Appeal No. UKEAT/0249/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2012
Judgment handed down on 11 March 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR J R RIVERS CBE

MR P M SMITH

MINISTRY OF DEFENCE — APPELLANT

MR W KEMEH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATTHEW PURCHASE (of Counsel) Instructed by: Employment Group Team 2 Treasury Solicitor's Department One Kemble Street London WC2B 4TS
For the Respondent	MR MICHAEL REED (Free Representation Unit)

SUMMARY

JURISDICTIONAL POINTS- Agency relationships

RACE DISCRIMINATION

Direct

Injury to feelings

Accepted, in line with EAT authority, that common law agency principles apply to **Race Relations Act** s32(1). On that basis employer appeal against agency finding upheld and set aside.

Injury to feelings award manifestly excessive and wrong in principle (see **Vento**). Award reduced from £12,000 to £6,000.

HIS HONOUR JUDGE PETER CLARK

1. The Claimant before the Southampton ET, Mr Kemeh, is a black African originally from Ghana. In November 2004 he joined the British army and became a British National in July 2009. At the relevant time, in June 2010, he was a private soldier in the Royal Logistics Corps, serving as a chef in the main catering facility for the Falklands Islands garrison. Part of the catering function at that facility was contracted out by the Respondent, the Ministry of Defence, to Serco which in turn sub-contracted part of the operation to Sodexho. One of Sodexho's employees was a Ms Karen Ausher, who worked as a butcher.

2. During that month the Claimant suffered two incidents of racial abuse. The first was on 15 June when the Claimant, in the course of his duties, approached Ms Ausher in the meat store and asked her for some chicken. She gave him just two pieces. He said; "Trust me, I am making soup for 1,000 people, give me more than that." She replied "Why should I trust you? First of all you are a private in the British Army and then you are black." The Claimant was very upset by that remark, the implication being that because he was black he was dishonest and could not be trusted with a substantial quantity of ingredients.

3. The second incident occurred on 23 June when the Claimant was discussing football (the World Cup was in progress) with a senior NCO in the Mess, Sgt Simmons. During that conversation Simmons shouted at the Claimant "shut up you dumb black bastard." Again the Claimant was very upset by that comment.

4. Some investigation of the Claimant's complaint about Sgt Simmons' remark was carried out on the Falklands. The upshot was that Simmons made an apology of sorts, although the

Employment Tribunal accepted the Claimant's evidence that Simmons did not appear to him to be taking the incident as seriously as he should.

5. The Claimant did not raise a complaint against Ms Ausher at the time, since she was not military personnel and he did not believe that he could do so.

6. Following his return to the UK he submitted a Service Complaint against Simmons to his CO who concluded that Simmons had used the language alleged and that it amounted to bullying and/or racial harassment. He also concluded that Captain Lindsay, the investigating officer on the Falklands, had not carried out a proper investigation. It is right to say that before the ET Mr Downs, then appearing on behalf of the Respondent, accepted that the remarks complained of were made by Ms Ausher and Sgt Simmons and expressed the Respondent's sincere regret that such unacceptable remarks had been made to the Claimant. The ET found those comments to be extremely helpful and positive.

7. The Claimant's complaint of racial discrimination came before an ET chaired by Employment Judge Coles sitting on 3 January 2012. By a Judgment with reasons dated 20 January that ET made the following findings in relation to remedy, liability being admitted;

(1) That Ms Ausher was the agent of the Respondent for the purposes of s32(2) **Race Relations Act 1976** (then in force) and thus the Respondent had responsibility for her racial remark (The Agency Point).

(2) The Respondent being liable for Ms Ausher's discriminatory act, compensation for injury to feelings was assessed at £3,500.

(3) As to the remark by Sgt Simmons, an injury to feelings award of £12,000 was made (the Simmons award).

8. In this appeal the Respondent challenges the ET decision in relation to both the Agency point and the Simmons award. There is no challenge to the assessment of compensation in relation to the Ausher remark, if responsibility therefore lies with the Respondent. We shall consider each point in turn.

The agency point

9. It is common ground before us that the common law principles of agency do apply to the construction of s32(2) **Race Relations Act**. There is now consistent authority to that effect in the Employment Appeal Tribunal; see **Yearwood v Metropolitan Police Commissioner** (2004) ICR 1660 (HHJ McMullen QC and Members), followed in **May and Baker Ltd v Okerago** (2010) IRLR 394 (HHJ Birtles and Members) and **Bungay v Saini** (UEAT/0331/10/CEA (2011) EqLR 1130) (Silber J and Members). In these circumstances it is conceded by Mr Reed on behalf of the Claimant that the ET applied the wrong legal test when, at para 31 of their reasons, they directed themselves that common law principles concerning agency are not necessarily applicable when dealing with s32(2) **Race Relations Act**.

10. In the light of that concession and the authorities to which we have been referred at EAT level it is simply not open to us in this appeal to approve the ET's approach. However, having taken time to consider the law, we would make this observation: s32(1) **Race Relations Act**, not applicable in this case, deals with discriminatory acts done by a person (the employee) in the course of his employment for which his employer is also liable. Significantly, in our view, the Court of Appeal, when construing that provision in **Jones v Tower Boot Co Ltd** (1997) IRLR 168, held that the common law vicarious liability principles to be found in the law of tort did not apply under s32(1). The phrase 'in the course of his employment' should be construed in a layman's sense by the ET as a question of fact. The court upheld the ET's finding that the employer was liable for the discriminatory acts of the Claimant's fellow employee.

