Neutral Citation Number: [2023] EAT 7

Case No: EA-2020-000503-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 February 2023

Before :

JUDGE BARRY CLARKE

- -

Between :

MR B WYTRZYSZCZEWSKI

Appellant

- and -

BRITISH AIRWAYS PLC

Respondent

- -
- -

Eleena Misra for the **Appellant**
Bianca Venkata (instructed by Harrison Clark Rickerbys) for the **Respondent**

Hearing date: 16 November 2022

- -

JUDGMENT

SUMMARY

RACE DISCRIMINATION

Race discrimination – constructive discriminatory dismissal – section 39(7)(b) Equality Act 2010

The EAT allowed an appeal on the basis that the ET did not adjudicate upon one of the complaints before it, which was whether the claimant was entitled to treat himself as having been subjected to a constructive (race) discriminatory dismissal. Case remitted to the same ET to determine that complaint.

JUDGE BARRY CLARKE:

Introduction

1. This is an appeal against the judgment of an Employment Tribunal (ET) sitting in Watford, comprising Employment Judge Hyams, Mrs Smith and Ms Sood. Over six days in March 2020, the ET considered a case involving allegations of direct sex discrimination, sexual harassment, direct race discrimination, and detriment for making protected disclosures. The claimant had resigned, so he also complained of a constructive dismissal that was said to be both automatically unfair (by reason of his protected disclosures) and race discriminatory. The main contention pursued in this appeal is that, when dismissing the claim in full, the ET erred in law by failing to decide the complaint of constructive discriminatory dismissal.

2. I shall refer to the parties as claimant and respondent, as they were before the ET. The claimant represented himself before the ET, but was represented before the EAT by Ms Misra; she has provided her services through Advocate (formerly the Bar Pro Bono Unit) in the best traditions of the Bar. The respondent is represented today by Ms Venkata, who also appeared before the ET. I am grateful to them both.

The complaints before the ET

3. The claimant worked for the respondent as a member of its cabin crew for a little over eight months, between 24 July 2017 and 2 April 2018. He resigned from his employment. He presented a claim to the ET on 13 July 2018. The relevant information box on the ET1 claim form stated simply: "*Multiple health and safety issues reported where no action had been taken which forced me to resign/xenophobic comments/prolonged bullying and harassment*".

4. At an earlier stage of the proceedings, the ET spent time identifying the complaints requiring adjudication, which the claimant had articulated in a four-page letter of resignation (appended to his ET1 claim form as a proxy for his particulars of claim) and a subsequent letter to the ET. Those complaints were discussed at a preliminary hearing for case management purposes, which was conducted by Employment Judge Lewis on 13 February 2019. This resulted in a clear and comprehensive case management order.

5. The complaints that came before the ET at the full hearing, having been clarified by EJ Lewis at the earlier preliminary hearing, were based on statutory rights derived from the **Employment Rights Act 1996** ("ERA") and the **Equality Act 2010** ("EqA").

6. Under the ERA, the claimant complained of unfair dismissal, but only within the meaning of section 103A; this is because he lacked the qualifying service to bring a complaint of "ordinary" unfair dismissal under section 94(1) ERA. His resignation could be a dismissal if it fell within the circumstances described at section 95(1)(c) ERA; by this provision, an employee is treated as dismissed if he "*terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*". This is colloquially known as an "unfair constructive dismissal" or "constructive unfair dismissal", although such expressions do not appear in the statute. As is well established, the common law test of contractual repudiation applies to the concept of unfair constructive dismissal as embodied in the ERA.

7. Where an employee is dismissed for a reason that the statute expressly prohibits, such as the making of protected disclosures, that dismissal will be regarded as unfair. This is sometimes colloquially called an "automatically unfair dismissal". Again, this expression does not appear in the statute.

