What to do when faced with unclear and confusing pleadings from a litigant in person?

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Cox V Adecco & Others UKEAT/0339/19

Background

1. C worked as an agency worker in the SEN department of Croydon Council. During his work at the Council he raised a number of concerns about alleged matters including a potential breach of GDPR as regards disclosure of his pay details and that staff were undertaking roles for which they were not qualified.

Claim

2. Post termination, C presented an ET1 to the ET. He was a litigant in person and, as is not uncommon in such cases, it appears that his pleading was not clear. However it seems that within his ET1 he, in essence, pleaded that he had made a protected disclosure and had been dismissed/subjected to detriment as a result. It seems that the pleaded protected disclosure was as regards "fraud", i.e. that he had disclosed that R2 had allegedly been overcharging R3 for the work in fact being carried out and not passing on the additional payment to the relevant staff.

Closed PH

3. A closed PH occurred, for case management purposes. The ET decided to list an open PH so as to hear matters including an existing application for strike out (or deposit order) by R1 on the basis that C had no prospects of showing that he had made a protected disclosure and to hear any contested applications to amend. C was ordered to provide in writing additional information as regards the alleged protected disclosures.

Open PH

4. C provided additional information as regards his protected disclosure/s, further to the order made. He had also provided a draft Amended Particulars of Claim and a Scott Schedule.

5. In advance of the open PH, R2 and R3 had also made applications to strike out etc on a similar basis.

6. Having considered the representations made by the parties the ET concluded that C had no reasonable prospects of demonstrating that he had made a protected disclosure. The claim was accordingly struck out.

EAT

7. C appealed to the EAT, in respect of which he was assisted by Advocate.

8. The appeal was heard by HHJ Taylor; in giving judgment HHJ Taylor provided helpful reminders for ETs and Rs giving consideration to the strike out of unclear claims pursued by LIPs.

9. The EAT highlighted the guidance provided in the *Malik* case:

> "I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:
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> > "50. The claimant was not professionally represented. He had, however, produced a detailed witness statement which, as I set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled "Additional information", which are appended to the claim form and which contained some of the matters referred to in his witness statement.
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> > 51. In my judgment, the obligation to take the Claimant's case at its highest for the purposes of the strike-out application, particularly where a litigant in person is involved, requires the Tribunal to do more than simply ask the claimant to be taken to the relevant material. The Tribunal should carefully consider the claim

as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it. ….."

10. On initial inspection it might seem surprising that an ET would be expected to go hunting outside of the pleadings to find, or understand, the claim. Indeed the EAT pointed out that, as per *Chapman v Simon* [1994] IRLR 124 ETs are limited to determining claims in the claim form.

11. However the EAT pointed out that as part of exercising its discretion as to whether to strike out a claim, an ET can consider whether it would be appropriate to permit an amendment to the claim. Arguably the fact that such an amendment would give rise to a claim with merit is a factor which would be likely to weigh in its favour.

12. The EAT observed as follows:

"From these cases a number of general propositions emerge, some generally well understood, some not so much:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional

information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstance

13. The EAT went on to make reference to a scenarios with which practitioners are all too aware:

> "…….. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information ……. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity."

14. The EAT made clear that, when faced with a LIP and an unclear claim, there is an obligation on the ET, before taking any decision to strike out, to seek to identify the claims; and that it should do so not only from the pleading but also from other core documents.

15. The EAT also highlighted that an obligation falls on Rs in this regard as well:

> "Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in

which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable."

16. In respect of this appeal, HHJ Taylor concluded that the ET had erred in striking out the claim. He appears, in essence, to have reached the view that the ET did not sufficiently identify the relevant issues, including the sub-issues contained within the question of whether C had made protected disclosure; it seems that in the EAT's view that led the ET into error, along with a failure to take into account relevant information, such information being apparent upon a careful examination of all the relevant papers.

17. The Judgment made clear that, before any further strike out was considered in this case, it would be necessary for the ET first to undertake a careful analysis of the underlying claim. HHJ Taylor went on to remark:

> "Once the issues are clarified the respondents may wish to consider whether seeking strikeout is a proportionate way forward".

Comment

18. Rs faced with a lengthy unclear claim by a LIP (which is of course not uncommon at all) can find themselves in a difficult position: requesting further information often has the result of simply worsening the problem of lack of clarity. However proceeding without such a request can, potentially, leave Rs unclear as to the scope of the litigation, and as such unclear as to the potential risk inherent within it.

19. It can be tempting in such situations to apply for a strike out. However, as highlighted by the EAT, Rs should take care before taking that course.

20. In this judgment HHJ Taylor highlights a point which is perhaps not well recognised by all Rs (or all professional representatives), namely that as part of their duties to the court, professional representatives are obliged to invest the time required to ascertain which underlying claims in fact appear in the papers, if they are to pursue a strike out of a LIP's claim in front of the ET; and it seems that analysis should take account of not only the pleadings, but other core documents as well.

21. HHJ Taylor suggested that, in many cases, seeking a deposit order, as opposed to strike out, "may be a more proportionate way forwards". However one wonders whether a

deposit order issued by the ET in this case, on the same basis as was given for the strike out, might have been at risk of challenge at appeal for the same reasons.

22. In the end, jumping to strike out as a short cut has the very real risk, in many cases, of increasing costs in the long run (in the event of a wasted PH due to a rejected application or a successful application being overturned later on appeal). In light of this judgment, Rs will have to decide whether they are willing to take that risk, or whether the better option in such cases might be instead to take the time necessary on receipt of the ET1 to look to piece together what the potential underlying claim might be, before then deciding on what, if any, applications might be appropriate.

23. If Rs are minded to seek further information as an alternative, Rs may wish to consider HHJ Taylor's observations on that approach as well, i.e. that seeking further information of a LIP can sometimes simply worsen the problem, and as such any such care should be taken with the scope of any such request:

> "But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible."

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