Appeal No. UKEAT/0439/10/DA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 10 March 2011

Before

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

MR K EDMONDSON JP

MRS D M PALMER

MR M HUSSAIN — APPELLANT

(1) VISION SECURITY LTD
(2) MITIE SECURITY GROUP LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID CUNNINGTON (of Counsel) Instructed by: Messrs McKeowns Solicitors 8 Parkway Porters Wood St Albans Herts AL3 6PA
For the First Respondent	No appearance or representation by or on behalf of the First Respondent
For the Second Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: Messrs Borneos Solicitors Chancery House 199 Silbury Boulevard Central Milton Keynes MK9 1JL

SUMMARY

AGE DISCRIMINATION

Tribunal wrongly held that the Appellant had not shown a sufficient *prima facie* case of age discrimination to satisfy "**Igen** stage 1" - Since the only explanation of the difference in treatment complained of had been rejected the Appellant's claim succeeded – Remitted for consideration of remedy

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

1. The Appellant is a gentleman now aged 68. In July 2000 he started work as a security guard for Rentokil Initial Security Services Ltd. He worked at a site called the Gillette Gatehouse in Hemel Hempstead. In 2006 his employment transferred under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") to Mitie Security Services Ltd.

2. On 19 January 2007, at which date the Appellant was aged 64, Mr Rogers, Mitie's contract manager for the site, wrote to the Appellant and two of his colleagues, Mr Charon and Mr Enright, to say that Mitie's services would not be required at the Gatehouse from the end of the month, and that they would work as relief officers from 1 February until a suitable permanent site could be found. By the end of that month, or at least within a few days thereafter, Messrs Charon and Enright were transferred to the site of a client called Gist Ltd. The Appellant was not, even though – as, to anticipate, the Tribunal found - there was, or shortly arose, at Gist a vacancy which he could have filled but which was eventually filled by external recruitment.

3. In April 2007 the Appellant commenced proceedings in the Employment Tribunal raising various claims. The only one which is now live is that he was discriminated against on the grounds of his age by not being transferred to the Gist site when Messrs Charon and Enright, who were at the time aged 34 and 36 respectively, were transferred. That claim was heard in Bedford before a Tribunal chaired by Employment Judge Cassel on 11 February 2008. It heard evidence from the Appellant himself and from Mr Rogers. By a Judgment and Reasons sent to the parties on 27 February 2008 the Appellant's claim was dismissed. The basis on which it was dismissed was that the Tribunal accepted evidence from Mr Rogers, which the Appellant

had disputed, that he had spoken on the telephone to the Appellant, Mr Charon and Mr Enright on 21 January 2007 to offer all of them the available work at Gist, but that the Appellant had refused. If that evidence were true, there was of course an obvious reason for the Appellant not being moved to Gist when the other two were.

4. On 10 February 2009 this Tribunal allowed an appeal by the Appellant on the basis of fresh evidence from Mr Charon and Mr Enright which contradicted Mr Rogers' evidence that he had spoken to them on 21 January (see UKEAT/0342/08). The case was remitted to the same Tribunal to consider, as it is put at paragraph 66 of the Judgment:

> **"….the key issue, whether there was age discrimination arising from the fact that younger colleagues were transferred to the Gist site in Hemel Hempstead whereas Mr Hussain was not."**

5. The remitted hearing took place on 17 and 18 May 2010. By that time Mitie's business, or the part of it in which the Appellant worked, had transferred to Vision Security Group Ltd ("VSG"), and accordingly the Appellant's employment and any past liabilities had been transferred to VSG under TUPE. VSG were accordingly joined as Second Respondent. The Appellant was represented by Mr David Cunnington of counsel. Both Respondents were also represented by counsel. The Appellant did not give further evidence, but he called the evidence of Mr Charon and Mr Enright, and indeed of a third witness, Mr Mathirson. The evidence of Mr Charon and Mr Enright confirmed the evidence which had been produced to this Tribunal on the appeal contradicting Mr Rogers' evidence. Mr Rogers himself gave further evidence.

6. By a Judgment and Reasons sent to the parties on 8 June 2010 the Tribunal again dismissed the Appellant's claim, although it said that it had found the decision a difficult one.

7. This is an appeal against that decision. Mr Cunnington appears for the Appellant. Mitie, though formally a Respondent, has no interest in the case and has not appeared. VSG is represented by Mr Michael Salter of counsel.

8. We should start by summarising the Tribunal's Reasons. It did not start again from scratch, but focused on the issue remitted by this Tribunal. Although it did not expressly say so, it is clear that the findings which it had made on the first occasion were relied on by way of background, and it made further factual findings only to the extent necessary as a result of the further evidence.

9. The Tribunal made its essential findings of fact at paragraphs 4 and 5 of the Reasons. These are very brief. In the light of the further evidence now called and also of inconsistencies in Mr Rogers' evidence taken as a whole, it no longer accepted that he had spoken to the Appellant and his two comparators on 21 January 2007, or therefore that the Appellant had refused an offer to move to Gist. It found that Mr Rogers had instructed the two comparators to start at the Gist site, one on 29 January and the other on 6 or 7 February. It found that no offer of employment at the Gist site was ever made to the Appellant. Mr Rogers' evidence was described as "unreliable", but on the specific point to which we have referred it is hard to see how it could have been anything but untruthful.

