Can a tribunal depart from an agreed List of Issues at a final hearing? Yes, in certain circumstances, says the Court of Appeal in Mervyn v BW Controls Ltd [2020] EWCA Civ 393

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Facts

The Claimant was employed by the Respondent as an administrator from November 2005. Following various issues at work, she left the office on 14 November 2016. It was her position that she had been dismissed, and the Respondent alleged that she had resigned. The Claimant issued a claim on 4 December 2016 ticking the box next to the words "I was unfairly dismissed (including constructive dismissal)". Within the body of her claim form, she raised allegations which could quite clearly form the basis of a claim for constructive unfair dismissal, alleging that she was "forced to leave [her] workplace" and that her manager made it "very difficult for [her] to carry out [her] job correctly and legally".

A case management hearing took place by telephone on 30 January 2017. In their agenda, the Respondent suggested that one of the issues to be determined was whether the Claimant was dismissed or had resigned and, if the latter, whether she could claim constructive dismissal. The Claimant maintained at the hearing that she had not resigned. EJ Reed recorded the following:

"If she was indeed actually dismissed, that dismissal would have to be unfair, since there was no procedure attendant upon it. If, on the other hand, she resigned, her claim must fail, since she does not allege that she did so because of the respondent's actions (indeed she says there was no resignation at all)."

The final hearing took place in November 2017. At the outset of the hearing, the judge confirmed that the issues to be determined were those identified at the case management hearing.

ET judgment

It was found that the words and actions of the Claimant amounted to a resignation and that she was not dismissed. It was thus concluded that *“Accordingly, the Claimant's complaint of unfair dismissal failed. She was not dismissed and she did not claim that any resignation had amounted to a constructive unfair dismissal.”.*

The Claimant appealed to the EAT and the following ground was allowed to proceed:

“"I claimed that I was constructively unfairly dismissed and the Respondent acknowledged this in its ET3. However, having found that I resigned, the ET failed to go on and consider whether I did so in circumstances that would amount to a dismissal contrary to s 95(1)(c) ERA 1996. The ET ought properly to have done so where such a claim was plainly an alternate pleading by a self-representing litigant."

EAT judgment

Elisabeth Laing J held "*if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim*", the ET has a duty to ensure that the litigant in person understands the nature of that claim. Where a litigant in person has decided not to advance a claim, *"the ET should be confident that the litigant in person has done so advertently*." The Judge noted that "*a person with no legal training might well think that if she wanted to bring an unfair dismissal claim, the last thing that it would be in her interest to concede would be that she had resigned rather than been dismissed*".

Elisabeth Laing J found that the allegations in the ET1 "*did raise a potential constructive dismissal claim*". Indeed, the Judge noted that counsel for the Respondent had accepted that the ET1 "*described an employee walking out of the job because the job had become intolerable"*. She concluded that the list of issues did not bind the ET.

On the issue as to whether the ET was bound to consider a claim of constructive unfair dismissal, she concluded as follows:

95. I have not found this an easy issue to decide. On the one hand the Claimant was not represented and the ET1 appears to describe what in some ways might be seen as a paradigm case of constructive dismissal. On the other hand, perhaps because the Claimant

had not had any advice about her position, her clear stance throughout the litigation was that she had not resigned. It was still her position when she gave evidence to the ET and when she made her closing submissions.

96. In this situation I consider that the ET cannot be criticised for not doing more than it did to investigate the Claimant's claim. It would have been impossible for the ET to investigate this issue without pressing the Claimant on the fundamental aspect of the way that she put her case and had been clearly putting her case for some considerable time, which was that she had not resigned. There was no constructive dismissal claim available to her unless she had resigned.

The Claimant was granted permission to appeal to the Court of Appeal, arguing that the EAT had erred in concluding that the ET was justified in neither considering the constructive dismissal claim nor satisfying itself that the litigant in person had "advertently" withdrawn that claim. The ET should have recognised that the distinction between a dismissal and constructive dismissal case would be confusing for a litigant in person. EJ Reed should have taken more care in the telephone hearing to ensure that the Claimant really wanted to withdraw the constructive dismissal claim and understood the consequences of doing so. The ET should have also been prepared not to adhere to the list of issues at the final hearing.

