Neutral Citation Number: [2025] EAT 199

Case No: EA-2024-000929-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 December 2025

Before:

HIS HONOUR JUDGE BARKLEM

Between:

STAY SAFE EAST

Appellant

- and -

MONIQUE FRANCOIS

Respondent

Mr Rad Kohanzad (instructed by Croner) for the **Appellant**
Mr Adam Ohringer (instructed by TSUT Carpenters Group) for the **Respondent**

Hearing dates: 3 & 5 December 2025

JUDGMENT

SUMMARY

Discrimination

An employment tribunal rejected an unopposed application to adjourn a full hearing. The claimant's witness statement had not been received in advance of the hearing by the respondent or the tribunal itself. There was considerable oral augmentation of that statement. The respondent's representative was unable to attend the actual hearing.

The claimant's claim was that, in a discriminatory way, decision makers refused to make a discretionary payment to her, (a black woman with a physical disability) during sickness absence, which had earlier been paid to another female employee who was white and neurodiverse,

The tribunal's written reasons do not set out the relevant law other than by reference to a single case. In particular they do not make any reference to the well established principle that, to establish discriminatory treatment there has to be "something more" beyond a mere difference in status and treatment. In the absence of any finding of a "something more" the ET erred in law. Moreover there is nothing in the written reasons to explain on what basis they found that the relevant decision makers were the same, the reasons therefore not being Meek compliant. The matter was remitted for rehearing by a fresh tribunal.

HIS HONOUR JUDGE BARKLEM:

1. This is an appeal against the decision of an employment tribunal sitting at London East, Employment Judge Housego presiding, sitting with members Mr Daniels and Dr Ukemenam, which took place on 5-8 June 2024.

2. The claimant brought a number of claims arising out of her employment with the respondent, which is a charity supporting disabled people, but the only two with which I was concerned were a claim of direct race discrimination and a claim for unlawful deductions from wages. The appeal in respect of the latter was withdrawn in the course of the proceedings before me, and I say no more about it. The appeal was permitted to proceed to a full hearing by HHJ Auerbach following the sift on Grounds 1 and 3; only Ground 1 now being live.

3. Before me, the parties were represented by counsel, neither of whom appeared below. Mr Kohanzad for the appellant, which is appealing, and Mr Oringer for the respondent. I am grateful to each of them for their succinct skeleton arguments and oral submissions.

4. It appears from the written reasons of the tribunal that the respondent had applied shortly before the hearing for an adjournment. This was not opposed by the claimant. The application had not been seen by an employment judge prior to the hearing and the tribunal decided not to grant the adjournment. There had been a failure by both parties to comply with orders which had been made earlier in the case; the respondent's representative having been handed the file only the day before the first day of the hearing, with neither witness statements nor a document bundle having been provided to her. The respondent had not, as it had been required to do, stated its position as to whether the claimant was disabled. Moreover, although the tribunal accepted that the claimant had posted a copy of her witness statement, it had not reached the ET, nor had it reached the respondent.

5. At paragraph 35 of its reasons, the tribunal said:

> "The claimant's case is otherwise clear from the particulars of claim. She has sent a witness statement, and it is not her fault that it was not received. The respondent is not disadvantaged by late sight of the witness statement because what her claim is about has always been clear."

6. The hearing proceeded, and it appears that the respondent's representative did not attend the hearing when it began on the second day. At paragraph 61 of the reasons, the tribunal said:

> "The tribunal heard oral evidence from the claimant. For the reason set out above there was no other evidence. Counsel had no part in the preparation of the claimant's witness statement and so asked extensive supplemental questions to enable more detail to be given. Nothing not presaged in the particulars of claim or the witness statement was asked. There was no one from the respondent to cross-examine the claimant."

