Appeal No. UKEAT/0302/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 August 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MRS A GALLICO

MS G MILLS CBE

MR I S CAM	APPELLANT
MATRIX SERVICE DEVELOPMENT AND TRAINING LTD	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS S FRASER BUTLIN (of Counsel) Bar Pro Bono Unit
For the Respondent	MR C WHITEHOUSE (of Counsel) Instructed by: Guile Nicholas Solicitors 50 Canbury Park Road Kingston Surrey KT2 6LX

<u>SUMMARY</u>

RACE DISCRIMINATION

Racial harassment – Tribunal did not make a finding on the question of whether a fellow employee used the expression "white trash" in his hearing, did not make findings on certain relevant aspects of section 3A of the **Race Relations Act 1976** and did not deal with one aspect of the Claimant's racial harassment case. Racial harassment issue, and associated time points, remitted to Tribunal for reconsideration.

Victimisation – Tribunal's findings not perverse and upheld.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Mr Ian Cam ("the Claimant") against a judgment of the Employment Tribunal sitting in London South, Employment Judge Hall-Smith presiding, dated 2 February 2012. He had brought proceedings against his former employers, Matrix Service Development and Training Ltd ("the Respondent") claiming unfair dismissal, race discrimination (including victimisation and harassment) and disability discrimination. The Tribunal found that his dismissal was procedurally unfair, but in all other respects it decided the case against him, rejecting his claims of disability and race discrimination and making no compensatory award on the ground that he had contributed 100 per cent to his own dismissal. The appeal concerns the Tribunal's findings relating to victimisation and harassment.

The background facts

2. The Respondent is a small, not-for-profit organisation dependent on public funding providing advocacy services for individuals with mental health problems, learning disabilities and other vulnerabilities. The Claimant was employed with effect from 26 August 2008, initially on a short-term basis, as a learning disability adviser. There were changes in his role as public funding changed. Eventually the Respondent adopted a team-based approach and the Claimant became part of a team at the Respondent's Chertsey office.

3. The Tribunal found that the Claimant was unwilling to work as part of a team. His relationship with colleagues was poor. He said for the first time in December 2009 that he was being treated for depression, which he blamed for comments he made critical of his colleagues. There was an incident in a public canteen in February 2010 when he accused a colleague of lying and swore at him.

4. The Claimant appealed, admitting misconduct but seeking that the warning be downgraded to a verbal warning. In the course of his appeal the Claimant in particular complained that another colleague, Mr Chadha, had used racist language. He said:

> **"I have also found many of Suneel's [Mr Chadha's] comments to be offensive. For example, while Suneel finds it amusing to say "Staines" (my home town) in what is meant to be a parody of lower-class white British South West London accent I experience it as social snobbery and in context racist. I also experience that some of Suneel's comments made over the last six weeks eg. 'white trash', 'All white people look the same' and 'disgusting European men' as racist."**

5. It is important to note that, as the Tribunal found, the Claimant had on one occasion complained at the time about Mr Chadha's language, saying that it was racist, a matter that Mr Chadha and another member of staff denied. The Tribunal's findings of fact about this matter were as follows:

> **"34. The Tribunal heard from Suneel Chadha and we accepted his account of the context in which he had made some of the remarks complained of by the Claimant. It was not in fact until 6 April 2009 that Suneel Chadha had become aware that the Claimant had made complaints of discrimination. We found that the remarks made by Suneel Chadha were not aimed at the Claimant. In relation to the reference to disgusting European men, such comment had arisen during a discussion with colleagues in the work canteen in which Suneel Chadha was talking about experiences in visiting Thailand. Both Suneel Chadha and the colleague he was speaking to stated that they had been disturbed to see young girls on the arms of older men and they said that they had noticed that the older men seen by them were of white European origin. The Claimant had remarked that the comment or observation was racist and another member of the group involved in the conversation said it was not racist. The matter was not raised again.**
>
> **35. Suneel Chadha accepted that during the course of a team discussion relating to work involving older people with mental health difficulties Suneel Chadha remarked that it was difficult to distinguish the personalities or individual needs because he was not able to spend sufficient time with that individual and said that he thought that the older white people looked the same.**
>
> **36. In relation to the commend [sic] about Staines this arose during the course of a conversation with a colleague about uncomfortable conditions at the Staines office. After the Claimant had informed Suneel Chadha and his colleague Alison Burnham that comments about Staines made him uncomfortable, they stopped referring to Staines in his presence."**

