When should ET stays of proceedings be allowed?

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ONEA v Contingent and Future Technologies Ltd [2023] EAT 125

This was a decision by the EAT of an appeal against a decision of the Employment Tribunal to refuse a stay of those proceedings in pending resolution of concurrent High Court proceedings.

Slightly unusually, it was the Claimant who brought that application to stay: there were two sets of High Court proceedings, one brought by the Claimant to the Tribunal proceedings and one by his former employer.

The EAT's decision is the second reminder in 2023 (following ***Lycatel Services Ltd v Schneider*** *[2023] EAT 81*) that such applications need to be determined following a decision on which forum the dispute would be "most conveniently and appropriately be tried" as per ***Bowater Plc v Charlwood*** *[1991] ICR 798*. There is no presumption in favour of the Tribunal retaining jurisdiction, or particular threshold that needs to be met in favour of High Court proceedings taking precedent.

Factual Background and Claims Brought

The Claimant had been a co-founder of the Respondent employer. There were disciplinary proceedings relating to a number of allegations, which included misuse of confidential information. He was dismissed for gross misconduct in October 2021, a day after he purported to resign and asserted he had been constructively dismissed.

As a co-founder he had considerable shareholdings in the Respondent, but had been classed as a "bad leaver" on the basis of his dismissal for gross misconduct. On 21 September 2021 the Claimant brought an Unfair Prejudice Petition on the basis, *inter alia*, that he had been dismissed on the basis of "false and baseless accusations" based upon "fabricated evidence".

On 8 November 2021 the Respondent employer brought a claim for injunctive relief on the basis of the Claimant's contractual and equitable duties of confidence in relation to information it was said he held.

On 28 January 2022 the Claimant presented his claim to the ET, for causes of action including protected disclosure detriment, automatic unfair dismissal because of protected disclosures, ordinary unfair dismissal and wrongful dismissal. The Respondent's response included an assertion that the Claimant was dismissed for the potentially fair reason of conduct which was said to include unauthorised use of the Respondent's IT and email systems and making unauthorised recordings relating to confidential business matters.

Refusal of Application to Stay

The Claimant brought an application to stay the ET proceedings, which was opposed by the Respondent and refused by the ET. The judge at first instance set out his written reasons in the case management decision sent to the parties, which relied as its "principal factor" the lack of overlap of the issues to be determined, noting that "the claimant was required to establish a very real risk of considerable embarrassment to the High Court".

As a "secondary factor", and in reference to a CCMC in the unfair prejudice petition taking place shortly after the ET hearing, the judge stated that "the claimant remains at liberty to seek a direction from the High Court on whether these tribunal proceedings should be stayed" at that hearing. A further secondary factor was said to be the delay to the ET proceedings, given that one of the High Court proceedings was unlikely to be listed before late 2023.

The judge had referred to ***Mindimaxnox LLP v Gover*** *UKEAT/0225/10/DA* (see below) but not *Bowater*.

Grounds of Appeal

The Claimant appealed on four grounds.

- (1) that the ET had erred in refusing the stay on the basis that there was not a considerable overlap between the respective proceedings.
- (2) and (3), that it had erred in taking into account the delay to the ET proceedings and the possibility of a direction from the High Court respectively.

- (4) in what appears effectively to be a perversity ground, that the ET had erred in its decision that it was not in the interests of justice to grant the stay.

Determination and Reasons

Determination of the Appeal

Heather Williams J sets out a summary of the relevant caselaw, including the *Bowater* and *Lycatel Services* cases referred to above.

She also set out at some length the reasoning of the EAT in *Mindimaxnox LLP*, referred to by the ET judge, which endorsed the principle that "where there is considerable overlap it is appropriate to cede to the High Court" to avoid the High Court being embarrassed by being bound by findings of the ET.

She found that the ET judge had failed to ask himself the right question in failing to address the key question in *Bowater* on the convenient and appropriate trial of the issues, and also in his framing the question of potential embarrassment of the High Court which set the matter as a threshold of "very real risk of considerable embarrassment". She considered this fell into both Grounds 1 and 4 of the appeal as pursued by the Claimant.

She also found that the judge had erred in his approach to the overlap of issues, noting that the overlap included that:

- The Respondent was relying upon the alleged breaches of confidence as its defence to the wrongful dismissal claim; and
- The Claimant was pursuing his Unfair Prejudice Petition on the basis of a sham process, which overlapped with the questions of genuine belief in the unfair dismissal claim.

On Ground 3, and noting that the High Court cannot make directions staying the ET proceedings but can direct parties to make (or not oppose) applications to do the same, the EAT considered that it would be a rare case in which it would be appropriate for the ET to effective cede the decision to the High Court: "If an application for a stay is made to the ET, then the ET should carry out the balancing exercise and determine which is the more convenient and appropriate forum".

Ground 2 was not upheld, given that delay to ET proceedings is a relevant factor and the question of the weight to be attached to that factor is one for the first-instance judge to make.

Ground 4 was not upheld on the basis of perversity: the decision to refuse to stay was not one which no reasonable ET judge could have made, if made on a proper determination of the law and relevant factors.

Re-Determination of Application to Stay

Having allowed the appeal, the EAT considered the application afresh and allowed the stay.

It was found that the degree of overlap was considerable and issue estoppels would arise in a number of issues in the High Court claims if the ET claim were to proceed. The judge reiterated, as per *Mindimaxnox LLP*, that "the norm is for the High Court proceedings to proceed first and the ET Claim to be stayed where such embarrassment arises".

Further, there were complex issues of fact and the cases were likely to be document-heavy. The more formal pleading requirements and greater resourcing of the High Court, in terms of reading time, were factors in favour of the High Court being the more appropriate forum for determination of those issues.

Conclusions

There might initially appear to be some tension between the dicta of *Mindimaxnox LLP* and that of *Bowatel* (bolstered by cases including the recent *Lycatel*): the former suggests a presumption in favour of staying ET claims and proceeding in the High Court where, as will often be the case, there is significant overlap; the latter suggests a far more open discretion based upon the "convenient and appropriate forum".

This case helps to resolve that apparent tension: the key test is that in *Bowatel* and that must be the question which the ET addresses itself to, but the kinds of considerations in *Mindimaxnox LLP* are likely to be significant factors in the application of that more general test where there is significant overlap of issues with extant proceedings in the High Court.

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