Appeal No. UKEAT/0586/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 June 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR M CLANCY

MR D G SMITH

MR H S FULLAH — APPELLANT

(1) MEDICAL RESEARCH COUNCIL (MRC)
(2) PROFESSOR WILLIAM MARSLEN-WILSON — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR H S FULLAH (The Appellant in Person)
For the Respondents	MR STUART BRITTENDEN (of Counsel) Instructed by: Squire Sanders Hammonds LLP Solicitors 7 Devonshire Square Cutlers Gardens London EC2M 4YH

SUMMARY

RACE DISCRIMINATION

Direct

Detriment

The Claimant did not specify race discrimination in his internal complaint about his manager. Applying **Waters** and **Durrani**, the context did not admit of a generous interpretation of his language. There was no protected act. There was no unfavourable treatment as the Claimant accepted the manager treated black and white employees in the same unfavourable way. There was no detriment to the Claimant as the decisions on acting up and a permanent position were made without reference to race or any protected act. The Claimant's appeal was dismissed.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about victimisation on the grounds of having made a complaint of race discrimination. This is the Judgment of the court to which all members, appointed by statute for their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondents.

Introduction

2. It is an appeal by the Claimant in those proceedings against the Judgment of an Employment Tribunal chaired by Employment Judge G Foxwell sitting over eight days and two days in deliberation at Bury St Edmunds. The Claimant represents himself. The Respondent was represented by counsel and today by different counsel, Mr Stuart Brittenden. The Claimant made a very substantial number of claims of direct race discrimination and victimisation against both the corporate and the individual Respondent and failed on all. The Respondents had denied both of the substantive claims.

3. The Claimant appeals against that Judgment. Directions were given on the paper sift by HHJ Peter Clark rejecting the claims but he succeeded at a renewed application before Wilkie J, where the Claimant had the advantage to be represented Mr Purchase, of counsel, giving his services under the ELAA Scheme. A single point was identified out of the large number of grounds of appeal. Formally the position was that counsel addressed the Judge on the victimisation point and did not expressly abandon any of the many grounds of appeal which had been raised in the homemade Notice of Appeal by the Claimant, but the Judge dismissed all of those bar the one before us.

4. It is necessary to say this because notwithstanding that express dismissal the Claimant seeks to advance arguments expressly noted as errors of fact and statistics where these have been the subject of dismissal by Wilkie J (see paragraph 6 of the Judge's ruling).

The legislation

5. The legislation is not in dispute. It predates the **Equality Act 2010** and is the **Race Relations Act 1976**, s.2(1)(d):

> **"2. Discrimination by way of victimisation.**
>
> **(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—**
>
> **…**
>
> **(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act,**
>
> **or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them."**

6. It is (d) that the Claimant relies on.

The facts

7. The Claimant describes himself as black British. He was born in Sierra Leone and came to the UK in 1989. He is a well educated person, gaining qualifications in accountancy and computer science. He then took up a position at the First Respondent in 2001 in the IT department. The facts were set out in great detail by the Employment Tribunal over 36 pages. A number of claims represented by the letters (a) to (t) were made by the Claimant and the Tribunal took a good deal of time going through analytically each one of these allegations dating from 2001 to 2010.

8. The department is responsible for very sophisticated research and he was allocated to the Brain Sciences Unit in Cambridge. The leading light in this at the time was his manager, Dr Vlasta Malinek. There were two other computer officers and the Claimant. The composition of the department changed a number of times but it seems that at all times the Claimant was the only black person there. Things did not go well after a while with Dr Malinek. They had been on good terms but the relationship deteriorated. We have been shown findings by the Tribunal in relation to the Claimant's complaint where he asserts that Dr Malinek behaved badly to all of the people within the unit, black and white alike. The Claimant uses the word 'mirrored' in respect of the treatment which he received as juxtaposed to the treatment the other white members received, driving a number of them out of the unit. In due course, Dr Malinek himself resigned having been disciplined for his poor, as it was put, "man management" skills.

9. The issues which survive on appeal relate to the consequences of Dr Malinek's departure. There were two. There was an acting up position in the IT department and then there was the appointment of a permanent replacement. The basis of the Claimant's case was that he had done a protected act under s 2(1)(d) of the Act and, as a result, had suffered less favourable treatment and had been victimised, causing him detriment. The basis of the protected act was set out in documents by the Claimant and it will be important to note that by March 2010 the Claimant was explicitly alleging victimisation and discrimination on the grounds of race, but there is no other document from him that is explicit.

10. The Claimant relied upon the following, which are not in chronological order. On 26 January 2009 he appealed against a decision which was made in the course of an investigation into the harassment claim he brought against Dr Malinek. We have looked with care at this email and it does show the Claimant saying that he believed he was subject to

bullying, harassment, discrimination and victimisation going on for four years at the hands of Dr Malinek. There is not in this comprehensive document a mention of race.

