Appeal No. UKEAT/0484/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 April 2013
Judgment handed down on 18 June 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR A HARRIS

MS N SUTCLIFFE

MRS S KIMTI — APPELLANT

TYNE & WEAR FIRE & RESCUE AUTHORITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HOLLY STOUT (of Counsel) Instructed by: Samuel Phillips Law Firm Gibb Chambers 52 Westgate Road Newcastle upon Tyne NE1 5XU
For the Respondent	MR SEAMUS SWEENEY (of Counsel) Instructed by: Sunderland City Council Legal Services P O Box 100 Civic Centre Sunderland SR2 7DN

SUMMARY

VICTIMISATION DISCRIMINATION

RACE DISCRIMINATION – Direct

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Reasonableness of dismissal

Employment Tribunal heard this case over 10 days and concluded that the Claimant's dismissal, by reason of redundancy, was fair and wholly unconnected with her race or protected acts. Equally, there was no detrimental treatment on those grounds during her employment. No basis in law for interfering with those findings. Her appeal was dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. In **Anyanwu v South Bank Students Union** [2001] ICR 391, at para. 37, Lord Hope of Craigshead observed that the questions of law that have to be determined [in discrimination cases] are often highly fact-sensitive. The present case is no exception. The Claimant, Mrs Kimti, brought complaints of race and sex discrimination, victimisation, unlawful deductions from wages and unfair dismissal against her former employer, the Respondent Tyne & Wear Fire Rescue Authority.

2. The claims were resisted and came on for a full merits hearing before an Employment Tribunal sitting at Newcastle chaired by Employment Judge Johnson over 10 days in March 2012. Following a further day's deliberations in private that ET dismissed all her complaints by a Judgment with very full reasons running to 41 pages dated 19 June. Against that Judgment she now appeals with the permission of Mr Recorder Luba QC on the paper sift.

Summary

3. Following a competitive process the Claimant, who is of British-Indian ethnic origin, was appointed to the role of Regional Diversity and Equality Policy Advisor with the Respondent on 17 September 2007. The word 'Regional' in that title is significant, on the ET's findings of fact, because the post was funded by four authorities in the region. Three withdrew their share of that funding in late 2010/early 2011 (reasons, para. 7.54). As a result the post was identified by the Respondent for redundancy. The Claimant was told that her post was at risk on 19 January 2011. A consultation process followed. No realistic alternative post was found. The Respondent decided that redundancy would lie where it fell. She was dismissed with effect from 30 April 2011. The ET determined that her dismissal for redundancy was fair. At an

early point in the employment the Claimant complained that she was unfairly treated because she was black (para. 7.15). She further complained that a colleague, Claire Maddocks, had been given a new role, entitled Diversity and Resources Manager (she was formerly Resources Manager) in about March 2009 "because she had blue eyes and blond hair". She also complained that she was later excluded from some 20 events connected with diversity issues. In the event her representative, Mr Gibson, concentrated on 5 of those. Each was considered in turn by the ET at para. 7.39. None was found to be acts of discrimination or victimisation on the facts.

4. As to the dismissal process, first it was said that the Claimant was not offered alternative employment as an Administrative Assistant, 9 grades below her own grade; secondly she complained that Mr Bathgate, the Chief Fire Officer, signed her dismissal letter and then heard her appeal, contrary to the principles of natural justice. We would add that she had a further right of appeal to a different appeals panel but did not pursue that option.

The appeal

5. Ms Stout, now appearing on behalf of the Claimant, puts the appeal on six grounds, four of which relate to the complaints of unlawful discrimination; two to the unfair dismissal issue.

6. Before turning to the individual grounds we return to the observation of Lord Hope with which we began this Judgment. As Mr Sweeney submitted, correctly in our view, the Claimant lost her case on the facts. At para. 6 the ET found the Claimant to be more persistent than consistent in her evidence; there were a number of inaccuracies in the allegations which she made. Conversely, the ET found the evidence given by the five witnesses called by the Respondent to be honest and persuasive and preferable to that given by the Claimant where a conflict occurred. We remind ourselves that the facts are for the ET not this appeal tribunal. It

is not for the EAT to substitute its judgment for that of the ET. Having considered the arguments presented by Ms Stout and Mr Sweeney's response that is what, in part, she invites us to do.

Unlawful discrimination

7. First, Ms Stout submits that the ET misdirected itself in law in failing to consider the comparative exercise but instead has adopted the 'reason why' approach of Lord Nicholls in **Nagarajan v LRT** [1999] ICR 877 and in **Shamoon v Chief Constable of the RUC** [2003] ICR 337 and secondly in failing to consider subconscious as well as conscious motivation for the Respondent's treatment of the Claimant and further that the ET has impermissibly taken account of the Respondent's motive for that treatment.

8. Dealing with those points in turn; first, as Ms Stout accepts, asking the reason why the Claimant was treated as she was is a permissible approach in law. The observations of Lord Nicholls were made in the House of Lords; **Shamoon** and **Nagarajan** are therefore high authority. It is an approach that has been consistently adopted; see the seminal judgment of Elias J in **Bahl v Law Society** [2003] IRLR 640, later affirmed by the Court of Appeal [2004] IRLR 799 (the two decisions are conflated by the ET at para. 22). Indeed, we note that in his careful and detailed written closing submissions below Mr Gibson specifically referred the ET to **Nagarajan**, describing that case as setting out the classic statement regarding motive, intention and reason and subconscious influence.