6. A particular concern of the Respondent related to the Claimant's repeated failure to secure confidential documents. The Respondent's policy required secure storage of records, and its disciplinary policy provided that breach of confidentiality was potentially gross

misconduct. In January 2010, after the Claimant left filing cabinets unlocked and confidential documents strewn over his desk, he was reminded of the importance of keeping files confidential. A few days later the reminder had to be repeated. The issue was raised with him again on 16 March 2010 at a line management discussion, on 23 March 2010 at a meeting and on 30 March 2010 in an email.

7. Matters concerning the Claimant's employment came to a head in late March and early April 2010. It is one of the submissions made by Mrs Fraser Butlin on the Claimant's behalf that the Tribunal did not properly consider the timeline of events during this period. We will analyse them as follows, taking our findings from the Tribunal's Reasons:

(1) The Claimant was critical of a work colleague, Alison Burnham, on 24 March 2010 and 1 April 2010. Ms Burnham wrote to her manager about this on 2 April, saying that the Claimant's frequent criticism of her felt personal and undermining. She made a formal complaint, supported by a colleague, on 6 April 2010. She said the Claimant's behaviour was having a detrimental effect on her health; she had felt threatened, undermined and bullied by him to the extent that she no longer felt able to work with him.

(2) The Claimant himself, one hour after the altercation with Ms Burnham on 1 April, sent an email renewing complaints he had made against Mr Chadha. The complaints, as we have said, had originally been made in February 2010, but he had been given paid leave at that time to compose himself, and after his leave he said he was ready to move forward and did not wish to pursue any of his complaints against colleagues. However he renewed the complaints by email dated 1 April "for my own protection".

(3) Mr Chadha wrote an email to the Claimant on 5 April 2010 in which said that he had learnt that the Claimant was criticising him behind his back. The Tribunal said that Mr Chadha's email "bordered on offensiveness in a number of respects". On 7 April 2010 the Claimant made a formal complaint about this email.

(4) On 6 April 2010, while the Claimant was on leave, it was again found that he had left confidential documents insecure. Confidential client letters were found in an open drawer, and his memory stick, containing details of confidential clients, was on public display in the USB drive of his computer.

8. We now summarise how the Respondent dealt with each of these matters. As to (2), the Respondent investigated the Claimant's complaint against Mr Chadha and informed him on 6 April 2010 that they were rejected. As to (3), the Respondent did not investigate his further complaint on 7 April 2010. As to (1) and (4), the Respondent instituted disciplinary proceedings on 6 April 2010. The Claimant was invited to a disciplinary hearing on 12 April 2010. He was, by this time, off work by reason of ill-health, but he specifically asked that the meeting should go ahead. The Tribunal found that at the meeting he was flippant in his approach to the issue of confidentiality and failed to demonstrate an understanding of the need to retain confidential documents securely. He was dismissed relating to this matter for gross insubordination, refusal to carry out a reasonable management request and neglect of duty in a manner that might be detrimental to clients or the Respondent. The misconduct was classified as gross misconduct, but the Respondent paid him in full for April 2010 in what it described as a gesture of goodwill.

The Tribunal's Reasons

9. The Claimant represented himself at the Tribunal. Mr Whitehouse represented the Respondent, as he does again today. There had been a case management discussion on 15 September 2010 at which issues were defined. The hearing took place over three days in November 2011.

