LITTLETON

# EMPLOYMENT TRIBUNALS: INTERIM RELIEF AND THE EQUALITY ACT 2010

by Joseph Bryan

*Joseph Bryan* discusses ***Steer v Stormsure Ltd,*** in which the Employment Appeal Tribunal has raised the prospect of an amendment to the law to permit claimants in proceedings under the Equality Act 2010 to seek interim relief.[1]

## *Introduction*

Interim relief is seldom sought and even more seldom granted in employment tribunals. It is available only in respect of dismissals alleged to be unfair on certain proscribed grounds, notably including protected disclosures or trade union activities[2]. In eligible cases, the period in which to apply for the relief is short and strict[3]. Even then, before the relief is granted, the tribunal must be satisfied that the claim is likely to be determined in favour of the (ex-)employee.[4]

But if a claimant overcomes these hurdles it is a potent remedy. The tribunal may order that the employment contract continues in force from the date of its termination until the claim is decided or settled.[5] The potential financial benefit to an employee who might otherwise wait months or years for compensation is significant. By the same token, the employer will be naturally concerned about having to continue to pay an ex-employee until judgment, without any prospect of recovering the sums so paid even if the decision to dismiss is ultimately vindicated.[6]

It will be an obvious point to practitioners: if the availability of interim relief were to be extended to dismissal-related claims under the Equality Act 2010, the number of potentially eligible claimants would vastly increase.[7] This is the possible effect of the decision of Cavanagh J in *Steer*.

1 The unreported judgment under appeal no. UKEAT/0216/20/AT is available *here*.

2 Employment Rights Act 1996, s. 128(1). The other grounds are recited at paras. 33-37 of the judgment in *Steer*.

3 The period is seven days immediately following the effective date of termination: Employment Rights Act 1996, s. 128(2).

4 Employment Rights Act 1996, s. 129(1).

5 Employment Rights Act 1996, s. 130.

6 Note, however, that under s. 131, Employment Rights Act 1996, either party may apply for a variation or revocation of the order if there has been a relevant change of circumstances. In some cases, an employer may also be able to apply for a reconsideration: *Robinson v Al Qasimi* [2020] IRLR 345.

7 Cavanagh J also thought this would be the case: Judgment, para. 153.

### *The issues in Steer*

Mrs Steer brought complaints of sex discrimination and victimisation arising from her dismissal. Although there is no express right to apply for interim relief on the face of the Equality Act 2010, she contended on appeal that the non-availability of interim relief in such claims:

1. infringed the EU law principles of effectiveness and equivalence and, on those grounds, the right to seek interim relief should be read into the domestic law statutory framework;
2. violated fundamental principles of EU law, which gave rise to a directly effective right by reason of horizontal direct effect; and
3. amounted to a breach of Art. 14 of the European Convention on Human Rights, when read with Arts. 6 or 8, or Art. 1 of Protocol 1.

### *The EU law grounds*

The EU law grounds of appeal did not succeed.

Rights derived from EU directives, including direct and indirect discrimination, are enforced by domestic procedural rules and remedies. Such rules and remedies are, however, subject to EU principles of effectiveness and equivalence. As Cavanagh J summarised:

> *"The principle of effectiveness requires that the member state's domestic law provides an effective remedy, and the principle of equivalence requires that the procedures and remedies are no less favourable than those which apply to similar actions of a domestic nature."*[8]

As to effectiveness, this was achieved in domestic law by the already available remedies of declaration, compensation and recommendation. Whether or not interim relief would *improve* this suite of remedies was not the issue.[9] There was nothing in the EU case-law surveyed by Cavanagh J which required domestic law to make provision for interim relief in cases of (allegedly) discriminatory dismissals.

As to equivalence, Cavanagh J reasoned as follows.

1. For the purposes of the principle of equivalence, all types of claims of discrimination and victimisation under the Equality Act 2010 are comparable to a claim of 'automatic' unfair dismissal for having made a protected disclosure under s. 103A, Employment Rights Act 1996.[10]
2. Looking at the entirety of the procedures and remedies applicable to Equality Act 2010 claims and s. 103A claims, the bulk of the procedures and remedies are the same for each. Although there are differences, the procedures and remedies applicable to discrimination/victimisation claims are *not*, therefore, less favourable than those that apply to s. 103A claims.[11]
3. In any event, because interim relief is not available for 'ordinary' unfair dismissal

8 Judgment, para. 50.

9 Judgment, para. 62.

10 Judgment, paras. 92-101.

11 Judgment, paras. 102-116.

claims,[12] and because such claims are similar actions to claims for discrimination/victimisation, there has been no breach of the equivalence principle.[13]

Accordingly, neither effectiveness nor equivalence required interim relief to be available in discrimination and victimisation cases.

