Appeal No. UKEAT/0012/20/OO (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 18 August 2020

Before

HIS HONOUR JUDGE BARKLEM

(SITTING ALONE)

MR J LASILA — APPELLANT

APCOA PARKING (UK) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MISS PENNYCOOK (of Counsel) Instructed by: Free Representation Unit
For the Respondent	MR KOHANZAD (of Counsel) Instructed by: Peninsula Business Service Limited The Peninsula Victoria Place Manchester M4 4FB

SUMMARY

RACE DISCRIMINATION

Among other claims, the Claimant complained that he was required to drive a faulty vehicle back to base while another employee had a van sent to recover his vehicle which merely had a flat tyre. It was his contention that the reason for the difference in treatment was his race. The ET held, in brief that the Claimant's vehicle was drivable but the other vehicle had four slashed tyres and could not be expected to be driven.

The appeal was allowed to proceed to a Full Hearing following an assertion at the Rule 3(10) hearing that there was no evidence as to four slashed tyres, which had merely been an assertion by the solicitor advocate appearing for the Respondent. It was also pointed out that there had been an admission by the Respondent to an assertion in the ET1 that the other vehicle merely had a flat tyre, and the ET erred in allowing the Respondent to run the "slashed tyres" argument without seeking to amend its ET3.

The notes of the Employment Judge established, the EAT held, that there was an evidential basis for the ET's finding that four tyres had been slashed. The issues before the ET had been set out at a Preliminary Hearing and refined at the outset of the final hearing. The ET did not err in permitting the evidence to be adduced without amendment: the key question for it, so far as this head of claim was concerned, was the reason for the difference in treatment.

HIS HONOUR JUDGE BARKLEM

1. This is an appeal on a narrow point arising from a decision of an Employment Tribunal ("the ET") sitting at the East London Hearing Centre between 16-19 and 23-24 October 2018. I shall refer to the parties as they were below.

2. The Claimant represented himself before ET and the Respondent was represented by Mr Chaudry. Before me, the Claimant had the benefit of representation by Ms Pennycook on behalf of the Free Representation Unit while Mr Kohanzad represented the Respondent. Each has served helpful skeletons and has amplified those with oral submissions this morning

3. The Claimant had been a Civil Enforcement Officer working for the Respondent, largely in a mobile role, meaning that he would usually drive a van. On leaving the Respondent's employment, he raised a number of issues including constructive unfair dismissal, paternity leave discrimination, race discrimination and victimisation. All his claims failed.

4. His wide-ranging appeal was rejected at the sift, but at a Rule 3(10) Hearing one discrete point was permitted to proceed to a Full Hearing by Lewis J and the Grounds of Appeal were duly amended.

5. In the original form ET1, the Claimant had made a number of claims under paragraph 2 headed "Discrimination." Of relevance to this appeal are sub-paragraphs (c) and (d).

6. Sub-paragraph 2(c) asserted that a company car started smoking while he was driving during his shift. He called his supervisor to express his concern and was told to drive the car

back in its unsafe condition whereas he alleged a, "Caucasian colleague obtained [sic] a flat tyre twice and a recovery vehicle was sent to his aid and no investigation was carried out".

7. Paragraph 2(d) reads, "The Company vehicle that is constantly being driven by numerous members of staff developed a fault in September 2017, only three members of staff including myself were investigated and till now no official conclusion has been received."

8. In the very terse ET3, which was far from a model of clarity, paragraph 2(c) was admitted, although paragraph 2(d) was denied, the Respondent contending that "all drivers of the said vehicle were investigated and thereafter no action was taken against anyone." There was a "general denial" as to the Claimant's entitled to relief, whether as sought or at all, I think it obvious from the pleading as a whole that discrimination was denied.

9. A list of issues was prepared following a Preliminary Hearing. This was clarified at the start of the Final Hearing and some amendments made. The final list is annexed to the written reasons.

10. There were, in total, 19 issues, although the first two are a general summary. Issue 5 raises four sub-categories. Issues 15 and 16 deal with matters relevant to the appeal. They read:

> **"15 Did the Respondent treat the Claimant less favourably because of his race than it treated Caucasian employees who were not investigated in relation to the faulty vehicle in or around September 2017? The Claimant says that in September 2017 the company vehicle he was driving developed smoke coming from the bonnet. He said he asked for the vehicle to be picked up but that Miss Leeman Ozkan, his supervisor, refused. He says that in comparison, about three weeks later, the company vehicle that Mr Costa (surname unknown) was driving broke down and the vehicle was picked up."**
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> **16 Can the Respondent establish a non discriminatory explanation? The Respondent says that all those who used the vehicle were investigated regardless of their colour or ethnic origins."**

11. The ET found, in relation to the faulty vehicle incident, that the Claimant had been asked to drive a vehicle back which had developed a clutch problem. A garage carrying out repairs

noted that the damage had been caused by the manner in which the van had been driven. An investigation began in which the Claimant and one other driver, both black, were interviewed. These were the main drivers of the vehicle. Other drivers, two being white, had driven the vehicle but only on limited occasions.

12. The ET went on to hold; see paragraph 112, that the Claimant's contention that the vehicle was smoking was incorrect. It based that finding on a document which bore the Claimant's signature (having rejected his contention that it was a forgery) which made no reference to smoke but to the vehicle making a terrible sound.

