Appeal No. UKEAT/0268/14/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 12 June 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

DR S RAJARATNAN — APPELLANT

CARE UK CLINICAL SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR S RAJARATNAN (The Appellant in Person)
For the Respondent	MR DECLAN O'DEMPSEY (of Counsel) Instructed by: DAC Beachcroft LLP St Paul's House 23 Park Square South Leeds West Yorkshire LS1 2ND

SUMMARY

PRACTICE AND PROCEDURE – Case Management

PRACTICE AND PROCEDURE – Disposal of appeal including remission

The Appellant ('A') appealed against a decision of the Employment Tribunal ('the ET') about the correct interpretation of a list of issues for a Full Hearing. A contended that the ET had wrongly interpreted the list of issues, and, as a result, had wrongly refused to hear some of her claims at the Full Hearing.

The factual basis of the claims which the ET decided not hear was the same as the factual basis of some of the claims which it did hear. It dismissed all A's claims after the Full Hearing. She did not appeal against the decision of the ET after the Full Hearing.

The Employment Appeal Tribunal ('the EAT') held that the ET had erred in law in wrongly interpreting the list of issues, and that, on its proper interpretation, it included claims which the ET had refused to hear. The EAT held that the error of law was immaterial and dismissed the appeal.

A applied for a review of the EAT's decision. The EAT allowed the application, holding that it should have allowed the appeal, rather than dismissing it. It declined to remit the case to the ET, however, on the ground that the error of law was immaterial.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is my Decision after an appeal. The appeal is against a Judgment of the Employment Tribunal sitting at Watford ("the ET"). The ET consisted of Employment Judge Mahoney ("the EJ"), Mr Bone and Mr Underwood. In a Judgment sent to the parties on 4 April 2014, the ET decided a question which it said had arisen on 24 March 2014 in the course of the hearing of the Claimant's claims at a Substantive Hearing, which took place between 24 March (which is said to have been reading day), 26, 27 and 31 March and 1 April (which were all hearing days) followed by deliberation days on 16 and 17 April 2014.

2. That question was described by the ET in the Decision sent to the parties on 4 April 2014, which I will refer to as 'Decision 1' in this way, "an issue arose after the Claimant had given evidence as to the correct meaning of the issues which were set out by Employment Judge Ryan following a Preliminary Hearing on 16 December 2013…"

3. In a Judgment sent to the parties on 2 July 2014, which I will refer to as 'Decision 2', the ET dismissed the Claimant's claims of automatically unfair dismissal under Sections 103(A) and 104 of the **Employment Rights Act 1996** ("the ERA") and her complaint of sex discrimination. The ET upheld the Claimant's complaint of a breach of Section 80(F) of the **ERA** and of the **Flexible (Procedural Requirements) Regulations 2002**.

4. The ET partly upheld the Claimant's complaint that she had suffered a detriment as a part-time worker. The ET dismissed the Claimant's complaint that she had suffered a detriment as a result of making an application for flexible working time. The delay between the hearing in the ET and the hearing of this appeal is explained by the fact that the appeal to the Employment

Appeal Tribunal ("the EAT") was struck out by the EAT because no hearing fee was paid by the Claimant and then reinstated after the Supreme Court decided that the fees regime was unlawful.

5. I will refer to the parties as they were below. Paragraph references are to the ET's Decision 1 and 2, as the case may be. The Claimant represented herself at the hearing on this appeal. She was represented in the course of the proceedings by Mr Brown of the Free Representation Unit. The Respondent was represented at the hearing of this appeal by Mr O'Dempsey of Counsel. I thank both the Claimant and Mr O'Dempsey for their very helpful oral and written submissions.