8. This case deployed a double colloquialism of the sort familiar to practitioners but which can be confusing to litigants in person: that of the "automatically unfair constructive dismissal". In a case of this sort, an ET will usually need to decide (among other matters) whether the employer subjected the employee to detrimental treatment for the prohibited reason (such as the making of protected disclosures), whether that treatment repudiated the contract of employment (often expressed as a fundamental breach of the implied term of mutual trust and confidence), and whether the employee resigned in consequence. Such a contention is often, as it was here, accompanied by a freestanding complaint of detrimental treatment in employment in consequence of making protected disclosures, and which is separately prohibited by section 47B(1) ERA.

9. Under the EqA, the claimant complained of direct sex discrimination (which he argued in the

alternative as sexual harassment) and direct race discrimination. Direct discrimination and harassment are defined respectively at sections 13 and 26 EqA. However, those provisions concern the prohibited conduct; they do not stipulate the cause of action. The cause of action is instead found at section 39(2) EqA. Section 39(2)(c) provides that an employer must not discriminate against a person by dismissing him, and section 39(2)(d) provides that an employer must not discriminate against a person by subjecting him to any other detriment.

10. Section 39(7)(b) EqA confirms that a discriminatory dismissal contrary to section 39(2)(c) includes a constructive dismissal, by using wording similar to that found in section 95(1)(c) ERA: dismissal "*includes a reference to the termination of B's employment … by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice*". This is sometimes called a "constructive discriminatory dismissal" although, again, this expression is not found in the statute. It forms a separate and distinct cause of action to that provided for by section 103A ERA. In a case of this sort, an ET will usually need to decide (among other matters) whether the employer subjected the employee to prohibited discrimination, whether that treatment repudiated the contract of employment (often expressed as a fundamental breach of the implied term of mutual trust and confidence), and whether the employee resigned in consequence of it.

11. At the preliminary hearing held for case management purposes, EJ Lewis noted that the claimant complained of "*automatically unfair constructive dismissal and/or of discrimination in dismissal*". For present purposes, it is important to note that, at paragraph 10.12 of his case management order, EJ Lewis further recorded the two assertions relied upon by the claimant in explaining his decision to resign: (a) unnecessary and hostile remarks made about his nationality at a meeting on 5 March 2018; and (b) a failure by the respondent to investigate his complaint about that. Consequently, to determine the claimant's complaint that he had been subject to direct race discrimination, in the form of a constructive discriminatory dismissal, the ET needed to adjudicate on both of these assertions.

12. This was subject to an observation EJ Lewis made about the operation of the statutory three-month

time limit in this case, as modified by the application of Acas early conciliation. At paragraph 10.4 of his order, by reference to the date on which the ET1 claim form was presented and the dates of early conciliation, EJ Lewis noted that any complaint about matters occurring before 29 March 2018 was potentially time-barred. Pausing there, this included the date of the meeting on 5 March 2018, but it would not include the claimant's resignation on 2 April 2018 nor any alleged ongoing failure, continuing until that date, to investigate his complaint.

The scope of this appeal

13. The claimant's grounds of appeal were lengthy, but they have since been narrowed in scope. Following decisions of Cavanagh J on the sift, and Soole J at a rule 3(10) hearing (which resulted in invocation of the **Burns/Barke** procedure), he has permission to pursue two of them:

13.1 The first ground (originally ground 6) is now expressed as follows: "*The Employment Tribunal failed to determine the Claimant's claim of discriminatory (race) constructive unfair dismissal contrary to section 39(7)(b) of the Equality Act 2010*". Pausing there, the word "unfair" in the preceding sentence is otiose. A constructive dismissal can only be unfair under the ERA, and it can only be discriminatory under the EqA. Otherwise, the criticism is clear: the ET did not decide this complaint.

13.2 The second (originally ground 7, then amended with permission) is now expressed as follows: "*The Tribunal did not provide any (alternatively any adequate) reasons for its conclusion … that the claimant's employment would not have ended any later than the end of his probation period. The judgment was not therefore* ***Meek****-compliant in this regard*".

