Appeal No. UKEAT/0024/18/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 September 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

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(1) MISS K STEFANKO
(2) MISS J WORONOWICZ
(3) MR J JONIK — APPELLANTS

(1) MARITIME HOTEL LTD (in voluntary liquidation)
(2) MR N DOHERTY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	DR EWAN McGAUGHEY (of Counsel) Free Representation Unit
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

CONTRACT OF EMPLOYMENT - Written particulars

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Comparison

The Employment Tribunal erred in concluding that an employee who has more than one but less than two months' service is not entitled to a section 1 **Employment Rights Act 1996** statement of terms and conditions of employment. It does not follow from the flexibility afforded to an employer by section 1(2) as to when the statement of initial employment particulars must be provided, that there is no requirement to provide a statement if the contract ends within two months.

The Employment Tribunal's dismissal of the Second Claimant's claim under section 1 and refusal to make an award under section 38 **Employment Act 2002** is set aside and substituted with a finding that the First Respondent was in breach of section 1. The case is remitted to a different Tribunal to calculate the award under section 38.

The Employment Tribunal erred in its approach to the Claimants' complaints of direct race discrimination in (1) not considering whether the manner, as well as the fact of dismissal, constituted direct race discrimination; and (2) in its application of the burden of proof to the evidence in its conclusion that the fact of dismissal did not constitute direct race discrimination. The complaint of direct race discrimination in dismissal is remitted to a new Tribunal for re-hearing.

HER HONOUR JUDGE STACEY

1. There are three distinct and entirely separate issues in this appeal. Firstly, whether section 1 of the **Employment Rights Act 1996** ("ERA 1996") entitles an employee to a written statement of terms and conditions of employment if his or her employment ends between one and two months after the beginning of employment; secondly, the Employment Tribunal's approach to the evidence concerning a complaint of direct race discrimination; and thirdly, the effectiveness of the litigation process to enforce the Claimants' rights where the First Respondent before the Tribunal below is now in creditors' voluntary liquidation.

2. The Employment Tribunal hearing was before Employment Judge Kolanko and members (Mrs S Collis and Mr R Spry-Shute), and took place on 5 to 7 June 2017 with a further day on 19 July 2017. Following a chambers discussion on 20 July 2017, a Reserved Judgment with Reasons was sent to the parties on 31 August 2017.

3. The Appellants were the Claimants below. The First Respondent to the appeal was the First Respondent below and the employer of the Claimants. The Second Respondent was the sole Director and one of two Shareholders of the First Respondent. I shall continue to refer to the parties by reference either to their names or their status below.

4. The claims succeeded in a number of respects: for wages, holiday pay, section 38 compensation for failure to provide a section 1 statement of terms to the First and Third Claimants, and a finding of automatically unfair dismissal for asserting a statutory right, contrary to section 104 of the **ERA 1996**. But the complaint of direct race discrimination in dismissal was dismissed, as was the Second Claimant's claim for breach of section 1 **ERA 1996** and claim for

compensation under section 38. There is no cross-appeal by either Respondent in relation to the aspects that were successful. The Claimants seek to appeal the findings concerning race discrimination and the finding in relation to section 38 **Employment Act 2002** concerning the Second Claimant.

5. At the sift procedure before this Tribunal, Mrs Justice Laing considered there were some arguable grounds and permitted the claim to go forward on the claim of direct race discrimination on the basis that the Tribunal had erred in law by stating that there was no evidence of less favourable treatment, and that it had misapplied the burden of proof set out in section 136 of the **Equality Act 2010**. Secondly, that it was arguable that it had erred by failing to give an award for the employer's failure to provide a written statement of the contract of employment to the Second Claimant. However, the Claimants were not permitted to reopen the harassment claim that had been withdrawn at a previous Preliminary Hearing.

6. The Respondents were not present today. The First Respondent is now in creditors' voluntary liquidation as of 19 February 2018 and the liquidator indicated he would not be taking part any further. There was no explanation from the Second Respondent as to why he is not here today, in his written answer to the appeal he seeks to uphold the Tribunal's decision and explains that he is not a racist by any means having employed many ethnic minorities over the years. He has paid the monies ordered by the Tribunal and the appeal is a set up to destroy him and his business. He resists the appeal. I am especially grateful to Dr McGaughey who has provided his services to the Claimants pro bono under the Free Representation Unit scheme.

