Appeal No. UKEAT/0127/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 October 2017
Judgment handed down on 21 December 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MS C WALTERS — APPELLANT

AVANTA ENTERPRISE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CIMONE WALTERS (The Appellant in Person)
For the Respondent	MR CHRIS MacNAUGHTON (Representative) Vista Employer Services Ltd Southgate Two 321 Wilmslow Road Cheadle SK8 3PW

SUMMARY

RACE DISCRIMINATION - Direct

PRACTICE AND PROCEDURE - Striking-out/dismissal

The basis of the Claimant's claim of race discrimination, properly understood, was that the attitude of a manager who had described her, an Afro-Caribbean, as a coconut or Bounty Bar, caused her to treat the Claimant differently from an employee who behaved stereotypically consistently with their race or ethnic origin. The Employment Judge erred in not considering that it was arguable that an Employment Tribunal should consider how a hypothetical white comparator would be treated in the circumstances and that on the basis of allegations in the ET1 it could not be said that the claim of race discrimination should be struck out as having no reasonable prospect of success. **Anyanwu v South Bank Students' Union** [2001] IRLR 305 considered.

The victimisation claim was rightly struck out as having no reasonable prospect of success.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Ms C Walters ("the Claimant") appeals from the Decision of an Employment Tribunal, Employment Judge Wade sitting alone ("the EJ"), sent to the parties on 31 March 2015 ("the Judgment"). The EJ struck out all the Claimant's claims - these were of disability discrimination, direct race discrimination, harassment and victimisation - as having no reasonable prospect of success. Following a Rule 3(10) Hearing before Mrs Justice Laing DBE, the Claimant's appeal from the striking out of her claims for direct race discrimination and victimisation (race) were permitted to proceed to a Full Hearing on revised grounds of appeal.

Outline Facts

2. The Respondent is a welfare to work and training provider in four main geographical regions. The Claimant, who is black Caribbean, was employed as a job coach in their Westminster branch from 21 May 2013 until her resignation on 6 June 2014, which she alleges was a constructive dismissal. Ms Choudhury, a Bengali, was her manager.

3. The EJ recorded that in paragraph 14 of the Claimant's claim she stated that in December 2013 Ms Choudhury threw some chocolates at her team:

> **"She jokingly suggested that she had chosen the chocolates for everyone's personalities and threw the Claimant a Bounty and exclaimed "I wasn't trying to say you're a coconut!!" The Claimant advised that they did not take this meaning as they did not see themselves as a "coconut" but rather as exotic due to their Caribbean heritage but they continued and two members of the team actually asked what a coconut was as they did not get the reference - The manager then went on to explain the racial slur and stressed again that she did not think the Claimant was a coconut."**

This made the Claimant feel uncomfortable.

4. The EJ observed at paragraph 9:

> **"… The reference to bounty/coconut is a slur used against a black person who is perceived to be behaving like a white person (black on the outside and white on the inside). The insult is towards a black person who is effectively [being] accused of being a collaborator; it's [sic] not a slur about the colour of their skin."**

5. In March 2014 a period of absence management of the Claimant began. The Claimant had been off sick for ten days from 16 September 2013.

6. On 1 April 2014 the Claimant started a period of thirteen days sick leave.

7. The Respondent placed the Claimant on a performance improvement plan ("PIP") in April 2014. The EJ recorded at paragraph 17 that this was triggered by the Claimant not hitting her key performance indicators. The EJ noted:

> **"… The Claimant criticizes the process and says that her manager Ms Choudhury was attempting to put all people who she believed to be coconuts at a disadvantage. The PIP had not progressed at the point the Claimant resigned."**

8. The EJ recorded at paragraph 16:

> **"There was one further unexplained absence on 27 May and on 28 May the Claimant resigned. … there was no formal sanction under disciplinary or capability procedure against her, just a verbal warning."**

9. The EJ outlined the claim of victimisation in paragraph 18:

> **"… The Claimant raised a grievance after she had resigned and this is treated as the protected act for the purposes of a victimisation complaint. It is important to note that no reference to the disability discrimination is recorded and the only reference to race discrimination is the complaint about the incident in December 2013."**

The Decision of the Employment Judge

10. The EJ set out in paragraph 22 a reason for holding that the complaint of direct race discrimination had no reasonable prospect of success. It was because "there is no white comparator and it is not easy to see how this could be race discrimination". The EJ held:

