

To claim or not to claim: that is the question

The Employment Tribunals Extension of Jurisdiction Order 1994 apparently makes life easier for claimants and their advisers by enabling contractual and tortious claims to be made in the employment tribunal rather than in the County Court.

However, such a helpful provision also creates some potential headaches for lawyers. First, there is a significant exception to the rule. It does not apply to claims for damages in respect of personal injuries (article 3 of the Order).

Second, the extension only applies if ‘the claim arises or is outstanding on the termination of the employee’s employment’ (article 3(c) of the Order). A contractual claim or tortious claim cannot, for example, be tacked on to a claim for discrimination brought by someone who continues to be employed by the Respondent.

Third, and most importantly, an employment tribunal cannot ‘in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding £25,000’ (article 10 of the Order). That figure has remained constant since the Extension of Jurisdiction Order was introduced, and its value in real terms is being steadily eroded by inflation.

The most significant contractual claim most employees have is a claim for damages for wrongful dismissal, but this is far from being the only one.

Lawyers advising clients who have a potential contractual claim, as well as an unfair dismissal claim, need to conduct a careful balancing act. On the one hand, there are obvious advantages to including the contractual claim along with the unfair dismissal claim. For a start, this avoids the duplication of legal costs. After all, the County Court cannot hear the unfair dismissal claim. Secondly, the employment tribunal rarely awards costs against the losing party, and so while the employee will have to bear their own legal costs even if they win, they are unlikely to have to pay the employer’s (perhaps larger) legal costs if they lose. On the other hand, the main risk taken by the employee if the contractual claim is included in the employment tribunal proceedings, is that the claim subsequently turns out to be worth more than the £25,000 limit. What are the implications if this is the case?

In *Fraser v. HLMAD Ltd* [2006] IRLR 687, Mr Fraser had been dismissed as chief executive of the Respondent company. He presented an application to the employment tribunal claiming unfair dismissal and wrongful dismissal. In his claim form, he stated that, "Insofar as my claim for damages for wrongful dismissal exceeds the tribunal's jurisdiction of £25,000, I expressly reserve the right to pursue an action in the High Court." Before the tribunal hearing took place, he began an action for wrongful dismissal in the High Court with a view to recovering the excess of any award that he received in the employment tribunal. However, he did not withdraw his wrongful dismissal claim from the employment tribunal proceedings.

The tribunal found that Mr Fraser had been unfairly and wrongfully dismissed. It determined his damages for breach of contract in the sum of just over £80,000 but limited its award to the statutory cap of £25,000.

The employers subsequently applied to strike out the High Court action, contending that the wrongful dismissal claim had already been litigated in the employment tribunal and that Mr Fraser could not litigate the matter further in the ordinary courts. The employers submitted that since the first claim had not been withdrawn from the tribunal, the doctrine of cause of action estoppel applied so as to bar the second claim.

The Court of Appeal accepted the employers' submissions. It held that once an employment tribunal has given final judgment on a claim for wrongful dismissal, the common law doctrine of merger of causes of action applies. The cause of action for wrongful dismissal merges into the tribunal's judgment and is extinguished. Once it has merged, there is no longer any cause of action which the employee can pursue in the High Court. The claim for the excess is not a separate cause of action. The cause of action cannot be split into two causes of action, one for damages up to £25,000 and another for the balance. A claim in the High Court for the balance of the loss determined in the tribunal would have to be based on a single indivisible cause of action for wrongful dismissal.

In the light of *Fraser*, it is clear that if there is a risk that the Claimant's claim may be worth more than £25,000, the employment tribunal must not be allowed to rule on it. One apparent way round this problem would be to issue a claim in the employment tribunal which includes a claim for damages for breach of contract, and then subsequently to withdraw that claim before the tribunal has adjudicated upon it.

Rule 25 of the Employment Tribunal Rules of Procedure 2004 provides, *inter alia*, that:

“(1) A claimant may withdraw all or part of his claim at any time – this may be done orally at a hearing or in writing in accordance with paragraph (2).

(2) To withdraw a claim or part of one in writing, the claimant must inform the Employment Tribunal Office of the claim or the parts of it which are to be withdrawn. ...

(3) ... where the whole claim is withdrawn, subject to paragraph (4), proceedings are brought to an end against the relevant respondent on that date. Withdrawal does not affect proceedings as to costs, preparation time or wasted costs.

(4) Where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed. ... If the respondent's application is granted and the proceedings are dismissed, those proceedings cannot be continued by the claimant (unless the decision to dismiss is successfully reviewed or appealed).”

The problem with this solution is that whilst a claimant can raise in the County Court a claim which has only been withdrawn in the employment tribunal, he or she cannot do so if the claim has been dismissed by the employment tribunal upon application by the Respondent.

In the recent case of *British Association for Shooting & Conservation v. Cokayne*, decided on 19th October 2007, it was held that although if an employment tribunal claim which includes a claim for damages for breach of contract is withdrawn, the Claimant remains free to issue a County Court claim for such damages; if the withdrawn claim is also dismissed by the employment tribunal, then the possibility of a County Court claim is barred.

In *Cokayne*, C, acting in person, brought a claim for constructive dismissal. He withdrew it after B had taken the point that he had issued proceedings before the conclusion of its grievance procedure. Upon being informed of C's decision to withdraw, B made an application to have his claim dismissed. C did not respond to the application, which was granted. He then presented a second claim for constructive dismissal, referring, among other things, to the grievance and appeal hearings that had taken place after his resignation.

The Employment Appeal Tribunal held that under the 2004 rules, withdrawal was the equivalent of discontinuance, whereas dismissal was a formal judgment terminating the proceedings. Once proceedings had been dismissed after a withdrawal under rule 25, a claimant in subsequent proceedings based on the same cause of action could not avoid the consequences of the order dismissing the proceedings merely by asserting that he had always intended to bring a second claim and that it was not an abuse of process to do so. While the earlier dismissal stood, it provided an answer to the subsequent claim. However, a remedy did exist for a claimant who had withdrawn proceedings and, ignorant of the true purpose of rule 25, had not opposed an application for the proceedings to be dismissed: he could apply for a review of the dismissal. The question for the tribunal determining the review application would be whether it was an abuse of process for him to do so.

Claimants who withdraw contractual claims in the hope of subsequently recovering more than £25,000 in the civil courts, therefore run the risk of having to defend an application to have their claims dismissed.

What then is to be done? In *Fraser v. HLMAD Ltd*, Lord Justice Mummery commented that Claimants and their advisers would be well-advised to confine claims in employment tribunal proceedings to unfair dismissal, unless they are sure that the Claimant is willing to limit the total damages claimed for wrongful dismissal to £25,000 or less. If the Claimant wishes to recover over £25,000, the wrongful dismissal claim should only be made in High Court or County Court proceedings. The findings of the employment tribunal in its judgment on the unfair dismissal claim will assist, as they will give rise to an issue estoppel in any subsequent proceedings for wrongful dismissal, but there will be no merger of action and the Claimant will not be prevented by success in the employment tribunal for unfair dismissal from pursuing an action for wrongful dismissal.

Checklist

For those advising Claimants

make sure that the Claimant has been fully advised as to the advantages and disadvantages of bringing a claim for damages for breach of contract in the employment tribunal. If this is affected by, say, the terms of the Claimant's legal expenses insurance, then this should be fully explained to them.

For those advising Respondents

to prevent the risk of a further County Court claim, where an employment tribunal claim including a claim for breach of contract or a tort has been withdrawn or settled, apply for the claim to be dismissed.

David McIlroy, Barrister, 3 Paper Buildings