Neutral Citation Number: [2023] EAT 101

Case No: EA-2021-000700-RN

IN THE EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane, London
EC4A 1NL

20th June 2023

Before:

JUDGE KEITH

Between:

MS A WAINWRIGHT **Appellant**

- and -

CENNOX PLC **Respondent**

- -
- -

Ms Grace Cullen (instructed by Birkett Long LLP) for the **Appellant**
Ms Robin White (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 20 June 2023

- -

JUDGMENT

- -

SUMMARY

Disability Discrimination and unfair dismissal

The ET erred in failing to analyse whether acts of discrimination because of something arising in consequence of the Appellant's disability, contrary to **Section 15 Equality Act 2010**, as found by it, also amounted to fundamental breaches of contract; if there were such breaches, whether the Appellant nevertheless affirmed her contract; and whether such breaches materially contributed to the Appellant's decision to resign, as per **Williams v Alderman Davies Church in Wales Primary School [2020] IRLR 589**. That error in turn resulted in the ET's failure to consider whether, if the Appellant were constructively dismissed, her dismissal also amounted to an act of discrimination.

In respect of the claim of 'ordinary' constructive dismissal, the ET's reasons were inadequate in explaining why, as per **Nottinghamshire County Council v Meikle [2004] IRLR 703**, the fact that the Appellant objected to other actions of the employer, which were found not to be discriminatory, vitiated her acceptance of discriminatory acts, as repudiating her contract. The Appellant needed to resign in response, at least in part, to the employer's fundamental breach of contract, but it need not be the effective cause of her resignation.

JUDGE KEITH:

1. These written reasons reflect the full oral decision which I gave to the parties at the end of the hearing.

2. The Appellant appeals against part of the decision of an Employment Tribunal, sitting in East London and chaired by Employment Judge Burgher, which was sent to the parties on 10th May 2021. The ET had dismissed the Appellant's claims of direct disability discrimination; victimisation; wrongful dismissal; constructive unfair and discriminatory dismissal. The ET found that the Appellant's claim of discrimination contrary to Section 15 **EqA** (because of something arising in consequence of the Appellant's disability, cancer) was well-founded. By the time of the renewed grounds before me, the only permitted challenges are to the ET's dismissal of the constructive unfair and discriminatory dismissal claims. The remainder of the ET's findings on the other claims are unaffected by this appeal and are preserved, as set out later in these reasons.

The ET's findings

3. The background facts, as found by the ET, are that the Appellant was a long-serving employee of her former employer, from 2002, until her resignation with immediate effect on 27th September 2019. Her employment had transferred in January 2018 from a relatively small company to Cennox plc, a larger one, on acquisition, under the **Transfer of Undertakings (Protection of Employment) Regulation 2006.** As a consequence, whereas previously, the Appellant had worked directly for her employer's Managing Director and stood in for her, as needs arose, with the title of Customer Services Director, (as

the ET found at paragraphs 39 to 40 of its decision), following her transfer, she no longer reported to the Managing Director and her job title change to that of "Head of Installations", (para. 45). One area of dispute, as to which I make no findings in this decision, is a suggestion that the Appellant had struggled with her work/life balance, which the Appellant disputed, but which was said to have informed the Respondent's decision (para. 52).

4. The Appellant was diagnosed with cancer on 17th August 2018 and, prior to starting chemotherapy, promptly completed a handover of her work on 20th August 2018, before her absence on sick leave started on 21st August 2018. Despite her absence, she remained in contact with her employer, and later returned to work the following year, for a brief period, before a further period of sickness absence and her resignation.

5. In her absence, and unknown to her at the time, one of the Appellant's colleagues, whom it is unnecessary to name, notified their mutual employer that she intended to resign. The colleague was a valued employee and partly in order to retain her, the Respondent offered her a permanent role of Head of Installations, on the assumption that there would be enough work for two Heads of Installation, once the Appellant returned to work (para. 61). The Appellant only learnt of this appointment in November 2018, when she saw a communication on the professional networking website "LinkedIn", inviting congratulations to the Appellant's colleague in her new role.

