Neutral Citation Number: [2024] EAT 196

Case No: EA-2022-001079-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 12 November 2024

Before:

JUDGE KEITH

- -

Between:

MRS F LALOUI

Appellant

- and -

(1) PARKS (LONDON) LIMITED
(IN CREDITORS' VOLUNTARY LIQUIDATION)
(2) MR R SYMONS

Respondents

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MR K HARRIS for the **Appellant**
MR R KOHANZAD for the **Respondents**

Hearing date: 12 November 2024

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JUDGMENT

SUMMARY

Sex discrimination

The Employment Tribunal erred in failing to consider evidential comparators, when analysing whether certain claims of direct sex discrimination should succeed. The matters were remitted to the same Tribunal to consider those evidential comparators, in the light of the evidence which it had already considered.

JUDGE KEITH:

1. These written reasons reflect the full oral judgment which I gave to the parties at the end of the hearing. For the reasons I will give, the Employment Tribunal erred on limited grounds, but the Appellant's other grounds fail and are dismissed.

2. The Appellant appeals against the decision of the Employment Tribunal sitting in London Central, who, in a reserved judgment sent to the parties on 6th September 2022, dismissed the Appellant's claims for sex discrimination, harassment, victimisation and unfair dismissal. The Appellant submitted a notice of appeal against that decision on 17th October 2022, in response to which HHJ Tayler ordered that there be a preliminary hearing.

3. In a decision of 12th September 2023, Andrew Burns KC, sitting as a Deputy High Court Judge, granted permission on limited grounds, subject to further amendments which needed to address the alleged failure by the ET to consider comparators relied upon, to list which allegations were relevant to which comparators, and the alleged difference between the terms in respect of a role offered to the Appellant, before the Appellant was dismissed, and the terms offered to a male comparator. Andrew Burns KC directed that the grounds be amended and, on that basis, be permitted to proceed.

4. Ground (a), but I re-number as ground (1), is as follows:

Ground (1) - Failure to address actual comparators and to list which allegations were relevant to actual comparators.

5. The Appellant says that the ET erred by failing to make findings on the treatment of named comparators. The agreed list of issues was annexed to the judgment at pages [40] to [45] and, at paragraph [5], identified named comparators. The ET did not consider or make the findings as to how the comparators were treated, and if they were treated differently to the Appellant. Further, the

ET failed to consider which comparators were relevant to which of the pleaded allegations. The ET also erred by concluding that the Appellant had not been discriminated against, without considering the treatment of the named comparators and whether the ET should draw any inferences from differences in treatment between them and the Appellant.

5. Ground (b), but which I re-number as ground (2), is as follows:

Ground (2) – Failure to address the difference between the terms offered to the Appellant in respect of a commercial director role and that of a male comparator

6. The Appellant argued that the ET had erred at paragraph [244] by failing to find that she suffered less favourable treatment within the meaning of Section 13 of the Equality Act 2010 in relation to the terms offered to her for the Commercial Director role, in that the ET found that Mr Shaw, the male candidate for the Commercial Director role, was offered (as found at paragraph [161] of the judgment) an initial salary of £4,000 per calendar month, and the aim was increase this to £60,000 per annum in salary by December after three months of commencing the role. The Respondent also aimed to make up the difference in December, meaning that Mr Shaw would have been paid effectively £5,000 per calendar month since commencing his role. He was eligible to participate in a company-wide bonus; and he was not required to work in the office full-time.

7. I pause to add that it is unclear that there was in fact a finding on Mr Shaw not needing to work in the office full-time.

8. In contrast, the Appellant was offered, (as found at para [182]), a salary of £47,916 per annum. It might only increase to the same level as Mr Shaw after six months, there was no mention of making up the difference in December; there was no company-wide bonus and there was a requirement to work in the office. Over the first six months of the role, the Appellant's offer would be worth £6,042 less, before taking into account any bonus paid to Mr Shaw. The ET found that the

Respondent would have strongly suspected that the Appellant would not have wanted to apply for it given the requirement for it to be office-based.

9. The ET's finding that the Appellant would have haggled for a higher salary did not mean that she did not suffer less favourable treatment by being offered a lower salary. Moreover, a finding that the terms offered to the Appellant were broadly similar to the terms offered to Mr Shaw, even if that were correct, does not mean that the individual less favourable terms do not constitute less favourable treatment (see the judgment at para [182]).

The Respondents' Answer

10. The Respondent was not able initially to address which comparators were said to refer to which alleged aspect of discrimination, because the Appellant had not complied with Judge Burns KC's directions on that point. The summary of the Answer is as follows.

