How to stop serial claimants in their tracks

Angharad Harris explores ways for employers to deal with vexatious litigants, such as job applicants simply seeking a discrimination award

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'Vexatious litigants in the employment law field will often make mass job applications, usually against different respondents, with a view to then pursuing tribunal proceedings.'

The term 'vexatious litigant' is bandied around in the context of employment tribunal claims. Indeed, while the government did not explicitly say that it intended the introduction of tribunal fees in 2013 to deter vexatious claims, this was referred to in the consultation and ministers have subsequently claimed that fees have had this effect. It has, however, always been rare for employers and their advisers to have to deal with a genuinely vexatious litigant – as opposed to one whose claim is simply weak or unmeritorious. The cases discussed below consider what makes a claimant 'vexatious', what the difficulties are for employers and their advisers when they are faced with a serial litigant and what tools are available to use in these circumstances.

What do we really mean by a vexatious litigant?

There is a very important distinction to be drawn between claims with little or no merit as distinct from a 'vexatious litigant'. In *HM Attorney General v Barker* [2000], Bingham CJ said that the:

> ... hallmark of a vexatious proceeding is in my judgement that it has little or no basis in law (or at least no discernible basis); that, whatever the intention of the proceedings may be, the effect is to subject the defendant to inconvenience, harassment and expenses out of all proportion to any gain likely to accrue to the claimant, and it involves an abuse of the process of the court.

Currently, 190 people are listed on the gov.uk website as vexatious litigants and are forbidden from starting civil cases without the permission of the court. While it is rare to have to deal with a vexatious litigant, when an employer is faced with such a claim, it can be extremely problematic and there is a case for taking preventative action where possible.

Available tools

The Employment Tribunal Rules provide tools for employment judges to deal with vexatious claims. Rule 37 provides that the tribunal, either on its own initiative or on the application of a party, may strike out all or part of the claim if it is:

> ... scandalous or vexatious or has no reasonable prospect of success.

The tribunal can also impose costs awards against vexatious litigants.

Where a litigant continues to bring claims that are without merit, there are two additional tools that may be used – a restriction of proceedings order (RPO) and a civil restraint order (CRO).

Restriction of proceedings order

Under s33 of the Employment Tribunals Act 1996, the attorney general can apply to the Employment Appeal Tribunal (EAT) where a person has:

> ... habitually and persistently and without any reasonable ground

> instituted vexatious proceedings... or made vexatious applications in any proceedings.

Following this application, the EAT can make an RPO, which prevents a person from bringing further claims or making further applications within existing claims without leave from either the EAT or a High Court judge. If not otherwise specified, the order remains in place indefinitely. However, such orders are rare and the application must be in the public interest.

An example of when an RPO of infinite duration was found to be justified was in *HM Attorney General v Bentley* [2012]. Mr Bentley had made 31 claims in different employment tribunal applications against at least 44 different respondents (including naming more than one respondent in some cases) after they turned down his job applications. The attorney general's case was that Mr Bentley had embarked on and pursued a campaign based on age discrimination and, in some cases, disability discrimination. Some of his later claims involved victimisation. Many of his claims were dismissed and an order was made of indefinite duration that he could not begin proceedings in an employment tribunal or the EAT without their permission.

Similarly, in *HM Attorney General v Iteshi* [2014], Mr Iteshi brought 30 employment tribunal claims and numerous applications within claims between 2007 and 2011. All of these were dismissed or struck out as vexatious or having no reasonable prospect of success and, in some cases, Mr Iteshi was ordered to pay a costs award. He had made a series of failed applications for jobs for which he was not qualified, four of which were against existing employers, with the rest against recruitment agencies. All the claims alleged direct and indirect race discrimination, all but one alleged sex discrimination and some alleged victimisation. The EAT calculated that between them the respondents had incurred legal fees amounting to a substantial six-figure sum and made an order preventing Mr Iteshi from bringing any more claims for an indefinite period.

Civil restraint order

Another option for dealing with vexatious litigants is to apply for a CRO, which is an order that can be of a limited, extended or general type. However, the Civil Procedure Rules allow for a CRO to be made only in relation to claims in the High Court or County Court.

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Whether such an order could be extended to the employment tribunal was considered in *Nursing and Midwifery Council (NMC) & anor v Harrold* [2015]. North Bristol NHS Trust (the Trust) and the NMC sought a CRO against Mrs Harrold, who had worked for the Trust as a nurse until it terminated her employment. The NMC subsequently struck her off on the grounds that her conduct was 'fundamentally incompatible with being on the register'. Mrs Harrold brought a series of claims against the Trust and the NMC, mostly before the employment tribunal but also in the County Court. They contended that she was making hopeless claims, and hopeless applications within those claims, often seeking to raise claims under a different guise that had already been dismissed. Without some intervention, they argued that she would continue to pursue the litigation, vexing and harassing publically funded bodies. They made a CRO application that was not just limited to the High Court and the County Court, but extended to the employment tribunal.

Mrs Harrold argued that the High Court's inherent jurisdiction is limited and a CRO would be contrary to the fundamental principle that discrimination claims are fact sensitive and should not be determined summarily. Her arguments failed: the court said that the employment tribunal's powers were not sufficient to prevent vexatious claims themselves and the attorney general's ability to intervene did not remove the need for CROs.

A CRO was also used in *PricewaterhouseCoopers LLP (PwC) v Popa* [2016]. The High Court granted an interim general CRO against Mrs Popa, who had brought numerous claims, many of which were struck out as totally without merit. It prohibited her from bringing any kind of civil litigation, including employment tribunal proceedings, without first obtaining the judge's permission.

