Treading a tightrope: litigants in person and procedural fairness

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Vulnerable litigants in person pose particular challenges for both tribunals and respondents. While the overriding objective requires a tribunal to consider how a LiP's vulnerabilities affect their ability to conduct the claim, the tribunal must not act as the LiP's advocate.

Higgins: recent guidance

The overriding objective requires the tribunal, so far as practicable, to deal with a case so as to ensure that the parties are on 'an equal footing'. Rule 41 of the ET Rules gives tribunals great flexibility in conducting hearings in a 'fair manner' in line with the overriding objective. Where the claimant is a LiP with vulnerabilities, such as a mental health disability, how should the tribunal conduct itself?

The most recent case to consider this difficult problem is *Higgins*. The claimant had a long history of mental illness. She issued her claim for unfair constructive dismissal some six years after her employment ended. The ET1 was poorly drafted and Ms Higgins was sent a letter of rejection of the claim pursuant to ET Rule 12, which requires an employment judge to reject a claim form if it is an abuse of process. Her subsequent application for reconsideration, which relied upon a psychiatrist's letter stating that she had not been well enough over the past six years to pursue a claim, was also rejected.

HHJ Serota QC allowed her appeal at the EAT. Although the ET1 was badly drafted, it was possible to spell out a claim for unfair dismissal. There was sufficient material to show that the employment judge should have appreciated that she may have had mental health issues and therefore may have lacked the competence to participate in proceedings. HHJ Serota stated that Rule 12 orders were equivalent to a striking-out direction and 'should only be made in the most plain and obvious cases'. Any borderline case, or cases lacking clarity, or where there is 'a muddle involving a litigant in person', should be disposed of under Rule 27, which permits a claimant to make representations (para 35). HHJ Serota held that the overriding objective requires the tribunal to have regard to any disability of which it is aware.

This was the approach taken in *Butler and Wilson*, another recent EAT case. The appellant had a history of mental health difficulties and had arrived late at the tribunal claiming to suffer from symptoms of a psychotic episode, which were apparent to the employment judge. Wilkie J held that the fact of the appellant's disability was an important factor to which the employment judge had to have regard when making case management decisions, in accordance with the overriding objective.

Accordingly, the employment judge should have adjourned the hearing for a brief period in order to allow the appellant to recover sufficiently to present his case. Furthermore, it was incumbent on the employment judge to have advised him on the different ways in which he could apply for a review of the strike-out decision that she had made in his absence.

Tribunal must assist not advocate

A tribunal thus has a duty to demonstrate sensitivity to a LiP's vulnerabilities and make appropriate procedural allowances. As emphasised by Langstaff P in *Sanders*, the tribunal can do this by:

- ensuring that the form of questioning is appropriate;
- controlling the amount of time a witness spends in the witness box;
- asking its own, preferably non-leading, questions in order to ensure that a witness gives the best evidence that he or she can provide; and
- where appropriate, asking the parties whether they have thought about obtaining particular evidence, or even suggesting an adjournment for such evidence to be obtained.

However, as the case of *Sanders* demonstrates, such sensitivity must not lead the tribunal to abandon impartiality and become

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the LiP's advocate. In *Sanders*, the tribunal had concluded that the claimant, who had suffered from depression and anxiety, was not best able to present her own case. It thus wrongly adopted an inquisitorial procedure including carrying out its own internet research. The tribunal then further erred in questioning the claimant as if the researched material was true, thereby failing to show impartiality.

Langstaff P stressed that a 'degree of care' is required by the tribunal: 'in assisting one party, it should be cautious not to cross the line between impartiality (which it must maintain) and acting as an advocate (which it must never do)' (para 46, page 305). In practice, however, as noted by HHJ Serota in *Johnson*, it remains difficult for a tribunal to know how far it should assist LiPs.

In *Johnson*, the appellant argued that the tribunal, before whom he had appeared as a LiP, had erred in law by failing to take a point which he had not raised himself. HHJ Serota found that the point in question was neither so obvious nor so significant as to amount to an error of law on the part of the tribunal. However, he did suggest that where a point is 'an essential ingredient of a claim' – for example, a failure to consult in a redundancy case – it may be that the tribunal should offer assistance and take the point itself (para 31).

The represented party's role

The overriding objective also applies to the parties themselves. In June this year, the Bar Council, CILEx and the Law Society produced *Litigants in person: new guidelines for lawyers*, which offers helpful practical advice on dealing with LiPs. The guidelines set out good practice and are intended to apply in tribunals as well as throughout the civil justice system.

In addition to reminding legal representatives of their duty to the tribunal, the guidelines note that some LiPs may be vulnerable adults who require additional support from the court or the legal representative. If a legal representative believes that a LiP is vulnerable and that their needs in terms of participating in the proceedings have not been recognised, this should be brought to the tribunal's attention.

The tribunal usually requires represented parties to prepare hearing bundles, including an agreed bundle of authorities. These should be compiled in accordance with the new EAT practice statement (*ELA Briefing*, June, page 15). In *Sanders*, Langstaff P emphasised that it is unfair to LiPs if a respondent fails to mark the specific passages in authorities upon which it intends to rely. Langstaff P warned that a party wishing to rely upon an unmarked authority bundle may be required to mark all the bundles before the case begins and must be prepared to give sufficient time to the other side, especially if it is a LiP, to consider those passages. If a matter is adjourned or is part-heard as a result, there are likely to be costs implications.

Conclusion

LiPs are a feature of the employment tribunal system that is here to stay. All legal practitioners must ensure that they understand the extent and the limit of their duties in the tribunal or risk facing appeal.

KEY:

Higgins	*Higgins v Home Office* [2015] UKEAT/0296/14/LA
Sanders	*East of England Ambulance Service NHS Trust v Sanders* [2015] ICR 293
Butler and Wilson	*U v Butler and Wilson* [2014] UKEAT/0354/13
Johnson	*Johnson v Manpower Direct (UK) Ltd* [2015] UKEAT/0351/14/DXA