

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

At the Tribunal
On 4 July 2013
Judgment handed down on 19 November 2013

Before

THE HONOURABLE MR JUSTICE WILKIE

PROFESSOR K C MOHANTY JP

MR T STANWORTH

REMPLOY LTD

APPELLANT

(1) MR J CAMPBELL
(2) LONDON BOROUGH OF REDBRIDGE

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

RACE DISCRIMINATION – Vicarious liability

The Employment Tribunal failed to ask itself the correct questions in deciding whether Redbridge acted as agent of Remploy, whether on the basis of implied prior authority or ratification subsequent to the act complained of.

Thus, the ET failed properly to address all the issues it was required to address in order properly to answer the question whether Remploy was jointly liable pursuant to s 32(2) of the **Race Relations Act** for Redbridge's discriminatory acts.

THE HONOURABLE MR JUSTICE WILKIE

1. The Appellant, Remploy Ltd (Remploy) appeals against certain parts of the decision of the Employment Tribunal heard at the East London hearing centre which decided, amongst other things, that Remploy automatically unfairly dismissed Mr J Campbell and unfairly dismissed him pursuant to section 98(4) **Employment Rights Act 1996** and that both Remploy and the London Borough of Redbridge (Redbridge) discriminated against Mr Campbell on the grounds of race by deciding to terminate his CCTV operator placement with Redbridge, Redbridge being found to have acted as agent for Remploy as principal in so doing.

2. The Tribunal dismissed a number of other claims by Mr Campbell.

3. By a further decision dated 28 September 2012 the Tribunal awarded Mr Campbell a total of £8,902.40 compensation for unfair dismissal and awarded him £6,105 compensation for race discrimination for which Remploy and Redbridge were jointly liable. Mr Campbell told us and we accept that he has now been paid the sums awarded to him less the recoupment element in respect of the unfair dismissal award. The sole issue in the case is whether Remploy should pay Redbridge its agreed contribution of £1,526.27 towards their present joint liability to Mr Campbell.

4. Remploy appeals against the finding that it was liable for race discrimination for which Redbridge were principally liable.

5. The appeal turns on whether the Employment Tribunal erred in law in concluding that Remploy was liable as principal for the acts of Redbridge as agent. The focus of the appeal

therefore was the meaning of and correctness of the analysis set out in paragraph 138 of the decision which reads:

"In this case, the first [sic second] respondent managed the claimant day to day, giving him instructions and allocating duties on rotas. On the facts of this case, the second respondent made the decision about who to retain and whose contract to terminate. Even if the second respondent did not have express or implied authority, in advance, to do that act, the first respondent did not question the act and simply accepted it. The first respondent had a procedure pursuant to which it was required to obtain information about selection criteria and the reasons for removing the claimant from the second respondent's organisation. It completely failed to do that and left the decision entirely in the second Respondent's hands. It accepted the decision and acted on it. The Tribunal considers that the first Respondent thereby subsequently ratified the decision and confirmed that the second Respondent had authority to make it. The Tribunal concludes that the second Respondent had the first Respondent's implied consent to make that decision in respect of the complainant's employment."

The facts found by the Tribunal

6. Whilst there were issues of fact which were in dispute, for the purposes of this appeal the factual matrix was not in dispute.

7. Mr Campbell is a black British man who is disabled by reason of his dyslexia. Remploy is an executive non-departmental public body sponsored by the Department of Work and Pensions. It assists disabled people in finding work. The Appellant is part of the Remploy group. It employs some disabled people direct in its own factories and CCTV division. The CCTV division also employs disabled people and places them in other organisations' CCTV operations including local authorities.

8. Redbridge is one in whose CCTV operations Remploy places their CCTV operators. Remploy was required to provide contract staff to Redbridge. Remploy employed such staff but Redbridge managed that staff day to day, for example by giving instructions on how to perform work and devising rotas.