The ET's judgment

14. It is in the nature of appeals that the focus sometimes shifts away from the matters that occupied most of the time and attention at first instance. The scope of the appeal in this case, as just noted, is narrowly drawn. However, it would do a disservice to the ET to fail to note the complexity of the task it faced. The bundle

comprised over 2,000 pages. Most of the issues the ET had to address related to the claimant's allegations about whistleblowing. He had relied on five alleged protected disclosures (some of which the respondent accepted were protected, but all of which involved concerns about health and safety) and he had identified 13 detriments besides his resignation. The ET's analysis of this part of the claimant's claim took up much of its 52-page judgment. It rejected the whistleblowing aspects of his claim, both in respect of detriment and automatically unfair constructive dismissal. The claimant's appeal against that part of the judgment has not survived to a full hearing before the EAT.

15. The ET also considered complaints of direct sex discrimination and sexual harassment. There is no need to elucidate these, beyond noting that they related to an allegation that the claimant had experienced unwanted sexual advances from a colleague. The ET dismissed that part of his claim and, again, his appeal against that conclusion has not survived to a full hearing before the EAT.

16. Insofar as the claimant's race discrimination complaint was concerned, the ET noted his contention that there had been a constructive discriminatory dismissal, and not just an automatically unfair constructive dismissal. It further noted that this part of his case was based on "*one or more of the sequence of events … as an accumulation which, together, amounted to a breach of the implied term of trust and confidence*", and which "*constituted unlawfully discriminatory conduct within the meaning of the EqA*" (paragraph 2.1 of its judgment). It should be emphasised that the claimant's claim of constructive discriminatory dismissal was pursued by sole reference to the protected characteristic of race and, specifically, his Polish national origin.

17. As had been clarified at the earlier case management hearing, the starting point in assessing that accumulation was the meeting on 5 March 2018. This occurred about a month before the claimant resigned. It involved him, his second-level line manager (Ms Butler) and a note-taker (Mr Van Gelderen). The context of the meeting is important. The relationship between the parties had begun to deteriorate. Without wishing to oversimplify the complexity of the narrative, the claimant had been informed a few weeks previously that he did not meet the expected standards and that his probation was to be extended by three months, such that it would now expire on 24 April 2018 (paragraph 15 of the judgment). The claimant believed this decision was

improperly influenced by a series of disclosures he had made about health and safety matters, although the ET found otherwise (at paragraphs 44-47). The claimant's objection to the respondent's decision to extend his probationary period prompted what the ET described as an "*extraordinary series of emails*" sent late in the evening on several dates to a variety of recipients including the respondent's chief executive (paragraphs 48-52). The claimant had also been de-rostered (described by the ET as a suspension) amidst concerns about his mental well-being (paragraphs 68-70). His first-level line manager, Ms Hale, had suggested that he responded poorly to situations that were not favourable to him and that he was not respectful towards management; for his part, the claimant disputed that assessment. Against that context, the meeting held on 5 March 2018 was arranged with the purpose of reviewing his ongoing probation. Ms Butler conducted the meeting because Ms Hale had been reassigned for personal reasons. It was, by all accounts, a difficult meeting.

18. The claimant's contention before the ET was that, at the end of the meeting, Ms Butler said to him: "*I appreciate your European heritage but this is British Airways*" (with the emphasis on the word "*British*"). This was the allegedly xenophobic comment to which the claimant had alluded in his ET1 claim form. Ms Butler did not give evidence to the ET, but Mr Van Gelderen did. His minutes of the meeting recorded Ms Butler as saying: "*I know that within your Eastern European culture there can be some directness in how you communicate … so you may want to be a bit more aware of this*" (paragraph 73). Mr Van Gelderen told the ET that the words used by Ms Butler had simply reflected feedback from a colleague, which stated that the claimant could "*come across a bit direct when talking to colleagues however this is part of his European culture and he is working in coming across more polite*" (paragraph 74). The ET analysed the evidence and decided that the claimant had misremembered the exchange. It preferred the evidence of Mr Van Gelderen (paragraph 76).

