[EMPLOYMENT APPEAL TRIBUNAL]

DIAKOU v. ISLINGTON UNISON "A" BRANCH

1996 May 8; June 21

Mummery J., Ms S. Corby and Mr. L. D. Cowan

Discrimination, Race—Trade organisation—Victimisation—Applicant complaining of victimisation by union and officials following resignation—Whether unlawful discrimination—Race Relations Act 1976 (c. 74), ss. 11(2)(3), 33[1]

The applicant, who was employed by a local authority, had been a member of the respondent union until December 1992. In 1994 she made a complaint to an industrial tribunal that on occasions between 1992 and 1994 the union had discriminated against her on the ground of her race, contrary to the Race Relations Act 1976. In May 1995 the applicant sought leave to amend her originating application to add a complaint that in February 1995, after she had resigned from the union, she had been victimised and subjected to a detriment by the union and three union officials, within the meaning of section 2 and section 11(3)(*c*) of the Act of 1976. An industrial tribunal chairman refused leave to amend on the ground that the applicant was not entitled to pursue that claim against the union or against the individual officials.

On the applicant's appeal:—

Held, dismissing the appeal, that (by the majority) it was not sufficient for the applicant to establish an act of victimisation falling within section 2 of the Race Relations Act 1976 without also establishing that the act was rendered unlawful under Part II of the Act; that, not being employed by the union, the only section in Part II on which the applicant could rely was section 11; but that, in so far as the applicant had been subjected to any detriment since the end of 1992, she could not bring herself within section 11(3)(*c*) because she was not a member of the union at the date of the alleged act of victimisation, and, although section 11(2) made it unlawful for a union to discriminate by committing specified acts against non-members, the alleged act of victimisation was not one of those specified acts; and that, further, since the union had accordingly not committed any unlawful act of victimisation, the individual union officials could not be treated as having committed acts of discrimination against the applicant by virtue of section 33 of the Act of 1976 either as persons who had knowingly aided another to do an unlawful act or as agents of the union (post, pp. 126E–H, 127D–F, 128C–D, E–F).

[1] Race Relations Act 1976, s. 2(1): "(1) A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—(*a*) brought proceedings against the discriminator or any other person under this Act; . . . or (*c*) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; . . ."

S. 11(2)(3): see post, p. 127A–C.

S. 33: see post, p. 128A–B.

The following cases are referred to in the judgment:

General Aviation Services (U.K.) Ltd. v. Transport and General Workers' Union [1974] I.C.R. 35, N.I.R.C.; [1975] I.C.R. 276, C.A.

Nagarajan v. Agnew [1995] I.C.R. 520, E.A.T.

The following additional case was cited in argument:

Chapman v. Simon [1994] I.R.L.R. 124, C.A.

INTERLOCUTORY APPEAL from an industrial tribunal chairman sitting at Stratford.

By an originating application dated 14 September 1994, the applicant, Ms Eline Diakou, made a complaint of unlawful race discrimination against the respondents, Islington UNISON "A" Branch. By an interlocutory order dated 18 October 1995, the chairman refused leave to amend the applicant's originating application to add a claim of victimisation against the union and three union officials.

On 23 November 1995, the applicant appealed on the ground, inter alia, that the industrial tribunal was wrong in seeking to be satisfied that action was taken by members of the union and not by employees of the union.

The facts are stated in the judgment.

The applicant in person.

Ian Scott for the union and the officials.

Cur. adv. vult.

21 June. The following judgment of the appeal tribunal was handed down.

MUMMERY J. In what circumstances are a trade union and those acting on its behalf liable for racial discrimination in the employment field in the case of (a) a person who is a member of the union and (b) a person who is not a member of the union? The answer to that question in this appeal turns on the proper interpretation and application to the facts of this case of sections 1, 2, 11, 32 and 33 of the Race Relations Act 1976.

