Neutral Citation Number: [2024] EAT 47

Case No: EA-2021-001236-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 March 2024

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

MRS F ATIF

Appellant

- and -

DOLCE & GABBANA UK LIMITED

Respondent

- -
- -

MS M MURPHY appeared for the **Appellant**
MR C HOWELLS (instructed by Blake Morgan LLP) for the **Respondent**

Hearing date: 7 March 2024

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JUDGMENT

SUMMARY

RACE DISCRIMINATION

The ET rejected the Claimant's claim that she had been dismissed because of her race on the basis that they had not received evidence which meant that section 136 EqA 2010 applied and the burden of proof was reversed.

The EAT considered that there were facts from which the tribunal could decide that there had been discrimination and that section 136 should have been applied. But, on analysis, the ET had grappled in detail with those facts and their implications and had reached a clear conclusion that there was no race discrimination in the case and that they would clearly have reached that conclusion in any event. The appeal was accordingly dismissed.

HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal against a judgment of the London Central Employment Tribunal, (EJ Adkin and members) which was sent out on 26 November 2021 dismissing Mrs Atif's claims of unfair dismissal and race discrimination after a three-day hearing in July 2021 at which Mrs Atif represented herself. On this hearing she has been assisted by Ms Murphy of counsel. Mr Howells represented the Respondents, Dolce & Gabbana UK Limited, before the Tribunal and before this Appeal Tribunal.

2. The claimant worked for Dolce & Gabbana UK Limited as a client advisor at their Harrods concession from 2013 until her dismissal on 10 March 2020. She is Algerian and Arab speaking. She was dismissed for systematically abusing the Respondent's sickness absence policy and her claims of unfair dismissal and race discrimination, as I say, failed.

3. After a number of hearings in the Employment Appeal Tribunal (EAT) an appeal in relation to race discrimination was allowed to proceed by HH Judge Tucker on grounds which are set out in the skeleton argument that was used on that occasion by an ELAAS representative, which are set out at pages 67 and 68 in my bundle. That was in February 2023, and I am afraid the full hearing has only come on over a year later in March 2024.

Facts

4. The Respondent is, as its name suggests, the UK subsidiary of Dolce & Gabbana and I think I can take judicial notice of the fact that that is an Italian organisation. It is clear that the claimant had problems with her immediate manager, a lady called Paola Habte, and I think I can also take judicial notice of the fact that she was herself Italian.

5. As part of her witness statement the Claimant referred the Tribunal to the structure of the company, and she said it was unprofessional and incompetent because it supported Italian workers purely because of their nationality, so that workers who were not Italian and had genuine skills and loyalty were completely ignored and rejected because they were not Italian, especially Arabic ones, which is nationalism turned into racism. The Tribunal directly addressed that statement and they found that the employees who were not Italian were not completely ignored and rejected, but they did acknowledge the comment about structure which they said was supported to the extent that the management or the HR personnel working in the UK company were exclusively Italian and that that was at least relevant. They also accepted that there was a team of non-Italian Arabic speakers, including herself, who worked on the shop floor in Harrods.

6. So far as Mrs Atif's relationship with Paola Habte is concerned, the first relevant fact recorded is that on 16 October 2019 she complained to someone called Ms Di Ruocco about Paola Habte's treatment of her, in particular in relation to allocation of late shifts and so on, and she apparently complained that no Arabic speakers had lasted within the team.

7. On 19 November 2019 she requested leave, including 31 December, New Year's Eve. That request was refused and she then told colleagues that she would take it anyway as sick leave.

8. On 20 November 2019 she complained to someone called Silvia Corbella, the European HR Manager, about discrimination as a result of being placed on the shift rota for both Christmas and the New Year, although she did not specify what type of discrimination.