> **"… Whilst it is true that if the Claimant had not been black Ms Choudhury would probably not have had the discussing bounty/coconut with her but there is a chasm of time between the December 2013 conversation and the implementation of the PIP. Anyway, even the Claimant does not say the PIP was instituted because she is black; …"**

11. The EJ held at paragraph 23 that:

> **"… apart from the Claimant's after-the-event umbrage at the "coconut" conversation she made no reference to race discrimination in the ET1 or the grievance, perhaps because she did not consider the December 2013 conversation to be race discriminatory at the time. When reading the particulars of claim as a whole the allusion to race discrimination is very light."**

12. The EJ reasoned in paragraph 24 that the Claimant agreed that she did not reach her targets:

> **"… Why therefore look for an ulterior motive on the part of Ms Choudhury and why would a Tribunal conclude that there was evidence which could lead the Tribunal to infer that there had been race discrimination?"**

13. The EJ noted in paragraph 31 that the victimisation claim was made mainly because the Employment Judge on 2 February 2015 identified a complaint of failure to deal properly with the post employment grievance as a complaint of victimisation. However "race and disability discrimination were not the focus of the grievance and therefore were not likely to trigger an adverse reaction in the Respondent". The EJ concluded that:

> **"… Ms Choudhury was not the one to hear the grievance and she was the only manager likely to be aggrieved by the Claimant's accusations so all in all the Claimant received a sympathetic hearing to her grievance. …"**

14. The EJ concluded that the claims including those the subject of this appeal had no reasonable prospect of success and were struck out.

15. In the revised grounds of appeal the Claimant advanced the following contentions in relation to the striking out the claim of direct race discrimination:

(1) In striking out the complaint of race discrimination the EJ erred in her analysis in paragraphs 9 and 22 of whether the treatment complained of by the Claimant was because of race;

(2) The EJ erred in deciding that there was no white comparator, in failing to consider treatment of a hypothetical comparator and concluding that the "chasm of time" between Ms Choudhury referring to the Claimant as "a bounty bar" and the implementation of the Performance Improvement Programme ("PIP") was material.

(3) The EJ erred in paragraphs 8 and 24 in considering whether the Respondent had a discriminatory motivation in putting the Claimant on a PIP rather than the Claimant's case that the decision was caused or materially influenced by her race;

(4) The EJ erred in considering the Claimant's initial reaction to being referred to as a Bounty bar/coconut was definitive;

(5) The EJ erred in striking out the direct race discrimination claim before the case and evidence had been heard and without considering the claim at its highest.

As for the decision of the EJ to strike out her claim of victimisation the Claimant contended:

(6) The EJ erred in paragraph 32 in her analysis of the causation required by the **Equality Act 2010** section 27(1) by focussing on the language she used in her grievance rather than the doing of the protected act, the raising of the grievance;

(7) The EJ erred in paragraph 33 in her analysis of motivation by considering that of Ms Choudhury without considering whether others were materially

influenced by her protected act in dealing with her grievance in the way they did.

(8) The EJ erred in striking out the complaint of victimisation without considering evidence and taking the Claimant's case at its highest.

The Submissions of the Parties

16. Ms Walters submitted that the race discrimination she alleged before the EJ was less favourable treatment because she was black but behaved as a white person. The phrase, Bounty bar/coconut used by Ms Choudhury to her in December 2013 was relied upon by her not as an act of discrimination in itself but as evidence of how her manager Ms Choudhury regarded her. Her claim was that Ms Choudhury in the next year treated her less favourably than she would a hypothetical white comparator. It was said that because she was a black person who behaved as a white person she was treated less favourably than Ms Choudhury would treat a white person who behaved in the same way.

17. Ms Walters contended that because Ms Choudhury regarded her in an unfavourable way, as a black person who behaved like a white person and not as a stereotypical black person that she treated her less favourably than she would a white person. The less favourable treatment was said to be arranging her work to make it more difficult to achieve required targets and placing her on a PIP. The Claimant contended in her ET1 paragraph 65:

> **"This is an example of direct discrimination and harassment as it puts all people that the manager believes to be a coconut at a disadvantage in that people the manager did not label as coconuts were intentionally assisted at the cost of the claimant's statistics so as to avoid anyone being on a PIP except the claimant and potentially resulting in dismissal. This violates the Equality Act 2010 ss. 13(1), 26, 31(7), 39(2) and 40."**

18. Ms Walters contended that the EJ rightly recognised that she was not alleging that Ms Choudhury instituted the PIP because she was black but because she was targeting black people who she considered to be coconuts. However the EJ erred in holding at paragraph 22:

> **"… Therefore there is no white comparator and it is not easy to see how this could be race discrimination. …"**

19. It was said that the EJ erred in failing to consider the Claimant's case as it was put in the ET1. The race discrimination was not what was said in December 2013 but by Ms Choudhury applying that approach to her treatment of the Claimant. It was said that she would have treated a white person in the same way for acting as a white person. Accordingly the EJ erred in paragraph 22 in failing to consider how a hypothetical white comparator would have been treated. It was said the EJ misunderstood the Claimant's case was illustrated by the irrelevant reference to the "chasm of time" between the incident in December 2013 and placing her on a PIP.