10. At paragraphs 6 and 7 of the Reasons the Tribunal set out the relevant provisions of the **Employment Equality (Age) Regulations 2006**. It also said that it had been referred to the decision of the Court of Appeal in **Madarassy v Nomura International Plc** [2007] ICR 867. At paragraph 8, the Tribunal said that it had found the case difficult and that it did not doubt the sincerity with which it had been brought by the Appellant. At paragraphs 9 and 10 it referred to

Madarassy and set out in particular paragraph 56 of the judgment of Mummery LJ, which we will set out in its context presently.

11. The Tribunal's decisive reasoning appears at paragraphs 11 and 12 of the Reasons, which read as follows:

> **"11. It seems to us based in our findings of fact, that in essence the Claimant's claim amounts to no more than this:-**
>
> **(i) my comparators are 30 years or so younger than me**
>
> **(ii) I have been treated less favourably than they have**
>
> **(iii) the decision maker, Mr P Rogers is an unreliable witness and therefore I must have been subjected to age discrimination**
>
> **12. The evidence that we have before us and the findings that we have made could not lead to us to the conclusion that we "could conclude" that the Respondent or either of them has committed the act of which the Claimant complains. The burden of proof makes it abundantly clear that it is for the complainant to prove fact from which we could conclude unlawful discrimination and he has failed to do so. In those circumstances the claim must be dismissed."**

12. Before we turn to consider the Appellant's challenge to that reasoning, we should ourselves refer briefly to the relevant principles of law, though they are uncontroversial. Regulation 37 (2) of the 2006 Regulations is in substantially the same terms as the "reverse burden of proof" provisions appearing in the other anti-discrimination legislation. It provides that where a complainant "proves facts from which the Tribunal could ... conclude in the absence of an adequate explanation" that the respondent has committed an act of discrimination "the tribunal shall uphold the complaint unless the respondent proves that he did not commit ... that act". The exercise required by the regulation or its cognates has been explained by the Court of Appeal in **Igen Ltd v Wong** [2005] ICR 931 and, most recently and authoritatively, in **Madarassy**, to which the Tribunal referred. Mummery LJ in **Madarassy** offered guidance on what is meant by "facts from which the Tribunal could ... conclude" that discrimination had occurred. The relevant paragraphs are 48-61, but it is unnecessary that we set them out in full. We should note, however, that at paragraph 54 Mummery LJ said that he was unable to agree

with a submission from Mr Robin Allen QC for the claimant that the burden of proof shifted to the employer simply on her establishing the facts of a difference in status and a difference in the treatment. That conclusion is explained and amplified at paragraphs 56 to 58, which read as follows:

> **"56. The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could 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 a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
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> **57. "Could conclude" in section 63A(2) 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 allegations of sex discrimination, such as evidence of a difference in status, a difference 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 (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.**
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> **58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."**

13. Mr Cunnington's primary submission on behalf of the Appellant was that the Tribunal's findings of primary fact required it to hold that, to use the shorthand adopted in **Madarassy**, a *prima facie* case of age discrimination had been established. He accepted that the relevant factual findings amounted to those identified by the Tribunal at paragraph 11 of the Reasons, but he said that those facts by themselves were sufficient to call for an explanation if an inference of age discrimination were not to be made.

14. In response to that case Mr Salter relied on Mummery LJ's statement in **Madarassy** that it was not the law that "**Igen** stage one" was satisfied merely by showing a difference of status

and a difference of treatment. He said that "something more" was required and that here there was nothing more. He said that this was not a case where there was, for example, evidence of ageist remarks or conduct by Mr Rogers. Indeed, there was evidence, recited at paragraph 12 of the Tribunal's first Reasons, that Mitie positively welcomed older members of staff remaining in post and did not require retirement at 65 or indeed any other specific age. Mr Salter acknowledged that the Tribunal had not referred to that evidence in its reasoning but it should be assumed to have had it in mind. He also acknowledged that the evidence in question derived from Mr Rogers, who had since been stigmatised as unreliable, but he said that that finding had been directed at another issue and did not relate to this, very different, kind of evidence. He also reminded us that the relevant question was one for the factual assessment of the Tribunal, with which we should not interfere unless it was perverse.

15. In our judgment the matters relied on by the Appellant were indeed sufficient to shift the burden of proof. There were three vacancies at Gist: two were offered to colleagues of the Appellant who were in their thirties, but the third was not offered to the Appellant, who was on the brink of pensionable age and indeed was filled by external recruitment. Mr Rogers, when age discrimination had been alleged, had given an untruthful explanation for the difference in treatment. It could perhaps be added, although this is of less significance, that he had also failed to deal with correspondence from the Appellant expressly alleging age discrimination. A tribunal could properly infer in those circumstances that the Appellant's age, and more specifically the difference between his age and his comparators', was indeed the reason for the difference in treatment, unless the Respondent proved an adequate explanation. That would be our view even if the finding in the first set of Reasons that Mitie did not generally require retirement at 65 stands and should be taken into account. A general policy is one thing, but it does not negative, or indeed necessarily weigh very heavily against, an inference that an individual manager in particular circumstances was motivated by discriminatory considerations.

