Appeal No. UKEAT/0147/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 November 2017

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

MR J EDWARDS — APPELLANT

(1) HOME LETTINGS LTD
(2) MR P WILLIS
(3) MS S STEWART — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID STEPHENSON (of Counsel) Direct Public Access
For the Respondents	MR R CHAUDHRY (Consultant) Peninsula Business Services Limited The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

RACE DISCRIMINATION

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Inferring discrimination

RACE DISCRIMINATION - Burden of proof

The Tribunal erred in concluding that the Second Respondent, the individual who informed the Claimant of his dismissal, did not say "*You're not right for me*" without properly explaining its reasons for so finding. The Tribunal found all of the relevant witnesses on this disputed issue to be credible and that the burden of proof had shifted to the Respondent. However, it could not, without a proper and full explanation, be said (as the Tribunal did) that the account of that matter given by the Second Respondent, on this potentially important issue of fact, was consistent; on the contrary, there were inconsistencies within the evidence which the Tribunal was required to address when setting out its reasoned conclusion on this issue. Once it has undertaken the task of determining an important issue of disputed fact and then explaining its reasons for that decision, it should then carefully consider its decision on the allegation of discrimination having regard to the burden of proof.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is an appeal against the Decision of the Employment Tribunal sitting in London South. The Decision itself was sent to the parties on 1 February 2017.

2. The application to appeal was considered on the sift by Mrs Justice Elisabeth Laing, who allowed it to proceed albeit on a very limited basis. The basis upon which it has proceeded and upon which it has been argued today is, essentially, two-fold. The first issue relates to the finding of the Tribunal that the Second Respondent - that is Mr Peter Willis, who carried out the dismissal of the Claimant - did not say the words "*You're not right for me*" when explaining the dismissal. The second issue is, to the extent that it is relevant to that first issue, whether the Tribunal erred in law when considering the question of direct discrimination, because its views were tainted by its earlier findings, the approach evidenced by, in particular at paragraph 50 (set out below), and, because it put too much weight on the Respondents' denials.

3. The appeal arises out of the Claimant's - I will refer to the Appellant as "the Claimant" - employment, which was for a relatively short duration. The Respondent is a Lettings Agency. It is a small organisation with approximately six employees working in one office. Mr Peter Willis is the Second Respondent and is the owner and Director of the First Respondent organisation. Ms Sarah Stewart is his Co-Director. She had the prime responsibility for recruitment. The Claimant, who is a British Black man, was recruited by the Respondent organisation to work as a Lettings Negotiator. He replaced the previous employee who had left - as the Tribunal records - in order to go to a higher paid role. The Tribunal decision also records that that previous employee was also Black.

4. On the evidence before the Tribunal it appeared that the Claimant had less experience than the Respondent had ideally sought but, nonetheless, they recruited him. The finding of the Tribunal was that both Respondents knew that the Claimant was Black before he was recruited. He was ultimately made an offer of employment on 2 April.

5. The Claimant was dismissed on 15 May. His dismissal was carried out by Mr Willis, the Second Respondent. However, the Tribunal found that both the First and Third Respondents had agreed before that that the Claimant should be dismissed. The reason that they gave, and that the Tribunal found was the reason for the dismissal, was the Claimant's performance.

6. The appeal relates, as I have already outlined, to one comment that the Claimant alleged had been made by Mr Willis when dismissing him. The Claimant alleged that Mr Willis said, in the course of that conversation, "*You're not right for me*". That was one of several other comments made in the conversation and about which the Claimant complained, namely: "*You're not right for me*"; "*you haven't got enough experience*"; "*in my experience there's no point in waiting any longer and I prefer to cut my losses now*"; "*I can't have you sitting in the office on your own while Sarah is on holiday*"; "*you're a nice guy, but you should be in social work*" or words to that effect.

