Appeal No. UKEAT/0050/18/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 August 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MISS A OLADIPO — APPELLANT

LUSH RETAIL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOEL McMILLAN (of Counsel) Direct Public Access
For the Respondent	MR GARY SELF (of Counsel) Instructed by: Lester Aldridge Solicitors Russell House Oxford Road Bournemouth Dorset BH8 8EX

SUMMARY

VICTIMISATION DISCRIMINATION - Other forms of victimisation

The Tribunal's approach to and reasons for its Judgment in relation to the Claimant's complaint of victimisation dismissal and some of the evidence were unclear. Overall, and on the particular facts of the case, the lack of findings about the dismissing officers' knowledge or belief of the protected acts having been done, and other concerns in the findings and reasoning for its conclusions, the victimisation complaint only is remitted to a freshly constituted Tribunal for re-hearing, for the Tribunal to consider whether the Claimant's dismissal was because of victimisation contrary to sections 27 and 39 **Equality Act 2010**.

There is no challenge to the Tribunal's clearly reasoned and impeccable decision that the Claimant was not subjected to unlawful direct race discrimination.

HER HONOUR JUDGE STACEY

1. This case comes before this Tribunal on a Full Hearing on a Tribunal's approach to the evidence and causation in a victimisation complaint. The parties are the Appellant (Miss Oladipo) who was the Claimant below, and the Respondent to the appeal (Lush Retail Limited) was the Respondent in the proceedings below. I shall continue to refer to the parties as they were before the Employment Tribunal.

2. The Employment Tribunal Judgment appealed against was heard before Employment Judge Norris and Lay Members (Ms N Foster and Mr R Lucking) in the London (Central) Tribunal on the Claimant's complaint of direct race discrimination and victimisation. The detriment relied on as an act of victimisation was her dismissal. The issues before the Tribunal were crisp and clear, having been identified at a Preliminary Hearing before Employment Judge Snelson. The case was heard over three days from 28 to 30 March 2017. A Reserved Judgment, sent to the parties some six weeks later on 17 May 2017, dismissed the claim in its entirety.

3. The appeal today is only against the finding of victimisation and I will not rehearse the Tribunal's findings and conclusions relating to direct race discrimination except insofar as is necessary for an understanding of the underlying events. The central issue was whether the adequacy of its Reasons and the Tribunal's approach to the drawing of inferences and causation was legally flawed.

The History and Tribunal Judgment

4. The Claimant's case was that she had been dismissed in a telephone call on 1 September 2016 by the Respondent (a hand-made cosmetic company) because of victimisation after five months' employment with them.

5. The Claimant was initially employed by the Respondent as a sales assistant in their Oxford Street store, and in the summer of 2016, along with seven others, achieved her aim of being accepted onto the Respondent's intensive seven-week residential Spa Therapist Training Programme at the company's headquarters in Poole, Dorset which took place from 29 July to 20 September 2016. The course did not live up to the Claimant's expectations and the Claimant, together with three other of the trainees, were considered by the Respondent to be underperforming on the course. On 12 August the Claimant and a colleague, Mercedez Gonzalez, who was one of the other perceived under-performers, were told to return to the Oxford Street store on the following Monday, 15 August, and that their training would continue in store interspersed with their normal sales assistant duties. The Claimant's complaint of direct race discrimination concerned her treatment at the training course in Poole and the bulk of the Respondent's evidence was from the spa trainers and managers at Poole - Alanda Colegate (spa trainer), Nikki Camm (spa trainer manager) and Sonya Fanson (spa support). The other witnesses who gave evidence on behalf of the Respondent before the Tribunal were Elise McKenna (who did some of the spa training at the course in Poole, but was based in the Oxford Street store) and Nick Back (from people support).

6. The Claimant was very unhappy about her treatment and had not enjoyed being in Poole. There was a further difficulty, because as she had thought she would be out of London for seven weeks, she had either given up or sub-let her flat, and she did not in fact have accommodation to

return to in London at such short notice. She sent an extremely angry text on 14 August 2016 to Ms Rogers, who was an administrator at Poole, which was the first protected act relied on pursuant to section 27 of the **Equality Act 2010** ("EqA") and accepted by the Respondent as amounting to a protected act:

