EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102964/2022 Preliminary Hearing at Edinburgh on 25 October 2022

Employment Judge: M A Macleod

Michelle Donnelly	Claimant Not Present and Not Represented
Build a Rocket Boy Games Limited	Respondent Represented by Mr B Doherty Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **Judgment of the Employment Tribunal** is **that:**

1. The claimant's application for strike out of the response is refused; **and**
2. The respondent's application for strike out of the claimant's claim is granted, and the claim is therefore struck out in its entirety.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 30 May 2022 in which she complained that she had been unfairly and wrongfully dismissed, discriminated against on the grounds of disability, and unlawfully deprived of holiday pay and other payments.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A Preliminary Hearing took place before the sitting Employment Judge on 4 August 2022 at which the respondent was represented by Mr B Doherty, solicitor, and the claimant did not attend nor was represented. In the Note following that Preliminary Hearing, the Tribunal determined that an Open Preliminary Hearing should take place in person in order to determine 2 applications, namely the claimant's application for strike out of the respondent's response, and the respondent's application for strike out of the claim.

4. That Open Preliminary Hearing was listed to take place at 10am on 25 October 2022 in the Employment Tribunal Edinburgh. Mr Doherty attended and appeared for the respondent. The claimant did not attend, nor was she represented.

5. When the clerk advised me at 9.55am that neither the claimant nor her representative was in attendance, I instructed that she should contact the claimant's representative by means of the mobile telephone number provided by her in correspondence to the Tribunal. She did so, but received no reply. She informed me that she left a voicemail message, but no contact was made in response.

6. Mr Doherty advised that he had been in touch with the claimant's representative since the fixing of this Hearing, in order to try to agree the terms of a Joint Bundle of Documents, but received no reply; and that he had then sent the Bundle of Documents, duly indexed and paginated, with authorities, but again had received no reply.

7. The last email he had received in this case from the claimant or her representative was dated 23 September 2022.

8. in all of the circumstances, there having been no indication that the claimant or her representative was unable to attend the Hearing, nor any

application to postpone the Hearing, I considered that it was appropriate and consistent with the overriding objective to proceed with this Hearing.

9. Mr Doherty produced a Bundle of Documents which essentially included the pleadings, the applications to the Tribunal and correspondence which he considered to be relevant to his and the claimant's applications.

10. I directed that, notwithstanding that the claimant had not attended at the Hearing nor sent a representative, Mr Doherty should address the Tribunal on both applications.

11. It is appropriate to set out the claimant's application first, together with Mr Doherty's submission and then the Tribunal's decision; and then the respondent's application, Mr Doherty's submission, and again the Tribunal's decision.

Claimant's Application and Respondent's Submission

12. It is a feature of this case that correspondence sent to the Tribunal on behalf of the claimant has been in the name of both the claimant herself and her representative, Carol McMillan. The application for strike out of the respondent's claim, which was sent to the Tribunal on 30 June 2022 (51ff), was sent in the name of the claimant.

13. I noted in the Note following the previous Preliminary Hearing that there was an oddity about that email, in that the claimant referred to the claim as "Dawson v Build a Rocket Boy Limited". I simply recorded that I understood that to be a misprint, since the claimant's name in this case is Michelle Donnelly. There has been no explanation from the claimant nor her representative about that anomaly.

14. In any event, the application by the claimant - and as noted before, it was the claimant who wrote the email of 30 June 2022, and set out her criticisms of Mr Doherty from which the following phrases emerge:

- *"/ will not tolerate this continued barrage of abuse and harassment from Mr Doherty, he has no right to interrogate me or*

my support worker in this manner and / require this formally addressed and I would now also ask that the Judge considers finding in my favour without a hearing, given the deliberate attempt by Mr Doherty to interfere with the administration of Justice and prevent me from exercising my legal right to a fair and lawful hearing…"

- *"This is a formal strike out request to remove Mr Doherty, he is fully aware his clients case has no reasonable chance of success as its based on dishonesty which can easily be evidenced, his conduct has been continually intrusive and his questioning of my representative have been harassing and offensive..."*
- *'7 require Mr Doherty removed to allow my case to proceed in a lawful manner and without any further delay or any further prejudices against me..."*

15. The claimant set out 10 points which she asserted amounted to conduct justifying strike out of the respondent's response. Although she made reference to having Mr Doherty removed from the process, she appeared, through her representative, to accept in later correspondence that that was not a matter for the Tribunal. However, she did assert that the respondent's case had no reasonable prospect of success, and as a result, I interpreted her email of 30 June 2022 as an application for strike out of the respondent's response.

