Appeal No. UKEAT/0075/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 August 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR A A OLATINWO — APPELLANT

QUALITYCOURSE LTD t/a TRANSLINE GROUP — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM YOUNG (of Counsel) Bar Pro Bono Scheme
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Burden of proof

The Employment Tribunal did not sufficiently consider and apply section 39(2), section 13(1) and section 136(2) and (3) of the **Equality Act 2010** in respect of the actions and words of the Respondent's Compliance Team and the Respondent's Regional Manager; in the light of its primary findings of fact it was necessary for the Employment Tribunal to consider whether those persons took or participated in the decisions which the Claimant criticised as discriminatory; and if so whether the Employment Tribunal could conclude in the absence of any explanation that by virtue of their conduct the Respondent contravened the provision concerned; and if so whether the Respondent showed that it did not contravene the provision.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Abiodune Ayodeji Olatinwo ("the Claimant") against a Judgment of the Employment Tribunal ("the ET") sitting in East London (Employment Judge Jones, Mr Banks, and Ms Conwell-Tillotson), dated 20 July 2016. The ET dismissed a claim of race discrimination which he brought against Qualitycourse Ltd, trading as the Transline Group ("the Respondent").

2. The appeal proceeds on amended grounds for which permission was given by Kerr J at a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**. Put shortly, the questions are: (1) whether the ET sufficiently identified the persons who took decisions of which the Claimant complained, and (2) in that context, whether it correctly applied the burden of proof provision in section 136 of the **Equality Act 2010**.

3. The Respondent lodged an Answer to the appeal on 20 April 2017. Since that time it has appointed administrators and ceased to trade. The administrators have written to the Employment Appeal Tribunal to say that, while they agree to the continuation of the appeal, they will not take an active part in it. The Respondent has therefore not been represented today. I have taken into account the points made in the Respondent's Answer, to which I will refer in this Judgment.

The Background Facts

4. The Claimant is a Nigerian national. He has a right of permanent residence in the UK, carrying with it an entitlement to work here. This right was stamped into his passport on 13 October 2009. It is described there as a "permanent residence card" and states that it is "due for

renewal on 13 October 2019". That passport was, by the time the Home Office stamped the permanent residence card into it, already out of date. This did not affect the validity of the permanent residence card; but of course the Claimant also required an up-to-date Nigerian passport. By July 2015, he had a different current Nigerian passport, issued on 26 January 2011.

5. The Respondent supplied labour to an Argos distribution centre in Basildon on a substantial scale; some 194 operatives in July 2015. It had a team there, including Mr Parish, a Contracts Manager. Mr Parish had not had any training in complying with laws about immigration and employment. However, he could, and did, ask for advice from within the Respondent's wider organisation. In particular, there was a Compliance Auditor, Ms Gemma Ross, part of the Internal Compliance Team, which also included Ms Hancock and his Regional Manager, Ms Karen Drewett.

6. The Claimant was called for interview to the Basildon Distribution Centre on 13 July 2015. He assured Mr Parish that he had the right to work in the UK. He brought with him his expired passport containing the residence card, and also his current passport. He brought also two letters from the Home Office, which had been given to him with the permanent residence card, and which confirmed the position. The following day, 14 July 2015, he also brought, and handed in, a section of Home Office guidance for employers. This provided:

> **"When a current residence case, permanent residence card, accession residence card or derivative residence card is inserted into the holder's national passport, there is no requirement for the passport to be current. However, you should ensure that the passport belongs to that person and take particular care checking the passport photograph if the passport is a number of years old."**

7. By the time of the ET hearing, it was common ground that the Claimant was entitled to work in the UK, that he had showed the Respondent all the documents that were required to

establish that right, and that if the Respondent had continued to employ him, it would have complied with the duties of an employer to make checks under immigration legislation. In fact, however, the Respondent employed the Claimant only from 14 July 2015 to 25 July 2015. He was then taken from the night shift by two supervisors and told he had to leave.

