Strike-out applications of discrimination claims: approach with particular caution

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In ***Mallon v AECOM Ltd, UKEAT/0175/20/LA (V)*** the EAT gave renewed guidance that strike-out applications of discrimination claims should be approached with particular caution, and warned against only considering the first of the three duties under s20 of the Equality Act (relating to a provision, criterion or practice) when considering reasonable adjustment claims.

This was a claim following an application for a job by Mr Mallon who requested, on the basis of his dyspraxia, that he be allowed to make an application orally via telephone rather than using the online written form which the Respondent used. It also appears he provided a copy of his CV. The Respondent asked for further information about the aspects of the online form which Mr Mallon found difficult, but ultimately did not allow him to make an oral application as requested.

Mr Mallon brought a claim in the Employment Tribunal, and it appears he had brought a number of similar claims previously.

Which Requirement under s20 Equality Act?

The claim had been characterised in a list of issues compiled at a previous preliminary hearing as being a breach of the duty in s.20(3) – the "first requirement" in that section – to take reasonable steps to avoid disadvantage arising from a provision, criterion or practice that puts a disabled person at substantial disadvantage.

In fact the claim had been presented in a factual manner, without any particular requirement or sub-section of s.20 referred to by Mr Mallon.

In giving his judgment of the appeal, HHJ James Tayler considered the claim might also be interpreted as a failure to provide an auxiliary service, whereby a person was provided by the Respondent to effectively transcribe Mr Mallon's application into the online form.

While noting that it may make little difference to the matter he had to consider in the appeal, HHJ Tayler emphasised that employment judges when drawing out lists of issues of factually-described claims should not be too quick to assume a "reasonable adjustments" claim relates to a provision, criterion or practice. Rather, they should consider whether they might better be analysed as a breach of one of the other two duties under s.20: to take reasonable steps to avoid substantial disadvantage arising from physical features; and to take reasonable steps to provide an auxiliary aid or auxiliary service where the absence of this gives rise to substantial disadvantage.

This is, of course, useful guidance to any other persons involved in drawing up lists of issues or pleading cases: HHJ Tayler noted that the Respondent could have done more to ensure the nature of the claim was "subject to more focus".

Strike-Out Application on Discrimination Claims

The Respondent made an application for strike-out under Rule 37, which was granted on the basis that Mr Mallon had no reasonable prospect of being able to establish that a substantial disadvantage was created by the use of an online form.

HHJ Tayler considered that the judge at first instance went beyond the evidence available to him in concluding a range of matters necessary to make this judgment, and made use of flawed reasoning in coming to his conclusion.

In particular, there was a conflation of the fact that Mr Mallon *could* potentially complete the online form, in time and/or with assistance, with the question of whether he would be at a substantial disadvantage in so doing. The latter question was likely to require a careful factual analysis of, for instance, the extent to which other people were able and willing to assist Mr Mallon.

HHJ Tayler also warned that "great care should be taken" before a conclusion is made on the basis that some other person can make the adjustment necessary, or provide help which would otherwise have constituted the reasonable adjustment.

Deposit Orders as an Alternative

After observing that applications for deposit orders and for strike-out are frequently made together, and appear to be applying a similar test, HHJ Tayler suggests that applications for deposit orders might frequently be more appropriate in cases where there remain disputes of fact.

Such applications, he considered, are less likely to develop into a "mini-trial" where findings of fact are made. They might, however, provide a proportionate disincentive to continue weak claims, including as laying the ground for a later application for costs if the basis for that deposit order is made out.

Comment

The EAT has again reiterated the need for caution in making strike-out applications in discrimination claims, which will often be so factually sensitive that it will not be possible to determine the matters in a summary hearing. While strike-out applications will obviously be more efficient than a full trial when successful, unsuccessful strike-out applications simply add costs and may not require substantially less time to be heard than the full trial in very straightforward claims.

Applications for deposit orders may well be more appropriate in such cases. The lower bar required ("little reasonable prospect of success" rather than "no reasonable prospect") may allow for such orders to be made without determination of a range of factual matters.

Although it may often make little difference as to whether a claim succeeds, practitioners would be well advised to consider reasonable adjustment claims under s.20 through the lens of all three requirements on employers created by that section, rather than going straight to the first requirement.

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31 March 2021

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