



EMPLOYMENT TRIBUNALS

Claimant: Mr F Da Silva

Respondent: Costa Limited

Heard at: Birmingham (Midlands West Region)
(Public preliminary hearing via CVP video)

On: 7/09/2026

Before: Employment Judge Swann

Representation

Claimant: In person

Respondent: Ms Martin of Counsel

JUDGMENT

The claimant's application for the striking out of the respondent's response in accordance with rule 38(1)(b) of the Employment Tribunal Procedure Rules 2024 is hereby dismissed.

REASONS

Background

1. The history of this case is well documented and set down within the narratives to a number of previous judgements and case management hearings following the ending of the claimant's employment relationship with the respondent. The case was ultimately set down for final hearing commencing on 7 September this year and the parties in accordance with the tribunal orders proceeded to exchange documents and prepare witness statements for exchange. The matters remaining were the claimant's outstanding claims of harassment relating to race and that the claimant suffered detrimental treatment by reason of raising protected disclosures. The full details of these remaining complaints are recorded within the narrative and orders prepared by Employment Judge Dimbylow following a preliminary hearing that took place on the 1st of July 2025.

2. Whilst the claimant had made an application for reconsideration of one of the earlier determinations of Judge Dimbylow (which is referred to more particularly in a separate case management hearing record promulgated by me) it was during the exchanging of documents for the final hearing that the claimant raised concerns about the authenticity and origin of a particular email that had been submitted to him by the respondent. As a result the claimant on the 3rd of September 2025 made application for the striking out of the respondent's response in accordance with what is now rule 38 of the Employment Tribunal Procedure Rules 2024. This was supported by a witness statement attached to the email in which the claimant sets out the grounds and basis of his application.
3. The application itself was prompted by disclosure of two versions of an email letter from Ms Grace Audsley of the respondent company dated the 18th of December 2024 which the claimant confirmed appeared twice at page 120 and page 434 of the proposed final hearing bundle as he put it in "two materially different versions". The claimant in his application statement records that the version at page 120 was the authentic and original document sent to him by Ms Audsley on the 18th of December 2024. This followed a disciplinary hearing concerning allegations against the claimant during which the claimant resigned on the 13 December, before any outcome was formally determined. The original email contains the following sentence **"please note for the avoidance of doubt the disciplinary officer Ollie Pitt would have made the decision to terminate employment on the grounds of gross misconduct if you had not resigned"** The version at page 434 of the proposed bundle as submitted by the claimant was not the original document aforesaid but had been altered. He pointed out that the critical sentence cited above had been omitted and a new sentence inserted in a previous paragraph reading as follows **"our intention was to follow proper disciplinary procedures and the outcome had not been pre-judged"**.
4. The claimant submits in his statement that the alteration completely changed the meaning and context of the letter. That the discrepancy was not minor. That he wrote to the respondent's solicitors to bring this to their attention and to ask for the version at page 434 to be removed from the final bundle. That the respondent's solicitors failed to address the substantive issue of this matter. That there had been a failure and refusal to remove as he put it the "falsified document from the bundle or provide any credible explanation for its inclusion". The claimant continues by way of commenting that the respondent's conduct in knowingly including a false document in the hearing bundle and refusing to remove it when questioned amounted to a deliberate and flagrant abuse of the tribunal process. That the behaviour was designed to mislead the tribunal and had prejudiced his ability to present his case fairly. He argues in his statement that in light of this "serious misconduct" he believed that it was no longer possible to have a fair hearing of his claim. That therefore his application for an order striking out the respondent's ET3 response should be allowed and the tribunal should consider awarding him the costs of the application.
5. Although no action was then taken by the tribunal to resolve this, it was brought more specifically to light when the respondent at the beginning of this year submitted to the tribunal that delays in preparing the final bundle and documentation lay with the claimant. He responded by email of the 8th

of January 2026 confirming that the principal cause of the delay and the reason why matters had come to a halt was because of the respondent's adverse abuse of process i.e. more specifically the fact of "falsified documents" which meant it was impossible for him to agree a final bundle and that his application for strikeout must be resolved before any procedural steps could be contemplated.