The Employment Tribunal Judgment

7. The Claimants are of Polish national origin and were employed as waiting staff by the First Respondent, commencing on various dates from 21 April 2016 until their summary dismissal on 7 July 2016, at the First Respondent's hotel in Portland, Dorset. The Second Respondent, who stayed at the hotel was a hands-on manager and co-owner as Shareholder and Director of the First Respondent.

8. The Claimants were provided with accommodation at the hotel. None of them were given a section 1 statement of terms and conditions at any time during the course of their employment or thereafter.

9. It is evident from the Tribunal's Decision that the Claimants were not well treated by their employer and were frequently sworn at by the Second Respondent. When they objected to persistent shortfalls in their wages, late payment and a falsification of their wage slips, they were summarily dismissed on 7 July 2016 (two weeks after the Brexit referendum), told to pack their bags and leave the hotel immediately. They did as they were requested but with nowhere else to go, got into their vehicle and drove to Dover and onwards to Poland.

Section 1 ***ERA 1996*** *Statement of Terms*

10. There was a conflict of evidence between the Claimants and the Respondents about whether they had been provided with a written statement of the terms of their employment. The Tribunal found as follows:

> **"15. … On the disputed issue of written contractual terms and conditions being provided to the claimants, we are entirely satisfied that the claimants received no documentation containing terms and conditions of employment during the course of their employment with the first respondent."**

11. The Tribunal considered whether that failure by the First Respondent gave rise to a remedy pursuant to section 38 **Employment Act 2002** ("EA 2002") and concluded that the Second Claimant, Ms Woronowicz, unlike her colleagues, would not be entitled to an award under that section because she had less than two months' employment, reasoning as follows:

> **"25. In respect of the complaint under section 38 of the Employment Act 2002, we are satisfied that no written employment particulars were provided to the claimants during their employment, and certainly not particulars that accord with section 1 of the 1996 Act. The obligation under Section 1 is to provide such particulars not later than 2 months after the beginning of the employment. Such obligation was not complied with in respect of Miss Stefanko, or Mr Jonik. Miss Woronowicz's employment ended within the 2 months. In view of the failure of the respondent to provide such information, and having regard to the fact that we have rejected their evidence that contract documents had been provided, we judge it is just and equitable to make an award of 4 weeks basic pay in favour of Miss Stefanko, and Mr Jonik. …"**

The First Claimant was awarded £1,176.36 and the Third Claimant £1,078.68 representing four weeks' pay. It was common ground that the Second Claimant had accrued six weeks' continuous service when her employment ended on 7 July 2016, which had commenced on 20 May 2016, two weeks shy of two months' service.

Race Discrimination

12. The Tribunal identified, in paragraph 3 of its Judgment, that the issue in the race discrimination complaint was whether "*the respondent subjected the claimants to the following treatment falling within section 39 Equality Act 2010, namely dismissing them?*" It then posed the following questions: whether the Claimants had been treated less favourably than hypothetical comparators; whether the Claimants had proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic; and fourthly, directed itself to consider the Respondent's explanation and whether it proved a non-discriminatory reason for any proven treatment, if the burden of proof had shifted?

13. The list of issues is taken from the ET1 and an earlier Preliminary Hearing. The narrative in the ET1 provided by the Claimants describes the dismissal having been undertaken in a particularly brutal manner and being accompanied with racially tainted language. The comments said by the Claimants to have accompanied the dismissal are set out in the claim form including comments such as, "*Fuck off from my hotel and take your Polish friends with you*". Other similar comments and matters were recited in the Claimants' witness statements.

14. It is noteworthy that the Claimants agreed at the Preliminary Hearing that they were not relying on a separate and a freestanding complaint of racial harassment, but focusing on the dismissal. It is apparent from both the Preliminary Hearing and the wording of the ET1 form that the Claimants were alleging discrimination about the treatment in the *way* they were dismissed, or manner of dismissal, as well as the *fact* of their dismissal.

15. The findings of fact that the Tribunal reached, having heard the evidence, are set out at paragraphs 10.16 to 10.18 of the Judgment. They describe the criticism meted out to the Claimants, in particular Ms Woronowicz, by Mr Doherty and also by the hotel manager Ms Friedi-Mackenzie and the way in which Ms Woronowicz was criticised for having asked for correct wages and an accurate pay slip.

