Appeal No. UKEAT/0248/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 March 2021

Before

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(SITTING ALONE)

KEY CARE SUPPORT LTD — APPELLANT

MR J W JOHNSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R MORTON (Solicitor) Avensure Ltd South Central 11 Peter Street Manchester M2 5QR
For the Respondent	MR J W JOHNSON (Respondent in Person)

SUMMARY

DIRECT DISCRIMINATION DUE TO RACE AND ASSOCIATED AWARD

The Respondent's appeal against the ET's finding that it had directly discriminated against the Claimant because of race, and associated award, was allowed.

In concluding that the Claimant had discharged his burden at stage one of the test established in **Igen v Wong** [2005] ICR 931, CA, the ET had failed to identify a suitable hypothetical comparator and to explain the bases upon which it had drawn secondary inferences of fact from the primary factual findings which it had made. Had it done so, the Respondent might not have been called upon to discharge its burden at stage two of the test. The matter would be remitted to a differently constituted tribunal for its determination afresh of liability and (if appropriate) remedy.

A **THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE**

Introduction

B 1. In this judgment, I refer to the parties by their respective statuses before the Manchester Employment Tribunal (Employment Judge Ross, sitting with Mrs E Cadbury and Mr J Flynn — "the ET").

C 2. This is the Respondent's appeal from the ET's conclusion that the Claimant's claim of direct race discrimination, contrary to section 13 of the **Equality Act 2010** (EqA), succeeded, for which it sent written reasons to the parties on 22 March 2019.

D 3. At an earlier preliminary hearing, a differently constituted Tribunal had held that the Claimant was a worker, for the purposes of section 83(2) EqA, and identified the claim which the Claimant was able to pursue as relating to the Respondent's alleged failure to have acted on his

E complaint of racial abuse by another agency worker. As recorded by the ET (Reasons, paragraph 19), the issues identified by that Tribunal for determination at the full hearing were:

> Did the Claimant make a complaint to the Respondent about being racially abused by

F another care worker? and

> Did the Respondent fail to take any action in relation to that complaint?

The material facts

G 4. The Respondent is in an agency which supplies healthcare workers to its clients. The ET found that the Claimant had been engaged by the Respondent, as an agency worker, on a zero-hours contract, from 9 February 2016. On 1 October 2017, he had accepted a night shift at

H Mather Fold House, a residential unit. Following that shift was Ms Rachel Wright of the Respondent had asked the Claimant how it had gone. He had informed her that he did not like

working at Mather Fold House for three reasons, one of which being that he had been racially abused whilst working there by an agency worker supplied by a different agency. The ET found that Ms Wright had raised the Claimant's complaint of racial abuse with Mrs Walker, who worked closely with her in the office which they both occupied.

5. On 10 October 2017 the Claimant had worked a further shift at Mather Fold House. Once again he had been contacted by Ms Wright, asking how the shift had gone, and had reported a further incident of racial abuse, by a female member of staff supplied by another agency, who had stated that she refused to work with black people, thereby referring to the Claimant and another worker. The ET recorded Mrs Walker's evidence that she did not accept that this had amounted to a complaint but did agree that it was serious.

6. At paragraphs 11 and 12 of its Reasons, the ET stated:

> **"11. The Tribunal finds that any reasonable employer would have clearly identified this as a complaint requiring investigation. The Tribunal finds it entirely unacceptable in a modern workplace that a serious concern that a worker has suffered racial abuse in the course of his working for an organisation should not be investigated.**
>
> **12. We find the respondent took no action in relation to this concern other than sending the claimant's statement through to the client at Mather Fold. We find Mrs Walker did not ask the client to take any steps to actively investigate the allegation of racial abuse on their behalf."**

7. Following a short paragraph in which the ET reminded itself, in summary, of the principles established by **Igen and Ors v Wong** [2005] ICR 931, CA and **Madarassy v Nomura International PLC** [2007] ICR 867, CA, the ET referred to the two issues which had been identified at the preliminary hearing. At paragraphs 20 to 24 of its Reasons, it concluded:

> **"20. We find the answer to both those questions is yes. We find the claimant did make a complaint both verbally and in writing as we have clearly explained above. We find the respondent took no action whatsoever in response to his complaint. We find failure to action a complaint amounts to less favourable treatment.**