The final EU law ground relied on was a violation of fundamental principles of EU law, in particular non-discrimination. If such a violation was established, the advantage to Mrs Steer was that it raised the possibility of relying on the EU law right directly against her private-sector employer (horizontal direct effect). But Cavanagh J dismissed this ground on the basis that domestic law already provides an effective remedy for unlawful discrimination.[14]

### *The ECHR ground*

The argument on this ground was that the non-availability of interim relief in dismissal-related discrimination and victimisation cases amounted to a breach of Art. 14 (prohibition of discrimination), when read with Art. 6 (right to a fair trial), Art. 8 (right to respect for private and family life) or Art. 1 of Protocol 1 (protection of property). It was argued that there is a difference in treatment for persons dismissed on discriminatory grounds, as compared with those who were dismissed for making a protected disclosure (or who wish to bring claims on those bases), and that there is no justification for the difference.

Cavanagh J held that there was a breach of Art. 14 for the following reasons. In summary:

1. The matter came within the ambit of Art. 6 "*because it relates to access to judicial remedies for the enforcement of civil rights*".[15]
2. Mrs Steer had a relevant status for the purposes of Art. 14, namely "*being an individual who wishes to bring a claim of dismissal/victimisation arising from dismissal*".[16]
3. The differences between discrimination/victimisation claims and s. 103A claims was not justified, in the circumstances of this appeal, because the Government had not intervened (despite being afforded the opportunity to do so) and so no justification was put forward.
4. No justification for the difference in treatment having been put forward, it followed that the non-availability of interim relief was a breach of Art. 14.

12 Employment Rights Act, s. 98.

13 Cavanagh J engages in an interesting discussion of the "no most favourable treatment Proviso", but his conclusions are *obiter dicta*, so not discussed further here: Judgment, paras. 117-127.

14 Judgment, paras. 163-170.

15 Judgment, para. 180.

16 Judgment, para. 184.

However, as to whether or not the Equality Act 2010 can be read down to bring it in line with EU/ECHR principles, Cavanagh J referred to the seminal principle in *Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89)* [1990] ECR I-4135. The court asks whether a conforming interpretation is possible. In this case, Cavanagh J held that introducing interim relief to the Equality Act 2010 would impermissibly cross the boundary between interpreting and amending the statute. One reason for this was that it "*would require this EAT to make decisions on matters that the Appeal Tribunal is not equipped to evaluate*".[17]

### *Permission to appeal*

Since a conforming interpretation was not possible and since the EAT has no power to make a declaration of incompatibility,[18] inevitably the appeal was dismissed – but permission was granted for Mrs Steer to appeal to the Court of Appeal. That court may make such a declaration, if it agrees with Cavanagh J on the ECHR ground.

### *Conclusion: watch this space – but temper expectations*

On its face, this is a judgment which has the potential to revolutionise this field of employment tribunal practice. But whether the revolution will transpire remains uncertain. The outcome in the Court of Appeal, assuming the case makes it that far, may well be different. A breach of the ECHR was established here in large part because of the Government's failure to intervene. It will surely intervene in the Court of Appeal and advance a justification argument.

Among the potential justification arguments are practical considerations. If interim relief were to be made available to complainants of dismissal-related discrimination and victimisation, the immediate question arises: what impact would it have on the already busy employment tribunal listings? The demand for interim "*emergency hearings*" may be overwhelming.[19] A raft of possible other practical and policy considerations were noted by Cavanagh J in his judgment.[20]

Moreover, even if Mrs Steer were to secure a declaration of incompatibility and assuming the Government acts on it, the law will need to be amended in Parliament, which is unlikely to happen overnight. She may, of course, convince the Court of Appeal to read words into the statute, though she will have to contend with Cavanagh J's cogent reasons for declining to do so.

Given the potential ramifications, it may even be envisaged that the Government would seek to review the wider framework of interim relief if Mrs Steer is successful in the appellate courts. This is, at least, a matter on which we are unlikely to have heard the last.

17 Judgment, para. 140.

18 Human Rights Act 1998, s. 4; *Benkharbouche v Embassy of the Republic of Sudan* [2014] ICR 169.

19 Interim relief hearings were described as such in *Bombardier Aerospace/Short Brothers plc v McConnell* [2008] IRLR 51 [7].

20 Judgment, paras. 151-158.