EAT considers effect of delay on fairness of trial and emphasises importance of considering material differences in circumstances between claimant and comparators when deciding whether burden of proof has shifted

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Virgin Active Ltd v Hughes [2023] EAT 130

Relevant background

1. The Respondent ("R") operates fitness clubs. In January 2017 the Claimant ("C") became the manager of R's Mayfair club. An audit of the club was conducted and C considered that it raised serious concerns about the operation of the club.

2. By April 2017 there were personal improvement plans in place for 3 members of staff. C conducted investigation meetings with each of them in June 2017, as a result of which disciplinary processes were commenced against them. Whilst C was trying to manage one of those employee's performance, he alleged that she said to him "*you are only doing this to me as I am old, black and fat*"[1].

3. At the end of June / beginning of July 2017 each of the 3 aforementioned members of staff raised grievances against C, which were investigated by R. It was determined that C should face disciplinary action because: (1) he had not provided adequate support to his staff; (2) he had made a racist comment to one of them in June 2017, namely "*We had better watch out in the office, you're Iranian aren't you?*"; (3) he had a tendency towards disciplinary action; (4) he had treated one of those employees unfairly and sought to influence disciplinary action against her to bring about her dismissal.

[1] Paragraphs 39 & 40 of the Judgment.

4. C was suspended and thereafter informed he would be investigated. C was invited to attend a disciplinary hearing. The following day C emailed R complaining about the lack of response to his earlier "grievance", wishing to escalate his original grievance to senior management" and setting out additional concerns in further correspondence.

5. On 22nd August and 19th September disciplinary hearings were held with C. C was summarily dismissed for gross misconduct and thereafter his appeal against his dismissal and a work-related stress grievance were dismissed.

6. C brought claims for whistleblowing automatic unfair dismissal, "ordinary' unfair dismissal, and direct age, sex, and race discrimination claims. Part of his direct race discrimination claim was the allegation that whilst he considered the comment made to him by the employee whose performance he was managing was racist, it was not investigated during the course of his grievance whereas the alleged racist comment made by him had resulted in disciplinary action against him.

7. The hearing took place on 23-26 & 30 July 2019, 3 September 2019, and 11 & 25 October 2019, and in chambers on 23 & 24 January 2020 and 16 & 18 February 2021. The judgment was dated and sent to the parties on 15 June 2021[2].

ET decision

8. C succeeded in his claims of direct race discrimination relating to the handling of his disciplinary and grievance procedure, "ordinary" unfair dismissal and whistleblowing automatic unfair dismissal. His claims of direct age and sex discrimination were dismissed[3].

9. Materially for the focus of this case summary and discussion, in analysing and determining that the burden of proof had shifted to R in relation to the direct race discrimination claim the ET considered the 3 employees who C was investigating and who had made grievances about him as comparators, despite their circumstances appearing to differ significantly from his. The ET summarised its conclusion on the shifting burden of proof:

[2] Paragraph 1.
[3] Paragraph 2.

"…By way of summary, the matters in relation to which the Tribunal finds an explanation from the Respondent is required are: (1) the decision of Ms Tysoe which determined that the Claimant's grievances…should be dealt with as part of a disciplinary process rather than within the framework of the Respondent's grievance procedure; (2) the decision to refuse to make any adjustment to the personnel involved with the disciplinary and appeal procedures in the light of the Claimant's complaints and observations about Mrs Thomas; (3) the handling by Mr Armstrong of the disciplinary allegation against the Claimant in respect of a "racist comment"; and (4) the application of different sanctions (or lack of sanctions) for the Claimant by contrast with his comparators. In relation to each of those matters the Tribunal has found that there is a difference between the Claimant and his comparators by reference to the protected characteristic of race and that the Claimant has been subjected to less favourable treatment"[4].

