
This briefing will summarise some of the key findings in a recent Judicial Review which highlights the issue of the difficulties experienced by successful claimants in enforcing awards made by the Employment Tribunal (ET). It is understood that the decision is under appeal. In the meantime, the decision of the Outer House as it stands, is significant and may have an impact on the advice employment lawyers and advisers give their clients where there is a concern that if successful, there may be difficulties in enforcing any award made.

Background to the case
The Petitioner (A) had been awarded around £75,000 by an Employment Tribunal which made 29 findings in her favour of discrimination, harassment and victimisation on the grounds of sex and religion. She argued that she was unable to enforce the award as by the time she was aware of allegations that her employer was shifting its funds and her lawyer was able to raise an interdict, most of her employers funds were no longer in their bank account.

The basis of the Judicial Review
A raised a Judicial Review arguing that she would not have been in the position of being unable to enforce her award, had an employment Judge had the power to arrest on the dependence (see below), which is available in the Sheriff court. She argued that the failure of the Government to put in place an equivalent power at the ET, amounted to a breach of EU law in terms of the principles of equivalence and effectiveness.

Explainer: arrest on the dependence:
Arresting on the dependence is a way to help ensure that where someone is suing for money, any judgment in their favour can be
effectively enforced. Arresting can include freezing an amount of money in a bank account. Inhibition is an order to stop the sale of land. Arresting on the dependence means taking steps before a case is decided - so the money is frozen and will be paid to the pursuer depending on the outcome of the case.

The Equality and Human Rights Commission ("the Commission") considered this to be a strategic case with wider public interest as a 2013 study demonstrated that in Scotland, even where the ET claimant had taken enforcement action, 46% had not received any payment of the amount awarded, 13% had been paid in part and only 41% had been paid in full. The Commission was granted permission to Intervene.

**The Judgement**

Lord Tyre accepted that the reports lodged by the Commission painted a concerning picture regarding enforcement of ET awards but stated that it is not clear the extent to which the fact there was no interim diligence available was a material factor. He refused the Petition. In doing so the Court took a step-by-step approach [starting at para 23]:

- The principle of effectiveness requires the UK to provide an effective remedy for a claim to the employment tribunal.
- The ET has no power to grant any measure which would have protected the Petitioner from the position she found herself in.
- Remedies which enabled A to take steps after the tribunal award (eg the interdict to stop money being moved) are not sufficient.
- There would be a breach of the principle of effectiveness in EU law if there was no way of securing diligence on the dependence before the claim was determined.
- There is such a remedy available. It is possible for a Scottish Court to grant protective diligence for ET proceedings [35] So a Sheriff Court could grant arrestment on the dependence in relation to a Tribunal case. In coming to this view, Lord Tyre attached no weight to the Commission’s argument that we were not aware of any such action ever having been taken by an ET claimant. (the Commission holds a database of Equality Act cases raised in the Sheriff Court which require to be intimated on the Commission)
- The principle of effectiveness is not breached. The need to raise protective action in a separate court does not meet the high threshold of being "practically impossible or excessively difficult"
Impact on Employment Lawyers

Employment lawyers and advisers may wish to read the decision in detail and consider what advice to give to clients at the commencement of, or during, their case. The decision as it stands indicates that it would be prudent for advisers to consider advising clients of the potential that any award might not be able to be enforced either where employers are unable to pay or where they take deliberate steps to get rid of assets. Claimants might want to consider taking steps to raise and possibly sist (freeze) a separate action in the Sheriff Court. If there is any argument that the court action isn’t competent, pursuers could usefully cite Lord Tyre in *A v Secretary of State for Business, Energy and Industrial Strategy*.

This briefing has provided a simplified and brief overview of the main conclusions. For a more in-depth discussion of the decision and the practical implications, readers may wish to download the latest podcast in the series *Pods Law* featuring Julius Komorowski, Advocate, who appeared for the Advocate General and Lindsey Reynolds the instructing solicitor for EHRC.

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