6. The Appellant liaised promptly with the Respondent. Its HR Director assured her, albeit inaccurately, that her role would be unaffected as a result (para. 66).

The Appellant was not informed about the Respondent's assumptions in creating the new role, nor that the new role was permanent.

7. The Appellant and her manager later had discussions about the Appellant's return to work, in the context of which, the Respondent sought occupational health advice, which was that the Appellant should initially return on a phased basis (para. 78).

8. In terms of next developments, the ET found that in July 2019, the Respondent provided the Appellant a new job description and organisation chart, in to which her role fitted. The Appellant was deeply unhappy about both, believing that she had been demoted, whereas the Respondent did not. This resulted in an impasse, (para. 104) which the Appellant's manager indicated would need to be resolved by way of a formal grievance.

9. When the Appellant then proceeded to raise a formal grievance, the Appellant's UK Managing Director indicated that he was very surprised and disappointed that she wished to do so. The ET was critical of the Managing Director's response (para 108).

10. The Appellant was then ill through stress. During that period, the Respondent learned that the Appellant had been approached by one of the Respondent's customers about potentially recruiting her. On discovering this, the Respondent temporarily removed the Appellant's access to her work e-mail account.

11. There was also a delay in progressing resolution of the Appellant's grievance. The ET found that the Appellant did not wish anyone under the managerial responsibility of the UK Managing Director to consider her grievance. The one

employee who had been identified as satisfactory, subsequently became seriously ill, to the extent that he was hospitalised.

12. In the context of that delay, (albeit I reiterate that I am not making any findings which bind a future ET), the Appellant subsequently resigned. The ET cited at para. 120 the reasons given by the Appellant for her resignation, which started with a statement that the Appellant was very unhappy about the way she had been treated and then set out a list of what she regarded as the more serious matters, which included learning, while on sickness absence in 2018, that a colleague had been given her job, querying this but being assured it would not affect her role.

The ET's conclusions

13. The ET recited the law at paras. 120 to 147. The parties accept that the recital was an accurate reflection of the law.

14. The ET dismissed the Appellant's claim of direct discrimination at paras. 149 to 161, for reasons the gist of which is that the ET did not accept that there was less favourable treatment because of the Appellant's cancer diagnosis. The ET identified as a comparator a senior employee on long term sickness absence in a company undergoing organisational change. While the Respondent had misled the Appellant, this was not because of her disability (para. 158).

15. The ET also dismissed the Appellant's claims of victimisation, with reasons at paras. 204 to 211. In accepting that the Appellant had done protected acts, the ET found either that alleged detriments did not occur, or for those that did occur, they were not because of the protected acts.

16. The ET dismissed the Appellant's wrongful dismissal claim on the basis that there was no contractual breach, for the Appellant to consider as potentially repudiatory (para. 203).

17. The ET did find in the Appellant's favour in respect of the **Section 15 EqA** claims, in two respects: first, in appointing the Appellant's colleague to the permanent role of Head of Installations, which affected the Appellant, without any input from her, and which arose from the Appellant's disability-related absence (paras.162 to 165). The unfavourable treatment also encompassed an announcement to the Appellant's team, while not including her and removing her from the organisational structure at the same time (November 2018).

18. Second, the ET found that the Respondent misled the Appellant between November 2018 and March 2019 when it informed her that her colleague's appointment was temporary, because of its "clumsy and misguided view" that it did not wish to upset her during her treatment, which the ET concluded was also unfavourable treatment (paras. 166 to 168). The ET dismissed the remainder of the **Section 15 EqA** claims.