10. Generally, the ET did not accept R's various explanations for its less favourable treatment of C.

Grounds of appeal

11. R advanced 6 overlapping grounds of appeal, but for the focus of this case summary the principal ones were for delay (ground 1) and that the wrong legal test had been applied to the race discrimination claim (grounds 4 & 5)[5].

EAT decision

Race discrimination claim

12. In upholding R's appeal against the findings of direct race discrimination, setting those findings aside and remitting the claims for rehearing before a new ET, the EAT materially held that:

> "60. *Determining a claim of direct discrimination is inherently a comparative exercise. The Employment Tribunal has to consider whether the claimant was*

[4] Paragraph 43.
[5] Paragraphs 53 & 54. The appeals in respect of the other heads of claim were dismissed.

treated less favourably than a person with whom he does not share the protected characteristic was treated, or would have been treated, and whether the difference of treatment was because of race, in the sense that race was a material factor.

61. In many direct discrimination claims the claimant does not rely on a comparison between his treatment and that of another person. The claimant relies on other types of evidence from which it is contended that an inference of discrimination should be drawn, the comparison being with how the claimant would have been treated had he had some other protected characteristic.

62. In other cases, the claimant compares his treatment with that of one or more other people. There are two ways in which such comparison may be relevant. If there are no material differences between the circumstances of the claimant and the person with whom the comparison is made (the person is usually referred to as an actual comparator), this provides significant evidence that there could have been discrimination. However, because there must be no material difference in circumstances between a claimant and a comparator for the purpose of section 23 EQA it is rare that a claimant can point to an actual comparator. The second situation in which a comparison with the treatment of another person may provide evidence of discrimination is where the circumstances are similar, but not sufficiently alike for the person to be an actual comparator. The treatment of such a person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ to those of the claimant would have been treated (generally referred to as a hypothetical comparator. Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ to those of the claimant…

67. If anything more is required to shift the burden of proof when there is an actual comparator it will be less than would be the case if a claimant compares his treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator…

> *69. Accordingly, where a claimant compares his treatment with that of another person, it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination.*
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> *70. The Employment Tribunal did not direct itself by reference to section 23 EQA or analyse whether there were material differences between the circumstances of the claimant and his comparators. The Employment Tribunal did not state whether the comparators the claimant relied on were actual comparators or were being used as providing evidence from which an inference of discrimination might be drawn. The Employment Tribunal clearly thought it was highly significant that the allegation that the claimant had said… "We had better watch out in the office, you're Iranian aren't you?" resulted in disciplinary action, whereas the claimant's allegation when he sought to performance manage…she said to him "you are only doing this to me as I am old, black and fat". The Employment Tribunal did not state whether it thought there were material differences between the circumstances of the two alleged comments".*

13. The EAT considered that the ET treated the 3 employees as actual comparators without analysing whether there were material differences between their circumstances and those of C. The ET held that because of the difference in treatment alone the burden of proof shifted to R to disprove discrimination. Accordingly, R's challenge to the legal analysis that resulted in the burden of proof shifting was made out and that part of the appeal succeeded[6].

Delay

14. The parties accepted that the correct legal approach to delay is set out in **Connex South Eastern Ltd v Bangs [2005] ICR 763**, per Mummery LJ at 43, which includes setting out that unreasonable delay is a matter of fact, not a question of law, and no question of law arises from a decision itself just because it was not promulgated within a reasonable time. However, there may be exceptional cases in which unreasonable delay by the ET in

[6] Paragraph 71 of the Judgment.

promulgating its decision can properly be treated as a serious procedural error or material irregularity giving rise to a question of law: "…*Such a case could occur if the appellant established that the failure to promulgate the decision within a reasonable time gave rise to a real risk that, due to the delayed decision, the party complaining was deprived of the substance of his right to a fair trial under article 6(1)…*"[7].

15. The EAT stated that:

"*In deciding whether there is a risk that a party has been deprived of a fair trial it is nonetheless helpful to consider what errors of law are asserted in the judgment, the reason for the delay and whether on an overview there is a real risk that the trial was not fair*"[8].