6. This was pursued further by the respondent in an email to the tribunal on the 7th of July 2026 reminding the tribunal that the final hearing was approaching; that case management directions had been stayed and requesting the tribunal to provide an update regarding the outstanding applications, (which of course included the aforementioned strikeout application). On the 3rd of August 2026 the respondent's solicitors wrote to the tribunal (copied to the claimant), requesting a postponement of the final hearing on the basis that one of the key witnesses of the respondent i.e. the aforementioned Ms Audsley was on extended maternity leave and could not because of childcare commitments return to work sooner than the 15th of September. The respondent therefore sought a postponement until after that date apologizing for any inconvenience.
7. On on the 21st of August 2026 Employment Judge Bansal considered the application and having read the previous correspondence on the file determined that the final hearing would be postponed, but that a public preliminary hearing for one day would be listed instead. That at that hearing the Employment Judge would determine firstly the claimant's application to strike out the response dated the 3rd of September 2025; secondly the claimant's application for disclosure; thirdly any outstanding applications subject to the Judge's discretion and finally to make further case management orders and to relist the final hearing. The respondent was directed to prepare a short bundle for use of the preliminary hearing.
8. A notice of hearing setting out the above directions was submitted to the parties by the tribunal on the 25th of August 2026 and the case was therefore listed for the public preliminary hearing before me today.
9. **Documents for the hearing**
10. I received from the parties, a bundle of relevant documents (the preliminary hearing bundle) and have also considered the aforementioned witness statement which formed part of the claimant's application for strike out. Although I did not hear any formal evidence from either party I have dealt with that witness statement as if it were submissions relied on by the claimant in support of his application. I am grateful to the parties for their assistance in this regard.
11. **The relevant law and case law guidance considered in regard to the application to strike out the respondent's response as outlined to the parties at the hearing.**

The relevant law to be considered in regard to the issue of striking out a claim or response is set out within the **Employment Tribunal Procedure Rules 2024** (the rules) which provides as follows:

By rule 38(1) *the tribunal may on its own initiative or on the application of a party strike out all or part of a claim, response or reply on any of the following grounds:*

(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

(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).

The relevant law in regard to the announcement of a tribunal's decision is set out in rule 60(3) of the rules:

By rule 60(3) *In the case of a decision announced at a hearing, the reasons may be given orally at the hearing or reserved to be given in writing which may but need not be as part of the written record of the decision.*

I have considered the guidance arising from the following cases (which I refer to in more detail as appropriate in my conclusions below)

Bennett v Southwark London Borough Council [2002] ICR 881CA, Attorney General v Barker [2000] 1 FLR QBD (Civ Div), ET Marler Ltd v Robertson 1974 ICR 72 NIRC, De Keyser Ltd v Wilson [2001] IRLR 324 EAT, Bolch v Chipman [2004] IRLR 140 EAT, Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA

12. The submissions of the parties

13. There were no written submissions provided by the respondent instead Counsel for the respondent, Ms Martin relied on oral submissions and by reference to the preliminary hearing bundle now before me. For the claimant I took his witness statement and application into account by way of written submissions followed up with any oral submissions he wanted to make thereafter. In respect of the documents the subject of the strikeout application these are replicated in detail within the preliminary hearing bundle itself commencing a page 137 (the email of the 3rd of September 2025); the aforesaid witness statement at page 138 of the preliminary hearing bundle and the relevant emails from Ms Audsley with attachments at page 140 onwards and the relevant amendments made highlighted by the claimant at page 142 onwards.

14. The respondent's submissions

15. The respondent's submissions presented by Ms Martin were as follows. Firstly, she made reference to the respondent's solicitors replies to the application submitting that it had not been ignored, That email correspondence to the claimant and tribunal of 8th of September 2025 (copied at page 146 of the preliminary hearing bundle), confirmed that whilst instructions were being taken it was submitted that there had been no material alteration of any document for inclusion in the main bundle nor had the respondent at any stage refused the removal of the document as alleged. That email it was submitted simply confirmed the taking of instructions and that when the correct version of the document had been identified, the bundle would be updated to ensure that that was included.