The question, which is of considerable interest and some significance, has arisen in the context of an interlocutory appeal from the decision of the chairman of the industrial tribunal sitting alone at Stratford on 21 September 1995. The extended reasons for the decision were sent to the parties on 18 October 1995 explaining why the chairman (1) extended the time for the applicant, Ms Eline Diakou, to bring a claim of racial discrimination against the Islington UNISON "A" Branch ("the union") under section 11(3)(*c*) of the Race Relations Act 1976—the union does not appeal against that decision; and (2) refused to grant the applicant leave to amend her originating application to add a claim of victimisation against the union and three individual respondents—a union convener, the branch secretary and a union steward. The applicant appealed against that decision by notice of appeal dated 23 November 1995.

A On the hearing of the appeal the applicant appeared in person and Mr. Scott appeared for the union and the three individuals. We thank them for their help in an unusual case involving detailed consideration of statutory provisions rarely invoked.

The facts

B As this case has not yet been heard on the merits, we make it clear that there are conflicts of fact yet to be resolved. We are, however, able to decide this appeal on the following undisputed facts. On 14 September 1994 the applicant, who is of Cypriot origin and is a neighbourhood manager in the employment of Islington London Borough Council, presented an originating application to the industrial tribunal alleging racial harassment by the union. Although she alleged that the action C complained of took place on 20 July 1994, the details set out in her case contain allegations dating back to September 1992 in support of a general allegation that the union had "directly discriminated against her on the grounds of race, through systematically harassing her by disseminating misinformation about alleged instances of misconduct perpetrated by the applicant."

D The earliest incident is alleged to have taken place in September 1992 and took the form of alleged verbal abuse and physical threats by the union shop steward when the applicant crossed the union picket line and went to work. The other allegations relate to events in 1993 and 1994: an alleged conspiracy by union officials to discredit her by making allegations of fraud and misconduct and the detrimental consequences of those allegations. Paragraph 9 of the details of the originating application states E a claim by the applicant that:

> "there is collusion between the senior management and UNISON against her motivated on racial grounds . . . other neighbourhood managers who, too, crossed the picket line were not threatened in the same way as her, by UNISON."

F The union's notice of appearance, signed by the branch secretary and dated 1 November 1994, disputes in detail the allegations in the applicant's application. No specific mention is made of her membership status. There is no dispute, however, that on 21 December 1992 the applicant wrote a letter to the branch secretary stating: "I write to advise you that I resign my [union] membership as from today." The applicant informed us that she has not paid any subscription since then, though she continues to be G sent UNISON material, including membership cards. She does not, however, claim to be a member of the union since 21 December 1992.

The applicant submitted a substantially amended originating application dated 10 May 1995, in which she alleged, in addition to direct racial discrimination contrary to section 1(1)(*a*) of the Race Relations Act 1976, victimisation. She added the three individual union officials as respondents. The principal new allegation was that in February 1995 she was allocated H to a new post as a social services manager in a different office where the named union convener worked and that the union organised meetings to discuss her appointment, spread information about her being a bad manager "particularly on black and minority staff" and alleged she was

guilty of fraud. As a result, the staff, who had never met her or worked with her, petitioned the director of social services of the council, indicating their opposition to her appointment and their unwillingness to work with her. The applicant added: "I believe these actions by UNISON 'A' members and officers, were racially motivated and intended to continue their victimising practices until I was pressured enough to leave my job."

On 17 May 1995 the industrial tribunal informed the applicant that there would be a preliminary hearing of the issue: "Whether the application discloses a claim that can be brought before an industrial tribunal under section 11 of the Race Relations Act 1976." The nature of the preliminary issue was clarified in a further letter of 20 June 1995, after a hearing originally fixed for 9 June 1995 had been adjourned at the applicant's request. The particular points were that her application appeared to be out of time; that she accepted that she had resigned from the union on 21 December 1992; that her new allegations of victimisation contrary to section 2 of the Race Relations Act 1976 related to events after the date of her originating application and might not be accepted as an amendment, but possibly should be the subject of a new complaint; and that, in any event, the applicant would "need to convince the chairman that she can rely upon these allegations notwithstanding the earlier termination of her union membership." Written representations were invited on the preliminary issue, so that they could be considered before the matter was restored for further legal argument.

