Employment tribunals: striking out claims

Sally Robertson considers strike-out applications and the current approach to cases with no reasonable prospects of success.

In a jurisdiction in which recovery of costs is unusual, getting a technical knock-out through a procedural short-cut can look particularly inviting. The reality is that unless there is no serious dispute or the fairness of a trial seems in jeopardy, the possibilities are more limited. Robust case management generally has to give way to the right to have the case heard. There is also the catch-22 that going for a strike-out is akin to asking for further particulars: it forces the other side to get their case in order. Yet avoiding the temptation may generate a downside when the omission is used to help defend a costs application.

The Employment Tribunals (Constitution and Rules of Procedure) Regulations (ET(CRP) Regs) 2004 SI No 1861 Sch 1 r18(7) sets out five heads under which strike-out may be considered. Each head raises different considerations but common to all is a recognition that the power is a draconian one, described as 'not to be readily exercised' by Lord Justice Sedley in *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA; [2006] EWCA Civ 684, 25 May 2006 at para 5.

Part or all of a claim or response may be struck out because:

- 'it is scandalous, or vexatious or has no reasonable prospect of success' (r18(7)(b));
- 'the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent … has been scandalous, unreasonable or vexatious' (r18(7)(c)) (see *Blockbuster v James* at para 5 for the overall approach to strike-out under this rule);
- of 'non-compliance with an order or practice direction' (r18(7)(e)).

A claim, but not a response, may also be struck out where:

- the claim 'has not been actively pursued' (r18(7)(d));
- the employment judge or tribunal considers 'it is no longer possible to have a fair hearing' (r18(7)(f)).

General points

ET(CRP) Regs Sch 1 r18(8) provides that a claim or response or any part of one can be struck out only on the grounds set out in rule 18(7)(b)–(f). Sch 1 r17(2) provides that orders and judgments made under rule 18(7) cannot be made at a case-management discussion. It follows that case-management powers cannot be used to circumvent rule 18(7): see *Sood v Governing Body of Christ the King School and others* EAT/0449/10, 20 July 2011 at para 15. No more general provisions under the ET(CRP) Regs can be used to effect strike-out. Only specific provisions may be used, so rule 18(8) does not prevent claims being dismissed on jurisdictional grounds, for example because of specific provisions relating to time limits or employee or worker status.

A grey area is the effect of rule 18(8) on background matters included in a claim or response. In *HSBC Asia Holdings v Gillespie* [2011] IRLR 209, 19 November 2010, the Employment Appeal Tribunal (EAT) found that the employment judge had misdirected himself in holding that he was unable to restrict the number of background matters on which the claimant sought to rely. In deciding the issue himself and deploying the concept of 'insufficient relevance', Mr Justice Underhill excluded 'background' allegations as not relating to the people or department at issue in the claim. The effect of rule 18(8) and the restrictions imposed by the judicial interpretation of higher courts in potentially limiting such robust case management was not considered. In *Sood*, for example, there was no need to do so as the employment judge had decided that the question of whether the historic allegations of race discrimination amounted to a 'continuing act' should be considered at a full merits hearing (see para 10).

Note that each 'conduct' case is inevitably fact-sensitive, with findings dependent on (and to an extent limited by) the type of conduct at issue. Although guidelines may be useful and help ensure consistency, at issue is whether on the facts rule 18(7)(c) applies, and whether strike-out is an appropriate response to the misconduct at issue when exercising discretion in accordance with the overriding objective. Whether or not a fair trial is still possible is not the only factor relevant to that exercise of discretion. In *Masood v Zahoor* [2010] 1 WLR 746; [2009] EWCA Civ 650, 3 July 2009, at para 71, the Court of Appeal agreed that where the misconduct is so serious that it would be an affront to the court to permit someone to continue to prosecute his/her claim, it may be struck out for that reason.

Strike-outs are normally a part of preliminary case management. Rule 18 itself deals with pre-hearing reviews (PHRs). Unless the parties agree to shorter notice, 14 clear days' notice of a PHR must be given, as well as the information that they have the opportunity to submit written representations and advance oral argument (Sch 1 r14(4)). In addition Sch 1 r19 provides that notice must be given of the order or judgment to be considered, although notice is not required if the party has been given an opportunity to give oral reasons as to why the order should not be made. If, however, a new point is sprung on a party, fairness would generally require at least a short adjournment to consider whether it can be dealt with adequately at that time. These requirements apply irrespective of whether the matter is raised on an employment judge's own initiative (Sch 1 r12) or by the other party's application (Sch 1 r11).