19. In relation to the claim of constructive unfair dismissal, the ET's analysis starts at paras. 183 to 189, reciting some allegations as proven and others as not, the latter including the Appellant's assertion that she had been demoted. The ET concluded, at paras. 190 and 200 to 202:

> "190. We conclude that the reason for the Claimant's resignation was her erroneous perception of her status. Indeed, she stated that she would have accepted the reassignment of responsibilities proposed by [her manager] if she could be given the title of Installations Director. This erroneous view of status was a hangover from her previous post at Acketts [the smaller company] that the Claimant had evidently failed to internally resolve."

> "200. In summary, we accept that the Claimant was misled in relation to the permanent appointment of [the colleague] to Head of Installations in November 2018. The Claimant was aware that she was not part of the current organisation structure in March 2019 when [the manager] sent an organogram to her. The Claimant reasonably concluded that this was a temporary arrangement until the Claimant returned. When the Claimant returned discussion took place regarding assignment of responsibilities for an optimal structure. This was not a sham. We are also critical of [the UK Managing Director's] email of 2 September 2019 expressing disappointment in the Claimant appealing. However, we do not conclude that the Claimant resigned because of these matters We conclude that she resigned because she was unable to 'negotiate' a Director title and status in the new structure. She was in a far bigger organisation than Acketts and was not contractually entitled to a higher title.
>
> 201. Ultimately, this is a sad case. The Respondent sought to be supportive and was clumsy in its process in permanently appointing [the colleague] and in its communication of this to the Claimant. The Claimant returned to work with suspicions about her role and motivation for the reorganisation but following explanation it should have been clear to her that her suspicions were not well founded because there were justified business reasons for the changes. The Claimant was unwilling to engage and work in the new structure, had she done so she perhaps could have demonstrated her worth and progressed within it.
>
> 202. In the circumstances the Claimant's claim for unfair constructive dismissal fails and is dismissed."

20. In dismissing the claim of constructive dismissal, the ET also it appears, dismissed the claim of discriminatory dismissal. It was recorded as a claim at para. 2 and to the extent that only specified claims in relation to **Section 15 EqA** succeeded, the remainder of the claims were, by implication, dismissed.

The Appellant's grounds of appeal

21. I refer only to the grounds which His Honour Judge Beard permitted to proceed, following a Rule 3(10) hearing on 16th June 2022, which were grounds (1), (2), (4) and (5).

22. Ground (1) challenges the adequacy of the ET's reasons in relation to discriminatory unfair dismissal, particularly where the ET had decided that discrimination contrary to **Section 15 EqA** had taken place, at paras. 2; 67; 74; and 163 to 168. The ET had failed to explain whether those acts of discrimination were repudiatory contractual breaches, and either alone or together formed part of the Appellant's decision to resign or whether, alternatively, the Appellant had affirmed her contract. The ET had failed to explain, if they did not form part of the reasons for the Appellant's resignation, its reasons for that conclusion.

23. Ground (2) is that the ET misapplied the law in respect of constructive dismissal. The ET had failed to ask itself whether the acts of discrimination were repudiatory breaches; if they were, whether the Appellant had nevertheless affirmed her contract or whether, in the context of **Williams,** they materially contributed to her resignation, as opposed to being the "effective cause," which was not the correct test.

24. Mirroring those two grounds are grounds (4) and (5) in respect of 'ordinary' constructive unfair dismissal. While not every act of discrimination might be a breach of the implied term of mutual trust and confidence, whether individually or cumulatively, the ET ought to have analysed whether the acts were capable of amounting to repudiatory breaches and if so, whether the appellant had treated them as such, or instead whether the Appellant had affirmed her contract. Ground (4) is a challenge to the adequacy of the ET's reasons. Ground (5) contends that the ET misapplied the law, in excluding (or failing to consider) one of a number of reasons for resignation. As per **Meikle**,

the employee's resignation must be in response to the breach, but the fact that the Appellant also objected to other actions of the respondent, would not vitiate the Appellant's acceptance of repudiation. The ET ought to have considered whether the conduct capable of amounting to a repudiatory breach formed part of the reason for the Appellant's resignation.

