# Interim relief and incompatibility: *Steer v Stormsure Ltd* UKEAT/0216/20/AT

By Naomi Webber
*3PB Barristers*

## Background

1. This was an interesting and unusual appeal heard on 15 December 2020, with judgment handed down by Cavanagh J very quickly on 21 December 2020 (for reasons explained below).

2. The Appellant was employed from 12 March-15 July 2020. She alleges she was subjected to sexual harassment from a fellow employee, and that her employer failed adequately to protect her from the harassment. She raised a grievance and was permitted to work from home, although was instructed to install screen shot monitoring software. On 9 July 2020, she was notified that her hours would be reduced to 60% because she had child-care responsibilities. The Appellant contends this was a dismissal or constructive dismissal, which amounted to sex discrimination and victimisation. She also claims that she was automatically unfairly dismissed for making a protected disclosure (whistleblowing).

3. On presenting her claims to the ET, the Appellant sought interim relief in relation to her whistleblowing and discrimination claims. An interim relief hearing was listed for the whistleblowing claim only. The Appellant initially applied for reconsideration, and then appealed, the decision not to list the discrimination claim for an interim relief hearing.

4. The Appellant accepts that the Equality Act 2010 makes no specific provision for interim financial relief in discrimination and victimisation cases. However, she argued in this appeal that this was a breach of EU law and/or the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998 (HRA).

5. The Appellant is supported by the EHRC. When permission to appeal to the EAT was granted, the Appellant was directed to notify the Government Legal Department ("GLD") of the appeal and gave permission for the Government to be represented or put in written submissions. The GLD did not take up this opportunity at the EAT hearing **[4]**.

## Main issues for the EAT

6. EU law **[2]**:

   (a) Whether the EU law principle of effectiveness requires that interim relief be made available in these circumstances, because otherwise a claimant will not have access to an effective remedy.

   (b) Whether the EU law principle of equivalence requires that interim relief be made available in discrimination and victimisation cases, because interim relief is available in relation to similar actions of a domestic nature (i.e., whistleblowing dismissal claims);

   (c) Whether the absence of interim relief protection for discrimination and victimisation claims is in violation of fundamental principles of EU law, including those set out in Articles 15 and 47 of the EU Charter of Fundamental Rights;

   (d) Whether the right to claim interim relief in discrimination and victimisation claims can be read into the domestic legislative framework (in relation to the principles of effectiveness and equivalence), or whether horizontal direct effect should be given to the Appellant's EU law rights, meaning she is afforded the right to claim interim relief (in relation to the Charter of Fundamental Rights).

7. ECHR **[3]**:

   (a) Whether the failure of domestic law to make provision for interim relief in discrimination and victimisation cases amounts to discrimination against women or 'other status', in breach of Article 14 of the ECHR, read together with Article 6 (right to a fair trial), Article 8 (right to respect for private life), and/or Article 1 of Protocol 1 ("A1/P1") (right not to have property interfered with);

   (b) Whether a right to claim interim relief can be read into domestic legislation under s3 HRA.

## Preliminary matter – effect of withdrawal from EU

8. Given this appeal was heard in December 2020, it was first necessary to consider two issues in relation to the UK's withdrawal from the EU. First, whether the principles of EU law relied upon were in place at the date of the appeal, the UK having formally left the EU on 31 January 2020. As EU law continued to apply in the UK during the transition period (under European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020), it was clear this was the case **[8]**. Second, whether any decision in

favour of the Appellant would have any value as precedent, once the transitional period had come to an end. Applying s4 European Union Withdrawal Act 2018 (which allows all EU law to continue to be recognised in domestic law after exit day), the judge considered that as long as the decision was handed down prior to the end of the transition period, it would be binding unless or until it was overturned on appeal or by legislation **[11-13]**.

## Decision – European Law

9. In relation to the principle of effectiveness, the Appellant relied on the delay of an award of compensation, which will often only come many months after a discriminatory dismissal. It was submitted that without the option of preserving the status quo, this fails to afford remedies which are "effective and dissuasive" **[58]**. The judge, however, considered that the current remedies (including uncapped compensation) do constitute an effective remedy, and did not accept that (even the current) delays in the tribunal system mean that claimants are being deprived of this. Furthermore, the EU law principle of effectiveness does not require member states to make provision for interim relief **[62-67]**.