20. Further Ms Walters contended that the EJ erred in paragraph 22 by placing weight on Ms Choudhury telling her immediately after the incident in December 2013 that she did not consider the Claimant to be a coconut. The Claimant contended that in referring to her "ulterior motive" in paragraph 24 the EJ erred. The EJ should have considered whether the view that Ms Choudhury had of black people who behaved like white people was the reason why she placed her on a PIP. The Claimant contended that other members of staff had also not met their targets but were not treated in the same way as the Claimant.

21. The Claimant referred to the judgment of Mr Justice Langstaff in **Mr and Mrs Chandhok v Ms P Tirkey** UKEAT/0190/14/KN paragraph 15 as demonstrating that a group with certain characteristics, in that case a caste, which was within a wider ethnic group, could

fall within the scope of **Equality Act 2010** section 9(1). The Claimant also referred to the judgment of the House of Lords in **Mandla v Dowell-Lee** [1983] ICR 385. She contended that as a black person who was regarded as behaving as a white person she fell within the category of belonging to an ethnic group identified by Lord Fraser as falling within the scope of "race" as a minority within a larger community.

22. Ms Walters contended that in the circumstances the EJ erred in striking out her race discrimination claim without considering her case at its highest and without evidence being tested. If she had done so she would not have concluded as she did in paragraph 24 that she did "not think that the Claimant would be successful in surmounting the burden of proof in relation to a race discrimination complaint".

23. The Claimant contended that the EJ erred in striking out her claim of victimisation. She contended that the EJ erred in concluding that race and disability discrimination was not the focus of her grievance therefore there was nothing linking the detriment of downgrading her grievance to the protected act of complaining of such discrimination. By ground 5 it is asserted that the EJ erred in paragraph 31 by placing weight on the omission by the Claimant to initially place the correct label on her claim when acting as a litigant in person. Further, ground 6 of the grounds of appeal asserts that at paragraph 32 the EJ erred in the analysis of causation required by **Equality Act 2010** section 27(1).

24. Mr MacNaughton for the Respondent relied on the Judgment of the EJ to support her decision. Mr MacNaughton recognised that the power to strike out a claim is to be used sparingly and with caution. He submitted that the EJ rightly took the Claimant's case at its highest but the claims did not "get out of the starting blocks".

25. Mr MacNaughton contended that on the facts alleged by the Claimant she could not assert that she was discriminated against on grounds of her race. It was submitted that the EJ recognised that the ethnicity of the Claimant was black Caribbean. Mr MacNaughton contended that being a "Bounty bar" or "coconut" a black person who behaves as a white person, is not a sub-set of Afro-Caribbean ethnic identity. The representative contended that this assertion would be similar to saying that Scottish or Welsh people who do act consistently with their traditional stereotypes were a sub-set of British citizens.

26. Mr MacNaughton pointed out that as recorded in paragraph 22 of the Judgment the one named comparator who the Claimant alluded to was black and that her allegation was that Ms Choudhury targeted black people who she believed to be "coconuts".

27. The Respondent's representative contended that there was not a shred of evidence that the Claimant had been discriminated against on grounds of her race whether by being put on a PIP or otherwise.

28. It was submitted on behalf of the Respondent that even if the EJ had erred in paragraph 22 of her Judgment her findings in paragraphs 23 and 24 supported her decision to strike out the race discrimination claim. The EJ observed in paragraph 23 that:

> **"… apart from the Claimant's after-the-event umbrage at the "coconut" conversation she made no reference to race discrimination in the ET1 or the grievance, perhaps because she did not consider the December 2013 conversation to be race discriminatory at the time. When reading the particulars of claim as a whole the allusion to race discrimination is very light."**

In paragraph 24 the EJ held:

> **"… Her record of what happened in December 2013 is not supportive of such a claim and also, in relation to the PIP, she herself agrees that she had not hit targets. …"**

A Mr MacNaughton submitted that the Claimant had not asserted facts sufficient to support a prima facie case of race discrimination to pass the burden of proof to the Respondent. The EJ was right to strike out the claim of direct race discrimination.

