Focus on the issues, not the list of issues

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Introduction

1. In Z v Y [2024] EAT 63, the Employment Appeal Tribunal (**"EAT"**) reiterated the importance of correctly identifying a litigant in person's pleaded claims and not elevating a list of issues to the status of a pleading [55]. The EAT confirmed that:

    a. The Employment Tribunal (**"ET"**) is not required to "*stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence*" (per **Parekh v Brent London Borough Council** [2012] EWCA Civ 1630);

    b. The ET will fall into legal error by relying on a list of issues which fails to correctly identify the claims (where such claims "shouted out" from the pleadings, per **Mervyn v BW Controls Ltd** [2020] ICR 1363 and **McLeary v One Housing Group Ltd** UKEAT/0124/18); and

    c. Given the ET's findings of fact, the EAT upheld the Claimant's complaint of discriminatory constructive dismissal (an "in time" act of discrimination), which had previously been treated as an "ordinary" unfair constructive dismissal claim only. As a consequence, the EAT remitted (i) whether the earlier acts of discrimination were part of a course of conduct extending over time, ending with the constructive dismissal, and (ii) the issue of remedy.

2. This decision and the line of case law which precedes it make it challenging for Respondents to navigate the pitfalls of litigation against litigants in person. While Respondents are able to take a robust position as to whether a Claimant has adequately pleaded their claims, and whether an application to amend is required, a careful approach should be adopted when appearing in preliminary hearings and drawing up lists of issues. In the long run, ensuring that the correct legal label is attached to a litigant in person's claims (and that obvious claims are

ventilated) is likely to save the time and expense associated with appeals which centre on the (in)adequacy of a list of issues.

The facts

3. The facts of the case are as follows:

    a. The Respondent is a county council and, from 2015, the Claimant was employed within the Respondent's fire and rescue service as a risk and statistical data advisor (on a permanent full-time contract) [9].

    b. The Claimant raised a grievance in which she alleged that she was bullied at work, which prompted a counter grievance. Following these processes, the Claimant went on a prolonged period of sick leave [10].

    c. The Respondent was said to have failed to make a reasonable adjustment in relation to the seating arrangements in the Claimant's workplace. The ET found that the Respondent's position was made clear at meetings on 19 and 27 December 2017 [36, 58].

    d. Having taken over the management of the Claimant's sickness, on 31 January 2018, "W" refused to allow adjustments and indicated that the Claimant should not be allowed to return to her work [10, 21].

    e. Following discussions between the parties, the Respondent found another role for the Claimant. This was an IT service desk job on a fixed term contract and was no longer within the fire and rescue department. The Claimant commenced this role on 1 May 2018 [10].

    f. After receiving the Claimant's references, she was confirmed in post. Thereafter, the Claimant resigned from her original permanent position on 1 June 2018 [11].

The pleadings

4. Following ACAS EC, the Claimant presented her claim to the ET on 23 October 2018. Her claim for constructive dismissal was "in time", but her other claims would be time barred unless

they were held to be "conduct extending over a period" (s.123(3)(a) of the Equality Act 2010 (**"EqA"**)).

5. The Claimant ticked the boxes at section 8 of the ET1 to show that she was making claims of unfair dismissal and disability discrimination [12-13], and her particulars stated as follows (emphasis added):

> "*The failure of [the respondent] to make reasonable adjustments (even short term) is a breach of the Equality Act 2010. The continuing state of affairs, refusing to allow me to return to work and to seek alternative employment, led to me … resigning my post with [the respondent's fire and rescue service].* ***I was Constructively Dismissed by [the respondent] on 1st June 2018 – the last act of discrimination.***"

6. Therefore, on the facts of this case, the Claimant had clearly brought a complaint of discriminatory constructive dismissal (see s.39(2)(c) and (7)(b) EqA) (as the Respondent later accepted [14]). However, the list of issues (drafted and re-drafted by the Respondent in response to the Claimant's provision of further information), and the ET, only construed the Claimant's constructive dismissal complaint as falling under s.95(1)(c) of the Employment Rights Act 1996 (**"ERA"**) [19]. As discussed below, the ET fell into error by failing to identify the Claimant's complaint of discriminatory constructive dismissal.

Procedural history

7. On 15 January 2020, the ET's first liability judgment dismissed the Claimant's "ordinary" unfair constructive dismissal complaint and found that it did not have jurisdiction to consider her complaints of disability discrimination, as they were time barred [20]. The ET went on to find that, had the EqA claims been in time, the Claimant would have succeeded in showing that:

    a. W's remarks on 31 January 2018 (i.e., that the Claimant could not return to her role under any circumstances) breached s.15 EqA;

    b. The Respondent failed to make reasonable adjustments (contrary to ss.20-21 EqA) when W enforced a practice that all team members needed to be co-located at a specific desk location (see para 3c above); and

    c. The above acts of discrimination (at paras 7a-b) breached the implied term of trust and confidence (para 128 of the ET's determination).

