Neutral Citation Number: [2010] EWCA Civ 921

Case No: A2/2009/2355

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ McMULLEN QC
UKEAT/0412/08/CEA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2010

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE WILSON
and
LORD JUSTICE PATTEN

- -

Between :

ST CHRISTOPHER'S FELLOWSHIP	**Appellant**
- and -	
MRS BARBARA WALTERS-ENNIS	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Ms Hilary Winstone (Instructed By Messrs Trowers & Hamlins Llp) For The Appellant
Mr Peter Linstead (Instructed By Messrs Thackray Williams) For The Respondent

Hearing date : 18th June 2010

- -

Judgment
As Approved by the Court

Lord Justice Mummery :

The issue

1. The main point in this appeal is whether the statutory burden of proof in a case of alleged direct race discrimination was properly understood and applied by the Employment Tribunal (ET) in accordance with s54A(2) of the Race Relations Act 1976, as amended (the 1976 Act).

2. In their judgment registered on 24 June 2008 the ET, after a seven day hearing, upheld a complaint by Mrs Walters-Ennis (the Claimant) of constructive unfair dismissal and one of her complaints of direct race discrimination. Her former employer, St Christopher's Fellowship, was the respondent. It is a children's charity. It also acts as a housing association providing care, accommodation and support to children, young people and vulnerable adults.

3. On 8 October 2009 the Employment Appeal Tribunal (EAT) dismissed the respondent's appeal. The EAT concluded (paragraph 34) that the ET applied the law correctly to the facts found about the respondent's actions, the detriment suffered by the Claimant by the respondent's treatment of her when she was excluded from the procedure for the recruitment of a member of staff and the reason for such treatment.

4. Liability for unfair dismissal is no longer an issue. The respondent now accepts liability and, at a remedies hearing, it was ordered to pay £28,195.80 compensation to the Claimant. However, the respondent continues to dispute the finding of race discrimination for which it has been ordered to pay compensation of £14,767 (including interest) for injury to feelings. The respondent regards the finding of discrimination as unjustified in fact, erroneous in law and damaging to its reputation as an organisation that works closely with vulnerable children of all races. In particular, it takes seriously the transparency of its recruitment procedures in relation to which the race discrimination complaint has been made.

5. On 24 November 2009 Sir Richard Buxton refused permission to appeal. Rimer LJ granted permission on 18 February 2010 at the oral hearing of a renewed application.

6. The question for this court is this: did the ET misunderstand and misapply the 1976 Act in holding that the Claimant had proved facts from which the ET "could conclude", in the absence of an adequate explanation, that the respondent had committed an act of race discrimination in its treatment of her in February and March 2007. The treatment occurred in connection with the recruitment of an administrator at the respondent's Southend Office.

Outline facts

7. In January 2003 the Claimant, who is black African Caribbean, started her own fostering business, Elite Fostering Limited. In January 2006 she sold the business to the respondent. She became its Fostering Manager and had a say in recruitment matters. There were disagreements between the Claimant and the respondent. The Claimant was dissatisfied about the terms on which she transferred her business to the respondent, in particular her profit share.

8. Two other areas of disagreement were about recruitment. The first was in connection with the recruitment of the Claimant's step-daughter, Kayleigh Morrison, who is black African Caribbean. The Claimant's decision to appoint her to a voluntary temporary position of office assistant to the Fostering Team was reversed by the respondent. It withdrew the initial job offer to Ms Morrison for a reason that was not explained adequately or at all to the Claimant. The respondent required that the Claimant should not be involved in the recruitment process for an office assistant or in the line management of her once recruited.

9. The ET found that there was reasonable and probable cause for the respondent to be concerned about a potential conflict of interest, but held that that did not justify the way in which it dealt with the issue. It had not involved the Claimant in informed discussion about its obligations and procedures relating to such potential conflicts of interest.

10. The second area of disagreement arose after the Claimant brought in Ms Margaret Haywood to work as a temporary administrator in the respondent's Southend office. Ms Haywood, who is white, is an ex-colleague of the Claimant. She was not, as the respondent mistakenly believed, a friend of the Claimant. The respondent's senior personnel became concerned about the Claimant's involvement in the appointment process. The respondent's Chief Executive is Mr Jonathan Farrow, who is based at the Head Office in Putney and is white, as are the HR Director, Ms Lynda Morgan, and the Head of Children's Services and the claimant's line manager, Mr Gordon Parker, to whom she complained about her exclusion from the recruitment process of Kayleigh Morrison to an administrative role. The Claimant worked with other staff in Mitcham and at the office of the new fostering operation in Southend.