6. The case management summary sent to the parties on 23 December 2013:

> **"The Issues**
>
> **4. I first record that the complaint of direct sex discrimination is withdrawn and dismissed. The issues between the parties which will fall to be determined by the Tribunal are as follows:**
>
> **5. Automatic unfair dismissal by reason of assertion of a statutory right**
>
> **5.1. Dismissal? The claimant resigned on 18 January 2013 giving one month's notice, although she did not in fact work it. She asserts that there was a fundamental breach of the implied tern of trust and confidence because the respondent, she alleges, subjected her to detriments as follows:**
>
> **5.1.1. Refusing her request for flexible working without proper consideration, having pre-judged it and committed various breaches of procedure.**
>
> **5.1.2. In consequence of that request being presented formally in writing on 18 December, turning a meeting to discuss the request into a probation meeting.**
>
> **5.1.3. At the meeting, extending the claimant's probation for three months and raising false concerns about her performance.**
>
> **5.1.4. Falling at any stage properly to support the claimant in respect of the performance concerns, so that she chose to remain away from work (taking unpaid leave, she says) in January 2013.**
>
> **5.1.5. Putting forward a new, more onerous shift pattern requiring her to work one weekend in two and a week of nights on her part-time basis every four weeks. This would have been 2 nights in 28. Compare full-time employees only worked one weekend in four.**
>
> **5.1.6. Further or alternatively, this new shift pattern was proposed because the claimant pointed out that requiring her to work ten hour nights would be in breach of the Working Time Regulation, since she understood that a night shift maximum was eight hours unless one had opted out of the regulation (her reliance on regulation 6). She asserted this on 5 December 2012 and in emails in January 2013. This was again an allegation of a breach of statutory duty.**
>
> **5.1.7. The claimant complained of less favourable treatment of her s part-time worker, on the basis that full-time workers were allowed to take leave over the Christmas period 2012-**

2013, but she was not. Even if the leave had not properly accrued (see Working Time Regulations 15A(1)), full -time workers were allowed to take the leave.

5.1.8. Indirectly discriminating against the claimant by insisting that she should work two nights every four weeks.

5.2. The claimant asserts that in consequence she accepted the breaches as fundamentally undermining the employment relationship and resigned. She gave notice because she did not understand that she could leave without giving notice.

5.3. It is the claimant's case that if she is found to be dismissed it was automatically unfair because the respondent subjected her to detriments (which are set out below) by reason of the following statements:

5.3.1. Statements by the claimant to the respondent that a requirement to work ten hour nightshifts was a breach of the Working Time Regulations.

5.3.2. Statements by the claimant to the respondent that the respondent was breaching working Time regulations and putting patients' safety at risk by requiring Dr Hoxha to work a 24 hour shift and Dr Khalek to work note than 48 hours night shifts per week (5x12 hour night shifts per week regularly and sometimes 12 consecutive shifts) and not recording Dr Khalek's shifts on rota. Those statements, she alleges, were made by her to Dr Hoxha on 11 July and 14 December 2012 and on 9 January 2013 to Dr Schneider and paragraph 17of the ET1 refers.

5.3.3. Statements by the claimant to the respondent that she was being treated less favourably as a part-time worker. The claimant is permitted to rely upon the statement allegedly made to Dr Hoxha on 14 December 2012 wherein she alleges she said that part time workers were required to work a greater proportion of weekends than full time workers. She alleges she made similar comments to Dr Schneider and Mr Passaway on 9 January 2013 and on the latter occasion also made a comment about having less training time as a part time worker

5.3.4. Statements by the claimant to the respondent that she was entitled to wages in respect of a shift for which she presented herself on 18 November 2012.

5.3.5. Statements by the claimant to the respondent that it was not complying with the recommendations of NHS Brent as regards time for training. The claimant avers that this tends to show that health and safety was being put at risk.

5.4. It is the claimant's case that the statements set out at 5.3.1 to 5.3.5 above were the cause of the detriments set out at 5.1.1 to 5.1.8 and it is in that way that she makes the causative link between her resignation and what she says is the breach of contract by the respondent namely subjecting her to those detriments. It is those reasons which make her constructive dismissal, she says, unfair.

5.5. If the claimant establishes dismissal, the respondent may seek to prove that she contributed in whole or part, by in essence her responses to its attempts to have her work in accordance with her contract.

…

7 Breach of s.80f-g ERA 1996 and the Flexible Working (Procedural Requirements) Regulations 2002

7.1. Has the respondent breached those sections of the regulation set out above?

7.2. It is the claimant's case that the respondent did not hold a meeting to discuss her application for flexible working within 28 days . It is the respondent's case that the application was in fact discussed with the claimant on 18 December 2012, following her probationary review.

7.3. The claimant alleges she was given insufficient reasons for the rejection of her application. The respondent 's case is that the details surrounding the rejection of the application were examined in a meeting with the claimant on 16 January 2013.