9. On 28 July 2010 at a pre-hearing review a number of case management orders were made. In the course of that, the Employment Judge found facts which, though not seeking to bind the Tribunal hearing the claim, were, in our judgment, correct and not in dispute. It included the following:

"In April 2006 London local authorities entered an agreement with Matrix which precluded agencies such as Remploy supplying staff directly but set up a new procedure for a joint procurement process. Matrix managed the recruitment, time recording and payment processes. Thus Redbridge did not pay Remploy direct but made payments through Matrix. When a London Borough needed staff they contacted Matrix who advised which agency supplied the type of staff required.

However, in relation to CCTV operatives it had been agreed that when there was a vacancy Remploy would be contacted direct to see if they had anyone suitable. If they had, a joint interview would be conducted as happened in this case."

In addition it is common ground that throughout Remploy paid Mr Campbell's wages and was remunerated by Redbridge for providing him and his services through the Matrix procedure.

10. In 2007 Mr Campbell was registered with job centre plus. He contacted Remploy to discuss potential employment opportunities. He attended an interview with Remploy's area operations manager for its CCTV division. Also in attendance was Redbridge's CCTV manager and its manager for community safety. The interview was conducted at Redbridge's offices. During the interview Redbridge confirmed it was happy for Mr Campbell to be placed with it provided he completed the relevant CCTV courses, which he did in early 2008.

11. He was employed by Remploy from 17 March 2008 and was placed in Redbridge's organisation from about that date. By clause 2 of his contract of employment his terms and conditions were governed by a collective agreement between Remploy and the GMB Trade Union. This was the Remploy Managed Services Agreement. That agreement contains a number of terms which provide for the terms and conditions of work; for example disciplinary

and grievance procedures, disputes procedures, wages, hours of work, overtime, bank and statutory holiday working, mobility and so on. It also provides for termination of employment.

12. Clause 13 concerns managed services contract withdrawal and provides as follows:

"Where Remploy managed services loses a managed services contract and the reason for withdrawal is beyond the control of the individual employee, then the employee is in a position of potential redundancy from Remploy managed services. Remploy managed services will work with inter-work to endeavour to find alternative employment for all affected employees ..."

There is a code of practice imposing obligations on Remploy as employer some of which are directly relevant and to which the ET referred.

13. Redbridge was satisfied with Mr Campbell's standard of work and conduct including his attendance and punctuality and commitment. He was allocated to the crime desk and worked there. This was in the same room, but separate from, the traffic desk. In May 2008 Redbridge's CCTV team was tasked with operating a new CCTV traffic and parking enforcement service in addition to the crime and disorder work the team had previously been carrying out. Redbridge approached Remploy to provide more CCTV operators to work this service. Two people, Andy Reid and Chris Heathcoate were placed by Remploy into Redbridge's CCTV operation to cover the traffic and parking enforcement service. Both were disabled and white. A third operator was also placed but left shortly afterwards in September 2008. In fact the traffic desk did not become operational in July 2008 as planned. The commencement date was repeatedly delayed, ultimately to July 2009 at the earliest, as a result of which Redbridge's highways service withdrew funding for the traffic desk. Redbridge decided it no longer had funding for three CCTV operators but only for one.

14. On 2 March 2009 Redbridge phoned Remploy to inform them that Redbridge could not continue to employ 2 of the 3 CCTV operators. Redbridge told Remploy that it had decided to retain Mr Heathcoate and it would not retain Andy Reid or Mr Campbell. Redbridge did not tell Remploy why it had decided to retain Mr Heathcoate and Remploy did not ask what criteria had been used to select Mr Heathcoate. Nor did it seek any explanation for the decision not to retain Mr Campbell. No reason for the decision to retain Mr Heathcoate and no selection criteria were recorded in writing by Redbridge at the time.

15. Having received this information, Remploy management contacted its own Human Resources department for advice. Its documented procedure for dealing with a host company withdrawing a contract thereby putting a Remploy employee at risk of redundancy was in the code of practice already described. Paragraphs 1 and 2 of the procedure provide as follows:

“1. It is very important that any host wishing to terminate the contract should notify OSC or the appropriate employment advisor immediately allowing us to start the procedure as soon as possible. This should then be followed up in writing giving appropriate notice stating the reasons for the redundancy and confirming that they have considered all possible alternatives.