10. On the question of unfair dismissal, the Tribunal concluded that the true reason for dismissal was the Claimant's continued failure to carry out what it considered were wholly justified management requests that he should ensure that confidential information in his possession was secure, a failure that it found to be aggravated by his flippant attitude. It found the dismissal to be fair except in procedural respects. It found that there was "no measurable chance whatsoever that the Claimant would not have been dismissed" and that the basic and compensatory awards should be reduced to the extent of 100%. The Tribunal also found against the Claimant in respect of disability discrimination; we need not set out the reasoning for today's purposes.

11. As regards racial harassment and discrimination, the Tribunal said that the Claimant's case concerned (1) derogatory and racist comments and (2) failure to take seriously and/or investigate properly the grievance of 1 April 2010. The Tribunal's conclusions were the following:

> **82. The Tribunal concluded that the Claimant's allegations of harassment involving comments about the conduct of white European males were not comments which were directed at the Claimant and amounted to no more than general observations about the conduct of individuals which can and do take place in any workplace environment. We do not consider that such conduct approached the threshold of unlawful harassment of the Claimant on grounds of race.**
>
> **83. In any event the Claimant's complaint of direct race discrimination and harassment related to incidents before 8 April 2010 and accordingly, fall outside the primary time limit of three months for bringing such complaints. In his e-mail of 1 April 2010 to Donna Moffatt, page 67, in which the Claimant complained about Sunnil Chadhur's [sic] conduct involving**

> **what the Claimant labelled as racist remarks, the Claimant was clearly referring to events before 1 April 2010. The Tribunal concluded that in any event there were no grounds justifying extending the time limit for such complaints on just and equitable grounds. The Claimant's complaints of unlawful racial discrimination are not well founded and are in any event out of time."**

12. On the question of victimisation, the Tribunal said that the Claimant's case was that he had been treated less favourably by reason of his complaint on 1 April 2010 in respect of the disciplinary process, the subsequent dismissal, the failure to investigate properly the second complaint on 7 April and subsequent refusal to provide him with a reference. In this respect the Tribunal was correctly summarising the issues that had been determined at the case management discussion a year earlier. The Tribunal rejected these complaints for the following reasons:

> **"84. The Tribunal found that there was no causal link between the protected act, namely the Claimant's grievance on 1 April 2010 and the Claimant's dismissal. We found, for the reasons already referred to, that the Claimant's conduct justified the disciplinary process leading to his dismissal. We further noted that although the Claimant was dismissed on 12 April 2010 for reasons of gross misconduct he was paid up to the end of April 2010, which we did not consider reflected an approach on the part of the Respondent which was otherwise tainted by victimisation.**
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> **85. In relation to the Claimant's grievance or complaint of 7 April 2010 we again found that there was no causal links between the protected act and the treatment complained of. Donna Moffitt [sic] had not ignored the complaint but had replied to the Claimant on 8 April 2010 pointing out the following:**
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> > **'I acknowledge receipt of your formal complaint dated 7 April, which will be dealt with in line with company policy in due course.'**
>
> **86. The Claimant was signed off sick on the same day, 8 April 2010, and on 12 April 2010 he was dismissed. The matter was not investigated further by the Respondent, a small organisation, because the Claimant had ceased to be an employee.**
>
> **87. In relation to the issue of a reference the Respondent had never refused to provide the Claimant with a reference. The Claimant was offered an 'open reference' by the Respondent which he failed to take up."**

Racial harassment

13. On behalf of the Claimant Ms Fraser Butlin first criticises the Tribunal's reasoning on the question of racial harassment. She submits that the Tribunal rejected the Claimant's complaint of harassment because the comments had not been directed at him. This, however, was not a

determinative consideration. The Tribunal was required by section 3A of the **Race Relations Act 1976** (RRA) to consider the effect of the Respondent's conduct even if it was not the purpose of the Respondent to produce that effect. This it omitted to do. Moreover, the finding that the comments in question were merely "general observations" was not one that was open to the Tribunal. The finding was perverse, given that the words complained of included such phrases as "white trash", "All white people look the same", and "disgusting European men". These were overtly racist remarks. Ms Fraser Butlin further argues that the Tribunal did not give consideration to the email of Mr Chadha dated 5 April 2010 that was expressly stated in the claim form to be a further act of harassment.