19. The claimant had complained about the comment made during the meeting (among other matters) in an email sent on 11 March 2018 (paragraph 79). The respondent treated this as a grievance and appointed Ms Pilgrim to deal with it. There was correspondence between the claimant and Ms Pilgrim on matters such as whether their meeting should be face-to-face or not, and whether he should be granted a period of additional paid leave to prepare for the meeting. The meeting was arranged for 11 April 2018. Ms Pilgrim declined to

grant additional paid leave. She emailed the claimant on 24 March 2018, ahead of the meeting, telling him it was inappropriate for him "*to continually harass*" senior managers (including the respondent's chief executive). The claimant found her email threatening. This was the incident he relied upon as the last straw (paragraph 80), although the ET found its content both unobjectionable and justified in the circumstances (paragraph 82). The ET recorded that, by letter dated 26 March 2018, the claimant resigned (paragraph 84).

20. Using a series of headed sections in its judgment, the ET then dismissed in turn each of the following complaints brought by the claimant: that he had been subjected to detriments for protected disclosures (paragraphs 88-101); that he had been automatically unfairly constructively dismissed for those protected disclosures (paragraph 102); that he had been subjected to direct sex discrimination (paragraph 103); that he had been sexually harassed (paragraph 104-107); and that he had been subjected to direct race discrimination (paragraph 108).

21. In this appeal, I am concerned only with the last of these conclusions. Referring to the meeting on 5 March 2018, the ET concluded that Ms Butler's reference to the claimant's "*Eastern European culture*" represented an inoffensive attempt to "*soften the impact*" of the criticism that he was a blunt communicator, and that it was not an act of direct race discrimination. It further concluded that this part of his claim was presented outside the applicable statutory time limit and that it would not have been just and equitable to extend time (paragraph 109).

22. The judgment contained no heading, and no conclusion, in respect of whether there had been a constructive discriminatory dismissal. Under the heading "*Outcome*", in the final paragraph of its judgment (paragraph 110), the ET expressed its overall conclusion as follows:

> **Accordingly, the claims could not succeed. If they had succeeded, however, then we would have concluded that the claimant's employment would not have ended any later than the end of his probation period, as, we concluded, whoever made the decision about the completion of the claimant's probation period would have decided that his employment with the respondent should cease.**

Burns/Barke procedure

23. Following a preliminary hearing, and in accordance with the **Burns/Barke** procedure, the EAT asked

the ET to do the following:

23.1 Firstly, to confirm whether its judgment contained any conclusion on the complaint of constructive race discriminatory dismissal (and, if not, to provide that conclusion, with reasons for it); and

23.2 Secondly, to amplify the reasoning for its conclusion at paragraph 110 of its judgment, as quoted above, that the claimant's employment would have ended in any case upon the expiry of his probationary period.

24. On behalf of the ET, EJ Hyams responded as follows:

24.1 In relation to the first question, EJ Hyams accepted that the ET's judgment contained no express conclusion on the complaint of constructive discriminatory dismissal. He explained that this was because that claim depended for its potential success on a finding in the claimant's favour that there had been discriminatory conduct, and there was none. The judge referred to paragraph 103 of the ET's judgment (the dismissal of the claimant's complaint of direct sex discrimination), paragraph 107 (the dismissal of the claimant's complaint of sexual harassment) and paragraph 108 (which, as noted above, contained the ET's conclusion that the comment made during the meeting on 5 March 2018 was not an act of direct race discrimination). That being so, in terms, the claim of constructive discriminatory dismissal was bound to fail.

24.2 The ET's conclusion that the claimant's employment would have ended in any case upon the expiry of his extended probationary period was reached by reference to the sequence of events referred to throughout its judgment. EJ Hyams referred to the paragraphs in the ET's judgment concerning the emails the claimant had sent following the extension of his probationary period; the views that were taken of his performance and attitude towards management; and the exchanges about whether he should be given additional paid leave. EJ Hyams explained that these factors would have been considered by whoever subsequently faced the task of deciding whether the claimant's employment

should continue, and they would have decided it should not.

