When does destroying evidence render a fair hearing impossible?

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Kaur v Sun Mark Ltd and Others [2024] EAT 41

Introduction

1. The decision in **Kaur v Sun Mark Ltd and Others [2024] EAT 41** concerns the ET's decision to strike out a Claimant's claim for remedies in circumstances where she had a liability judgment that was partially in her favour. The ET took the unusual step of striking out the Claimant's case as, typically, the ET is loath to strike out claims of discrimination given that such claims must be taken at their highest.

2. **Kaur**, however, has stark facts and is not a run of the mill case. EJ Hyams, sitting alone at Watford ET on 9 and 10 January 2023, heard live evidence from the Claimant as to her admitted destruction of key evidence following the determination of her claims under the Equality Act 2010 (**"EqA"**). In view of that, the ET had to determine whether the Claimant's claim should be struck out because her conduct of the proceedings had been "*scandalous, unreasonable or vexatious*" and/or that it was "*no longer possible to have a fair [remedies] hearing …*" (rules 37(1)(b) and 37(1)(e) of schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (**"the ET Rules"**)).

3. The Claimant's position was that she had destroyed evidence (a personal notebook and a mobile phone) in December 2020 following the ET's judgment on liability. However, EJ Hyams found that the Claimant had in fact destroyed the evidence in October 2022 following a Case Management Order which had indicated that the Claimant may need to allow inspection of this evidence, which may well have been relevant to the Claimant's claim for compensation. EJ Hyams recognised that he had a judicial discretion as to whether the Claimant's remedies claim should be struck out and he held that, given a fair remedies hearing was no longer possible, it was appropriate and proportionate to strike out the claim.

4. This is an important case for the following reasons:

    a. It demonstrates that the ET (and EAT) are prepared to take decisive action where a Claimant destroys material evidence, even if they have succeeded on liability.

    b. The ET and EAT relied on cases from the civil courts which highlight that "*[T]he deliberate and successful suppression of a material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial*" (**Logicrose Ltd v Southend United Football Club Ltd (1988) Times, 5 March** (cited with approval in **Arrow Nominees**)).

    c. The EAT confirmed its supervisory function, citing **DPP Law Ltd v Greenberg [2021] EWCA Civ 672** per Popplewell LJ at paragraph 57 to the effect that the EAT should not be "*hypercritical*" with respect to the ET's reasoning.

The facts

5. From 2 January 2018, the Claimant was an accounts manager employed by Sea Air and Land Forwarding Limited (**"SALF"**). Sun Mark Limited (**"Sun Mark"**) was an export company, owned by SALF, Lord Raminder Ranger (its Chairman) and his wife, Lady Ranger. Mr Harmeet Ahuja, the son-in-law of Lord and Lady Ranger, was director and group CEO of Sun Mark and SALF. Mr Kapil Sharma was head of finance at Sun Mark.

6. By an ET claim presented on 8 November 2018, the Claimant made complaints of direct sex discrimination, harassment related to her sex, sexual harassment, and victimisation. The full merits hearing was heard between 7 and 18 September 2020 before EJ Smail and two lay members.

7. By an anonymised judgment dated 27 November 2020, the Claimant's claims were upheld in the following respects:

    a. From early July 2018 until the end of September 2018, Mr Sharma subjected the Claimant to unwanted sexual attention, which had the effect of creating an offensive environment for her (contrary to sections 26(1) and/or 26(3) EqA).

    b. Mr Ahuja victimised the Claimant when, on 1 October 2018, he sought to dissuade her from pursuing a complaint of sexual harassment (contrary to section 27(1) EqA).

c. Lord Ranger directly discriminated against the Claimant, harassed, and victimised her in the course of a telephone call on 5 October 2018 (contrary to sections 13, 26(1) and 27(1) EqA).

The evidence and procedural history

8. Notwithstanding directions for disclosure, it was only during the Claimant's cross-examination at the liability hearing (in September 2020) that the existence of the following items was disclosed:

    a. a notebook, in which the Claimant said she had contemporaneously recorded events and her thoughts between July and October 2018 (the period over which the alleged harassment and discrimination occurred); and

    b. a second mobile phone, containing a recording of the Claimant's conversation with Lord Ranger on 5 October 2018.

9. The Respondents sought disclosure of these items on 21 May 2021 because they wished to have the notebook forensically examined (which had not been possible at the liability hearing) to confirm whether the entries were authentic. This was said to be relevant to the Claimant's remedies claim because the notebook entries indicated the impact that the discrimination, victimisation and sexual harassment had had on her. As for the mobile phone, the Respondents sought disclosure for forensic examination because they claimed that the full recording of the telephone call of 5 October 2018 would show that the Claimant had made false and inflammatory remarks, which gave context to Lord Ranger's response(s). This could reduce the Claimant's award for injury to feelings (**Snowball v Gardner Merchant Ltd [1987] ICR 719**).

10. The Respondents made further requests for disclosure and inspection of this evidence in 2021 and 2022, including at several preliminary hearings, at which the Claimant was represented. Following a preliminary hearing on 9 August 2022, EJ Tobin directed that the application for inspection and disclosure of the evidence would be considered at a further preliminary hearing (listed for 31 October 2022), stating the inspection sought:

    "7. … may be relevant and the substantive information is not otiose. … there remains a credible argument as to why the claimant should allow inspection of the second mobile and her notebook …"

11. The Claimant received this order between 25-27 October 2022. Subsequently, on 28 October 2022, the Claimant requested a postponement of the re-listed preliminary hearing and, on 30 October 2022, the Claimant sent a witness statement to the ET in which she stated that she had destroyed the evidence in December 2020.

