

Neutral Citation Number: [2022] EAT 188

Case No: EA-2020-000580-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 November 2022

Before :

HIS HONOUR JUDGE SHANKS

Between :

MR GRAHAM ELLIS

Appellant

- v -

(1) MS K BACON

(2) ADVANCED FIRE SOLUTIONS LTD (In Administration)

Respondents

Heather Platt (instructed by **Solicitors 12 King Ride**) for the **Appellant**
Joanna Bradbury (instructed by **Gordon Dean Solicitors LTD**) for the **First Respondent**

Hearing date: 22 November 2022

JUDGMENT

SUMMARY

Marriage and Civil Partnership

The claimant (Ms Bacon) was treated unfavourably and ultimately dismissed by the appellant Mr Ellis, the managing director of her employer (Advanced Fire Solutions Ltd), who was acting at the behest of her husband Mr Bacon who was the majority shareholder of the company. The ET found that Mr Ellis had discriminated against her because she was married.

The EAT allowed Mr Ellis's appeal because the ET had failed properly to address the issue whether it was her marital status which was the cause of the treatment as opposed to the fact that she was married to Mr Bacon; and the ET had failed to construct the appropriate comparator, namely someone in a close relationship with Mr Bacon but not married to him and ask itself whether such a person would have been treated differently.

HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal by Graham Ellis against the judgment of the Employment Tribunal in Norwich (EJ Postle, Ms Daniels and Mrs Gaywood) sent out on 26 May 2020 following a hearing in February 2020. The appeal was allowed to proceed by HHJ Tayler on the sift on 17 March 2021. At the hearing before the Employment Tribunal Mr Ellis was unrepresented and Advanced Fire Solutions Limited was in administration. The claimant, Kirsty Bacon, was represented, as on this appeal, by Ms Bradbury of counsel. Ms Platt has represented Mr Ellis on the appeal.

2. The claimant joined Advanced Fire Solutions Limited as a bookkeeper in 2005. In due course she married the managing director and majority shareholder of the company, Jonathan Bacon, and in 2008 she herself became a director and shareholder. In 2012 Mr Ellis joined the company and he became a director and 10% shareholder in 2013. He was appointed managing director in August 2017.

3. In that same month, the claimant informed Mr Bacon that she wished to separate. That was the start, unfortunately, of an acrimonious divorce between Mr and Mrs Bacon. False allegations were raised against her that she had misused company IT. She was suspended from the company on 18 January 2018 and dismissed by a letter which was signed by Mr Ellis as managing director on 29 June 2018. A wholly baseless complaint was made to the police.

4. The ET found that Mr Ellis sided with Mr Bacon in relation to the marital dispute and was compliant with him in removing the claimant's directorship, not paying her dividends, reporting her to the police and suspending and dismissing her on spurious grounds. The ET found that these actions involved less favourable treatment by Mr Ellis against Mrs Bacon because of her marital status as a

wife to Mr Bacon.

5. In the context of the dismissal the ET said at paragraph 68 in the judgment that Mr Ellis had no other explanation for his treatment of her:

“... other than he was siding with Mr Bacon whom he no doubt felt was where his future lied [I think the tribunal must mean lay] within the company rather than that with Mrs Bacon.”

In the context of other treatment, the ET used different words which Ms Bradbury has drawn to my attention and which I will quote from. In the context of the allegation of withholding dividend payments, at paragraph 73 the tribunal said this

“It is clear that despite dividends being declared that Mr Ellis as Managing Director clearly was active in not authorising the payment to the claimant for these sums. There is no adequate explanation for Mr Ellis, the inference being that it was because of the claimant's marital status to Mr Bacon and the claim is therefore well founded.”

At paragraph 74 the tribunal dealt with stopping the claimant's share loan repayments and diverting them to Mr Bacon. They said this:

“It is clear from the evidence that Mr Ellis did so from his notification in June/July 2018 and did so at the request of Mr Bacon and those payments seemed to have been then diverted to Mr Bacon to the effect that Mrs Bacon did not receive any further payment. Clearly that is less favourable treatment. What is the reason for it? The claimant being married to Mr Bacon. There is simply no other reason advanced by Mr Ellis other than the fact that he was doing so because they were married and in the middle of a separation.”

Then there is a heading “Allowing Mr Bacon to use Company Funds to Pay for his Divorce Proceedings.” At paragraph 75 they say it was clearly less favourable treatment and the reason for that treatment was the fact that Mrs Bacon was married to Mr Bacon and effectively Mr Bacon was pulling Mr Ellis's strings. There is then a heading, “Disregarding the claimant's grievance.” The tribunal ask what the reason for that was and the reason was the claimant's separation from Mr Bacon. That was therefore less favourable treatment on the grounds of her marital status and that claim is

well founded. Then under the heading of “Reporting the claimant to the Police for theft” paragraph 77 says:

“In relation to the allegation of reporting the claimant to the Police for theft, again the only explanation for this is the dispute that was ongoing between Mr and Mrs Bacon, Mr Ellis was clearly an active participant in this and the reason for that treatment was the claimant's marriage to Mr Bacon which was now in the process of being dissolved. Clearly the claimant was being treated less favourably on the grounds of her marital status...”