7.4. The claimant alleges the respondent made a decision based on incorrect facts. The respondent denies that.

7.5. If the claimant proves the breach that she alleges, what compensation should be afforded to her?

8. Detriment claims

8.1. If she does not succeed in respect of unfair dismissal, the claimant claims in the alternative that she was subjected to detriments by the respondents in respect of each of the matters set out at paragraphs 5.3.1 to 5.3.5 above.

8.2. In relation to sub-paragraph 5.3.1 the claimant alleges that the tribunal has jurisdiction by virtue of ERA s.45(1)(f). The claimant pursues sub-paragraph 5.3.2. as a s.47b protected disclosure detriment. The respondent accepts that under the Part Time Worker Regulations. The claimant can have protection from detriment for asserting a right under those regulations. There is an issue between the parties as to whether the tribunal has jurisdiction to hear a claim for detriment in respect of asserting a statutory right. The respondent says there is not jurisdiction and the claimant is to consider her position and withdraw the pint if there is none. The case in respect of sub-paragraph 5.3.5 is raised also as protected disclosure detriment. The respondent accepts that under the Flexible Working Regulations there is a similar protection to that in the Part Time Worker Regulations. Those are the claims made in the alternative by the claimant if she fails to succeed in her complaint of unfair dismissal. For the avoidance of doubt, it is recorded that the detriments in respect of which the claimant brings her various complaints are those set out at 5.5.1 to 5.1.8 above.

The ET's Decision 1

7. The ET, as I have said, indicated that the issue which had to decide was "the correct meaning of the issues which were set out by Employment Judge Ryan" after the Hearing in December 2013 (paragraph 1). The ET said in paragraph 2 of Decision 1:

> **"The issue that has arisen relates to whether or not the Claimant has set out as issues, automatic unfair dismissal under s 104C in relation to flexible working under s 101A in relation to working time under the Employment Rights Act 1996 and under Regulation 7 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in relation to part-time work."**

8. The ET referred to the case management Order in paragraph 3. In paragraph 4 it recited the procedural history.

9. After the case management summary was sent to the parties on 23 December 2013, Mr Brown, who was representing the Claimant, wrote to the Tribunal on 14 January 2014. The ET quoted relevant paragraphs from his letter. He said:

> **"The heading of paragraph 5 of the Order refers to assertion of statutory rights. The statements said to have caused the Claimant's constructive dismissal listed at paragraph 5.3.1 to 5.3.5. They include assertions of statutory rights, but also fall under other legal provisions and this appears to be recognised at paragraph 8. For example, paragraph 5.3.5 is an alleged protected disclosure rather than an assertion of the statutory right.**
>
> **Accordingly, I understand that at the final hearing the tribunal will, if the Claimant is found to have been constructively dismissed, consider whether this is to be regarded as unfair on the**

> **ground that the dismissal was because the Claimant had asserted statutory right, but also under the other legal provisions referred to in paragraph 8. I would be grateful for confirmation that this understanding is correct."**

10. In paragraph 5 the ET said at paragraph 8 of the case management summary was headed "Detriment claims." At paragraph 6 the ET quoted the response of Employment Judge Ryan dated 17 January 2014. He said that he considered that the issues were:

> **"…Exhaustively and thoroughly clarified at the preliminary hearing on 16 December 2013. He believes that the complaints of unfair dismissal and detriment are [as] set out in the record. If the claimant now needs to expand those issues an application to amend will have to be made so the respondent has a proper opportunity to make representations."**

11. In paragraph 7 the ET quoted a further letter from Mr Brown to the Respondent's representatives. In that letter Mr Brown asserted that the Claimant was not seeking to expand the list of issues, but simply looking for clarity "as to the legal tests which will be applied." He noted that the Respondent had not objected to his letter of 14 January and he asked the Respondent to confirm whether the Respondent agreed that the unfair dismissal claim included a claim that the dismissal must be regarded as unfair on the grounds that it was because the Claimant made protected disclosures.

12. He went on to say that paragraph 5 of the Order did not make sense unless it was read in that way. He went on to say further that the Claimant did not want to expand the list of issues, but if the Respondent was unable to agree to that the Claimant might be forced to make a formal application to amend. That letter was sent by email, Ms Roberts from the Respondent's solicitors replied, agreeing that a limited claim of constructive unfair dismissal was being brought under Section 103(A) of the **ERA**, despite the fact that it had not been labelled in that way at the Preliminary Hearing.