B

29. Mr MacNaughton contended that the EJ was right to strike out the victimisation claim. As the EJ recorded in paragraph 33 of her Judgment the Claimant had failed to assert facts which were capable of amount to a detriment as a result of lodging her grievance even if the C grievance could be regarded as a "protected act" within the meaning of **Equality Act 2010** section 27(1)(a).

D 30. In response the Claimant contended that the detriment relied upon in the victimisation claim was the Respondent not dealing with her grievance through the appropriate procedure but as if it were a complaint.

E

31. Mr MacNaughton contended that the EJ did not err in striking out the victimisation claim.

F

Discussion and Conclusion

32. Pursuant to **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** Rule 37(1)(a), a tribunal may strike out a claim if it has no reasonable G prospect of success. The importance of not striking out discrimination cases in particular in any but the clearest of cases was emphasised in **Anyanwu v South Bank Students' Union** [2001] IRLR 305. In such cases an employment tribunal may be invited to draw inferences from facts. Further the Court of Appeal in **Ezsias v Glamorgan NHS Trust** [2007] IRLR 603 held that it H will only be in exceptional circumstances that it would be appropriate to strike out a claim

where the central facts were in dispute and the evidence relating to them had not been heard. However within these parameters there is no special rule preventing the striking out of a race discrimination claim in an appropriate case.

33. In Ms Walters' claim the relevant facts were not in dispute. The task of the EJ in deciding whether to exercise her discretion under Rule 27(1)(a) was to determine whether the Claimant had put forward in her ET1 and supporting documents a case which demonstrated that her claims of race discrimination and victimisation had a reasonable prospect of success. The EJ rightly directed herself at paragraph 2:

> **"… Striking out a claim at a preliminary hearing is a draconian step which should not be taken lightly and which should only be taken in the context of allowing the Claimant to "put her best foot forward". This decision is based upon the content of the Claimant's ET1 together with the documents in the bundle which was provided for the hearing."**

34. In order to assess whether a claim of race discrimination has a reasonable prospect of success it was necessary to start by identifying the race to which the Claimant alleged she belongs. This was identified by reference to her colour, black. In my judgment a black person who behaves as if they are white is not a member of a group capable of falling within the scope of **Equality Act 2010** section 9(1). Accent, manners and behaviour which may mark out a black person as a "coconut" are learned characteristics. In my judgment the combination of black appearance and non-stereotypical behaviour does not fall within the description in **Mr and Mrs Chandhok v Ms P Tirkey** UKEAT/0190/14/KN relied upon by the Claimant. In **Chandhok** Mr Justice Langstaff P held at paragraph 51:

> **"It follows that with the omission of the bold assertion from paragraph 54 that "caste discrimination" is prohibited by the Equality Act - as to which the answer must be there is as yet no formal definition of "caste" for those purposes - there may be factual circumstances in which the application of the label "caste" is appropriate, many of which are capable - depending on their facts - of falling within the scope of section 9(1), particularly coming within "ethnic origins", as portraying a group with characteristics determined in part by descent, and of a sufficient quality to be described as "ethnic". As the Judge put it, caste "is an integral part of the picture" in the present case."**

35. The comparison required by **Equality Act 2010** section 23(1) for a race discrimination claim is that "there must be no material difference between the circumstances relating to each case". As the Claimant is black in my judgment it is strongly arguable that the relevant comparator is a white employee in no materially different circumstances. It is reasonably arguable that the relevant circumstances include that the white employee speaks and behaves as a white person, which was the behaviour which led Ms Choudhury to call the Claimant a "coconut" or a "Bounty bar" and that the comparison required by section 23(1) is with such a white employee.

36. In my judgment the EJ erred in holding in paragraph 22 that because the Claimant "alluded to" a black comparator there was no white comparator. The basis of the Claimant's claim may have been difficult to understand. However in my judgment the EJ erred in failing to identify the real complaint. It was that the Claimant was treated differently and less favourably as a black person with white behaviour. It is strongly arguable that consideration should have been given by the EJ to how a hypothetical white comparator who behaved as a white person is expected to behave as did the Claimant and who similarly was not achieving their targets would have been treated by Ms Choudhury.