The further hearing took place on 21 September 1995. The applicant appeared in person, answered some questions and provided documents to the chairman of the tribunal. The union appeared by the branch secretary.

The decision of the industrial tribunal

The chairman of the industrial tribunal decided, for the following reasons, that the matter could proceed as a claim only of racial discrimination against the respondents in respect of the incident which occurred in September 1992.

(1) Section 11 of the Race Relations Act 1976 was the only section on which the applicant could found a claim, in particular, section 11(3)(*c*), which provides:

> "It is unlawful for an organisation to which this section applies, in the case of a person who is a member of the organisation, to discriminate against him—. . . (*c*) by subjecting him to any other detriment."

(2) The applicant conceded that she could not bring any claim of race discrimination in the industrial tribunal in respect of events which occurred after her resignation from the union on 21 December 1992.

(3) She could bring a claim in respect of the alleged incident in September 1992, at which time she was a member of the union. The chairman decided that it was just and equitable to extend the time to enable her to pursue that claim.

(4) As for the alleged victimisation based on the alleged incidents in February 1995, the applicant was not entitled to pursue that claim against the union or the individual union officials, either by amendment to her

originating application or by the issue of a new application because (a) amendment was not possible, as the alleged victimisation occurred after the issue of the originating application; (b) she had no cause of action against the union for vicarious liability in respect of actions taken against her by members (as distinct from employees) of the union; and (c) as against the individual respondents there was insufficient evidence for a claim of victimisation:

> "there was no evidence whatever which could enable me to say that these persons would have known of the claim which the applicant has brought against the union. Unless they knew that she had done so, then they cannot be liable for victimising her, contrary to section 2 . . ."

The applicant applied to the industrial tribunal chairman for a review of that decision, but that was refused on 22 November 1995 on the grounds that it had no reasonable prospects of success. She also appeals against that decision.

Submissions of the applicant

The main points made by the applicant in support of the appeal were as follows.

(1) The victimisation claim raises matters of fact which can only be determined on hearing all the evidence at a full hearing of the tribunal. The chairman did not hear all the evidence. For that reason he was wrong in ruling that there was insufficient evidence to bring proceedings against the individuals. He was clearly wrong in holding that the individuals did not know of the originating application issued by her against the union. The branch secretary had signed the notice of appearance disputing her claim.

(2) The chairman failed to consider the fact that the originating application presented in September 1994 actually included a victimisation claim (contrary to section 2(1)(*d*) of the Act of 1976) and that the protected act that she was relying on in her proposed amendment was the presentation of that application as yet a further instance of victimisation already complained of.

(3) It was an error on the part of the chairman (a) to refuse her amendment on the basis that it was a new allegation of victimisation; and (b) to rule that she could not file a fresh application about the further victimisation by members of the union in February 1995.

(4) The chairman of the tribunal erred in refusing her application for a review on the ground that it had no reasonable prospect of success. She repeated that her claims raised matters of fact which could only be decided at a full hearing of the case.

Conclusions

In our judgment, the applicant's appeal should be dismissed because the chairman was legally correct in rejecting her complaint of victimisation, whether brought in by way of amendment to the existing application or as the subject of a new action, against both the union and the individual officers. We agree with the applicant to the limited extent that the

chairman was in error in stating that, as regards the individuals, there was no evidence of their knowledge of her claim against the union, but that error does not mean that the chairman's overall conclusions were legally incorrect. We also dismiss the appeal against the review decision, as there was no error of law in that decision. There is a difference between the members of the appeal tribunal as to the correct reasoning for this result. In the view of the majority the legal position may be summarised as follows.

(1) The jurisdiction of an industrial tribunal to hear complaints under the Race Relations Act 1976 is limited by section 54(1). The jurisdiction is confined to two types of complaint, namely, a complaint by a person ("the complainant") that another person ("the respondent"):

> "(*a*) has committed an act of discrimination against the complainant which is unlawful by virtue of Part II; or (*b*) is by virtue of section 32 or 33 to be treated as having committed *such* an act of discrimination against the complainant . . ." (Our emphasis.)