13. She explained the scope of that concession and that she did not accept that the statements at paragraphs 5.3.1 to 5.3.4 were relevant to the whistleblowing claim. It seems from that correspondence that the only issue that was raised immediately after Employment Judge Ryan's Decision by Mr Brown concerned whether or not the issues included a whistleblowing claim.

14. At Paragraph 9 the ET recorded that it was instructed that the Claimant had not applied to amend, but also that there had been no mention in the correspondence either to the Tribunal or to the Respondent of the Claimant wishing to make a complaint either under s 104C in relation to flexible working or a claim under Section 101A of the **Part-Time Working Regulations** or under Regulation 7, those all being claims of automatically unfair dismissal.

15. In paragraph 10 the ET recorded that the Respondent accepted that there were complaints under s 104A of the **ERA** and s 103A set out in the issues, but they did not accept that there had been any further complaints which were before the Tribunal. The ET said that it agreed with that assertion of the Respondent and went on to say that if the Claimant wished to bring in those particular matters an application amendment should have been made with a specifically amended document setting out precisely how those complaints were to be made.

16. The ET then said that it was clear that no such complaints were before the Tribunal, no amendment had been applied for and "therefore, the Tribunal will not accept this application to amend by the Claimant." It seems to me that the right way to read paragraph 11 is to understand the phrase "no amendment has been applied for" as meaning "no amendment has been applied for before today" because it is only in that way that the reference to "this application" makes sense. Therefore, in other words, I understand paragraph 11 to mean that the Claimant had not

A applied before 24 March to amend the pleadings to include the claims referred to in paragraph 9 of Decision 1, but had made such an application on 24 March.

B 17. I should now refer to Decision 2, which is in the supplementary bundle which has been prepared for the purposes of this appeal. The issues which the ET decided in Decision 2 included whether the Claimant was automatically unfairly constructively dismissed under s 103A of the **ERA** for making protected disclosures; and whether she was automatically unfairly C constructively dismissed under s 104 of the **ERA** for; (1) telling the Respondent that they were breaching the **Working Time Regulations 1998** by requiring a 10-hour shift; (2) telling the Respondent she was being treated less favourably as part-time worker and (3) telling the D Respondent she was entitled to be paid for a shift on 18 November 2012.

18. In paragraph 2.1 of Decision 2 the ET referred to the procedural history, including a E hearing in July 2013 and the further hearing in front of Employment Judge Ryan, which led to the case management summary to which I have already referred. The ET went on to say that despite that procedural history "there was still a dispute of some substance between the parties as to the agreed issues in the case."

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19. The issues in respect of the complaints of automatic unfair dismissal were decided by the Tribunal that the Full Merits Hearing on 24 March 2014 (the written record of which was sent to G the parties on 4 April 2014). During the hearing a further dispute occurred in relation to what detriments were being alleged under what statutory provisions. Those were decided by the Tribunal on 1 April 2014.

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20. The ET then set out in Decision 2, in paragraphs 2.2 to 3.12.4, the issues which it had to decide. There is a substantial if not total identity between that list of issues and the list of issues which were set out in Employment Judge Ryan's case summary.

21. The ET in Decision 2 held that the Claimant did not make the statements on which she relied in support of her s 103A claim; see paragraph 8.1 to 8.2. On the Section 104 claim the ET also found that the Claimant had raised a breach of the **Working Time Regulations** on one occasion, but that that had had nothing to do with the termination of her employment. The ET did not accept that the Claimant made the allegations set out at issue 2.3.2.

22. The ET found that the Claimant did assert that she was entitled to be paid for a shift in November 2012. The ET made its findings about that in paragraph 5.5.7 and 5.5.8 and held that there was no breach of contract by the Respondent, let alone a fundamental breach.

23. The ET directed itself about the test for constructive dismissal under the heading "Constructive dismissal" in paragraph 7.10 of the Decision. No attack is made to that part of Decision 2. The ET had already set out the relevant statutory provisions beginning at paragraph 7.1.

