Interim relief not incompatible: *Steer v Stormsure Ltd* [2021] EWCA Civ 887

By Naomi Webber
3PB Barristers

Background

1. We reported in the January newsletter, the EAT decision in *Steer v Stormsure Ltd* UKEAT/0216/20/AT. At spectacular pace, the matter has now been heard by the Court of Appeal and judgment handed down on 11 June 2021.

2. The background and reasoning of the EAT is set out in the previous case summary, but in brief: the claimant brought a number of claims, including one for dismissal or constructive dismissal, which amounted to sex discrimination and victimisation. She also applied for interim relief for her discrimination claim. She accepted that the Equality Act 2010 makes no provision for interim relief but argued, among other things, that this was incompatible with her rights under the European Convention on Human Rights (ECHR). Specifically, she argued that the failure of domestic law to make provision for interim relief in discrimination and victimisation cases amounted 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 against interference with property); the "other status" being an individual who was dismissed on discriminatory grounds compared to one that was dismissed for making a protected disclosure.

3. In the EAT it was conceded by the Respondent that the matter fell within the ambit of Article 6 and 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.

4. On this basis, the EAT (Cavanagh J) found that there was in principle a breach of Article 14 when read together with Article 6. However, it held that it was not possible to 'read down' the legislation in line with s3 Human Rights Act. In addition, the EAT does not have jurisdiction to make a declaration of incompatibility. As such, the Claimant could not succeed, but permission to appeal to the Court of Appeal was granted.

Issues before for the Court of Appeal

5. The Claimant's argument was that the unavailability of interim relief in discrimination claims involving a dismissal amounts to unlawful discrimination in breach of Article 14 when read with Article 6, Article 8 or A1P1. The Claimant relied on the status of sex, alternatively on the Appellant's "other status" of being a person who claims that she was dismissed on discriminatory grounds. This was the only issue for the Court of Appeal to consider.

6. The Secretary of State for International Trade and Minister for Women and Equalities[1] joined as an interested party and made submissions. This included withdrawing previous concessions, on the ambit of Article 6 and the status of the Claimant, made by the Respondent in the EAT.

Relevant test

7. The classic four-stage approach to considering whether there has been an infringement of Article 14 was set out by Lady Black in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59. These are:

    (a) The circumstances must fall within the ambit of another Convention right;

    (b) The difference in treatment must be 'on the ground' of one of the characteristics set out in Article 14 or 'other status'

    (c) The claimant and the person who has been treated differently must be in analogous situations

    (d) There is no objective justification for the difference in treatment

Judgment (Bean LJ)

8. **Ambit of Article 6, Article 8 and A1P1 ECHR:** Notwithstanding the concession made by the Respondent in the EAT, it was held that this case does not fall within the ambit of Article 6 which is principally concerned with procedural fairness and not the substantive content of domestic law (citing *Matthews v Ministry of Defence* [2003] 1 AC 1163 and *Kehoe v UK* [2008] 2 FLR 1014) **[31-33]**. The position on Article 8 was less clear cut. Bean LJ highlighted the decision of Underhill LJ in *Wandsworth LBC v Vining* [2017] EWCA Civ

[1] Her full title, the relevant position being minister for women and equalities.

1092, in which he noted that the fact of termination of employment is not enough to make Article 8 applicable but referred to Strasbourg case law suggesting that the circumstances of the termination may make it such. In this case, he was prepared to assume that Article 8 was engaged. On that basis, it was unnecessary to consider the ambit of A1P1 **[34-35]**.

9. **Status:** Bean LJ agreed with the EAT that the fact an individual can claim interim relief in a whistleblowing case and not in a sex discrimination case does not amount to discrimination on the grounds of sex. A male or female individual can equally bring claims in both cases. Furthermore, he gave short shrift to the idea that the fact more women bring sex discrimination claims changes this, stating that "*Otherwise this would lead to a comparison between every form of litigation brought approximately equally by men and women with sex discrimination claims"* (giving the example of a personal injury claim, which provides some advantages to claimants which they do not receive in discrimination claims). He also noted that were interim relief to be granted in sex discrimination claims, the next step would be for a man to bring an ordinary unfair dismissal claim and argue that the lack of interim relief available there constituted indirect discrimination on the grounds of sex or of his status as a litigant in a particular type of claim **[36-41]**. Bean LJ concluded: *"The reason why a claimant in a discrimination case cannot claim interim relief is because she has not brought one of the small and select group of substantive claims in which Parliament has conferred jurisdiction on the ET to grant interim relief. The fact that a particular remedy is available in litigation of type A but not of type B does not constitute discrimination against the claimant in a type B case on the ground of her status as a type B claimant."* **[42]**

10. **Analogous situations:** The Claimant argued that there are many examples in the case law of discrimination claims being considered analogous to whistleblowing claims. Bean LJ considered the appropriate route to ask whether, to the extent that they are, any difference in treatment is justified. However, before doing so it was necessary to consider if there had been any less favourable treatment **[44-50]**.

11. **Less favourable treatment:** Here, Bean LJ adopted the reasoning of Cavanagh J in the EAT. Cavanagh J highlighted a number of ways in which the requirements for discrimination or victimisation claims are more favourable to claimants than those in whistleblowing claims, including: time limits, burden of proof, reason for dismissal, third party liability, injury to feelings, and contributory fault. Viewing *'the package as a whole'* it was held that the Claimant is not treated any less favourably than her hypothetical whistleblowing comparator **[51-54]**.

12. **Justification:** The above reasoning meant that the Claimant could not succeed. However, Bean LJ considered that if a contrary view on status and less favourable treatment was taken it was justified. He rejected the argument that Parliament had never considered the issue, noting that the Equality Act was a major piece of legislation and that the EAT was right to find that a positive decision must have been made that there was no need to add interim relief to the suite of remedies available to discrimination claimants **[56-59]**. He also noted that the rationale for where Parliament has drawn the line *'is not hard to find'* as *'Interim relief is a measure protecting employees who have done certain acts in a representative capacity, or on behalf of the workforce generally, or in the public interest'* **[60]**. Furthermore, given the amount of discrimination claims brought each year, allowing interim relief applications in these claims could lead to a considerable burden on the Employment Tribunals **[61-66]**. While it is unsatisfactory that an individual who has been unfairly dismissed has to wait many months (sometimes years) for a hearing and compensation, decisions as to how to resolve this are for Parliament, and not the court, to make **[67]**.

Comment

13. The availability of interim relief may appear to be a bit of an anomaly. However, any extension to the remedy would put a significant strain on an already overburdened Tribunal system. As Bean LJ highlighted, the fact that claimants must wait many months for a hearing and remedy is unsatisfactory and could be resolved by increasing resources in the Employment Tribunal or providing some type of interim relief in all dismissal cases. Nevertheless, this is a matter for Parliament to decide.

2 July 2021

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team**.**

Naomi Webber

Barrister
3PB Barristers

0330 332 2633
naomi.webber@3pb.co.uk

3pb.co.uk