We agree with the analysis of this section by the appeal tribunal in *Nagarajan v. Agnew* [1995] I.C.R. 520, 531, that section 54(1)(*b*) is no wider than (*a*) because (*b*) contains the expression "*such* an act of discrimination" which refers back to the acts of discrimination mentioned in (*a*), and that those are acts against the complainant which are unlawful by virtue of Part II. That is entirely consistent with the scheme of the Act. Part I contains definitions of different acts of discrimination: section 1 discrimination, commonly referred to as direct and indirect, in section 1(1)(*a*) and section 1(1)(*b*), respectively; and section 2 discrimination, described in the heading as "by way of victimisation." But nowhere in section 1 or 2 is anything said about those acts of discrimination being unlawful. Those two sections contain definitions of what constitutes discrimination in certain circumstances. It is only in Part II that the Act prescribes acts as unlawful acts of discrimination.

(2) On the analysis summarised in (1) above, it is not enough, as the applicant suggested at some points in her argument, to allege that the act she complains of is an act of victimisation in section 2 of the Race Relations Act 1976. That section in Part I of the Act identifies or defines the discrimination by way of victimisation to which the Act applies. It does not, in itself, make the acts of victimisation unlawful. The provisions in Part II of the Act identify and define those acts in the employment field which are rendered unlawful acts of discrimination by the Act. In other words, the applicant cannot succeed in the proceedings simply by alleging against respondents that she has been treated less favourably than other persons were treated and that she has been so treated by reason that she has brought proceedings under the Race Relations Act 1976.

(3) The only section under which the applicant can succeed in a claim for alleged unlawful acts of discrimination by her union is section 11. For example, she does not and cannot claim unlawful discrimination by the union under section 4 of the Act, which deals only with discrimination against applicants for employment and against employees. The applicant is an employee of the council. She was never an employee of, or an applicant for employment by, the union.

A (4) Section 11 makes it unlawful for a union to discriminate by committing specified acts as against two classes of persons—non-members (section 11(2)) and members (section 11(3)). Thus, under section 11(2) it is unlawful for a trade union:

> "in the case of a person who is not a member of the organisation, to discriminate against him—(*a*) in the terms on which it is prepared to B admit him to membership; or (*b*) by refusing, or deliberately omitting to accept, his application for membership."

Section 11(3) makes unlawful certain acts of discrimination in the case of a person who is a member of the union:

> "(*a*) in the way it affords him access to any benefits, facilities or C services, or by refusing or deliberately omitting to afford him access to them; or (*b*) by depriving him of membership, or varying the terms on which he is a member; or (*c*) by subjecting him to any other detriment."

(5) Since 21 December 1992 the applicant has not been a member of the union. The alleged victimisation against her by the union in February D 1995 is not one of the acts unlawful as against non-members under section 11(2). Before 21 December 1992 the applicant was a member and so is able to complain of the alleged direct discrimination of subjecting her to detriment in September 1992. But, in so far as she has been subjected to any detriment since the end of 1992, e.g. in February 1995, she cannot bring her case within section 11(3)(*c*), because she was not a member of E the union at the date of the alleged act of victimisation. She has no case against the union in respect of the alleged victimisation, because the acts which she alleges were committed against her occurred after she ceased to be a member. They are not included in the specified list of acts which it is unlawful for a union to commit by way of discrimination against a non-member.

F At one point in the argument the applicant submitted that she could bring her case within section 11(3)(*b*) because she had been deprived of membership by the union. This is the first time that she has put her case this way. When we inquired further, it appeared that the applicant was saying that, although she accepted that she had resigned from the union, and had not been expelled, this was a case of "constructive deprivation:" she had been driven, forced or hounded out by the acts of the union and G its officials. Even if this way of putting the case had been raised before, we do not see how, on the facts pleaded, it could be brought within section 11(3)(*b*). The wording of that section does not expressly admit of constructively depriving a person of membership: cf. the case of constructive dismissal where the concept of constructive dismissal is expressly incorporated into the Employment Protection (Consolidation) H Act 1978 (section 55(2)(*c*)).

