Taming sweeping discrimination claims: could a staged approach work?

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Taking a staged approach towards sweeping discrimination claims could prove fruitful. This would involve putting the strongest claims into a primary schedule and lesser claims into a secondary schedule. The latter could be revived by the claimant following judgment.

Many claimants have not been deterred from bringing wide-ranging discrimination claims despite the introduction of tribunal fees and appeals from the judiciary to focus fire on the strongest claims (REJ Gay, *ELA Briefing,* March to May 2014). Respondents are often dissuaded from pursuing strike-out applications due to the reluctance of tribunals to find, at a preliminary stage, that allegations have no reasonable prospects of success or are 'out of time'. In consequence, respondents can be drawn into time-consuming litigation and tribunals required to adjudicate upon long lists of complaints, some of which can be comparatively weak and would add little by way of financial compensation even if they were upheld.

This article looks at a possible solution to dealing with wide-ranging discrimination claims: a staged approach. This idea seems unusual and accordingly we will:

- explain how a staged approach would work in practice
- deal with rules and case law that allow for such an approach
- explore the advantages and disadvantages for the parties.

What does it entail?

A staged approach involves the claims being divided into primary and secondary schedules.

The tribunal would then adjudicate upon the primary claims. The strongest and most valuable claims would almost inevitably appear in this group. The secondary complaints would not have been withdrawn and so could be revived by the claimant, if appropriate, once judgment has been handed down.

In practice, the claimant would only revive the secondary complaints if the primary claims were successful and even then it is likely that the matter would be capable of resolution between the parties since the existing judgment would inevitably highlight the strengths and weaknesses of the secondary claims. If the primary complaints were unsuccessful, then the secondary complaints are unlikely to be revived or, alternatively, the respondent would probably find it relatively easy to strike them out on the basis that they had no reasonable prospects of success since the primary allegations had been rejected.

Relevant rules and case law

A staged approach towards discrimination claims is undoubtedly unusual. There are probably two reasons for this: a lack of clarity as to the existence of the relevant power, and a lack of appreciation of the benefits to the parties in adopting such an approach.

Turning to the first, there is nothing in the rules that prohibits such an approach. Rule 2, the overriding objective, requires tribunals to deal with cases 'fairly and justly', which includes '(a) dealing with cases in ways which are proportionate to the complexity and importance of the issues' and '(e) saving expense'. The staged approach advocated in this article appears to fall squarely within such an overriding objective.

Rule 29 allows for tribunals to make case management orders which it considers appropriate without any express limitation. The breadth of the rule undoubtedly covers a staged approach being taken to the litigation.

Turning to the case law, there are three cases that indicate that it is permissible for the tribunal to request (or perhaps go so far as compel) claimants to hive off some of their allegations into a secondary 'schedule' or to do so itself.

In *Hendricks*, Mummery LJ made the following *obiter* comments: 'Attempts must be made by all concerned to keep

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the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations. The parties' representatives should consult one another about their proposals before requesting another directions hearing before the [employment judge]. It will be for him to decide how the matter should proceed, if it is impossible to reach a sensible agreement.'

These *obiter* sentiments were reiterated by Mummery LJ in *Walters-Ennis*: 'Case management is important, particularly in discrimination cases … The real issues would have been clearer, the hearing shorter and the judgment of the ET more focussed, if there had been drastic pruning at the pre-hearing Case Management Discussion to exclude peripheral and minor issues from the list agreed by the parties.'

Finally, in *Gillespie*, Underhill P (as he was then) stated *obiter* that: 'It does not necessarily follow that all of a claimant's claims need to be heard in a single hearing. There is no reason in principle why as a matter of case management – and, more specifically, exercising its power under rule 10(2)(i) of the Employment Tribunals Rules of Procedure 2004 – a tribunal cannot hive off claims which it regards as secondary or repetitive or otherwise unnecessary, to be dealt with at a subsequent hearing, in the more or less confident expectation that in practice once the first tranche of claims has been heard the second is unlikely to proceed.'

There is no reason to suppose that a different approach would be adopted under the current tribunal rules of procedure.

Advantages and disadvantages for the respondent

There are a number of advantages to the respondent of a staged approach:

- the litigation is likely to be more limited, cheaper and quicker;
- it would undermine claimants who have a strategy of simply advancing as many allegations as possible so as to increase the cost of the litigation and accordingly the chances of favourable settlement;
- it could curtail claimants who use the litigation to advance allegations that are intended to embarrass the respondent but which add very little to the merits of the claim itself;
- it would limit sprawling claims without running the risk of losing an early strike-out application.