11. For that, one has to look at the internal communications which preceded it because of the references to the previous four years. Here there is internal communication between HR officers on 10 December 2008. That is about the time that an independent investigator was appointed to look into the Claimant's concerns about Dr Malinek's bullying. This is noted:

> **"The Claimant previously raised an allegation of bullying and harassment against his line manager (white male on black male although race has no yet been raised as an issue)."**

12. As part of his submissions to support his complaint and ultimately before the investigating officer, the Claimant sent what he described as "an overview of the basis of my complaint of bullying, harassment, discrimination and victimisation by Dr Vlasta Malinek". Going back to October 2004 is this entry:

> **"was the beginning of deterioration and the start of what I believe to be physically, verbally and psychologically bullied and harassed, discriminated and victimised both directly and indirectly; and I was at a loss to understand why."**

13. That is the total documentary evidence emanating from the Claimant. On 13 March 2008 Dr Malinek had written to an HR officer saying the following:

> **"This is I think Henry's last chance. If he doesn't change then I guess we'll have to start the whole sorry business of dismissal. This latter process would be unpleasant for all concerned and would I guess end up at an Industrial Tribunal. Whether or not Henry would claim racial discrimination I can't say but it has been raised by HR as a possible scenario.**
>
> **If Henry makes an effort to change all well and good. I don't think he can keep up with the new requirements of the job but I could at least try and get a new member of staff at a higher level. Henry could then learn to work efficiently on tasks appropriate to his ability. He would need to be very clear that he'd need to work consistently and appropriately for at least a year to convince me he has."**

14. Thus, there are two references in internal management communications relating to race and two references by the Claimant in support of his complaints (his ad hominem complaint about the treatment he received from his manager) which do not mention race.

15. On the basis of this material the Tribunal looked at the context. Context is important in every aspect of employment law. Having heard the evidence of the actors in this drama, and particularly of the Claimant, it came to the conclusion that there was no protected act done by the Claimant in, what is said to be, early 2009. The Claimant puts his finger on 26 January 2009. It is against that that he appeals.

16. If that were not sufficient to dispose of the case, the Tribunal went on to decide that the complaints he was making were not of less favourable treatment in any event. His criticism of was of Dr Malinek's poor skills in relation to all of the people in the department which changed its personnel over time. In other words, he, as a black employee, was treated in the same unfavourable way by the line manager as the other three, from time to time, employees who were white. So the claim could not get off the ground even if he succeeded in proving the protected act.

17. The Tribunal went further and looked at the allegations on the merits. First was that he was not selected for acting up on the grounds of his having done a protected act. We have been taken to the findings in detail about this and it is plain that the Tribunal found that there was nothing unfair or wrong about appointing someone else. There was a good business case for doing so in respect of the acting up. Secondly, as to the permanent post for which he reached the last six, completely different people took the decision. It would be noted that he had allies who were on the selection process, either persons he had himself called upon to give a reference, or who in other ways were, objectively, likely to take a favourable view of the

Claimant or at least not to turn him down on the grounds of having done a protected act. The Tribunal gave cogent reasons both in its findings of fact and by reference to the minutes for its conclusions for that.

The Claimant's case

18. The Claimant himself acknowledges only two detriments are now live on appeal: the acting up and the permanent position. He contends that what he was doing was obvious. He was complaining of race discrimination and victimisation on the grounds of having done a protected act. An insight into the understanding of that and, thus, the context, is given by the internal communications of the officers at the time. The Tribunal erred in law in that it failed to recognise that there was a protected act. He contends the matter should go back for a full hearing before the Employment Tribunal.

19. Secondly, he contends that the detriments that he suffered were, indeed, to do with his having done the protected act. He acknowledges that no decision has been made as to the jurisdiction points taken by the Respondent on continuing act and out of time complaints. He has comprehensively put together a skeleton argument but, as we pointed out to him, much of it replicates the Notice of Appeal that was taken out of our hands by the Judgment of Wilkie J, statistics and errors of fact, for example. That leaves the two crisp points to be dealt with.

The Respondent's case

20. On behalf of the Respondent, Mr Brittenden contends that what is fatal to this case is the finding on a protected act and that this matter cannot survive the first step. If it can, there was no less favourable treatment of him as against others who had not done the protected act or, alternatively, who were not black. Finally, on the facts this case goes nowhere because the two

detriments said to have been suffered were objectively justified. The Tribunal made firm findings that they were nothing to do with race.

Discussion and conclusions

21. The starting point for this case is to define what a protected act is. In **Waters v Commissioner of Police for the Metropolis** [1997] ICR 1073 a literal submission was made to the Court of Appeal by employers who were on the receiving end of a complaint of victimisation for sexual harassment of a police officer. The Court of Appeal, as did the EAT under Mummery P as he then was, rejected the specific submissions based on a generous construction of s.2(1)(d).