16. Secondly Ms Martin submitted that the respondent gave a full explanation in an email of the 15th of September 2025 from its solicitors both to the claimant and the tribunal. This email is copied at page 151 of the pre-hearing bundle. Within that, the respondent confirms that the correct version of the letter was the one received by the claimant. That there was no dispute in that, but that a previous draft version of the letter had simply been inadvertently disclosed which could be disregarded. The letter goes on to say that it was not relevant and would not be included in any final bundle. The email further records that the letter in question was a letter accepting the claimant's resignation but noting the claimant had already been subjected to disciplinary action which would have resulted in his termination had he not resigned prior to that time. The respondent solicitors argue that no document had been falsified as alleged nor had there been any abuse of process. That the claimant's complaints remained to be tried in regards to the issues of harassment and or detriments. Ms Martin submitted therefore that this was simply an earlier draft of the actual letter sent to the claimant that had been disclosed as part of the overall documentation.
17. In light of the above, Ms Martin submitted that in terms of the question of whether or not this was a scandalous vexatious or unreasonable act on the part of the respondent there was no attempt to mislead anybody. That the second document disclosed to the claimant was no more than an old draft version of the actual document itself. Ms Martin submitted that because of that, there was no need for any stage two consideration given that a fair trial was still possible in respect of the harassment and a detriment claims set out at Pages 119 and 120 of the preliminary hearing bundle (the record of the list of issues recorded by Judge Dimbylow in his preliminary hearing orders from the hearing that took place on the 1st of July 2025). It was further argued that even if the claimant had succeeded in pursuing a claim of unfair dismissal as part of the claim (the claimant's application to include a claim of constructive unfair dismissal by way of amendment had previously been refused by Judge Dimbylow) the letters in question remained of limited use as they in principle simply acknowledged the claimant's resignation which took place on the 13th of December 2025 and the strikeout application therefore did not get near the benchmark required to consider striking out the response.
18. In response to the claimant's allegation of lack of reliability now of the respondent's evidence, Ms Martin submitted that this disclosure had been accidentally made by the respondent. That for the claimant to establish there was a falsified document made by the respondent, the time to consider this for the tribunal would be after hearing evidence about it at the final hearing. It would be then that the tribunal would have to form a view if there had been falsification, but even if that was the case, it did not tarnish in any way the remainder of the evidence concerning the matters to be determined because it related to one witness only. That the application should therefore be dismissed.
19. **The claimants submission in reply.**
20. The claimant in response commented only briefly. That so far as he was concerned the respondent's email letter at page 147 of the bundle paragraph 2 in which it argues that no document had been "materially

altered” for inclusion in the bundle was simply not correct. That it made a significant difference to the case and that the document having been now disclosed in duplicate should remain in duplicate in its two different versions. The claimant therefore stood by the matter set out by way of submissions in his written witness statement.

21. **The conclusions**

22. I have reached the following conclusions concerning the application having taken into account the documentation and bundle that I have been referred to at this preliminary hearing; the relevant law and case law that I have cited above in this my judgement and the submissions that I have heard from the parties and referred to above. I am grateful to both parties for their assistance in this matter.

23. In regard to the striking out of a claim or response and in accordance with **rule 38 (1)**, the claimant has to establish that the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious.

24. For the conduct of a case by a party (in this case the respondent), to be scandalous the case of **Bennett v Southwark London Borough Council** clearly establishes that the word “scandalous” is not to be given its colloquial meaning of signifying something that is shocking. Rather it is whether or not there has been a misuse of the legal process amounting to the vilification of others or gratuitously insulting the court or tribunal during the process of the hearing. For it to be vexatious in this case, the claimant would have to establish that the response was one that was not pursued with the expectation of success, but rather to harass the other side or to demonstrate it was done out of some improper motive. This was established in the case of **ET Marler Limited v Robertson** and referred to again in **Attorney General V Barker** where Lord Chief justice Bingham recorded that the hallmark of the vexatious proceeding is whether it has a little or no basis in law or at least no discernible basis. That whatever the intention of the proceeding 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. That this involves an abuse of process of the court meaning 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.

25. In considering the guidance in respect of the issue of scandalous or vexatious conduct, I am satisfied and concur with Ms Martin that there was no evidence that by submitting a different copy of the email letter to that which was actually received by the claimant within the final hearing bundle in no way reached the levels of scandalous or vexatious conduct on the part of the respondent. There is an ongoing duty in any event on parties to disclose documentation relevant to the issues in question to the other party whether or not it assists that party’s case. Whether or not it was intended by the respondent to disclose what they described as being a draft email letter to the claimant, nevertheless it was so disclosed and therefore is in itself in accordance with that ongoing duty. Nor am I satisfied that the manner in which the respondent responded to the claimant’s challenge to this disclosure and the explanations given for its

disclosure, or the manner in which it suggested it be dealt with amounted to either scandalous or vexatious conduct. I therefore turn next to the final ground that could be considered for strikeout i.e. whether the conduct of the respondent in making this disclosure in the manner which it did and responded to the claimant's challenge to that was unreasonable and could render a fair trial no longer possible.