7. The tribunal described the claimant's evidence concerning the issue which is live before me in paragraphs 98-119. I have quoted only the evidence that relates to the relevant issue, beginning at paragraph 98:

> "Miss Francois says:
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> 98.1. she was not paid other than SSP until she objected, and it took a long time to resolve this.
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> 98.2. In 2020, a white colleague, AS, who had neurodiverse conditions was paid full pay for a period of nine months, but she was not.
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> 98.3. She was never told that there was a discretion to pay full pay not SSP.
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> 102. This leaves Miss Francois not being told that there was a discretion to pay sick pay at full pay once a contractual amount had expired. Miss Francois was belatedly paid contractual sick pay but then reverted to SSP. Miss Francois named comparators Alex Irvine and AS. There is no cogent comparison between Miss Francois and Mr Irvine for the reasons given above.
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> 110. 5 "While every case is determined on its individual facts, the respondent is an organisation, most of whose staff are disabled. It is less likely that they would engage in disability discrimination when they go out of their way to support disabled people by employing them. It is a diverse workforce and, again, that makes it less likely that race discrimination would occur. The tribunal is aware that there are many forms of race

> discrimination and diversity does not preclude a specific prejudice and took this into account also.
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> 111. However, the tribunal accepted that three white people -- and they were named -- all of whom have differences in nationality or ethnicity but have in common the fact that they are white, were the decision makers. AS is white also. For her, a white person with a neurodiverse condition, discretion to pay full pay was exercised for some nine months. For Miss Francois, a black person with a disability evidencing itself physically, discretion was not exercised and Miss Francois was not told that there was such a discretion. Miss Francois says AS is white and neurodiverse and was paid discretionary full pay for nine months. This is the only argument put forward that could justify a finding of disability discrimination or race discrimination.
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> 113. The tribunal finds that it is a primary fact that leads the tribunal to infer that this was race discrimination unless the respondent can prove otherwise.
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> 114. This is a classic case of looking after someone who is like you but not looking after someone who is different. This certainly applies to race, which is sufficient for the claim of unlawful discrimination to succeed.
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> 115. Because the tribunal does not know what, if any, disabilities the people who made the decisions have it is not possible for the tribunal to find facts which could lead to a finding of disability discrimination.
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> 116. As Miss Francois pointed out, management knew that she was in great financial hardship, using foodbanks and borrowing from relatives, but they did not tell her that there was a discretion to pay more than sick pay or exercise that discretion. Plainly, they knew of the discretion as it had been exercised for AS in the recent past.
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> 117. This is unconnected with the error in paying SSP only, but the fact was that it was SSP only being paid and that should have prompted consideration of discretionary payments to Miss Francois as the respondent knew of her financial difficulty: she told them of it.
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> 118. The respondent had not considered the exercise of the discretion. It had not given cogent reasons why that discretion would not have been exercised in favour of Miss Francois.
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> 119. As these were facts from which the tribunal could infer that there was race discrimination, the burden of proof therefore passed to the respondent. There was no evidence from the respondent and so they could not do so. Therefore, the claims for direct race discrimination succeeds."

The tribunal then made an award of damages under the Vento principle.

8. Ground 1 of the appeal is as follows. The tribunal erred in considering that the burden of proof had shifted. The claimant was not paid a discretionary payment when she was on sick leave, receiving

SSP, whereas her white comparator was. Whilst that established less favourable treatment, the ET erred in failing to consider whether there was "something more" in the **Madarassy v Nomura International** case sense. In concluding that the burden of proof had shifted merely because the claimant had established less favourable treatment, the tribunal erred. The tribunal neither cited nor applied the principles in **Madarassy**. In the alternative, the ET erred in concluding that the race of the decision makers was something more. One cannot infer discrimination merely from the comparator sharing the race of the decision maker.

9. The ET further erred in concluding that this is a classic case of looking after someone who is like you but not looking after someone who is different. There was no evidential basis for that finding that the managers were "looking after" fellow white employees because they were white, but not black employees. A sample size of one is not sufficient from which to infer such conduct. These errors follow a number of occasions where the tribunal set out the law as to the burden of proof in an entirely unsatisfactory way [see paragraph 10: The wrong test enunciated, and 44: Causal links suggests but for causation].