11. On 14 February 2007 the Claimant discovered that Ms Haywood's post was to be the subject of a formal recruitment exercise. The Claimant objected on the ground that she had just settled Ms Haywood into her post. From 21 to 28 February the Claimant was away on holiday. She returned to work on 2 March. She had been sent an email on 28 February of CVs of candidates for Ms Haywood's post. On 2 March the Claimant obtained clarification that the post was permanent. She encouraged Ms Haywood to apply, which Ms Haywood did on that day. On 5 March Human Resources informed the Claimant that she would not be conducting the interviews for the Administrator for the respondent's Southend office. On 12 March 2007 the Claimant sent a series of emails to the respondent objecting to the recruitment exercise. She commended Ms Haywood's work. The interviews for the post were held on 13 March. Ms Haywood attended. She was unsuccessful and resigned. Her complaint about her treatment was endorsed by the Claimant who on 26 March raised a grievance about a number of matters. On 20 April the Claimant received a written response to her grievance from Ms Lynda Morgan, expressing surprise that she had complained about being excluded from the interview for the post at Southend, given, it was stated, that "a friend of yours was applying." On 10 May the Claimant gave notice of resignation and her employment terminated on 9 July 2007.

12. On 24 July the Claimant lodged her ET1 form for constructive unfair dismissal and race discrimination.

ET judgment

13. The unanimous judgment of the ET was that the exclusion from the Southend recruitment process was on racial grounds. I would hesitate to recommend the unusual way in which the ET presented the findings of fact in their judgment. The parties had provided the ET with an over-elaborate list of numbered factual and legal issues. The ET set out them at length in 6 pages at the beginning of the judgment and then answered them issue by issue in 6 pages (pages 31 to 37). The ET also made findings of fact in the course of recounting the evidence at length. In contrast, the ET gave only a brief account of the submissions of the parties, the relevant law and their conclusions.

14. Case management is important, particularly in discrimination cases. The agreed detailed issues, which HHJ McMullen QC, who presided over the appeal in the EAT, calculated added up to 50 issues of fact and 11 issues of law, were not, in my view, a helpful way of approaching the evidence or presenting the findings of fact and law in this case. The real issues would have been clearer, the hearing shorter and the judgment of the ET more focussed, if there had been drastic pruning at the pre-hearing Case Management Discussion to exclude peripheral and minor issues from the list agreed by the parties.

15. On the law the burden of proof provisions are crucial, but they are not set out in the judgment, no doubt because they are familiar to the ET. It is provided by s54A(2) of the 1976 Act that

> "Where, upon the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –
>
> (a) has committed an act of discrimination or harassment against the complainant, or
>
> (b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant,
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> the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act."

16. The important words "could conclude" mean that "a reasonable ET could properly conclude" from all the evidence before them: *Madarassy v. Nomura International PLC* [2007] IRLR 246 at paragraph 57. That includes all the evidence given by the respondent, as well as by the Claimant.

17. As the ET noted, the direct race discrimination complaint was put forward on the basis that, apart from race, there was no other explanation for the high- handed way in which the ET found that the Claimant was treated when, without explanation, she was excluded from the process for the recruitment of an administrator for the Southend office.

18. The ET first considered whether the burden of proof had shifted to the respondent to prove that the Claimant's race (colour) formed no part whatsoever of the reason for

the exclusion. They held that the burden had shifted because there were circumstances, which, taken with the relevant differences in race, led the ET "to consider that the Claimant's treatment could have been on racial grounds." (para 147) The circumstances were that the respondent "singularly failed to communicate appropriately with the Claimant about why she needed to be kept out of the Southend recruitment."

19. As noted earlier, one of the candidates for the post was Ms Margaret Haywood. The Claimant had appointed her to work as a temporary administrator from 2 December 2006. Although she had professional contact with the Claimant some years earlier, Ms Haywood was not in fact a friend of hers before then. The ET found that the respondent had no proper or adequate grounds in early 2007 for believing that Ms Haywood was a friend of the Claimant, who was not consulted or informed at all about her relationship with Ms Haywood or any concerns the respondent may have had about it. At some point prior to 2 March 2007 a directive was given by Mr Jonathan Farrow that another temp should be employed in place of Ms Haywood and the Claimant was informed of this. She expressed her concern about the inconvenience caused by that decision, about Mr Farrow humiliating and excluding her and about feeling demotivated and anxious. Mr Parker led her to believe that he agreed with her concerns, but a decision had been made to exclude her from recruitment for the administrator's post. The permanent post was not advertised internally or externally, although that was normally done. Ms Haywood was not told about the vacancy because the respondent considered her to be the Claimant's friend and as such did not want her to apply for the position. At the respondent's request an employment agency sent details of possible candidates. Ms Haywood resigned on 13 March 2007 as a result of the way she was treated in relation to this matter.