26. The case of **Bolch v Chipman** sets out more specifically the steps that a tribunal should consider and take when deciding whether or not to make a striking out order. Firstly, the tribunal must find and conclude that a party or his or her representative has behaved scandalously unreasonably or vexatiously when conducting the proceedings. I have already determined that there was no evidence of scandalous or vexatious behaviour, on the part of the respondent. Secondly when such a determination has been made, the tribunal is to consider whether a fair trial is still possible, because save in exceptional circumstances, a striking out order is not regarded simply as a punishment if a fair trial is still possible and the case should be permitted to proceed. Thirdly, even if it is no longer possible to achieve a fair trial the tribunal should consider the appropriate remedy in the circumstances. For instance, that it may be more appropriate to impose a lesser penalty by making for example a costs or preparation order against the party concerned
27. The case of **De keyser v Wilson** makes it abundantly clear that when considering whether a claim or response should be struck out on the grounds of unreasonable or scandalous behaviour, the tribunal must consider whether a fair trial is still possible. Whilst that case determined that such conduct as the deliberate non-compliance of a tribunal order could lead to the question of a striking out of a claim or response. In ordinary circumstances neither a claim nor a defence should be struck out on the basis of conduct unless the tribunal concludes that a fair trial is no longer possible.
28. **Blockbuster Entertainment v James** Court of Appeal. acknowledged that whilst in that case the claimant had been "difficult querulous and uncooperative", it also noted that courts and tribunals must be open to the difficult as well as the compliant so long as they do not conduct their cases, unreasonably. That in considering whether a case has been conducted unreasonably a tribunal should bear in mind that the time to deal with persistent or deliberate failure to comply with rules or orders is when they have reached the point of no return. More particularly the case went onto record that for it to be unreasonable conduct it must be a deliberate or persistent disregard of required steps that has made a fair trial no longer possible.
29. In this case the application concerns the disclosure of one additional document different in content to the one actually sent to the claimant. The claimant argues that by submitting two versions of the same document that this undermines the position of the respondent and makes a fair trial now impossible for him on the basis that the respondent's evidence as a whole is unreliable. There is no doubt that the claimant received what the respondent intended him to receive by way of correspondence at the relevant time. The respondent argues that the other email letter concerning the same subject was in itself only a draft and was never sent

to the claimant. The author of the letter in question in both instances is Ms Audsley. The claimant maintains that this means the respondent evidence as a whole is unreliable but there is no other evidence that I have been taken to that I could make such a determination upon. The question in regard to the remaining ground under rule 38(1) is whether the disclosure of one amended document amounts to unreasonable conduct taken with the manner in which the respondent refused to deal with it subsequently such that it should face the striking out of its response.

30. I am not satisfied on the evidence before me today and taking into account the decided case law guidance referred to above, that there was a deliberate or persistent disregard of required steps amounting to unreasonable conduct by the respondent or that it would in any event make a fair trial impossible in relation to the matters currently before the tribunal either as to its disclosure or the respondent's response to that disclosure when challenged by the claimant. As I indicated to the parties the two versions of the email letter in question having now been disclosed, they should as a matter of course remain in the bundle (and be open to scrutiny by the tribunal panel and to challenge by the claimant as the tribunal considers appropriate). I therefore conclude that there is no basis upon which the respondent's response should be struck out and duly dismiss the claimant's application in that regard.
31. I announced my decision to the parties in accordance with **rule 60(3) of the Employment Tribunal Procedure Rules 2024** without giving oral reasons so that they were aware of the decision that I had made as this critically affected case management that then followed. This judgement with reasons therefore, is now given in accordance with the aforesaid rule and in order that the parties can understand the basis upon which I have reached my determination. The case has now been listed for final hearing in accordance with my case management directions and orders which has been promulgated to the parties in a separate tribunal document. In regard to the application for disclosure made by the claimant and as listed by Judge Bansal in the notice of hearing, the claimant confirmed there was no specific disclosure he was seeking and I have therefore made no orders in that regard. There were no other applications remaining outstanding

Approved by:

Employment Judge Swann

Date 17/09/2026