16. She set out 10 points, which Mr Doherty sought to reply to in his submission, and which I address in turn as follows:

(1) The respondent's case has no reasonable prospect of success; in order to defend it they will require to be dishonest to cover up their wrongdoings. Mr Doherty observed that the prospects of success are not relevant to the conduct of the proceedings, but in any event it was not correct to say that the respondent has no reasonable prospect of success. The points made require to be tested in evidence. In any event, there are difficulties with the claimant's own case.

(2) The comments made by the respondent in an application for an Order from the Tribunal were a deliberate attempt to disrupt proceedings and a breach of the Data Protection Act. It is understood that this referred to Mr Doherty's application for an Order to disclose the claimant's representative's address and details of the company she operated under. Mr Doherty submitted that there were potentially good reasons for knowing this information, and the Order was sought only after Ms McMillan refused to disclose the information on a voluntary basis. It is also to be noted that in the Note following the Preliminary Hearing of 4 August 2022 the Tribunal refused that application, but gave the claimant's representative the opportunity to disclose the requested information confidentially to the Tribunal, to which there has been no response.

(3) A representative in the Tribunal is not required to be a solicitor. Mr Doherty readily accepted this, but said that his application did not say that she was a solicitor, but that her email contained a waiver at its foot which referred to the Law Society of Scotland.

(4) Comments made by Mr Doherty were malicious and an abuse of the Tribunal process, and premediated (understood to mean premeditated). Mr Doherty denied that he had done anything in breach of the Tribunal process, or had said anything malicious.

(5) Breach of section 38 Criminal Justice and Licensing (Scotland) Act 2010. There is, said Mr Doherty, nothing in his application which amounts to threatening or abusive behaviour.

(6) Breach of principle *1* of the Data Protection Act. Again, Mr Doherty denied that he had done so, but even if he had, this fell outwith the jurisdiction of the Tribunal.

(7) Mr Doherty's conduct was scandalous, frivolous and vexatious. Mr Doherty denied this, and maintained that he had not said anything that would amount to "unfounded and inflammatory attacks on the integrity" of the claimant or her representative.

(8) Choice of representative. Mr Doherty argued that he had never stated that the claimant could not be represented by Ms McMillan, and in suggesting this the claimant had misrepresented his application.

(9) Breach of Equality Act 2010. Mr Doherty submitted that he had done nothing which would amount to a breach of the Act.

(10) Breach of Code of Conduct in that he disrupted the Tribunal process. Mr Doherty denied that he had acted in such a way.

17. Mr Doherty therefore argued that the claimant's application is without merit and should be refused.

Decision

18. The claimant presented an application over 6 pages which was directed at the conduct of Mr Doherty, the respondent's solicitor.

19. It is important to note that the application concerned Mr Doherty's correspondence and application to the Tribunal attempting to obtain information about Ms McMillan, including her postal address, clarification of the claimant's postal address, and details of the company under which she operated.

20. That application was refused by the Tribunal on 4 August 2022, on the basis that there is no requirement for a representative to provide that level of detailed information in the Employment Tribunals Rules of Procedure 2013.

21. However, I do not regard Mr Doherty's request, of itself, to be an unreasonable one. There may well be circumstances in which a party may require to send documents by post to a representative of another party, or to serve a document upon them at that address (for example, an award of wasted costs against a representative would require to be addressed to that representative).

22. What is striking from the correspondence is how extraordinary the claimant's reaction - and that of her representative - has been to this

request. It has generated an extremely hostile response from the claimant and her representative, and it is quite clear that the tone of the claimants application amounts to a gross overreaction to the application.

23. It is incomprehensible why a valid representative and the claimant would react in such a way.

24. In any event, the application is full of criticisms of the conduct of Mr Doherty in making the application and seeking information from the claimant and her representative.

25. Given that the claimant did not attend at this Hearing, nor was she represented, it is reasonable to conclude that she is not pursuing this application. There is no good reason given in any of the correspondence why the claimant or her representative could not attend this Hearing and make their submissions. Choosing not to attend means that, in my view, the application is not being pursued, and on that basis alone it should be refused.

26. However, in fairness to both parties, it was appropriate to consider the application and to allow Mr Doherty to make his submissions.

27. Dealing with the points made in the application, I am persuaded that there is no basis for any of the criticisms made by the claimant of Mr Doherty. A solicitor is required, professionally, to advance the interests of his client. In litigation, that may be done robustly, so long as professional conduct is maintained. There is nothing in the application which justifies the opprobrium directed at Mr Doherty by the claimant. To make an allegation of dishonesty against an experienced practising solicitor is an extremely serious matter, and since that solicitor is limited in his ability to respond to such an allegation, because his primary obligation in litigation is to act on behalf of his client rather than himself, the Tribunal must take account of, and on occasions act in protection of, the professional standing of a solicitor against whom extremely strong allegations are made without foundation.

