Neutral Citation Number: [2023] EAT 163

Case No: EA-2022-000076-AS

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 November 2023

Before:

HIS HONOUR JUDGE SHANKS
MISS NATALIE SMITH
MRS ELIZABETH WILLIAMS

- -

Between:

NICOLAS TOURE

Appellant

- and –

KEN WILKINS PRINT LTD

Respondent

- -
- -

MR CHIKE ONYEARI (instructed by **Charles Hill & Co Solicitors**) for the **Appellant**
MR JAMES HOWLETT (instructed by **Cenpro Legal Ltd**) for the **Respondent**

Hearing date: 28 November 2023

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JUDGMENT

- -

SUMMARY

VICTIMISATION

The Appellant was employed by the Respondent from 16/8/18 until he was dismissed for misconduct on 14/10/19.

In January 2019 he had alleged that he had been subjected to racial abuse by a colleague. The matter was investigated and his grievance was rejected, the manager concluding that he had not in fact been racially abused. He appealed against that finding. While the appeal was pending he told two managers that he would not pursue it or bring any legal proceedings based on the racial abuse if he was promoted and given a salary increase. On 1/10/19 he abandoned the appeal and was then dismissed for unrelated misconduct occurring in the period August-October 2019 and for his statements to the two managers which the Respondent said were tantamount to blackmail.

The appeal was dismissed on the basis of the EAT's findings that:

(1) The ET was entitled to conclude that the allegation of racial abuse was, as they put it, "fictional", and to rely in doing so on their assessment of the Appellant and his evidence and on the hearsay statements taken by the manager in his investigation.

(2) Although the ET's reason given for rejecting the victimisation claim in so far as it related to his dismissal was plainly wrong, it was also plain on their findings of fact that that claim could not succeed because: (a) the original allegation of racial abuse was false and must have been made in bad faith and (b) what was said to the two managers during the appeal process was plainly "separable" and was indeed tantamount to blackmail.

HIS HONOUR JUDGE SHANKS:

1. This is an appeal against a judgment of the Employment Tribunal sitting in Nottingham (EJ M Butler, Ms Hallam and Mr C Tansley) sent out on 23 May 2022 dismissing Mr Toure's claims of race and religious discrimination and harassment and victimisation. We note that the claims were heard between 4 and 8 October 2021. For some reason, the Employment Tribunal did not meet in chambers until 8 December 2021, the judgment was not signed until 12 January 2022 and was not sent out until 23 May 2022. That may all be explained by the pandemic and other problems but it seems a long gap.

THE FACTS

2. Mr Toure describes himself as black African and a Muslim. He was employed by the respondent company, Ken Wilkins Print Limited, as a forklift truck driver and warehouse operative from 16 April 2018 to 14 October 2019 when he was summarily dismissed.

3. In January 2019 after an aggressive altercation with another employee, Mr Slade, the claimant raised a grievance with his employer's management which included a complaint that he had been called racist names, in particular the "N" word by a Mr Lowe. Matters were investigated by Mr O'Dowd, the Production Director, who interviewed a number of witnesses and rejected the grievance on 20 June 2019, concluding in particular that Mr Toure had not, in fact, been racially abused. Mr Toure, was transferred to a new place of work in the main factory to reduce tensions between him and other employees. He indicated that this transfer resolved his grievance to his satisfaction but then on 17 July 2019, he said he wished to appeal. He apparently told Mr Wilkins, the

senior manager, that he had further evidence to present but this was never, in fact, produced.

4. The Employment Tribunal found that he told Mr Wilkins and Mr O'Dowd in two separate conversations that he would not pursue the appeal or bring any legal proceedings based on his grievance if he was promoted and given a salary increase. The appeal continued but Mr Toure gave no further grounds and on 1 October 2019 he wrote to Mr Wilkins saying:

> **I have taken advice and if I wish I could go to an Employment Tribunal. I have now decided to let the matter drop as a gesture of goodwill towards the company and hopefully start again from scratch.**

5. During August, September and into October 2019 there were a number of incidents involving Mr Toure which are set out in findings of fact at paragraphs 17.8 to 17.13 of the tribunal's reasons. The tribunal found that the respondent had delayed taking action against the claimant while his appeal was still outstanding but then on 14 October 2019 they wrote dismissing him.

6. The letter of dismissal gave reasons notwithstanding that he had less than two years' service. It stated that the grievance had not had any bearing on the decision to dismiss. It then said that it related exclusively to his conduct while at the main factory which had led to the respondent's decision that he was "not right for the job". Specifically, the letter referred to: (i) unauthorised paternity leave; (ii) the events we have just referred to in relation to the claimant seeking a promotion which were described in the letter as a disgraceful proposition and being tantamount to blackmail; (iii) his conduct in relation to a photograph; (iv) borrowing £3,000 from a fellow employee and then refusing to communicate with him while seeking to borrow money from other colleagues; (v) use of his

mobile phone whilst at work; (vi) taking extended breaks; and (vii) failing to wear protective equipment.

