

Employment Law - Practice and Procedure

(5) Strike out, deposits and costs

Agenda

- Strike out
- Unless orders
- Deposit orders
- Costs orders
- Tactics - offensive
- Tactics - defensive

Strike out (1)

- Rule 37 gives the ET the power to strike out a claim or response or part thereof on any or all of the following grounds:
- That it is scandalous or vexatious or has no reasonable prospect of success
- That the manner in which the proceedings have been conducted has been scandalous, unreasonable, or vexatious
- That the procedural rules or an order of the tribunal have not been complied with
- That it has not been actively pursued
- That the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Strike out (2)

- The party against whom the strike out is sought must be given a reasonable opportunity to contest the application
- This could be either in writing or, if requested, at a hearing.
- In practice, except in the most straightforward of cases, the strike out application will be the subject of a preliminary hearing.
- The hearing will focus on the papers and give both sides the opportunity to argue for or against strike out
- The ET will be reluctant to hear evidence, since the point is to determine whether a full hearing is necessary/possible

Strike out (3)

- Appellate courts have warned against tribunals and lower courts striking out a claim without good reason
- “striking out a statement of claim or dismissing the claim or counterclaim is one of the most powerful weapons in the court’s case management armoury and should not be deployed unless its consequences can be justified” (*Marcan Shipping v Kefalas* [2007] EWCA Civ 463).
- Where strike out is sought on grounds of failing to comply with a direction of the tribunal, instead of striking out, the tribunal may well issue an ‘unless’ order
- This will mean that unless the offending party complies with the relevant direction a strike out will follow.

Strike out (4)

- What about strike out sought because the claim or response has no reasonable prospect of success?
- Generally speaking the tribunal ought not to decide there are no reasonable prospects of success if there is a disputed point of fact that requires oral evidence from witnesses before it can be resolved.
- Tribunals are particularly reluctant to strike out discrimination and whistleblowing claims: *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126.
- Also *Cox v Adecco* UKEAT/0339/19

Unless orders

- They are dealt with in Rule 38
- An unless order specifies that, if it is not complied with by the specified date, the claim or response or part thereof shall be dismissed without further notice
- Application can be made within 14 days to have the order dismissing the claim, response or part set aside
- That application is on basis of written representations unless a hearing is requested
- If a response is dismissed, the effect is just as if there had been no response

Deposit orders (1)

- Rule 39 is the one governing deposit orders
- Deposit orders under rule 39 are a less draconian alternative than strike out.
- The test is: ‘does the claim or response (or a part of it) have **little** reasonable prospects of success?’ This is subtly different from the test for strike out of ‘**no** reasonable prospects of success’
- More importantly, an order for a deposit does not stop a case or a defence dead in its tracks, whereas strike out does.
- The deposit can be fixed at up to £1,000, depending on the party’s ability to pay. The party who is the subject of the order will be given a short period to pay.

Deposit orders (2)

- Failure to pay the deposit will mean the claim or response, or the relevant allegation, is struck out.
- If the party pays the deposit, proceeds to a final hearing and loses on the relevant point, they will forfeit the deposit and be at risk of a costs order against them.
- In practice, a large proportion of parties who are subject to a deposit order will draw back at the prospect of pursuing the point in question.
- They will have had the opinion of an outsider - the employment judge - who thinks that their point has little merit, and that may dissuade them from going further with it.
- In effect, they have had a warning about costs from the EJ

Costs orders (1)

- There is a fundamental difference between the civil courts and tribunals in relation to costs.
- In the courts, the general rule is that costs follow the event — in other words, normally reasonable costs are awarded against the losing party.
- In tribunals, the general rule is that no costs are awarded, with certain exceptions
- The powers of the tribunal are to be found in Rules 75-84
- If a party in an employment tribunal case can show that the other side has, in bringing or conducting proceedings, acted vexatiously, abusively, disruptively, or otherwise unreasonably, the tribunal has discretion to award costs
- Similarly if any part of the claim or response was without reasonable prospects of success.
- In any such case a tribunal can award costs - see Rule 76

