A constructive dismissal is, in principle, capable of constituting an act of harassment, within the meaning of section 26 of the Equality Act 2010

By Craig Ludlow

3PB Barristers

Ms M Driscoll (Nee Cobbing) v (1) V & P Global Ltd (2) Mr F Varela **(EA-2020-000876-LA; EA-2020-000877-LA)**[1]

Summary

1. In summary, in a detailed 76 page judgment, Ellenbogen J (sitting alone) in the EAT, held that:

1.1 The EAT's earlier decision in **Timothy James Consulting Ltd v Wilton [2015] IRLR 368** had been decided per incuriam European Directives and domestic case law, in the light of which it was 'manifestly wrong'. In so far as **Wilton** had decided that a constructive dismissal could not itself amount to an act of unlawful harassment within the meaning of section 26 of the Equality Act 2010 ('EqA'), it would not be followed.

1.2 A constructive dismissal is, in principle, capable of constituting an act of harassment, within the meaning of section 26 EqA. Accordingly, C's claim of harassment constituted in her alleged constructive dismissal (which had been struck out by the ET in reliance upon **Wilton** and certain obiter dicta in **Urso v Department of Work and Pensions [2017] IRLR 304, EAT**) would be reinstated, with consequential amendments made to the list of issues to be determined by the ET at the full merits hearing.

[1] https://assets.publishing.service.gov.uk/media/60f03553d3bf7f56896128d3/Ms_M_Driscoll__nee_Cobbing__v__1__V___P_Global_Ltd_2__Mr_F_Varela_EA-2020-000876-LA.pdf

1.3 The ET ought to have permitted an amendment to the claim form, to include an additional allegation of harassment, which was based upon facts already pleaded. Permission to re-amend the particulars of claim, and to make associated amendments to the list of issues, was granted.

Background facts[2]

2. Between 2nd April and 29th July 2019, C was employed by R1, a legal recruitment consultancy, as an executive assistant / operations manager. R2 is the founder and Chief Executive of R1. In these proceedings, leaving aside the claim which had been struck out, C asserted that, on various occasions in the course of her employment, R2 made comments which constituted harassment related to sex, race or disability, contrary to section 26 EqA; that she was victimised by R1, after her employment had ended, and that R1 was in breach of its duty to provide written particulars of employment.

3. Rs' case was that any alleged act which occurred prior to 6th June 2019 was statute-barred and that, in any event, all substantive claims, together with the facts alleged to underpin them, are denied. Rs contend that C resigned for personal reasons and that all of her claims had been advanced as an unreasonable and vexatious attempt to seek to intimidate and / or embarrass R2 and to put Rs to significant cost, as a direct response to R1's request that C repay overpaid holiday pay and salary. All such matters, together with remedy, if appropriate, fall to be resolved by an ET, at a full merits hearing.

The relevant legislative provisions

<u>The EqA</u>

4. So far as material to the appeal, section 26 EqA provides:

'(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of-

(i) *violating B's dignity, or*

[2] Paragraph 4 of the Judgment.

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

…'

5. Subsections 39(2) and 39(4) EqA provide that an employer (A) must not, respectively, discriminate against, or victimise, an employee (B) by (amongst other things) dismissing B or subjecting B to any other detriment.

6. Section 39(7)(b) provides that, in each case, the reference to dismissing B includes a reference to:

'*the termination of B's employment…by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.'*

7. Section 40 EqA provides, in full:

'*(1) An employer (A) must not, in relation to employment by A, harass a person (B)*

(a) who is an employee of A's;

(b) who has applied to A for employment.'

8. Section 212 EqA materially provides:

'(1) In this Act-

…

"detriment" does not, subject to subsection (5), include conduct which amounts to harassment.

…

(3) Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that

characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic…'

The EU Directives

9. In relation to the protected characteristics on which reliance is placed by C, the relevant current EU Directives and their respective Recitals / Articles are:

   9.1 Recital 6 and Articles 2(1)(c)(2)(a), 14(1)(c), and 26 of the recast EU Equal Treatment Directive (No.2006/54/EC) (a consolidating Directive, relating, so far as material to this appeal, to sex discrimination)[3];

   9.2 Articles 1, 2(1)(3), 3(1)(c) of the EU Equal Treatment Framework Directive (No.2000/78/EC) (relating, amongst other matters, to disability discrimination)[4]; and

   9.3 Articles 2(1)(3), 3(1)(c) of the EU Race Equality Directive (2000/43/EC)[5].

The ET judgment and decision under appeal

10. C's constructive dismissal claim was struck out by the ET as it held that it was bound by **Timothy James Consulting Ltd v Wilton [2015] IRLR 368, EAT** and **Urso v Department of Work and Pensions [2017] IRLR 304, EAT** to conclude that, as a matter of law, a constructive dismissal could not amount to an act of harassment contrary to section 26 EqA. Accordingly, it struck out the claim, under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, Schedule 1, as having no reasonable prospect of success.