Mrs Popa resigned in 2006 and received an unfavourable reference from PwC. She subsequently brought claims of race discrimination, constructive unfair dismissal and wrongful dismissal. The employment tribunal found that the reference was a one-off instance of victimisation and did not prevent her from finding alternative employment shortly

Impact of tribunal fees

In any judicial system, there will always be some claimants who bring claims that might be weak or even unmeritorious but the threshold for someone to become a 'vexatious litigant' is extremely high. The Employment Tribunal Rules already equip employment judges with tools to manage cases effectively where there is no reasonable prospect of success or where the claimant may even be scandalous or vexatious.

When the government was consulting on the introduction of fees to bring a tribunal claim, it suggested that this could help deter unreasonable behaviour like pursuing weak or vexatious claims. However, there is considerable disagreement about the number of claims that might fall into the vexatious category. For instance, the Working Families charity has said that they 'may be less than 5%, even less than 2%' of the total.

What is undisputed is the precipitous drop of nearly 70% in the number of cases brought before the employment tribunal. How this has affected access to justice is the subject of intense scrutiny and debate. It remains to be seen whether there will be any changes once the government publishes its delayed post-implementation review of tribunal fees.

afterwards. However, Mrs Popa brought at least 25 further claims against PwC, which it said had led to harassment of its staff.

In deciding whether to grant the CRO, the court looked at whether Mrs Popa's behaviour was persistent and needed to be controlled. It found that her claims were without merit and had a detrimental effect on the management of court time and the ability of other litigants to have their cases heard. Further, without a CRO, it was clear that Mrs Popa would continue to bring claims.

Obtaining the status of applicant for the purpose of claiming compensation can be considered an abuse of rights under EU law.

How vexatious litigants operate

As highlighted above, vexatious litigants in the employment law field will often make mass job applications, usually against different respondents, with a view to then pursuing tribunal proceedings.

The case of *Keane v Investigo & ors* [2009] involved a 51-year-old experienced accountant. Mrs Keane applied online for 20 or more accounting jobs advertised on employment agency websites. All the posts made clear that they were aimed at recently qualified accountants. When the employment agencies did not offer Mrs Keane an interview, she served them with an age discrimination questionnaire and then commenced employment tribunal proceedings, claiming age discrimination.

At the employment tribunal, the agencies asserted that Mrs Keane did not genuinely want any of the positions for which she had applied. They argued that she made the applications both to make a point about age discrimination and in order to make a claim which they would pay her to settle. The tribunal said that up to half the original parties had settled with Mrs Keane. Both sides accepted that if she had not made a genuine job application, then she could not have suffered a detriment if she was not put forward for that role.

The employment tribunal, in a ruling upheld by the EAT, found that there had been neither direct nor indirect discrimination. It also decided that Mrs Keane's applications were not genuine as it did not believe that she really wanted any of the jobs she applied for. It also made a costs award against Mrs Keane.

A similar point was recently considered by the European Court of Justice (ECJ) in *Kratzer v R+V Allgemeine Versicherung AG (RAV AG)* [2016]. RAV AG had advertised trainee positions for legal graduates, stating that applicants must have a good university law degree, completed within the past year or to be completed within the coming months, as well as relevant practical experience. In addition, graduates were required to have passed the state examinations and to have taken an employment law option or to have some medical law knowledge.

Mr Kratzer, a lawyer and former manager with an insurance company, applied for one of the legal trainee positions. When RAV AG rejected his application, he wrote complaining of age discrimination and demanding compensation. RAV AG then invited him to an interview with its head of human resources, stating that its rejection of his application had been automatically generated and did not accord with its intentions. However, Mr Kratzer declined the invitation and stated that RAV AG should only discuss his future with him once it had satisfied his compensation claim. He then issued a claim for €14,000 in compensation for age discrimination. He subsequently learnt that although the 60-plus applicants for RAV AG's trainee positions had been almost equally divided between men and women, it had awarded all four posts to female applicants. On this basis, he claimed an additional €3,500 in compensation for sex discrimination.

The Federal Labour Court made a reference to the ECJ, asking whether a person who applies for a job not to gain employment but merely to obtain the status of applicant to bring claims for compensation qualifies as a person seeking access to employment. The court also asked whether obtaining the status of applicant for the purpose of claiming compensation can be considered an abuse of rights under EU law.

The ECJ dealt with both questions together. It held that submitting a job application only to obtain the formal status of applicant to claim compensation for discrimination is, in principle, outside the scope of the Employment Equality Framework Directive and Equal Treatment Directive. To hold otherwise would be incompatible with the directives' objective of ensuring equal treatment in 'employment and occupation' by offering effective protection against certain forms of discrimination, in particular concerning 'access to employment'. The ECJ also held that a person making an application solely to claim discrimination cannot be regarded as a 'victim' or a 'person injured' within the meaning of the directives.

Steps for employers

Where an employer has the misfortune to be on the receiving end of a vexatious claim, the quickest and probably least costly way to deal with it is an application to strike out, coupled with a costs warning and an application for a cost award. This may not, however, deter a serial litigant in the vein of Mr Iteshi or Mrs Popa and so applications for a RPO or a CRO should be sought in such cases to prevent further claims. While obtaining such an order takes time and money, it can be effective and may be the only option to prevent a serial vexatious litigant from continuing to issue proceedings. ■

HM Attorney General v Barker [2000] EWHC 453

HM Attorney General v Bentley [2012] UKEAT/0556/11/RN

HM Attorney General v Iteshi [2014] UKEAT/0435/13/RN

Keane v Investigo [2009] UKEAT/0389/09/SM

C-423/15 *Kratzer v R+V Allgemeine Versicherung* [2016] WLR (D) 432

Nursing and Midwifery Council and the Hospital Trust & anor v Harrold [2015] EWHC 2254 (QB)

PricewaterhouseCoopers LLP v Popa (Unreported, 14 March 2016)