Ground (1)

11. The Appellant's criticism of the ET's consideration of a difference between comparators and the Appellant and a failure to consider adverse inferences could not give rise to standalone errors if the ET had not erred in failing to make findings about specific comparators. It was not uncommon for parties to name purported comparators only for them not to pursue them at a hearing, and it was not for the ET to run the Appellant's case for her, particularly where she was legally represented. If the Appellant relied upon a named comparator, she should have named the comparator, identified which allegation related to which comparator, unless abundantly clear, and lead evidence on the difference in treatment asserted before the ET.

12. Simply setting out a collective list of names and list of issues did not set out the Appellant's case. If the Appellant's legal representatives had failed to invite the ET to carry out that comparative analysis, it could not assert that the ET had erred. The fact that the Appellant's

representatives had not complied with a direction of this Tribunal (Andrew Burns KC) to set out which allegations were relevant to which comparators, implied that the Respondent had never been able to engage with this substantively before the ET and the ET had not been able to address it in this way.

13. There was also no error in failing to consider a comparator where there was a positive finding as to the reason 'why,' in the sense that the treatment was nothing whatsoever to do with a protected characteristic.

14. In addition, if the Appellant could not establish less favourable treatment in the first place, that was an end of the matter.

15. In simple terms, the ET's reasons for dismissing the claims fells into two categories: either the Appellant had not established the facts relied upon, or the ET dismissed the claims because the reason 'why' was not discriminatory.

16. The Answer then deals in detail with each of the various grounds of appeal. I do not refer to all of them because, for reasons I will come on to discuss, a number of them were withdrawn by Mr Harris at the beginning of the hearing before me. Instead, I refer to those sub-issues where the Appellant continues to assert that the ET erred in law, and which the Respondent addressed in turn.

17. The first was "issue 1(a)" In January 2018, the Appellant was travelling with the Second Respondent, Jeremy Taylor, Federica Nardozza and Alison Thompson on the Eurostar to Paris for a 'Maison et Objet' trade show. The Second Respondent was said to have referred to the female members of his staff as his "harem". The Respondents say that this is really an allegation of harassment. In relation to any direct discrimination allegation, the ET found, at para [230], that the Appellant was not treated less favourably because of her sex. No named comparator would have been relevant to that finding.

18. Turning next, to issue 1(k): (because errors in relation to issues 1(b) to (j) were no longer pursued) the Appellant was furloughed. The ET found:

> "We have found nothing to suggest that the decision to place the claimant on furlough, along with numerous other men and women working for the respondent, had anything to do with her sex."

19. Next, in relation to issue1(l): on 4th June 2020, the Appellant was placed at risk for redundancy. The ET concluded, "her sex has nothing to do with the decision".

20. On issue (m): on 12th August 2020, the Appellant was offered the opportunity to apply for the role of Commercial Director, which involved a pay cut and working at the office, which it is alleged that the Respondent knew the Appellant could not carry out. The ET found that "The claimant's sex had nothing to do with the opportunity being offered and the terms on which it was offered."

21. On issues 1(n) and (o): on 14th August 2020, the Appellant as given notice and, on 31st October 2020, her contract was terminated. The ET had concluded that the reason why the Appellant was dismissed was because her role was redundant.

Ground (2)

22. The Respondent says that this ground mischaracterises the allegation which the ET was asked to consider. The ET was not asked to make any finding about whether the Appellant had suffered less favourable treatment in relation to the employment terms offered to her. That would have been a simple claim to make, bearing in mind that the Appellant was legally represented. Instead, she had made a fundamentally different claim, namely that the offer was not a genuine one, and the Respondents had discriminated against her by offering her a role which they knew she could not carry out because it involved a pay cut, working in the office and also working with Mr Symons, with whom it is said relations were at a state of imminent collapse.

23. At paragraph [244], the ET was not finding that the Appellant was not treated less favourably because terms were broadly similar, but were seeking to explain why it concluded that the Respondents' offer to the Appellant was a genuine one, as outlined at paras [178] to [184].

Discussion and conclusions

Ground (1)

24. I have considered the representatives' written and oral submissions, which have assisted me, but do not recite them except where necessary to explain my decision. As I have already outlined at the outset of the hearing, the issues were substantially narrowed. In light of the Respondents' Answer, Mr Harris accepted that no appeal was pursued in respect of ground (1) on issues 1(b) to (j), as set out at para [48] of the bundle, and so, accordingly, those grounds are dismissed.

