary period. What was identified as detriment 1 relating to teaching evaluation she stated she had expected to be received, and would have been expected by the end of October 2025.

29. She argued that there had been retaliation for her making both protected acts and protected disclosures, with those involved aware of her doing so from discussion about her grievance, the outcome of that, and more generally. She argued that the test for no or little reasonable prospects of success was not met, and argued that there were other options than an unless order that should be followed, such as asking her specific questions.

The Law

30. 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.

31. The overriding objective is now in Rule 3, and applies to the exercise of discretion under Rule 38. 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."

32. 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

33. The word vexatious appears in both Rules 38(1)(a) and (b). It is not however defined in the Rules. There is a distinction between a claim being vexatious in (a) and the manner in which the claim has been conducted being vexatious. In relation to (a) there is no provision whereby the presentation of a Claim may be struck out on the basis that doing so was unreasonable, but under (b) it may be if the manner of conduct of that claim was unreasonable, a matter addressed below.

34. In ***ET Marler Ltd v Robertson*** [1974] ICR 72 the NIRC held that:

"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".

35. In ***Ashmore v British Coal Corporation*** [1990] ICR 485 the Court of Appeal addressed an earlier version of the Rule and held:

> "A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material."

36. The EAT held that there are four matters to be addressed when considering a strike out under what is now Rule 38 in ***Bolch v Chipman*** [2004] IRLR 140, which were approved by the Court of Appeal in ***Blockbuster Entertainment Ltd v James*** [2006] IRLR 630. They are, relevant for present purposes (i) whether the pursuit of the claim is vexatious (ii) whether a fair trial is no longer possible (iii) whether strike out would be proportionate and (iv) if the claim is struck out, what further consequences might follow.

37. It is a word found in other contexts. In ***Attorney-General v Barker*** [2000] 1 FLR 759 under a provision of English civil law and procedure the following was stated:

> "“Vexatious” is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

38. The Vexatious Actions (Scotland) Act 1898 does not define the term, but applies where “any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings.” Nor is it defined in section 100 of the Courts Reform (Scotland) Act 2014 which has provision for a vexatious litigation order. In ***Lord Advocate v McNamara*** 2009 SC 598 the definition in ***Barker*** was referred to when considering such an order.

No reasonable prospects of success

39. As a general principle, discrimination cases should not be struck out on the argument that there are no reasonable prospects of success under what is now Rule 38(1)(a) except in what might be described as sufficiently clear 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."

40. 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."

41. 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."

42. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given by the Inner House following those principles:

> "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).”

43. The present case is not one of unfair dismissal but the Inner House comments are in my view equally applicable to the claims being made, and are binding on me.

44. 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.

45. 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. 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.

46. The position as to strike out for no reasonable prospects of success was reviewed by the EAT in ***Mechkarov v Citibank NA*** [2016] ICR 1121.

47. 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.”

48. 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. The EAT further summarised the process in ***Wangtian Xie v E'Quipe Japan Ltd*** [2024] EAT 176. Care must be taken to avoid making an informal assessment at a summary stage of the credibility and reliability of the evidence based on documents alone, where those are inconsistent with the claimant's case taken at its highest: ***Kostrova v McDermott International Inc*** [2025] EAT 35. The same principle applies, in my view, to consideration of what is pled.

Unreasonable conduct

49. Rule 38(1)(b) has a separate provision which includes unreasonable conduct of the claim, to summarise its terms. In that regard the Court of Appeal in ***Blockbuster Entertainment Ltd v James*** [2006] IRLR 630 held that:

> "This power, [of strike out] as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."

Discretion

50. The EAT held that the striking out process requires a two-stage test, both in ***HM Prison Service v Dolby*** [2003] IRLR 694 and ***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."

51. 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.