37. Ms Choudhury calling the Claimant a "coconut" was not relied upon by her as an act of race discrimination but as evidence of the reason why she carried out the acts, including putting the Claimant on a PIP, which were the subject of the race discrimination claim. The EJ erred in holding at paragraph 23 that:

> **"… apart from the Claimant's after-the-event umbrage at the "coconut" conversation she made no reference to race discrimination in the ET1 or the grievance …"**

Once the basis of the claim is understood, paragraph 65 of the ET1 sets out the Claimant's complaint of less favourable treatment than such a white employee by being put on a PIP which she alleges to be:

> **"an example of direct discrimination and harassment as it puts all people that the manager believes to be a coconut at a disadvantage in that people the manager did not label as coconuts were intentionally assisted at the cost of the claimant's statistics so as to avoid anyone being on a PIP except the claimant and potentially resulting in dismissal. This violates the Equality Act 2010 ss. 13(1), 26, 31(7), 39(2) and 40."**

38. The Particulars of Claim in the ET1 run to 76 paragraphs. It is correct to observe that there is little reference in those paragraphs to race discrimination. In Particulars of substantially fewer paragraphs the claim articulated in paragraph 65 may have been more noticeable. However the EJ erred in observing in paragraph 23 of her Judgment that apart from the December 2013 incident the Claimant made no reference to race discrimination in the ET1.

39. The EJ stated at paragraph 23 that apart from the December 2013 incident the Claimant made no reference to race discrimination in her grievance.

40. With respect, this observation is somewhat at odds with paragraph 32 when, in considering the victimisation claim, the EJ holds:

> **"Whilst the grievance may be capable of being a "protected act" for the purposes of Equality Act s.27, race and disability discrimination were not the focus of the grievance …"**

In order to constitute a protected act within the meaning of **Equality Act 2010** section 27(2)(d) the Claimant must have alleged that the Respondent had perpetrated an act of race and disability discrimination. Either such allegations were made in the grievance or they were not.

41. At paragraph 24 the EJ observed:

> **"I also do not think that the Claimant would be successful in surmounting the burden of proof in relation to a race discrimination/harassment complaint … [as] she had not hit targets. …"**

The case being advanced by the Claimant included but was not limited to race discrimination in being disciplined for not reaching her targets but also in not being given the assistance given to others so that she could reach her targets. "Not thinking" that the Claimant would not be successful in discharging the burden of proof of her race discrimination claim is not the same as applying the necessary and high threshold required by ET Rule 34(1)(a) of concluding that a claim has no reasonable prospect of success.

42. For all these reasons in my judgment the EJ based her decision to strike out the Claimant's race discrimination claim on errors in analysing the claim. This led her to fail to consider whether the claim had no reasonable prospect of success when the Claimant's treatment was compared with a hypothetical white comparator. The EJ appears to have misunderstood the purpose for which the Claimant referred to the December 2013 incident. It was as evidence of the attitude of Ms Choudhury to her. The apology given, the lack of umbrage taken and the gap in time between the incident and the act of race discrimination complained of, being placed on a PIP, were given undue weight by the EJ. Further, although not extensive, despite the EJ saying there was no reference in the ET1 to race discrimination, it was referred to in paragraph 65 of the Particulars. Saying it is not thought that the Claimant would be successful in discharging the burden of proof in a discrimination claim is not the same as concluding that the claim has no reasonable prospect of success.

43. The race discrimination claim may have little prospect of success. However the EJ erred in concluding that it had no reasonable prospect of success and in taking the serious step of striking it out.

44. The EJ stated in paragraph 31 that the victimisation claim arose mainly because she had identified a complaint of failure to deal properly with a post employment grievance. The EJ recognised that a victimisation complaint "was not in the ET1 as the Claimant's focus at all".

45. At the hearing of the appeal before me, the Claimant contended that the detriment she relied upon in the victimisation claim was the downgrading of her grievance to a complaint. She fairly recognised that there was nothing in the ET1 linking this alleged detriment to a protected act.

46. The EJ recognised that it was she who identified a victimisation claim. On consideration the EJ concluded that such a claim had no reasonable prospect of success. The detriment expressed at the hearing of the appeal of downgrading the grievance to a complaint was not explained. Nor had a complaint been made in the ET1 of victimisation by detriment caused by a protected act of making an allegation of race discrimination.

47. The EJ did not err in striking out the complaint of victimisation contrary to **Equality Act 2010** section 27(1)(a) and (2)(d).

48. The appeal from the striking out of the claim of race discrimination succeeds. The claim of direct race discrimination is to proceed to a Full Hearing before an Employment Tribunal.

49. The appeal from the striking out of the complaint of victimisation is dismissed.