16. The Tribunal found that although Mr Doherty did not call Ms Woronowicz a "*self-centred Polish bitch*" he was very angry and told her that if she thought things were so bad, she should go back to Poland and that he repeatedly swore and told the three of them to pack their bags and leave as they repeatedly requested the correct payment for their wages. The Tribunal heard a recording of the conversation with Mr Doherty, which corroborated the Claimants' account that Mr Doherty had sworn at them and been extremely angry and the Tribunal also noted that Mr

Doherty mimics Mr Jonik's Polish accent in the exchange. The paragraphs go on to explain the angry exchange that took place.

17. The Tribunal then set out what it described as the relevant statutory provisions to the issues in the case. It set out section 1 **Employment Rights Act 1996** and section 38 **Employment Act 2002** in full. It also set out section 13 **Equality Act 2010**, the definition of direct discrimination, but no other sections or provisions of that Act are set out or summarised, nor is there any reference to the burden of proof provisions or section 136.

18. The Tribunal made the following conclusions relating to the dismissal and the discrimination complaint.

19. In paragraph 20 they find that the reason for the dismissal was the assertion of a statutory right. The Tribunal found that the Respondents "*were appreciative of the work the claimants provided*" as they apparently particularly valued Polish workers. The finding at paragraph 21 was that the only reason for their dismissal by Mr Doherty on 7 July was for their assertion of their statutory rights.

20. It then turned to the complaint of race discrimination. The findings are set out at paragraph 24:

> **"24. We now turn to the complaint of direct discrimination on the grounds of race. It is not disputed that they suffered the treatment of being dismissed. Was such treatment less favourable treatment than would have been received by a hypothetical comparator? We have to say that we have received no evidence to suggest that the hypothetical comparator in similar circumstances, that is complaining about non-payment of wages and or unlawful deduction would have been treated more favourably than the claimants, nor have we heard any evidence to suggest that the respondents' questionable approach to lawful payment of wages and the implications of tax and the national minimum wage was only imposed upon the claimants as Polish nationals and not other staff. The claimants in their evidence were at pains to point out the respondent's behaviour towards other staff who in consequence left the first respondent's employment. We do not find that the claimants have established less favourable treatment on the grounds of race, this complaint is accordingly dismissed."**

21. In that paragraph they say that they have not received any evidence to suggest that a non-Polish comparator in similar circumstances, complaining about non-payment of wages, would have been treated more favourably than the Claimants. They do not think that the Respondent's questionable approach to lawful payment of wages was imposed upon the Polish nationals and not other staff. The Tribunal does not address the questions it has listed in paragraph 3 of its Judgment (set out in paragraph 12 above).

22. The Remedy Hearing remains outstanding in relation to the complaints which the Tribunal decided were well-founded.

The Appeal Grounds

Section 1 ***ERA 1996*** *statement and remedy under section 38* ***EA 2002***

23. Section 1 **ERA 1996** provides that:

> **"(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.**
>
> **(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment."**

Section 2(6) provides as follows:

> **"(6) A statement shall be given to a person under section 1 even if his employment ends before the end of the period within which the statement is required to be given."**

For the sake of completeness, I note that section 198 **ERA 1996** headed "*Short-term employ*ment" provides that sections 1 to 7 **ERA 1996** do not apply to an employee if his or her employment continues for less than one month. Since the Second Claimant had continuous service for six weeks, she is unaffected by the provision however.

24. Prior to the **EA 2002**, where an employer was found to be in breach of section 1, the only remedy was for the Tribunal to determine the particulars that ought to have been included in the

section 1 statement in accordance with sections 11 and 12 **ERA 1996**. For employees whose employment had ended, the provision therefore tended to be of more historic than practical benefit, unless there was also a dispute about what the contractual terms had been. The **EA 2002** introduced what was in effect a financial penalty for non-compliance by an employer consisting of either two, or four, weeks' pay (unless exceptional circumstances apply which would make it unjust or inequitable to make an award), where a successful claim had also been brought in respect of any one of a number of jurisdictions listed in Schedule 5 to the **Act**. The rights under section 38 **EA 2002** are in addition to the Tribunal's power to make a determination in accordance with section 12 **ERA 1996**. The section 1 right therefore gained an added significance for former employees but has received little attention by way of case law. The details of section 38 are not relevant for the purposes of this appeal, since if the Second Claimant is entitled to a section 1 **ERA 1996** statement it will follow, on the facts of this case, that she is entitled to an award under section 38 **EA 2002** subject only to the exceptional circumstances proviso.

