

Appeal No. UKEAT/0054/15/DM

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 June 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

EAD SOLICITORS LLP AND 7 OTHERS

APPELLANTS

GARRY ABRAMS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants

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For the Respondent

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SUMMARY

AGE DISCRIMINATION

Can a corporate body which is a member of an LLP claim to have suffered detriment because of the protected characteristic of an individual who happened to be its principal shareholder and member? An Employment Judge's affirmative answer to this question was correct, and arguments that because only an individual could have a protected characteristic only an individual could raise a claim for discrimination under the **Equality Act 2010** was rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Can a limited company bring a claim that it has been directly discriminated against where it suffers detrimental treatment because of the protected characteristic of someone with whom it is associated? At a Preliminary Hearing held to consider this question as a preliminary issue Employment Judge Ryan at Liverpool at first instinctively considered that it could not, since discrimination is so intensely personal. In the end, however, he was persuaded by the argument; he held it could. This appeal is to consider whether he was right. The proposition is general and does not turn on the particular facts of the case. As to those it is therefore sufficient to give only a summary.

2. For tax reasons a Mr Abrams set up a limited company as he approached retirement. He was a member of a limited liability partnership (LLP). He was due to retire at 62. Having set up the limited company of which he was the sole director to take his place as a member of the LLP, he withdrew from membership. The limited company, as a member of the LLP, was entitled to receive the profit share Mr Abrams would have received had he continued as a member, and for its part it agreed to supply the services of an appropriate fee-earner to the LLP. Though the parties expected that this would be Mr Abrams himself, there was no obligation that this should be the case. Accordingly, he was neither an employee serving under a contract of employment nor a worker, nor did he have any continuing contractual relationship with the LLP.

3. Before the Tribunal Mr Abrams was the First Claimant; the company that he had set up was the Second. I shall refer to that company as “the Claimant” for present purposes. The LLP objected to the Claimant offering Mr Abrams’ services once he had reached the time at which it

had been agreed that had he then been a member of the LLP in his own right and under a contract to work for it he would retire. It objected to the limited company continuing as a member of the LLP.

4. The parties are, I understand, in dispute as to whether the Claimant continues to be a member or whether it has suffered any other detriment by reason of the age of Mr Abrams. For the purposes of this decision I shall assume this to be so, but it is important to state that it has not yet been determined and it may be no easy matter to do so.

5. By section 4 of the **Limited Liability Partnership Act 2000**, a corporate body may be a member of an LLP. This was thus well established before the **Equality Act 2010** came to be drafted. Part 5 of the **Equality Act** contains a provision as to the way in which an LLP is to treat its members. Thus section 45(2) of the **Equality Act** provides:

“(2) An LLP (A) must not discriminate against a member (B) -

(a) as to the terms on which B is a member;

...

(c) by expelling B;

(d) by subjecting B to any other detriment.”

6. Claims brought for a contravention of that right may be litigated only before an Employment Tribunal and not in the County Court (section 120(1)(a) of the **Equality Act**). Discrimination is defined between sections 13 and 25 in part 1 of the **Equality Act**. The provision that is relevant for the present appeal is section 13. Subsection (1) provides:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

7. The **Interpretation Act 1978** provides in section 5 under the heading “Definitions”:

“In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.”

8. In Schedule 1 the word “person” is said to include “a body of persons corporate or unincorporate”. Thus on the face of section 13 the LLP (as person A) may be held to discriminate against another, B, and if the word “another” means, as it seems to me plain it does, “another person”, B may be a natural or a legal person in accordance with the **Interpretation Act** unless the contrary intention appears. If, therefore, section 13 is capable in the **Equality Act** of holding the way in which a corporate body has been treated by an alleged discriminator as being unlawful discrimination, then under section 45 a breach of the Act would be made out once it was shown that, because of a protected characteristic, the limited company had been treated less favourably than A treated or would have treated others. This assumes that section 45 is to be read as including a legal person as well as a natural person as a member.

9. The argument for the Claimant before me as it was before the Judge is simplicity itself: a person may include a corporation. Within section 13, the opening words “A person (A)” must include a corporate body, for it is familiar to any employment lawyer that many corporations are alleged to be discriminators and no one has so far considered that is inappropriate. If, then, the word “person” is to be used at the outset of section 31 as including a corporation, there is no proper basis for reading the same word, albeit introduced by “another”, in any different sense where it appears later in the same section. There is no contrary intention appearing in the statute.