Discussion

52. I have considered all of the written material provided by the parties, the terms of their oral submissions, and the case file for the first claim. I have concluded that it is not appropriate under the overriding objective to strike out the present claim either in whole or part, at this stage. The claimant is a party litigant. She has not pled matters with sufficient clarity, and has done so at undue length. She has adopted a narrative style that would not be appropriate were she legally represented – ***C v D*** UKEAT/032/19. Despite these difficulties there is I consider a core of disputed fact, and the authorities are clear that in such a situation strike out of a claim such

as the present is not generally appropriate. Particular care is required in circumstances where there is a party litigant. During the course of the hearing before me she gave further information as to the detail of the claims she sought to make and why that was. She has yet to frame an amendment, but that she intends to apply to do so is a factor that I consider relevant to the assessment.

(a) Abuse of process

53. The respondent argued in its skeleton submission that there has been an abuse of process, relying on the rule in *Henderson v Henderson*. It was addressed by the House of Lords in ***Johnson v Gore Wood and C*** [2002] AC 1 and the basic test stated as whether, taking into account all the circumstances, the party is abusing the process of the court by seeking to raise a matter that it could and should have done before. A simple finding that a party should have raised a matter in earlier proceedings is insufficient.

54. The rule in *Henderson v Henderson* and the related issue of cause of action estoppel were addressed in the EAT sitting in England in ***The Home Office v Oxley*** [2024] EAT 44. Abuse of process was also addressed 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. The principle from *Henderson v Henderson* has therefore been applied to an Employment Tribunal in England and Wales.

55. But the position in Scotland is I consider different. The rule in *Henderson v Henderson* has been held to be not part of the law of Scotland in the Outer House. In ***Troup v West Lothian Council*** 2020 CSOH *29,* it was held that

> "The [*Henderson v Henderson*] rule, based on public policy, is that a defendant should not be oppressed by successive suits when one would do. However, this rule is not part of Scots law and does not form part of the doctrine of personal bar (E Reid and J Blackie, Personal Bar (Scottish Universities Law Institute, 2006) at paragraph 19.10)."

56. In ***Sheikholeslami v University of Edinburgh*** [2026] EAT 96 a somewhat similar approach was taken to the English law concept of estoppel by record, not the same as the *Henderson* principle but operating as a bar to pursuit of a claim as I understand it, with the EAT sitting in Scotland noting, where the appellant was represented by an English KC, that

> "the appellant placed some reliance on estoppel by record, but that particular doctrine is not part of Scots law. Scots law does have a doctrine of res judicata, but that tends to apply in relation

to a later case being brought where an earlier case conclusively decided the point."

57. *Res judicata* does not apply at this stage as there has not yet been a determination of a matter of fact as yet. The overall principle that Scots Law is to be applied in a case in Scotland is I consider supported by that decision. I further note that the words of the Rule do not include abuse of process.

58. I therefore conclude that as the principle from the *Henderson* case is not part of the law of Scotland the argument as to abuse of process is not to be considered in that context. Ms Smith argued in her oral submission that it was persuasive, but I do not consider that it is.

(b) Vexatious

59. If a claim is vexatious, within the terms of Rule 38, it can be struck out if other considerations are met. I have however come to the conclusion that the present claim cannot be held to be vexatious *per se*. That is firstly as it does not meet the definition as explained above. It is a word of reasonably wide ambit, and connotes a claim pursued where there is either no reasonable ground for doing so, or deliberately to cause harm to the respondent when there is no reasonable prospect of success or otherwise has no reasonable basis for its pursuit. There is here an element of repetition of matters raised in the first claim, but that is to a limited extent and justified where there is a need to identify protected acts or protected disclosures as a basis for what is alleged to be a detriment; and much of the focus is on the events that post-dated the first claim, and so far as they do not it may be permissible to refer to them as matters of background. They also require to be seen in the context of the claimant referring back to the first claim and the List of Issues for it in the paper apart to the present claim, doing so as a party litigant and not using a more traditional formula of pleading to do so (such as incorporating those provisions *brevitatis causa*) but in terms I regard as sufficiently clear to show that that is what she intended – to incorporate them without repeating their wording for the sake of brevity.