2. Information should be obtained from the host company in relation to the use of selection criteria and reasons. Any concerns about how the host company have selected employees should be discussed with the field operations manager.”

16. No one from Remploy sought information from Redbridge about the use of selection criteria or reasons and no concerns about how Redbridge had selected employees were discussed with Redbridge before Mr Campbell’s dismissal on 14 April 2009. Afterwards, in the context of Mr Campbell’s grievance and appeal, such enquiries were made on 24 April and 5 June 2009 but no substantive response was obtained.

17. The Remploy representative met Mr Campbell on the 3 March 2009 at Redbridge’s premises, without notice to Mr Campbell. He explained that Mr Campbell’s position at

Redbridge was being made redundant because of lack of funding and told him he would be entitled to 4 weeks notice and 6 weeks redeployment assistance, running concurrently with the notice, which would involve trying to place him with another employer. In fact no suitable vacancies were identified. Mr Campbell was then escorted off the premises by the Remploy representative for security reasons.

18. On 4 March 2009 Remploy wrote to Mr Campbell confirming what had happened on the 3 March 2009, namely that his position at Redbridge would become redundant with effect from 9 March 2009 due to lack of funding, but that there would be an individual consultation period of 6 weeks for investigating redeployment. Should an opportunity not be forthcoming his employment would be terminated on the grounds of redundancy at the end of that period which included his entitlement to 4 weeks notice at which time he would be entitled to a redundancy payment. On one reading, that letter seems to suggest that, to some extent, the decision was Remploy's, though triggered by the prior decision of Redbridge, but we are satisfied, as was the Tribunal, that the decisions to end two placements and to select Mr Campbell as one of them was Redbridge's without any input from Remploy until after it had been notified by Redbridge of the decisions.

The Tribunal's decision on race discrimination by Redbridge

19. The Tribunal, having considered the evidence in respect of the selection of Mr Heathcoate to remain, concluded that, in those circumstances, it could infer that Redbridge had discriminated against Mr Campbell. Thereupon the burden of proof shifted to Redbridge to explain the reasons for its decision, a conclusion which Redbridge had conceded. The Tribunal applied the relevant case law and concluded that it should look for cogent evidence to discharge the burden of proof. It concluded in paragraph 130:

“Given the comprehensive lack of any contemporaneous evidence and considerable contradiction in the evidence that is available, the Tribunal is unable to accept the alleged reason now given for the decision to terminate the claimant’s contract ... Applying the Barton guidance, the Tribunal concludes that the second Respondent has not discharged the burden of proof on it to show that colour was not the reason for withdrawing the claimant’s contract. The tribunal finds that the second respondent discriminated against the claimant in terminating his contract.”

The law on the issue of liability of Remploy for the actions of Redbridge

20. Section 32 of the **Race Relations Act 1976** provides:

“Liability of employers and principals.

- (1) Anything done by a person in the course of his employment shall be treated for the purposes of this act ... as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval.
- (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this act ... as done by that other person as well as by him.
- (3) In proceedings brought under this act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

21. The Tribunal noted a number of authorities relevant to this issue in particular as follows:

1. An employer’s vicarious liability can extend to discriminatory acts committed against one of its employees by an agency worker performing work for that employer (**Mahood v Irish Centre Housing** [2011] EQLR 586). The ET identified the following principles in that case.
 - (a) The employer may only be liable if the agency worker is employed by the employer or an agent of the employer acting with its authority.
 - (b) It is generally unlikely that an agency worker will for these purposes be an employee of an end user employer who has procured the worker’s services from an agency.
 - (c) The employer will only be vicariously liable for the agency worker as its agent if the worker has authority from the employer to do the category of act in to which the discriminatory act falls, and

(d) The employer will not be liable for the act of an agent if it has taken such steps that are practicable to prevent the agent from doing that act and that agent nonetheless does that act without its knowledge or approval.