8. Given the ET's finding that the Claimant had at least in part resigned in response to the Respondent's fundamental breach of contract, the Claimant was able to lodge a successful appeal to the EAT (**"the First Appeal"**). Following the First Appeal, John Bowers KC, sitting as a Deputy Judge of the High Court, remitted the case to the ET to determine whether the Claimant had (i) waived the breach and/or affirmed her contract of employment, and (ii) whether or not the Claimant's allegations under the EqA amounted to a continuing act in relation to paras 7a-b above [22].

9. Upon remittal the ET found that:

    a. The Claimant was constructively unfairly dismissed (albeit the ET refused to consider whether the constructive dismissal was itself discriminatory, as the ET stated that that issue was never before it [25]); and

    b. There were no continuing acts in relation to the EqA claims: they were therefore dismissed as being out of time.

10. The Claimant lodged a further appeal to the EAT (**"the Second Appeal"**) on the following grounds [28]:

    a. It was perverse for the ET to find that the claim did not include a case of discriminatory dismissal, and thus to exclude that matter when considering the question of continuing act for the purpose of determining whether the EqA claims had been brought out of time; and

    b. The ET erred in its approach to the determination of whether there had been a "continuing act", considering each of the found instances of discrimination in isolation, when it ought to have adopted a holistic approach.

The legal framework on the Second Appeal

11. The EAT's judgment helpfully sets out the law on the ET's case management powers, the status of lists of issues, and the principles that underpin whether a claim for constructive dismissal can be classed as an act of discrimination [37-46] (Ground 1). Further, the EAT provides a useful refresher on the general principles which guide the fact-specific assessment as to whether an act amounts to conduct "extending over a period" under s.123 EqA [48-53] (Ground 2). The EAT drew on the following principles:

a. "… *the ET … [has] a duty, if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim. In addition, if the ET decides that the litigant in person has decided not to advance that claim, the ET should be confident that the litigant in person has withdrawn that claim advertently*" (**Mervyn** [2019] UKEAT/0140/18, para 84 [44]).

b. "… *Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory*" (**Lauren de Lacey v Wechseln Ltd t/as The Andrew Hill Salon** UKEAT/0038/20, para 69 [45]).

c. "… *a discrimination claim arising out of a constructive dismissal may be in time even if the discriminatory events that render the dismissal discriminatory are themselves out of time …*" (**Lauren de Lacey**, para 72 [49]).

d. When determining whether the acts complained of amount to "conduct extending over a period" (s.123 EqA), or whether they are isolated and separate acts, it can be relevant to consider whether there is a common thread that links the matters relied on – for example, a common personality (see **Southern Cross Healthcare v Owolabi** UKEAT/0056/11 and **Veolia Environmental Services UK v Gumbs** UKEAT/0487/12 [51]).

e. In a claim for failure to make reasonable adjustments (ss.20-21 EqA), the duty to make a reasonable adjustment (a) arises as soon as there is a substantial disadvantage to the disabled person arising from a PCP and (b) may be dealt with as an omission under s.123(3)(b) EqA, such that time runs from when the relevant person decided on it. Where the relevant person has not positively made a decision a notional date will apply, either (a) when the decision-taker does an act inconsistent with that duty, or (b) at the end of the period during which they might reasonably have been expected to undertake an act consistent with it (s.123(4) EqA) (see also **Fernandes v Department for Work and Pensions** EA-2022-000277 [55]).

The EAT's conclusions on the Second Appeal

12. With the above principles in mind, Mrs Justice Eady (DBE, President) dealt swiftly with the two grounds of appeal as follows:

    a. The Claimant had plainly pleaded an act of discriminatory constructive dismissal (relied on as "*the last act of discrimination*" and "*the final act of discrimination … due to my mental health disability*" [54]). It "shouted out" from the pleadings that this was the true nature of the Claimant's complaint for constructive dismissal. It was immaterial that the list of issues did not include such a complaint: they are not a pleading that can formally replace the claim [55]. The Claimant therefore succeeded on Ground 1. It was common ground between the parties that, based on the ET's findings, the EAT should uphold the Claimant's complaint of discriminatory constructive dismissal. It was further agreed that the matter must be remitted so that the question of remedy could be revisited as (i) the statutory cap would no longer apply, and (ii) there could now be compensation for injury to feelings [56].

    b. Counsel for the Respondent, Mr Hodge, acknowledged in argument that the position as to whether the earlier acts of discrimination (outlined at paras 7a-b above) were in time may potentially change once it is allowed that there was a discriminatory constructive dismissal. Mrs Justice Eady found that the question as to whether these acts of discrimination (s.15 and ss.20-21 EqA) were in time should be remitted, as the matter was not to her mind only capable of one answer [59-62].

Comment

13. **Z v Y** [2024] EAT 63 reiterates the importance of accurately identifying a litigant in person's pleaded claims and ensuring that the list of issues mirrors the pleadings. In the light of this and earlier judgments, it is important for Respondents to approach preliminary hearings in a strategic way, and consider the extent to which they provide assistance in framing obviously pleaded claims.

14. **Z v Y** also provides a useful recap on the principles that govern "conduct extending over a period". The upshot is that there needs to be careful consideration as to whether there is a common thread (such as the same decision-maker) between the acts of discrimination, or an initial act or decision that initiates a process of further acts, which, as here, may culminate in a dismissal. But, as ever, each case will ultimately turn on its facts.

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