12. Following the preliminary hearing on 31 October 2022, EJ Hyams listed a further hearing to consider striking out the Claimant's remedies claim, given that, on its face, the destruction of this evidence could be regarded as unreasonable conduct which impacted on whether it was possible to have a fair trial of the remedies.

The ET's strike out decision

13. The ET's conclusions were as follows:

    a. EJ Hyams made a central factual finding that if the Claimant had in fact destroyed the notebook and mobile telephone, "*then she did so only after receiving the record of EJ Tobin …, which was … at the latest on 27 October 2022*" (para 61). EJ Hyams found that if the Claimant had destroyed those items in December 2020 then she would not have stood by and allowed the Respondents to press their applications for inspection for well over a year. Therefore, the ET held that the Claimant destroyed the evidence in circumstances where "*there was a real chance that the tribunal might order the re-inspection*" of the evidence and that the Claimant had told a "*deliberate untruth*", given that she claimed to have destroyed the evidence in December 2020 after she had received the liability judgment.

    b. Given his findings of fact, EJ Hyams concluded that the Claimant's conduct was scandalous, unreasonable, and vexatious, within the meaning of rule 37(1)(b) of the ET Rules.

    c. EJ Hyams acknowledged that strike out was a draconian step, particularly where the Claimant had partially succeeded on liability. However, he found that it was by no means fanciful that the evidence that the Claimant had destroyed could have had a material impact on the remedies hearing (see above at para 9). EJ Hyams stated that "*[E]ven though it was by no means clear that an expert examination of the notebook would have revealed something of value to the respondents, they had now been precluded from obtaining such an examination*" (para 83.2.4).

d. It was in these circumstances that EJ Hyams found a fair remedies hearing was impossible (para 83.2) and that the Claimant's conduct was "… *inimical to the doing of justice in that it was designed to frustrate the doing of justice*" (para 85).

e. EJ Hyams finally considered whether it was appropriate and proportionate to strike out the Claimant's remedies claim. In undertaking that assessment, EJ Hyams considered that the Respondents had not sought an adjournment of the liability hearing in September 2020 in order to inspect the evidence (para 84). He also considered that EJ Smail had already reached a conclusion on the reliability of the entries in the notebook. Nonetheless, EJ Hyams found that it would be proportionate and appropriate to strike out the Claimant's remedies claim given her deliberate destruction of the evidence and the concomitant impact on the ability to hold a fair remedies hearing.

The EAT's approach

14. The Claimant challenged the ET's determination on five grounds, most of which sought to undermine the ET's proportionality assessment, and/or challenge the ET's factual findings under the guise that the ET failed to take into account material factors when reaching its conclusions.

15. The grounds of appeal in relation to proportionality were twofold: (i) it was argued that EJ Hyams had failed to apply the four-stage approach laid down in **Bolch v Chipman [2004] IRLR 140 EAT**; and (ii) the Claimant claimed that the ET's finding that it was impossible to have a fair remedies hearing was perverse.

16. On the first point, the Claimant argued that "*EJ Hyams failed to ask whether there had been unreasonable conduct "of the proceedings": if the evidence was destroyed in December 2020, the proceedings were not then being actively conducted*" [51]. Mrs Justice Eady (DBE, President) rejected this assertion at para 52 of the EAT's judgment: Eady J relied on **DPP Law Ltd v Greenberg** for the proposition that the Claimant was being "*hypercritical*" of the ET's judgment. When the ET's determination was read as a whole, it was tolerably clear that each step of **Bolch** had been applied ((1) whether there had been unreasonable conduct "of the proceedings", (2) whether it was possible to hold a fair hearing, (3) whether it would be appropriate and proportionate to strike out the claim, and (4) whether a lesser sanction should be applied).

17. On the second point, as to whether it was perverse to find it impossible to have a fair remedies hearing because it was based on no evidence, the EAT found against the

Claimant [61-62]. Here, the fundamental point was that the Claimant should not be allowed to benefit from the destruction of key evidence, particularly where the Claimant had deliberately destroyed that evidence to prevent further investigation of the same [63-64]. It was therefore sufficient that the evidence was "potentially" relevant to the remedies claim: the Respondents did not bear the burden of proving that the evidence was pertinent.

18. Finally, the EAT dismissed the grounds of appeal which sought to challenge EJ Hyams' factual determinations on the basis that he had failed to consider material matters [57-60]. These grounds of challenge ignored EJ Hyams' central finding that the Claimant had deliberately destroyed the evidence after receiving EJ Tobin's Order, which had raised the spectre of inspection.

Comment

19. This case illustrates the importance of factual findings. EJ Hyams found that the Claimant had deliberately destroyed the evidence to prevent its inspection, which then permeated his legal analysis as to the proportionality of striking out the Claimant's remedies claim. This demonstrates the importance of effective cross-examination at open preliminary hearings, such as for applications in relation to strike out and the preliminary issue of worker status.

20. In addition, the EAT's adoption of authorities from the civil courts (such as **Active Media Services Inc v Burmester, Duncker & Joly GmbH & Co Kg & Ors [2021] EWHC 232 (Comm)**) in relation to the suppression of evidence, and its relationship with the ability to hold a fair hearing, is instructive. It shows that the courts are alert to the hardship that would be caused if an innocent party had the burden of proving that the evidence in question was material to the ability to hold a fair hearing. Again, on the facts of this case, where there were clear factual findings that the Claimant had deliberately destroyed evidence which was relevant to matters which needed to be determined at the remedies hearing, it would not be just to allow the case to proceed. As such the appeal was dismissed.

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