Overall, the ET therefore found that Mrs Bacon's claims against Mr Ellis personally for direct marital discrimination were well founded.

6. On this appeal Mr Ellis says that the ET erred in this conclusion because they failed properly to address the statutory test as to the cause of the unfavourable treatment or to consider the appropriate hypothetical comparator. The relevant law is set out in a few sections of the **Equality Act 2010 (“EqA”)**. Section 4 identifies marriage and civil partnership as one of the protected characteristics. Section 8 says that a person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner. Section 13, which is the main section creating the concept of direct discrimination, says at subsection 1:

“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.”

And section 13(4) which relates specifically to the protected characteristic of marriage and civil partnership says that the section applies to a contravention of Part 5 which deals with work only if the treatment is because it is B who is married or a civil partner, and B for these purposes would obviously be the claimant.

7. There is directly relevant authority on the concept of discrimination because of marriage and it is a case which has resemblances to this one, namely **Hawkins v Atex Group Limited** [2012] ICR 1315, a decision of Underhill P. The essence of the decision is to be found in the headnote: the characteristic protected by the relevant section is the fact of being married and the appropriate comparator would usually be someone in a relationship akin to marriage but who was not actually married. Where the reason for less favourable treatment comprised both the fact that the claimant was married and the identity of her husband, it was essential that the fact that they were married rather than simply in a close relationship was part of the ground for the

employer's action, and that since in reality there was no prospect of the claimant (in that particular case) being able to establish that the respondents were motivated specifically by the fact that she and the chief executive officer were married rather than simply by the closeness of their relationship, the case was suitable to be decided on a strike out application and the judge had been right to strike out the claim.

8. The issue in this case was therefore whether Mr Ellis treated Mrs Bacon in the unfavourable ways that have been identified because she was married. That is where the sentence ends: the question is not whether she was badly treated because she was married to a particular person. Another way of looking at the issue was to ask oneself whether an unmarried woman whose circumstances were otherwise the same as hers, including being in a close relationship with Mr Bacon, would have been treated differently. It seems to me, on the face of it, plain from the judgment that the ET, no doubt because the merits were so clearly in Mrs Bacon's favour and because they did not have the relevant case law I have referred to drawn to their attention, failed to address their minds to the real issue or, which is really the same thing, to construct the appropriate hypothetical comparator.

9. Ms Bradbury drew my attention to the Particulars of Claim which say at paragraph 36 on my page 49 that the treatment received by the claimant was not because the claimant and Mr Bacon were in a close relationship, rather it was the particular relationship of marriage with the legal and personal ties it carries. I see that is stated as a fact in the Particulars, but I cannot I am afraid draw from it the inference that the ET asked itself the right question although, as I say, it seems to me clear from everything they say that they did not.

10. Ms Bradbury also says that the law is properly set out and that there are clear conclusions of fact in many of the parts of the judgment that I have read where the tribunal say in terms that it was marriage that caused the unfavourable treatment. First of all, so far as setting the law out, I think the ET needed to show that they had focused on the right question in a case like this which, as I have mentioned, had some similarity to the **Hawkins** case. In fact, they failed to direct themselves in accordance with **Hawkins**, and I do not suggest for a moment that they needed to name the case, but they at least needed to refer to the concept that it was the fact of being married that was all important and to the type of hypothetical comparator that I have mentioned.

The bare assertion at various points that the reason for the unfavourable treatment was that Mrs Bacon was married is not, in all the circumstances, sufficient in my view, particularly when in fact, as one reads through the various paragraphs that I have quoted, the fact of being married is muddled up with numerous other considerations to do with acting on Mr Bacon's instructions and so forth.

11. I have well in mind the limits of the role of the EAT and the principles set out in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 but I am afraid I am satisfied in this case that the ET erred in law by not addressing their minds to the true issue.

12. Accordingly, I allow the appeal. I do so with a very heavy heart. I know Mrs Bacon was very badly treated by Mr Ellis, amongst others, and the ET's findings in that respect cannot be challenged. However, I must apply the law. I also sympathise with her, as I do with numerous litigants in this jurisdiction and in the criminal jurisdiction and others, who are being treated so badly by the delays which are I am afraid endemic to the system at the moment, but as I say I am afraid I have to apply the law and accordingly allow the appeal.