20. The ET concluded that there was no reasonable or proper cause for the respondent's actions in its treatment of Ms Haywood and the Claimant. The ET found that-

> "147. …The nature of the relationship between Ms Hayward and the Claimant was not apparent. The Tribunal considered that the failure to clarify its nature and to agree with the Claimant how to deal with any issue arising in terms of the recruitment exercise was patronising and contemptuous. Excluding Mrs Walters–Ennis led to the unusual situation of the selection decision being made by a manager who had not been involved in the short listing stage. Further, Mr Parker's witness statement evidence as to his lack of involvement in the recruitment process was contradicted by his own record of involvement in the shortlisting stage which emerged as part of the documents disclosed after the hearing was underway. These circumstances taken with the relevant differences in race led the Tribunal to consider that the Claimant's treatment could have been on racial grounds."

21. The ET then concluded that the respondent failed to prove that the Claimant's race (colour) formed no part whatsoever of the reason for the exclusion. The ET said-

> "148. …The Respondent's failure to address this issue by way of direct evidence from Mr Parker, Mr Farrow, or Mr Earl left a good deal unexplained. In addition the Tribunal had no confidence in the

> evidence given on this issue by Lynda Morgan as it did not appear to be based on a proper investigation of the events. Thus at paragraph 26 of her witness statement she repeated the Respondent's position that the post had been advertised both internally and externally which implied that the Respondent had been open about recruitment at the time, contrary to the Claimant's case. There was not a shred of evidence to support that contention. In fact, as emerged from the oral evidence and late disclosure, the Respondent contacted an agency to request cvs of likely candidates. As stated above although Mr Parker was involved in the shortlisting he had failed to deal with this in his witness statement saying only, incorrectly, that he had no involvement other than to confirm the position of the successful candidate.
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> 149. Ms Morgan's statement at paragraph 27 described the Respondent's reasons for excluding the Claimant. She gave no detail however of the process such as describing who was involved and when this decision was taken. She also gave no explanation as to why the Claimant was not consulted. It was also an unsatisfactory account in the light of the late disclosure. She asserted that the Claimant was excluded form the process "[as] Margaret had applied for the role…" However the evidence showed that Mrs Walters-Ennis was excluded from the recruitment process before Ms Hayward even knew that the Respondent was recruiting for the vacancy.
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> 150. In order to discharge the burden of proof, a Respondent must put forward cogent evidence of the reason for the treatment. The Respondent's evidence on this issue fell far short. In all the circumstances the Claimant was racially discriminated against by being excluded from the recruitment process of the Southend administrator."

Submissions

22. Ms Winstone, who did not appear in the ET, appears for the respondent. She contends that ET misdirected themselves on s54A (2). Their conclusion was not supported by proven facts from which they "could conclude", in the absence of an adequate explanation, that the respondent had committed an act of discrimination against the Claimant. The failure to investigate the relationship between the Claimant and Ms Haywood and the lack of communication with her were not sufficient by themselves to shift the burden of proof to the respondent. The facts relied on by the ET about lack of a satisfactory explanation had no bearing on the issue of race discrimination. They were irrelevant and extraneous. The ET's conclusion was perverse and was based on erroneous facts, including a finding that she was excluded from the whole recruitment process rather than just the final stage of the interviewing panel.

23. The ET's inquiry should have been into the respondent's subjective state of mind at the relevant date. Instead, the inquiry was tainted by the opinion of the ET. It was accepted that the respondent genuinely, though mistakenly, believed that the Claimant would be biased in the recruitment interview that included her friend Ms Haywood as

a candidate. That was the reason why she was taken off the process by the respondent. It was not a racial reason. The respondent's mistake about their relationship, their failings in communications with the Claimant and their manner of excluding her did not make it a racial reason.

24. The respondent is scrupulous about its recruitment procedures. Only a few weeks previously it had decided that the Claimant should not be involved in the recruitment process involving Kayleigh Morrison as a candidate, because of their relationship and the potential conflict of interest. The Claimant had actively promoted both women prior to recruitment in voluntary and temporary positions and was angry about interference in her recruitment decisions.

25. The ET had also erred in failing to construct a hypothetical comparator after rejecting the Claimant's actual comparator (Karen Irving, a white Fostering Consultant). They should have asked whether a hypothetical comparator would have been treated in the same way regardless of race or colour. If they had, they would not have found less favourable treatment, because the respondent would have removed the comparator from the recruitment process in the belief that there was a conflict of interest.