8. Precisely how this came to happen was described in detail by the ET. The following summary will suffice. On 13 July, Mr Parish did not know whether it mattered that the residence card was in an expired passport. He failed to read, or photocopy, the second page of one of the supporting letters which the Claimant brought. This page might have helped him to realise that the right continued to apply, even if the Claimant had a new passport. Mr Parish emailed Ms Ross for assistance. He asked a somewhat misleading question, which gave the impression the Claimant had not brought in a current passport. Ms Drewett replied that a passport must be in date.

9. Mr Parish then wrote again, this time highlighting the correct issue. Ms Drewett's reply was incorrect. She said, and confirmed in a further email later that day:

> **"Annoyingly as far as I am aware, he has to transfer his old visa to his new passport otherwise it's invalid and we can't employ unless he does this. Gemma is this correct?"**

There was no response from Ms Ross in the documents.

10. At this stage, the Claimant had not brought in the Home Office guidance to which I have already referred. He brought it in the following day. Mr Parish took a copy of it. He telephoned the Internal Compliance Team. They advised him to carry out a Home Office check, that the Claimant could work in the meantime, and that he should inform the Claimant that if the check came back and it was not in the Claimant's favour, the Respondent would need

to terminate his employment. This advice was again wrong. There was no requirement for a Home Office check. Indeed, the guidance, which the ET found neither Mr Parish nor the Compliance Team were familiar with, told them that they should not apply for verification in these circumstances.

11. On 14 July Mr Parish did a check with the Home Office online checking service but he did not complete the form correctly. He did not tell the Home Office that he had seen a residence card. He told the ET that he was advised by Ms Hancock of the Internal Compliance Team to complete the form this way. In the meantime, he employed the Claimant who he said was a good worker whose credibility was never in question.

12. Eventually, the Home Office responded that it was unable to confirm the Claimant's status in the UK, or provide a letter which would amount to a statutory excuse for employing him. The Home Office did not inform the Respondent that the Claimant had a residence permit.

13. The ET's description of the ending of the Claimant's employment is in paragraphs 61 to 62 of its Reasons:

> **"61. On night [sic] of 25 July, during the night shift, the Claimant was informed of the responses from the Home Office. The Claimant was approached by Shayla Bowditch and Jakub who were the Respondent's supervisors. Mr Parish was not at work at the time. The Claimant was unable to go into work as his security card had been deactivated. The security let him in and he waited in reception for someone to come and speak to him. Eventually, the Claimant was allowed to start work. While he was working, Shayla and Jakub came into the warehouse to speak to him while he was picking goods. Shayla advised him that the check from the Home Office had came back [sic] negative and that the company was sorry but that he had to leave. Jakub did not say very much to the Claimant and Ms Bowditch did most of the talking. She advised him that the check from the Home Office had come back negative and that he had to leave the site. The Claimant informed her that he was surprised at that and asked if he could speak to Mr Parish. Ms Bowditch said that Mr Parish was on holiday and that she understood that he had applied for a British passport and that if he got it, he could come back to work.**
>
> **62. The Claimant went to the changing room and got his stuff out of the locker and left."**

14. Following his dismissal, the Claimant contacted Mr Parish again. He spelled out, in the clearest of terms, why he had the right to work and said he hoped the Respondent would get in touch with him, confirm his employment, and allow him to continue to work. He received no response from the Respondent. It was not until 18 September, after the Claimant had contacted ACAS and obtained work elsewhere, that the Respondent admitted a mistake. By this time the Claimant no longer had any faith in the Respondent and brought the present proceedings.

The ET Hearing and Reasons

15. The ET1 claim form lodged on behalf of the Claimant pleaded both that the dismissal was an act of race discrimination and that the actions of "the Respondent's Human Resources Personnel", in various respects, were acts of discrimination; in particular refusing to accept his permanent residence status endorsed in his Nigerian passport, the Home Office letter confirming the same, and guidance confirming the same.