24. The ET held that the Respondent did breach the flexible working provisions imposed by s 80F of the **ERA**; see paragraph 8.1.4 in relation to flexible working, but that those breaches were trivial; see paragraph 8.15.5. The ET also held that the detriment claims under s 47B and s 47E of the **ERA** succeeded.

25. Mr Brown submitted in his grounds of appeal, and these submissions are repeated in the Claimant's skeleton argument, that paragraphs 5.3 and 5.3.3 and 5.4 of the list of issues clearly put an unfair dismissal claim pursuant to Regulation 7 before the ET. It is also submitted that paragraph 5.1, 5.1.1, 5.1.2, 5.1.3 and 7.2 clearly put a claim of automatic unfair dismissal pursuant to s 104C before the ET. It was argued that it was desirable for the relevant statutory provisions to be identified, but that that was a question of substance not of label.

26. The Claimant's arguments refer to paragraph 15 of the Decision of this Tribunal in **Grimmer v KLM City Hopper UK** [2005] IRLR 596. The test for the details of a claim is whether it can be discerned from the claim as presented that the Claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the Employment Tribunal. That passage deals with a somewhat different point as it concerns the contents of an ET1, but it can in my judgement be generalised to this context. The Claimant submitted in the alternative that if the ET applied the right legal test, the Decision that those two types of claim were contained in the issues set out by Employment Judge Ryan was a perverse Decision.

27. The third ground of appeal was that the ET failed to apply the test for giving permission to amend. The submissions refer to the Decision of this Tribunal in **Selkent Bus Company Ltd t/a Stagecoach Selkent v Moore** [1996] ICR 661. It is submitted that the ET erred in deciding that the time at which the application made was the sole criterion for whether or not leave to amend should be granted. The ET failed to account that the amendment would merely add new legal labels and not add any new factual allegations.

28. The ET erred in failing to balance relative hardship. That argument, it is said, was put before the ET. The evidence on which the Claimant sought to rely was identical to the evidence

on which she relied for her other claims, which were already before the ET and so it was said there is no prejudice to the Respondent in having to deal with the further claims.

29. The fourth ground of appeal is that the ET gave inadequate Reasons for its Decision. The Claimant, it is said, does not know why the two unfair dismissal claims could not be discerned from the list of issues or why the ET refused the application for leave to amend.

30. Mr O'Dempsey relies on a Decision 2. In essence he submits that the ET heard all the evidence which was relevant to the two claims with which this appeal is concerned. The ET found having heard that evidence that the Claimant's factual case was not made out. Those factual findings are fatal to the two claims with which this appeal is concerned. In particular, the ET found that the Claimant was not constructively dismissed and there has been no appeal against that finding.

31. That means that there is now no scope for any issue between the parties about the reasons for the Claimant's dismissal. That is because the ET found, in a Decision which has not been appealed on that point, that the Claimant simply was not dismissed. Further, the ET found that the Claimant did not make the statements she relied on; that the Respondent did not breach the implied term of trust and confidence or fundamentally breach the contract of employment. It also made findings about why the Claimant resigned. That, says Mr O'Dempsey, should dispose of the appeal.

32. If that is not enough, he also relies on the Decision of the Court of Appeal **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 and in particular paragraph 31 of that Decision. Paragraph 31 supports five propositions; first, the list of issues as a case management

tool; second, the Tribunal hearing the case is not obliged slavishly to stick to the list of issues (even if that has been agreed); third, the primary obligation of the Tribunal is to decide the case in accordance with the law and the evidence; fourth, case management Decisions are not final Decisions and can be revisited in the interests of effectiveness and; fifth, the issues in the case are for the Tribunal hearing the case to decide (**Land Rover v Short** UKEAT 0496/10/RN at paragraph 56).

33. He submits that the ET was entitled, and obliged, to decide what the issues in the case were as the parties could not agree what they were. The ET was entitled to find the issues as it did. In any event, the ET found that the Claimant did not make the statements on which she relied to support her claim.

34. The ET found that the sole reason for the Claimant's resignation was that she did not want to work night shifts; paragraph 5.8.6 of Decision 2. The ET knew that the Claimant's case was that she had made statements about her treatment as a part-time worker and the ET rejected her evidence about that (paragraph 8.4). That finding has not been challenged in any appeal against Decision 2 and cannot be challenged now.