22. The Tribunal also referred to the **Commissioner of Police of the Metropolis v Weeks** [2012] EQLR 209. A complaint was made by a civilian employee of the Metropolitan Police who was line managed by an officer of the City of London police. The EAT upheld the Tribunal's decision that the manager was the agent of the Metropolitan Police Commissioner notwithstanding that he was a police officer with a different police force. The correct question had been posed by the Tribunal namely: whether, in fulfilling the role of line manager, the officer had the express or implied consent of the employer to make the decision he did in respect of the claimant's employment. The Tribunal summarised the legal approach it should adopt as follows in paragraph 85:

"Accordingly, for an employer to be liable for the acts of another person, the employer (the principal) needs to have given that other person (the agent) express or implied authority, whether precedent or subsequent, to act in the relevant way on the employer's behalf in relation to an employee's employment."

23. The Tribunal reminded itself of this approach in paragraph 137 of the decision where it said as follows:

"As the cases have confirmed a principal is liable for the act of an agent done within the scope of the agent's authority, express or implied, whether the authority was given in advance, or whether the act was subsequently ratified. If the agent has authority from the employer to do the category of act into which the discriminatory act falls, then the employer is liable. The employer will not be liable for the act of an agent if it has taken such steps that are practicable to prevent the agent from doing the act and the agent nonetheless does the act without its knowledge or approval. Those appointed to act as managers of an employee can be liable as agents if they have authority to make the relevant management decisions."

24. It then applied those principles to the facts as found in the manner already referred to at paragraph 138 of the decision.

The Appellant's case

25. The Appellant accepts that the Tribunal correctly directed itself at paragraph 85 as focussing on two matters. First, the principal must confer authority whether express or implied, and second, the agent must be acting on behalf of the principal. To this the Appellant adds the requirement that the authority to act as agent includes only authority to act for the benefit of the principal (see *Bowstead and Reynolds* para. 3-007).

26. The Appellant also accepts that at paragraph 138 the Tribunal had correctly identified the relevant factual matrix including that Redbridge managed the Claimant day to day and made the decision about who to retain and whose contract to terminate.

27. The Appellant contends that upon the proper construction of paragraph 138 of the decision, the Tribunal made no decision whether there was actual authority, express or implied, for Redbridge to do the act complained of. It is said that the decision was based on ratification alone.

28. In any event, if the decision was made on the basis of a finding that it acted as agent on the implied authority, the Appellant contends that the Tribunal fell into error by assuming that in managing and deploying Mr Campbell in his day to day performance of his work and in having the power to decide who to retain and whose contract to terminate, Redbridge were, on that basis alone, acting pursuant to authority conferred on them by Remploy. It contends that Redbridge was acting pursuant to its power as "host" to issue a notice of withdrawal in accordance with its contractual rights acting on its own account and not on behalf of Remploy and that the Tribunal failed to ask itself whether Redbridge was acting on behalf of Remploy or solely on its own account in so acting.

29. It further contends that the Tribunal failed to address the fact that no authority to terminate a placement could have been conferred on Redbridge by Remploy to be exercised for Remploy's benefit. The power to terminate Mr Campbell's placement arose out of Redbridge's contractual right as "host" and could only be exercised by the host on its own behalf and for its own benefit and not for the benefit of Remploy. The only effect of Redbridge exercising such a power would be adverse to Remploy's interests as it involved the ending of a placement, for which fees would otherwise have been paid to Remploy, through Matrix, in respect of a person, or persons, who would remain employees of Remploy with all the expense that involves.

30. In his skeleton and in oral argument emphasis has been placed on the fact that Remploy and Redbridge were two independent commercial parties in a tri-party arrangement with Mr Campbell. The mere supply of Mr Campbell as a contract worker to Redbridge did not warrant any inference that a principal/agent relationship was created. It is said that it is common place for end users to manage employees supplied by agencies and there is no warrant to imply, by those managerial functions, that the supplier of the worker manifests assent or confers authority on the part of the end user to act on its behalf.

31. It is said that as Remploy had no power to decide or control whether Redbridge should take on a particular employee or terminate employee's placement as that, it is said, could not be pursuant to a conferred authority as Remploy had no right to withdraw Redbridge's ability to select particular contract workers.