16. The ET heard the proceedings on 14 and 15 April 2016. Both sides were represented by counsel. The ET identified the issue as being one of less favourable treatment on the grounds of nationality. In paragraph 3, it referred to a paragraph of the ET1 claim form, which I have already summarised. In paragraphs 7 to 9 it said that the Claimant's case was as follows:

> **"7. The Claimant's case was that because he was a Nigerian national the Respondent decided to make a further check on his immigration status despite him having permanent residence endorsement in his expired Nigerian passport and that this put him at a disadvantage because the response from the Home Office was incorrect and led the Respondent to dismiss him.**
>
> **8. It was his case that a hypothetical comparator who had submitted the same documentation that he had, who was not a Nigerian citizen, would have had that documentation accepted and the Respondent would not have taken the further step of making a further check on that person's immigration status with the Home Office's employer checking service. The Claimant submitted that the Respondent took that step of requiring a further check because of a conscious or subconscious prejudice against the Claimant because of his nationality (Nigerian) - specifically on the basis that his immigration documentation was somehow less trustworthy than that of a non Nigerian.**
>
> **9. The Claimant submitted that the reason for his treatment was a prejudicial and stereotypical view of Nigerians and specifically the view that they are less likely to hold valid immigration documents and/or status. The Claimant submitted that the Tribunal can make this inference on the basis of the Respondent's failure to follow the straightforward guidance from the Home Office and taking the Claimant's documents as read requiring an unnecessary**

> **and erroneous further check. The Respondent ignored the clear explanation and advice from the Claimant and ignored his documentation, which explained the situation. The Respondent also failed to complete the employer checking service questions correctly in blatant disregard of the relevant guidance on when such a check is appropriate and indeed how to perform it."**

17. The ET heard evidence from the Claimant and Mr Parish. It did not hear evidence from anyone in the Compliance Team or Ms Drewett. It is noteworthy that Mr Parish said explicitly in his witness statement that he was "acting under instructions" from Ms Drewett and the Compliance Team (see paragraph 22 of his witness statement).

18. The ET set out the law in paragraphs 12 to 20 of its Reasons, and reached findings of fact - on which I have already drawn - in paragraphs 24 to 76. It turned to its conclusions in paragraphs 77 to 94. It said the following in paragraph 77:

> **"77. The facts from which we could infer less favourable treatment are that the Claimant is a Nigerian national and that despite having a permanent residence card stamped in his expired passport which is a List A document, the Respondent conducted a Home Office check on him. This [caused] the Claimant to suffer less favourable treatment as the Respondent terminated his employment on the basis that they could not get statutory excuse from the Home Office in order to continue to employ him."**

19. The ET said that the burden shifted to the Respondent to provide a non-discriminatory reason for the less favourable treatment because (1) the Respondent failed properly to complete the form that it sent to the Home Office checking service, and (2) the Respondent had not ensured that the Compliance Team, Managers, and Mr Parish were familiar with Home Office guidance, although its recruitment involved dealing with people of many different nationalities.

20. In evaluating the question whether the Respondent had provided such a non-discriminatory reason, the ET said the following:

> **"84. It was completely incorrect for the Respondent to do a check on the Home Office checking service. It was not necessary as the Claimant had given the Respondent a List A document which meant that all that was [needed] for it [sic] to be copied and a copy kept on his file.**
>
> **85. In our judgment the reason why the Respondent conducted the check through the Home Officer checking service was because the Respondent was confused by the existence of the**

> **Claimant's residence card in his expired passport. Ms Drewett and Ms Hancock believed that it was not valid because it was in an expired passport."**