> **21. Having found that there was less favourable treatment we turn now to the burden of proof. We rely on the following matters which we say shift the burden of proof from the claimant to the respondent. We rely on the fact that the respondent's witnesses both agreed they had not received any training in equal opportunities, and we rely on our finding that there was no equality policy produced by the respondent. We rely on our finding that Mrs Walker, who was the more senior employee, had a lack of awareness as to the agency's responsibility towards their own workers to be safe at work. We rely on our finding that when an issue in relation to racial abuse was raised it should have been investigated as a serious matter. We rely on our finding that there was no requirement for the claimant to follow some sort of further formal procedure: it was absolutely clear from the document that he provided what the nature of the concern was and exactly what had occurred.**
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> **22. We also relied on the fact that Mrs Walker appeared to suggest that the reason why the claimant had complained of racial abuse was because he had a safeguarding complaint against him; we find this is suggestive of her mindset. We find it is a matter of fact that he [sic] claimant had already raised a concern about racial abuse with the respondent, even on their own evidence, before he was aware of any safeguarding incident. For all these reasons we find the burden of proof shifts to the respondent.**
>
> **23. We remind ourselves that this is a case where there was a failure to take action by Ms Wright and Mrs Walker, namely to investigate the claimant's complaint of racial abuse. We have reminded ourselves when making these findings that there is no requirement for motive in a discrimination case. We remind ourselves discrimination may be unconscious. We remind ourselves that we must consider the mindset of the individuals involved.**
>
> **24. Having found that the burden of proof has shifted to the respondent to show us a non-discriminatory reason for their failure to investigate the claimant's complaint of racial abuse, we find they do not. There was no evidence of a non-discriminatory reason for their failure to take action with regard to the claimant's complaints. We find there was no clear explanation as to why they had not investigated his complaint. Accordingly, his claim succeeds."**

The grounds of appeal

8. There are two short grounds of appeal from the ET's Judgment. The first is that the ET failed to identify an actual or hypothetical comparator, such that it could not fairly conclude that the Claimant had received less favourable treatment because of his race. Further, the ET had given no reasons for such conclusion. The second is that its conclusions were perverse, for the same reason. As a result, it is said, the ET's liability and remedy findings cannot stand, and the matter should be remitted to a differently constituted Tribunal for a rehearing.

9. Before me, the Respondent has been ably represented by Mr Richard Morton, solicitor of Avensure Ltd. As he did below, the Claimant represented himself. By his Respondent's Answer he contended that the ET's judgment should be upheld, for the reasons which the ET gave.

The Respondent's submissions

10. In his admirably succinct submissions, Mr Morton contended that the ET impermissibly moved from its finding at paragraph 11 (namely that it was entirely unacceptable in a modern workplace that a serious concern that a worker has suffered racial abuse in the course of his working for an organisation should not be investigated) to its findings at paragraph 20 that the Respondent had failed to take action in relation to the Claimant's complaint and that such a failure amounted to less favourable treatment. It was Mr Morton's contention that, having addressed the issues identified at the earlier hearing, the ET ought to have gone on to consider two further questions: (1) Was there any evidence before the ET that the Claimant had been treated less favourably by the Respondent because of his race and/or ethnic origin? and (2) Who was the Claimant's comparator (actual or hypothetical) in this case?

11. Mr Morton submitted that there was no evidence before the ET that the Claimant had been treated differently from any other worker, or that the Respondent had adopted a different approach to the handling of his complaint because of his race and/or ethnic origin. There was no basis upon which the burden of proof could be said to have shifted to the Respondent and, certainly, none which had been adequately explained. In essence, the Respondent had fallen into the trap criticised in **Zafar v Glasgow City Council** [1998] IRLR 36, HL, in relying upon the Respondent's unreasonable conduct, as set out at paragraphs 11 and 12 of its Reasons. He submitted that all of the matters from which it drew inferences were properly characterised as instances of such conduct. If an improper or racist motive was being attributed to Mrs Walker at

paragraph 22, that conclusion ought to have been clearly stated and explained. Instead, the paragraph was, at best, ambiguous. For the same reasons, the ET's conclusions were perverse.

The Claimant's submissions

12. I am grateful to the Claimant for his clear oral submissions. It was his position that the appeal had been lodged out of time. In any event, the ET had correctly addressed and determined all relevant issues. It had correctly rejected the Respondent's application for reconsideration of its judgment, in the absence of any error of law. The Claimant submitted that the Respondent had discriminated against him. The ET had had the opportunity to observe Mrs Walker giving evidence and had reached permissible conclusions in that context. Its judgment should stand. If the matter had to be remitted, he would leave the EAT to determine whether remission ought to be to the same, or a differently constituted, tribunal.

Discussion and conclusions

Was the appeal lodged in time?

13. The ET's Reasons were sent to the parties on 22 March 2019, meaning that any appeal and the required accompanying documents had to be lodged by 3 May 2019. All such documents had been lodged by email, by 1.30 pm on that date, and, accordingly, the appeal was lodged in time, in accordance with rule 3(3)(a)(i) of the **Employment Appeal Tribunal Rules 1993** (as amended).