7. The Tribunal's conclusion in relation to those allegations, and in particular the Claimant's case that Mr Willis said "*You're not right for me*", was set out at paragraph 55 of its Judgment. That reads as follows:

> **"55. The claimant complains about various statements made during that meeting. Mr Willis accepts that during the meeting he said the comments set out at para 3(c)(ii)-(v) of the list of**

> **issues[1]. He denies however saying "you're not right for me" (para 3(c)(i)) as he said he did not personalise the situation. When asked about this at the appeal his answers can be read to support both accounts. His written response in advance of the appeal supports his evidence to the Tribunal. His denial has been consistent and we find that he did not say it."**

The Parties' Submissions

8. On appeal, on the Claimant's behalf, the submissions have been as follows. First, the Tribunal's conclusion set out within that paragraph that Mr Willis' denial was 'consistent' was simply and plainly wrong, because it was not consistent with a number of other documents, including his witness statement, the Response to the Tribunal and the findings of the appeal officer who dealt with the Claimant's internal appeal against his dismissal. Secondly, and in any event, the Tribunal failed to explain adequately its decision that the Second Respondent did not say those words, having regard to that evidence of inconsistency. The third submission made was that, against the background that the Tribunal's findings of fact in relation to the making of that comment were flawed, the Tribunal then erred in concluding that the Respondent had not directly discriminated against the Claimant because it erred in its assessment of the Respondents' explanation for its actions. In particular, it was overly influenced by the view or approach it expressed in paragraph 50 of the Judgment, set out below.

9. The Respondents' Response to the appeal was short. Essentially, the Respondent submitted that, when the Reasons are read as a whole, it is clear that the Tribunal was fully entitled to reach the conclusion on its facts that it did; that this Appeal Tribunal should not interfere with that decision because it was for the Employment Tribunal to assess the credibility of the witnesses and they were entitled to conclude that Mr Willis' evidence had been consistent and should be preferred to the Claimant's account. Furthermore, it was submitted that Mr Willis' witness statement referred to the explanation that he had given in the documents

[1] The comments set out at paragraph 6 of this Judgment with the exception of the "*You're not right for me*" comment.

prior to the internal appeal. Finally, the Respondent submitted that it was clear that the Tribunal had accepted the Respondents' explanation for its decision to dismiss, namely the Claimant's performance, and consequently, it was submitted, whatever the position in relation to one particular comment, the finding on that issue would have made no difference at all to the ultimate outcome that the Tribunal reached.

10. On that last point, the Claimant replied that the fact that the statement had been found not to have been said meant, by definition, that is was not included in the Tribunal's overall analysis of the Respondents' explanation. If, in fact, the disputed words had been said, that fact would need to feed into paragraphs 63 to 65 of the Judgment (the reason for the dismissal) and, without it having done so, those paragraphs could not stand.

11. On remedy, I was requested, by the Claimant, if I allowed the appeal, to remit the claim for consideration of the claim as a whole to a differently constituted Tribunal. The reason relied upon for that submission was that it would be difficult for the Tribunal to come back from the view it expressed in paragraph 50.

The Authorities

12. Touching briefly on the authorities, I was referred in particular to **Anya v University of Oxford** [2001] ICR 847 CA. In that decision, the Court of Appeal emphasised the importance for Tribunals, when seeking to discern the reason for treatment in a claim of discrimination, to pay due regard to the fact that discrimination is often not conscious, particularly, when there has been a failure to follow appropriate equal opportunity policies, procedures or training. Furthermore, the evidence that racial factors contributed to a decision or a course of action may well emerge from surrounding circumstances and previous history, not just the alleged act of

discrimination of itself, particularly in cases where the decision taken or course of conduct complained about is capable of being influenced, often not consciously, by idiosyncratic factors or subjective analysis.

13. The Court of Appeal emphasised that Tribunals should not just set out what the evidential issues are but that they are required to follow them through to a *reasoned* conclusion; that a bold statement that X's evidence is preferred to Y's evidence is simply not enough, and that Tribunals should, in cases where this is required so that the parties can understand their reasons, explain why it was that X's evidence was preferred to Y's evidence on a particular issue.

14. Of course, a Tribunal, or indeed any Court tasked with making findings of facts at first instance, can prefer a witness' account on one issue and not on another. The task, which I recognise can be a difficult one at times, requires the fact-finding Tribunal to articulate what it is about a particular point or the witness' evidence that led them to prefer one witness' account to another. That, in my judgment, is all the more important in cases of this kind where an allegation of race discrimination is made. Race discrimination is rarely openly admitted and where race may have affected a decision, it is possible that a decision-maker allowed racial factors to play a part without consciously being aware of it at the time, particularly where there has been no, or inadequate, equal opportunities training.

