Harvey on Industrial Relations and Employment Law

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Bulletin Editor
Ian Smith MA, LLB; Barrister
Emeritus Professor of Employment Law at the Norwich Law School, University of East Anglia.

DIVISION DI UNFAIR DISMISSAL

Constructive dismissal; no need for communication to the employer; effect of conduct

DI [521.01]

***Chemcen Scotland Ltd v Ure UKEATl0036l19* (*18 August 2020, unreported*)**

Ever since the leading case of *Weathersfield Ltd v Sargent* [1999] IRLR 94, [1999] ICR 425, CA, it has been the law that there is no absolute legal requirement on a claimant for constructive dismissal to have communicated to the ex-employer exactly why they were leaving. The judgment there talks of an ET considering all the facts including the 'acts and conduct of the party'. The instant decision of Lord Summers in the EAT is a good example of this and involves not an act but an omission.

The claimant was on maternity leave when things became personally difficult within the family firm. She at first objected to the cessation of her SMP but it turned out that it had expired legally. However, she also objected to other acts of the management (in fact, her father) during her leave which the ET held were repudiatory. The result was that she did not return from her leave and instead brought ET proceedings for constructive unfair dismissal. The ET found for her and the employer appealed, partly on the basis that simply failing to return without any explanation could not be enough to show acceptance of the repudiatory conduct bringing her employment to an end. Dismissing the appeal in a short judgment, the EAT cited *Weathersfield* and held that it was a question of fact whether (in a rather lovely phrase) her non-return was 'eloquent of an acceptance of the repudiatory conduct'. Normally, a decision not to return would be accompanied by an explanation but that is not an actual requirement and here there was ample evidence for the ET to have decided as it did.

Remedies; compensatory award; loss of statutory rights; effect of a Polkey reduction

DI [2626]

Gardner v Coopers Company and Coborn School UKEAT/0235/19 (***7 August 2020, unreported***)

Most of the appeal in this case concerned the timing of the claimant's dismissal by notice for redundancy; that notice was given by letter against the backdrop of contractual provisions requiring notice to expire only at certain times because of school term dates. The issue was whether the claimant had either received or had a reasonable opportunity to receive the letter (see *Newcastle upon Tyne NHS Foundation Trust v Haywood* [2018] UKSC 22, [2018] IRLR 644, considered at **AII [413.01]**). The ET accepted the employer's version of events but the EAT allowed the claimant's appeal on this point.

However, what is more important legally here was a cross-appeal by the school. The ET had found the dismissal unfair because of lack of an appeal, but had gone on to hold that even if there had been such an appeal there was only a 10% chance that she would have retained her job. The result was a 90% *Polkey* reduction *but* (possibly as an oversight) the ET had not applied this to the £500 award for loss of statutory rights. The cross-appeal on this was allowed by the EAT, holding that a *Polkey* reduction does indeed apply to this part of a compensatory award, citing *Hope v Jordan Engineering Ltd* UKEAT/0545/07, [2008] All ER (D) 370 (Jun) which is considered at **DI [2626]** where it is suggested that this is the correct view of the law.

DIVISION DII DETRIMENT

Time limit; continuing act; uplift to compensation not applicable to whistleblowing cases

DII [455]; PI [113]; AII [348]; DI [2768.01]

Ikejiaku v British Institute of Technology UKEAT/0243/19 (***7 May 2020, unreported***)

The time limit for a claim of detriment under the ERA 1996 s 48 **Q [672]** is normally three months (subject to a 'not reasonably practicable' escape clause). However, there is a further possible avenue for a prima facie late claim under s 48(4)(a) in the case of 'an act extending over a period', when time starts to run only on the last day of that period. There is a similar provision in discrimination law (EqA 2010 s 123 **Q [1541]**) where most of the case law has arisen, see **PI [113]** ff. The basic distinction that has to be drawn here is between a continuing act (covered) and something that merely has continuing *effects* but remains fundamentally a specific act (not covered). This decision of Soole J in the EAT is a good example of drawing this particular line.

The claimant was dismissed, he alleged because of whistleblowing. He brought ET proceedings for automatically unfair dismissal under the ERA

1996 s 103; he also claimed under s 47B that he had suffered detriment prior to his dismissal for the same reason. The former claim was in time but the problem with the second claim was that the principal ground relied on (that he had been forced to sign a new contract attempting to make him self-employed) had occurred outside the three-month limit. He argued that it had not been reasonably practicable to bring the claim in time, but also that in any case the contractual change was a continuing act operating up to his dismissal.

The ET held that the detriment claim was out of time – it disapproved his 'not reasonably practicable' argument and, more significantly here, further held that the contractual change was a one-off occurrence, which only had continuing effects; it was not a continuing act under s 48(4)(a). It did go on to uphold the unfair dismissal claim. The claimant appealed on the detriment point, but the EAT upheld the ET's decision which, in the light of the case law, was 'clearly correct'. In terms of examples in the case law, the change was akin to a regrading/pay decision, rather than to a persistent adverse policy operated by the employer (the former being a one-off albeit with continuing effects; the latter being a continuing act).

