WHEN THE TIME HAS COME TO SAY: 'STOP'

Simon Auerbach **contrasts the jurisdiction in civil courts and tribunals to deal with vexatious litigants and considers the statutory powers and common law jurisdiction of the High Court.**

SECTION 42 of the Senior Courts Act 1981 confers a power on the High Court to issue a civil proceedings order (CPO) restricting an individual who is found to have been a vexatious litigant. In *HM Attorney-General v Barker* [2000] 1 FLR 759, Lord Bingham MR said:

> 'From extensive experience of dealing with applications under section 42 the court has become familiar with the hallmark of persistent and habitual litigious activity. The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop.'

Order
CPO (Civil proceedings order)
RPO (Restriction of proceedings order)
CRO (Civil restraint order)

Enabling power
Section 42, Senior Courts Act 1981
Section 33, Employment Tribunals Act 1996
Civil Procedure Rules, rule 3.11; PD 3C

The person against whom such an order is made may not bring proceedings before any court without the permission of the High Court. In *IB v Information Commissioner* [2011] UKUT 370, the Upper Tribunal (Administrative Appeals Chamber) held that the First-tier and Upper Tribunals were courts in respect of which a section 42 order applied. The Upper Tribunal did not, however, have the power to give the permission required to bring proceedings before such tribunals.

Employment tribunals

Vexatious litigation can also, of course, be conducted in the Employment Tribunal and section 33 of the Employment Tribunals Act 1996 enables the Attorney-General to apply to the Employment Appeal Tribunal (EAT) for a restriction of proceedings order (RPO).

An RPO is an order to the effect that no proceedings may be instituted or continued in either tribunal without the permission of the EAT where the addressee has 'habitually and persistently and without any reasonable ground' either instituted vexatious proceedings in one or other of those fora, or made vexatious applications in any such forum. An RPO may last for either an indefinite or a specified period. Unsurprisingly, the threshold for the grant of an RPO order is high and the elements of the test are cumulative: the EAT must be satisfied that each of the proceedings relied on was vexatious and that their pursuit has been habitual and persistent and unreasonable.

Right to a fair trial

In *Attorney-General v Wheen* [2001] IRLR 91, the Court of Appeal considered the compatibility

of the section 33 power with article 6 of the European Convention on Human Rights. The court agreed:

> 'That is not an absolute right. A balance has to be struck between the right of the citizen to use the courts and the rights of others and the courts not to be troubled with wholly unmeritorious claims. The administration of justice has to be taken into account. But in any event the order which has been made against Mr Wheen provides for access to the employment tribunal system by him so long as permission is obtained. That is a necessary feature of an order obtained under s33. That is a familiar feature of many proceedings which take place in our judicial system. It is not something which in my judgment can amount to a breach of Article 6. Access to the courts is not prohibited; it is provided for on certain terms. It is in my judgment wholly unarguable that s33 of the Employment Tribunals Act conflicts with the European Convention on Human Rights.'

Indefinite order

A recent, particularly extreme, case was *AG v McCluskey* UKEAT/0118/09. In that case, the litigant had presented seven claims alleging various detrimental treatment and discrimination, all of which had been either dismissed or struck out, a further four claims against judges and court staff and a further claim against some 23 respondents. These claims had in turn spawned multiple review applications and appeals to the EAT, which observed:

> 'But, in this case, there is the additional factor of the insidious attack on those who are doing the public's business for them, be they judges who are required to be robust, but even more so staff at the various courts and tribunals who are not employed to be, or expected to be, robust, other than, no doubt, in their courteous dealings every day with the public. They are certainly not expected to be themselves the object and the subject matter of litigious proceedings over and over again, and there must be a risk that the carrying out of their activities on behalf of the public is affected if they are fearful at all times that they can be bombarded by proceedings.'

In that particular case an indefinite RPO was made.

Civil restraint order

While the Employment Tribunal itself cannot grant an RPO, individual litigants in the civil jurisdiction can apply, in a given set of proceedings, for a civil restraint order (CRO), which comes in three forms.

A limited CRO restrains the addressee from making any further application in the proceedings in question without first obtaining the permission of a judge. It may be made where a party has made two or more applications which are totally without merit.

An extended CRO restrains the addressee from issuing claims or making applications in any court specified in the order 'concerning any matter involving or relating to or touching upon or leading' to the proceedings in which the order is made, without first obtaining the permission of a judge. It may be made where the addressee has persistently issued claims or made applications which are totally without merit.

Finally, a general CRO restrains the addressee from issuing any claim or making any application *in any court* without prior permission. It may be made where a party persists in issuing claims or making applications which are totally without merit. An extended or general CRO will last for a maximum of two years.

Civil courts only

However, the power to grant a CRO applies to litigation in the civil courts only and may only restrain claims or applications in the High

Court or county court. Accordingly, a party who perceives themselves to be the victim of vexatious litigation in the Employment Tribunal cannot themselves institute an application under section 33 of the 1996 Act, nor can they ask the High Court to make such an order to restrict further tribunal litigation.

Inherent jurisdiction

However, the court has long had an inherent jurisdiction to grant CROs and this was considered in *Law Society of England and Wales v Otobo* [2011] EWCA 2264. Mr Otobo had been the subject of three CROs in the civil courts. However, he also brought discrimination claims in the Employment Tribunal, which the Law Society contended had been pursued both because of the different costs jurisdiction and because it was not covered by the CRO. The Law Society applied to the High Court for a CRO to be made, where the central question was whether the court's inherent common law power to grant a CRO could extend to the restriction of litigation in the Employment Tribunal.

'. . . where the inferior court has no jurisdiction of its own to make a CRO restraining proceedings before it, the High Court has the power to do so as part of its inherent jurisdiction.'

Complements

In the judgment, Proudman J noted that it was already established that tribunals are courts for the purposes of the law of contempt; and that the statutory power of the High Court to make CROs does not replace the common law jurisdiction, but complements it. Against that background, and in an extensive review of the authorities and scholarly commentary upon the historical development of the common law jurisdiction, she concluded (at para 49) that 'in a case such as this where the inferior court has no jurisdiction of its own to make a CRO restraining proceedings before it, the High Court has the power to do so as part of its inherent jurisdiction.'

The Court went on to make an order in the form of a general CRO, but extending to claims in the Employment Tribunal.

Assisting others

One feature of note in *Otobo* was that it was found that Mr Otobo had also been assisting another litigant to bring similar proceedings to his own claims, although Proudman J did not consider it appropriate to take this into account in deciding whether to grant the CRO.

In *Paragon Finance plc v Noueiri* [2001] EWCA Civ 1402, the Court of Appeal made an order restricting an individual 'from taking any steps whatever within the Royal Courts of Justice by way of acting or purporting to act on behalf of persons other than himself in legal proceedings except with the permission of a judge of the High Court or the Court of Appeal'.

In *HM Attorney-General v Branch* [2008] EWHC 2872, the High Court granted an interim injunction where it was found (per Dyson LJ at para 2) that Mr Branch, having already been the subject of a CPO under the 1981 Act, had pursued 'many hopeless, abusive and vexatious pieces of litigation on behalf of others, often using the litigation as a vehicle for airing claims of himself or his family, which claims were ultimately the cause of the section 42 order that was made against him.'

Where no High Court claim?

Finally, in *Otobo* the order was made pursuant to an application in one of Mr Otobo's High Court claims. Whether an application could successfully be made for an order restraining Employment Tribunal litigation where *no* High Court claim has been brought remains to be tested.

Simon Auerbach is an employment judge.