Case Management Order unintentionally struck out claim

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***Mendy v Motorola Solutions UK Ltd and Others* [2022] EAT 47**

Here was a procedural muddle.

It is commonplace – as the President of the EAT observed in this appeal - for ETs, carrying out their case management functions at a private preliminary hearing, to seek to clarify the claims that are being pursued and to draw up a list of issues to be determined at the full merits hearing in order to decide those claims. In the present case, such a task came before an EJ sitting alone at a closed preliminary hearing - together with a great quantity of material including a document setting out the claimant's grounds of complaint over some 64 pages.

An ET might be forgiven for missing one of the claims made amongst the mass of paperwork thus presented - as the President also observed - and indeed this one did.

Following the closed preliminary hearing, in a case management order sent to the parties, the ET recorded that there was a reference in the claim form to indirect discrimination, but no discernible claim of indirect discrimination, and ET ordered that, *"there being no discernible claim of indirect discrimination at present"* the claimant would need to make an application to amend should he seek to pursue such an allegation.

The claimant appealed against this order and, following a hearing under rule 3(10) of the EAT Rules, he was given permission to appeal on the basis that (i) the ET was in error in considering that there was no claim of indirect discrimination within the existing grounds of claim, and (ii) the case management order amounted to a striking out of the indirect discrimination claim at a closed preliminary hearing, contrary to rule 56, and without the necessary safeguards provided by rule 37(2) having been afforded to the claimant.

What happened next was that the relevant EJ, on receiving notice of the EAT order made following the rule 3(10) hearing, reviewed the papers and concluded that a certain paragraph of the grounds of complaint, which did raise, on its face, a claim of indirect discrimination, had not been brought to his attention at the closed preliminary hearing. After requesting the parties' views, he determined to revoke the relevant part of his case management order. He reasoned that the order was intended as a case management order not a judgment, so any revocation initially fell to be considered under rule 29, but he also indicated that if the parties were to contend that the effect of the order was to strike out the claim, which was not permissible at a closed preliminary hearing, he might consider a reconsideration of the 'judgment' under rule 70.

The respondents did not object to the revocation under rule 29, but the claimant applied for a reconsideration under rule 70. The EJ refused this, however, observing that it might have been better had he not exercised his discretion and revoked the order under rule 29, but as the respondents had accepted the order should be revoked, he could not find it was in the interests of justice to reinstate a decision which was not pursued by the respondents, which the claimant objected to, and which he, the EJ, considered to be wrong.

The claimant pursued his appeal.

The President of the EAT agreed that there was on the face of the grounds of complaint a claim of indirect discrimination and although the EJ had not intended to strike it out at the closed preliminary hearing, that had been the effect of his order. This was not a case where the ET's order was recording clarification or further particularisation of the claims made by the claimant at the preliminary hearing. Rather, the ET was itself stating that it did not recognise that such a claim could be pursued on the basis of the pleaded case, the effect of which was to determine that the claimant's indirect discrimination claim could not proceed and, absent a successful application to amend, that brought any such claim in the proceedings to an end. As that amounted to a judgment, not merely a case management order, the revocation of under rule 29 could be of no effect.

The President cautioned that where, at a closed preliminary hearing, there is a need to clarify how the case is being put, an ET will, consistent with the overriding objective, seek to avoid unnecessary formality and adopt a flexible approach, but ET will need to exercise care in defining the claims before it. Just as a withdrawal of a claim cannot simply be inferred (see *Arvunescu v Quick Release (Automotive) Limited* UKEAT/1099/16), a failure to adequately particularise a claim does not mean that it is not being pursued. In such cases, it would be

open to an ET to direct that further particulars be given or, where it is considered that the claim as pleaded could have little, or no, reasonable prospect of success, to adopt the procedure laid down (under rules 39 or 37 of the ET Rules respectively) for the consideration of the making of a deposit order or for the striking out of the claim. At all stages, in undertaking its case management functions in this regard, the ET should be assisted by the parties and their representatives, consistent with their obligation to further the overriding objective. In the present case, in attempting to clarify the claims before it, the ET unhappily fell into error, which might have been rectified by the ET's exercising its power of reconsideration under rule 70 but it was not a decision that could simply be revoked under rule 29.

Comment: It is not unusual for litigants in person to bring a poorly pleaded case which is challenging to deal with such cases in ways that meet all the aims of the overriding objective. This is a case where an ET's attempt to deal with a case in a proportionate and pragmatic way had, unfortunately, the opposite effect. Litigants in person are often directed to give further particulars and, particularly in discrimination claims, they are sometimes afforded multiple chances to clarify their claims, causing expense and delay which may be out of proportion to the complexity and importance of the issues and sometimes even greater confusion. It is less usual for consideration to be given to the making of a deposit order or for the striking out of the claim. Arguably respondent representatives should be more proactive in seeking, and tribunals more responsive to considering, early preliminary hearings in public where such orders may be considered.

3 May 2022

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