22. The principal Judgment on this in **Waters** was given by Waite LJ who set out in full what we will describe as the generous interpretation advanced by counsel for the Claimant in that case, and comprehensively rejected it:

> **"That submission fails, in my judgment, for this reason. True it is that the legislation must be construed in a sense favourable to its important public purpose. But there is another principle involved—also essential to that same purpose. Charges of race or sex discrimination are hurtful and damaging and not always easy to refute. In justice, therefore, to those against whom they are brought, it is vital that discrimination, including victimisation, should be defined in language sufficiently precise to enable people to know where they stand before the law. Precision of language is also necessary to prevent the valuable purpose of combating discrimination from becoming frustrated or brought into disrepute through the use of language which encourages unscrupulous or vexatious recourse to the machinery provided by the discrimination Acts. The interpretation proposed by Mr Allen would involve an imprecision of language leaving employers in a state of uncertainty as to how they should respond to a particular complaint, and would place the machinery of the Acts at serious risk of abuse. It is better, and safer, to give the words of the subsection their clear and literal meaning. The allegation relied on need not state explicitly that an act of discrimination has occurred—that is clear from the words in brackets in section 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 6(2)(b). The facts alleged by the complaint in this case were incapable in law of amounting to an act of discrimination by the commissioner because they were not done by him, and they cannot (because the alleged perpetrator was not acting in the course of his employment) be treated as done by him for the purposes of section 41 of the Act of 1975."**

23. That approach was followed and expanded by Langstaff P in **Durrani v London Borough of Ealing** UKEAT/0454/2013, a Judgment handed down after the appellate Judge's

sift in our case. What Langstaff P was asked to consider was whether it is necessary to use the words race discrimination. He decided it was not, so long as the context made it clear. First, he said that a Tribunal decision must be read as a whole and that the employers must know what it was constituted a protected act. He accepted that it was not necessary that a complainant should refer to race using the very word, but went on to say this:

> **"[…] I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies. As Mr Davies points out, the Tribunal found as a fact that the Claimant did not attribute any treatment (at the time) to the fact that he is British of Pakistani origin. That finding of fact alone means that there is no evidence that an employer, seeking to cause detriment to the Claimant as a result of making the complaint he did, could have been victimising him for a complaint made by reference to, under, or associated with the relevant Act.**
>
> **[…]**
>
> **23. The Tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.**
>
> **[…]**
>
> **27. This case should not be taken as any general endorsement for the view that where an employee complains of 'discrimination' he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word 'race' or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the grounds of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally."**

24. In our judgment, the approach to the documents in this case would tend to support the Claimant's submission, that is that he is black, he is making complaints against his white supervisor and that in the minds of the supervisor and the HR people there may be a possibility of an Employment Tribunal claim based on race. However, the judges of this are the Employment Tribunal, who were enjoined to look not just at the documentation but at the context, in particular, the context in which the Claimant made explicit claims a year later of race discrimination, a claim made by an articulate, well educated person knowing clearly what the language is. There is no basis in either of the two emanations that he puts forward for a

complaint of race discrimination. An employer is entitled to more notice than is given by a simple contention that there is victimisation and discrimination.

25. Mr Brittenden draws our attention to s.27 of the **Equality Act**, which is victimisation in respect of all ten protected characteristics under the Act. The person on the receiving end of a complaint of victimisation ought to be able to identify what protected characteristic it is in respect of. That Act was not in force at the time and we accept Mr Fullah's argument that we are looking exclusively at a statue which is about race discrimination. Nevertheless, in the absence of any evidence of reliance on a protected characteristic, buttressing the complaint of victimisation or discrimination, it cannot be said that there was a protected act in this case.

26. The Employment Tribunal looked at all the circumstances most carefully and was there to judge from the witnesses and from what the Claimant told it the correct context for his use of language. We accept, of course, that the word 'race' does not have to appear but the context of the complaint made by a complainant does. There is no such context here, indeed, it is to the contrary. If one reads the language of the Claimant in his complaints literally, he is complaining with his fellow employees, who were not black did not make claims of race discrimination, that they are suffering detriment at the hands of Dr Malinek. He was unfavourable to them all and, therefore, the claim could not get off the ground. We see no error of law in the Tribunal's finding that there was no protected act.

27. Very helpfully for us on appeal, and we suggest for the parties, too, the Tribunal went on to look at the question whether or not there was a detriment. We accept Mr Brittenden's submission that the Tribunal here has effectively buried the claim. It cannot get above the ground even if it survived the protected act. If one looks at the steps in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, in the speech of

Lord Nicholls, they involve three ingredients. The relevant circumstances (see paragraph 23) must be identified. There must be less favourable treatment (see paragraph 24 and 25) and then, finally, the act of detriment must have been done by reason that the Claimant had done a protected act. This requires an examination of the mind of the alleged discriminator (see paragraph 29). The Tribunal has earnestly considered on live evidence what was in the minds of the alleged discriminators when they made the decision said to be unlawful in respect of acting up and permanent position. There is no error in the Tribunal's findings which correspond to the speech of Lord Nicholls.

28. So, the narrow grounds of appeal put before us today fail. We would like to thank Mr Fullah for his very measured submissions and Mr Brittenden. The appeal is dismissed against both of the Respondents.