Discussion and conclusions

25. I do not recite all of the parties' written and oral submissions, except to explain why I have reached my decision. I take each ground in turn.

Ground (1)

26. The ET had found that acts of discrimination contrary to **Section 15 EqA** had taken place between November 2018 and March 2019. In November 2018, this was the Appellant's removal from the organisation chart; the appointment of the colleague on a permanent basis; the Respondent's message to the Appellant's team, which excluded the Appellant; and the Respondent's HR Director's misleading reassurance that the Appellant's colleague's appointment was not permanent. In March 2019, the acts were the those of the same HR Director, in reassuring the Appellant that her role had not changed and that the appointment of her colleague was needed to manage the work in the Appellant's absence.

27. On the one hand, Ms White urged me to consider that the ET had indeed considered multiple potential causes for the Appellant's resignation, and had concluded that there was one reason, and one reason only, which was not because of the discriminatory act. She emphasised, as I have outlined in the summary at the beginning of these reasons, the Appellant's dissatisfaction with

her role following her TUPE transfer to Cennox plc, a larger business. Ms White emphasised the ET's rejection of the Appellant's claim that the splitting of her role was not genuine or justified for business reasons, and also the ET's finding that had the Appellant not been absent due to her disability, the Respondent would have discussed the need for the reorganisation, which was a genuine one (see para. 88). The Respondent's failure was in informing and consulting with the Appellant, not the fact of the reorganisation. It was the latter that had resulted in the impasse, and the Appellant's perception that her role had changed. Symptomatic of the Appellant's perception of her role was her suggestion, by way of a compromise (para. 103), that she should be called "Installations Director." The ET found that the Appellant's perception that she had been demoted was inaccurate (paras. 189 and 190) which was ultimately the reason for her resignation, and that reason alone.

28. On the other hand, Ms Cullen returns to the ET's findings at para. 200, (which I bear in mind must be read in context), which are that the Appellant was misled; and that she reasonably concluded that her colleague's appointment was only a temporary one. It was only on 30th August 2019, a short period before the Appellant's resignation on 27th September 2019, that the Appellant discovered the truth, not from the Respondent, but from her colleague, as reflected in the Appellant's chronology. The ET had also referred in critical terms to the Respondent's UK Managing Director's email expressing disappointment, dated 2nd September 2019, one again only a short period before the Appellant's resignation. Ms White says that the ET considered and rejected those as reasons for why the Appellant resigned, when the ET stated at para 200:

> "…However, we do not conclude that the Claimant resigned because of these matters We conclude that she resigned because she was unable to 'negotiate' a Director title and status in the new structure…"

29. Ms White says that that is a complete answer, even if, as she pragmatically accepted, the reasons could perhaps have been elaborated on.

30. I do not accept that the reasons are adequate in explaining why the discriminatory acts did not amount to repudiatory breaches and did not form part of the Appellant's reasons for resigning. My conclusion is based, in part, on Ms Cullen's point that the Appellant had specifically referred in her resignation letter, as recited at para 120, matters in November 2018 which were found to be discriminatory acts, including being misled. She referred to the same in her witness statement before the ET. Ms White argues that the ET was entitled to conclude that this was merely the context and not one of the reasons for her dismissal. However, returning to the example of one of the discriminatory acts, the concealment and misleading of the Appellant, while Ms Cullen cited numerous examples in the Appellant's witness statement that she says were unchallenged as to the treatment she says that caused her to resign, one such that stands out is where the Appellant refers to having been misled and lied to for nearly a year – internal para. 306 of her witness statement. Where the evidence of the contemporaneous resignation letter and the later witness statement is so explicit, a mere rejection of those, as part of the reasons for resigning, demands an explanation, for which there is not one. I accept Ms Cullen's submission that the Appellant is left wondering why her evidence has been rejected. The ET was not, of course, bound to accept that evidence, but it needed to explain why it did not.