9. On 21 December 2019 Julia Barnstable, the Deputy Store Director, emailed Ms Habte and expressed concerns about Mrs Atif's repeated requests about the number of sick days she had remaining; specifically, she had twice asked how many sick days she had taken and how many she had left. Ms Habte replied a few minutes later with her own concern about the Claimant, in that she seemed to believe that she should get an extra day of sickness which she, Ms Habte, felt was a suspicious question to ask and she indicated that sickness absence from that day to the end of the year would be monitored. Ms Barnstable replied saying: "I agree, it's very suspicious for someone to be asking how many sicknesses they 'have left' as sickness is not a leave balance to be taken in full, only as needed."

10. On 30 December Ms Habte replied, copying in Ms Corbella and a number of others, and said: "Unfortunately the claimant called sick today, this is after she enquired in regards to her sickness as you can see from the below emails. I informed her on 26 December that she had used 6 days of sickness this year. She had been asking to have today and tomorrow off since the start of the month and the rota was changed as to accommodate her request for tomorrow, it wasn't however possible also to give her today off, therefore to date sickness is highly suspicious."

11. Mrs Atif in fact came back to work on 4 January 2020. On 6 January she complained to Ms Corbella about her treatment by Ms Habte since 4 January. Then on some date between 6 and 13 January 2020 Ms Corbella requested that the Claimant's sick absences be investigated, and that led in due course first to an investigation meeting between the Claimant and Ms Di Ruocco and in due course to her dismissal on 10 March 2020. The reason for that was given as gross misconduct, in that she had systematically abused the sickness absence policy, and that was based on, according to the Tribunal at paragraph 52: "(i) a clear and consistent pattern

of sick days linked to holidays, days off or days in lieu; (ii) consistently taking 7 days sick absence each year since January 2018 corresponding to the number of days eligible for sick pay, and (iii) stating to colleagues an intention to take a sick day on 31 December 2019 when a request for leave had been refused." It was acknowledged by the decision-maker that, in fact, as it turned out, the sick absence on 31 December was a genuine sick absence but that did not detract from the finding that the claimant had decided in advance to take that day as sick at a time when she would have had no reason to believe she would be ill. Mrs Atif had contended that there was a widespread abuse of sick pay and the decision-maker said that the rotas of other colleagues would be considered separately and if warranted in their cases disciplinary action would be taken against them. As to the grievance which had been raised on 6 January 2020, Ms Bianchini took account of the reference to being sick, but the remainder of the document she said would be treated separately by HR as part of a grievance process.

12. In due course there was an internal appeal against the dismissal which was refused. In the meantime the Claimant started these proceedings. As I have already indicated, the Employment Tribunal found that the dismissal was fair and although that decision was challenged originally as part of the appeal I am not considering a challenge to that decision today.

13. Today we are solely focused on the claim of race discrimination. The Appellant says that her claim for race discrimination should have succeeded. Her claim was that she was investigated, disciplined and dismissed and her grievance not properly considered because of her race, in particular that she was one of the non-Italian Arab speaking staff.

Section 136

14. Plainly section 136 of the Equality Act 2010 was potentially in play and the appeal in this case relates basically to the way the Employment Tribunal dealt with the question of burden of proof and its treatment of the question of comparators. I do not propose to set out the law in relation to section 136. I remind myself that a finding of discrimination requires only that the protected characteristic had a significant influence on the relevant decision and that, even if the decision in question was fair, that does not mean it was not discriminatory. The claimant's case was that she was treated differently to her Italian colleagues and that others doing the same thing as her were not or would not have been treated in the same way even if it would have been open to them to be treated that way on a fair approach.

15. I alerted counsel to a useful decision of HHJ Tayler relating to particularly to section 136, called **Field v Steve Pye & Co (KL) Ltd** [2022] EAT 68, which was decided on 5 May 2022. Judge Tayler re-emphasises the importance of the shifting burden of proof and the need to approach a claim of race discrimination or other kinds of discrimination in the logical way that is required by section 136, and he says at paragraph 41: "If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment on the balance or probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores [the fact] that the burden of proof requires careful consideration if there is room for doubt."