14. In reply, Mr Whitehouse submits that the Tribunal had in mind both purpose and effect in its finding. The fact that conduct was not directed at an individual was relevant to effect as well as to purpose. Mr Whitehouse took us to the detailed evidence of Mr Chadha and supporting witnesses. He argued that the Tribunal was entitled, having accepted that evidence, to reach the conclusion it did. He pointed out that Mr Chadha had not accepted using the words "white trash". He submitted that it was implicit that the Tribunal accepted Mr Chadha's evidence about this. Mr Chadha had explained the context of his remark about older white people and about "disgusting European men". The Tribunal was entitled to say that the Respondent's conduct was not within the definition of harassment. Mr Whitehouse accepted that the Tribunal's reasoning was rolled up on these issues. That, in the circumstances, was, he submitted, sufficient; it was implicit that that Tribunal had not regarded the email dated 5 April as amounting to harassment.

15. Both counsel referred us to **Richmond Pharmacology Ltd v Dhaliwal** [2009] ICR 724 and **Weeks v Newham College of Further Education** UKEAT/0630/11.

16. Section 3A of the RRA provided as follows:

> **"(1) A person subjects another to harassment in any circumstances relevant (in the employment field) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of—**
>
> **(a) violating that other person's dignity, or**
>
> **(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.**
>
> **(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."**

17. In **<u>Dhaliwal</u>** the Appeal Tribunal, Underhill P, as he then was, presiding, gave general guidance concerning the provisions of section 3A (see paragraphs 7-17). This guidance sets out the legislative background to section 3A, analyses its requirements and comments helpfully on the way it should be applied. It is not necessary to set it out in full here; we would, however, draw attention to two particular passages.

18. In paragraph 11, after identifying the various issues that arise under section 3A and commenting that there is potentially overlap between them, Underhill P said:

> **"It will be a healthy discipline for a Tribunal in any case brought under this section (or its equivalence in the other discrimination legislation) specifically to address in its Reasons each of the elements which we have identified in order to establish whether any issue arises in relation to it and to ensure that clear factual findings are made on each element in relation to which an issue arises."**

19. In paragraph 16, considering the requirement that harassment must be on grounds of race, he said:

> **"It is also worth observing that, although establishing the reason why a respondent in a discrimination case acted in the way complained of typically involves an examination of the "mental processes" (using, again, Lord Nicholls' terminology) of the decision-taker, that is not always so. In some cases, the "ground" of the action complained of is inherently racial. The best-known example in the case-law, though in fact relating to sex discrimination, is the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751 ([1990]**

> **ICR 554). In that case the criterion applied by the Council inherently discriminated between men and women, and no consideration of the thought processes of the decision-makers was necessary: the application of the inherently discriminatory criterion could without more be identified as "the reason why" the plaintiff had suffered the detriment of which she complained. It is only because in most cases the detriment complained of does not consist in the application of an overtly discriminatory criterion of that sort that the "reason" (or "grounds") for the act has to be sought by considering the respondent's motivation (not motive). It seems to us particularly important to bear that point in mind in harassment cases. Where the nature of the conduct complained of consists, for example, of overtly racial abuse the respondent can be found to be acting on racial grounds without troubling to consider his mental processes."**

20. To the general summary in **Dhaliwal** we would only add that the well-known provisions contained in equality legislation concerning the burden of proof were applicable (see section 54A(1)(b) and (2)). Many cases, such as those concerned with overtly racist language, are likely to turn on primary findings of fact, but in others the burden-of-proof provisions may be important.