Ground (2)

31. I will be briefer in relation to the remainder of the grounds. I accept the Appellant's challenge that the ET misapplied the law, in failing to carry out a structured analysis, as per **Williams**, of considering whether the discriminatory acts amounted to potentially repudiatory breaches of the implied term of mutual trust and confidence; and whether the Appellant was materially influenced, in resigning, even if only in part, because of such breaches. Any last straw needed to add "something," although the last straw itself does not need to be discriminatory or unreasonable (contrary to the ET's suggestion at para. 199). The ET's misapplication of the law was to assume that one cause (the Appellant's perception of her role) necessarily excluded all other causes or factors, without going through the structured analysis outlined.

Grounds (4) and (5)

32. In relation to the challenges to the ET's adequacy of reasons and application of the law in relation to the claim of 'ordinary' constructive unfair dismissal, Ms White pragmatically accepted that if the grounds in relation to discriminatory dismissal succeeded, then grounds (4) and (5) should also succeed. I regard that as a realistic assessment, but for completeness, I accept that the ET did not adequately analyse whether, stand-alone, or cumulatively, the Respondent's actions in misleading the Appellant, (as has been found), amounted to potentially repudiatory breaches. This Tribunal found in **Rawlinson v Brightside Group Ltd [2018] IRLR 180**, that an employer's positive act in misleading an employee, out of its misguided desire to "soften the blow" of the real reason for his dismissal had amounted to a breach of

contract. Every case is, of course, fact specific, but the fact that an employer's actions in providing untrue statements to an employee can amount to a breach of contract, highlights the importance of analysing whether the Respondent's actions in misleading the Appellant amounted to a repudiatory breach of the implied term of mutual trust and confidence; and of they did, to go through the **Williams /Meikle** analysis.

Disposal of the appeal

33. I do not accept that the evidence is such that the only outcome is that the appeal should succeed, either in relation to ordinary or discriminatory constructive unfair dismissal. Where, in my view, the ET had fallen into error was in its analysis and explanation of possible multiple causes or, if only one cause, the reason for rejecting those possible alternative claimed causes for the Appellant's resignation. In the circumstances, I regard it as appropriate that the matter is remitted to an Employment Tribunal for consideration of the claims of constructive unfair and discriminatory dismissal and wrongful dismissal. Remaking is subject to the ET's preserved findings in relation to its rejection of the direct discrimination and victimisation claims, and parts of the **Section 15 EqA claim**. For the avoidance of doubt, the ET's findings at paras. 36 to 126 are unaffected by this decision, as are the ET's conclusions at paras. 149 to 182; and 204 to 211.

34. I have considered whether remaking should be remitted to the same ET if possible, or a differently constituted Tribunal, bearing in mind the factors in **Sinclair Roche & Temperley v Heard [2004] IRLR 763.** I am conscious that there is no allegation of bias and bear in mind potential difficulties in an

alternative Tribunal taking as its starting point, and needing to pick out, particular findings. Nevertheless, those findings are clear, detailed and extensive. The scope of the unresolved facts is narrow, and encompasses the reason or reasons for the Appellant's resignation. The remaking Tribunal can also take as its starting point the ET's conclusions on discriminatory acts in breach of **Section 15 EqA.**

35. Without impugning the professionalism of the ET, I conclude that it is not appropriate to remit the matter to the same ET. The reason is that the ET has made a clear decision in relation the dismissal claims, even if its reasons for doing so were not adequate. To remit to the original ET the task of remaking would risk putting them in the position of being tempted to retrospectively analyse why they reached their previous decisions, or there would be a very real risk of the appearance of the same. Moreover, the ET's errors were not just an inadequacy of reasons, but misapplications of the law.

36. I regard it as appropriate that the appeal is remitted to a differently constituted Employment Tribunal.