> **"Hi Julie, this is Aminat.**
>
> **As you know I will be leaving the flat [in Poole] today. I will leave my keys on the table, and I will be sure my room is cleaned and the bed stripped before I leave.**
>
> **I have left my expenses forms and receipt with Emily, I hope to still get reimbursed for food and travel as agreed.**
>
> **I would like to get some kind of feedback form from [sic] you, as I plan on filing a complaint against the trainers at 7 Witney road.**
>
> **Someone needs to be aware that certain trainers are practicing discrimination (and outright white supremacy) on behalf of the company - by favouring persons who are White, European, and thin.**
>
> **The manner I was treated in [sic] Friday was truly disgusting, and I will never under any circumstances come back to Poole Dorset.**
>
> **As a black woman, I have faced many instances of people in the UK showing overt racism towards me simply because of my color. I've had experiences wherein my humanity has been demeaned by persons who spat in my face and called me the N word.**
>
> **The aforementioned experiences, and feelings that accompanied those interactions is nothing however - compared to how I am feeling about my spa training experience with Lush.**
>
> **I thought I had seen the faces of evil in my 38 years on this earth, in fact, I thought I could recognized [sic] it from a mile away.**
>
> **I was wrong, the faces of evil are in fact embodied in the two trainers who are employed by one of the most ethical companies on this planet.**
>
> **Alanda and Nikki set Mercedes and I up for failure. I had hardly any support during my training. All of the White Trainee spa therapists in the group got talking trainer treatments - whilst Nikki did not say a word to me during my trainer treatment with her.**
>
> **I know when I am being set up Julie (I am a trained Nurse with 2 College degrees so you are not talking to a dummy) in fact, you can tell the trainers that I could FEEL and SEE what they were up to before the news was given to us.**
>
> **The only reason I am being sent back is due to my color and weight, and Mercedez is being sent back to Oxford street for the same reason.**
>
> **Alanda and Nikki were well aware that I am facing homelessness upon my arrival in London, yet this fact did not affect their disgusting decision.**
>
> **As far as I am concerned, they are the faces of evil and I would have preferred if they spat in my face and called me the N word.**
>
> **I am going [to] start drafting an email this weekend detailing everything I observed and my experience with the trainers. [T]his includes the obvious bias behavior they showed towards me vs the other white spa therapist trainees.**
>
> **If I do not hear from you by Monday, I have already called People Support, and I will file the written complaint through them if need be.**
>
> **I hope something is done about this, as I personally do not plan on coming back to Poole Dorset. My enthusiasm and passion for Lush [has] been diminished.**

> **Of all the places that I thought I would experience white supremacy and racism[,] Lush never came across my radar. I honestly do [not] know if I want to stay with the company as I feel really on edge and very stressed out. This whole situation was completely unnecessary. Why bring us all the way out here if this is how we will be treated? Why build our hopes only to have them dashed by persons who tell lies and play sick psychological games?"**

7. Ms Rogers did not give evidence at the Tribunal and nor was there any other evidence from her. However the Tribunal found as a fact that Ms Rogers did not refer the matter onwards (paragraph 4.14).

8. The second protected act relied on was an email of 25 August 2016 to Ms Bebb (one of the spa trainers in Poole) headed feedback, which criticised the trainers Ms Colegate and Gemma White, in contrast to Ms Bebb's training which the Claimant found to be supportive and helpful. In the email the Claimant asserts that she saw "*other group members in the team receiving way more support than Mercedez and I received. I can honestly say that [I] felt Alanda had an obvious preference for certain members of the group vs others*". She also stated that Ms Camm and Ms Colegate "*are just biased, and are more into how a person looks than ... the content of their character*". Mercedez is a reference to Ms Gonzalez who was the only other non-white trainee in Poole. The Tribunal found (paragraph 6.5) that the email did not:

> **"… either expressly or indirectly, make any allegation that someone had contravened the Equality Act 2010 in connection with race. The highest it goes is to allege that Ms Colegate had an obvious preference for certain members of the group and that she and Ms Camm were just biased and were more "into how a person looks" than the content of their character. This could be a reference to height, weight, fashion sense etc, and is insufficiently precise to constitute any reference to the protected characteristic of race as such. …"**

9. The third protected act relied on occurred during a telephone conversation on 29 August 2016 between Ms Fanson and the Claimant. Although not formally recorded in the Judgment[1] it is common ground that the Claimant told Ms Fanson that she felt that one of the trainers did not

[1] Paragraph 4.17 of the Judgment takes it as a given that there has been a protected act and the decision is focussed more on whether the Claimant sought to have her complaint dealt with formally or informally.

like black people and she considered that she had been kicked off the course because of her colour. It was accepted by the Respondent to be a protected act.