25. The remaining issues were 1(a), namely the "harem" comment, and 1(k) to (o), where Mr Harris says the ET's analysis was fundamentally flawed because of a failure to consider the specific comparators relied upon.

26. The Appellant had provided named comparators by way of "further information" to the ET. It also now provided a response to Andrew Burns KC's directions, with comparators. In respect of 1(a), the Appellant had relied on a comparator, a Mr Taylor. In relation to allegation 1(k), namely that the Appellant was furloughed, the comparators were said to be Mr Bond, Mr Whelan and Mr Shaw. In relation to the allegation at 1(l), that, on 4th June 2020, the Appellant was placed at risk of redundancy, no comparator was identified in the further information to this Tribunal. At issue 1(m), namely on 12th August 2020, the Appellant was offered the opportunity to apply for the role of Commercial Director, when it involved a pay cut and working hours at the office, which the Respondent knew the Appellant could not carry out, the Respondent relied on Mr Bond, Mr Whelan and Mr Shaw. At issue 1(n), namely on 4th August 2020, the Appellant was given notice

and issue 1(o), namely, on 31st October 2020, her contract was terminated, the same comparators were relied on.

27. In very broad summary of his submissions, Mr Harris points out that the ET had found, specifically in relation to 1(a), that the conduct was unwanted by the Appellant (see paras [39] and [40], pages [8] to [9], in the bundle), and the analysis of why Mr Symons, as a consequence, made that remark was undermined because of a failure to consider the male comparator relied upon, in this case Mr Taylor. That was the case even if Mr Taylor was strictly speaking an evidential rather than a statutory comparator, and the fact that he might not meet the test on this, or indeed in any of the issues, of a statutory comparator did not take away the need to consider specifically pleaded evidential comparators, unless in the clearest of cases there was no need to consider matters beyond the question, "why?" That much was clear from the cases **Bahl v Law Society** [2004] IRLR 799, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and **Watt (formerly Carter) v Ahsan** [2007] UKHL 51. This was not 'any' other piece of evidence, as the Respondents contended and which it was safe to assume the ET had considered, but was a critical analysis and potentially centrally important evidence.

28. Similarly, with regard to being placed on furlough, being placed at risk of redundancy, offered terms which the Respondents knew the Appellant could not carry out, as a result of which she was dismissed, while Mr Kohanzad on behalf of the Respondent had taken this Tribunal in detail through why the comparators were not relevant, and indeed were such weak evidential comparators such that the conclusions of the ET should not be disturbed, Mr Harris argued that it was this analysis that the ET ought to have carried out and that it is impossible for this Tribunal, one step removed from the evidence, to be satisfied that the conclusions which the ET reached were safe.

29. In resolving ground (1), have significant sympathy with the ET. The list of issues, as drafted before it, was likely to confuse. In particular, the reference at para [5], page [50] to a whole number of comparators for a lengthy list of allegations, did not state which comparator referred to which allegation. The confusion was compounded by the fact that the comparators outlined at para [16], page [104], of the further information, which was before the ET, do not match those in the Appellant's response to Andrew Burns KC's directions contained in correspondence dated 17th January 2024, at page [57]. I add that the ET cannot be fairly criticised for failing to consider comparators only identified after its decision.

30. Moreover, the ET cannot be criticised for not attempting to second-guess which comparators were relevant to which allegations. Where the Appellant was legally represented, it was for those representatives to put her case clearly. Moreover, even now, after a response to Andrew Burns KC's directions, no comparator is identified for issue 1(l), namely being placed at risk of redundancy.

31. However, I do accept that the ET failed to consider the specific evidential comparators identified in the "further information," when considering the claims of direct discrimination. I also accept Mr Harris's submission that this Tribunal is one step removed from the evidence and it is not possible to conclude, based on the limited information, about what conclusions might have been otherwise reached had those comparators have been considered. It may well be that the ET, when considering, once again, through the lens of the comparator, the evidence, concludes that, for example, a self-employed individual contractor is so far removed from the Appellant's circumstances to have limited, if any, evidential weight as a comparator, but I emphasise again it is not safe for me to reach such a conclusion at such a distance from the evidence.

32. Therefore, in relation to ground 1, with the exception of issue 1(l), this ground discloses an error of law such that the ET's conclusions on the allegations of direct discrimination on issues

1(a), (k), (m), (n) and (o) are not safe and cannot stand, specifically because of the absence of consideration of the comparators as outlined in the further information.