First ground of appeal

25. It is an error of law for an ET to fail to decide one of the complaints requiring a decision. As previously noted, the first ground of appeal is that the ET failed to determine the claimant's complaint that he was subjected to a constructive race discriminatory dismissal. I have carefully considered the submissions made by Ms Misra for the claimant and Ms Venkata for the respondent, but I prefer Ms Misra's submissions for the reasons set out below.

26. Even with the assistance of the clarification provided by the ET under the **Burns/Barke** procedure, it remains the case that its judgment contained no conclusion on one of the two matters that the claimant had argued, in accumulation, amounted to discriminatory conduct entitling him to resign and treat himself as constructively dismissed, which is that the respondent failed to investigate his complaint about the comment made to him during the meeting on 5 March 2018. Ms Venkata contended that it would amount to a counsel of perfection to suggest that the ET should have included a sentence dealing with the point, but I disagree: this was one of the assertions that had been identified at the case management hearing as requiring determination, and it featured in both parties' written submissions.

27. It may be thought that, because the ET found the comment inoffensive, the respondent would likewise have done so if it had investigated the matter. However, that does not address whether, separately, there was a failure to investigate, and which had been influenced by the claimant's national origin.

28. It may also be thought that, because the ET found against the claimant in respect of what happened at the meeting on 5 March 2018 and in respect all his other complaints of detriments for protected disclosures (and there being no permission to pursue an appeal in those respects), it is fanciful to assume that this one alleged oversight could be sufficient to found a successful complaint of constructive dismissal. However, a failure to investigate a grievance about discrimination is a significant matter and, if that failure is influenced by a protected characteristic, it is capable of being repudiatory for the purposes of section 39(7)(b) EqA.

29. The ET's judgment recorded the circumstances in which the claimant resigned, following receipt of the email from Ms Pilgrim, but it contained no finding about the steps she had taken to investigate his complaint about what had been said at the meeting, whether any such failure to investigate (if it could be so described) was influenced by the claimant's national origin, and whether this did, or did not, play any part in his decision to resign. It is of course important for the EAT to read an ET's judgment fairly and as a whole, without being hypercritical or pernickety (as recently restated by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] IRLR 1016), as Ms Venkata has impressed upon me. At the same time, however, it is not for the EAT to try to fill gaps in an ET's reasoning, for example by speculating that Ms Pilgrim did not investigate the complaint simply because the claimant resigned before she could do so, or whether he resigned because (as discussed below) he had found another job. The ET considered Ms Butler's comment inoffensive but it needed to decide, and state expressly, whether the claimant's complaint about that comment had been investigated and, if it had not, whether this had been influenced by his national origin.

30. I agree with Ms Misra that there are two further indications that the ET did not properly adjudicate on the point, even when considering the amplified reasoning provided through the **Burns/Barke** procedure. Firstly, when explaining why it had rejected the claimant's complaint of constructive discriminatory dismissal, the ET mentioned that it had rejected his complaints of direct sex discrimination and sexual harassment, as well as his complaint of direct race discrimination. However, the complaint of constructive discriminatory dismissal was brought solely by reference to the protected characteristic of race and the two assertions identified in EJ Lewis's case management order, so other protected characteristics and other factual assertions made by the claimant were not relevant. Secondly, the ET had dismissed the claimant's complaint of direct race discrimination complaint on the alternative basis that it was out of time, but the time-bar would not have applied to an ongoing failure to investigate (if that is what it was) and a decision to resign in response to that failure (if that is what it was).

31. In my judgment, therefore, the ET failed properly to adjudicate on this part of the claimant's claim and the appeal on this ground must be allowed. The matter will be remitted to the ET to decide. However, the ambit of the remittal is a narrow one. The ET must make findings of fact about the steps taken by the respondent to

investigate the claimant's complaint about what was said at the meeting on 5 March 2018 (but it will be bound by its conclusions about what, in fact, was said at that meeting). The ET must then decide whether the approach taken by the respondent, if that approach is to be impugned, was influenced by the claimant's national origin; and, if it was, whether such conduct was repudiatory, so entitling the claimant to resign and treat himself as having been subjected to a constructive discriminatory dismissal.