28. There is nothing in the application which persuades me that Mr Doherty has acted dishonestly at any stage. I would observe that during the Hearing of 4 August 2022, Mr Doherty advised the Tribunal that it was his understanding that the claimant would not be proceeding with her unfair dismissal claim, but I noted that I was unable to find any reference to this. Mr Doherty subsequently confirmed in his application for strike out of the claim that he had been able to identify where this reference was made, in the fifth paragraph of Ms McMillan's email of 30 June 2022 timed at 0921 hours, when she said "The claimant is not making a case for unfair dismissal, the claim is for wrongful dismissal and discrimination which the claimant is legally entitled to claim…"(73).

29. Furthermore, the application accuses Mr Doherty of criminal conduct, an extraordinary and entirely unjustifiable allegation, which may have a deleterious effect on a practising solicitor. Making wild and unjustified allegations of this kind cannot be supported by the Tribunal.

30. I agree, in addition, that some of the allegations - for example, that Mr Doherty should not have questioned the claimant's right to be represented - misrepresent what Mr Doherty was saying. He has not suggested that the claimant does not have the right to be represented, but has proposed that he be given more information about the identity of that representative. On the face of it, as I have indicated above, there is no apparent reason why a valid representative would take such a request quite so badly.

31. Taking the application as a whole, it amounts to an excessively personal attack on the professional actions of a solicitor who is entitled to conduct litigation on behalf of his client.

32. One final point arises. The claimant has repeatedly accused Mr Doherty of having breached the Data Protection Act, but has not explained how he has done so. To ask an individual for information is not a breach of the Act. To misuse that information once it is received may well be a breach, but that is not the allegation here. It is open to an individual asked for

information to decline to provide *it* as here. The matter rests there. In any event, as Mr Doherty points out, any breach of the Data Protection Act should be referred to the Information Commissioner for Scotland, and falls outwith the jurisdiction of the Tribunal.

33. It is my conclusion that the claimant's application for strike out of the respondent's response, which is a thinly-veiled attempt to remove the respondent's solicitor from the proceedings, is wholly without merit. It is therefore refused.

Respondent's Application and Submissions

34. Mr Doherty proceeded to advance his application for strike out of the claim.

35. The original application by Mr Doherty was submitted to the Tribunal on 30 August 2022 (57).

36. Essentially, the application is one which is made under Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013, that the claimant's claim be struck out due to the way that the proceedings had been conducted had been scandalous, unreasonable or vexatious.

37. Mr Doherty submitted that the proceedings had been conducted in a manner which could be described as scandalous, or unreasonable, or vexatious, being three different definitions of conduct.

38. He dealt firstly with the conduct which he argued was scandalous. He referred to Bennett v Southwark London Borough Council 2002 ICR 881 CA and Bolch v Chipman 2004 IRLR 140 EAT.

39. Bennett establishes some principles to which Mr Doherty referred. It is not simply the manner in which the representative acts but how she conducts the proceedings on behalf of her client; what is done in a party's name is presumptively, but not irrefutably, done on his or her behalf; and "scandalous" in this context is not a synonym for "shocking", but rather means either the misuse of legal process in order to vilify others, or the

giving of gratuitous insult to the Tribunal in the course of the legal process; and where the conduct of proceedings is found to have been scandalous, the Tribunal must go on to consider whether striking out is a proportionate response.

40. Bolch requires the Tribunal to consider, if the conduct is scandalous, whether a fair trial is still possible; and even then to decide whether or not a lesser sanction may still be appropriate.

41. Mr Doherty then pointed out a number of examples of what he regarded as abusive disparaging comments about him, and insulting comments about the Tribunal.

42. So far as he himself was concerned, the examples included being accused of:

- Harassing and clear malicious behaviour, and indulging in a barrage of abuse and harassment:
- A deliberate attempt to interfere with the administration of justice;
- Being deliberately obstructive:
- Intimidating behaviour or attempts to cause fear or alarm;
- Dishonesty;
- Deliberately attempting to mislead the Judge;
- Unprofessional and highly offensive behaviour;
- Criminal offence; and
- Acting outwith his permitted professional regulations.

43. He also submitted that the claimant or her representative had been insulting towards the Tribunal, for example:

- Saying that the Tribunal needed to put some standards in place and start adhering to its own rules and the laws in place to protect the claimant;
- Accusing the Tribunal of trying to bully her;
- Suggesting that the Judge does not have an understanding of the law, how to apply it correctly;
- Suggesting that the process was a shambles, being run by incompetent judges;
- Saying that the service was not fit for purpose, and repeating the accusation that the judges were incompetent and weak;
- Telling the Tribunal that time was now up, and that the Judge was required to make a decision in favour of the claimant or refer it to an Hon Lord to review it;
- Suggesting that it was unclear why the Judges had been so appalling during the case, or whether the Judge was related or connected to someone on the other party.