21. Later, the ET said this:

> **"91. The Tribunal did not hear evidence from Ms Hancock or Ms Drewett and could not judge their mindset when they gave Mr Parish advice as to how to address the Claimant's status. We did not have evidence from which we could conclude that their advice had been tainted by their awareness that the Claimant was a Nigerian national.**
>
> **92. The Tribunal did not have facts from which it confer [sic] that the Respondent treated the Claimant less favourably on the grounds of his nationality. In our judgment, the treatment was not on the grounds that he was a Nigerian national. The Respondent did not accept the Claimant's documents because his residence card was in an expired passport and they thought that it needed to be in a current one. They failed to read the documents he gave them. The Respondent did not doubt the authenticity of his documents. They questioned whether they were sufficient. Mr Parish preferred the advice from his manager rather than what the Claimant was telling him. He did not check for himself until September when the Claimant approached ACAS. At the time, he simply relied on the advice from his managers and from Compliance. He wrongly considered that they were more likely to know the rules than the Claimant was. In our judgment it is likely that if the Claimant had been from another part of the world which was not part of the EEA, if he required permission to work in the UK and had a residence card in an expired passport; the Respondent would have done exactly the same thing and conducted a check with the Home Office's employer checking service.**
>
> **93. In our judgment, the less favourable treatment was not because the Claimant was a Nigerian national but because of the Respondent's failure to understand his documents and to understand and apply the relevant guidance. The person who made the decision about the Claimant's right to work at the Respondent failed to read the documents the Claimant gave him because he was busy or chose instead to rely on the advice from his manager and from compliance.**
>
> **94. This was a costly mistake. The non-discriminatory reason does not have to be reasonable, or a good reason. It does need to be the real reason and untainted by considerations of race and nationality. In our judgment for the reason for the treatment was an error on the Respondent's part caused by confusion, lack of training and mistake. It was not because of the Claimant's nationality."**

The Appeal

22. On behalf of the Claimant, Mr William Young first submits that the ET was wrong to focus on Mr Parish as decision maker. Its findings made it clear that Mr Parish had relied on the Compliance Team and Regional Manager. He was merely implementing their decision or, at the very least, they were joint decision makers with him. He drew a distinction between this case and that of **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 to which he referred me. Here, it was the acts of the Compliance Team and the Regional Manager which caused the less favourable treatment. Here too, it was not only the decision to dismiss which was less

favourable treatment, but also the decision not to accept the Claimant's documents at face value, and to require a check.

23. Secondly, Mr Young submits that if, and insofar as it considered the mental processes of the Compliance Team and Ms Drewett, paragraphs 91 and 92 show that it did not correctly apply the burden of proof. Without evidence from the real decision maker, the Respondent had not discharged the burden of proving a non-discriminatory explanation. Merely saying that they believed the residence card to be invalid because it was in an expired passport, was not sufficient to deal with the issue.

24. In its Answer the Respondent argues that the ET reached a permissible conclusion that the unfavourable treatment was not because the Claimant was Nigerian, but because the Respondent failed to understand his documents and understand and apply relevant guidance. In reaching that decision, it took into account that it did not have evidence from Ms Hancock or Ms Drewett. It made an express finding that they did not believe the Claimant's residence card was invalid because it was in an expired passport, and it thereby gave adequate reasons for finding that the Respondent had discharged the burden of proof. Looked at overall, the ET's Reasons show that the Respondent had indeed acted out of a pure mistake, unaffected by the Claimant's nationality.

Statutory Provisions

25. Section 39(2)(c) and (d) provide:

> **"(2) An employer (A) must not discriminate against an employee of A's (B) -**
>
> **…**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

26. Section 13(1) defines direct discrimination:

> **"(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."**

27. Section 136(1)-(3) address the burden of proof:

> **"(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

Discussion and Conclusions

28. The starting point for the ET, in applying section 39(2) and section 13(1), was to identify the unlawful act or acts complained of. It is plain, both from the ET1 and from the summary in the ET's Reasons at paragraphs 7 to 9, which I have quoted above, that the Claimant's case was not restricted to dismissal - as to which see section 39(2)(c). He also put the case on the basis of detriment - section 39(2)(d) - the detriment including the decision to check his immigration status, rather than accept his word. This being so, I would expect to find in the ET's conclusions a clear finding as to whether the decision to check the Claimant's immigration status, rather than accepting his word, was a detriment and then I would expect the ET to identify who took or participated in the decision and to apply the burden of proof provisions in that context.