11. C's application to amend the List of Issues in 2 respects was refused because the allegation of discriminatory constructive dismissal had been struck out and because a new allegation of harassment which amounted to an application to amend the claim was made.

12. C appealed these decisions to the EAT.

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054&from=EN
[4] https://www.legislation.gov.uk/eudr/2000/78/pdfs/eudr_20000078_adopted_en.pdf
[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN

The EAT judgment[6]

13. Ellenbogen J found that none of the aforementioned EU Directives had been cited to the EAT in **Wilton**[7], that the EAT in **Urso** had not had the benefit of any potentially relevant EU law (or related submissions)[8], and that neither constitution of the EAT was referred to the case of **Meikle v Nottinghamshire County Council [2005] ICR 1, CA** (in which the Court of Appeal had held that the EAT had been right to regard the constructive dismissal of the claimant as being, in itself, discriminatory under the Disability Discrimination Act 1995; and that whilst the case was not concerned, expressly, with harassment, the Court of Appeal had seen no principled basis for distinguishing between the different types of dismissal when considering a claim of discrimination)[9]. Accordingly, the decisions in both **Wilton** and **Urso** were made per incuriam of **Meikle**.

14. She was satisfied that each of the aforementioned EU Directives above proscribes harassment on the grounds to which it refers, including in relation to dismissals, and that there is no principled basis upon which the word dismissal should be taken to exclude constructive dismissal[10].

15. Consequently, Ellenbogen J concluded that:

"In my judgment, as a matter of law, where an employee (as defined by the EqA) resigns in response to repudiatory conduct which constitutes or includes unlawful harassment, his or her constructive dismissal is itself capable of constituting 'unwanted conduct' and, hence, an act of harassment, contrary to sections 26 and 40 of the EqA. Whether or not it does so in the particular case will be a matter for the tribunal to determine."[11]

16. On C's application to amend (and allowing the same), she cited **Selkent Bus Co Ltd. Moore [1996] ICR 836, EAT**, **Abercrombie and others v Aga Rangemaster [2014] ICR 290, CA**, **Vaughan v Modality Partnership [2021] IRLR 97, EAT**, and stated:

"Stepping back and balancing the injustice and hardship of allowing the amendment sought against the injustice and hardship of refusing it, I am satisfied that it ought to be

[6] The discussion and conclusions are at paragraph 56 of the Judgment onwards.
[7] Paragraph 56 of the Judgment.
[8] Paragraph 60 of the Judgment.
[9] Paragraph 62 of the Judgment.
[10] Paragraphs 67 and 69 of the Judgment.
[11] Paragraph 73 of the Judgment.

permitted. True it is that the Respondents will have to face a complaint which would have been out of time had it been brought as a new claim. However, in circumstances in which all factual and legal issues arising will need to be canvassed in any event and the Claimant would otherwise be deprived of a potentially valid claim, it is clear that the injustice and hardship of refusing the amendment would outweigh the injustice and hardship of allowing it."[12]

Commentary

17. This writer is of the view that this case is important to practitioners for 2 main reasons:

17.1 It can be expected that ET1s / Particulars of Claims are far more likely to include claims of harassment related to a protected characteristic where claims for 'normal' constructive dismissal are also being made. However, such claims of harassment will still need to be determined on their own facts.

17.2 Approval of HHJ Tayler's judgment in **Vaughan** when deciding amendment applications (in which he referred to Underhill LJ's comments in **Abercrombie**) confirms the difficulties faced by respondents in opposing such applications. It also provided a reminder (if one were needed) to respondent representatives of the focus they must have in responding to such applications in order to maximise the chances of successfully resisting them[13]:

"Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to

[12] Paragraph 96.6 of the Judgment.
[13] Paragraph 96.3 of the Judgment.

advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim."[14]

Craig Ludlow

Barrister
3PB

020 7583 8055
Craig.ludlow@3pb.co.uk

3pb.co.uk

[14] Paragraph 21 of the Judgment in **Vaughan**: https://assets.publishing.service.gov.uk/media/5fac0dc18fa8f56da022858f/Mrs_G_Vaughan_v_Modality_Partnership_UKEAT_0147_20_BA__V__.pdf