44. Mr Doherty suggested that these examples illustrated frequent and repeated scandalous conduct of the proceedings by Ms McMillan and the claimant, and the claimant must have been aware of this correspondence and the numerous examples cited. He submitted that a fair trial was not possible. The claimant's representative constantly threatened to report Mr Doherty to his professional body, and told the Tribunal that the Employment Judge had been reported to the Judicial Office for Scotland.

45. He argued that it is clear that the Tribunal has at all times acted within its powers, and had been extremely patient towards the claimant and her representative. He went on to submit that his own actions had always been in compliance with the Tribunal Rules of Procedure and he had never harassed or intimidated the claimant. The blame for the lack of progress rests with Ms McMillan's conduct of the proceedings. The

claimant will not comply with any case management orders issued by the Tribunal, since neither she nor her representative has any respect for the Tribunal. A fair trial is therefore impossible in this case.

46. He pointed out that in the claimant's representative's email of 26 July 2022, she said that if the Judge were not in a position to create a safe environment for her and the claimant to engage in, "matters will not be proceeding under these circumstances and the Judges will be required to continue to be replaced until one that is competent enough to proceed the matter lawfully."

47. No matter how firm the case management might be, the claimant and her representative will not comply with it, he said.

48. Mr Doherty turned then to the submission that the claimant's representative and the claimant have acted unreasonably in the conduct of the proceedings. He referred to Blockbuster Entertainment Limited v James [2006] EWCA Civ 684 as the leading authority, which states that "two cardinal conditions for this 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."

49. He relied, under this heading, on what he described as the deliberate and persistent disregard of required procedural steps, including failing to attend at either Preliminary Hearing listed in this case, complaining persistently about Employment Judge Gall's decision to postpone the original Preliminary Hearing, failing to provide answers to the information requested in the Tribunal's Note dated 5 August 2022 and refusing to provide a telephone number to the Tribunal for use in the first Preliminary Hearing.

50. He maintained that this unreasonable behaviour rendered a fair trial impossible.

51. He then moved to submit that the claim should be struck out on the basis that the claim and its conduct were both vexatious. He referred to the

case of Marler Ltd v Robertson 1974 ICR. 72, and in particular the court stating 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 process.

52. The reason why Ms McMillan is conducting the case in this manner, he said, is to put the respondent to as much expense as possible. In the ET1, she says that if the respondent wishes to discuss settlement, they were welcome to do so, and that the sum sought is in excess of £2,500,000. Settlement is frequently mentioned in open correspondence "to make it all go away", with the threat of impending complaints to Mr Doherty's professional body with the possibility of removal from the professional register.

53. Mr Doherty then addressed the Tribunal on the alternative of a deposit order being issued in light of the fact that the claims have little reasonable prospect of success, in the event that the Tribunal does not uphold the application for strike out; and alternatively that if the Tribunal is not minded to issue either a strike out judgment or deposit orders then unless orders should be issued.

Discussion and Decision

54. Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013 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-

…(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…[1]

55. Rule 37(2) provides:

"A claim or response 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."

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

57. 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.

58. In Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

59. The court went on to say (paragraph 21): *"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact - if it is a fact - that the tribunal is ready to try the claims; or - as the case may be - that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen: but it must even so keep in mind the purpose for which it and its procedures exist."*

60. In Ashmore v British Coal Corporation **1990** ICR **485,** Stuart-Smith LJ said, *"With all respect to Stephenson LJ, I do not agree that the claim can only be struck out as being an abuse of the process if it is a sham, not*

honest or bona fide. On the contrary, I prefer the views of the other members of the court that it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances. "

61. Sedley LJ, in Bennett v Southwark LBC [2002] ICR 881, considered the question of proportionality in the context of that appeal: *"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. …"*

62. In that same case, which dealt with the conduct of proceedings by a lay representative on behalf of the claimant, Ward LJ had some trenchant observations about the performance of judicial duty:

"Judicial duty is to be performed both without fear as well as without favour. The tribunal did not act fearlessly when it capitulated to the inexcusable petulance and insolence displayed by Mr Harry [the claimant's representative]. It was wrong not to listen to Mr Harry's diatribe with phlegmatic fortitude, retiring, if necessary, to compose itself and to cool the advocate's ardour, and then calmly continuing. Instead it allowed invective to infect it with prejudice. In getting on its high horse it fell off the judgment seat. I do not deny that it is thoroughly unpleasant and uncomfortable to be accused of bias. It is, sadly, not an uncommon charge. It is, on the contrary, a worryingly increasing challenge to the court's authority at all levels. Judges, members of tribunals, magistrates, all have to rise above such a challenge because all must be confident in their ability to judge impartially. "

63. The case of Faron Fariba v Pfizer Limited & Others UKEAT/0605/10/CEA was a case in which the EAT found that an

Employment Judge was entitled to strike out claims by a claimant who had demonstrated by her disregard for Tribunal orders and the allegations made in correspondence against the respondent, their solicitors and the Tribunal that she was incapable of bringing her complaints to a fair and orderly trial.

