Strike force

In the first of a three part series, **Mark Whitcombe** examines the employment tribunal's approach to striking out

IN BRIEF

- ET's power to be exercised in accordance with the overriding objective.
- Is striking out proportionate?
- Is a fair trial still possible?
- Will firm case management or a lesser penalty provide a more appropriate solution?

Applications to strike out are a much overused tactic, especially by respondents. Many applications are inappropriately made and have little chance of success. This article explores the different tests that employment tribunals will apply when considering whether to exercise their power to strike out a claim or response.

The article is split into three parts. The first part will consider both applications to strike out on the basis that a claim or response is scandalous, vexatious or has no reasonable prospect of success, and also applications to strike out on the basis that the manner in which proceedings have been conducted has been scandalous, unreasonable or vexatious. The second part will deal with the striking out of claims that have not been actively pursued, striking out for non-compliance with an order or practice direction, and striking out where it is no longer possible to have a fair hearing. The third and final part will consider striking out pursuant to an "unless order", and future developments under the new Employment Tribunal Rules of Procedure 2013.

Employment Tribunals Rules of Procedure 2004

The power to strike out a claim or response is currently contained in r 18(7)(b)–(f) of the Employment Tribunals Rules of Procedure 2004. It gives employment tribunals the power to strike out all or any part of any claim or response on the following alternative bases:

- it is scandalous or vexatious or has no reasonable prospect of success;
- the manner in which proceedings have been conducted by or on behalf of the party concerned has been scandalous, unreasonable or vexatious;
- in the case of *claims* only (not responses) where that claim has not been actively pursued;
- non-compliance with an order or practice direction;
- where it is no longer possible to have a fair hearing in those proceedings.

That is an exhaustive list, and the tribunal's wide case management powers do not give it the power to strike out on any other basis (*Care First Partnership v Roffey* [2001] ICR 87, [2001] IRLR 85, and r 18(8) of the 2004 Rules of Procedure).

There is an important procedural safeguard in that the tribunal must first give notice in writing to the party concerned giving him or her the opportunity to show cause why the tribunal should not make an order striking out, unless an opportunity to do so orally has already been given (rr 18(6) and 19). Striking out following an "unless" order is an exception to this rule, presumably since the order itself provides sufficient notification of the consequence of default (r 13(2)).

Judgments striking out the whole or part of a claim or response may be made at a hearing or a pre-hearing review, but not at a case management discussion (r 17(2)).

Claims or responses which are scandalous, vexatious or which have no reasonable prospect of success (rule 18(7)(b))

(i) Scandalous or vexatious claims

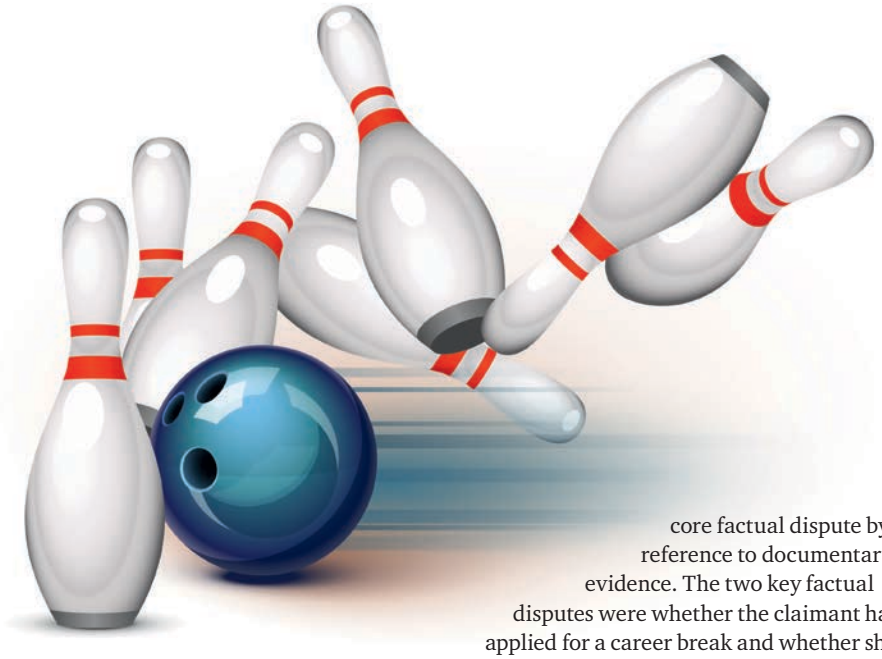
In this context "scandalous" means both irrelevant and abusive to the other side, or misuse of the privilege of legal process to vilify others, or giving gratuitous insult to the court. It is not a synonym for "shocking".

