Strike Out Season

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1. As winter fades and spring is upon us the Employment Appeal Tribunal has handed down no less than 4 recent decisions on strike out. To save you some time, I have summarised the key aspects of these 4 authorities so that you can spend more time in the evening sunlight and less time under your office striplight.

W v Highways England and others, 18th February 2025, [2025] EAT 18, Lord Fairley

2. The Claimant brought claims against KPMG which was acting as a management consultant for the Claimant' employer. The claims were for whistleblowing public interest detriments, direct sex discrimination and sex victimisation. The Claimant also asserted that in breach of section 112 Equality Act KPMG had aided her employer to commit basic contraventions against her. After hearing evidence regarding whether the Claimant had an implied contract with KPMG, the Tribunal struck out the claims against KPMG because the Claimant failed to establish that there was an implied contract between her and KPMG.

What the EAT decided:

3. The claims should not have been struck out. This was because KPMG could potentially be liable to the Claimant without having a direct contractual relationship with her. There were fact-sensitive issues that could not properly be determined at a strike out application: KPMG might be an agent of the employer; KPMG could fall within the extended definition of "employer" for the whistleblowing complaint; KPMG might have knowingly helped the employer to commit a basic contravention against the Claimant pursuant to s112 EqA.

Takeaways:

4. Discrimination and whistleblowing cases should not be struck out except in the clearest of circumstances

5. It is not generally open to the Tribunal at a strike out hearing to conduct an impromptu trial of the facts

6. Strike out of discrimination and whistleblowing cases might be appropriate where central facts are undisputed or where it is instantly demonstrable that a claimant's averments in the pleadings are untrue or where the claim is incompetent as a matter of law. Otherwise, a strike out of a discrimination or whistleblowing case is likely to be an error of law.

Kostrova v McDermott International INC and CB&I UK Ltd, 13th March 2025, [2025] EAT 35, Lord Fairley

7. The claims of sex and age discrimination were struck out as having no reasonable prospect of success. The Tribunal Judge considered that the main facts of the case were not in dispute.

What the EAT decided:

8. The claim should not have been struck out. There were issues of fact in dispute. In deciding whether the core facts of a case are in dispute, a tribunal must first identify with clarity the particular complaints advanced before then considering the extent of any dispute over the key facts upon which those complaints depend. In the case of a claimant in person, the complaints should not be ascertained only by requiring the claimant to explain them under the stress of a hearing. This is particularly so where the first language of the claimant in person is not English. Care should be taken to read the pleadings.

9. The tribunal failed to recognise the extent of the appellant's pleaded case, wrongly concluded that the material facts about her discrimination complaints were not disputed, failed to take her complaints at their highest, and instead made an informal assessment of likelihood of the respondent's evidence being preferred. The strike out of the discrimination complaints was therefore an error of law.

Takeaways: - a sense of *déjà vu* arises …

10. Discrimination cases should not be struck out except in the clearest of circumstances

11. It is not generally open to the Tribunal at a strike out hearing to conduct an impromptu trial of the facts

12. Strike out of discrimination cases might be appropriate where central facts are undisputed or where it is instantly demonstrable that a claimant's averments in the pleadings are untrue or where the claim is incompetent as a matter of law. Otherwise, a strike out of a discrimination case in which there are material disputed issues of fact is likely to be an error of law.

13. A litigant in person, especially one whose first language is not English, should not be required to explain the facts at a stressful strike out hearing.

Kamphues v Venator Materials UK Ltd, 19th March 2025, [2025] EAT 30, HHJ Tayler

14. The litigant in person's claim for race discrimination, harassment, whistleblowing, unpaid wages and constructive unfair dismissal was struck out because of the failure to comply with a previous order and because the claim was not being actively pursued. The Claimant made multiple applications for late postponement of preliminary hearings and failed to provide particulars that had been ordered. His claim was described as speculative. The Claimant had provided no cogent response to the Judge's order but had, instead, made allegations about the Respondent's representative's behaviour and the Tribunal and he refused to acknowledge the Tribunal's authority to order disclosure.

What the EAT decided:

15. There must first be "threshold conduct" which gives rise to the discretion to strike out. That will be followed by the "discretionary decision" to decide whether the claim should be struck out. In nearly every case, there will need to be consideration of whether a fair trial remains possible.

16. Consideration of a fair trial includes looking at whether the trial could take place within a reasonable period without undue waste of costs and the limited resources of the Employment Tribunal.

Takeaways:

17. Where an opaque claim is pleaded by a litigant in person, it is helpful if the Respondent provides clarity in its Response as it will generally know the cause of the Claimant's dissatisfaction.

18. Case management that avoids lengthy further particulars in which more and more subsidiary claims and issues get added that obscure the real dispute between the parties will help to avoid a litigant in person becoming increasingly intransigent and unhelpful. Therefore limit the requests for particulars in cases where you predict the other unrepresented party will be challenging or difficult. Press for an early preliminary hearing instead.

19. Where a party conducts themselves in such a way that the claim or response could be struck out, the Tribunal merely has discretion to strike out. The Tribunal must then weigh up the relevant factors which generally requires consideration of whether there can still be a fair trial. Think not just about forensic prejudice, such as unavailability of witnesses or reduced cogency of evidence but also about whether the trial will be within a reasonable period at reasonable cost and not at too high a demand on the Tribunal's resource.

Kinch v Compassion in World Farming International, 26th March 2025, [2025] EAT 41, Lord Fairley

20. The Claimant resigned with notice in response to what she claimed was a repudiatory breach by the respondent of her contract of employment. She brought a claim for constructive unfair dismissal. Upon the Respondent's application the complaint was struck out on the basis that it had no reasonable prospect of success. The judge concluded on the papers that there was no prospect of the appellant establishing that a series of agreed extensions of her notice period following her resignation did not have the effect of affirming the contract.

What the EAT decided:

21. The EAT held that the Tribunal Judge was wrong to have determined that it was an undisputed fact that the appellant had repeatedly asked for extensions of her notice period for her own benefit – this conclusion was not supported in the pleadings, the strike out application, the submissions or in the contemporaneous documents.

22. The claim should not have been struck out without a hearing of evidence about the precise circumstances in which the notice period was extended because this was material to the question of whether the Claimant affirmed the contract of employment.

Takeaways:

23. Although a claim can be struck out where there are disputed core facts, it would only happen in an exceptional case. For example, where the facts relied upon by a claimant were clearly inconsistent with undisputed contemporaneous documentation. In cases that are not exceptional, a dispute of core facts will preclude a successful strike out application because the Tribunal would not be able to correctly find that there was no reasonable prospect of success. Where facts are disputed there must be at least some reasonable prospect of success. The question of whether a party has affirmed an employment contract is highly fact sensitive and context dependent. It is always a question of fact and degree whether conduct should properly be regarded as affirmation of the contract.

Conclusions

24. Careful consideration of the merits of a strike out application is needed. It will be rare indeed that a discrimination or whistleblowing claim will be struck out, but not impossible. In other cases core facts need to be uncontested or the claim needs to not make sense (e.g. where a detriment precedes a protected disclosure rather than follows afterwards). Deplorable behaviour by a party will not, in itself, justify a strike out unless a fair trial is no longer possible.

I hope the above case summaries give you some valuable guidance on the recent approach to strike out applications.

29 March 2025

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