64. In reviewing the claimant's conduct, Mr Justice Underhill noted: *"Dr Fariba said at this hearing that the Tribunal was being distracted from dealing with her employment claim. I entirely agree with that statement, but in my judgment it is Dr Fariba who has not been focussing upon the specific legal claims that she wishes to have the Tribunal determine, but has consistently sought to divert attention from them by raising peripheral issues and making extensive and excessive allegations. "*

65. At a later stage in the judgment, Mr Justice Underhill said: *"This is not... a case of the (not uncommon) kind where a litigant in person fails to meet deadlines and/or behaves unreasonably or offensively but is nevertheless doing his or misguided best to comply with the directions set by the tribunal in order to get to trial. Instead, the scatter of allegations of misconduct, the applications for a stay, the pursuit of other proceedings, the threats of resort to criminal or regulatory sanctions, clearly indicated that the Appellant's focus was entirely elsewhere and that if the case remained live she would, if I may use my own language, continue to thrash around indefinitely. That is why, and the sense in which, the Judge concluded that a fair trial was impossible. "*

66. The application made by the respondent is that the claimant's representative's conduct, and to some extent the claimant's conduct, of these proceedings has been scandalous, vexatious and unreasonable.

67. Mr Doherty took the approach of separating out the various definitions of these terms and applying them to the conduct referred to. I considered this to be a helpful approach. The drafters of the Rules of Procedure must be taken to have used these different words advisedly, understanding them to have different meanings.

68. Accordingly, I address Mr Doherty's submission in the way in which he presented it.

69. Prior to doing so, it is useful to clarify one matter. Running through the claimant's and claimant's representative's correspondence is the suggestion that the Employment Judge is familiar with the respondent or their agent, and thus has conducted the proceedings in such a way as to favour them. I have never met Mr Doherty either personally or professionally, other than on the very few occasions when he has appeared before me in the Employment Tribunal over a period of 10 years. He confirmed this to be the case when I raised this with him at the Hearing. There is no connection whatsoever between me and the respondent or their representatives.

70. The first issue before me, then, is whether the claimant's representative has conducted the proceedings in such a way as to be scandalous.

71. Scandalous conduct includes either the misuse of legal process in order to vilify others, or the giving of gratuitous insult to the Tribunal in the course of the legal process.

72. The claimant's representative Ms McMillan has been responsible for the majority of the correspondence with Mr Doherty and the Tribunal, but the claimant herself has entered the fray by writing a number of emails, including the email of 30 June 2022 in which the application for strike out of the respondent's response is made.

73. I consider that the claimant and the claimant's representative have been clearly acting together, and consistently with each other, throughout the proceedings. The tone and language used by each is remarkably similar. If one were not informed that they are two different people, it would be possible to believe that the emails were written by the same person. As a result, I consider it to be a safe presumption that the claimant's representative, when behaving in the allegedly scandalous manner of which she is accused by Mr Doherty, is plainly working closely with the

claimant and acting on the claimants instructions and her behalf, because she uses the same tone and language as the claimant does.

74. I am fortified in that view by the email of Ms McMillan sent to Mr Doherty on 8 June 2022 (61), in which she confirmed that "I represent the claimant on behalf of several legal advisers from different firms whom she has engaged, as I'm sure you appreciate, Advocates and QC's and Senior Solicitors are in court most days so I will deal with early negotiations to ensure matters are not held up, I have full authority to discuss matters on the claimants behalf and full access to the claimant and her legal representatives who will receive any communications we have .."

75. In general, the tone and language used in the correspondence is extreme. Repeated accusations of wrongdoing against Mr Doherty are made, based on the claimant's representative's extraordinarily strong reaction to his questions about her identity and address. I have already found that those accusations have been made without justification.

76. What Mr Doherty proposes is that the Tribunal finds that in conducting the proceedings in this matter, the claimant's representative has behaved in such a way as to distract attention from the weakness of the claim, and to persuade the respondent, in an illegitimate way, to settle the claim at a level far above its true value.

77. In the application for strike out, which bears to have been written by the claimant herself (51ff), she said she found Mr Doherty's behaviour "offensive and harassing and unacceptable", when he sought further information about her representative; and that he was guilty of "clear malicious behaviour" and "an attempt to discredit me and have the case thrown out so his client does not have to face justice or indeed have the misconduct heard in the public domain", when he repeated his questions about her representative after she had provided information to him about this.

