

A rushed dismissal undertaken with a view to avoiding the financial consequences of an age trigger being reached

[Cook v Gentoo Group Limited \[2023\] EAT 12](#)

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The facts

C commenced employment with R on 1.3.92. He was latterly in the role of Head of Compliance (Property Services).

In October 2017, R was assessed by its Regulator as “non-compliant” in respect of governance. This was due to the board having exercised “weak governance and internal control when agreeing executive contracts and severance payments to outgoing executives”.

On 24.4.19 the Executive Team decided to undertake a restructure. It seems that this would have entailed the deletion of C’s role.

Any such restructure required board approval. However, on 2.5.19 R’s Appointments and Remuneration Committee decided to forgo board approval (the next due board meeting being scheduled for 22.5.19); this decision was taken with a view to hurrying through the redundancy process so as to avoid C becoming entitled to an enhanced pension. If C had been made redundant after the age of fifty-five R would have been obliged to make a further payment of £80,000 into his pension scheme.

On 3.5.19 an initial consultation meeting was held with C. He was told that he was going to be made redundant. He was soon thereafter signed off by his GP for a “stress related problem.”

C failed to attend the second consultation meeting, which had been fixed for 8.5.19. It was rebooked for 13.5.19. C did not attend.

On 16.5.19 R dismissed C without notice.

The ET

C brought claims including unfair dismissal and direct age discrimination (the treatment in question being the dismissal).

As to the unfair dismissal claim, the ET found that the principal reason for the dismissal was redundancy. However, it found the dismissal unfair under s98(4). This was due to matters including the speed of the process and the lack of attempt by R to seek suitable alternative employment for the claimant.

The ET held that, if R had acted fairly, the restructure would have been considered by the board at its next meeting on 22.5.19. There would then have been consultation with the claimant, which would have led to C's (fair) dismissal for redundancy.

The ET held that, absent unfairness, C would have been given on 6.6.19, with termination taking effect after he had reached 55 (which was on 11.8.19). As such C would have been entitled to an enhanced pension.

The ET went on to hold that compensation should be reduced by 90% for various reasons pertaining to C's conduct prior to dismissal.

In respect of C's claim for direct age discrimination, C had argued that the curtailment of the redundancy process with a view to avoiding him obtaining an enhanced pension constituted direct age discrimination.

The ET held that C's identified comparators were inappropriate (although the ET did not proceed to consider any hypothetical comparators).

The ET also held that, even if the C's identified comparators had been valid, the ET would have considered the treatment in question to be "a proportionate means of achieving a legitimate aim". The ET did not expand on that conclusion.

The Appeal

C appealed on two grounds, one being that the ET had erred in holding that dismissing C unfairly was a proportionate means of achieving a legitimate aim.

At first the matter was permitted to proceed.

Burns/ Barke

R applied for a Burns/Barke order requesting that the ET be asked to set out the legitimate aim relied on and the reasons why the tribunal found the detrimental treatment in question as having been a proportionate means of achieving that aim.

The EAT proceeded to issue such a direction. The EAT also made allowance for C to ask a question of the ET if appropriate.

The ET responded with information in response to the question posed.

The wording of the ET's response included striking features, such as:

- "My answers to the questions asked by [the EAT] are as follows" (emphasis added)
- ".....The Tribunal would have found this to be the aim because....." (emphasis added)
- "The Tribunal would have found the detriment to be proportionate, as" (emphasis added)

The wording adopted raised doubts about whether the answers provided by the ET were on behalf of the full panel, or solely the EJ, and also the question of whether the answers provided covered decisions made by the ET at the time of its original judgment or rather whether they constituted fresh thinking in light of the Burns/Barke direction.

However, as later pointed out by the EAT, C did not avail himself of the opportunity to ask the ET further questions on the matter. Given C's failure to check that point with the ET, the EAT decided to proceed on the assumption that the answers provided by the ET were indeed those of the full panel and did in fact cover decisions made at the time of the original judgment.

The EAT's Judgment

The key point at the final EAT hearing was whether or not, taking into account the answers provided by the ET under the Burns/Barke procedure, the ET had erred in dismissing the direct age discrimination claim.

The EAT explored the relevant authorities pertaining to the question of justification of direct age discrimination claims, ascertaining the permitted scope of such matters. Amongst other things, this included confirmation of the requirement for any aim relied on to fit within the "costs plus" approach. The EAT also covered the need for any such aim to entail "social policy objectives", with an explanation of the background to that requirement.

In the instant case, the legitimate aim relied on was "saving costs which would have been incurred in making the additional payment into the pension fund"; the "plus" element was "the prior disapproval of the Regulator of Social Housing of the practice of windfall pension enhancements".

C conceded that it was open to R to rely upon the stated aim. The battleground was therefore in respect of justification.

In that regard, the ET's answer, under the Burns/Barke order, as to the grounds on which it had decided that the dismissal was justified had been as follows:

- "The balance would have fallen in favour of the respondent. The claimant was paid more than £47,000.00 in redundancy and notice pay and had access to a pension scheme that he chose to freeze".

The EAT referred to this as a "terse analysis"; it concluded that the analysis provided by the ET was "insufficient to support the determination reached".

The EAT set out several reasons for its conclusion in that regard. In essence, the EAT seems to have taken the view that the ET had failed to take into account various relevant matters in its consideration of the matter.

As to disposal, given the observations made by the EAT in respect of the matters which it considered to be of relevance to the issue of justification, it is possible that C might have been expecting the EAT to substitute a decision in his favour. However, the EAT proceeded to state that it did not consider that there was only one answer to the issue; as such the matter was remitted to the ET (albeit to a fresh tribunal).

Comment

For those advising on whether justification may be available in a direct age discrimination claim, this authority provides a very useful review of the relevant authorities. It carefully covers the unique aspects requiring consideration in any direct age discrimination, including in particular the scope of "legitimate aims" available.

it also serves as a useful point of call for any practitioner faced with advising on a rushed dismissal undertaken with a view to avoiding financial consequence of a particular age trigger being reached.

Employers will in the past have tried to place reliance on [Woodcock v Cumbria Primary Care Trust \[2012\] EWCA Civ 330](#), in which an employer had successfully defended a direct age discrimination claim based on an arguably rushed dismissal which had negated the obligation for an enhanced financial payment.

In the instant case, the EAT pointed out that Woodcock included very particular facts. The key point was that, in Woodcock, the employer could have run through the entire dismissal process in good time before the claimant reached the trigger age; a series of unexpected events had resulted in that not happening.

That was a somewhat different situation to the scenario encountered in the Cook case.

Any claimant who hereafter finds themselves to be the subject of a rushed dismissal prior to reaching a key age milestone, with the effect that enhanced employment rights are lost, may wish to explore this authority in some detail; it arguably serves as a useful guide to the types of matters which may be considered relevant in any ensuing direct age discrimination claim.

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