Whatever Mitie's policy generally may have been, it is a matter of common knowledge that assumptions about whether employees of the Appellant's age should continue in employment, or enjoy equal opportunities in a particular employment situation, are still very common. That Mr Rogers should have been influenced, consciously or unconsciously, by the Appellant's age is not in any sense implausible, even without any specific evidence of prior manifestation of ageist attitudes.

16. We do not believe that our conclusion that the facts relied on by the Appellant raised a *prima facie* case of age discrimination conflicts in any way with the passage from Mummery LJ's judgment in **Madarassy** on which Mr Salter relies. Mummery LJ was there rejecting Mr Allen's submission that the burden of proof is, automatically and in all cases, reversed merely by proof of difference in the relevant status and difference in treatment. That is not the basis on which we have reached our conclusion, which is situation-specific. In the particular situation in this case, with its specific features, which go beyond the mere fact that the Appellant is older than his comparators, we believe that a *prima facie* case of age discrimination was shown. We would not wish any generalised conclusions to be drawn from our decision. The process of drawing an inference of discrimination, including deciding whether "**Igen** stage one" is satisfied, is a matter for factual assessment and, as we have said, situation-specific. We deprecate the development of sophisticated quasi-rules of law governing that exercise, of the kind which are at least implicit in Mr Salter's submissions. The inference that the non-offer of a job to the Appellant was significantly influenced by his age is in the circumstances of this case a legitimate factual conclusion and not a "tick-box" presumption. It is, in the absence of anything else, the likely explanation.

17. We appreciate that that last observation might appear to lend weight to Mr Salter's other submission, namely that we ought not ourselves to interfere with a factual assessment by the

Employment Tribunal. We would not in fact shrink from a finding in this case that the Tribunal's decision was perverse. It was the view of all three members of this Tribunal when they first read the papers in this case that the differential did indeed raise a *prima facie* case of age discrimination, and it was important to see what explanation the Respondents could advance; and that impression was sufficiently strong that we cannot, with respect to the Tribunal, see how a different conclusion could be justified. However, we in fact think that the Tribunal here probably went wrong not by a perverse application of the right test but by failing to understand what that test involved. The reasoning in paragraphs 11 and 12 of the Reasons is so shortly stated that it is frankly impossible to see what process the Tribunal went through in saying that it was unable to conclude that Mitie had been motivated by the Appellant's age: that decision is stated rather than reasoned. But we infer, partly from the very shortness of the reasoning and partly also from the repeated references to **Madarassy**, that the Tribunal was proceeding on the basis of what it understood to be a rule of law, rather than on an assessment of what inference is to be drawn from the primary facts.

18. We should also say, following on from the point just made, that even if we were wrong to conclude that the Tribunal's decision was one which was not factually open to it on the evidence available, we believe that its decision is nevertheless flawed for failure to give proper reasons and/or for self-misdirection. In those circumstances it is, as Mr Salter accepted, open to us, by reference to section 35 of the **Employment Tribunals Act 1996**, to consider the facts for ourselves and to reach our own conclusion on the evidence rather than remit the matter for a third hearing in the Employment Tribunal. Given the prolonged history of this case to date, and the difficulties which would arise if we were to take the remittal route to the same or a different Tribunal, we think that justice would require that we decide the point ourselves. On the basis of the factual findings available to us, it follows from what we have already said that our

conclusion would be that the burden of proof had shifted to the Respondents, even if that were not the only possible conclusion.

19. By whichever route, therefore, we would reverse the finding of the Tribunal that the burden of proof had not shifted to the Respondents. Since no explanation for the difference of treatment between the Appellant and his comparators was proved, the only explanation offered being having been found to be unreliable, the Appellant's claim of age discrimination must be allowed, and the claim must be remitted to the Employment Tribunal for consideration of matters of remedy. It seems to us that the issues which will arise on remedy are so distinct from those that arose on liability that there is no particular reason why it should go back to the same Tribunal, but we will hear any submissions to the contrary that the parties wish to make.

20. We should say by way of postscript that we discussed with both counsel whether the Appellant's case was strengthened by the evidence of Mr Mathirson, whose witness statement appeared in the bundle, notwithstanding that the Tribunal itself made no reference to it. Mr Salter, however, explained that there had been aspects of Mr Mathirson's evidence which did not assist the Appellant, which were indeed referred to at paragraph 12 of the Respondent's Answer, and Mr Cunnington made it clear that his omission to rely on Mr Mathirson's evidence in his Notice of Appeal or skeleton argument was deliberate. In those circumstances we are sure that counsel were right that we should put Mr Mathirson's evidence to one side.