78. She went on, at 52, to state that she would not tolerate this continued "barrage of abuse and harassment from Mr Doherty, he has no right to

interrogate me or my support worker in this matter and I require this formally addressed and I would now also ask that the Judge considers finding in my favour without a hearing given the deliberate attempt by Mr Doherty to interfere with the administration of justice and prevent me from exercising my legal right to a fair and lawful hearing..."

79. I observe in passing that the reference to the claimant's support worker, when apparently referring to her representative, is a curious one, unexplained elsewhere. It may simply be a description of her representative and so no inference is drawn from it.

80. The claimant accused Mr Doherty of breaching the standards of engagement set out by the Law Society of Scotland (52). She continued (53) to accuse him of "a clear and deliberate attempt to maliciously disrupt the proceedings, in law that is known as deliberately obstructing the just disposal." She suggested that he was failing to comply with the Employment Tribunals Rules of Procedure, and that he was guilty of misuse of data in breach of the Data Protection Act and the UK GDPR Regulations.

81. She suggested, again, that he was guilty of an abuse of process, by making malicious comments; and that his conduct went so far as to be in breach of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, that is, amounting to behaviour such as to cause fear and alarm, a criminal offence. She also accused him of professional misconduct (54).

82. On 10 June 2022, Ms McMillan wrote to the Tribunal to complain about Mr Doherty's conduct, saying that he had been "deliberately obtrusive", and repeated that the claimant was feeling harassed and distressed by his behaviour. She also said that the claimant was feeling concerned about her own safety in using the service (presumably the Tribunal service).

83. On 30 June 2022, the same day upon which the application to strike out was sent by the claimant herself (from the same email account as Ms McMillan), Ms McMillan emailed the Tribunal (73) to make a number

of comments, including "As a result of this now being the third time, first when the initial form was issued as attached, his conduct in relation to annual leave and now this, on behalf of the client we wish to strike out Mr Dohertys involvement further in this matter on the grounds his behaviour vexious (sic) and malicious and it's a deliberate attempt to sway the court from allowing the claimant the justice she deserves and it is a deliberate attempt to interfere with the administration of justice being delivered." She went on to ask the Tribunal to remove Mr Doherty from the process (74)

84. On that day another email was sent, some 4 hours later at 1.24pm, again by Ms McMillan, in which she again asked for the response by Mr Doherty to be struck out, on the basis that it was understood that the Tribunal could not remove him from the process, and said that this would -form the basis of a complaint to the Scottish Legal Complaints Commission to investigate misconduct

85. It is worth noting that Mr Doherty submitted in this Hearing that while the claimant's representative has regularly threatened to report him to the Law Society of Scotland, the Scottish Legal Complaints Commission and the Information Commissioner's Office, no such complaints have ever been submitted, so far as he is aware.

86. Similar complaints were made in Ms McMillan's email of 26 July 2022 (91) and of 4 August 2022 (98).

87. She accused Mr Doherty of dishonesty again in her email of 25 August 2022 (102), following the Tribunal's Note of the Preliminary Hearing of 4 August 2022. She said that "It is also concerning to have read that Mr Doherty made comment that aspects of the claim were not proceeding, that was yet again another attempt by him to dishonestly attempt to stop his client facing justice for their misconduct. This statement is not true and he should not have said it and its clear his misconduct and behaviour issues are going to continue and unfortunately the claimant has no confidence in the Judge to be able to deal with that properly."

88. That was a reference to Mr Doherty's assertion in that PH that the claimant had confirmed that she was not proceeding with an unfair dismissal claim, which I had noted that I was unable to trace in the correspondence. In fact that was a statement which appeared in the email of 30 June 2022 (73) where Ms McMillan plainly states "The claimant is not making a case for unfair dismissal..."

89. The reality of that exchange, to which I shall return, is that Mr Doherty was not dishonest, whereas Ms McMillan clearly was.

90. On 6 September 2022 (105ff), Ms McMillan continued her attacks on Mr Doherty, asserting that her views of his conduct were supported by an unnamed QC. In the midst of her criticisms, she repeated her proposal that settlement should take place in order to "make it go away", and states that "Mr Doherty has no option but to accept whether he likes it or not, the claimant has the right to now receive a decision and award and to be fully compensated for the failings in this case."

91. She 'went on: "His options in this matter are make an offer to the claimant to make it all go away, or accept his behaviour has resulted in serious misconduct allegations that may result in prosecution for himself and removal from the register to practice (sic)."

92. In relation to the claimant's representative's conduct towards Mr Doherty in these proceedings, then, it is important, in my view, to draw a distinction between unpleasant and scandalous conduct.