Rule 18 provides for all types of PHR. Rule 18(2)(d) enables an employment judge to 'consider any oral or written representations or evidence'. However, the authorities take a different view over whether or not this power may be restricted where rule 18(7)(b) is in play. One view is represented by His Honour Judge Serota QC who observed in *QDOS Consulting Ltd v Swanson* EAT/0495/11, 12 April 2012, that applications that involve:

> *prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under rule 18(7)(b) but must be determined at a full hearing … Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days* (para 49).

In contrast, in *Eastman v Tesco Stores Ltd* EAT/0143/12, 5 October 2012, where a PHR had heard live evidence and resolved two core factual disputes against the claimant, His Honour Judge Peter Clark held that the employment judge was entitled to do so. He distinguished *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126; [2007] EWCA Civ 330, 7 March 2007 and *Balls v Downham Market High School and College* [2011] IRLR 217; EAT/0343/10, 15 November 2010, on the basis that neither had heard live evidence, nor had the factual disputes at issue been resolved. In *Eastman*, the two factual disputes

were essentially simple: had the claimant been guaranteed a return to her old job and had she completed a career break form. The Court of Session's judgment in *Tayside Public Transport Co Ltd v Reilly* [2012] CSIH 46, 30 May 2012, now reported at [2012] IRLR 755 (see below), was not cited, but this is arguably an example of a case where having decided to hear live evidence, 'no serious dispute' that required a full hearing was left to resolve (see *Tayside* para 30).

Rodrigues v Co-operative Group Ltd EATS/0022/12, 17 July 2012, is an earlier example of exploring what amounts to 'rare and exceptional circumstances' justifying strike-out without a full hearing (para 52). In *Rodrigues*, the time bar and whether a series of incidents amounted to a 'continuing act' were at issue at a PHR. The employment judge had heard full evidence: it was not an 'impromptu trial' (para 54). Having resolved the time bar issues against the claimant, only one act remained in time. Lady Smith found that the employment judge's reasoning went well beyond simply being a matter of his own view of what facts a full tribunal might find. The problems with the claimant's case and with the claimant as a witness were insurmountable: if there was no reasonable prospect of his evidence being believed, his case was doomed to failure and strike-out was justified.

The area of uncertainty for litigants is whether or not the nature of the central factual disputes in their case can be resolved simply and whether or not a PHR is really likely to result in saving costs. So far no authority has involved a timeous challenge to an employment judge's exercise of discretion to hear, or not hear, live evidence at a PHR. If an employment judge decides against live evidence, that does not mean it is wrong to consider written statements. They help an employment judge understand the issues in the case and what the evidence is likely to be (see *Pillay v Inc Research UK Ltd* EAT/0182/11, 9 September 2011 at para 37).

If no live evidence is heard on a rule 18(7)(b) strike-out application, the facts pleaded in the claim or response should, except in exceptional cases, be taken to be true 'unless the opposite can be shown by clear evidence which is not seriously disputable' – see *A v B and C* [2010] EWCA Civ 1378, 8 December 2010 at para 11 and also *Reilly v Tayside Public Transport Co Ltd* EATS/0065/10, 27 May 2011 at paras 4 and 10 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, 4 April 2003 at para 10. To the extent that there seems to be a need to hear oral evidence, the existence of a live factual dispute becomes increasingly probable.

Although rule 18(7) powers may be exercised at any time, the design of the rules shows their principal use is intended to be at the pre-hearing stage and requires notice, as noted by Mr Justice Langstaff in *Williams v Real Care Agency Ltd* EATS/0051/11, 13 March 2012 at paras 8 and 19. As with any power or discretion, 'such a power must be exercised in accordance with reason, relevance, principle and justice' (para 18). Although some of the other grounds for strike-out may be appropriate during a hearing, as in *Force One Utilities Ltd v Hatfield* [2009] IRLR 45, EAT; EAT/0048/08, 22 April 2008, where during an adjournment a respondent's witnesses had made a serious threat of physical harm to the claimant, Langstaff J considered that:

> *... it would be very exceptional indeed, to the point of the instances of it being vanishingly small, that a claim could ever legitimately be struck out mid-hearing on the grounds of evidential insubstantiability* (*Williams,* para 21).

Note that repackaging a mid-hearing strike-out argument as one of 'no case to answer' does not work – see *Timbo v Greenwich Council for Racial Equality* EAT/0160/12, 2 October 2012.