60. Secondly the claimant has sought to raise in the present claim two protected disclosures also argued to be protected acts both of which pre-date the first claim but are not mentioned in it. That is very likely to be a matter going to credibility and reliability, as addressed in the separate Note, but she gives an explanation that in the volume of matters before her she did not include them in error, to summarise her position very briefly. It seems to me that that is almost certain to lead to an inference that she forgot about the two matters when presenting her claim, but I consider that there is no absolute bar in Scots Law to her doing so.

61. The position at the present is that no judicial determination has been made in relation to the first claim, such that no argument of *res judicata* yet

arises. As I understand it the claimant has not applied to amend the first claim to add these two matters, and she only seeks to raise them in this claim, for the detriments she argues post-dated the presentation of the first claim.

62. A protected disclosure or protected act is not sufficient of itself, but a necessary ingredient for later victimisation, to summarise matters very briefly under both the section 27 of the 2010 Act and section 47B of the 1996 Act. The claimant is I consider not acting vexatiously in seeking to raise these matters, for such assistance as doing so may give her in light of the fact that the first claim is a protected act and may be a protected disclosure and a matter that is more closely related in time to what are said to be her later detriments. But it is not impossible that those involved in those detriments may not have been aware of the first claim, or the matters relied on in that claim, but were aware of these two disputed protected acts or protected disclosures. Although it may be very difficult for her to establish that either disclosure or act, if made and satisfying the statutory test, was that which caused any detriment, a matter addressed in the Note, she is in my view not prevented from making the attempt on the basis of that being vexatious. It seems to me that it does not fall within that term.

63. Thirdly it was possible for the claimant to have sought to amend the first claim to add both the additional protected acts or protected disclosures, and the detriments she claims happened after the first claim was presented, but that claim is as she says already very complex, it has had a Final Hearing fixed after detailed procedures, including the postponement of one set of dates for a Final Hearing, it was not certain that her amendment would be permitted as the respondent had the entitlement to object to it, and presenting a new claim was at the least a permissible option for her. She states that she thought that it was not appropriate to plead in the first claim a detriment arising from making it. Her understanding was not in my view right but proceeding by a second claim was not incompetent. It is far from a rare occurrence.

64. Fourthly whilst the two claims are as already noted unduly long in pleading, without sufficient clarity, and there is an element of duplication to some extent, the claimant is a party litigant, and it is not within the overriding objective to hold her to the standards to be expected of a solicitor. In essence she seeks to argue in the present claim that additional and separate detriments have arisen since her first claim was presented, and are a continuation of the matters she alleged in that claim. To the extent that she pursues that basic argument, of what might be described as new detriments being those arising after the first claim but continuing from and after the matters raised in it, and on the basis of additional acts and disclosures, it seems to me that she is entitled to do so unless other

considerations, such as of the prospects of success, arise. They are dealt with separately below.

65. In so far as there is repetition of the protected acts, disclosures and detriments founded on in the first claim I consider that as, at least at this stage, this is a separate Claim it is competent to plead them either as protected acts or disclosures that led to later detriments, or as matters of background where the acts alleged as detriments are said to be extending over a period for jurisdiction and other purposes. If the two claims are combined, a matter addressed in the separate Note and on which as yet no decision has been taken, the problem of duplication should largely fall away or be capable of being dealt with by case management. If they are not then, and if the first claim is determined by evidence independently, whether there was a protected act or disclosure as founded on in that claim may well, where also founded on in the present claim, be a matter that becomes *res judicata*, and if not it may inform any later application for strike out or deposit order.

66. Separately the alleged detriments are ones that at least arguably, for all save one, have a time period after the first claim was presented.

(i) The first alleged detriment was a failure to provide teaching evaluations in June 2025, and the claimant argued that that continued thereafter, including to dates after presentation of the first claim.