33. For the avoidance of doubt, the ET's other findings, in particular in relation to the Appellant's credibility and the claims of harassment and victimisation stand. In relation to the findings on unfair dismissal, the ET may also review its findings if, on reassessment of the evidence in the light of the evidential comparators, it concludes that the Appellant's dismissal was discriminatory.

Ground (2)

34. I am satisfied that the ET did not err in law on ground (2). Mr Harris contends that the ET's analysis was flawed because it erroneously imputed a test of broad equivalence to a remuneration package which was clearly contrary to the case law on equal pay claims and in any event the package was not, overall, equivalent. However, I accept Mr Kohanzad's submission that that was not how the claim was put before the ET. Rather, the particulars of claim and the list of issues make repeated reference to the offer not being a genuine one, in bad faith, and that was because it was one that the Respondents knew that the Appellant could not accept. The three bases on which that case had been considered, including by reference to the remuneration package, the requirement to work full-time in the office and also to work with Mr Symons, with whom it is said that relations were at a stage of virtual collapse, where all in the context of whether the offer was a genuine one. While Mr Harris sought to rely on his notes of his closing submissions before the ET, I accept Mr Kohanzad's submission that the ET cannot be fairly criticised for not picking up on such a comment where there was no application to amend the particulars of claim and the parties had proceeded on the basis of the list of issues. Put another way, except where a legal representative clearly indicates that the nature of the claim has shifted, it is not sufficient to make passing references to it in different terms, in closing submissions.

Disposal

35. I have considered, in terms of remaking, how the outstanding appeal should be resolved, by reference to Sinclair Roche & Temperley v Heard [2004] IRLR 763. Mr Harris was concerned about the passage of time and the question of whether the same ET could be constituted, whereas, for his part, Mr Kohanzad submitted that the ideal situation was for the same ET (if practicable or, if not, as directed by the Regional Employment Judge) to remake the decision.

36. This is not a case where the professionalism of the ET has been impugned. I am aware of the passage of time since the ET's original decision. I also bear in mind that what is sometimes referred to as the risk of the "second bite." However, where, as here, a significant number of the ET's findings are undisturbed and it has heard evidence on the remainder of the issues which need to be remade, and in light of the pressing need to resolve this case because of the First Respondent's creditors' voluntary liquidation, I am satisfied that the most efficient and just way of resolving matters is for the original Employment Tribunal, if practicable, to consider, in light of the evidence it had previously had before it, the comparators outlined in issues 1(a) and 1(k), (m), (n) and (o), and to reach appropriate findings on the analysis of claims of direct discrimination; and, to the extent that it is impacted, the fairness of any dismissal.

37. In the circumstances, I therefore remit the matter to the same Employment Tribunal if possible and practicable or, if not, as directed by the Regional Employment Judge.

Review decision

38. Shortly after I gave my oral decision, I considered an oral application at the hearing by the Respondent to review an element of my decision, in relation to issue 1(m). What is said in simple terms is that, whilst the further information at page [104] had referred to Messrs Bond, Whelan and Shaw, in relation to that allegation, the correspondence at page [57], which postdated the ET's

decision, focused instead upon Mr Shaw alone and that no evidence had been led in relation to Bond and Whelan. In response, Mr Harris said that it is not the case that the comparators were not before the ET and that it was necessary to consider all three comparators in that context.

39. I maintain my decision that there was an error in respect of all three comparators. While the evidence was adduced and considered in relation to Mr Shaw, the question here (and the case before the ET) was to consider all three comparators. It may well be, (and I do not know the substance of the evidence, bearing in mind that I am one step removed from it), that evidence about one comparator is relevant to all three. I do no more than invite, as the ET were originally asked, to consider their analysis in light of the three comparators. I maintain that element of my decision as there is no arguable error in it.

Summary

40. The ET erred on what I have renumbered as ground (1), in relation to issues 1(a), 1(k), (m), (n) and (o), as set out in the list of issues before the ET. The grounds of appeal in respect of issues 1(b) to (j) were not pursued and are dismissed. I concluded that there is no error in respect of the reasons in relation to issue 1(l).

41. Ground (2), as I renumbered it, fails and is dismissed.

42. I remitted remaking back to the original ET, if possible and practicable or, if not, as directed by the Regional Employment Judge, to consider its decision on the direct discrimination claims as outlined above.

43. For the avoidance of doubt, there is no error in respect of the ET's dismissal of the other claims, with one exception, and that is to the extent to which the analysis of the unfair dismissal claim is affected by issues 1(n) and (o), namely dismissal by reason of redundancy and the extent to which, if that were discriminatory, it would affect the fairness of that dismissal.