32. It is also argued that termination of a placement by an end user is self evidently adverse to the commercial interests of the supplier of the staff which loses money thereby. Thus it could not be for the benefit of Remploy that Redbridge acted. Reliance is placed on Article 23
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in *Bowstead & Reynolds on Agency* that authority only includes authority to act for the benefit of the principal. If the very act is contrary to the principle's interests it cannot be regarded as authorised unless expressly provided for (see *Bowstead* 3-008).

33. The Appellant also contends that the Tribunal fell into error when concluding that Remploy ratified Redbridge's decision thereby giving effect to the decision as if it had been authorised by Remploy.

34. It is said that the Tribunal made no finding that Redbridge's decision was purportedly made in the name of or on behalf of Remploy, nor could it have on the evidence. That is a requirement of ratification as described at paragraph 2-047 of *Bowstead and Reynolds*.

35. It is also said that there is an evidential basis to conclude that the Claimant believed the act of Redbridge was authorised by Remploy which is another requirement for ratification as described in *Bowstead and Reynolds* (para 2.047). In particular, reliance is made of a passage in the ET1 of Mr Campbell, settled by solicitors, which on the face of it suggests that his understanding was that the decision to terminate his placement was that of Redbridge for reasons connected with its lack of funding.

36. Second, it is said that, on the evidence, there was no factual basis to enable it to conclude that Remploy adopted the act of Redbridge. Remploy's inactivity, or subsequent acceptance of Redbridge's decision to terminate the placement, simply recognised that Remploy had no power to prevent Redbridge acting as it did and could not amount to Remploy adopting the act.

37. It also relies on the fact that, on the two occasions already referred to, 24 April and 5 June 2009, Remploy did write to Redbridge seeking reasons for the termination of the Claimant's UKEAT/0550/12/JOJ

placement and reminding Redbridge of its obligations to avoid unfair treatment and discrimination (albeit after the end of the Claimant's contract).

The submissions of Redbridge

38. Redbridge reminds the EAT of the relevant common law test as applied to employment situations in **Yearwood v Commissioner of Police of the Metropolis** [2004] ICR 1660 at 36 that:

"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly assents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation."

39. We are also reminded of the statement of principle in **Bungay and another v Saini and others** UKEAT 0331/10/CEA in the following terms:

"Thus the test of authority is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principle ... and not whether the principle had ... in fact authorised the appellant's to discriminate."

Finally we are reminded of the long established principle that in the employment context dealing with discrimination legal principles such as agency and ratification should be approached purposively to give effect to the requirement that those, the subject of discrimination, should have ready access to remedies. Thus, it is said the approach, when asking whether Redbridge had the express or implied consent of Remploy to make decisions having an effect on the employment of Remploy's employee, Mr Campbell, is whether Redbridge was undertaking the type of tasks which an employer would usually perform. The answer to that being yes, then it followed that Redbridge was exercising powers conferred by Remploy to act on its behalf as agent.

40. On the question whether the authority was to act for the benefit of the principal, it is submitted that Redbridge was able to determine the pattern of work of Mr Campbell, what work was made available to him and to provide him with training. In so doing Redbridge was acting for the benefit of Remploy in providing its employee with work and training required to maintain and improve his skills and to make him, at least as, if not more, employable in the future for whoever might subsequently be in the market for Remploy to supply such skilled workers or that it was “otherwise agreed” on the facts of this case (see Bowstead and Reynolds paragraph 3-007). Thus Redbridge was afforded a very wide margin of control and discretion by Remploy in the way it directed Mr Campbell’s work. It is submitted that section 32 extends to ostensible authority, which is outside of the scope of Article 23 in *Bowstead* (see para 3-008 and 8-013). Thus Remploy by its conduct had represented that Redbridge had authority to act on its behalf and that Mr Campbell would reasonably believe that Redbridge had Remploy’s authority to take decisions about his work in relation to the provision of and withdrawal of work from him. On that basis, Redbridge argues that the requirement of Article 23, which limits authority as an agent to act for the benefit of the principal falls away.

41. On ratification it is said that the Tribunal found and was entitled to find that Redbridge had actual authority to take the decision as agent for Remploy and so ratification does not come in to the question. But, if it did, it is said that the Tribunal was entitled to conclude on the facts that Remploy adopted Redbridge’s act.