10. The Tribunal found that the Claimant was considered by the Respondent to be at times aggressive and her manner and attitude to be difficult and that these problems began to emerge before the protected acts were performed. There were three specific outbursts identified: on 27 August 2016 to a receptionist colleague at Oxford Street, and two incidents that occurred on 1 September 2016 to two colleagues in the communications and co-ordinations team that the Tribunal found caused her to be dismissed:

> **"4.18. The dismissal itself arose following three complaints about the Claimant from different members of staff. The first was on 27 August and arose because the Claimant was said to have been rude to a receptionist colleague, Ailsa Scott, when there was a discussion about what was happening to the Claimant's treatments. Ms Scott complained that the Claimant had been abrupt, rude and condescending and left her speechless, giving exactly the opposite vibe from what one would expect in a spa centre. This was the first time Ms Scott and the Claimant had spoken. The email from Ms Scott in which she briefly details this incident was in the bundle. Both the second and third complaints arose from incidents on 1 September 2016 and involved Gemma Holt and Jasmin Mondata in the communication and co-ordinations team. Both complained that the Claimant was rude and aggressive."**

11. That same day, 1 September 2016, as set out in the Tribunal's findings at paragraph 4.21, the Claimant's senior managers in Oxford Street, Claire Constantine and Ms McKenna, decided that the Claimant would be dismissed:

> **"4.21. … Ms Constantine and Ms McKenna … concluded that while the Claimant had improved as a therapist she was still not at the standard required and, in light of her recent conduct issues they would terminate her employment, the latter issues being pre-eminent in that decision. As a Lush representative, she was required to epitomise the brand, and she did not. Mr Back was called upon to draft a blueprint for the meeting, and the Claimant was dismissed with no right of appeal the following day."**

12. The Tribunal goes on to record that no procedure whatsoever was followed, which they were surprised at given the high ethical practice and values of the company:

> **"4.23. The Respondent has conceded, and we therefore find as a fact, that there was a signal failure to follow even a vestige of procedure on its part in dismissing the Claimant. She was called to a meeting at which she was presented with a *fait accompli* of her dismissal and no right of appeal because, the Respondent said, she had not completed her probation. As we have found, this is incorrect. There was a cursory investigation and then Ms McKenna and Ms**

Constantine decided that the Claimant's employment should end. They did not allow her to address them about the allegations against her before the decision was taken.

4.24. While the Respondent paid the Claimant in lieu of a month's notice that was, in reality, the only point in its favour. Had this concession not been made it would have had no prospect at all of defending its actions in this regard from a best, or even good, practice perspective. However, deplorable though those actions may be, and risky as they actually turned out to be - because they led the Claimant to think it was because of her protected acts - the issues before us do not include evaluating the Respondent's fairness, or lack thereof, in procedure. Mr Self says missing out a full process for employees who have been with the business for under two years is common practice up and down the country, but our experience as an industrial jury is that, increasingly, companies of this size and with aspirations to high ethical practice do not play fast and loose with basic disciplinary procedures."

13. The Tribunal then went on to conclude in paragraph 6.6, that the only reason for the Claimant's dismissal was her behaviour which was not conducive to the spa environment and that her protected acts did not in any way influence that conclusion:

"6.6. In light of our findings of fact, we conclude that the reason for the Claimant's dismissal was not that she had done those protected acts. It was because of her conduct in her dealings with her colleagues and the fact that the Respondent decided that her behaviour was not conducive towards the spa environment, either in terms of the business's image or her role. Her protected acts did not in any way influence that conclusion.

6.7. Although it is now said by Mr Ogilvy [the Claimant's representative] that the Respondent "raced" to dismiss the Claimant "because of her complaints", in fact we find that the text sent to Ms Rogers went no further, the discussion on 29 August 2016 with Ms Fansom appeared, so far [as] the Respondent was concerned, to have been dealt with …

6.8. We draw no inference from the Respondent's failure to call other witnesses to give evidence because it did not appear to us that there were any witnesses from whom we did not hear and who had necessary and relevant evidence to give as to the issues before us.

6.9. The burden of proof, according to the law we have set out above, is initially on the Claimant and we conclude that it does not shift. Even if we are wrong on that and it should have shifted, there is clear and cogent evidence from the Respondent that would have provided an explanation sufficient to discharge it."

14. The Tribunal had directed themselves as follows concerning the law:

"3.4. Section 27 EqA defines victimisation as circumstances where A subjects B to a detriment because B does a protected act, or where A believes that B has done or may do a protected act. Under section 27(2) a "protected act" includes (for present purposes) making an allegation, whether or not express, that A or another person has contravened the EqA, or doing any other thing for the purposes of or in connection with, the EqA.

