Addressing time limits at preliminary hearings: Mesuria v Eurofins Forensics Services Ltd [2025] EAT 103

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Summary

1. HHJ Tayler provides guidance to tribunals as to what is required when listing a preliminary hearing to deal with time limits, and emphasises the importance of tribunals properly considering whether the matter is to be considered substantively as a preliminary issue, or whether the claim should be struck out on the basis that it does not have reasonable prospects of success, given the different legal tests which are applicable.

The Facts

2. The Claimant was employed as a senior document examiner. She was disabled by reason of multiple sclerosis and blepharospasm, a visual impairment. In September 2021 she issued a claim alleging disability discrimination. She then issued a further disability discrimination claim in May 2022. A case management hearing was listed in December 2022, at which it was directed that there should be a further preliminary hearing on time limits. The order provided that:

> *"The matter is listed for a one day open preliminary hearing on 3 March 2023 to determine the matters set down in the Notice of Hearing relating to that hearing. This includes whether some or all of the claimant's claims are out of time, or whether she has any reasonable prospect of success at a final hearing of establishing that the claims are brought in time. This may involve consideration of whether the claimant has prospects of establishing that there has been discriminatory conduct extending over a period, or the Tribunal granting a just and equitable extension of time to allow some or all of the claims to be brought late."*

3. This direction was thus that *either* the time issue would be substantively determined, *or* that there would be consideration as to whether the claims should be struck out on the basis of time issues. An order was made for the claimant to provide a statement, but not for any witness evidence from the respondent.

4. The purpose of the hearing was recorded differently in the Notice of Hearing, which stated that:
   "At the hearing, an Employment Judge will decide if any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred."

5. This added in the question of a deposit order being made. The question of strike out was limited to time issues only, and the issue of conduct extending over a period and an extension of time could be considered as a component of the preliminary issue and/or strike out.

6. The preliminary hearing took place on 3 March 2023. At that hearing the claimant (who was represented by her sister) indicated that she was only prepared to deal with the time limit issue. However, EJ Wright appeared to proceed on the basis that strike out on the merits was also to be considered. There was no discussion at the outset of the hearing as to the legal tests that were being considered, or any difference in the structure of the hearing depending on how the time point was to be considered.

The ET decision

7. The tribunal gave a very brief, one-paragraph summary of the law on time limits, with no direction as to the law on strike out or conduct extending over a period. The overall conclusion was that "*the first claim was presented out of time. The tribunal does not have*

jurisdiction to consider it. The second claim is struck out as it has no reasonable prospects of success".

8. There were six separate claims for direct discrimination that were being considered, as well as one claim of indirect discrimination, one claim of discrimination arising from disability and one claim of victimisation. The judge went through them one by one. For three of the direct discrimination claims, the merits of the claims were considered but it was not clear if the merits were being considered as part of the 'just and equitable' extension question, or more generally. None of the allegations were found to be continuing acts, but there was no analysis as to why this was. For example, there was no analysis as to why certain acts were not considered to form part of conduct extending over a period together with other conduct that was in time. In respect of the victimisation claim, only the merits were considered, with no reference to time limits, despite the fact that this was not one of the issues to be considered in the CMO. There were also claims for holiday pay and unauthorised deduction from wages, which were dismissed on the merits alone.

9. The Claimant appealed, arguing *inter alia*, that the proceedings had been conducted in such a way as to deprive the claimant of a fair hearing, in particular, that the judge gave no introduction as to how the hearing was to be structured.

The EAT decision

10. HHJ Tayler first went through the relevant law in respect of preliminary hearings and time limit issues. He identified that, when dealing with a time limit issue at a preliminary hearing, a tribunal has two options:

    (i) Under Rule 53 of the 2013 ET Rules (now Rule 52 of the 2024 Rules) a tribunal has the power to determine a preliminary issue, which would entail substantively determining an issue in the case;
    (ii) Under Rule 37 of the 2013 Rules (now Rule 38 under the 2024 Rules), a tribunal has the power to strike out all or part of a claim on the basis that it has "no reasonable prospect of success".

11. The distinction between these two powers was considered by HHJ Auerbach in Caterham School Ltd v Rose UKEAT/0149/19/RN, in which it was explained that if a hearing was listed to determine strike out on the basis of time limits, and the claim was not struck out,

the point is not decided in the claimant's favour. Rather, the claimant will 'live to fight another day' and the time limit issue will be determined substantively at the final hearing. However, if a hearing was listed to consider the time issue as a preliminary issue, the time issue would be definitively determined. The latter option would require the preparation and presentation of evidence, with findings of fact being made [para 60]. However when considering whether or not to strike out a claim, a tribunal was simply determining whether or not there was a prima facie case that a claim was in time, which could be done by considering whether "*even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or on the merits), that will bring that complaint to an end."* HHJ Auerbach stated that in such circumstances, no evidence or findings of fact would be required.

12. HHJ Tayler then considered the case of E v X et al UKEAT/0079/20/RN, in which Ellenbogen J concurred with HHJ Auerbach in Caterham, bar in one respect, namely the issue as to whether or not evidence was required when the tribunal was considering strike out, with it being held that (para 47):

    "*In my judgment, whilst, in any given case, it may be possible and appropriate to determine a strike-out application by reference to the pleaded case alone, it cannot be said that that approach should be adopted on every occasion. That is not to say that the tribunal is to consider the assertions made by the claimant uncritically, or to disregard any implausible aspects of the claimant's case, taken at its highest. Save, possibly, to highlight any factual basis for asserted implausibility (which is not synonymous with the mere running of an alternative case), one would not expect evidence to be called by a respondent in relation to the existence, or otherwise, of a prima facie case"*.

13. HHJ Tayler concluded that the overarching ground of appeal, namely that there was no fair hearing, was made out. He found that:

    "It is clear from the Employment Judge's notes of the hearing that the Employment Judge did not clarify at the outset whether she was going to consider the time point as a matter of substance or strike out or, possibly both. This was important as significantly different tests apply. If the time point was to be considered in substance or alternatively for strike out at the same time, there had to be some explanation of how that would be managed. It was unclear whether findings of fact were to be made. The Employment Judge did not explain that she was considering the underlying merits of the complaints for possible strike

out despite the fact that the strike out issue identified in the case management order and notice of hearing was limited to the time point."

Commentary

14. Despite preliminary hearings on time issues being a regular occurrence in the employment tribunal, the types of issues that were thrown up in the case (while common) need addressing at an early stage. It is crucial that when directions are being made for a preliminary hearing on time limits that the parties put their mind to whether they are requesting strike out under Rule 38, or a preliminary determination under Rule 52, as that will fundamentally alter both how the hearing is prepared for and how it is conducted. In particular, this will be relevant to the documents which will be required and whether or not the parties need to provide statements. It is particularly important in cases which involve litigants in person, as they need to be clear as to what it is that they need to prepare for, as they will be much less likely than a legal representative to be able to adapt their arguments at the last minute. Even if the order of hearing is clear as to how the matter should proceed, it is always worthwhile clarifying this at the outset of the hearing to ensure that the judge is proceeding on the correct basis.

15. A further point to note from this case is that the judge strayed beyond the scope of what the notice of hearing had stated was to be considered at the hearing. Whilst it may be tempting from a respondent's perspective to not object to such an approach when it was clear that the judge was potentially going to make findings that were favourable to the respondent's case, this appeal clearly demonstrates the dangers of allowing this to happen. Whilst at first instance the respondent benefited in having various claims struck out that were not anticipated to be within the scope of strike out, it was a somewhat hollow victory as it led to what was no doubt an expensive appeal, and overall delay.

27 August 2025

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