9. We entirely accept Mr Sweeney's submission that the ET plainly had those well-known principles in mind in approaching the facts as they found them. In relation to subconscious discrimination the ET directed themselves (para. 22) to the CA decision in **Anya v University**

of Oxford [2001] IRLR 377, accurately summarising the main principles to be derived from that case in this way:

> **"The CA in *Anya*… said that evidence may point to the possibility of conscious or unconscious racial bias having entered into the process, but that it is impossible to consider the drawing of relevant inferences without making findings of primary fact."**

10. Where the original ET went wrong in **Anya** was to simply accept the Respondent's witnesses as honest and reliable. They did not make findings as to the background issues raised by Dr Anya. That is not the case with the present ET; nor was it with the second ET which heard and dismissed Dr Anya's claim following remission.

11. As to motive and motivation the two concepts are different, as Underhill P, explained in **Ahmed v Amnesty International** [2009] IRLR 884. Whilst motive is strictly irrelevant, an ET must examine the respondent's motivation in the sense of the mental processes (whether conscious or unconscious) which led the alleged discriminator to act as he did. We agree with Mr Sweeney that when the ET say, at para. 24:

> **"In respect of each allegation (of discrimination) the respondent has provided an explanation which the Tribunal found to have shown that there was no difference in treatment, or that the treatment was in no way influenced by the claimant's sex or race."**

they have in mind the possibility of subconscious as well as conscious discrimination.

12. Further, in so finding, the ET expressly state that they took into account all of the evidence put forward by the Claimant and Respondent. In so doing they applied the guidance given by Mummery P in **Qureshi** [2001] ICR 863, note, approved by Sedley LJ in **Anya**.

13. It follows, in our judgment, that this ET correctly directed themselves as to the relevant legal principles and applied them to the facts found in reaching their conclusion that the discrimination complaints failed.

14. As to the facts, Ms Stout seeks to re-argue the significance of the "blues eyes and blond hair" remark made by a colleague of the Claimant about Ms Maddocks, dealt with by the ET at para. 7.25; Mr Bathgate's 'failure' to deal with the Claimant's complaint of discrimination made at the hearing of her appeal against dismissal and the ET's factual conclusion at para. 7.30. These are all jury points which do not advance the appeal on a question of law.

15. Ground 2 seeks to revisit the ET's clear findings in relation to the 5 conferences, selected by Mr Gibson out of 20 examples, which the Claimant did not attend; see para. 7.39. Her case was that she was deliberately excluded from events to which white colleagues were invited. That case was rejected (para. 7.38).

16. Thirdly, it is suggested that the ET failed to consider the case in the round (see **Qureshi**). We have earlier referred to para. 22 of the ET reasons. In our judgment the ET looked at the whole picture and rejected any inference of discriminatory treatment by the Respondent.

17. Finally, limitation. Strictly, this is a preliminary jurisdictional question. However, sensibly in our view, the ET considered the merits of the case before turning to the issue of limitation, raised by the Respondent. Having done so and found that the acts complained of were not discriminatory, it followed that there was no continuing series of acts which rendered complaints arising more than 3 months before the form ET1 was lodged on 29 July 2011 in time. Limitation is fully dealt with at para. 25. We can see no error of approach by the ET.

Unfair dismissal

18. The challenge here lies against the ET's findings that the Respondent took reasonable steps to find alternative employment for the Claimant (para. 31) and that Mr Bathgate carried out a fair appeal (para. 32).

19. As to alternative employment, Ms Stout focuses on the possibility of the Claimant being offered the post of Administrative Assistant, 9 grades below her post as Regional Diversity and Equality Policy Advisor, requiring some further training. The relevant findings of fact are at para. 7.66. It was plainly open to the ET to find that that was not reasonable alternative employment for the Claimant, particularly as it would involve a period of pay protection well above the pay rate for the administrative post.

20. As to the appeal to Mr Bathgate, the ET acknowledged that he had signed the letter dismissing the Claimant. They also record, at para. 32, Mr Sweeney's point that under the Respondent's procedure a first tier appeal lay to the Chief Fire Officer (Mr Bathgate) and then a further right of appeal to a separate appeals panel which she chose not to pursue. The ET found that the appeal to Mr Bathgate was fairly conducted. Although, as Ms Stout emphasised, the Claimant was the only employee out of 150 to be made compulsorily redundant, her position was unique in that its funding came from four authorities; three of whom had withdrawn their contributions.

21. As Mr Sweeney pointed out in his closing submissions below (para. 91) by reference to the judgment of Lady Smith in **Charles Scott v Hamilton** (UKEATS/0072/10/BI, 9 August 2011, para. 82), it is not always essential that an internal appeal must be heard by someone other than the dismissing officer. That, it seems to us, is consistent with the more recent approach to internal appeals now found in the CA decision in **Taylor v OCS Group Ltd**

[2006] IRLR 613, which focuses on the fairness of the process, rather than a rigid distinction between appeals by way of rehearing or review.

22. However, the point is moot in circumstances where a further right of appeal lay to a separate and independent panel of elected members. That the Claimant chose not to pursue that further right of appeal was a matter for her. The ET was entitled to conclude that the appeal process did not render the dismissal unfair.

Conclusion

23. Having listened to this case for 10 days the ET's impression, expressed at para. 24, was that the Claimant's unjustified sense of grievance at having been dismissed for reasons of redundancy led her to make allegations of unlawful sex and race discrimination and victimisation, all of which were unsupported by the evidence. We can see no grounds in law for interfering with that clear and unequivocal assessment of these claims. This appeal fails and is dismissed.