16. Then Judge Tayler goes on at paragraph 42: "Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain

why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an **Igen** analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one **Igen** threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the **Igen** guidelines."

17. So, the reason for applying section 136 properly is to ensure that the Tribunal reverses the burden of proof when appropriate and grapples with the evidence which is suggestive of discrimination and then asks itself the right question at the end of the process, namely, whether it has been proved that there was no discriminatory reason for the treatment.

18. In this case, the Employment Tribunal's decision at paragraph 159 was this: "Ultimately, we do not find that we have received evidence from which we could draw an inference that race is the reason for the claimant's treatment. The claim of race discrimination therefore does not succeed." Employment Judge Adkin confirmed in answer to questions put by the EAT that the Tribunal did not find that the burden of proof had shifted to the Respondent.

19. In the course of argument before me a number of facts have been identified which the claimant says, at least in combination, would shift the burden of proof. First, the structure of the company and the fact that all the management were Italian. Second, the timing of the investigation: I have read from the judgment in my description of the facts, and in particular at paragraphs 24 and 25 it appears from the timing that the investigation could have been a response to the complaint which the claimant lodged on 6 January 2019. Third, the fact that

that grievance against her line manager was never properly completed. Fourth, the fact that the decision to dismiss was harsh. And fifth, the fact that others, in particular employee X, who was in fact it is now acknowledged all round, Ms Habte, were treated differently, although it is said her case was sufficiently similar to serve as a comparator.

20. As I have said, the Employment Tribunal decided that the burden had not shifted, in other words, that those facts did not give rise to a potential inference of discrimination. However, in the course of the judgment they did consider each of those matters raised, as Mr Howells has demonstrated.

21. On the first point about the structure of the company and the fact that the senior staff were all Italian the Tribunal said this at paragraph 153: "Had one of the claimant's allegations of direct race discrimination been that she had applied for a position but lost out to an Italian colleague with equivalent qualifications, this background about the structure might have been enough for us to draw an inference of possible race discrimination, or at least enough to help the Claimant to satisfy the initial burden of proof on her. That is not her claim however." In the answer to the EAT's question EJ Adkin said this: "The content of paragraph 153 of the written reasons was comment that the composition of different nationalities in the structure of the workplace **might** have been enough to draw an inference in a hypothetical claim about losing out in a job application to an Italian colleague. That was not the claim we were dealing with and we did not find that the burden of proof had shifted based on the evidence in the case before us."

22. Initially, I confess I found that a difficult logic to follow, but thinking about it, I can see what the Tribunal are getting at. It is one thing to infer that a non-Italian would not be given a job, certainly in management, because of her race, but it is perhaps another and a step further

to infer that the management would actually treat her differently in the context of disciplining an existing member of staff. It is a difficult piece of reasoning but nevertheless was the view of the Tribunal, who had clearly thought about it.

23. The second point relates to the timing of the investigation and it being in response possibly to the complaint made on 6 January 2020. Mr Howells pointed out by reference to the dates that in fact the timing was equally consistent with the investigation being a direct response to the email that Ms Habte had sent to Ms Corbella on 30 December 2019, and that is certainly right, and it appears, I think from paragraph 143 of the reasons, that the Employment Tribunal accepted the Respondent's case about what led to the investigation.

24. The third thing is the lack of follow up on the grievance. Again, that was considered in detail in particular at paragraph 150, where the Tribunal say: "We have not found that the grievance was entirely ignored, but we acknowledged the formal process was not concluded." The process was somewhat protracted but there was a mediation in February 2020 and ultimately by that stage the claimant was subject to a disciplinary process with charges that amounted to gross misconduct which were then substantiated and upheld on appeal, and the backdrop also to the appeal process which took place remotely was Covid 19 which placed everybody under strain, and they say: "We can understand how in those circumstances the grievance may have gone by the wayside": that was still not a satisfactory outcome for the Claimant but was clearly in the Tribunal's opinion explained.