16. Here the EAT found that: there was a lengthy delay in the ET judgment being produced, mainly because of the very serious ill health of the EJ[9]; the EJ had provided a very detailed explanation of the delay and how the judgment was produced; the EJ took 117 pages of handwritten notes which were available to the ET at all stages of its deliberations; all members of the ET at all stages of its deliberations had the hearing bundle in hard or soft copy; during the deliberations the EJ made recordings of factual findings and of important points discussed in the deliberations; and the ET had supplementary notes taken by the lay members.

17. On this ground, the EAT held that standing back and considering the totality of R's complaints, R had not established that the delay in producing the judgment gave rise to a real risk that R was deprived of the substance of the right to a fair trial[10].

Commentary

18. This case provides a very clear reminder to practitioners advising their clients on the merits of their direct discrimination claims and to ETs in assessing the evidence before them of the importance of considering whether there are material differences in circumstances between a claimant and a comparator before applying section 136 EqA and the shifting burden of proof. It highlights the point that the greater the differences between the

[7] Paragraph 56 of the Judgment.
[8] Paragraph 57 of the Judgment.
[9] Paragraph 84 of the Judgment.
[10] Paragraph 94 of the Judgment.

claimant's and the comparator's circumstances the less likely it is that the difference of treatment is suggestive of discrimination.

19. In seeking to further explain the shifting burden of proof, as well as the EAT reminding us of probably the most regularly cited passage concerning section 136 EqA from the judgment of Mummery LJ in **Madarassy v Nomura International plc [2007] ICR 867** at paragraph 56 that: "…*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*"[11], it gave the helpful example of if 2 people who differ in a protected characteristic attend a job interview and one is appointed but the other is not, that, of itself, would not be enough to shift the burden of proof, but if they scored the same marks in the assessment, so there is an actual comparator, the difference of treatment would seem to call out for an explanation[12].

20. The case also highlights the importance of pinning a claimant down on the comparator(s) being relied upon as early as possible (and certainly at the Preliminary Hearing stage), so that any attempt at the full merits hearing to try and invoke different comparators can be robustly resisted.

Delay

21. It would not come as a surprise if this EAT judgment has a deterrent effect on appeals based on the ground of 'delay' in receiving judgments. Whilst it is made clear by the EAT that such a ground of appeal could in principle succeed (see paragraph 15 above), nonetheless the ET's judgment in this case was sent to the parties around 23 months after the start of the hearing and a little less than 19 months after the last day of the hearing[13]. Whilst there is no 'bright line' timescale as to when such delay of receipt of judgment becomes excessive delay and worth an appeal, practitioners are highly likely to be very cautious in advising their clients to advance any such appeal based on this ground in the future.

[11] Paragraph 63 of the Judgment.
[12] Paragraph 68 of the Judgment.
[13] Paragraph 4 of the Judgment.

Covert recordings

22. As an aside from the focus of this case summary, C made covert recordings of the disciplinary meetings. In deciding that the making of the protected disclosures was the reason for C's dismissal , the ET relied primarily on the transcripts of the covert recording of the disciplinary hearings, including what had been said in C's absence[14].

23. Whilst many disciplinary and grievance policies expressly prohibit employees making audio recordings of disciplinary and grievance meetings and employees are frequently reminded at the commencement of such meetings of this prohibition, most (if not all) employment practitioners will be very familiar with claimants making such covert recordings on their phones and disclosure of the same being provided during the course of litigation. Whilst the fact that a claimant has made such recordings can usually be used against them to make them seem underhand / undermine their credibility as a witness, the transcripts if not the audio of the recordings are usually always allowed into evidence for the full merits hearing. This case provides another reminder to practitioners to advise their employer clients carrying out disciplinary / grievance processes to be wary of such behaviour by employees who might become potential claimants.

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[14] Paragraph 31 of the Judgment.