Tribunals remain “open to the difficult” … but perhaps not the persistently uncooperative

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Mr T Smith v Tesco Stores Ltd: [2023] EAT 11

Factual background

1. The claimant worked as a Customer Assistant for the respondent from 8 September 2008 until he was dismissed on 5 September 2018. The respondent asserted that the claimant was dismissed because, during a shopping trip in his own time, the claimant had an altercation with a store manager. He was also alleged to have been abusive to a shopper and refused to sign his training record.

2. The claimant asserted claims of unfair dismissal, race discrimination and disability discrimination spanning a period from 2014 until his dismissal in 2018. Some of the claims were relatively clear, while others were not.

Employment Tribunal hearings

3. In total five preliminary hearings were held. At the first preliminary hearing Employment Judge ("EJ") Flood did what she could to get to grips with the core issues and various claims. She drew up a list of issues and a table of facts and fixed a further preliminary hearing for case management. At the second preliminary hearing, the claimant added further allegations and further material and EJ Flood attempted to clarify what constituted new complaints and where information had been provided as background. At the third preliminary hearing, EJ Flood attempted to ready the claim for trial by confirming the claimant’s position regarding each allegation, compiling a schedule of allegations and forming a list of issues. A hearing date was set for the following summer.

4. Three months after the third hearing, the claimant applied to amend his claim to add depression as a disability. A hearing that had been fixed to ensure the case was trial ready was converted to consider the amendment application and became the fourth preliminary hearing. The claimant’s application to amend was refused and his request to provide

further and better particulars was refused, EJ Miller also declined to consider the respondent's renewed application for strike out. The claimant did not accept the respondent's draft list of issues but could not explain his objections during the hearing so EJ Miller ordered the parties to communicate specifically to conclude the list of issues without adding new issues and urged them to reach an agreement. The claimant did not comply with EJ Miller's order and instead applied to amend to add further claims, that application was dealt with on the papers and refused.

5. What became the fifth preliminary hearing had originally been listed to ensure the case was trial ready but this was also converted, this time to consider an application for strike out by the respondent. The hearing was originally listed in person but changed to a remote hearing due to ongoing Coronavirus measures however, because the claimant was worried, he did not have the correct equipment, the hearing became hybrid. It appears the claimant did not appreciate that he would attend in person while counsel for the respondent and EJ Cookson would attend remotely.

6. Throughout the hearing the claimant refused to look at the screen or address EJ Cookson, instead insisting on making his communications via the court clerk. The claimant repeatedly spoke over the judge and refused to stop addressing the clerk despite having attended hearings before and therefore being aware of the proper way to behave before a judge. The claimant then collected his papers and left the hearing room without further indication. The hearing continued in the claimant's absence and oral submissions were received from counsel for the respondent that the claimant's conduct further justified and supported the grounds for strike out.

Decision to strike out

7. In response to the respondent's application to strike out the EJ directed herself to Rule 37 of the Employment Tribunal Rules 2013 and the decision of Burton J in ***Bolch v Chipman [2004] IRLR 140***.

8. The EJ found the claimant's conduct vexatious in several ways. Firstly, as regards the list of issues, the claimant had failed to respond meaningfully, had disregarded his duty of cooperation and had failed to follow the order of EJ Miller. Secondly, the claimant's behaviour towards the Employment Tribunal ("ET") on the day of the fifth hearing was abusive and formed part of a course of conduct adopted more generally by the claimant as demonstrated by correspondence between the parties. Thirdly the claimant's

application to amend had been made in terms that the claimant must or should have been aware were unreasonable and wilfully vague.

9. The EJ considered that a fair trial was not possible because the claimant had not cooperated with the ET process. In particular, he had failed to comply with EJ Cookson's instructions or allowed her to speak and he had failed to do what had been required of him by EJs Flood and Miller. The EJ considered that the claimant's behaviour was likely to be repeated.

10. The EJ considered that the previous judges in the matter had taken considerable steps to identify the claims and yet their orders had not been complied with. The EJ held that an unless order to further particularise claims would be inappropriate due to the difficulties in assessing non-compliance with such an order. There were no other measures available to the EJ that had not already been tried without success and therefore she considered strike out to be the only appropriate remedy. The EJ acknowledged the draconian nature of striking out a claim but considered that it was not in accordance with the overriding objective to expect the respondent to continue to face proceedings being conducted in this way.

11. EJ Cookson concluded that the claim should be struck out on two grounds. Firstly, under Rule 37(1)(b), the way the claimant had conducted the proceedings has been scandalous, unreasonable or vexatious. Secondly, under Rule 37(1)(e), it was no longer possible to have a fair hearing in respect of the claim because of the claimant's conduct.

Basis for appeal

12. The claimant was permitted to appeal on the ground that the ET erred in law in concluding that a fair trial was no longer possible, insofar as it relied upon:
    a. the fact that the claimant had not engaged with or agreed the latest draft list of issues produced by the respondent.
    b. the fact that the claimant had made a fresh application to amend which was unjustified and unreasonable.

    The claimant was not permitted to appeal that this conduct was scandalous or vexatious, only that the conduct did not preclude the possibility of a fair trial.

The Employment Appeal Tribunal

13. The hearing was held before EAT Judge, HHJ Tayler. The claimant did not attend the hearing and confirmed that he would not attend. The respondent's application to strike out the appeal was refused, and the appeal proceeded in the claimant's absence.

14. HHJ James Tayler noted that the parties' duties to assist the ET and to cooperate with each other and with the ET is phrased not as a request but as a requirement **[34]**. The Judge also noted that "anxious consideration" is required before a claim is struck out. In ***Bolch,*** the correct procedure for such anxious consideration was laid out.

15. Firstly, the ET should consider if there has been scandalous, unreasonable or vexatious conduct. The ET's decision that the conduct fitted this description was not a permitted ground of appeal in these proceedings.

16. Secondly, the ET should consider if a fair trial is no longer possible. The EAT considered ***Arrow v Nominees Inc v Blackledge [2000] 2 BCLC 167*** where in paragraph 55 it is stated:

> *"a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court"*

HHJ Tayler considered that the ET had not erred in considering that it was no longer possible to hold "a trial that was fair in the sense of undue expenditure of time and money taking into account the demands of other litigants and the finite resources of the employment tribunal." **[45]**.

17. Thirdly, the ET should consider if striking out the claim is proportionate, where there is a less draconian sanction available such as limiting the claim or striking out only the misconceived parts of a claim, this should be preferred. While difficulties in identifying the issues had been an ongoing feature of this case, this was not the basis on which the claim had been struck out. Rather the difficulties in concluding a list of issues were merely a symptom of the claimant's uncooperative conduct and demonstrated that the claimant would not abide by his obligation to assist in achieving the overriding objective even where there had been conspicuously careful case management. Therefore, in these circumstances, strike out was a proportionate response.

18. HHJ Tayler stressed that this case should not serve as a green light for striking out difficult-to-manage cases and that "the tribunals of this country are open to the difficult". He emphasised the importance of EJs continuing to "roll up their sleeves" to assist in identifying claims and issues. However, strike out was appropriate in this exceptional case because the claimant was simply not prepared to cooperate with the respondent and the ET to achieve a fair trial.

Practical implications

19. This case serves as a reminder that:
    a. Strike out is a draconian step but there are circumstances where lack of cooperation with the other parties and with the ET will render it a proportionate response.
    b. Even where a trial may be technically possible, when considering if a fair trial is possible the ET is entitled to have regard to the finite resources of the court and balance the needs of other litigants.

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