(ii) The second is an issue over a laptop replacement that appears to have culminated in July 2025, with the last date mentioned being 16 July 2025. On the face of it this issue ended before the first claim was presented.

(iii) The third is late assignment of hours and responsibilities said to have taken place in the period to September 2025.

(iv) The fourth is a dispute over student enrolment in a course said to have arisen up to early October 2025.

(v) The fifth is a deadline for a final examination paper the claimant argues was in October 2025.

(vi) The sixth is over course organiser responsibilities in autumn 2025, being in and around October 2025.

(vii) The seventh is criticism over an email dated 27 November 2025.

(viii) The eighth is a meeting on 24 February 2026 addressed below more fully.

(ix) The ninth and last is the cancellation of meetings of the CAHSS Staff Experience Committee in the period after August 2025, with four of five said to have been cancelled in that period.

67. At least arguably therefore all of these matters, with the exception of the second, post-date the presentation of the first claim. The claimant could not have included them when presenting the claim save for the second. What she might have done is to apply to amend it, but as discussed above her proceeding as she did is not incompetent.

68. In all the circumstances I did not accept the argument that the present claim was vexatious.

69. Even if, contrary to the view I formed, the argument of abuse of process were available in Scotland it would in my view not meet the test for being vexatious in that context. It seems to me that it is not an abuse of process in at least general terms to seek to rely in a new Claim on events occurring after the presentation of the first claim, and that that can include both acts and disclosures founded on in the first claim, and (unless other considerations arise) those that were not but might have been. Matters require to be seen in context, and the fact of new alleged detriments post-dating the first claim is particularly material in this regard, in my opinion.

(c) Discretion

70. Even if either of those arguments had succeeded I would separately not have considered it within the overriding objective to strike the Claim out either in whole or part. It would not be proportionate to do so. There are other less draconian steps that can be taken.

71. The claimant has, as noted above, indicated that she seeks to amend, particularly in relation to emails on 29 July 2024. Whether or not such an application will be granted is yet to be determined. Matters remain at a very early stage for the present claim. Documents have been sought by the claimant informally, although not as effectively as they might have been, as discussed during the hearing. But she may yet seek a document order which may or may not be granted. It seems to me premature to form a view on this aspect. I did consider whether to strike out the second of the matters listed above which does appear to have concluded prior to the first claim being presented, but have concluded that it may be pled either as the foundation of what are said to be acts extending over a period, or as a matter of evidence, at the least.

72. There are also matters of case management that arise, dealt with separately. In my view it is not appropriate under the overriding objective to strike out the claim, or a part of it but to address issues where they arise by orders for case management and otherwise as addressed in part in the Note.

(d) No reasonable prospects of success

73. The next issue is whether the present claim has no reasonable prospects of success, which is firstly on issues as to jurisdiction on the basis of time bar and secondly more generally on prospects on the merits.

(i) Time bar

74. The respondent seeks strike out on the basis that the claims are outwith the terms of section 48 of the 1996 Act and section 123 of the 2010 Act. The claimant argues in essence that having made what she argues are a series of what are both protected acts and protected disclosures the reaction was to subject her to some form of detriment, in summary as a form of retaliation for doing so, and that that continued such that all her claim is within the primary time limit. These are matters of core disputed fact. I take the claimant's case at its highest. It is not possible to resolve these disputes of fact other than by hearing evidence in my view. It is not proportionate to do so on the basis of the respondent's assertions alone. That the pleadings are not as full as they might be, that different people were involved in different circumstances, and related arguments that are made by the respondent, is I consider not close to being sufficient to place this case in the kind of category that makes strike out on this basis as having no reasonable prospects of success within the overriding objective. At this stage the prospects of success for the claimant's argument are I consider entirely dependent on evidence, not least what answers are given in cross examination by all witnesses called on this point.