21. In **Weeks** the Appeal Tribunal was concerned with a case where sexual harassment was alleged. For the most part the claimant was found to have exaggerated or invented her allegations, but the Tribunal did accept that a fellow employee of the claimant had sent an indecent and demeaning cartoon of a woman by email to colleagues and that there had been language demeaning to women used in the staffroom not directed at the claimant. The Tribunal expressly and carefully adopted the approach in **Dhaliwal**. While the Appeal Tribunal expressed concern about the cartoon, it held that the Tribunal had committed no error of law. The appeal was dismissed. In the course of his Judgment, Langstaff P said:

> **"Context is all-important. The fact that unwanted conduct was not itself directed at the Claimant is a relevant consideration. It does not prevent that conduct being harassment and will not do so in many cases, but we cannot say it is an irrelevant consideration."**

22. We have three criticisms of the Tribunal's approach to the question of racial harassment.

23. Firstly, the Tribunal did not make clear findings of fact concerning the Claimant's evidence as to what Mr Chadha actually said. It is particularly striking that the Tribunal did not make any finding as to whether Mr Chadha used the expression "white trash". A Tribunal considering an allegation of racial harassment ought to make clear findings about key matters in dispute. On the one hand, the Tribunal appears, in the first sentence of paragraph 34, to proceed on the basis that the remarks complained of by the Claimant were made; on the other hand, Mr Chadha had not accepted in his witness statement that he used the expression "white trash". The Tribunal did not deal with this matter in its reasoning. Discussion of what Mr Chadha saw in Thailand is not intrinsically objectionable, but the use of the phrase "white trash" could hardly be described as amounting to "no more than general observations about the conduct of individuals".

24. Secondly, the Tribunal did not make any clear findings relating to elements of section 3A of the 1976 Act. It seems likely, since the Claimant objected on at least one occasion, that the Tribunal would have found at least some of the remarks of Mr Chadha to be unwanted. It also seems likely, since it found that the remarks were not directed at the Claimant, that the Tribunal would have found the remarks not to have had the purpose proscribed by section 3A. Much less clear is whether the Tribunal reasoned whether the remarks would have had the effect prescribed by section 3A; likewise, there is no clear reasoning about whether the remarks were on the grounds of race. In our judgment, the Tribunal would have been well advised to consider these issues expressly in accordance with the guidance in **<u>Dhaliwal</u>**.

25. The use in the workplace of language of the kind that Mr Chadha used is sensitive and will call for careful consideration by a Tribunal. It is important that the Tribunal should apply the threefold test set out in the legislation explained by the Appeal Tribunal in **<u>Dhaliwal</u>**.

26. Thirdly, the Tribunal did not consider the Claimant's case - plainly set out in his claim form - that the email on 5 April found by the Tribunal to have "bordered on the offensive" was itself an act of or part of the harassment by Mr Chadha. The list of issues was sufficiently wide to encompass this matter. The Tribunal left it out of account altogether. There is no analysis of the email in terms of harassment. It is true that the email, while, as the Tribunal said, "bordering on the offensive", contains no overtly racist language, but overtly racist language is not a necessary requirement for an allegation of racial harassment. The Tribunal should have considered the email dated 5 April and applied the tests in section 3A to it.

27. For these reasons, the Tribunal's findings on the racial harassment element of the case cannot stand and will require reconsideration.

Victimisation

28. Ms Fraser Butlin then criticised the Tribunal's finding that there was no causal link between the protected act on 1 April and the Claimant's dismissal. She submitted that the Tribunal failed, as she put it, to analyse the timeline properly. Although the Respondent may have had concerns about confidentiality for some time, no formal process started until 6 April 2010, five days after the protected act. There was no explanation for the instigation of disciplinary proceedings at this time. The investigation into the protected act was perfunctory. The people who took the decision to dismiss were the same people who investigated the complaint.