11. We make that observation because **Tower Boot** was not cited to us, nor was it cited to the EAT in **Yearwood**, although we note that under the heading 'The agency issue', at para 30, Judge McMullen records a submission made on behalf of the Claimants that the word 'agent' in S32(2) is to be given its everyday meaning of 'a person who acts on behalf of another person with their authority', otherwise described as "agency in general terms rather than at common law". That submission was rejected by the EAT (para 40), which preferred to adopt the classic definition to be found in *Bowstead and Reynolds on Agency* (see paras 35-38). That definition includes, as Mr Purchase submitted to us, a power in the agent to affect the principal's legal relations. Whether or not that is an appropriate prerequisite for the establishment of an agency relationship for the purposes of s32(2) (cf. the Court of Appeal approach to s32(1) common law principles in **Tower Boot**) is not for us to question in this appeal. For in **Okerago** (paras 35-38), having adopted without question the approach in **Yearwood**, the EAT simply held that there were no findings of fact, either in the ET's original reasons, nor in the Employment Judge's answers to certain questions posed under the Burns/Barke procedure, to support a finding of liability on the employer for the discriminatory acts of an agency worker under s32(2) **Race Relations Act**. Further, in **Bungay v Saini** in considering the equivalent provision to s32(2) **Race Relations Act** to be found in reg 22(2) of the **Employment Equality (Religion or Belief) Regs 2003**, the EAT again adopted without question the common law approach in **Yearwood** (see para 23). However, the EAT then went on to accept (para 28) a submission made on behalf of the Claimants, by reference to **Tower Boot**. Pausing there, the provision in the **Race Relations Act** considered in **Tower Boot** was s32(1), equivalent to reg 22(1) of the 2003 Regs, and not reg 22(2) equivalent to s32(2) as the EAT there state. Thus, on analysis, It seems to us that in **Bungay v Saini** on the one hand the EAT espoused the common law approach to agency to be found in **Yearwood** and then appears to have adopted a departure from the common law principles in favour of the purposive approach of the Court of Appeal in

Tower Boot, finding that the Centre was liable for the discriminating acts of two directors of the managing board as their agents.

12. With these reservations in mind we are nevertheless bound to ask ourselves whether, given the concession made on behalf of the Claimant that the ET fell into error, we are in a position to determine the agency point on appeal, or whether it is necessary to remit the matter for further consideration by the ET, applying the common law principles of agency.

13. Mr Reed accepts that there was no direct relationship between the Respondent and Sodexho, the latter being the sub-contractor of Serco which was in a direct contractual relationship with the Respondent and further does not argue that if Serco was the agent of the Respondent, it follows that Sodexho was the Respondent's agent. In these circumstances he invites us to remit that question to the ET.

14. To the contrary, Mr Purchase submits that there is no warrant for the ET's reasoning particularly at paras 34-36 that the nature of the contract for the provisions of services by Serco to the Respondent, or the fact that civilian employees of Serco's sub-contractor, Sodexho, such as Ms Ausher, were subject to day-to-day control by the military, gave rise to any relationship of agency at common law between the Respondent and Sodexho and its employees. There was no evidence that the Respondent consented, expressly or impliedly, to Sodexho having authority to act as its agent or that its employee, Ms Ausher did so in such as way as to found liability for her discriminatory conduct in the Respondent. In particular, she was acting as the employee of Sodexho, not agent for the Respondent.

15. We accept that analysis advanced by Mr Purchase. The necessary causative link contended for by Mr Reed cannot be made out on the evidence before and the facts found by

the ET. In these circumstances the appeal on the agency point is allowed and the award in respect of the Ausher remark set aside.

The Simmons award

16. It is common ground that we can only interfere with the ET's award for injury to feelings in respect of the Simmons remark if it was manifestly excessive and/or a wholly erroneous estimate of the loss suffered by the Claimant. We endorse that approach.

17. Mr Purchase contends that on its face the award of £12,000 made in respect of the Simmons remark is totally out of proportion when compared with the award of £3,500 made by the same ET in respect of the Ausher remark. Both were one-off comments causing a similar degree of hurt and upset to the Claimant.

18. Mr Reed asks us to uphold the Simmons award on the footing, as the ET observed, that a distinction must be drawn between the case of Sgt Simmons, who was the Claimants superior officer (see para 38) and that of Ms Ausher, an employee of a civilian contractor.

19. We accept that distinction and reject Mr Purchase's submission that the two incidents are properly comparable. However, that said, we are persuaded, having been referred to other awards, that placing the Simmons remark in the middle **Vento** band was wrong in principle and manifestly excessive. Such an award would be appropriate for a course of discriminatory conduct. In the present case, in our collective judgment, the proper award, at the top of the lower band, is one of £6,000. Accordingly we shall allow this part of the appeal to the extent of substituting an award of £6,000 for that of £12,000 in relation to the Simmons remark.

Disposal

20. It follows that the appeal is allowed. The award in respect of the Ausher remark is set aside; that in relation to the Simmons remark is reduced to £6,000.