75. Even if the claimant fails in her argument as to matters extending over a period, to summarise briefly the two sets of provisions, there are other points of disputed fact. For the claim under the 2010 Act there is the separate matter of what is just and equitable. That involves a broad discretion. It is I consider competent to hold a Final Hearing to which issues of jurisdiction of that nature are reserved. That may be apt where the respondent argues that it is not just and equitable to extend jurisdiction as it would suffer forensic prejudice. No decision has yet been taken on the Final Hearing for reasons given in the accompanying Note, but reserving jurisdiction is an example of a step that can be taken short of the draconian step of strike out. If it is the case that the respondent suffered material forensic prejudice by the time taken to raise matters, as is argued, it might be that that is a factor that supports finding that there was not jurisdiction for a case if outside the primary time limit. But at present I do not know whether that is the case and if so its extent. It is a possibility, but it is in my view proportionate under the overriding objective to determine it after evidence is heard and it is not within the overriding objective to strike out the claims under the 2010 Act on the basis of timebar.

76. For the claim under the 1996 Act there is the separate issue of reasonable practicability. That is a higher test, but is again fact sensitive. The claimant

seeks to argue that it was not reasonably practicable to have presented the Claim timeously, in so far as that was not done. It is not proportionate to strike out a claim where these issues remain to be resolved, and although the prospects for the claimant are less clear than in relation to what is just and equitable in my view the statutory test is not met.

77. Finally in this regard it should be noted that there some matters that the respondent accepts were raised timeously, and they can, subject to other considerations, proceed to an evidential hearing. I reject the respondent's argument so far as directed to matters the respondent does not accept are timeous.

(ii) *Merits*

78. The second argument is for the merits of the claims. The respondent argued in brief summary that the burden of proof for the claims would not shift, as the claimant has not pled sufficient primary fact to do so. For the 2010 Act claims the claimant does have the initial onus of proof. It seems to me however that in light of the guidance in authority, including in particular from the House of Lords, that this case is not one of the relatively rare cases in which it is sufficiently clear that the statutory test for strike out is met. The pleadings have been discussed above, as has the claimant's intention to apply to amend. That has yet to be determined. It is true that the claimant may face some difficulties in succeeding, and they are addressed by separate Note in relation to deposit order, but this is not I consider a case where it is sufficiently clear that I can be satisfied that striking out is within the overriding objective.

79. For the 1996 Act claim the onus falls on the respondent as set out above. That is an even stronger ground for refusing the application.

80. In relation to detriment I do not consider that it can be said that there are no reasonable prospects of success. I address this more fully in the Note, but in summary although I consider that the claimant's arguments are at the low end of what may qualify as a detriment, and her prospects are I consider somewhat less than good from what is presently before me, they do not meet the statutory test of having no reasonable prospects of success. It seems to me that these are issues that are dependent on evidence, particularly but perhaps not only from the claimant.

(e) Unreasonable conduct

81. I consider that there is nothing in the conduct of the present claim, being what has happened since it was presented, that is close to meeting the test in Rule 38(1)(b). In submission the respondent in my view sought to elide the tests in (a) and (b) of Rule 38(1). They are separate matters. In the fourth ground of the skeleton submission the respondent argues that the conduct has been unreasonable or vexatious. It however essentially founds on the terms of the present claim. It states, inter alia, that there are

deficiencies in it not remedied by the Schedule, but I consider that the claimant's attempts to provide specification, whilst imperfect, cannot properly be characterised as unreasonable or vexatious. I consider that this argument for the respondent comes very close to seeking to reword Rule 38(1)(a) to add that presenting the present claim was an unreasonable act.

Conclusion

82. I have accordingly refused the application to strike out the present claim. For the avoidance of doubt I have done so on the basis of matters as they stand before me, and that does not prevent another such application being made at a later date should it be considered within the overriding objective to do so.

83. The sex discrimination claims have been withdrawn and are dismissed under Rule 51 accordingly.

Date sent to parties **<u>12 August 2026</u>**