15. I was also referred to the decision in **X v Y** UKEAT/0322/12, in particular at paragraph 60, where the EAT set out a reminder to Tribunals to take a holistic view of all the relevant facts when making decisions.

The Tribunal's Decision

16. In order to understand the appeal and the decision I have reached, I consider it is important to set out a number of other matters about the Employment Tribunal's Decision. First, in relation to a different point, the Tribunal found that, contrary to the Third Respondent's - that is Ms Stewart's - denials, she had in fact said to the Claimant, early on in his employment, "*what do I call you, coloured or black*?". The Claimant had politely replied to that, "*John is fine*". On that particular issue, the Tribunal had preferred the Claimant's evidence to that of the Third Respondent, Ms Stewart. They found that Ms Stewart had not intended to give offence; in fact, in a clumsy way, what Ms Stewart was seeking to do was to be polite. The Tribunal referred to the fact that the Respondent operated within a small office and was one within which there were discussions, legitimate discussions, around cultural sensitivities. However, the Tribunal also found that Ms Stewart, in relation to a different allegation made by the Claimant, did not make a reference to "*black people's time*". On that issue, the Tribunal preferred her evidence to the Claimant's. Thirdly, as recorded at paragraph 42 of the Tribunal's Judgment, Mr Willis, during the course of giving evidence, made reference to the expression "*coloured*" when referring to Black people. It appeared to be agreed between the parties that, during the course of the hearing, he was not aware that that could be an offensive phrase. Fourthly, Mr Willis had not had equal opportunities training.

17. It is at this point that I return to and set out paragraph 50 of the Tribunal's Judgment. In the course of making its decision about whether or not Ms Stewart had made a reference to "*black people's time*", the Tribunal recorded a number of matters: first, Ms Stewart had accepted that that particular comment, if it had been said, which the Tribunal found it had not been, would have been overtly offensive. The Tribunal then continued:

> **"50. It must be likely that if she said it [those words] would betray some racist attitude on her part. Given that it was Ms Stewart's decision to put the claimant forward for employment it is at least unlikely that she had such racist attitudes and, in the absence of any corroboration**

> **and given her emphatic denial of making the comment at all, we conclude on balance that she did not make the comment. We are conscious that we have preferred the claimant's evidence in relation to the other disputed comment[2], but find first that that comment could be seen, albeit clumsily, as trying to avoid giving offence and second that there was a context for making that comment."**

In the course of submissions, whilst making it clear he did not seek to enlarge the appeal and go behind the decision of Mrs Justice Elizabeth Laing at the sift, Mr Stephenson criticised that paragraph because, in his submission, it betrayed an error in the Tribunal's approach and further, that that flawed approach may have contributed to the Tribunal's error in its final conclusion regarding the reason for the dismissal. His submission was that this paragraph revealed an error because the Tribunal approached the matter 'back to front': it was wrong to start by categorising somebody as being racist; the Tribunal should not have determined whether Ms Steward had racist attitudes and then determined whether she would have been likely to make the comment. Rather, he submitted, it was important to look at what an individual does or says (find the facts) and then consider 'why' they acted as they did or said what they said and, at that point, consider whether or not that particular action, decision or statement was tainted by race. He also submitted that the Tribunal had placed too much weight on the Respondents' denials of having made the comment in dispute.

Conclusions

18. My conclusions are these. I consider that the Tribunal was wrong to conclude, as they did, that the comment "*You're not right for me*" was not made by Mr Willis without at least explaining more about that decision and their reasons for it. In particular, the Tribunal's summary of the evidence, at paragraph 55 of its Reasons (set out at paragraph 7 above), does not set out the entirety of the evidence that was before the Tribunal. The appeal officer who dealt with the Claimant's internal appeal against dismissal appears to have concluded that the

[2] "*what do I call you, coloured or black?*"

phrase "*You're not right for me*" was said by Mr Willis. At paragraph 49 of her decision she recorded as follows:

> **"49. "you're not right for me" - it is accepted this was reference to the 'fit' for the role John was required to do - and what was believed he could do. It was not a reference to race or colour."**

Therefore, the appeal officer appeared to have accepted, on the basis of what was being conveyed to her at the time that, in fact, that those words were said.