The claimant also appealed against one entirely different aspect of the ET's decision on unfair dismissal. He had claimed an uplift payment of four weeks' pay under the TULR(C)A 1992 s 207A **Q [441.01]** on the basis that when dismissing him so suddenly the employer had breached the ACAS Code of Practice on Discipline and Dismissal. The ET rejected this element of his claim for compensation because it considered that the COP does not apply to a whistleblowing claim. This was upheld by the EAT, its reasoning being given at [46] and [47]:

> 'For the purposes of this appeal as it relates to the Discipline section of the Code, it is sufficient to cite the statement of Simler P in [*Holmes v QINETIQ Ltd* [2016] IRLR 664, EAT] that the relevant paragraphs: "… demonstrate that it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee."
>
> In the circumstances of this case the Tribunal was clearly right to hold that the Discipline section of the Code had no application. First, as it held, because a protected disclosure could never be a ground for disciplinary action, i.e. for an allegation involving the culpability of the employee. Secondly, because culpability formed no part of the Respondent's unsuccessful case on the true reason for the dismissal.'

To that extent, the claimant's argument based on the disciplinary procedure adopted was rejected *but* the matter did not end there because, on the facts, the EAT considered that the whistleblowing allegation in question had taken the form of a *grievance* which arguably had not been dealt with properly under the code. As that separate matter had not been considered by the ET, the appeal was allowed and the point remitted.

DIVISION L EQUAL OPPORTUNITIES

Discrimination arising from disability; because of something arising in consequence of the disability; causation

L [374.08]

Robinson v Department for Work and Pensions [2020] EWCA Civ 859, [2020] IRLR 884

The text at **L [374.08]** considers the case of *Dunn v Secretary of State for Justice* [2018] EWCA Civ 1998, [2019] IRLR 298, on the question of how to establish causation in a complaint of discrimination arising from disability under the EqA 2010 s 15 **Q [1468]**, in particular the phrase 'because of'. That decision was promulgated after the ET hearing in the instant case but became central when it was considered by the Court of Appeal, because it has a strong resemblance to the facts in the instant case. Moreover, it concerns an area of particular difficulty here, namely where the claimant is complaining of lapses in the employer's procedures in dealing with complaints, but the employer (accepting that it had acted poorly) maintains that its lapses in fact had nothing to do with the disability. The decision here is also of interest in aligning the causation position under s 15 with that in relation to direct discrimination under s 13.

The claimant had difficulty with office software because of a difficulty with migraines. Technical difficulties in looking for alternatives prolonged the problem and eventually proved inadequate, after which she was transferred to other work. One grievance by her was upheld, but she objected to the result of a second one and brought proceedings inter alia under s 15. The ET upheld her s 15 claim but the department appealed, arguing that the ET had not engaged with the reasons for the procedural lapses (which it said were not because of something arising from her disability) and the thought processes of the decision-makers. In effect, it argued that the ET had simply applied a 'but-for' test, which was contrary to *Dunn*. The EAT upheld the department's appeal and the Court of Appeal rejected the claimant's further appeal.

The key to all of this is found in very clear terms at [55] and [56] of Bean LJ's judgment:

> '… s 13 and s 15 use the same phrase "because of". One requires A to have treated B less favourably than a comparator would have been treated *because of* a protected characteristic (s 13), the other to have treated him unfavourably *because of* something arising in consequence of a disability (s 15). One difference between the sections is that s 13 explicitly involves a comparison between how the claimant and other persons without the protected characteristic are treated – "less favourable treatment" – whereas s 15 refers only to "unfavourable treatment". But both sections require the ET to ascertain whether the treatment (whether less favourable or unfavourable) was *because of* the protected characteristic and, as such, require a tribunal to look at the thought processes of the decision-maker(s) concerned.

> I also agree with the observation of Simler P in the EAT in *Dunn* that "just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary" if a s 15 claim is to succeed. As Underhill LJ said in this court, a prima facie case under s 15(1) is not established solely by the claimant showing that she would not be in the situation of being the victim of delay and incompetence if she were not disabled.'

This rejection of the but-for test allows an employer defence of 'incompetent but not discriminatory' but ultimately, as the judgment makes clear is a given, the ET is sovereign on fact and will be expected to evaluate such a defence carefully.

REFERENCE UPDATE

Bulletin	Case	Reference
503	*O'Sullivan v DSM Demolition Ltd*	[2020] IRLR 840, EAT
504	*Gwynedd Council v Barratt*	[2020] IRLR 847, EAT
504	*Gould v St John's Downshire Hill*	[2020] IRLR 863, EAT
505	*Varnish v British Cycling Federation*	[2020] IRLR 822, EAT
506	*Walker v Co-operative Group Ltd*	[2020] IRLR 896, CA
507	*Aramark (UK) Ltd v Fernandes*	[2020] IRLR 861, EAT

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Correspondence about the **content** of this Bulletin should be sent to Nigel Voak, Analytical Content, LexisNexis, FREEPOST 6983, Lexis House, 30 Farringdon Street, London, EC4A 4HH (tel: +44 (0)20 7400 2500).

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