Rule 18(3) requires the hearing to be before a full tribunal if a party applies in writing not less than ten days before the hearing and an employment judge considers that one or more substantive issues of fact are likely to be determined and that it would be desirable for the PHR to be conducted by a tribunal. If unfair dismissal only is at issue, the norm is for a judge alone to hear the full merits hearing. As such, the parties will also have to consider whether a full tribunal is desirable in any event, for example, in career-ending, whistle-blowing or other dismissals where the 'reason why' is at issue.

No reasonable prospect of success

A strike-out application under rule 18(7)(b) on the grounds that a claim has 'no reasonable prospect of success' is usually accompanied by one for a deposit under Sch 1 r20 as 'a condition of being permitted to continue to take part in the proceedings' in relation to a particular matter. The rule 20 test is the less stringent one of 'little reasonable prospect of success'. Changes to the employment tribunal system since 6 April 2012 are likely to result in an increase in the use of combined strike-out and deposit applications by employers.

For employees who start new employment on or after 6 April 2012, the exclusion from the right to complain to an employment tribunal about ordinary unfair dismissal, by the increase to a two-year qualifying period, increases the chances of turning to causes of action that do not require a qualifying period. More claims about automatically unfair dismissals, including whistle-blowing, or that dismissal is for a reason prohibited by the Equality Act 2010 because of the employee's protected status, may be anticipated. With such an increase comes the prospect of claims that employers would perceive as unmeritorious. Adding to the usual armoury for tackling such claims comes a doubling from £500 to £1,000 of the maximum amount that may be ordered as a security deposit and another doubling, in this instance from £10,000 to £20,000, of the maximum amount a tribunal may award in costs to a legally represented party.[1]

Counteracting an employer's enthusiasm for strike-out is a consistent message from the courts that in a normal case, whatever the jurisdiction, whether it be unfair dismissal, whistle-blowing or race discrimination, if there is a 'crucial core of disputed facts', as in *Ezsias*, it is an error of law for a tribunal to pre-empt the determination of a full hearing by striking out.

Helping to emphasise that when considering strike-out there is no material distinction in treatment based on the cause of action, the EAT's *Bundle of familiar authorities* includes just one authority on striking out, *Tayside* in the Court of Session (see above).[2] This was a claim for unfair dismissal where the driver of a double-decker bus had had to take a diversion from the normal route. He had taken the wrong diversion and his bus had collided with an overhead pedestrian walkway. The top of the bus was sheared off but no one was injured. The Court of Session observed that:

> *In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (*ED&F Man Liquid Products Ltd v Patel *(2003) CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED&F Man Liquid Products Ltd v Patel, *supra;* Ezsias v North Glamorgan NHS Trust*, supra). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias v North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)* (para 30).

In *Tayside*, the Court of Session recognised as live factual issues ones that are standard in many unfair dismissal cases. These are:

- **adequacy of investigation**: whether the

employer had failed to follow up on matters raised during the disciplinary proceedings, whether the change in route had been properly brought to the driver's attention, and whether he had been innocently misled by a colleague;
- **consistency**: whether there were other drivers who had had accidents or committed disciplinary offences and had not been dismissed;
- **misconduct**: whether the accident constituted gross misconduct and whether the cost of the damage done was a relevant measure in assessing the degree of misconduct.

In *Tayside*, the reason for dismissal was not in dispute. In *Ezsias*, it was – both the EAT and the Court of Appeal considered that at the heart of that case was a dispute of fact, namely what was the true reason for the dismissal. Mr Ezsias said it was because he was a whistle-blower. The hospital said it was because he was impossible to work with and that he unreasonably jeopardised the proper functioning of the hospital. The Court of Appeal held it was 'legally perverse' to consider that this 'head-on conflict of fact could be resolved without a trial' (paras 27 and 28).

Ezsias leaves open the possibility of 'exceptional' cases which can be struck out even where the central facts are in dispute. Lord Justice Maurice Kay gives the example of 'where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29).

Respondents should exercise caution here. Even where the documentation looks incontrovertible, the factual and legal arguments underlying the dispute may nevertheless show a factual dispute that cannot properly be resolved at a preliminary stage. In *A v B*, for example, the real reason for dismissal was at issue on a claim for unfair dismissal and sex discrimination. The higher education institution employer said it was for gross misconduct because of academic fraud: the claimant had claimed qualifications she did not hold. The claimant said it was because she had lodged a grievance four months before her dismissal complaining of sexual harassment by the institution's principal. Her case was that the issue of academic qualifications was used as an excuse to get rid of her because of that previous history, and not for its own sake: in essence the principal's alleged involvement in all of the institute's decisions made the disciplinary process a sham (see paras 57 and 58). This is a classic 'ulterior motive' argument based on *Associated Society of Locomotive Engineers and Firemen v Brady* [2006] IRLR 576; EAT/0057/06 and EAT/0130/06, 31 March 2006.