10. In his skeleton argument, Mr Kohanzad argued that the fact that the claimant was not paid a discretionary payment when she was on sick leave, whereas her white comparator had been, established "less favourable treatment" but the tribunal then failed to consider whether there was "something more" It was an error to conclude that the burden of proof had shifted merely because the claimant established less favourable treatment. He pointed to the fact that the tribunal neither cited nor applied the principles in **Madarassy** and the proper approach to the burden was as set out by the Court of Appeal in that case, in which Mummery LJ stated that the court in **Igen v Wong** [2005] ICR 931 had expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal conclude that the respondent could have committed an unlawful

act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which the tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

11. "Could conclude" in section 63A (2), the predecessor to section 1362, must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegation as of sex discrimination such as evidence of a difference in statement, a different in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory absence of an adequate explanation at this stage, the tribunal would need to consider all evidence relevant to the discrimination complaint.

12. Mr Kohanzad also points to the requirement for "something more" having been reaffirmed by the Court of Appeal in **Efobi v Royal Mail Group** [2019] ICR 750. He also argued that the tribunal had made no finding as to what racial bias or prejudice the three supposed decision makers had exhibited other than on this single occasion. It was thus speculation and far too sweeping a conclusion.

13. In answer to a question which I raised in the course of argument as to whether it was common ground that the decision makers had been the same in each case, that is to say the claimant and AS, this not being clear to me from the written reasons, Mr Kohanzad said, on instructions ,that they were not the same. Plainly, I cannot accept evidence, but I am satisfied that the ET had either not properly investigated the issue or had not set out clearly in its reasons what roles these individuals had.

14. For the respondent, Mr Oringer supported the tribunal's findings, arguing that, read as a whole and despite some loose language as to the correct legal principles, the tribunal had directed itself correctly. He described as "stark" the difference in treatment, AS having received full pay in 2020 for some nine months, whereas, knowing of her financial hardship, the white decision makers did not even consider exercising the discretion. He submitted that the stark treatment was sufficient to amount to the "something more: which he was accepted was required, beyond a mere difference in treatment and of status.

15. In my judgment, the legal test is clear and agreed. A mere difference of treatment and status will not suffice. The tribunal made no reference to the relevant case law other than as a footnote referencing **Royal Mail Group v Efobe** as "comprehensively setting out the law." Although correctly pointing to the requirement for the claimant to show reasons before the burden can shift, it at no stage referred to the legal test set out above and in particular, the need for a "something more".

16. It is clear that the respondent did not have the claimant's witness statement before the hearing, and common ground that neither the Form ET1 nor the list of issues which had been determined at an earlier stage made any reference to AS, whose relevance it seems emerged only in the claimant's witness statement. The conclusion that there was nothing in the claimant's statement that would not disadvantage the respondent therefore seems to me questionable. Unfortunately, that witness statement was not before me, so I have no idea what material the tribunal had before it as to how the decision makers approached the two distinct cases and what, if any, relevant matters both pointing to and away from the claimant's own case were set out in the evidence.

17. I reject the submission advanced on behalf of the claimant that the stark nature of the difference in treatment can constitute the "something more." Difference in treatment may be major or minor, but the authorities do not distinguish on a quantitative basis. I find, therefore, that the tribunal erred

in law in failing properly to direct itself as to what was required evidentially before it could conclude that, on the balance of probabilities, the burden had shifted. If I am wrong about that, I also find that it gave no explanation as to the basis for its conclusion that the same decision makers had been involved in the two cases, and how it was able to infer that both disability and race discrimination tainted the action or inaction of the respondents. In those respects, therefore, the decision was not Meek compliant.

18. I can understand the tribunal's reluctance to grant an adjournment, even when the claimant did not object to it, given the pressure on resources. However, when it became apparent that the respondent had not previously seen the statement which was, it seems, extensively augmented in examination-in-chief, that the comparator emerged for the first time only in the witness statement and the respondent's representative's was unable to attend the hearing, it is perhaps unfortunate that that decision was not revisited.

19. Be that as it may, the appeal succeeds and the matter must be remitted to a newly constituted tribunal for a re-hearing.