13. At paragraph 114, the ET noted that in relation to the other incident in which a vehicle driven by a white driver was towed back "the reason for the vehicle being towed was because it had had all four tyres slashed."

14. At paragraph 115, the ET formulated the two questions that arose from these matters in the following terms:

> **"Did the decision to investigate the Claimant over clutch misuse have anything to do with the Claimant's colour or racial origin; and did the decision to ask the Claimant to drive the vehicle back to the garage, rather than being towed, have anything to do with his colour or racial origins? Why was it done?"**

15. It answered these questions as follows, first, that the decision to investigate the Claimant over the clutch misuse had nothing to do with his colour or racial origin. The investigation was a reasonable step, as driver misuse was something that would have occurred over a period and the main driver or drivers were the ones most likely to have caused the damage. Second, that the driver of a vehicle with four slashed tyres cannot sensibly be expected to drive it back to the depot, whereas a car with a noisy clutch can be driven a short distance to be repaired.

16. At the Rule 3(10) Hearing, the Claimant was represented by Ms Pennycook then under the aegis of the Employment Law Appeal Advice Scheme. On instructions, she submitted that there had been no evidence whatsoever before the ET to support the finding that the vehicle which was towed back had had all four tyres slashed; this being an assertion advanced by the Respondent's counsel.

17. Lewis J summarised the reason for allowing the appeal to proceed in this way, "In its decision, the Tribunal proceeded on the basis that all four tyres of the vehicle driven by the white driver were slashed and that was the reason why the driver was given assistance and it was not on grounds of ethnicity. The appeal is that on that issue the finding was contrary to what was admitted and there was no evidence that the tyres of the other vehicle were slashed. That finding was perverse or involves procedural unfairness. If that finding cannot stand, then the factual premises for finding that there was direct discrimination on grounds of race cannot stand"

18. An Order was subsequently made that the ET's notes of evidence on this point be obtained.

19. Due to the pandemic that Order, sought at the end of March 2020, did not reach the ET until 5 August. Despite having retired as a salaried Judge and now working less frequently on a fee-paid basis, the Employment Judge attended the Tribunal's premises on 14 August for another matter. He located - and there and then personally typed up - his relevant notes of evidence with the understandable caveat that he had not seen underlying documents which could not be found by the ET's staff in time.

20. I had by then postponed the hearing of this appeal but upon receipt of the notes the parties both sought to restore it to which I agreed. I express the thanks of the Employment Appeal Tribunal to Employment Judge Goodrich for the speed in which he carried out this task.

21. It is clear from the notes of evidence that the issue of slashed tyres was raised with at least two witnesses and that the Claimant was able to and did cross-examine them on it. I have also seen the closing submissions of the parties. Those of the Respondent were understandably more focused on the evidence but made clear reference to the tyre slashing.

22. Miss Pennycook submitted that the Judge's notes are not sufficient to clarify the factual basis for the ET's finding. Those who were cross-examined, she said, were not directly involved with the two incidents.

23. It is important to put the issue in context. Although there was an unqualified admission to a sub-paragraph in the claim (regarding a smoking vehicle driven by the Claimant) compared to one which had a flat tyre, which was admitted in the ET3, discrimination was not admitted. The ET quite correctly sought to disentangle the pleadings in the list of issues and did so in formulating them as items 15 and 16. It was, in my judgment, entitled to proceed on the basis of the issues thus clarified.

24. Ms Pennycook also submitted that the change in stance from a "flat tyre" to "four slashed tyres" was a change in the Respondent's case of such significance that it ought to have sought permission to amend its case and the Claimant given a chance to deal with it. **Ladbrookes Racing v Traynor** UKEATS/0067/06 was relied on.

25. I reject that submission. The analogy with a new head of claim advanced by the Claimant (as was the case in **Traynor** is not appropriate) certainly on these facts. It had not been disputed that the two vehicles suffered mishap, nor that one was directed to be driven back to base and the other collected. Therefore, the reason for this had to ascertained and, if the Claimant was to succeed, a discriminatory motive established.

26. I do not accept that whether a vehicle was undriveable because of a flat tyre or because they had been slashed is such as to require a formal repleading. I therefore reject Ground 2 of this appeal which asserts a procedural irregularity allowing the Respondent to introduce a reason for the difference in treatment not raised in the ET3.

27. It is clear that "slashed tyres" was raised at the course of the evidence and the ET plainly accepted that evidence. I recognise the limitation of the Employment Judge's notes, but the evidence came from somewhere and it would be fanciful to suppose it had originated in the mind of the solicitor advocate representing the Respondent, only for two of his witnesses then to refer to it in confirmatory terms.

28. Mr Kohanzad then contends that, as the Claimant failed to establish that his car was smoking, the ET having rejected that argument, his claim was bound to fail. In my judgment that is too narrow an approach. The real issue is not whether the car was defective because it was smoking or had a faulty clutch, but whether the Claimant's race was a factor in the difference in treatment thereafter as opposed to the driver of the car with a flat tyre or tyres.

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29. Having accepted, as I do, that there was *some* evidence upon which the ET was entitled to make the finding that it did, it cannot have acted perversely. For that reason, Ground 1 also fails and is dismissed.

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