What tipped the balance in *A v B* was the effect of the reverse burden of proof. The claimant had enough of an argument to demonstrate a prima facie case to show:
- that the outcome of the determination on the factual dispute could not properly be foreseen at the strike-out stage; and
- that 'there remains a prospect which is more than fanciful that [the alleged discriminator] might not succeed in discharging the reverse burden of proof' (para 61).

It is only if there is some prospect, going beyond the fanciful, of the alleged discriminator failing to provide an explanation that excludes discrimination that the claim should not be struck out, as was the case in *A v B*. The converse of this is where the facts relied on by the claimant in respect of any particular discrimination claim do not establish a prima facie case.

In *ABN Amro Management Services Ltd and Royal Bank of Scotland v Hogben* EAT/0266/09, 20 November 2009, Underhill J found that the employment judge was wrong not to strike out a claim of discriminatory selection for redundancy which was 'prima facie implausible to the point of absurdity', as one claim rested on an age difference of nine months, the other on a difference of seven years (para 11). He described the prospect of proving a prima facie case of age discrimination in relation to non-appointment to either role as 'fanciful' (para 15). Apart from the interviewer thinking that the claimant was a year or two younger than he in fact was, Underhill J saw 'nothing else to indicate even a possibility of age discrimination'. He felt entitled to substitute his own assessment for that of the employment judge because the 'absence … of any basis for supposing that cross-examination could advance the claimant's case means that the judge ought not to have attached any weight to that factor' (para 15).

Respondents are likely to be keen to exploit the effect of *Madarassy v Nomura International plc* [2007] ICR 867; [2007] EWCA Civ 33, 26 January 2007, that the bare facts of a difference in status and a difference in treatment:

> *only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination* (paras 56–58).

Without a hint of that 'something more' factor, a discrimination claim could properly be struck out. However, the role of unreasonable behaviour in helping provide that 'something more' is arguably back in play. In *Hewage v Grampian Health Board* [2012] IRLR 870; [2012] UKSC 37, 25 July 2012, the Supreme Court upheld the Court of Session's decision, and without adverse comment.[3] A female consultant orthodontist of Asian origin had received a different response to her white male comparator to their complaints about a hostile and abusive employee. The 'something more' needed to make out a prima facie case looks suspiciously close to ordinary unreasonable behaviour. The factors included the failure to discipline the hostile colleague; the undue delay in issuing a final investigative report; and, having delayed, then deciding to take no action on that report.

The Northern Ireland Court of Appeal in *Rice v McEvoy* [2011] NICA 9, 16 May 2011; [2011] EqLR 771 provides part of an answer:

> *If an employer acts in a wholly unreasonable way that may assist in drawing an inference that the employer's purported explanation for his actions was not in fact the true explanation and that he was covering up a discriminatory intent. However it is not in itself determinative of the issue* (para 44).

As such, it would be reasonable to point to unreasonable behaviour as being sufficient to show that the prospect of proving a prima facie case would not be fanciful.

However, even if a clear factual dispute can be identified, that is not determinative. It depends on how it relates to the claim(s). The more relevant or central to the claims, the more exceptional it would be to strike out that element (see *Ezsias* and the discussion in *HSBC Asia Holdings* at para 13).

Conway v Community Options Ltd EAT/0034/12, 6 July 2012, provides an example of an exceptional case in which the employment judge was entitled to strike out claims of unfair dismissal and disability discrimination. The claimant was disabled because of depression and anxiety. He was off sick because of that condition during the 15 months before his dismissal on ill-health capability grounds. The medical evidence was plain and unchallenged: it was inadvisable for him to return to his former role, he was not yet fit to return in any other role, a phased return was inappropriate, and the occupational health doctor, after considering a report from the treating specialist, could not give a timescale for a return to work even if adjusted duties and a phased return were considered. There was no dispute about the facts. Irrespective of the validity of the identified provision, criterion or practice, there were no reasonable adjustments that could be made to enable him to return to work. In these circumstances there was no error in determining that the reasonable adjustments claim had no reasonable prospect of success. As the factors identified in *East*

Lindsey DC v Daubney [1977] ICR 566, 20 April 1977, had been covered without challenge by the claimant, the unfair dismissal claim similarly had no reasonable prospects of success.