93. Many claimants who represent themselves, or representatives who are not bound by the professional regulations of the Law Society of Scotland, express themselves in strong and sometimes unpleasant ways, in an attempt to press their case or persuade either the Tribunal to find in their favour or the respondent to concede the point and reach a financial settlement. The job of a solicitor in such circumstances may simply be to tolerate it, and respond in as professional a manner as possible.

94. What distinguishes the conduct of Ms McMillan and the claimant in this case is not just unpleasantness - and there is plenty of that, and arrogance too - but the persistent and baseless complaints to the Tribunal about the professional conduct of Mr Doherty, and perhaps in particular the regular allegations that he has been dishonest and has attempted to interfere with the course of justice.

95. Mr Doherty explained in this Hearing that he takes such allegations very seriously, and finds them extremely upsetting, on the basis that he regards his professional integrity as being of great importance.

96. There is at least one example, set out above, in which the claimant's representative accused Mr Doherty of dishonesty, whereas the reality reveals that it was she who was dishonest, and demonstrably so.

97. There is plainly a public interest in allowing parties to proceed to a Hearing on the Merits of their claim, particularly where that claim includes allegations of discrimination of any sort. However, this does not give licence to a party to continue to make scurrilous allegations of impropriety and dishonesty against the other party's representative with complete impunity. In this case, I consider that the interests of justice and of allowing legal representatives to do their work without suffering abuse outweighs the public interest in bringing her claims to a hearing.

98. In my judgment, the conduct of Ms McMillan, and by extension the claimant, acting together, has been scandalous, on the basis that she and they have repeatedly misused the Tribunal process for the purpose of vilifying Mr Doherty, entirely without foundation.

99. Her language is vivid and intemperate, and her reaction to what must be seen as a legitimate attempt to discover more information about the identity of the claimant's representative was excessive.

100. There is no evidence, in my view, that Mr Doherty has conducted himself other than professionally in this case; indeed, in the face of the strongest provocation, he has behaved with restraint and courtesy.

101. I turn then to consider whether the claimant's conduct towards the Tribunal has been scandalous, either directly or through her representative.

102. Prior to the Preliminary Hearing of 4 August 2022, Ms McMillan wrote to the Tribunal on a number of occasions, purporting to inform the Tribunal that the Hearing was postponed or cancelled, on the basis that it did not align with her wishes or view of the proceedings. Despite being advised that it was not for her to make any decisions as to whether a Hearing would proceed, she persisted in this behaviour.

103. I have identified a number of instances whereby the claimant or her representative have directed gratuitous insults towards the Tribunal, or have failed to comply with the Tribunal's requirements, and set them out here:

- At paragraph 23 to 25 of the Note following the previous PH (49), the Tribunal required that the claimant's postal address should be provided within 14 days, and that Ms McMillan should provide her details to the Tribunal confidentially within the same timescale. No response of any sort was received within that timescale, nor later. The Tribunal's Note was simply ignored.

- In her email of 26 July 2022 (91), Ms McMillan stated that Mr Doherty having been guilty of a serious data breach, "the Judge will have to guarantee no abuse or misuse of any data issued in evidence or will be held libel (sic) for any misuse of it…Should the Judge have an issue with this then I'd suggest they refer it to the Hon Lord Sir Keith Lindblom to address as quite frankly, nobody has the desire to engage with Mr Doherty... this will not go unpunished so either the Judge deals with it or refer it to Sir Keith to address…the Judge has yet to address any of that and is required to do so before I as the representative will accept any further part in this matter." In writing in these terms, Ms McMillan

appears to consider it acceptable to issue ultimatums and threats to the Tribunal.

- Further in that email (92), Ms McMillan says: "But let me be very clear to all, this matter will not be proceeding under these failures of Judges to do their job correctly nor will it be accepted that you continue to ignore the claimant's legal rights or make the rules up as you go alone, this process to date has been a complete farce and the Judge is required to get some order and control over the process and discontinue allowing the respondents to control." In my judgment, such language is simply insulting and contemptuous of the Tribunal process and of the capacity of the Tribunal to deal with the matter appropriately and fairly.

- She also says: "So either deal with all of the above before the 4th August or you postpone the matter until you have address the points outstanding, I'd also suggest the Judge stops coming back with defensive responses, they are neither productive nor helpful nor are they proceeding the matter, ignoring the points raised as you have done to date is not an option, address them or refer them to Sir Keith."