"Vexatious" claims or responses are ones pursued without the expectation that they will be successful in order to harass the other side out of some improper motive. It may also be vexatious to bring a second set of proceedings on the same facts (*Lynch v East Dumbartonshire Council* [2010] ICR 1094).

(ii) Claims with no reasonable prospect of success

The power to strike out a claim or response having no reasonable prospect of success is the current reformulation of the power to strike out "frivolous" and "misconceived" claims in earlier versions of the employment tribunal rules of procedure. The issue is of course whether the tribunal is satisfied that there is no reasonable prospect of success, and not simply whether the claim is likely to fail (*Balls v Downham Market High School & College* [2011] IRLR 217, [2010] All ER (D) 318 (Nov)). Claims or responses which have little reasonable prospect of success might warrant the payment of a deposit under r 20, and it will therefore often be sensible to combine applications to strike out under r 18(7)(b) with applications for the payment of a deposit under r 20.

The drastic power to strike out a claim on the basis that it has no reasonable prospect of success will be exercised cautiously. Cases involving a significant factual dispute are most unlikely to be struck out. Only in



exceptional cases will it be appropriate to strike out a claim where the central facts are in dispute and the evidence relating to them has not been heard. One example of such an exception might be where the facts asserted by one party were clearly and directly contradicted by contemporaneous documentation. *Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly* [2012] CSIH 46, [2012] IRLR 755 shows that even in relatively routine unfair dismissal cases it will require exceptional circumstances for a claim to be struck out where the central facts are in dispute. In a normal case it would be an error of law for a tribunal to pre-empt a full hearing on the merits by striking out.

Arguably, an even more cautious approach should be adopted in certain types of case. The need for such an approach has been emphasised in discrimination cases by *Anyanwu v South Bank Students' Union* [2001] 2 All ER 353, [2001] IRLR 305 where Lord Steyn referred to the fact sensitive nature of most discrimination cases, and to the public interest in a proper determination of discrimination claims on their merits in our pluralistic society. The Court of Appeal made similar comments in the context of whistleblowing claims in *Ezsias v North Glamorgan NHS Trust* [2007] 4 All ER 940, [2007] IRLR 603.

The recent case of *Eastman v Tesco Stores Ltd* [2012] UKEAT/0143/12/SM, [2012] All ER (D) 264 (Nov) provides a good example of a situation where a strike out was permissible, despite a core of disputed facts. The employment judge had received evidence on certain issues, as he was entitled to do at a pre-hearing review (r 18(2)(d)), and in contrast to the normal position when applications to strike out are heard in the ordinary courts. The Employment Appeal Tribunal (EAT) held that it was entirely open to the employment judge to resolve a core factual dispute by reference to documentary evidence. The two key factual disputes were whether the claimant had applied for a career break and whether she was given an oral guarantee that she could return to her old job at the end of that career break. The distinguishing feature of *Eastman* was that the judge was able to resolve those disputed facts, and having done so was entitled to conclude that an unfair dismissal claim had no reasonable prospect of success.

Advisers contemplating an application to strike out on the basis that a claim has no reasonable prospect of success should consider whether it is realistic or even possible for the tribunal to resolve the core disputed facts in the course of hearing that application. If not, then the application is highly likely to fail. *Eastman* was not a typical case because the core factual dispute was relatively simple. In *QDOS Consulting v Swanson* UKEAT 0495/11/1204, HHJ Serota QC reiterated that applications involving prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of witnesses should not be brought under r 18(7)(b).

It will generally be an error of law to strike out on the basis of a view taken about the credibility of a party or their witnesses formed during but prior to the end of a hearing. See, for example, *Williams v Real Care Agency Ltd* UKEATS/0051/11, [2012] ICR D27, *Timbo v Greenwich Council for Racial Equality* UKEAT/0160/12, [2013] ICR D7.

