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Questions of employment tribunal procedure

Snigdha Nag discusses procedural issues such as the employment tribunal's approach to time limits and decisions regarding Acas early conciliation

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Civil procedure is a topic which gains a great deal of attention from practitioners, judges, and commentators alike. Employment procedure cases generally do not, as it would appear the 2013 Employment Tribunals Rules of Procedure are a more niche topic with fewer broad questions of interpretation or justice. Nevertheless, some interesting procedural questions have been answered over the last 12 months, which practitioners should bear in mind.

Nursing & Midwifery Council v Harrold [2016] IRLR 30 is a notable recent case on civil restraint orders. It was held that the High Court could impose a civil restraint order in respect of claims to be brought in the employment tribunal using its inherent jurisdiction, despite the fact that the CPR (as amended) do not apply, since the ET is an inferior court. Such orders prevent vexation, oppression, and additionally prevent the unmeritorious waste of court resources, and as such give effect to the overriding objective.

Liddington v 2gether NHS Foundation Trust [2016] UKEAT 0002_16_2806 is a case involving a number of procedural issues, but one of the most relevant to practitioners is that costs orders for unreasonable conduct can be made even against litigants in person in the employment tribunal. Here, a repeated failure to properly particularise a claim was deemed unreasonable.

Bhardwaj v FDA [2016] IRLR 789 is a Court of Appeal case considering the issue of alleged bias of an employment tribunal following the appointment of two members of the respondent company as lay members of the employment tribunals service. One had been appointed to the tribunal where the claimant's case was to be heard (London Central), the other at London South. It later transpired that one of the lay members of the bench for the claimant's case attended a training day with the newly appointed lay tribunal member from the London South tribunal.

However, at the time of the hearing, the claimant was happy for the case to be heard despite the appointment of the two lay members from the respondent. The Court of Appeal held that the claimant had waived her right to object by agreeing for the hearing to go ahead, and that in any event the circumstances were not such that a 'fair-minded and informed observer' would conclude that there was a real possibility of bias.

Fallows v News Group Newspapers Ltd [2016] IRLR 827 involved a restricted reporting order in a case involving the former hairdresser to Sir Elton John, who was bringing a claim of sex discrimination and unfair dismissal, such a dispute obviously being of interest to the press. A restricted reporting order was made as the claim included an allegation of sexual misconduct, but the claim was withdrawn following an agreement being made between the parties.

News Group Newspapers applied for, and was granted, the revocation of the order, which was subsequently appealed. It was held that settlement and withdrawal of a claim does not result in the automatic lapse of a restricted reporting order (unlike the promulgation of a decision) and that the 2013 Rules permitted the ET to grant a permanent restricted reporting order, rather than one limited to the life of the proceedings.

Time limits

In *Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278, acceptance of an out-of-time discrimination claim (17 days late on grounds of the claimant's diabetes) was considered by the EAT. HHJ Peter Clark ruled that applications should be decided under a 'multi-factoral approach' in keeping with the tribunal's wide 'just and equitable' test. The discretion should be wide, and 'no single factor [should be] determinative'.

Another case on the subject of time limits is *Sheredes School v Davies* [2016] UKEAT 0196_16_1309, this time relating to an unfair dismissal (decided under the more stringent 'reasonably practicable' test). On 8 October 2015,

the employee's solicitors advised him to seek new solicitors in relation to the claim but failed to inform him that the time limit for his claim was due to expire on 25 October 2015. On 14 October 2015, the SRA intervened in the matter, preventing the solicitors from dealing with the case. The employee sought advice elsewhere on 5 November 2015 and brought a claim, with the help of his wife, on 10 November 2015 (without having all his papers, his file having been retained by his original solicitors).

In this case, because 'there can really be no argument that they ought to have been advised on that occasion [8 October 2015] of the urgent need present a claim; nor can there be any doubt that, if they had been so advised, the claim could have been presented in time', it would have been reasonably practicable for a claim to have been commenced in time, resulting in the EAT finding the claim ought not to be accepted.

As HHJ Shanks put it, 'I appreciate that this outcome is likely to be very disappointing, if not baffling, [to the claimants]. The only consolation I can offer is that they may well… have a claim against [their solicitors] in respect of the loss of an opportunity to bring a claim'. This follows the approach in civil proceedings on the subject of limitation from the long-standing precedent of *Thompson v Brown Construction* [1981] 2 All ER 296, where the possibility of pursuing a claim against negligent solicitors was a relevant factor in refusing to disapply the time limit.

Early conciliation

The operation of early conciliation as a pre-action requirement has led to a number of important decisions.

In *Science Warehouse Ltd v Mills* [2016] IRLR 96, the EAT ruled that a claimant seeking an amendment to add a new claim to existing tribunal proceedings was not obliged to go through Acas early conciliation for this fresh claim. *Compass Group UK & Ireland Ltd v Morgan* [2016] UKEAT 0060_16_2607 is analogous. Here, an employee resigned after a certificate had been issued by Acas and sought to claim constructive dismissal. The tribunal did have jurisdiction and a second conciliation period was unnecessary.

Mist v Derby Community Health Services NHS Trust [2016] ICR 543 is an EAT case where it was held that an error by the employee claimant in naming the respondent could not prevent a subsequent claim from being accepted by the employment tribunal. Here, the claimant had named the second respondent correctly in the ET1 form, but as a result of complications owing to the transfer of an undertaking, it had not been named in the Acas early conciliation certificate.

Notably, HHJ Eady QC stated that the requirement of section 18A of the Employment Tribunals Act 1996 (as amended) is to 'provide prescribed information to Acas before presenting an application to the ET. This will include the prospective respondent's name and address… The requirement is not for the precise or full legal title; it seems safe to assume (for example) that a trading name would be sufficient. The requirement is designed to ensure Acas is provided with sufficient information to be able to make contact with the prospective respondent if the claimant agrees such an attempt to conciliate should be made… I do not read it as setting any higher bar.'

In relation to bringing tribunal proceedings against additional parties not named in the original early conciliation certificate, in *Drake International Systems Ltd and others v Blue Arrow Ltd* [2016] ICR 445, the EAT held that rule 34 of the 2013 Rules permits a tribunal to exercise its discretion in favour of the claimant in making what is essentially a case management decision. Here, the link between the original intended respondent (the parent company) and the four subsequently selected respondents was close. The discretion must consider the overriding objective as well as the 'relevance, reason, justice, and fairness inherent in all judicial discretions'. In reaching this decision, Langstaff J noted that a contrary decision would have created 'a real risk that satellite litigation in respect of the provisions of early consideration might proliferate'.

Tanveer v East London Bus and Coach Company Ltd [2016] ICR D11 in the EAT establishes that the one-month extension to the relevant time limit as a result of Acas early conciliation conforms to the 'corresponding date' rule from *Dodds v Walker* [1981] 1 WLR 1027. In other words, where an early conciliation certificate was issued on 30 June 2015, the extension runs to 30 July 2015, namely 'the day of that month that bears the same number as the day of the earlier month on which the notice was given or the specified event occurred'.

The underlying theme is that while satellite litigation on the specific meaning of the early conciliation requirements is to be discouraged, generally speaking the employment tribunal can expect for time limits and other procedural requirements to be complied with. Where particulars are required, they should be provided, and where restrictions on reporting are set down, they are to be respected. Practitioners and litigants in person alike are expected to respect and follow time limits, directions, and orders or face the consequences. **SJ**

> **Applications should be decided under a 'multi-factoral approach' in keeping with the tribunal's wide 'just and equitable' test**