Court of Appeal judgment

Lord Justice Bean, in the leading judgment, concluded that the decision of the Court of Appeal in Parekh v London Borough of Brent [2012] EWCA Civ 1630 was instructive. In that case, the Respondent argued that the Claimant had been dismissed on the ground of capability. At a pre-hearing review (at which Mr Parekh acted in person), the first issue identified was "*Did the respondent act reasonably in treating capability as a sufficient reason for dismissal and in particular did the respondent act reasonably in concluding that the clamant lacked the competencies referred to in….".* Mr Parekh appealed, first to the EAT and then to this court, from the order made at the PHR. The complaint on his behalf was that as the list of issues did not include the prior question "*Has the [Council] proven on the balance of probabilities that the reason for the dismissal of [Mr Parekh] was capability?"* Mr Parekh was thereby prevented from disputing the Council's given reason for dismissing him.

Mummery LJ made the following observations:

30. … {The] list was described by the employment judge as the issues "definitively recorded" by him. He recorded them following the discussions at the PHR by Mr Parekh and Mr Ross, appearing for the Council, with him. The list was not the product of any adjudication, let alone any binding adjudication, of a dispute of substantive fact or law between the parties, such as whether capability was the reason for the dismissal, or of a procedural application or dispute.

31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it 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****: see Price v Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v English Heritage [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.*

32. While on the matter of appeals I would add that, if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that it is an incorrect record of the discussions, or that there has been a material change of circumstances, the proper procedure is not to appeal to the EAT, but to apply to the employment tribunal to reconsider the matter in the interests of justice."

The Court of Appeal case of Scicluna v Zippy Stitch [2018] EWCA Civ 1320 was also considered, in which Underhill LJ stated that "*There are exceptional cases where it may be legitimate for a tribunal not to be bound by the precise terms of an agreed list of issues: but this is not one of them."*

LJ Bean commented that he did not read this as meaning that there was a requirement of exceptionality in every case before a tribunal could depart from the precise terms of an agreed list of issues. Whilst it may be an unusual step to take, what was "necessary in the interests of justice" in respect of the tribunal's powers under Rule 29 of the Rules of Procedure would depend on a number of factors. For instance, whether the list had been agreed by legal representatives, whether the list was amended before any evidence was heard or whether amending the list would disrupt the proceedings (for instance, by requiring additional witness evidence such that a postponement would be necessary).

In his conclusion, LJ Bean suggested that "*It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice."*

On the particular facts of the case, he concluded that it was not sufficient for the tribunal to have simply confirmed at the outset of the hearing that the list of issues stood. It would not have amounted to a "step into the factual and evidential arena" for the tribunal to have said that it seemed to them that there was an issue as to whether the Claimant had resigned, and if so, to have gone on to consider whether the resignation was in response to any behaviour by the Respondent which amounted to constructive dismissal. In the witness statement of the manager against whom the Claimant had made the majority of her allegations, he had said that, in view of the case management order he would not address the Claimant's "misplaced claims" but added that they were untrue and irrelevant to the employment relationship in any event. LJ Bean concluded that he could almost certainly have given oral evidence about the disputed facts without significant delay or disruption of the hearing. Given that the Claimant here had clearly set out in both the ET1 and her witness statement facts which could give rise to a claim for constructive unfair dismissal, the appeal was allowed and the matter was remitted back to the ET.

Commentary

An important reminder to parties that, even where an agreed List of Issues has been prepared, there is always scope for this list to be departed from on the day of the trial, and not only in what could be categorised as exceptional circumstances. This is particularly so

where one party is unrepresented. For those acting for a respondent where the claimant is in person, it would be sensible to ensure that all of the (arguably) pleaded claims are sufficiently explored at the case management stage (even those where the pleading is not perfect), or you could find yourself in a situation of having to deal with issues at the final hearing which have not been properly set out in a witness statement (so long as it was considered that such issues could be dealt with in oral evidence). However the facts of this case were very specific, and in my view, it was clear from the outset that the tribunal ought to have been considering whether this was a case of dismissal or resignation, and then considering whether the dismissal was fair OR whether it was a constructive unfair dismissal. Indeed even in cases in which both parties are represented there is often a dispute as to whether the words or actions of the parties amounted to resignation or dismissal, and to conclude that, if a lay person in their mind considered that they had been dismissed, they were thereby precluded from pursuing a claim for constructive unfair dismissal in the alternative to ordinary unfair dismissal, would seem to be grossly unfair. Thus the practical impact of this case may well be fairly limited.

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