

Objective justification of dismissals in s.15 claims, long-term absence, and the relevance of alternative role trials

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[Department for Work and Pensions v Mrs Susan Boyers \[2022\] EAT 76](#)

1. The EAT gave a second dose of useful guidance in this case on dismissals and s.15 discrimination (“discrimination arising from”), where there has been long-term absence due to disability.
2. In summary, the EAT found that
 - A failure to lead evidence which connects the (subjective) decision with the legitimate aims relied upon at the hearing, or a lack of evidence showing that the decision-maker did consider other less discriminatory alternatives, will make it “more difficult” for an employer to show that it acted proportionately.
 - failures of process are not directly part of the question of objective justification, but they may well be evidentially relevant to the Tribunal’s determination of that issue.
3. This was the second judgment of the EAT in this case, the DWP having previously successfully appealed and this being an appeal of the judgment following the matter having been remitted to the ET and a second judgment given.

Factual Background

4. The factual background, in summary, is that Ms Boyers had worked for the DWP for some twelve and a half years prior to her dismissal. She had been on long-term sick leave for almost a year at the point of dismissal, her only period of work during that period being a three-week trial period in a different role and at a different location. Ms Boyers had made allegations of bullying and harassment by a colleague which she considered to contribute to her illness and disability and was unwilling to return to the site at which she had

previously worked. The work trial had not been considered a success by the Respondent at the time, although the processes for supporting Ms Boyer during the trial and assessing its success were later found by the ET to be deficient. She was dismissed around three months later.

5. At the first hearing, the ET had found the dismissal to be unfair and also discriminatory, contrary to s.15. The DWP was only, in its appeals, concerned with the ET's treatment of the "objective justification" defence – whether the dismissal was a proportionate means of achieving a legitimate aim. They did not challenge findings of unfavourable treatment, disability, or knowledge of disability.
6. At the first appeal, the EAT upheld the appeal broadly on the basis that the ET had focussed too heavily upon the failures in the process which led to the decision to dismiss, rather than the appropriate test of balancing the needs of the Respondent (as expressed through its legitimate aims) with the discriminatory impact upon the Claimant of being dismissed because of something arising from her disability. In particular, there was an absence of evidential findings of the impact upon the Respondent of the Claimant's long absence from work.
7. It is not difficult to see how an ET, considering both an unfair dismissal claim and a s.15 discrimination claim in respect of that dismissal, might fall into such an error.
8. In its second judgment, the matter having been remitted, the ET found that the DWP had not in fact advanced positive evidence on the legitimate aims relied upon in the hearing: that of scarcity of public funds and strain on the remaining workforce. There was not evidence that those matters had actually been considered by the decision-maker. It considered the matters on the basis of the evidence which it did have, but concluded that the actual cost to the public purse was likely to be minimal as Ms Boyer had been shortly to exhaust her entitlement to paid sick leave. Nor was the impact on the rest of the workforce sufficiently significant to dismiss Ms Boyer at that time.
9. In essence, as summarised by the EAT in the second appeal, the DWP had "jumped the gun" in dismissing Ms Boyer without having undertaken a proper and full assessment of the trial period or considering other alternatives, in the context of her long service and the modest impact upon the DWP of delaying any decision to dismiss. The DWP also appealed this second judgment of the ET.

The Grounds of Appeal

10. The first ground of appeal considered by the EAT was that the ET (second) judgment was perverse, or else it erred in law, in that it hadn't considered Ms Boyer's stated refusal to the Respondent, prior to dismissal, to return to her previous place of work. Her place of work was contractual. The approach taken, with its focus on the potential for the trial to be examined and perhaps acted upon, took too wide a view: the ET should have focussed upon the particular job that Ms Boyer was contracted to perform and that she was dismissed from.
11. Appended to that ground at the hearing was an argument by DWP's counsel that the ET had again, in looking at the failure to properly assess the work trial, focussed upon process rather than the decision itself in an impermissible way. Reliance was placed upon the first EAT judgment in this case as authority for that focus being impermissible in law.
12. The EAT was not convinced. It reminded itself of dicta in ***Chief Constable of West Midlands v Harrod [2015 ICR 1311]***, which was to the effect that while consideration of objective justification in s.15 is for the Tribunal to undertake and not an assessment of the process or the subjective reasoning of the decision-maker, a failure to lead evidence on such matters is likely to be unhelpful to an employer seeking to defend its decision.
13. A failure to lead evidence which connects the (subjective) decision with the legitimate aims relied upon at the hearing, or a lack of evidence showing that the decision-maker did consider other less discriminatory alternatives, will make it "more difficult" for an employer to show that it acted proportionately.
14. In summary (although the EAT did not characterise its conclusions in expressly these terms) failures of process are not directly part of the question of objective justification, but they may well be evidentially relevant to the Tribunal's determination of that issue.
15. Nor was the EAT persuaded that the ET should limit itself to the particular contractual terms of employment and not therefore consider potential redeployments outside of those terms as being relevant to the question of proportionality. There was no basis for limiting the balancing exercise required in considering objective justification and, as the EAT noted, the terms of employment can *themselves* be discriminatory. It would severely undermine the protection provided by s.15 for the exercise to be constrained in that way.
16. The second ground of appeal was that the ET had effectively imported into the consideration of objective justification a duty to consider redeployment, suggested as akin

to the duty to make reasonable adjustments. This was also dismissed by the EAT: the relevance of the work trial arose from the facts of the case and there was no reliance by the ET upon any general principle that alternative employment would always need to be considered for a dismissal to be objectively justified.

Conclusions

17. Both claimant and respondent representatives need to carefully distinguish and separately consider the relevant tests when a dismissal is relied upon as the unfavourable treatment in a s.15 claim. While the outcomes will frequently align, the routes to the conclusion are distinct.
18. Respondent representatives will want to carefully consider whether the legitimate aims pleaded align with the subjective reasons in the mind of the decision-maker. While the objective justification test is carried out by the ET and the legitimate aims need not correlate with the reasons given by the decision-maker at the time, respondents may face something of an uphill battle evidentially in that situation.
19. There is no general obligation for an employer to offer work trials or consider redeployment in cases of dismissal arising from long absence (although it will always of course be helpful evidence to justify the proportionality). However, where one has been offered the facts of that trial period, and the basis for the decision that it was not successful, is likely to be relevant to the question of proportionality.
20. Nor can an employer entirely rely upon the nature of the work an employee is currently contracted to carry out when deciding to dismiss in these circumstances: considering alternatives can include amendments to the contract of employment.

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