26. The ET had also erred factually and perversely in finding that the Claimant was excluded from the whole recruitment process rather than just the final stage of the interview panel, thereby contradicting their own findings of fact. The Claimant was not excluded until after the respondent discovered that Ms Haywood had applied for the post and so the only part of the process from which she was excluded was the interviewing.

27. The EAT wrongly failed to recognise the errors of the ET when dismissing the respondent's appeal from the ET.

28. Mr Linstead, who appears for the Claimant, contends that there is no legal error in the ET's judgment. On the basis of their findings of fact the ET could properly find that there was a prima facie case of discrimination causing the burden to shift to the respondent, which then failed to produce reliable and credible evidence from the relevant people to explain the detrimental treatment.

29. He submits that the detriment to the Claimant consisted not only of exclusion of the claimant from the interview panel but also from the recruitment process including stages prior to the interview, namely before 28 February when she was sent the already sifted CVs and from decisions about the process, such as decisions about advertising the post.

30. The ET had found that the respondent had acted towards the Claimant in a high-handed way in the light of an incorrect, though genuine, belief in a friendship between the Claimant and Ms Haywood. There was a failure to communicate with the Claimant and discuss with her any matters relating to recruitment. The ET found a "patronising and contemptuous" failure on the part of the respondent to communicate with her in order to clarify the relationship between the Claimant and Ms Haywood, or to give her a reason for her exclusion, or to agree with her how to deal with any of the relevant issues arising in the recruitment process. That was against the background of a finding that she was entitled to expect a central role in such recruitment and a

high degree of autonomy. She had originally been named in the requisition document as the chair of the panel.

31. He emphasises the finding of the ET that the facts surrounding the recruitment of Keighley Morrison from which the Claimant was excluded, but in respect of which the ET concluded that there were no racial grounds for the respondent's treatment of her, were "very different" and were not comparable.

Discussion and conclusions

32. That the respondent treated the Claimant badly in relation to the recruitment of both Kayleigh Morrison and Ms Haywood there can be no doubt, nor is it surprising that the ET concluded that this was a case of constructive unfair dismissal.

33. As for the claimant's only successful complaint of race discrimination, the starting point is, I think, the ET's findings about the treatment of the Claimant in connection with the recruitment of Kayleigh Morrison. The ET said that they could not conclude that, in the absence of an adequate explanation, there was a case of race discrimination in that instance.

34. It is true that the ET rejected the contention that there was no detriment to the Claimant holding that the reversal of a decision as to a member of the Claimant's team over her head undermined her as a manager. However, the ET went on to hold that, although the respondent had "handled the communications with Mrs Walters-Ennis appallingly as an organisation,"

> "145. …there was nothing in the picture, other than the race of the Claimant and the affected employee to suggest that this could be an example of direct race discrimination. On the other hand there was evidence that albeit they had dealt with the process differently, steps had been taken to ensure that there was no issue as to the organisation's probity when Ms Irving's son was employed. The evidence surrounding the employment of Ms Morrison clearly pointed to the Respondent having genuine concerns on this front…Even if the burden shifted to the Respondent, the Tribunal accepted that the explanation dispelled any question of racial grounds.
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> 146. As to the pleaded complaint therefore, the Tribunal concluded that the burden did not shift to the Respondent. The complaint of race discrimination against the Respondent in withdrawing Ms Morrison's post was therefore dismissed. "

35. The Claimant did not cross appeal against that decision. She must be treated as bound by those findings, which are consistent with the ET's finding that the respondent was scrupulous about its recruitment procedures.

36. The difficulty for the Claimant on this appeal is this: how could the ET come to the opposite conclusion about the race discrimination complaint relating to the Claimant's exclusion a few weeks later from the recruitment process for an administrator at the Southend office? As appears from the paragraphs quoted above they found that the burden had shifted to the respondent to prove that the Claimant's race formed no part

of the reason for exclusion. The critical point is that the ET said that they regarded the two cases as sufficiently different to justify arriving at different conclusions. They obviously appreciated that, if the cases were not in fact materially different, they would be reaching contradictory conclusions about the reasons for the respondent's treatment of the Claimant.

