Employment

Can a claim be struck out inadvertently? – Mendy v Motorola Solutions UK Limited

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The title of this article is taken from the first paragraph of the judgment of the President of the Employment Appeal Tribunal (Eady J) in *Mendy v Motorola Solutions UK Limited and others* [2022] EAT 47. The answer may seem obvious – strike out is a draconian action, generally appropriate only in response to conduct which is improper or to pleadings that are fundamentally flawed. In the employment tribunal, however, claims are sometimes presented which are hard to understand and harder to fit into the structures of the relevant legislation. In those circumstances, case management hearings are the norm and the parties may dispute what claims should be included in the tribunal's subsequent list of issues. The EAT in Mendy was considering a situation that sometimes arises in the employment tribunal and gave valuable guidance to practitioners as to what powers the tribunal has in such situations and how those powers should be exercised.

The procedural background

In Mendy, by 16 June 2020 the claimant had presented four claims to the employment tribunal which were directed to be heard together. The claimant was directed to, and did, file and serve consolidated grounds of complaint, which ran to roughly 64 pages and included 7 appendices. A preliminary hearing took place before Employment Judge Hodgson, after which a record of the issues in the case was produced in paragraph 2.9 of which, EJ Hodgson included a statement that:

> "There is a reference in the claim form to indirect discrimination. There is no discernible claim of indirect discrimination. It appears that the provisions, criteria or practices (PCPs) relied on appear to be allegations of direct discrimination. I can discern no claim of indirect discrimination. Should the claimant wish to bring a claim of indirect discrimination he must apply to amend and he should set out the essential elements of such a claim." (quoted by the EAT at [8]).

A corresponding order was made to the effect that there was *"no discernible claim of indirect discrimination"* and that *"if the claimant wishes to allege indirect discrimination he should serve an application to amend."* (quoted at [9]).

Such a direction is not uncommon. It can be difficult for litigants in person to understand the various causes of action open to them under the Equality Act 2010, and robust case management may require the ET to discern precisely which of the causes of action identified in an ET1 are relied upon. That a claimant has used the words "indirect discrimination" in an ET1 does not necessarily mean that he or she wishes to pursue such a claim, and respondents may try to persuade the judge at a preliminary hearing that the claimant's case is more limited in scope than the ET1 may suggest.

In Mendy, the claimant had expressly pleaded a claim of indirect discrimination by reference to s 19(1) of the Equality Act 2010 and had particularised the PCPs relied on, in one of his appendices. Accordingly, the EAT gave him permission to appeal the decision of EJ Hodgson on two grounds: (1) that the claim for indirect discrimination was struck out at a private hearing and without the claimant having the necessary public opportunity to make representations (contrary to rules 56 and 37(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 as to which see further below), and (2) that the ET1 had been misunderstood and that there was a claim for

indirect discrimination.

The EAT's permission came to the attention of EJ Hodgson who wrote to the parties seeking further submissions, as the paragraph of the ET1 pleading a claim for indirect discrimination had not been brought to his attention at the preliminary hearing. On 8 December 2021, EJ Hodgson sought to revoke the paragraph quoted above as his previous order. More precisely, he sought to revoke that paragraph of his order pursuant to rule 29 of the rules, which permits the ET to revoke any case management order where that is necessary in the interests of justice.

EJ Hodgson observed that it could be argued that the order had the effect of striking out a claim for indirect discrimination, and that if the parties maintained this he would consider the matter further with a view to reconsidering that judgment, pursuant to rule 70. However, no such application was made*****.

The procedural issues

The rules distinguish clearly between case management orders and judgments, which are defined separately at rules 1(3)(a) and 1(3)(b). The ET has different powers following a case management order and a judgment. A case management order may be varied, suspended, or set aside at any time where that is necessary in the interests of justice (rule 29). A judgment may be reconsidered by the ET where it is necessary in the interests of justice to do so, either on application or on the ET's own initiative; upon reconsideration the original decision may be confirmed, varied, or revoked and, if revoked, may be taken again (rule 70). The process for reconsideration is more closely circumscribed than the process for variation of case management orders and is set out at rules 71-73.

The rules also distinguish between a final hearing and a preliminary hearing. A final hearing is one at which the ET *"determines the claim or such parts as remain outstanding following the initial consideration (under rule 26) or any preliminary hearing"* (rule 57). A preliminary hearing is more widely defined as one at which the tribunal may do one or more of several things which are listed at rule 53(1)(a)-(e). In particular, the ET may consider whether a claim or response, or any part, should be struck out under rule 37, may conduct a preliminary consideration of the claim with the parties and make a case management order, and determine any preliminary issue (which is defined at rule 53(3)). Of particular importance in this case, final hearings are generally conducted in public (rule 59, subject to two exceptions at rules 50 and 94) while preliminary hearings are conducted in private except where a preliminary issue is determined or strike out is considered (rule 56).

The difference between final and preliminary hearings is of particular importance where the ET is considering striking out because a party must be permitted to make representations before strike out (rule 37(2)) and because strike out must only be determined at a public hearing (rules 56 and 53(1)(b)). Although the ET should deal with cases justly and fairly, avoiding unnecessary formality and seeking flexibility in the proceedings (rule 2(c)), it must, nonetheless, adhere to these rules.