- Finally she suggests that the Judge could contact her directly if they required further information, and that "matters will not be proceeding under these circumstances and the Judges will be required to continue to be replaced until one that is competent enough to proceed the matter lawfully." Such a suggestion - that she will not accept the decision or direction of any Judge until she is happy with that decision or direction - is a clear demonstration of utter contempt for the independence of the Employment Judge hearing the case, and an indication that she will simply not accept the authority of the Tribunal unless it aligns with her or her client's wishes.

- In an email of 6 September 2022, (109ff), Ms McMillan states (111) "It is unclear as to why the service from the Judges has been so appalling poor throughout this case or whether the judge is related or connected to someone on the other party but the behaviours and breaches to process the Judges have allowed to occur would not be allowed to occur in any of the higher courts and its clear the same standards are not being applied and as a result you are breaching the claimant's legal rights and failing to administer public justice as you are lawfully charged to do for members of the public whom engage in your service." Later she says (114) "I trust all that is clear, the claimant and her legal team have now had enough of this polava (sic) of a service, but be assured you will provide the service to the claimant as you are legally required to do and award her damages for her claim and there will clearly be a requirement for significant compensation for what has been allowed to occur her as the failure of this service to administer public justice would also constitute an offence."

104. Taking all of these matters together, it is clear, in my judgment, that the claimant's representative, acting closely and in concert with the claimant, has demonstrated a clear and contumelious disregard for the authority of the Tribunal. She appears to believe that it is acceptable to issue directions to the Tribunal according to her own whim, while declining to comply with the reasonable requirements of the Tribunal issued to her.

105. Ms McMillan has been wildly critical of the Tribunal, and the Employment Judges, in their handling of this case, and has made it perfectly clear that she will only be prepared to engage in the process on her own terms. She has not attended either of the Preliminary Hearings set down in this case, one of which was for the express purpose of allowing her to advance her application for strike out of the respondent's response. That unwillingness to engage with the process is very significant, but no good reason has been provided by her for her non-attendance.

106. She has, in my judgment, been gratuitously insulting towards the Tribunal and the Employment Judges charged with managing this case, it should be noted that Employment Judges require to be thick-skinned, and not to be overly sensitive about comments which are made in their direction by parties or representatives engaged in the heat of battle, especially when those parties or representatives are not legally represented or qualified. Ms McMillan regularly refers to her "legal team" including a number of senior counsel and senior solicitors, though no evidence has ever been provided as to the identity of these individuals; nonetheless, white she is apparently content to quote from these unknown sources about the actions of the Tribunal or of the respondent's solicitor, she appears to have absorbed or received no advice from them as to how to conduct herself before the Tribunal.

107. The persistent making of baseless allegations, including of some form of nepotism influencing the Tribunal, amounts to scandalous conduct, in my judgment.

108. Perhaps of greater significance, however, is that the conduct of the claimant's representative and of the claimant in these proceedings has clearly demonstrated that until they receive what they perceive to be satisfaction, something judged entirely on their own terms, they will not comply with the requirements of the Tribunal, attend Hearings or conduct themselves in a manner consistent with Rule 2 of the Employment Tribunals Rules of Procedure 2013, where parties are expected to cooperate with each other and with the Tribunal in conducting their proceedings.

109. I am therefore persuaded that the conduct of these proceedings by the claimant's representative, and thereby the claimant, has been scandalous, to the extent that the defiance and disregard exhibited towards the Tribunal and the respondent makes clear that a fair trial is no longer possible in this case. There is nothing to suggest that the claimant or her representative will comply with any further directions of the Tribunal, given that they have not done so to date; and ample evidence to

indicate that they will continue to correspond in entirely unsuitable and reprehensible terms both to the respondent and to the Tribunal, taking no account of the authority of the Tribunal to impose directions or manage the proceedings.

110. Accordingly, I am driven to the conclusion that in this case, the circumstances are so extreme and so exceptional that it is in the interests of justice to strike the claimant's claim out in its entirety.

111. I should add that I accept entirely the respondent's submissions that the conduct of the claimant and her representative has also amounted to unreasonable and vexatious conduct. The claimant's representative persistently refers to an extraordinarily high sum of compensation sought, for an extremely short term of employment, and it is impossible not to reach the conclusion that the blizzard of abusive and accusatory correspondence directed at the respondent and at the Tribunal is designed to achieve a financial outcome for which these whole proceedings have been constructed.

112. One final point remains. The claimant's representative's conduct towards the respondent and the Tribunal has been unacceptable. What should not be forgotten is that the Tribunal employs clerks to administer the files, who are responsible for the direct communications with the claimant and her representative. For them this has been a trying matter as well. While this does not form part of the reasons for striking the claim out, it is a salutary reminder that the effects of this type of conduct are not just upon those directly in the firing line.

Employment Judge: **M Macleod**
Date of Judgment: **31 October 2022**
Entered in register: **31 October 2022**
and copied to parties

Date sent to parties