37. After careful consideration I remain unpersuaded by the ET's reasoning that there is any significant difference between the two cases that the ET could reasonably regard as relevant to the alleged presence of racial grounds for the respondent's actions in this case. There was certainly a failure on the part of the respondent to investigate the nature of the relationship between the two women, or to explain to the Claimant the exclusion, or why it felt the need to keep her out of the Southend recruitment. Its treatment of the Claimant was described as "patronising and contemptuous." They are serious criticisms of the respondent. But the puzzling point is this: what were the differences between the cases of Kayleigh Morrison and Ms Haywood that led the ET to conclude that in one case there was no racial ground and that in the other case there was? If there were no differences relevant to the issue of race discrimination, the ET's finding of race discrimination in the case of Ms Haywood was internally inconsistent with their finding in the case of Kayleigh Morrison and that would be an error of law.

38. The ET regarded the case of Ms Haywood as different from that of Kayleigh Morrison, mainly because in the latter case the potential for offending the rules as to conflict of interest or lack of probity was obvious, whereas the nature of the relationship between Ms Haywood and the Claimant was not apparent. That is a factual difference, but I do not see how that difference could lead a reasonable tribunal to find that, although the burden of proving that there was no racial discrimination did not shift in the Keighley Morrison case, it did shift in their handling of the Southend office appointment and how they "could conclude" that there were racial grounds in the Southend case.

39. In my judgment, the factual differences are not sufficient to explain how the ET could conclude that there was a prima facie case of race discrimination in relation to the recruitment of an administrator at the Southend office. The ET accepted that the respondent genuinely believed that there was a relationship leading to a conflict of interest and possible bias in the Claimant's participation in a recruitment interview that included Ms Haywood as a candidate. It desired to follow a transparent recruitment process free of a conflict of interest. The fact that the respondent was genuinely mistaken about that relationship could not reasonably lead to the finding that there could be a racial explanation for its treatment of the Claimant. It explained the respondent's failure to communicate or discuss. But the respondent's failure to communicate and discuss had not led (and could not rationally have led) the ET to find a prima facie case of racial grounds in the handling of the Kayleigh Morrison recruitment.

40. In fact the findings of the ET show that there was a significant similarity between the two cases and it related to the respondent's state of mind: in both of them the respondent acted in the settled view and genuine belief that the Claimant was too closely connected to the candidates for the posts to allow a fair interview by her, if she were involved in the selection process. This is relevant to the complaint of direct race discrimination because it is, in general, necessary to discover, usually by a process of appropriate inferences from primary facts and surrounding circumstances,

what was in the mind of the alleged discriminator: why did the alleged discriminator decide to treat the claimant less favourably? See *Law Society v. Bahl* [2003] IRLR 640. What was in the mind of the respondent in connection with Ms Haywood was a genuine, though mistaken, non-racial belief that there was a friendship between the Claimant and Ms Haywood that raised a potential conflict of interest, if the Claimant was involved in the process of her recruitment. That important fact, in my view, made it impossible for a reasonable ET to say that it "could conclude" from all the evidence that the respondent had committed an act of discrimination by excluding her. By saying that they "could conclude" that, they contradicted their earlier finding that they could not so conclude in the case of Kayleigh Morrison.

41. As for the other grounds of appeal I do not think that the ET erred in holding that the claimant was excluded from the recruitment process or other stages of it than just physical exclusion from the interviewing part of the process. Although she was named as chair in the requisition paper, the Claimant had no say in the earlier stages of the process in deciding whether the post should be advertised or in the sifting process.

42. Nor do I think that there was any error of law in relation to the alleged failure expressly to construct a hypothetical comparator. It is not necessary to construct one in every case. If the ET has found on the evidence that the reason for the respondent's actions was not racial, then the Claimant has not been treated less favourably in a discriminatory way. The real issue is in this case is on the burden of proof and how, on their findings of fact, the ET could reasonably conclude that the acts of the respondent were on racial grounds when they had found in a similar situation of potential conflict of interest in a recruitment that the respondent had not acted on racial grounds.

Result

43. I would allow this appeal, as there is an error of law in the judgment of the ET. I have reached that conclusion with considerable hesitation. The ET gave a very detailed judgment after a long hearing in which they would have become immersed in the case in a way that can never be replicated in the EAT or in any appeal court. However, there are cases in which it is necessary to stand back from the detail and ask how the ET reached what is, on the face of it, a surprising conclusion about the reasons of the respondent for its treatment of the Claimant, given their rejection of other complaints of race discrimination and, in particular, one similar case occurring around the same time.

44. The respondent's bad treatment of the Claimant fully justified the finding of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the Claimant in the other instances in which the Claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Haywood the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the

burden of proof to the respondent to prove that it had not committed an act of race discrimination.

45. I would therefore not only allow the appeal, but I would also dismiss the only remaining race discrimination complaint.

Lord Justice Wilson:

46. I agree.

Lord Justice Patten:

47. I also agree.