25. **EU Directive 91/533/EEC** on the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship is also relevant. The Recitals clause of the Directive notes the importance of providing written terms to employees for the purposes of transparency and enforcement. Article 1 provides as follows:

> **"1. This Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.**
>
> **2. Member States may provide that this Directive shall not apply to employees having a contract or employment relationship:**
>
> > **(a) with a total duration not exceeding one month,**
> >
> > **…"**

26. The **ERA 1996** therefore complies with the requirements of the **Directive**.

27. In concluding that the Second Claimant did not have a right to receive a section 1 statement and consequentially no right to the remedy in section 38 **EA 2002**, the Tribunal has overlooked section 2(6) **ERA 1996**. The effect of sections 1, 2 and 198 is to make the entitlement to a section 1 statement a time served right, applicable to employees with one month's service, but thereafter, the employer is provided with a one month's grace in which to supply the written statement. However, the obligation to provide the statement continues for employees with one month or more service, whether or not the employment relationship is ended in its second month. It does not follow from the flexibility afforded to an employer by section 1(2) as to when the statement of initial employment particulars must be provided, that there is no requirement to provide a statement if the contract ends within two months.

28. It goes without saying that whilst sections 1, 2 and 198 **ERA 1996** represent the minimum floor of legal rights, it is best practice for the written particulars to be provided as soon as possible to protect both parties and in order to minimise risk of ambiguity or misunderstanding of the terms agreed that form the contractual basis of the employment relationship. In the words of the recital to the **Directive** it is important for enforcement and transparency.

29. I therefore conclude that it is an error law for the Tribunal not to have found that the Second Claimant was entitled to a section 1 statement which she should have received on or before 19 July 2016 regardless of whether her contract still subsisted at that date. I declare that the First Respondent failed to comply with the Second Claimant's entitlement to a section 1 **ERA 1996** statement by 19 July 2016.

The Race Discrimination Complaint

30. The Claimants' argument is that the Tribunal erred in law in dismissing the complaint of race discrimination by misapplying the burden of proof and stating there was no evidence of less favourable treatment when its own findings recorded such treatment.

31. In considering an appeal of this nature, it is important to be clear of the distinction between an error of law and facts found by a Tribunal that it has been entitled to reach. Only the former is susceptible to interference by this Appeal Tribunal. It is easy to allege a misapplication of the burden of proof when the real criticism is merely a dislike of the Tribunal's legitimate findings. Where neither of the Respondents has participated much in the appeal it is also worth considering what points could have been made on their behalf.

32. Section 136 **Equality Act 2010** ("EqA 2010") provides that:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court [which includes an employment tribunal in section 136(6)(a)] must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

33. I agree with Dr McGaughey's submission that when, as here, there are specific findings that comments have been made which appear on their face to be related to race and amount to less favourable treatment such as mimicking one Claimant's Polish accent and telling another to "Fuck off back to Poland" the Tribunal needed to have explained its reasoning as to how it applied the burden of proof and reached the conclusion that the dismissal had nothing whatsoever to do with race discrimination.

34. The difficulty is compounded by the Tribunal not having referred at all to the burden of proof provisions in its Decision or answered the questions it posed itself in paragraph 3 of its

Judgment. Another troubling aspect is that the Claimants' evidence included many other allegations of the use of racial epithets by the Respondents and other race-tainted behaviour which have not been addressed by the Tribunal which did not make relevant findings one way or another on the specific allegations. It is therefore difficult to see how the Tribunal could conclude, as it did in paragraph 24, that "*We have to say that we have received no evidence to suggest that the hypothetical comparator in similar circumstances ... would have been treated [differently]*". They had heard evidence, but it is unsure what they made of it.