19. Secondly, in his witness statement, Mr Willis stated as follows:

> **"Mr Edwards has commented on my reasons for dismissing him on page nine, paragraph eight; I accept I made those comments, but I did not mean them in a derogatory or racial way and that I explained what I meant at the time and I have also clarified what was meant by those responses, pages 76-77, and these comments have also been reviewed as part of Mr Edwards' appeal at page 88." (Underlining added)**

20. That last reference, on the basis of the information before me, may have been a cross-reference to a document in which Mr Willis was required to answer a number of questions in writing before the internal appeal took place. In that document, which appears at pages 4 to 5 of the supplementary bundle in this appeal, Mr Willis had written as follows;

> **"Q: Please explain in detail what exactly do you mean by saying "you're not right for me"**
>
> **A: I did not use the term 'me' but said us i.e. the company Home Lettings. I made this comment having explained the concerns we had with his work and that we had come to the conclusion that he was not right for our company."**

21. I accept that it is possible that the Tribunal may have meant that they read Mr Willis' written statement to be referring to that particular passage. Nonetheless, the way that the reasoning is set out is, at best, ambiguous and, in my judgment, the Tribunal was required, in the light of the conflicting evidence on this issue, to explain precisely what they found had been said at different times and why they concluded as they did. Furthermore, the ambiguity in the documents is compounded by the evidence before the Tribunal of what was said or not said in

A the course of the internal appeal. At pages 10 to 11 of the supplementary bundle (internal pages 41 to 42 of the notes of the appeal) the Claimant asked Mr Willis in the appeal exactly what Mr Willis had meant by saying "*you are not right for me*". Mr Willis' response was "*I have already done that, on more than one occasion explained to you what I meant by that*"; Claimant: "*Sorry, where and when?*"; Third party: "*Let him finish*". Mr Willis then went on to say that "*When I said to you … that I was terminating your contract. We had a long discussion, you seemed to be very selective in what you can remember*". It is apparent from reading the notes of the appeal meeting that there then ensured a rather heated argument between Mr Willis and the Claimant.

D 22. What is clear, however, from those documents, is that Mr Willis did not immediately say "*I did not say me; I said us and I meant the company*". Furthermore, following the appeal hearing, the appeal officer, as I have already stated, concluded that the words "*you're not right for me*" were said (that is paragraph 49, page 20 of the supplementary bundle).

23. In addition, in the Respondents' Response to the Tribunal Claim (at page 53 of the bundle) the Respondent appeared to have admitted that the comment was made. The Respondents' defence was as follows:

> **"8. … The Respondent contends that the comments made during the meeting such as 'you're not right for me, you're not right for the company, in my experience there's no point in waiting any longer and prefer to cut my losses now, I can't have you sitting in the office on your own while Sarah is on holiday … you should be in social work' were made with reference to the Claimant's inability to perform the role, and highlighted how the Claimant's inexperience did not fit within the current business set-up, where an experienced negotiator was required."**

24. Finally, counsel, Mr Stephenson, submitted that it was only in cross-examination that Mr Willis had denied saying that the Claimant was not right for him (a matter which was not disputed during argument on appeal). Taking that evidence as a whole, it is, in my judgment,

simply not possible to say, without more, that Mr Willis' denial was 'consistent'. It was consistent, potentially, with what he had written before the appeal, but that would be the only consistency and other accounts given by the Respondent were not consistent with that.

25. I considered that it may well have been open to the Tribunal to find, on the evidence, that the words "*You're not right for me*" were not said but, in order to do so, the Tribunal needed to explain specifically how it had addressed those inconsistencies. That was a requirement imposed upon it by law and, in my judgment, it is also a requirement which follows from the approach the Tribunal should adopt when dealing with the claim of race discrimination and discussed in the authorities I have been referred to.

26. Discrimination, as already stated, is not usually overt. In this case the Tribunal concluded that each witness was credible, that none had been deliberately dishonest. In addition, they preferred different witnesses on different aspects of the case. There was an inconsistency in the Respondents' evidence with which the Tribunal needed to grapple and then it was required to explain explicitly why it made the decision it did. It was required to determine what was said and then, if appropriate, address what can be the difficult question of why it was said and why the Respondents acted as they did.