10. The point is summed up in Mr Flynn’s skeleton argument in paragraphs 11 and 12:

“11. [The Claimant] alleges direct discrimination (by association) pursuant to section 13 [Equality Act]. For such a cause of action, [the Claimant] does not need to possess the protected characteristic relied upon. Direct discrimination will have occurred if [the

Respondent] has treated [the Claimant] less favourably because of Mr Garry [Abrams'] age (subject to the justification defence).

12. [The Claimant] avers that, in the context of section 45(2)(d), section 13(1) should be read as follows: "An LLP discriminates against a member if, because of a protected characteristic, an LLP treats a member less favourably than an LLP treats or would treat others." If section 13 [Equality Act] is read in this way, then all [the Respondent] need prove ... is that it is/was a member of the LLP. As this was not in dispute, Employment Judge Ryan was correct in his conclusion that the Tribunal does have jurisdiction to hear this complaint."

11. The argument of Mr Sendall, who appears for the LLP, begins by pointing out that only an individual can have a protected characteristic. Of the nine protected characteristics in section 4 of the **Equality Act**, only an individual can sensibly be said to have age; disability; be subject to gender reassignment; be entitled to marriage and civil partnership; enjoy pregnancy and maternity; have race; religion or belief; sex; or sexual orientation. That is obvious. Accordingly, he submits that the whole thrust of the anti-discrimination provisions that are contained in the **Equality Act** is directed towards individuals; it is concerned with their protection. In my view, this argument misses the point that the **Equality Act** does not deal with individuals on the basis of their protected characteristics but identifies discrimination as being detrimental treatment caused by the protected characteristic or related to it. Detrimental treatment can be given to any person, whether that person is natural or legal. There is no reason to restrict the class of those who can suffer a detriment if what is being complained of, and that which the statute seeks to avoid, is a detriment being suffered because of an individual's protected characteristic.

12. Thus as long ago as in the case of **Showboat v Owens** [1984] ICR 65 it was recognised that a person who had not themselves had the protected characteristic which founded the complaint could claim compensation for a detriment that they had suffered because of that characteristic; in that case the manager of a leisure centre who was told to exclude young black men from entering. In **Weathersfield v Sargent** [1999] ICR 425 a similar decision was reached by the Court of Appeal in respect of someone, who did not have a protected

characteristic related to the treatment of which she complained but who was held entitled to claim constructive dismissal because of an instruction she was given that amounted to discriminating against others on the basis of their race.

13. Those cases could easily be accommodated within the wording of the law as it stood. The case of **EBR Attridge Law LLP v Coleman** [2010] ICR 242 raised a different problem. The nature of the protected characteristic was different. There the Claimant, again, did not have the protected characteristic that was in question: it was disability. She was the primary carer of her disabled son. Her complaint was that she had suffered mistreatment because of his protected characteristic. The wording of the **Disability Discrimination Act 1995** did not lend itself easily to this claim as it stood at the time. That was because the provision read:

“A person directly discriminates against a disabled person if, on the ground of the disabled person’s disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability ...” (section 3A(5))

14. That link is between the treatment and the disabled person, not any person. The protected characteristic was expressly that of the person who was the victim of discrimination. Such a link on the grounds of disability is not present in the formulation adopted in the **Equality Act 2010**. There on a clear wording of section 13(1) the protected characteristic does not have to be enjoyed by the person who is subject to the detrimental treatment. The treatment has to be detrimental, to the Claimant - but it is not the treatment itself but the reason for the treatment that is relevant to this discussion. The wording is “because of a protected characteristic”, and the **Equality Act** does not specify that it has to be the protected characteristic of the person suffering the detriment. It is thus entirely open within the wording of the **Equality Act** that the protected characteristic may be that of an individual who is not the Claimant, and it would equally appear to be open, unless Mr Sendall is right in his submissions, that the Claimant suffering the detriment need not be capable of having a protected

characteristic. Whether the Claimant is capable or incapable of having the protected characteristic relied on for the claim is irrelevant to the cause of action. Accordingly, I reject Mr Sendall's argument that the wording of the **Equality Act** is such that the person who is discriminated against has to be an individual.

15. The second argument is that if the Judge is right, a whole new class of discrimination is created. I do not accept this. The discrimination complained of is still linked to the protected characteristic of an individual. There is nothing in the Judgment nor the reasoning to suggest that a corporation should be inferred to have a protected characteristic. All the law does is ensure that there is no detrimental treatment by reason of the protected characteristic of an individual. That is not new territory, even if it is rare to have found in previous cases that the complainant in relation to the detriment is a limited company. That is likely only to be a reflection of the reality that most of those who complain of discrimination are individuals who claim that it is their own protected characteristic which is responsible for their mistreatment.