35. Hale LJ's (as she then was) observations on the "*Porcelli* principle" and the useful rule of thumb that the more specific the insult and the injury by reference to a protected characteristic, the more persuasive must be the proof that the behaviour was completely unrelated to a protected characteristic in **Pearce v Governing Body of Mayfield Secondary School** [2001] EWCA Civ 1347 are apt in this regard. Especially since some of the comments or incidents appear overtly racial.

36. It could perhaps be argued on the Respondents' behalf that the finding at paragraph 21 that the only reason for the Claimants' dismissal is the whistleblowing effectively answers the Claimants' concerns since it makes an explicit finding of a non-racial and exclusive reason for the dismissal that in effect deals comprehensively with the race discrimination allegation. With some hesitation however, I would not have accepted the argument had the Respondents been here to make it. It is certainly a possibility, but without further explanation by the Tribunal it is not sufficient. It is also apparent from the claim form that the Claimants allege discrimination in both the fact of and manner of their dismissal, and the particularly brutal manner of dismissal has not been considered sufficiently by the Tribunal.

37. Overall, I therefore consider that there has been enough shown to me today by Dr McGaughey to say that the Tribunal has erred by failing to consider the burden of proof, failing to reach findings on material evidence and/or failed sufficiently to explain its reasons for its Judgment in order to be **Meek**-compliant.

Right to an effective remedy

38. Dr McGaughey advanced a further point in his skeleton argument and at the hearing, which was not in the original grounds of appeal and permission had not been granted to raise it. I shall therefore deal with it only briefly. The argument was that now the First Respondent is in creditors' voluntary liquidation, the Judgment should be enforced against the individuals responsible for the wrongs committed by the First Respondent. It is argued that it is necessary to give effect to the fundamental principle that rights should be given an effective remedy as recently reiterated by Lord Reed in **R (UNISON) v Lord Chancellor** [2017] UKSC 51 at paragraphs 6 and 68. Furthermore, Dr McGaughey submits, in relation to the section 38 **EA 2002** rights, was reinforced by the additional requirement under EU law to an effective remedy since the obligation stems from the **EU Directive 91/533/EEC**.

39. I do not grant permission for a matter to be raised that is not in the grounds of appeal, especially when the Respondents are not here to argue the point and nor are they on notice of it being raised. Additionally, it is an argument that would, if successful, have considerable ramifications and there are those no doubt who might wish to intervene in the debate should a Court or Tribunal consider the matter more fully. It would, for example, raise questions over privity of contract and well-established insolvency principles. I therefore dismiss the proposed ground of appeal.

Conclusion

40. The appeal is allowed in part. The Second Claimant was entitled to and did not receive her statement of terms and conditions contrary to sections 1 to 7 of the **Employment Rights Act 1996** and, since other parts of her Tribunal claim were successful, she is entitled to an award under section 38 of the **Employment Act 2002**. It is a judgment for the Tribunal to decide whether to award her two or four weeks' pay, (or if exceptional circumstances apply) and to make findings of fact about the Second Claimant's week's pay and to calculate the amount due to her.

41. I also find that the issue of whether the Claimants were subject to unlawful direct race discrimination in their dismissal should be re-heard, since the Tribunal erred in its approach to the burden of proof and/or in the sufficiency of its reasons.

42. I remit the case back to the Tribunal as follows:

(1) To calculate the Second Claimant's week's pay and decide whether she should receive two or four weeks' pay, or if exceptional circumstances apply, for the non-provision of her section 1 statement of terms, pursuant to section 38 **Employment Act 2002**;

(2) Secondly, to rehear all three Claimants' claims that the fact of and manner of their summary dismissal on 7 July 2016 amounted to unlawful race discrimination by either or both of the First Respondent and the Second Respondent in accordance with sections 109 and 110 **EqA 2010**.

43. The next question is whether the case should be heard before a fresh Tribunal or remitted back to the original Tribunal. Applying the factors listed in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at paragraph 46 to the circumstances of this case, whilst there is no

concern about the professionalism of the Tribunal and there is no risk of bias or partiality, I see force in the argument that to remit it back to the same Tribunal could constitute a second bite of the cherry. Some considerable time has passed since the original Decision and the Tribunal may well not remember it particularly well. The elements of the case that need re-hearing will not require a lengthy hearing or benefit from all the background information and will focus simply on one day and a few hours of conversation. I accept Dr McGaughey's submission that remission to a fresh Tribunal is the preferred option.