Finally, as Lady Smith for the EAT made clear in *Balls* (see above) the test for strike-out is a high one. On a careful consideration of all the available material, can the tribunal properly conclude that the claim, or part of it, has *no* reasonable prospects of success? The word 'no' is stressed 'because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail' (para 6). Nor can it be decided by considering the likelihood of the other party establishing as facts their assertions about disputed matters. To reiterate, there must be no reasonable prospects but that is not as high a requirement as showing there were no prospects at all. Reasonableness is at issue and that will inevitably vary depending on the nature of the factual and legal disputes.

1 Both are limited to claims presented on or after 6 April 2012.
2 See *EAT practice in relation to familiar authorities,* 17 July 2012, available at www.justice.gov.uk/downloads/tribunals/employment-appeals/familiar-cases.pdf.
3 See also *Pace Telecom Ltd v McAuley* [2011] NICA 63, 5 October 2011; [2012] EqLR 148.

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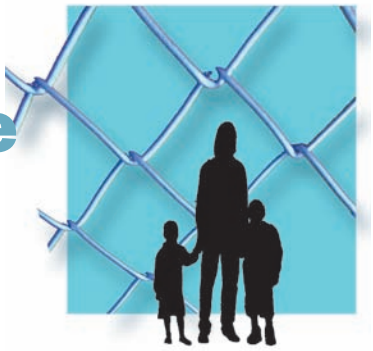
Support for migrants update



Sasha Rozansky and **Sue Willman** continue their updates on welfare provision for asylum-seekers and other migrants, supplementing the third edition of LAG's handbook, *Support for Asylum-seekers and other Migrants*, 2009. The last update appeared in June 2012 *Legal Action* 13.

POLICY AND LEGISLATION

EU law

Changes to the legislation affecting the right to reside

The Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003 were amended by the Immigration (European Economic Area) (Amendment) Regulations 2012 SI No 1547, which came into force on 16 July 2012. The I(EEA) Regs 2006 now give effect to a number of rulings by the Court of Justice of the European Union (CJEU) concerning EU citizens and their family members' right to reside in the UK, including:

- the right of entry and residence for the primary carer of an EEA national who is (a) under 18 years old and (b) residing in the UK as a self-sufficient person, where the denial of such a right would prevent the EEA child from exercising his/her right of residence, as decided in *Zhu and Chen v Secretary of State for the Home Department* C-200/02, 19 October 2004 (reg 15A(2));
- the right of entry and residence for (a) a child of an EEA national who is in education and who had begun residing in the UK when his/her EEA national parent was residing in the UK as a worker, and (b) the primary carer of a child of an EEA national where requiring the primary carer to leave the UK would prevent that child from being able to continue his/her education in the UK, as decided in the cases of *Harrow LBC v Ibrahim and Secretary of State for the Home Department* C-310/08, 23 February 2010 and *Teixeira v Lambeth LBC and Secretary of State for the Home Department* C-480/08, 23 February 2010 (reg 15A(3)–(4));
- periods of lawful residence for the purpose of the acquisition of the right of permanent residence include periods of lawful residence that ended before Directive 2004/38/EC (known as the Residence Directive and also as the Citizenship Directive) came into force on 30 April 2006, as decided in *Secretary of State for Work and Pensions v Lassal and Child Poverty Action Group (intervener)* C-162/09, 7 October 2010 (Sch 4 paras 6(1)–(2)); lawful residence will include periods where a person only had leave under domestic law but s/he was complying with Residence Directive article 7(1), for example as a worker or self-employed person, as decided in *Ziolkowski v Land Berlin and Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (intervener)* C-424/10, 21 December 2011 and *Szeja and others v Land Berlin and Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (intervener)* C-425/10, 21 December 2011 (Sch 4 para 6(3));
- periods of absence abroad of less than two years before the Residence Directive came into force can be ignored for the purpose of the acquisition of the right of permanent residence, also as decided in *Lassal* (Sch 4 para 6(4));
- a person will not be regarded as the spouse, civil partner or durable partner of an EEA national where the EEA national was already residing in the UK, and a person will not be regarded as an EEA national where s/he is also a UK national, as decided in *McCarthy v Secretary of State for the Home Department* C-434/09, 5 May 2011 (reg 2(1)).

The I(EEA) Regs 2006 now also provide rights of entry and residence to the dependant of a primary carer where a refusal to grant such a right would prevent the primary carer from exercising his/her rights of residence under regulation 15A(2) or (4) (reg 15A(5)).

Changes were also made to the definition of 'worker' and 'student', and to introduce a residence card for people who have a derivative right of residence under regulation 15A.

Comment: In September 2012, the Department for Work and Pensions issued