35. Those claimed statements were linked to her resignation and to the Respondent's alleged breach of contract in paragraph 5.3.3 of the list of issues. However, the ET found that she did not make those statements. Thus, he submits, the ET took into account the Claimant's factual case which was relevant to the Regulation 7 issue and rejected it.

36. The ET also made positive findings about the way in which the Claimant's employment ended. He further submits that no question arises under s 104C unless the Claimant is able to

persuade the ET that she resigned in response to a fundamental breach of contract. The ET found in Decision 2 that there was no such breach.

37. The case on fundamental breach of contract was that the Claimant was subjected to detriments because she asked to work flexibly. The ET found that the Claimant was not subjected to the detriments to which she claimed she was subjected because of that request.

38. Mr O'Dempsey then submits that no Particulars were given of ground 2; that is the perversity ground. The Decision was a case management Decision and one which it was open to the ET to make.

39. He contends in response to ground 3 that the ET did not give undue emphasis to any factor. It was entitled to take the view that the application to amend was made very late. In any event the Decision was unarguably right. It is impossible to see how allowing the application would have affected the ET's approach to the issues.

40. In particular, he submits that the decision on the application to amend is a decision which was made against the background of the procedural context which is described in paragraphs 4 to 9 of Decision 1. Mr O'Dempsey's point is that the context in which the application to amend was made was a context in which questions about the scope of Employment Judge Ryan's list of issues had already been raised. Employment Judge Ryan had expressed a view about what the list of issues contained and had also invited an application to amend if the Claimant wished to raise new issues back in December 2013.

41. The issue about protected disclosures had been resolved by the correspondence between Mr Brown and the Respondent's solicitors. That, Mr O'Dempsey submits, is the background against which the employment the ET in Decision 2 decided that it was inappropriate to allow a late application to amend.

42. He submits that the reasons given by the ET for both Decisions were adequate. He draws my attention to rule 62(4) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), which provides "the reasons given for any Decision shall be proportionate to the significance of the issue and for Decisions other than Judgments may be very short." He submits that in the context of the way in which this issue arose, the explanation for its decisions which the ET gave in Decision 1 were adequate and met the requirements of rule 62(4).

43. His fall-back submission is that if any of those arguments is wrong any error of law by the ET was immaterial. He relies on the Decision of the Court of Appeal in **Burrell v Micheldever Tyre Services Ltd** [2014] EWCA Civ 716. He draws attention first of all to a quotation from the Judgment Laws LJ in paragraph 21 of **Jafri v Lincoln College** [2014] EWCA Civ 449, in which Laws LJ said this:

> **"…It is not the task of the EAT to decide what result is "right" on the merits. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts…."**

44. He also relies on paragraph 20 of the Decision of the Court of Appeal in **Burrell** in which Maurice Kay LJ, having accepted that the statement made by Laws LJ in **Jafri** was correct, said this:

> **"However, even within the confines of the conventional approach, the EAT can contain its application in a number of ways. First, provided that it is intellectually honest, it can be robust rather than timorous in applying what I shall now call the Jafri approach. There is reason to believe that it is robust... Secondly, as Underhill LJ said in Jafri, parties to appeals to the EAT can be encouraged to consent to the EAT disposing of the case pursuant to its powers under section 35 (1) (A) of the Employment Tribunals Act 1996, even where the EAT does not consider that the appeal before it is an "only one outcome" case. Thirdly, even where remittal is necessary, the EAT, mindful of the overriding objective, may limit the scope of the remittal, for example by identifying issues or limiting or forbidding further evidence."**

45. He submits on the basis of the passage in **Jafri** to which I have referred that any error made in Decision 1 can clearly be seen to have been immaterial because it did not and could not have affected the final Decision made in Decision 2. He further submits that had the ET held that the two issues, which are the subject of the appeal, were included in the list of issues and had it determined those issues, one can be absolutely confident from the factual findings in Decision 2 that the ET would have resolved those issues against the Claimant. For that reason, he submits, any error of law in Decision 1 is immaterial and that on that basis the appeal should fail.

Discussion

46. This is a short point. There are two issues whether (1) the ET erred in law in holding that it did not have to consider and decide the claims of automatic unfair dismissal under Regulation 7 of the **Part-Time Working Regulations** ("the Regulation 7 issue") and under s 104C of the **ERA** ("the Section 104C issue") and if it did not, whether it should have given the Claimant permission to amend in order to rely on those arguments.

