EAT provides further guidance on striking out claims with no reasonable prospect of success

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HHJ Kalyany Kaul KC v (1) Ministry of Justice (2) The Lord Chancellor (3) The Lord Chief Justice [2023] EAT 41

The material facts

1. The Claimant ("C") brought claims of indirect discrimination, victimisation, failure to make reasonable adjustments, harassment, and discrimination arising from disability, in the Employment Tribunal ("ET") under section 50 of the Equality Act 2010 ("EqA"). Section 50 applies to persons holding public offices. C is a Circuit Judge[1].

2. In May 2019 she raised 2 grievances. The 1st grievance was under the Judicial Grievance Policy, which applies to complaints made by judicial office holders against other judicial office holders. C's grievance under that policy concerned the actions of 3 other Judges during the period 2016 to 2018 ("the judicial grievance"). The 2nd grievance was made under the Grievance Policy issued by the human resources directorate by the Ministry of Justice. The complaint concerned the actions of 3 members of staff employed by HMCTS ("the staff grievance").

3. Both grievances arose from events that had started in November 2015, shortly after C's appointment as a Circuit Judge. Generally put, her complaints were that she considered that the judges had failed to properly support her both during and after a trial that had commenced in November 2015 and then been re-started in January 2016; that one of the judges acted so as to victimise her by reason of previous complaints she had made against

[1] Paragraph 1 of the judgment.

court staff; and that actions by court staff had in various ways amounted to bullying, harassment and victimisation[2].

4. The judicial grievance was determined on its merits by a decision dated 7 July 2020, made by Sir Patrick Elias. He concluded that the grievance against the judges were not made out. The staff grievance was subject to 2 determinations: firstly, the CFO for HMCTS decided that the staff grievance was out of time under the applicable policies and so would not be investigated; secondly, C's appeal against that decision was determined by the CEO of HMCTS, who concluded that the original decision was a reasonable one and so did not uphold the grievance[3].

5. C commenced ET proceedings on 29 March 2020. She complained about the way in which the grievances were handled and, in the case of the staff grievance, the conclusion that it would not be determined on its merits because it was "out of time".

6. R applied to strike out C's claims pursuant to Rule 37(1)(a) of the Employment Tribunal Rules (Schedule 1 to the Employment Tribunals (Constitution and Rules of the Procedure) Regulations 2013) on the ground that C's claims had no reasonable prospect of success.

ET decision

7. R's application to strike out C's claims was partially successful. The EJ declined to strike out the complaints based on the decision not to decide the staff grievance on its merits, but he concluded that the remainder of the complaints had no reasonable prospect of success, and struck them out on that basis. The claims struck out arose from the way in which grievances had been addressed (but did not concern the substantive outcome of the grievances)[4].

Grounds of appeal

8. Put generally, C appealed the ET decision on the basis that on a proper application of Rule 37, the EJ's conclusions that the complaints struck out had no reasonable prospect of success were not conclusions properly open to him[5].

[2] Paragraph 2.
[3] Paragraph 3.
[4] Summary of judgment, paragraph 1.
[5] Paragraph 7.

9. During the course of the appeal, C advanced 3 submissions. Two were to the effect that the EJ had applied incorrect principles when dealing with some aspects of these decisions; the third was that the decisions the EJ made on matters of fact and matters of assessment were taken too soon – that decisions on such matters should have awaited the usual course of litigation, including disclosure and the final evidential hearing[6].

EAT decision

10. In dismissing C's appeal, the EAT stated variously that:

10.1 Taking a case at its highest does not require a Tribunal to speculate on a case that a claimant might have advanced, but has not advanced[7].

10.2 The power at Rule 37(1)(a) to strike out a claim on the ground it has no reasonable prospect of success is not limited to claims that cannot succeed as a matter of law: *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 at para.27. However, the authorities are equally clear that the scope for striking out a claim on the ground that there is no reasonable prospect that it will succeed on one or more critical issues of fact is limited for well-established and obvious reasons[8].

10.3 Although the authorities urge caution[9], the power to strike out a claim because on one or more critical factual issues it has no reasonable prospect of success pursuant to Rule 37(1)(a), remains: *Ahir v British Airways [2017] EWCA Civ 1392*[10].

10.4 The need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit[11].

10.5 Whether or not it is premature for a question of fact to be determined on an application under Rule 37(1)(a) is, in the first instance, a matter of evaluation for the ET. The usual position on appeal is that the EAT will only rarely interfere with an ET's assessment of fact[12].

[6] Paragraph 14.
[7] Paragraph 16.
[8] Paragraph 18
[9] Paragraph 19.
[10] Paragraph 21
[11] Paragraph 22.
[12] Paragraph 24.

10.6 In this case, the claims rested on undisputed events. The matters complained of were ordinary events that might occur in the course of any grievance process. No part of C's case explained why those events should not be taken at face value[13].

Commentary

11. In the concluding part of his judgment, Swift J accepted that the tenor of the authorities was that decisions that a claim has no reasonable prospect of success on its facts should be decisions more rare than common, as they all identify the caution Tribunals must apply when dealing with Rule 37(1)(a) applications. However, he went on to state that that submission on its own, is not sufficient: the strength attaching to it must be measured in the specifics of the case in hand[14].

12. This author's experience is that EJs continue to be very reluctant to strike out discrimination (and whistleblowing) claims prior to final hearings, however compelling the application. Instead they seem to be far more comfortable with making / likely to make Deposit orders pursuant to Rule 39 applied for in the alternative when considering the strength of such claims at early stages of litigation. However, the fact that the EAT has once again restated that striking out these types of claim is permissible provided that the authorities are correctly applied and that it will rarely interfere with such decisions, it remains to be seen whether parties will feel emboldened by this decision to make more strike out applications and / or whether EJs become easier to persuade to strike out such claims in the future.

[13] Summary, 3rd paragraph; Paragraphs 25 to 28.
[14] Paragraph 50.

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