29. Merely supplying information or opinions used for the purpose of making a decision, does not of itself constitute participation in the decision for the purposes of these provisions of the **Equality Act** - for reasons explained in **Reynolds v CLFIS (UK) Ltd**, especially at paragraphs 32 to 36 - but participation in the decision is sufficient.

30. In my judgment the ET did not follow through this issue correctly in its reasoning. In paragraph 77 it concentrated on the termination of employment as the less favourable treatment, and in paragraphs 90 and 91 it treated Ms Hancock and Ms Drewett as persons who gave advice to Mr Parish, rather than as persons who took or participated in the taking of any relevant decision. This is, I think, particularly clear by the way the ET has expressed itself in paragraph 91. If the ET had been treating Ms Hancock and Ms Drewett as decision makers, its reasoning in paragraph 91 would be problematic; either the ET would be withdrawing from its earlier conclusion that the burden of proof had transferred, or it would have made an obvious error of law in the application of the burden of proof.

31. In my judgment the ET's own findings required it to give close attention to the question whether members of the Compliance Team - particularly Ms Hancock or Ms Drewett, the Regional Manager - took or participated in the decision to reject the Claimant's documents and assurances and require a Home Office check. There may also be a question whether they participated in the decision to dismiss. It is not as clear as it might be from the ET's findings who actually took the decision to dismiss and how, given that Mr Parish was on holiday at the time of dismissal.

32. This leaves the ET's finding in paragraph 85 of its Reasons, where it stated that Ms Drewett and Ms Hancock believed that the residence card was invalid because it was in an expired passport. Is this finding sufficient to dispose of the case in the Respondent's favour, even though the ET has not properly considered their role as decision makers? I do not think it is for the following reasons.

33. Firstly, the question for the ET was not only whether they held this belief, but why; given that it was contrary not only to the Claimant's assurances, but also to the documents which he produced and the Home Office guidance. The fact that a mistake is made through incompetence may be, but is not necessarily, an answer to a complaint of unlawful discrimination. Mistakes may be more likely to occur where stereotypical assumptions are made. It was indeed the Claimant's case that a mistake was made here, where it would not have been made in, say, the case of an Australian providing the same documentation and giving the same assurances. The Claimant was entitled to have his case in this respect addressed by the ET.

34. Secondly, the finding in paragraph 85 must be read in the context of the application of the burden of proof by the ET in paragraph 91 - an application which would plainly be wrong if the burden of proof had transferred to the Respondent, in respect of Ms Hancock and Ms Drewett.

35. I therefore conclude that the ET erred in law in its approach to the question whether members of the Compliance Team and Ms Drewett participated in relevant decisions made in the Claimant's case. I do not, however, accept Mr Young's submission that I can substitute a finding of unlawful race discrimination in this case. **Jafri v Lincoln College** [2014] ICR 920 requires the Employment Appeal Tribunal to refrain from any factual evaluation of its own on questions of this kind. Once I refrain from factual evaluation, I do not think it can be said that only one conclusion was possible on any of the issues in this case.

36. The questions for the ET on remission appear to me to be the following. They need to be considered individually in the case of any member of the Compliance Team involved and

Ms Drewett. (1) Did that person take or participate in any of the taking of the relevant decisions? (2) If so, is section 136(2) satisfied so that the burden of proof transfers to the Respondent? (3) Did the Respondent satisfy the burden of proof in section 136(3)?

37. The final question is whether to remit the matter to the same ET or to a differently constituted Tribunal. That is a decision which the Employment Appeal Tribunal takes in accordance with criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I agree with Mr Young that there is nothing about the ET's reasoning which would render it inappropriate for the matter to be sent back to the same ET, and it seems to me, applying the overriding objective and the criteria in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, that I should send it back to the same ET. It will of course consider afresh the different issues which I have remitted to it.