Second ground of appeal

32. It is not uncommon for ETs, when dismissing complaints that have failed, to include alternative conclusions about remedy for a counterfactual in which they succeeded. This is often sensible as a means of encouraging settlement, especially if there is a prospect of an appeal, if the legal dispute between the parties encompasses claims in other jurisdictions, or if the employment relationship is continuing. Such conclusions must nevertheless be properly reasoned and cannot simply be expressed as an afterthought.

33. In this case, by the final sentence of its judgment, ET imposed a hard stop in respect of compensation for the claimant's lost earnings such that, even if his complaints had succeeded, he would have lost his job at the point when his extended probationary period came to an end (which was 24 April 2018). From the amplified reasoning provided through the **Burns/Barke** procedure, it is apparent that the ET's conclusion was based on behaviour by the claimant (including sending emails to senior managers) and concerns about his performance and attitude.

34. This did not appear to be a reduction for contributory fault; it appeared to be a 100% **Polkey**-type reduction in respect of losses beyond the expiry of the claimant's probation. The **Polkey** principle can of course operate in discrimination cases (see **Abbey National plc & another v. Chagger** [2010] ICR 397 CA) but the circumstances in which it will reduce loss to zero are rare. I accept Ms Misra's submission that the ET's conclusion in this regard was inadequately reasoned and therefore not **Meek**-compliant, even bearing in mind the need to read its judgment fairly and as a whole, without being hypercritical or pernickety. The ET did not refer to any evidence it had heard on the specific point about what would have happened if the claimant had not resigned; it did not refer to any policies or procedures in respect of reviews at the end of extended

probationary periods; and it did not refer to ongoing occupational health assessments in relation to the claimant.

35. In circumstances where the ET did not properly adjudicate on one of the claimant's complaints, this conclusion cannot stand. It remains at large whether the respondent failed to investigate the claimant's complaint about the comment made to him at the meeting on 5 March 2018, and whether any such failure was influenced by his national origin, so it cannot safely be assumed that there was a 100% chance he would have been dismissed for non-discriminatory reasons at the end of his probationary period. Therefore this issue must also be remitted to the ET to consider afresh, depending of course upon the conclusion it reaches on the complaint of constructive discriminatory dismissal.

36. There is a more revealing limitation on remedy in this case, which is the fact that, as was common ground before the ET, the claimant had secured an alternative full-time job starting on 3 April 2018. (The claimant's ET1 claim form referred to the job starting on 29 May 2018, and it referred to a salary higher than the respondent had paid him.) It therefore seems likely that, even if the claimant were to succeed in a complaint of constructive discriminatory dismissal (and quite apart from the **Polkey/Chagger** point), his compensation would be limited to a sum in respect of injured feelings and lost earnings for a short interim period, subject to any statutory adjustments that may operate in respect of the Acas Code of Practice. I invite the parties to reflect on this when considering if they might be able to reach agreement rather than incur the cost of a further hearing.

Disposal

37. The appeal is therefore allowed on both grounds and remitted to the ET to decide on the narrow points identified above.

38. The final question for me to consider is whether the matter should be considered by the same ET or a differently constituted ET, having regard to the guidance in **Sinclair Roche & Temperley v. Heard** [2004] IRLR 763. In my judgment, although the matter is finely balanced, I am persuaded that it should return to the same ET. In reaching that view, I have borne in mind the following: (a) the assumed professionalism of the tribunal panel, by which it can be expected to approach the matter with an open mind; (b) this was not a case

where it can be said that the ET's judgment was completely flawed or mishandled (notably, most grounds of appeal were rejected by the EAT at the sift stage); (c) there is no suggestion of bias or prejudgment; and (d) such a course of action is proportionate (in which regard I am especially swayed by the observation that the ET as currently constituted is familiar with the facts that would continue to bind the panel upon remission and by the observation that the value of the lost earnings element of the claim appears modest).