The law

14. Section 13(1) EqA provides:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

Section 23(1) EqA requires that there be no material difference between the circumstances relating to each case. Under section 136(2), (3) and (6)(a) EqA, if there are facts from which the ET could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, but that does not apply if A shows that A did not contravene the provision.

15. In **Zafar**, at paragraph 12, Lord Browne-Wilkinson commended the following words of Lord Morison, in the Court of Session:

> **"…It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances."**

16. In **Shamoon v Chief Constable of Royal Ulster Constabulary** [2003] IRLR 285, HL, Lord Nicholls of Birkenhead referred to the question of whether the Claimant had received less favourable treatment than the appropriate comparator as "the less favourable treatment issue" and the question of whether the less favourable treatment had been on the relevant proscribed ground as "the reason why issue". At paragraphs 7 and 8, he observed:

> **"7. Thus, the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.**
>
> **8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."**

17. At paragraph 11, he continued:

> **"[…] employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter,**

> **the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."**

18. At paragraph 116 of **Shamoon**, Lord Scott of Foscote held as follows:

> **"…I would readily accept that it is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator. I respectfully agree with Lord Hope that the contrary opinion expressed by Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v A* [2000] NI 261 cannot be accepted (paras 46 and 47 of Lord Hope's opinion). But in the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice. But there is nothing of that sort in the present case, or, at least, no reference to anything of that sort was made by the Industrial Tribunal."**

19. In **Bahl v The Law Society and Ors** [2004] IRLR 810, CA, Peter Gibson LJ observed, at paragraph 104:

> **"[…] in an area where the drawing of inferences is central, it is essential that the ET sets out with the utmost clarity the primary facts from which any inference of discrimination is drawn see: *Chapman v Simon*[1]… It is particularly important that the ET takes care to explain how it has made a finding of unconscious discrimination: see *Governors of Warwick Park School v Hazelhurst* [2001] EWCA Civ 2056, per Pill LJ at paragraphs 24-25 and *Shamoon*, per Lord Hutton at paragraph 86."**

In **Igen v Wong**, in relation to a predecessor provision to section 136 EqA, the Court of Appeal held that it is for the claimant who complains of discrimination to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination. In deciding whether the claimant has proved such facts, it is important to remember that the outcome, at this first stage of the analysis by the tribunal, will usually depend on the inferences which it is proper to draw from the primary facts found by the tribunal. The tribunal is looking for primary facts to

[1] [1994] IRLR 124, CA

consider which inferences of secondary fact might be drawn. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [here] race, it is then for the respondent to prove that it did not commit that act. In order to do so, it must prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the ground of race. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but, further, that it is adequate to discharge the burden of proof, on the balance of probabilities, that race was not a ground for the treatment in question.

20. As the Court of Appeal held in **Ayodele v Citylink Ltd and Anor** [2018] ICR 748, at paragraph 106, the principles in **Igen v Wong** remain good law in relation to section 136 EqA. The change in wording from the predecessor provisions simply makes clear that what should be considered at the first stage is all of the evidence, and not simply the evidence adduced by the Claimant.

The law applied to the facts

21. It is clear that the ET did not expressly identify a comparator when concluding that the Claimant had received less favourable treatment by the Respondent. There having been no actual comparator identified, the question was whether the Claimant had been treated less favourably than a hypothetical comparator, whose circumstances were not materially different.

22. The two issues which had been identified at the preliminary hearing were exclusively issues of fact. Having found, on the evidence, that the act and omission to which they,

respectively, related had occurred, the ET apparently moved directly to a conclusion that the latter constituted less favourable treatment (intrinsically requiring a comparative analysis). Having so found, it expressly turned to consider the burden of proof. Whilst infelicitously expressed, in my judgment that latter exercise can only make sense if the ET's initial conclusion is in fact to be read as meaning that it was satisfied that the omission on which the Claimant relied for his claim had occurred, as a question of fact.

23. It then separately considered, in turn, each stage of the **Igen v Wong** test, concluding that, for the reasons set out at paragraphs 21 and 22 of its Reasons, the Claimant had discharged his burden at stage one, obliging the ET to move to stage two. The ET did not conclude that it could concentrate primarily on why the Claimant had been treated as he had been. In other words (and acknowledging that the two issues are intertwined), it did not ask itself the rolled-up question of whether the Respondent's failure to have acted on the Claimant's complaint of racial abuse had been on the proscribed ground which was the foundation of his claim. That being so, the comparative analysis by reference to an appropriate hypothetical comparator ought to have been, but was not, undertaken at stage one.