25. The fourth thing, the harshness of the decision to dismiss the claimant, the Employment Tribunal do not really address directly. However, their decision on the unfair dismissal claim indicates that they clearly considered it was within a band of reasonable responses for the Respondents to dismiss the Claimant and they themselves clearly considered that it was fully

justified, and that I think appears clearly from paragraph 158, where they say that the circumstances leading to the Claimant's dismissal were because of her own misconduct in systematically abusing the sick absence policy.

26. That brings us to the fifth thing, which was that a number of other members of staff were in a comparable position and had not been the subject of the investigation and so forth. The most relevant of these was employee X who, as I have said, was in fact Ms Habte. Her sickness record is set out, so far as relevant, at paragraph 35 in the Tribunal's judgment and I am not going to get into the detail of that.

27. At paragraph 142 they set out the comparators, and they say: "We have not found any of these actual comparators to be in materially similar circumstances to the Claimant. The closest comparator is employee X who did appear to have a pattern of sick absence before or after other absence over a period of time." Then at paragraph 148 the Tribunal said this: "There is no actual comparator, in that there is no individual in the employment of the respondent who repeatedly asked about sick absence 'entitlement', threatened to take a sick day as well as having a clear pattern of taking sick absence immediately before or other absences over a two year period and took 7 days' absence in both years". So when they say there was no actual appropriate comparator, they acknowledge that Ms Habte was the closest but they say that she did not threaten to take a day off sick, repeatedly ask about her sickness entitlement and take 7 days absence in both relevant years in the way that the Claimant did, so that although she was the closest she was not an appropriate actual comparator. The Tribunal go on to say: "We consider a hypothetical comparator in those circumstances would be likely to be facing the ultimate disciplinary sanction."

Conclusions

28. One of the grounds of appeal, number (2), was phrased in this way, that the Tribunal held that the hypothetical comparator was not in materially similar circumstances when by definition the circumstances of the hypothetical comparator would be materially the same, except for the protective characteristic of race, and then it talks about the Tribunal failing to address the question whether the Claimant was treated less favourably than the hypothetical comparator would have been treated. I think that is slightly misconceived because the hypothetical comparator was by definition in materially the same position as the claimant, as described in paragraph 148. However, the conclusion, the bare conclusion that a hypothetical comparator in those circumstances would be likely to be facing the ultimate disciplinary sanction, i.e. would have been treated exactly the same, was really of very little value in itself. That was the very question that the Tribunal needed to address; in other words, whether someone of a different race in the same circumstances would have been treated the same or differently, so that does not really, in my view, advance things either way.

29. The real question it seems to me is whether the burden of proof had shifted and what the consequences of that were. I have reached the view that in this case the Employment Tribunal ought, looking at the facts I have identified in combination, to have concluded that the burden had indeed shifted and then to have asked itself whether the Respondent had demonstrated that it had not discriminated against the Claimant.

30. However, I have been through each of the facts relied on and I have identified how the Tribunal dealt with them and it seems to me that the detailed consideration given to each of those facts, along with the very clear and trenchant conclusions that the Tribunal reaches at paragraph 148 and 159, make me confident that the dangers referred to by Judge Tayler have

in this case been averted. The ultimate conclusion reached, namely, that there was not discrimination, is plainly not perverse, the Tribunal have engaged and grappled with the evidence that might have given rise to an inference that there was race discrimination, and although the route they have taken is, in my view, not ideal, it seems to me that they were entitled to reach the decision they reached and if they had put it in another way of saying the burden had shifted but we are now going to consider all those points, would clearly have reached the same decision.

31. So, although I have that criticism, it seems to me that the appeal should nevertheless be dismissed because the conclusion was one that was open to the Tribunal and they have done the work necessary, even if the burden had shifted over to the Respondents.