27. The task of explaining why one witness' evidence is preferred on a particular point is sometimes very difficult, because it requires the Tribunal to articulate what may possibly be an instinctive reaction to what they have heard and seen a witness say in evidence. Nonetheless, it is an important task which the Tribunal must undertake in discrimination claims. It may require a degree of self-reflection on the part of the Tribunal and each member of the Tribunal; just as

for example someone in Mr Willis' position, one would expect, would engage in a degree of self-reflection and ask themselves why they had the things they said, whatever that may be.

28. It is not enough, as the Tribunal did in this case, to simply set out the evidential issues. They must, and are required, to follow that through to a reasoned conclusion. For the reasons set out above, I am not satisfied that the Tribunal did so on this occasion. I therefore allow the appeal on the first and second issues summarised in paragraph 8 above.

29. In addition to the points made at paragraph 26 above, I then went on to consider the third point raised in the appeal. It is clear from the Reasons that the words "*You're not right for me*" form no part of the Tribunal's analysis because the Tribunal found that they were not said. Clearly, if that finding was wrong, and the comment was made, the Tribunal would need to look at the Respondents' explanation as to why it was said and set out its conclusion on that point and then consider that in the context of its analysis of the Respondents' overall explanation for the dismissal. Even if the Tribunal found as a fact that the words were not said, given the apparent inconsistency within the Respondents' evidence, they were also required to balance the inconsistency within the evidence and to consider it in the context of the employers' explanation as to why they acted as they did. At that point, on either version, the Tribunal were still required to consider whether or not they should draw an inference of discrimination.

30. Finally, nothing I have said should be seen to be encouraging lengthy decisions; on the contrary, a short and complete statement of reasons is a worthy aspiration and one which requires, often, greater time to prepare than a lengthy one. But, it is important to recall that in cases like this where the Tribunal had made a number of significantly important findings of

fact, that their conclusions on key matters are specifically articulated, with clear reasons for the decision that is made.

Remedy

31. That, then, brings me to the question of remedy and I considered the guidance set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I heard submissions from both parties on this issue. I considered issues of proportionality, cost and the passage of time. In my judgment, the Tribunal's decision was not totally flawed. The Tribunal made an error in relation to one matter. I accepted that it could, potentially, be an important matter. There were, however, cost implications at stake for both parties if the matter was sent back to a fresh Tribunal. There were no allegations of bias or partiality and no challenge to the professionalism of the Tribunal. I decided this issue on the basis that the Tribunal is capable of a professional approach when dealing with the matter on remission, particularly when specific guidance is set out.

32. The guidance I set out was that the Tribunal should look at the evidence about the making of that particular comment carefully and weigh and balance each piece of evidence relating to it carefully and against the evidence as a whole, before making the decision on the issue of fact of whether or not the statement was made. The Tribunal must then explain carefully, having regard to that evidence and evidence of inconsistency on the part of Mr Willis and the Respondent organisation, what consequence, if any, flowed from that and explain its conclusions. Then it should revisit its ultimate conclusion and apply to it the provisions relating to the burden of proof, as recently clarified in the judgment in **Ayodele v Citylink Ltd & Anor** [2017] EWCA Civ 1913. The Tribunal may find it useful to look at the passages cited within

A that judgment (Elias LJ) which draw the distinction between the acceptance of, on the one hand, a fact and, on the other hand, the explanation.

B 33. The Tribunal must be astute to ensure that it is clear on its findings that there is no discrimination - that must mean conscious or subconscious discrimination - and it must grapple with whether or not within this particular workforce there was evidence of subconscious discrimination at play because of, for example, the lack of equal opportunities training or the C use of outdated, or as what many would see as offensive, terms by individuals within that organisation.

D 34. It will be a matter for the Tribunal to consider whether or not they require any further evidence, or whether the matter could be dealt with on submissions alone; it may be they want to hear from both parties on that issue. They would clearly want to look at the documents that I have seen and that are within the bundle and the witness statements, and also careful notes of E the evidence that was given. It may be appropriate that there is an agreed note of the evidence that was given by Mr Willis. The Tribunal will need to set out what they believe was said decided in the internal appeal.

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35. I reject any implicit suggestion if made - and it was not expressly made - that remitting the matter to the same Tribunal would allow them simply to brush up reasons that they have G already given. It is going back to be reconsidered in the light of the guidance that I have set out. I expect the Tribunal to be open minded on the issue of whether or not, having gone through those steps, they reach a different conclusion.

H