3.5. Accordingly, a claimant seeking to show that they have been victimised must show that they have been subject to a detriment (which can clearly include dismissal) and that they were so subjected because they had done a protected act. While such a claimant does not have to compare themselves to someone else, they must establish that the alleged perpetrator knew or believed they had done a protected act."

15. It is accepted by the Claimant that paragraphs 3.4 and 3.5 are an accurate summary of section 27. It was also common ground that the Tribunal's direction concerning the burden of proof - section 136 **EqA** and the case law referring, was impeccable, and disclosed no error of law: the issue was whether the Tribunal had followed its own direction.

Grounds of Appeal

16. The grounds of appeal as helpfully re-arranged by Mr McMillan, were five fold: (1) that the Tribunal erred in failing to consider what adverse inferences ought to be drawn from the absence of evidence from Ms Constantine and Ms Rogers and whether Ms Rogers had passed on a text message from the Claimant; (2) that the Tribunal had erred in finding that the email to Ms Bebb (the second protected act relied on) was not a protected act; (3) that the Tribunal erred in failing to give proper consideration to what inferences ought to be drawn from the primary facts and whether such inferences were sufficient to shift the burden; (4) the Tribunal erred in failing to consider what adverse inferences ought to be drawn from the absence of evidence from Ms Constantine before concluding that the reason for the Claimant's dismissal was unrelated to her protected acts; (5) perversity in that no reasonable Tribunal could have dismissed the claim for victimisation.

17. The Respondent submitted that although the Judgment was not as clear or as detailed as might be ideal, and there were difficulties with some of its findings that strayed beyond the evidence before it, in light of the clear finding of the reason for the Claimant's dismissal being nothing whatsoever to do with the protected acts, the overall conclusion was unassailable. The Respondent had proved a non-victimisation reason for the Claimant's treatment which was a finding of fact that the Appeal Tribunal could not go behind. In such circumstances, the burden

of proof provisions have little to offer (as per Lord Hope of Craighead in **Hewage v Grampian Health Board** [2012] UKSC 37 paragraph 32).

18. Mr Self submitted that it is important to respect the primary role of the Employment Tribunal to make findings on the evidence before it. It is wrong to over-analyse or nit-pick and important to distinguish infelicitous wording from an error of law. Furthermore, I note that the Tribunal does not appear to have received as much help at the hearing from the Claimant's representative as they were entitled to expect and it is clear that the Tribunal has been diligent in attempting to put the parties on an equal footing, with or without the assistance of Mr Ogilvy. I approach the grounds of appeal with all that in mind.

Discussion and Conclusions

19. The Respondent accepted that there were a number of difficulties with some of the Tribunal's findings. It conceded that the Tribunal was in no position to make a finding that the text on 14 August was not forwarded by Ms Rogers to anyone, since Ms Rogers was not called to give evidence. It is also a slightly surprising conclusion given the extreme wording of the text. The problem is compounded by the absence of any evidence from Ms Constantine before the Tribunal. Ms Constantine was clearly an important witness who was the more senior of the two people who took the decision to dismiss the Claimant and on Ms McKenna's evidence, Ms Constantine led the dismissal meeting with the Claimant. There was no explanation for her not being called by the Respondent, and as HHJ Shanks noted in permitting the appeal to proceed at the Rule 3(10) Hearing, the meaning of the Tribunal's Judgment on the point is at best opaque when it concluded:

> **"6.8. We draw no inference from the Respondent's failure to call other witnesses to give evidence because it did not appear to us that there were any witnesses from whom we did not hear and who had necessary and relevant evidence to give as to the issues before us."**

When clearly Ms Constantine was a highly relevant witness. Mr McMillan refers to **Wisniewski v Central Manchester Health Authority** QBENF 96/0572/CMS1 and the well-known proposition that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give. It does not, of course, require a court or tribunal to draw such inferences, but there is force in Mr McMillan's argument that more was required of the Tribunal in explaining how it reached its conclusion in paragraph 6.8 above.

20. The difficulty with the Tribunal's finding concerning the second alleged protected act leads on from the absence of evidence from which to conclude that Ms Rogers kept the text of 14 August to herself. Whilst the Tribunal correctly identified that the email of 25 August does not make a direct allegation of breach of the **Equality Act 2010**, the Tribunal did not consider whether, pursuant to section 27(1)(b), the belief of the alleged discriminator that the Claimant has done, or may do, a protected act. The text of 14 August said, in express terms, that the Claimant would be complaining about the race discrimination experienced by her from the trainers on the course. Since it was an agreed fact (not addressed by the Tribunal) that Ms Constantine (one of the dismissing officers and therefore one of the alleged discriminators) told the Clamant in the dismissal meeting that she knew of her concerns, it is problematic that the evidence was not considered or discussed by the Tribunal. It is apparent from the Tribunal's discussion of the second alleged protected act that they considered it to be less important because the other two protected acts were conceded, but it overlooks the importance of section 27(1)(b) as to the state of knowledge or belief of the decision taker ("A" in the language of the statute) in the protected act having been done, or that may be done. Ms Constantine's state of knowledge or belief about the protected acts was an important evidential aspect of the case and was not addressed in Ms McKenna's statement.