16. In his skeleton argument Mr Sendall referred me to the case of **Rolloswin Investments Ltd v Chromolit** [1970] 2 All ER 673, a decision of Mocatta J in the Queen's Bench division. In that case the question was one that arose under the **Sunday Observance Act 1677**, which still applied in 1970. The question was whether a contract between the parties was void because it was reached contrary to that **Act**. The company had entered into a contract on a Sunday. The **Sunday Observance Act** required that:

“... noe tradesman, artificer workeman labourer or other person whatsoever shall doe or exercise any worldly labour, busines or worke of their ordinary callings upon the Lords day or any part thereof (workes of necessity and charity onely excepted) ...”

17. This was, as the section made clear, in order to ensure that the individuals covered by those descriptions could keep religious observance during the Sunday. The words “other

person” appeared, but they did not in context require that the court should interpret that expression to include a company, despite the provisions of the interpretation legislation then applicable. That was because, in the Judgment of Mocatta J, it was clear from reading the **Sunday Observance Act** that the contrary intention appeared:

“... A limited company is incapable of public worship or repairing to a church or of exercising itself in the duties of piety and true religion, either publicly or privately, on any day of the week. ...” (page 675h)

18. I regard that as an example of a case in which there was plainly a contrary intention. Such a contrary intention does not have to be expressly stated in a statute; it is more likely to be inferred from the general wording of the statute and the circumstances surrounding it. What I do not accept is that it has the consequence that in a statute that deals with protected characteristics that can only be enjoyed by individuals it gives any scope for saying that the detrimental treatment that founds the cause of action must be detrimental treatment suffered by an individual as opposed to any person.

19. Mr Sendall sought to develop his argument by reference to section 27(4) of the **Equality Act**. Section 27 deals with victimisation. In section 27(4) it provides, “This section applies only where the person subjected to a detriment is an individual”. He argues that this implicitly recognises that in other provisions the prohibition must relate only to individuals; there would be no necessity to state in those other provisions that it was only an individual who could complain, because it is obvious. This is not obvious when one comes to victimisation, because in order to complain of victimisation a complainant need not have the protected characteristic that founds the action. The substance of a case of victimisation is that the complainant has or is believed to have done or is thought about to do a protected act; protected acts are then defined. It would make little sense, submits Mr Sendall, to restrict the right to complain of this to an

individual if it were not implicit that it were so restricted in all other respects throughout the **Equality Act**.

20. For his part Mr Flynn takes a contrary point, also by reference to section 27(4). His point, as I understand it, is that the word “person” is to be understood in the sense it has once the **Interpretation Act** is applied. It includes a body corporate. That is recognised, he submits, by the fact that in section 27(4) there is a specific exclusion. The exclusion would not be necessary if the draughtsman had not thought that throughout the rest of the Act the word “person” was capable of including a corporation.

21. In my view, he is right about that. I have looked through the **Equality Act** more generally to see whether there is anything within the Act that points to the use of “person” as necessarily being restricted, as it was in the **Chromolit** case, to an individual. Since a discriminator is described as a person and a discriminator may be a corporation, there is nothing there to suggest it. There is nothing to suggest that the persons who are on the receiving end of mistreatment need themselves be individuals. Section 27(4) would tend to exclude it. It must also not be forgotten that the **Equality Act** lays down general concepts in respect of discrimination that do not just apply within the field of work. Work is dealt with by one part of the **Equality Act**, part 5; there are other parts too. In part 4, relating to premises, for instance (section 33(1)):

“(1) A person (A) who has the right to dispose of premises must not discriminate against another (B) -

(a) as to the terms on which A offers to dispose of the premises to B;

(b) by not disposing of the premises to B;

(c) in A’s treatment of B with respect to things done in relation to persons seeking premises.”

22. Though Mr Sendall points to section 33(4), which prohibits victimisation of B by A, the **Equality Act** here is plainly contemplating the disposal of premises between two parties. I see nothing inherent in that to suggest that the parties must both be individuals or that one of them, the person to whom the premises are to be disposed, must be an individual whereas the person disposing of it may not be, but the wording is remarkably similar and redolent of that in section 13. Similarly, if one turns to Part 7, which deals with associations, an association may in common experience consist of individuals, but it may also consist of groupings of individuals or corporations. Trade associations are one example; employers' associations are another. There is no distinction made in the text between such members and individual members. Again, the prohibition of discrimination is in similar terms to that found in section 45. Thus in section 101, headed "Members and associates", it is provided:

- "(1) An association (A) must not discriminate against a person (B) -**
- (a) in the arrangements A makes for deciding who to admit to membership;**
 - (b) as to the terms on which A is prepared to admit B to membership;**
 - (c) by not accepting B's application for membership."**

And so on; there is, again, I note, a prohibition, this time in subsections (5), (6) and (7), in respect of victimisation.