(6) That is not quite the end of the matter, however, because section 54(1)(*b*) requires us to consider whether the applicant could bring a case against the individual union officials on the basis that they are to be

treated as having committed acts of discrimination against her by virtue of sections 32 and 33 of the Race Relations Act 1976. In our view, those sections do not assist the applicant. The starting point is section 33 which provides:

> "(1) A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description. (2) For the purposes of subsection (1) an employee or agent for whose act the employer or principal is liable under section 32 (or would be so liable but for section 32(3)) shall be deemed to aid the doing of the act by the employer or principal."

In our view, section 33 does not assist the applicant. It is concerned with aiding unlawful acts and, for the reasons already explained, the union has not committed any unlawful act of victimisation against the applicant in respect of the period after she had ceased to be a member of the union. Section 33(1) only applies if the person who is knowingly giving aid is giving it to another person "to do an act made unlawful by this Act." The alleged acts of victimisation by the union are not made unlawful by the Act of 1976, because the protection given to a non-member does not include protection from victimisation within the meaning of section 2. The applicant was unable to point to any other section, save for sections 2 and 11, and, as already explained, section 2 on its own does not make anything unlawful. It simply contains a definition. Section 11 does not make unlawful what the applicant alleges against the union by way of discrimination. Section 33(2) is unhelpful for similar reasons. On the assumption that the named individual respondents are union officials and acting as agents of the union (this is disputed), they are only deemed to aid the doing of the act by the principal in a case where the principal is liable for the act of the agent. In that way both principal and agent may be held to be legally liable. But if the principal (in this case the union) is not legally liable, then the agent cannot be liable. What the individual respondents have done, as individuals, does not become unlawful under Part II, because they are not within the categories of persons who are liable for racial discrimination and victimisation in the employment field. What they have done as alleged agents has not been in the context of an act for which the union, as principal, would be legally liable.

In these circumstances it is not necessary to consider the further arguments advanced by Mr. Scott about the scope of the authority of a union official to act on behalf of a union contrary to the policies of the union: see *General Aviation Services (U.K.) Ltd. v. Transport and General Workers' Union* [1975] I.C.R. 276.

The minority (Ms Corby) agrees with the majority that this appeal should be dismissed but adopts a different reasoning. She does not interpret section 2 of the Race Relations Act 1976 as providing a free-standing definition, only activated if it comes under Part II directly. She takes the view that section 1 defines discrimination and a claim of discrimination can be made to an industrial tribunal if such discrimination falls under Part II. If such a claim is made, it is protected by section 2.

This interpretation derives from the fact that the wording of section 2 is couched extremely widely. For instance, section 2(1)(*c*) says "done anything under or by reference to this Act." Also anyone who is involved in the protected acts can rely on section 2. Secondly, this construction of section 2 (unlike the construction favoured by the majority) is in line with public policy to protect complainants of discrimination and a purposive approach. The minority's view, however, goes against the decision in *Nagarajan v. Agnew* [1995] I.C.R. 520, but that decision is persuasive, not binding. It is dependent on a dissection of the tense used in section 4(2) and assumes that section 2 is not dependent on section 1. Nevertheless, the minority also considers that this appeal should be dismissed. The lay officials were acting contrary to the policies of their union: *General Aviation Services (U.K.) Ltd. v. Transport and General Workers' Union* [1975] I.C.R. 276.

The result is that the applicant's appeal is dismissed. We should add that during the course of the hearing the applicant understandably expressed dismay at this result. She asked the tribunal what she could do about it. We explained that, although we had done all we could to assist her in the presentation of her appeal, we could not act as her adviser in her dispute with the union and its officials. There may be other avenues of complaint open to her, e.g. to the Commission for Racial Equality. There may be other legal courses of action open to her, e.g., possible common law claims, but she should seek advice on those matters. We express no views on them. Our decision rests on the fact that she has no legal basis for bringing a claim in the industrial tribunal for victimisation under the Race Relations Act 1976 against the union in respect of acts committed *after* she ceased to be a member or against the individual union officials who she alleges acted on behalf of the union.

Appeal dismissed.

Solicitors: Director of Legal Services, UNISON.

J. W.