42. Whilst it is acknowledged that the Tribunal did not expressly address the questions whether the act was purportedly done in the name of or on behalf of Remploy so that Mr Campbell believed that it was authorised as envisaged by para 2-047 of *Bowstead and Reynolds*, it is argued that the extent to which Remploy was involved by Redbridge in

implementing the termination of Mr Campbell's placement would have entitled them to make that necessary finding.

Conclusions

43. In our judgment, paragraph 138 of the Employment Tribunal's decision is ambiguous. It is not possible to be sure whether the Tribunal made its decision on two alternative bases: that Redbridge had Remploy's implied consent and authority as agent to make the decision, about who to retain and whose placement; alternatively, that although the decision was made without authority as agent, Remploy, by its conduct, ratified that decision in the legal sense so as to treat that act as if it had been authorised by Remploy.

44. If it did find that there was actual implied authority, it appears to have done so on the basis of its findings that Redbridge's act was part and parcel of Redbridge's general conduct of managing the Claimant day to day on his work for Redbridge both as to his deployment, instruction and supervision.

45. We are satisfied that the Tribunal was entitled to regard Redbridge's decision about whose placement to retain and whose to terminate was part and parcel of the day to day supervision which Redbridge had undertaken so that what happened was with Remploy's implied consent.

46. However the Tribunal, in answering the question it had posed for itself in paragraph 85 of the decision, did not provide an answer to that part of the question which required it to consider whether the consent or the authority had been given to take such action ***on Remploy's behalf***.

47. It is clear on the undisputed evidence that the purpose of the arrangement was for Remploy to provide Redbridge with trained staff to work on Redbridge's behalf on its CCTV monitoring system. Although Remploy put forward candidates for placement, it was Redbridge's decision whether it would accept a particular person to perform that role. Redbridge then deployed, instructed and supervised that person and, when it no longer needed so many and some placements had to be brought to an end, it selected who to retain. The Tribunal did not apply its mind to whether, in doing so, albeit with the consent of Remploy, Redbridge was acting on behalf of Remploy, or for the benefit of Remploy or otherwise agreed. In failing to ask these questions the Employment Tribunal erred in law. In light of our conclusion on the issue of ratification we have decided that the appropriate course is to remit the case to the same Tribunal for it to hear evidence, if it needs to, and to receive submissions on these issues.

48. In our judgment, there are arguments either way and there will have been evidence which we have not had sight of. It may be that there is also more evidence which the parties may wish to place before the Tribunal. Certain it is that this is not a case where we have the necessary evidence or facts to be entitled to come to a view on these issue ourselves.

49. On ratification, it is common ground that the Tribunal did not address the question whether the third party (Mr Campbell) perceived that Redbridge was acting purportedly in the name of or on behalf of Remploy. Accordingly, if, as we conclude, on the evidence, the Tribunal was entitled to conclude that Remploy adopted the decision of Redbridge, it did not ask the necessary questions to enable it to decide whether that adoption had the legal effect of ratification as described in *Bowstead and Reynolds*. On that basis the Tribunal erred in law on the issue of ratification, as well as on the issue of implied authority, if, indeed, it made any such decision.

50. We do not accept the submission of Remploy that the manifestation of “purporting to act on behalf of another” has to emanate from the party who is acting. Nor do we accept that that issue is separate from the perception of the third party. On the contrary, in our judgment, the question is whether the third party, Mr Campbell, did perceive that Redbridge, in acting as it did, was purportedly doing so in the name of, or on behalf of, Remploy. Only if the answer to that is “yes” does the question arise, which the Tribunal answered, namely whether Remploy has, by its actions, adopted Redbridge’s act.

51. We do not accept the contention that we can, in the state of our knowledge of the facts and evidence, answer that question. That must be for the Tribunal, having heard further evidence, if need be, and further argument.

52. Accordingly, this appeal succeeds. The matter is remitted to the same Employment Tribunal for it to determine the questions of implied authority and/or ratification on a proper legal basis, having heard any further evidence it requires and having received further argument.