23. Victimisation cannot extend except to individuals because of the wording of section 27(4), but that does not, in my view, have the consequence that the other provisions of section 101, or for that matter section 33, must necessarily envisage that the person suffering the detriment must be an individual.

24. There may also be some help, though this should not be overstated, from what is said at section 142 under Part 10 in relation to discrimination in contracts. The first subsection reads:

“(1) A term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act.”

The word “person” in that context appears plainly capable of covering both an individual and a corporation.

25. As a general conclusion, therefore, there is no obvious reason implicit in the wording of the **Equality Act** taken as a whole to restrict the wording of “person” to an individual, nor is there, as it seems to me, any particular reason for thinking that the general definition provision which section 13 amounts to should be so read. There is a reference in section 45 to “person” in a context in which, as I have pointed out, it was well understood by the time the **Equality Act** came to be enacted that an LLP could have a corporate body as one of its members.

26. Accordingly, in company with the Employment Judge I reject the argument that a corporation cannot complain of discrimination. It has not been necessary to this conclusion to have regard to European provisions, but it is right to record that Mr Sendall sought to argue that European provisions did not require this interpretation. This seems to me a long way from saying that they require the opposite interpretation, but I shall deal nonetheless with the argument that he put forward. He argued that in the **Race Discrimination Directive**, Council Directive 2000/43, there was a specific recital that provided for what might be called associative discrimination. Recital 16 reads:

“(16) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on the grounds of the racial or ethnic origin of their members.”

27. He could not point to any specific implementation of this provision in UK law, though Mr Flynn, for his part, argues that it is effectively implemented by section 13 in combination with part 5 of the **Equality Act 2010**. For his part, he argues that if the **Equality Act 2010** is to be read, so far as race is concerned, as honouring the intention shown by the recital that corporations should be protected by being allowed to claim where the racial or ethnic origin of those who are members of the corporation is the ground for mistreatment of the corporation, then the wording that permitted that could hardly be read to permit this so far as race is concerned but to exclude it so far as any other protected characteristic goes; that would be to read the same words in the same statute in relation to one protected characteristic in one way and in relation to the other protected characteristics in an entirely different way. He therefore points to this as being a support for his argument rather than, as Mr Sendall would have it, an indication that this is an exception to a general understanding that only those who are individuals have the right to complain about discrimination.

28. The **Equality Directive** followed shortly after the **Race Discrimination Directive**. As to that Mr Sendall shored up his submission in respect of victimisation by pointing to recital 30. He referred to the reference back to the **Race Discrimination Directive** in recital 10. He argued that the purpose and scope of the Directive was to protect individuals from the effect of adverse discrimination. In recital 6, a reference was made to the Community Charter of the Fundamental Social Rights of Workers, which recognised the importance of “combating every form of discrimination”. The forms of discrimination that were referred to in the Charter were references to individuals and their sex, colour, race, opinion and belief.

29. In my view, the fact is that the thrust of anti-discrimination legislation is always likely to be focused upon an individual and his or her reaction to the insult that discriminatory

treatment gives. However, the question is whether or not others - whether individual or corporate - may have the right to complain that they too have suffered detriment by reason of the way individuals have been treated. It seems to me that there are any number of examples that may be given of treatment which comes within the scope of this question that is plainly contrary to public policy. Examples might be a company being shunned commercially because it is seen to employ a Jewish or ethnic workforce; a company that loses a contract or suffers a detriment because of pursuing an avowedly Roman Catholic ethic; one that suffered treatment because of its financial support for the Conservative Party or, say, for Islamic education; or one that was deliberately not favoured because it offered employment opportunities to those who had specific disabilities that were unattractive to some would-be contractors or because, let us suppose, of the openly gay stance of a chief executive. These examples may not necessarily be brought within Chapter 5, but all are examples of the way in which one person, natural or legal, may suffer because of the protected characteristic of another when public policy tends to the view that that is no proper basis for any such treatment.

30. Accordingly, I have little difficulty in thinking, as Mr Flynn put it in his skeleton argument in paragraph 2, that on a strict interpretation of the **Equality Act** the Claimant is entitled to bring a complaint of direct discrimination before an Employment Tribunal, that there is nothing in the **Equality Act** that supports the Appellant's case that to do so would be contrary to Parliament's intention, and that such a claim is entirely consistent with European treaties and Directives. In my view, therefore, the Employment Judge was entirely right to rule as he did, and the appeal must be, and is, dismissed.