47. I consider that on its proper construction, those claims, that is the regulation 7 claim and s 104C claim, were stated in the list of issues even if the legal labels were absent. This point is

not susceptible of much elaboration. I consider that it is tolerably clear from paragraph 5 that the Claimant was articulating the case that the Respondent had fundamentally breached her contract of employment by reacting to her request for flexible working in the way in which she alleged that the Respondent did, and by reacting as she alleges the Respondent did to her statements about **Working Time Regulations**.

48. It is true that the correct labels were not attached to the claims, but I do not consider that that is what matters. What matters is whether, in substance, the facts alleged supported claims under Regulation 7 and under s104C. The ET framed this first issue as a question about "the correct meaning of the issues which were set out by Employment Judge Ryan…" That is a pure question of law. I consider that the ET erred in law in deciding that the issues did not include the Regulation 7 and s 104C issue.

49. That conclusion means that I do not have to consider whether or not the ET erred in law in refusing the application to amend. I found this issue less easy to decide and on balance my view is that given the particular procedural context described by the ET in Decision 1, its conclusion that it should not allow the application to amend was one which was open to it in the exercise of its case management powers. It is not a case where the only factor against the amendment was its lateness. There is the detailed procedural context, which I have already described. As I say, I consider that it would have been open to the ET to refuse the application to amend on the basis of that procedural context.

50. The reasons challenge is concerned, the Reasons challenge to Decision 1 in my judgement does not arise because I have decided that the first challenge is made out. However, I do consider that having regard to rule 62(4) of the **ET Rules**, the Reasons given by the ET for its Decision to

refuse to allow the amendment were adequate because that was a Decision taken against the detailed procedural context which was set out in Decision 1.

Disposal

51. The Claimant invited me in her skeleton argument and in her oral submissions to hold that as a result of the errors of the ET in Decision 1, Decision 2 was flawed and could not stand. She submitted that the ET in Decision 2 failed to look at the whole picture and fairly to decide the Claimant's claims. She submitted that she was deprived of the opportunity to cross-examine the Respondent's witnesses or to make submissions about her claims at the hearing. She submits therefore that she was deprived of her right to have a fair hearing of her claims and that the consequence should be that her claims should be remitted to a different ET to be reheard.

52. We now know what the ET decided at the Substantive Hearing. I accept Mr O'Dempsey's submission that the ET considered all the factual allegations in the list of issues and found against the Claimant on those issues. Although I understand that the Claimant appealed against part of Decision 2, there has been no appeal against the ET's reasoning on the unfair dismissal aspect of the case.

53. It is clear from those Decisions, which the ET made on the factual issues that the Claimant's two further constructive dismissal claims would inevitably have failed. The Claimant rightly submitted in the grounds of appeal and the skeleton argument that the Regulation 7 and s 104C issues involved no new factual issues.

54. The flip side of that, though, is that the Claimant has suffered no prejudice, in my Judgement, as a result of the two errors of law which I have described because the factual issues,

which were before the ET and described in the list of issues, were decided by the ET in a manner, which meant that the two further constructive dismissal claims based on Regulation 7 and s 104C would inevitably have failed. As I have already said it follows that the error which I have identified in Decision 1 is immaterial to the result of the Substantive Hearing.

55. However, that is not the real issue which is raised by the Claimant's submission that Decision 2 cannot stand and that I should overturn Decision 2. The premise of that submission is that this Tribunal is able, in the course of this appeal, to make a Decision which has an impact on Decision 2. I consider that the EAT does not have any power to interfere with the Decision 2, made by the ET after the Substantive Hearing.

56. There is and has been no appeal against Decision 2 which challenges the ET's findings about constructive dismissal and the associated factual findings about the claims that underpinned the unfair dismissal claims. That being so, the EAT in my judgement has no jurisdiction to do anything about Decision 2.

57. In light of the conclusions, I dismiss the appeal against Decision 1, because although I have held that the ET erred in law in Decision 1, I have also held that that error was immaterial. I have further decided that this Tribunal has no power to interfere with Decision 2 as this Tribunal does not have before it any appeal against Decision 2.