7. After his dismissal, Mr Toure brought proceedings alleging, among other things, that his dismissal was an act of victimisation because he had made a complaint of race discrimination which had been the subject of the grievance. The Employment Tribunal having heard the case found that his evidence was "totally unreliable" and they gave quite a number of reasons for this overall finding at paragraphs 13 and 14 of the judgment. At paragraph 16 they stated:

> **Where there was a dispute on the evidence, we preferred the evidence of the respondent's witnesses.**

8. Although the Employment Tribunal do not say so in terms, it is plain that they rejected the allegation that Mr Lowe had racially insulted the claimant in January 2019. We have already referred to paragraph 16. At paragraph 23 they say this:

> **We have already described the claimant's allegations as fictional [we take this to mean "fictitious"]. We did not believe any of his evidence. In respect of his first grievance, for example, in which he made allegations of racist language and named witnesses, those witnesses denied any such language was used.**

They also expressly accepted the evidence of Mr O'Dowd and Mr Wilkins that the claimant:

> **… attempted to use his grievance as a means of forcing the respondent to promote him in return for not taking proceedings.**

9. In paragraphs 33 and 34 the Employment Tribunal found: (i) that the discrimination claim failed; (ii) that the claimant had not been harassed; (iii) that the respondent had quite properly waited for the claimant to abandon his appeal before deciding to dismiss him; and (iv) that the principal reason for his

dismissal was as set out in the letter that we have referred to. In dealing specifically with the victimisation claim, the Employment Tribunal said this in paragraph 33:

> **Further, there is no reliable evidence that after doing a protected act by submitting a grievance, he [the claimant] suffered any detriments. We find that those detriments he apparently relies on simply did not happen.**

10. The claimant appeals on grounds set out in an amended notice of appeal approved by HHJ Tayler following a preliminary hearing on 4 April 2023 which are at pages 20 to 21 of our bundle. Taking those grounds not in the order they are put but in a perhaps more logical order, our conclusions are as follows.

11. It is said in ground 4 that the Employment Tribunal's finding as to the claimant's general credibility was inadequately reasoned. We disagree with that suggestion. As we have said, the Employment Tribunal provided a series of comments on the claimant's evidence in paragraphs 13 and 14 and, in our view, they were quite sufficient to lead to an overall conclusion that they could not rely on his evidence. Not only did they highlight eight particular points but they made this general comment:

> **On a number of occasions [the claimant] attempted to make allegations which had not been previously disclosed and regularly had great difficulty in answering the questions put to him by Mr Howlett.**

The finding that he was totally unreliable was a strong one but it is the job of an Employment Tribunal to assess the witnesses and their evidence and this finding was, in our view, clearly open to this tribunal.

12. The claimant says in ground 5 of his appeal, in effect, that the Employment Tribunal did not make the necessary findings of primary fact about what happened in January 2019 and, if they did, they gave impermissible weight to

the hearsay statements that had been taken by Mr O'Dowd. As we have already indicated, although the Employment Tribunal did not say in express terms that they found that the allegations of racial abuse were not true, that conclusion is implicit in paragraph 23. As to reliance on hearsay, that is perfectly permissible in an Employment Tribunal where the strict rules of evidence do not apply. As we have already indicated, in our view the tribunal gave perfectly adequate reasons for rejecting the claimant's evidence and therefore for accepting the denials which would have been in the form of hearsay statements and in those circumstances we consider it was open to the tribunal to make the finding that there was no racial abuse in January 2019. There is no suggestion that that finding was perverse, nor could there be.

13. The claimant says that the reason given for rejecting the victimisation claim at paragraph 33 cannot stand since the claim was based on the detriment of dismissal and it could not possibly be right to say that the claimant had not suffered that detriment, which is what paragraph 33 says in general terms. To that extent, this point is plainly valid. The tribunal did not address the question of whether the dismissal was an act of victimisation. However, on the findings of fact by the Employment Tribunal, we consider that the claim of victimisation leading to dismissal could not possibly have succeeded. It is necessary to refer to the victimisation provision of section 27 of the Equality Act. 27(1) which says this:

> **A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act…**
>
> **(2) Each of the following is a protected act—**

> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

On the Employment Tribunal's findings about the allegation that he was racially abused which led to the relevant grievance, the allegation was plainly false and, furthermore, can only have been made in bad faith. We recognise that that is a strong finding for the EAT to make but we cannot see how it could possibly be the case that the allegation was fictitious as the tribunal expressly find but not false and not made in bad faith. The allegation could not therefore possibly be the basis of a successful victimisation claim and, although it is right that the Employment Tribunal do not expressly address this point, we note that it was relied on by the Respondent in their Response at page 71, paragraph 18 and that it was therefore properly before the tribunal.

14. The claimant also relies in his notice of appeal at ground 3 on the fact that the respondent relied in dismissing him on the statements made by Mr Wilkins and Mr O'Dowd about dropping the appeal in exchange for a promotion and the claimant says the Employment Tribunal failed to consider whether those statements in themselves amounted to protected acts under section 27(2)(c) of the Equality Act. Again, it is true that the Employment Tribunal do not address this point in terms. This is perhaps not entirely surprising since the claimant's position at the hearing had been that he denied entirely that the two relevant

conversations ever took place. In any event, we are quite satisfied that on the findings of fact made by the Employment Tribunal such a claim was also doomed to fail. As we have said, on the tribunal's findings the initial allegation which led to the grievance was plainly false and made in bad faith. What then happened was that there was an implied threat made to Mr O'Dowd and Mr Wilkins which was, indeed, tantamount to blackmail. This threat, in our firm view, was clearly "separable", as the case law refers to it, and the cause of the dismissal was not a protected act: it was, rather, that a threat was made which was entirely inappropriate. It also clearly provided a valid additional ground for dismissal as set out in the letter for the dismissal. Again, we recognise that this EAT is filling the gaps so far as legal analysis is concerned but, given the findings of fact, we consider that there was no other legal answer.

15. For all these reasons, although the Employment Tribunal's judgment cannot be described as perfect and there were certainly matters omitted by way of express findings on some issues, we are quite satisfied that on the findings of fact which they made, which were open to them, they properly dismissed the claimant's complaint that he was dismissed by way of victimisation.

(Judgment ends)