The importance of this point cannot be understated. It is extremely difficult to strike out discrimination claims on the basis that they have no reasonable prospects of success since most cases involve matters of factual dispute which cannot sensibly be resolved at a preliminary stage (*Ezsias*). Claimants are often buoyed up by successfully defending this type of strike-out application. This can make later negotiations to bring about settlement far harder.

Moreover, if a respondent loses a strike-out application aimed at showing that the historic allegations are 'out of time', it is then stuck with a finding that these matters are 'in time' even though it may well have successfully demonstrated at the substantive hearing that they were 'out of time' after all. This frequently happens because claimants ordinarily argue that historic allegations form part of a continuing act and at a preliminary stage they simply need to demonstrate that there is a *prima facie* case for viewing the allegations in this way. In contrast, at the substantive hearing, the tribunal must be persuaded to uphold the factual basis for the allegations and conclude that there was actually a continuing act. This is plainly far harder for claimants.

Of course, in certain cases there will be disadvantages too for a respondent:

- the claimant may resist settlement after succeeding in their primary claims and insist on reviving the secondary allegations. It will be more costly for a respondent to defend two tranches of litigation rather than addressing all of the matters in one hit. There may also be practical problems associated with reconstituting the original tribunal to hear the balance of the allegations;
- the claimant's chances of success may increase if they adopt a staged approach since the tribunal will focus on the strongest claims first without being distracted by the weaker claims, which should have been hived off to the secondary schedule;
- the respondent may become drawn into defending the allegations contained in the secondary schedule as part of the primary litigation if the claimant tries to use those matters as supporting evidence. Plainly, this would undermine the staged approach. However, there is a neat solution to this particular problem, which is to ensure that there is an agreement (or failing that, an order) to the effect that the allegations contained in the secondary schedule cannot be advanced as background allegations in the primary claim;
- the respondent may become embroiled in a time-consuming process by which primary and secondary schedules are produced, agreed or ordered.

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Accordingly, as in all litigation, there is no 'one size fits all' answer to whether a staged approach will be to a respondent's advantage.

Advantages and disadvantages for claimants

A staged approach might appeal to the representatives of claimants too. Occasionally, claimants are deeply attached to particular allegations and will not consent to streamlining their claims regardless of the merits or their value. Adopting a staged approach may provide a helpful solution in that they can 'test' the strongest and most valuable allegations without abandoning the remaining complaints.

Similarly, where there are valid historic allegations which are dependent on the most recent allegations being upheld (say, a decision to discipline and then dismiss), so as to create the relevant continuing act, it may make sense to place the historic allegations on a secondary schedule, to be revived only if the primary and most recent complaints succeed. In this way, a claimant with limited financial resources could pursue the litigation in a more cost-effective way.

However, some caution is advisable since relegating certain allegations to the secondary schedule *may* implicitly indicate that the claims are weak. If a claimant unilaterally produced a primary and secondary schedule of allegations, yet failed to persuade the tribunal to consent to such an approach, the respondent may seek strike-out or a deposit order so as to place pressure on the claimant to withdraw the entirety of the allegations contained within the secondary schedule. Further, the tribunal itself may place pressure on the claimant to withdraw the allegations contained within the secondary schedule on the basis that they appear to be weak since they have been relegated to the secondary schedule.

Accordingly, it is only advisable to produce primary and secondary schedules where the tribunal and respondent have consented to their use in advance. Similarly, it may be important to explain why a staged approach is being adopted; for example, the allegations on the secondary schedule are 'out of time' unless the primary complaints succeed. In this way, the claimant should avoid having to justify the bringing of the claims in the first place despite being 'relegated' to the secondary schedule.

Finally, advisers always need to bear in mind that some background allegations, which might naturally fit within a secondary schedule, could be useful evidence to prove the primary complaints. In such a scenario, a staged approach may have little to offer.

Conclusion

At present, the adoption of a staged approach towards discrimination claims is not part of the culture of the tribunal system. However, we believe that greater thought should be given to a staged approach where sweeping discrimination claims are being advanced. It will not be suitable for all cases. But, since there are disadvantages to pursuing early strike-out applications, a staged approach may be one way of reducing the burdens on a respondent by streamlining litigation at the outset with a view to disposing of the claims in the most cost-effective manner.

KEY:

Hendricks	*Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96
Walters-Ennis	*St Christopher's Fellowship v Walters-Ennis* [2010] EWCA Civ 921
Gillespie	*HSBC Asia Holdings BV v Gillespie* [2011] ICR 192
Ezsias	*Ezsias v North Glamorgan Trust* [2007] ICR 1126