10. In relation to the principle of equivalence, the Appellant relied on a claim for automatic unfair dismissal for making a protected disclosure (a whistleblowing dismissal), made under section 103A ERA, as being equivalent to all claims under the Equality Act 2010 which result in dismissal (this includes all forms of discrimination and all forms of discriminatory dismissals, not just victimisation) **[80]**. Overall, this argument failed. The judge did agree that the discriminatory dismissals and s103A whistleblowing dismissals are comparable **[92]**. However, he held that the procedural/remedies rules for discrimination/victimisation claims are not less favourable than those from automatically unfair dismissal claims under s103A, taking into account the number of advantages of Equality Act dismissal claims: such as the just and equitable extension of time, the shifting burden of proof, and compensation for injury to feelings **[110]**. Furthermore, the "no most favourable treatment Proviso" ("the Proviso") does not apply. Cavanagh J held that the EU-based claim for discrimination/victimisation is no less favourable ordinary unfair dismissal claims (which was held to be a similar action of a domestic nature) **[122-127]**.

11. In addition, even if there had been a breach of the principle of effectiveness or equivalence, it was held that the Equality Act 2010 could not be interpreted so as include a right to interim relief (a conforming interpretation). To read this into the Equality Act "would cross the boundary between interpretation and amendment, and would require this EAT to make decisions on matters that the Appeal Tribunal is not equipped to evaluate" **[140]** and

"would have major policy and practical consequences, the effects of which the EAT is not equipped to evaluate" **[150]**.

12. In relation to the Charter of Fundamental Rights, it was held that this did not assist the Appellant. Domestic law already provides a remedy for sex discrimination and that remedy satisfies the principle of effectiveness **[166]**. Furthermore, the judge had already concluded that the procedural and remedies rules for discrimination/victimisation claims are no less favourable than the rules that apply to s103A cases **[169]**.

## Decision - ECHR

13. The judge was clear that the only remedy available under the Human Rights Act 1998 was a conforming interpretation under s3 HRA, as the EAT does not have the power to make a declaration of incompatibility under s4 HRA. Furthermore, for the same reasons as under EU law, a conforming interpretation was not possible under the ECHR. Nevertheless, he did consider the arguments based on the ECHR, although not in as much detail as he might otherwise have done; particularly as the Government, although invited, had not provided submissions on the matter **[172]**.

14. The Appellant argued that the non-availability of interim relief for discrimination/victimisation claims amounts to unlawful discrimination on either sex or "other status" in breach of Article 14, when read with Article 6, Article 8, or A1/P1; the "other status" being an individual who was dismissed on discriminatory grounds compared to one that was dismissed for making a protected disclosure **[176]**.

15. It was agreed between the parties that the matter comes within the ambit of Article 6 ECHR because it relates to access to judicial remedies for the enforcement of civil rights **[179-181]**. It was also agreed that the status of being a litigant in a claim of dismissal/victimisation arising from dismissal is capable of being an "other status" under Article 14 ECHR **[184]**. The question of justification was more difficult. The judge identified the correct question to be whether there are differences between discriminatory dismissals and protected disclosure dismissals which justify the availability of interim relief for the latter but not the former. The burden is on the Respondent to demonstrate that such a measure is justified. The Government had not intervened, and the Respondent (a private company) was not in a position to advance any particular justification. As such, the judge could not consider whether the differences were justified, and in the absence of a justification, a breach of ECHR Article 14, when read with Article 6, was established **[186-**

**192]**. Nevertheless, as explained above, the EAT has no power to make a declaration of incompatibility nor could the Equality Act be interpreted so as to conform with the HRA. Therefore, the Appellant's appeal was dismissed **[193-194]**.

## Comment and permission to appeal

16. Cavanagh J noted at the outset of the judgment that it is surprising no such challenge has been brought before. The right to interim relief was first introduced by s78 Employment Protection Act 1975, at roughly the same time as the enactment of the Sex Discrimination Act 1975, and the right to claim interim relief in whistleblowing cases was introduced by Public Interest Disclosure Act 1998 **[5]**.

17. Since Cavanagh J found there to be a breach of Article 14 but could not award a remedy, he granted permission to appeal to the Court of Appeal to consider the issues and, if appropriate, grant a declaration of incompatibility **[195]**. It remains to be seen whether the Court of Appeal agrees. If so, this could ultimately lead to another tool in the armoury for claimants bringing claims for discriminatory dismissals.

11 January 2021



**Naomi Webber**

*Barrister*
*3PB*

01865 793736
naomi.webber@3pb.co.uk

3pb.co.uk