29. Mr Whitehouse took us through the timings, key features of which we have already set out in our summary of the facts. He submitted that the Tribunal had the timing of events well in

mind; that the Claimant's own renewed complaint in April followed upon altercations that he had with Ms Burnham and that there was ample material upon which the Tribunal could find that the commencement of disciplinary proceedings against him was not causally related to the protected act.

30. On this part of the case we prefer the submissions of Mr Whitehouse. The Tribunal set out the elements of what Ms Fraser Butlin describes as the timeline accurately and carefully in its reasons. Its conclusion could be criticised only if it could be described as perverse. We can see no basis for any such criticism. The Appeal Tribunal's jurisdiction relates only to questions of law, for which reason the perversity test is set high; see **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 93-95.

31. Ms Fraser Butlin further argued that the Tribunal failed to address the Claimant's submission that the sending-out of the email dated 5 April 2010 by Mr Chadha was not only an act of harassment but also an act of victimisation. In our judgment this was not an issue for the Tribunal to consider. The case management discussion had carefully set out the issues. The order was consistent with the Employment Tribunal claim form which had plainly complained of the email dated 5 April 2010 as an act of harassment but not clearly as an act of victimisation. Ms Fraser Butlin submitted to us that the additional issue was so obvious that the Tribunal should in effect have taken it of its own motion given that the Claimant was a litigant in person. We do not agree; the case management discussion order had been made a year before, and the Claimant, if he wished to effectively add a further issue, had ample time to raise the matter. The Tribunal was not required to raise it on his behalf in the circumstances of this case.

32. We would add that Mr Whitehouse informs us that there was evidence on the Respondent's behalf that Mr Chadha had not known of the complaint dated 1 April when he sent the email on 5 April. This may be so, although there is no finding about it in the Tribunal's reasons. The fundamental point is that the issue was not identified as one for the Tribunal to decide and it committed no error of law.

Time points

33. The Tribunal's reasoning on time points cannot stand, for two reasons. Firstly, its reasoning was closely linked with its rejection of the claims of racial harassment and must be reconsidered along with those claims. Secondly, the Tribunal left out of account the email dated 5 April as a potential act of harassment. Again, it will have to reconsider time points in this context. Ms Butlin submits that the Tribunal ought to have considered whether there was a continuing act; in any event, the Tribunal will have to consider whether it is just and equitable to extend time. We should add that we do not think it will be sufficient on remission to repeat the conclusion that there are "no grounds" to extend time. There might be potential grounds for extending time. The claim of racial harassment is very closely interlinked with claims that the Tribunal in any event has had to hear and determine, and, particularly if the email dated 5 April is taken into account, the period of extension required is very short indeed. Ultimately, however, these are matters for the Tribunal to consider.

Disposal

34. This leaves the final question to be determined: should the matter go back to the same Tribunal or to a differently constituted Tribunal? Ms Fraser Butlin submits that the Tribunal's approach to the language used was so fundamentally wrong that the matter must go to a different Tribunal. She also submits that given the passage of time there would be little

prejudice in doing so. Mr Whitehouse submits that the matter can return to the same Tribunal and that given the amount of work that the Tribunal has done on the case there would be substantial prejudice if a different Tribunal were involved.

35. We apply criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In this case we think that the matter should return to the same Tribunal, assuming, of course, that it can be reconstituted. Our reasons, briefly, are as follows. The racial harassment aspect of the case was only one aspect of the Tribunal's consideration; in other respects, it decided the case according to law. Its fault was to overlook the importance in a sensitive area of careful findings and analysis to deal fully with the Claimant's complaints. We are confident that with the guidance that we have given the Tribunal will approach this matter afresh.

36. The Tribunal should certainly be prepared to hear submissions on the question. Whether it requires further evidence will be a matter for the Tribunal itself to determine. We have no doubt that the Tribunal will approach the matter again professionally and that it is undesirable that it should go before an entirely fresh Tribunal, which would have to inform itself of all the background and the evidence already given.