Costs orders (2)

- Even if one of the grounds in rule 76 is made out, the tribunal retains a discretion whether to make a costs order, and if so for how much. It may consider:
- The principle that cost orders are the exception rather than the rule in the tribunal.
- Factors the ET should consider include:
- The paying party's ability to pay - but the fact that a party is currently unable to pay costs will not necessarily stop an order being made.
- Whether the paying party has been legally advised - but that does not mean that a litigant in person is immune from costs orders.
- Whether the party claiming costs or the tribunal has previously made a 'costs warning' in respect of the paying party's conduct or the low merits of their case, although this is not essential.
- Rejection of any reasonable offer of settlement made by the party against whom costs are claimed. A rejection of a reasonable offer is not, by itself, grounds awarding costs, but it may amount to unreasonable conduct.

Costs orders (3)

- Rule 77 deals with the procedure for considering costs orders
- It may be applied for at any stage up to 28 days after final judgment
- Tribunals are reluctant to award costs before the hearing is finished
- It is common for an application to be made as soon as judgment is issued if delivered in person
- Costs can be set at a figure up to £20,000 - or more if a detailed assessment is carried out (Rule 78)

Costs orders (4)

- Preparation time orders are dealt with in Rule 79
- They are to reimburse an advisor/representative who is not a lawyer
- The amount to be paid is set at £42 per hour currently
- It does not cover the time spent actually in the hearing

Costs orders (5)

- What about costs where representation is pro bono?
- They can be claimed and paid to the pro bono charity Access to Justice
- That has been the case in the courts, but not the tribunals
- That has changed since s 48 of the Judicial Review and Courts Act 2022 came into force on 28 June 2022 - costs may be sought where a party has pro bono representation
- So apply for costs where appropriate
- The prospect that you may be able to do so can be a deterrent to an employer with a weak case, or one who conducts it unreasonably
- So warn R as to costs where case is really weak or conduct unreasonable
- See the Access to Justice website www.ATJF.org.uk

Tactics: on the offensive (1)

- Respondent fails to co-operate including failing to comply with ET orders
- Press R for compliance, in writing/email
- Give a realistic deadline
- If no response by the deadline, let ET know, seeking an unless order and arguing on basis of overriding objective
- Alternatively if conduct continues to be unreasonable and there is a preliminary hearing (PH), give notice of an application to strike out to be heard at PH - ?means a delay?
- Or seek to have a PH set down for that purpose
- Or give a warning to R as to costs

Tactics: on the offensive (2)

- If R has a really weak case, either overall or on a particular major point
- Seek a strike out, (maybe with the alternative of a deposit order) either for the response as a whole, or for the really weak point e g worker status
- You are arguing that R has no (or little) reasonable prospect of success
- Put the arguments in writing to the ET asking for the matter to be determined on the papers, or at a PH if the ET so considers
- Make use of the overriding objective in explaining why the response/point should be struck out now, rather than awaiting the full merits hearing
- e g avoiding delay, saving expense
- and/or warn R as to costs

Tactics: on the defensive (1)

- Assume you are faced with an unless order
- R claims unreasonable conduct/failure to follow ET orders
- Comply with what is requested if reasonable, or explain why not possible
- Seek an extension from the ET to comply if needed (see Rule 5) citing any relevant arguments from overriding objective
- e g ensuring parties are on an equal footing, seeking flexibility

Tactics: on the defensive (2)

- Assume R seeks strike out/deposit order - 'no reasonable prospect of success'
- Examine your case: any merit in R's claim?
- If so, work out how to retire gracefully!
- If not prepare to fight.
- Cite *Etzias*, *Cox v Adecco* etc
- Identify the matters of fact which depend on the evidence to be given at trial
- It is unlikely that witnesses will be required or allowed but you should have a helpful witness statement to hand
- And, if possible have the crucial witness (eg the claimant) on hand as belt and braces
- If R issues a threat as to costs - is it justified? if clearly unfounded you can bring it to the ET's attention

Questions

- Questions on today's session
- Topics for a future series
- Next week: the Hearing