



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 8000022/2026

Decision made in Glasgow without a hearing on 26 August 2026

Employment Judge M Whitcombe

Daniel McDougall

Claimant

Mitie Limited

Respondent

JUDGMENT

The claimant's application to strike out the response under rule 38(1)(a) and (possibly) rule 38(1)(b)) of the Employment Tribunal Procedure Rules 2024 is refused.

REASONS

Introduction and background

1. I have to resolve two applications on the basis of written submissions, without a hearing:
 - a. the claimant's application to strike out the whole of the response;

- b. the claimant's application for permission to amend the claim.
- 2. Since the first of those decisions is a judgment and the second is an order, I have dealt with them in separate documents. This is the judgment dealing with the application to strike out the whole of the response.

Application

- 3. In an email dated 14 February 2026 the claimant has applied for the response to be struck out in its entirety on the basis that it is scandalous, vexatious and has no reasonable prospect of success (i.e. rule 38(1)(a) of the Employment Tribunal Rules of Procedure 2024, incorrectly referred to by the claimant as rule 37).
- 4. The claimant did not explicitly allege alternatively that the respondent had *conducted the proceedings* in a way that was scandalous, vexatious or unreasonable, although he did refer (erroneously) to rule 37(1)(b). Given the nature of the claimant's argument I do not think that separate ground for strike out adds anything of significance and my reasoning is the same whether he intended to rely on it or not.

Legal principles

- 5. It is well-known that, as a matter of policy, discrimination claims (or responses) should not normally be struck out except in the plainest and most obvious cases, because they are fact sensitive and a careful decision based on evidence is vital in a pluralistic society (***Anyanwu*** [2001] UKHL 14). For similar reasons, where there is a relevant dispute of fact between the parties striking out will rarely be appropriate because factual disputes should normally be resolved at a full hearing (***Ezsias*** [2007] EWCA Civ 330). That is what they are for.

The amendment of the response

- 6. The claimant's application to strike out the response is mainly based on a *former* dispute of fact on the face of the claim and the response, and to that extent it is based on a misconception regarding the case as it now is. The original *unamended* response said that the respondent had provided a chair at the CCTV podium. However, the respondent's case on that point has now changed, and it will no longer seek to argue that it provided a chair at the CCTV podium. Permission to make that amendment was granted by EJ Doherty at the preliminary hearing on 20 May 2026 and her reasons are set out in writing. At the final hearing the respondent will argue that a chair was provided in the store office, but not at the CCTV podium.
- 7. The claimant has inappropriately focused on the response as it was prior to amendment. Even if the response had remained in its unamended form, the

point about the provision of a chair at the CCTV podium would be a factual dispute appropriate for resolution only at a full hearing. It would not have been appropriate to strike out the disputed paragraphs of the unamended response, still less the whole of it, because the facts pleaded by the respondent would be taken at their reasonable highest for the purposes of the application. The claimant referred to the original response as containing a “provable falsehood”, but that merely underlines the point. He could seek to prove that falsehood at the final hearing were it necessary to do so, but it would not be appropriate to assume victory on that point for the purposes of strike out.

8. The argument in favour of strike out is even weaker where the respondent has amended its response to remove the alleged “falsehood”. In his application to strike out, the claimant alternatively requested an unless order requiring the respondent to amend its response to reflect “the documented truth”. That is effectively what the respondent has done, without the need for an unless order. The claimant’s alternative argument when the application was made illustrates why the striking out of the response would be wholly disproportionate to the problem caused by the respondent’s pleaded case. In any event, the error has now been corrected and there is no need for any order at all.

Prospects of a successful defence

9. The respondent rightly highlights the following points:
 - a. the respondent will argue that the claim was commenced outside the jurisdictional time limit, in which case it must be dismissed for lack of jurisdiction.
 - b. The respondent will argue that the duty to make reasonable adjustments was discharged by providing additional rest periods and seating in the store office.
 - c. The respondent will argue that the adjustment sought by the claimant was not reasonable in any event.
10. It is impossible to say that those arguments lack a reasonable prospect of success without hearing evidence from both sides, resolving disputes of fact, and applying the law to those facts. The same is true of the claimant’s subsidiary point that the respondent’s stance on knowledge of disability and its effects is a “bad faith tactic”. Those arguments underline the need for a contested full hearing, and the inappropriateness of striking out the response at this stage. I agree with the respondent’s submission that the response raises legitimate legal and factual issues which have a reasonable prospect of success.

Scandalous and vexatious

11. There is nothing derogatory or insulting about the amended response, so it is not “scandalous”. It is not “vexatious” either, because there is no basis for a finding that it is pursued without expectation of success merely to cause annoyance to the claimant. The fact that the claimant finds it annoying is not the point. There was no deliberate attempt to mislead, because the response as originally drafted contained an error made in good faith, due to a key witness being absent on bereavement leave when instructions were originally taken. By making a prompt application to amend when the respondent realised that its original position had been wrong, the respondent did exactly the right thing at the right time.

Conclusion

12. In my assessment, the amended response is neither scandalous nor vexatious, and it enjoys a reasonable prospect of success. The test for strike out under rule 38(1)(a) is not satisfied and the claimant’s application is refused. The outcome of this case will be decided at the end of a hearing, and not on paper.

**Employment Judge: M Whitcombe
Date of Judgment: 26 August 2026
Entered in register: 31 August 2026
and copied to parties**