24. That omission was the more significant in the context of the ET's earlier stated conclusion (Reasons, paragraph 11) that the Respondent had behaved unreasonably, to which it referred at paragraph 21. Such a conclusion, without more, would not suffice: **Zafar**. The "something more" was, seemingly, considered to be afforded by the other factors to which the ET referred at paragraphs 21 and 22 of its Reasons. I bear in mind, as Underhill LJ observed in **Base Childrenswear Ltd v Otshudi** [2020] IRLR 118, CA, at paragraph 37, that:

> **"[…] the question of what inferences should be drawn from the primary facts is a question of fact and not of law. It is not legitimate for this Court to substitute its own view unless the Tribunal's conclusion was one which was not reasonably open to it."**

In my judgment, the difficulty in this case lies with the fact that the matters on which the ET relied for its conclusion that the Claimant had established a prima facie case of direct race discrimination failed to have any regard to whether the relevant hypothetical comparator would have been treated any differently. Each of the factors to which it referred at paragraph 21 could equally have informed the Respondent's approach to such a hypothetical comparator. The same is true of the additional factor upon which the ET relied, at paragraph 22, in relation to Mrs Walker. There is also force in Mr Morton's submission that all of the factors upon which the ET relied in concluding that the burden of proof had shifted to the Respondent could be considered to be aspects of unreasonable conduct per se. If paragraph 22 was intended to constitute something more, it was not set out with the clarity or explanation required.

25. In the language of Underhill P (as he then was), in **B and C v A** [2010] IRLR 400, EAT, at paragraph 22:

> **"[…] the fact that [the] behaviour calls for explanation does not automatically get the Claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that the behaviour was attributable (at least to as significant extent) to the fact that the Claimant was [here, black]."**

Whilst identifying the primary facts from which it had drawn inferences, the ET did not suitably identify the basis upon which it considered those inferences to be appropriate. As Pill LJ put it, at paragraph 24 of **Hazelherst**:

> **"…In a situation in which it is expressly found that there was no deliberate or conscious racial discrimination, it is necessary, before drawing the inference sought to be drawn, to set out the facts relied on and the process by which the inference is drawn. In some cases that process of reasoning need only be brief; in other cases more detailed reasoning will be required. The Employment Appeal Tribunal approached the matter in this way:**
>
> **'… we do suggest that the less obvious the primary facts are as pointers or the more inconclusive or ambivalent the explanations given for the events in issue are as pointers, the more the need for the Employment Tribunal to explain why it is that from such primary facts and upon such explanations the inference that they have drawn has been drawn. The more equivocal the primary facts, the more the**

Employment Tribunal needs to explain why they have concluded as they have.'"

26. In the absence of any analysis of the features of an appropriate comparator, the primary facts upon which the ET relied were not obvious pointers to the inferences of secondary fact which it drew in concluding that the Claimant had demonstrated a prima facie case that the reason for the Respondent's omission had been a discriminatory one, such that the burden passed to the Respondent to establish that race was not a ground for the treatment in question. Thus, it was incumbent upon the ET to explain why it was that it had drawn the relevant secondary inferences. This, it did not adequately do.

27. Accordingly, the Respondent was called upon to discharge a burden which, had the ET correctly approached stage one of the **Igen v Wong** analysis, it might never have been required to do. In failing to consider the appropriate comparator and to analyse the available evidence with such a person in mind, the ET erred in law. Furthermore, in failing adequately to explain the basis upon which its primary findings of fact had supported its secondary inferences, its Reasons were not **Meek**-compliant[2].

28. It follows that the first ground of appeal is allowed, and the second ground of appeal is academic. The ET's conclusion that the Respondent had directly discriminated against the Claimant, and its associated award, cannot stand.

Disposal

29. In this case, both the primary findings of fact and the inferences to be drawn from them are questions of fact. Even if the existing primary findings were left undisturbed, there is more

[2] **Meek v Birmingham City Council** [1987] IRLR 250, CA

A than one possible inference to be drawn from them. In accordance with the familiar principles in **Jafri v Lincoln College** [2014] IRLR 544, CA, it is not for the EAT to substitute its own findings, as Mr Morton recognised.

B

30. Having regard to the nature of the errors made; the two years which have elapsed since the ET's Reasons were promulgated; and the fact that the ET has, on the face of it, already made up its mind (having rejected the Respondent's application for reconsideration, advanced on the same basis as this appeal), it is appropriate to remit this matter to a differently constituted tribunal, for it to determine liability and (if appropriate) remedy afresh.

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