Cases which are legally misconceived are far more easily struck out than those turning on disputes of fact. In such a situation it may be possible for an employment tribunal to conclude that a claim is bound to fail without reference to disputed facts. One very simple example would be a claim for defamation or other matters in respect of which an employment tribunal simply has no jurisdiction. Another example would be a claim for unfair dismissal brought not only against the employer but also against individuals such as the managing director or the dismissing officer. Since a claim for unfair dismissal lies only against the employer it is not necessary to resolve any questions of fact in order to strike out claims made additionally against individuals involved in the dismissal. It is a simple issue of law.

Scandalous, unreasonable or vexatious conduct of proceedings (r 18(7)(c))

The issue here is whether the proceedings have been *conducted* scandalously, unreasonably or vexatiously and not simply whether a party or their representative has *behaved* scandalously, unreasonably or vexatiously (*Bolch v Chipman* [2004] IRLR 140, [2003] All ER (D) 122 (Nov) and *Bennett v London Borough of Southwark* [2002] EWCA Civ 223, [2002] IRLR 407).

In any case not involving deliberate disobedience or failure to perform an order of the tribunal, it was crucial to take into account whether a fair trial was still possible (*De Keyser Ltd v Wilson* [2001] IRLR 324, [2001] All ER (D) 237 (Mar)).

The key principles can be found in the judgment of Sedley LJ in *Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684, [2006] IRLR 630, a case where an employment tribunal had struck out a claim on the basis that the claimant had failed to comply with orders and in doing so had conducted proceedings unreasonably. It is well established that the power is not to be exercised too readily given its draconic consequences. That is because the first objective of any system of justice is to get triable cases tried. Courts and tribunals are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It takes something very unusual indeed to justify the striking out of a claim which had arrived at the point of trial.

> *"The drastic power to strike out a claim on the basis that it has no reasonable prospect of success will be exercised cautiously"*

The two alternative preconditions for the exercise of the power are either that:

- the unreasonable conduct has taken

the form of deliberate and persistent disregard of the required procedural steps; or
- that it has made a fair trial impossible.

Even if either or both of those conditions are fulfilled, it remains necessary to consider separately whether striking out was a proportionate response. The tribunal should consider whether a lesser sanction would be appropriate. For example, a refusal to admit late material might enable the hearing to go ahead. An adjournment coupled with an order for costs might do justice between the parties (*Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926). It might be appropriate to debar a respondent from defending the claim, but permit it to participate in the remedies hearing (*Osborne v Premium Care Homes Ltd* [2006] All ER (D) 272 (Oct)). The principle applies even where one party has threatened the other with violence (*Bolch*).

Sedley LJ expressed very similar views in *Bennett* in which he reminded tribunals that even if a party's approach to the proceedings had been scandalous, it must also be that striking out was a proportionate response to that conduct. Not every instance of misuse of the judicial process, albeit falling within the description "scandalous, frivolous or vexatious" (the applicable phrase under the 1993 Rules) would be sufficient to justify the premature determination of a claim or the defence to it. Firm case management might well afford a better solution.

> *"Firm case management might well afford a better solution"*

An order striking out a response was upheld in *Force One Utilities Ltd v Hatfield* [2009] IRLR 45, [2008] All ER (D) 130 (May), where the claimant had been intimidated by one of the respondent's directors outside the tribunal, and a fair trial was no longer possible. The EAT was not inclined to interfere with the tribunal's fact sensitive assessment of the possibility of a fair trial. Once intimidation had been found to have occurred it would rarely be perverse to find that a fair trial was no longer possible. The three relevant questions were:
- Was the conduct related to the manner in which proceedings had been conducted?
- Did the conduct make it impossible to hold a fair trial?
- Was there some step short of barring the wrongdoing party which would be proportionate?

In order to be proportionate, the alternative step would have to be sufficient to render a fair trial possible. In some cases prompt efforts to repudiate unacceptable conduct might be sufficient to mitigate its effects.

In *Force One Utilities Ltd* the EAT also observed that some tribunals might have debarred the respondent from participating in the liability hearing rather than striking out the claim altogether, but the tribunal was nonetheless entitled to reach the conclusion that the intimidation would also render a fair trial of remedy questions impossible if the respondent were to participate. **NLJ**

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