21. In relation to the third protected act, which was the contents of the telephone call, the Tribunal concluded that the phone call had resolved the issue. As Mr McMillan points out, that is a surprising way to look at the question. I think, in fairness to the Tribunal, they have done that in order to consider whether or not the matter might have been taken further but they do not go on to analyse that in any detail.

22. There are then no clear findings of fact expressly on the face of the Decision as to whether either of the decision makers, Ms McKenna or Ms Constantine, knew or believed or suspected anything about the protected acts. That is a surprising omission (a) because it is an important matter for the Tribunal to analyse, and (b) the Tribunal had before it the transcript of the telephone call in which the Claimant was dismissed, when Ms Constantine accepts that she knew of the Claimant's concerns, which appears to be a reference to her concerns in general, which we know includes concerns about possible race discrimination. Ms McKenna's witness statement states that she had no idea that a grievance about race discrimination had been raised by the Claimant. It was important for the Tribunal to have recorded that finding, if it had accepted the evidence.

23. Those are the criticisms that can fairly be levelled at the Tribunal's findings. Mr Self's response, for the Respondent, is that the clear finding of fact providing non-victimisation reasons for dismissal which discharged the Respondent's burden of proof, had it shifted. The unequivocal finding that the behaviour described from events of 27 August and 1 September are clearly matters that evidence inappropriate conduct towards colleagues. This would be exactly the sort of behaviour that might lead an employer to dispense with someone's services. So even if the Tribunal had erred in concluding that the Claimant had not raised a *prima facie* case shifting the burden of proof, the Tribunal dealt with the matter in the alternative in any event.

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24. I have found this to be a difficult case because the findings concerning the Claimant's behaviour are powerful and would provide non-victimisation reasons for the Claimant's dismissal. The guidance in **Martin v Devonshires Solicitors** [2011] ICR 352 EAT by Underhill P (as he then was) on whether features in the manner of the performance of a protected act could properly be treated as separable as from the act itself - and I refer to the Claimant's choice of wording in her email of 14 August for example - would also be something for the ET to consider. However, I am troubled by the lack of engagement by the Tribunal with some of the relevant evidence and the component parts of the victimisation claim. There is a troubling absence of reasoning and attention to detail, and an anxiety that relevant evidential matters have not been discussed or findings made in the Tribunal's Decision. The Tribunal's reasons for reaching its Judgment have not been set out clearly enough. On balance I conclude that it is not just a matter of infelicitous wording and over-zealous nit-picking of approach by this Tribunal, but that both parties are entitled to a more forensic and detailed approach to the evidence that they have presented by reference to the applicable legal tests. As Mr Self submitted, it may be that the Tribunal will find that the witnesses called by the Respondent were reasonable and proportionate and no adverse inferences can be drawn from the absence of Ms Constantine, but the Tribunal will need to explain why it reaches that conclusion, if indeed it does. The approach to the evidence set out in **Anya v University of Oxford** [2001] ICR 847 and an analysis of the indicators relied on by the Claimant was required in this case and was lacking.

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25. Therefore with considerable hesitation, I conclude that on balance the victimisation question should be re-heard. As canvassed in the course of argument, it may well be that the result will be the same following that exercise, but the Claimant will know that the matters raised in grounds 1 to 4 of this appeal, which may be relevant, have been considered and explained by

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the Tribunal. For the avoidance of doubt, the appeal does not succeed on the perversity ground and ground 5 is rejected.

26. As to whether the victimisation claim should be remitted to the same or a fresh Tribunal, the factors set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 were considered. The issues are discrete and clear, the evidence limited and the hearing should be comfortably concluded in a day, two at most. It is now two years since the Claimant's dismissal and there is a risk that the original Tribunal have forgotten about the case with the passage of time. Although the Claimant's concern that given the Tribunal's earlier findings it will be hard for it to approach the matter afresh is not shared by this Tribunal, I see the force in the argument that the preferred course would be to remit the case to a fresh Tribunal to consider the Claimant's victimisation complaint including the making of findings and conclusions in relation to matters 1 to 4 set out in paragraph 16 above.