EAT guidance on striking out discrimination complaints

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***Xie v E'quipe Japan Ltd* [2024] EAT 176**

The facts

C worked as a beauty consultant for R, a cosmetics company, in Harrods from March 2022. C, who was engaged under a zero-hours contract, described herself as Chinese.

R received a "letter of concern" from Harrods in October 2022 because a complaint had been made by customers who alleged C had provided poor service and shown a lack of respect.

C brought complaints of direct race discrimination against R on the basis of a number of allegations against her trainer and area manager, including for not allocating her to shifts thereafter and for failing her in her product knowledge test that ultimately resulted in C's dismissal.

The ET

At a PH, the Judge suggested to C that it appeared she was merely asserting a difference of protected characteristic and a difference of treatment.

C said she considered the "something more" was an "anti-Chinese culture" in which people of Chinese origin were treated less favourably than those of Arab origin, such as the customers who had complained against her. C described four examples as being evidence of "anti-Chinese culture":

1. One colleague told another colleague that "Chinese customers are easy";
2. R's area manager had required a Chinese colleague who was leaving R to work a shift and refused to change it, which she did not do for two other colleagues, one of whom was white and the other from the Philippines, when they left;

3. When R's area manager discussed the complaints made against C by Arabic and Chinese customers, she spent more time on the complaint by the Arabic customers and less on the one by Chinese customers; and
4. No action was taken against a Japanese colleague against whom a complaint was made by a Chinese customer.

The ET noted that the contention of an anti-Chinese culture had not been made prior to the PH and had not been pleaded. The ET said that even if the ET was to accept that each of those incidents took place as alleged, it does not appear at all likely that they would, taken together or singly, demonstrate an anti-Chinese culture.

The ET struck out the claim.

The EAT

C appealed to the EAT on a number of grounds. The appeal was successful on two grounds. Of interest is the summary given by HHJ Tayler concerning circumstances in which there is a core of disputed fact and on taking a case at its highest.

The index ground of appeal was that the ET had erred by failing to take C's case at its highest before finding that her claims of direct race discrimination had no reasonable prospects of success. It was said that the claims turned on a core of disputed facts that was not susceptible to determination otherwise than by evaluating the evidence at a full hearing. In particular, the ET had failed to assume that C's allegation that there was an "anti-Chinese culture" at work was correct.

The EAT noted that taking a case at its highest requires an assumption that primary facts will be established, rather than the inference of discrimination it is asserted should be drawn from the facts.

The EAT said that the ET was required, in the circumstances of this case, to assume that C would establish the facts from which it is asserted that the ET should infer discrimination. The ET was not required to assume that the inference of anti-Chinese culture would be established.

On the face of it, the ET did assume that the factual allegations would be made out but concluded that there were no reasonable prospects of C establishing an anti-Chinese culture on the basis of those facts.

The real issue here was the approach adopted by the ET to the core issue of disputed fact: why C was treated as she was. As well as appealing on the purported failure to take facts at their highest, C also challenged the approach adopted by the ET to the core of disputed fact. C contended that the complaint "turned on a core of disputed facts that was not susceptible to determination otherwise than by evaluating the evidence at a full hearing".

The EAT noted that the principle established in the authorities that strike out is not prohibited in discrimination cases, even where there are disputes of fact, must be seen as a limited exception to the general proposition that strike out is inappropriate in discrimination claims. The exception from this general proposition should not be treated as if it were a rule.

The EAT also reiterated the importance of returning to the general guidance, rather than merely focusing on the exception. It was said that, although they may be familiar, the words of Lord Steyn in ***Anyanwu v South Bank Students Union*** [2001] ICR 391, bear repeating:

> For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.

The EAT also reiterated the guidance given in ***Anyanwu*** by Lord Hope:

> I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.

The EAT said that these statements must be seen in the context of the great challenges faced by those who bring discrimination claims that turn on a determination of the mental processes of an alleged discriminator.

The EAT concluded that the ET could not, on a proper application of the guidance from the authorities, permissibly have found that there were no reasonable prospects of C establishing discrimination, even if she was able to establish the facts from which she contended an anti-Chinese culture could be inferred.

The appeal was allowed and the claim was remitted to the ET. If an application for strike out was pursued, and R was told to reflect on the EAT decision before deciding whether to renew an application, having regard to the overriding objective, the application would be made before a freshly constituted ET.

Comment

The EAT has provided a concise, readily accessible, summary of the approach to be taken by the ET when faced with an application for strike out in discrimination claims where there is a core of disputed facts.

Respondents are often keen to challenge a claim of discrimination at an early stage, particularly where the factual basis upon which a claim is brought is disputed. However, as the appellate courts have repeatedly found, discrimination claims can only be struck out in the most obvious and plainest cases.

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28 November 2024

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