The confluence of these rules caused particular procedural issues in Mendy: whether there had been a strike out given that EJ Hodgson had simply directed that *"[T]here being no discernible claim of indirect discrimination before the tribunal at present, if the claimant wishes to allege indirect discrimination he should serve an application to amend"* and whether EJ Hodgson was able to revoke that paragraph of his order. He could only revoke it if it was a case management decision as his order was expressly pursuant to rule 29 and not rule 70. Further, if the claim had been struck out then it would wrongly have been struck out at a private hearing contrary to rule 56. The EAT also had to determine whether the claimant had in fact made a claim of indirect discrimination.

The outcome of the appeal

Eady J answered the latter question in the affirmative, the claimant had clearly made a claim of indirect discrimination ([34]). Eady J identified the specific paragraphs which made that claim at [5], and it is notable that there is not only reference to "indirect discrimination" but also to the protected characteristics relied upon, the PCPs relied upon (which were in a separate appendix), the claimant being placed at a disadvantage and a pre-emptive denial that the PCPs were a proportionate means of achieving a legitimate aim. Although the ET may be forgiven for missing the claim, *"it was simply wrong to say that there was 'no discernible claim of indirect discrimination'"* [36].

Having given that answer, Eady J went on to consider the effect of the decision as follows:

> "… it is clear that the effect of the November 2020 order was to remove any complaint of indirect discrimination from the face of the claim before the ET. This was not a case where the claim in issue was ambiguous and the ET's order was merely providing clarification of how the claimant had stated his case was being pursued (effectively recording a further particularisation of the claim made at the case management hearing); the ET was itself stating that it did not recognise that such a claim could be pursued on the basis of the pleaded case. The effect of the ET's ruling was thus to determine that the claimant's claim of indirect discrimination could not proceed and… that brought any such claim in the proceedings to an end. That, in my judgement, amounted to a final determination of the claim of indirect discrimination that the claimant had made in the ET proceedings at that stage." [39].

As such, the decision was tantamount to striking out the claim and the decision was to be understood as a judgment, not merely a case management order [39]. EJ Hodgson's purported revocation of paragraph 3.5 of his order under rule 29 could be of no effect.

Finally, Eady J made some general remarks about case management in cases of this kind. In particular, she stated that, *"a failure to adequately particularise a claim does not mean that it is not being pursued"* [40], and suggested that provision of further particulars could be an appropriate direction in such a circumstance.

Lessons to be learnt

In paragraph [39] quoted above, Eady J said that, *"[T]he effect of the ET's ruling was thus to determine that the claimant's claim of indirect discrimination could not proceed"*, to conclude that the order amounted to a final determination and was therefore a judgment rather than a case management order. There are two points to draw from this.

The first is that whether a decision finally determines a claim or part of a claim (such that it is a judgment within rule 1(3)(b)) is not a matter of how it is expressed, but of what it does. EJ Hodgson did not order that the claim was dismissed, or that it was struck out, but made an order that had the practical effect that it could not proceed. In fact, Eady J found that EJ Hodgson's order amounted to striking out even when it was not intended to do so (see [38]). That reasoning would probably extend to other directions that effectively struck out a claim, or part of a claim, even if they did not do so in express terms.

The second point is that an order striking out a claim or part of a claim is a judgment and not a case management order. The ET therefore has the powers in relation to such orders that pertain to judgments, namely the power to reconsider pursuant to rules 70-73, and not the powers that pertain to case management decisions.

More broadly, there are practical lessons to be drawn by the representatives of both employees and employers. *Mendy* is a case that is of obvious assistance to claimants: Eady J gives clear guidance that claims that have been made should not be effectively struck out because of lack of clarity of the claimant's case (see [40]), and that the ET cannot infer an unwillingness to pursue a claim that has been made, purely because it has been inadequately particularised. Particularly where claims are complex, or where proceedings were initiated by an employee who was not at that time legally represented, *Mendy* supports a more forgiving approach to the identification of issues in the course of case management.

For respondents, the lesson is a little less clear. It will almost always be in the employer's interest to be responding to a claim that is more limited in scope, and so it will almost always be in the employer's interest to limit the issues that are identified at preliminary hearings. *Mendy* does little to change that, and Eady J recognises and endorses the task that ETs routinely perform in identifying the issues between the parties and clarifying the claims made by the claimant. What *Mendy* does, however, is illustrate the risks of taking too aggressive an approach to preliminary hearings. The ET is limited in the orders it can make at a private hearing, and Mendy shows that respondents should be wary of effectively seeking strike out through the back door by way of an overly restrictive "clarification" of the claim.

Where a claim is pleaded excessively broadly, the respondent may need to consider precisely what difference the

breadth of that claim makes. A larger list of issues will often look intimidating, but there may be no harm in allowing the claimant to include allegations that have little merit and will have little bearing on the outcome of the proceedings. *Mendy* is an illustration of how urging the tribunal to take an approach to case management that is in excess of its powers may ultimately prove counterproductive.

** In addition to the procedural chronology set out above, and for completeness, the claimant had applied to amend his ET1 to add a claim for indirect discrimination, but that application was dismissed (see [16]). The claimant also applied to EJ Hodgson to reconsider his order revoking paragraph 3.5, which application was also dismissed. The claimant continued to pursue his appeal but was not opposed by the respondent (see [3]).*

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