

Appeal No. UKEAT/0519/08/RN

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 18 February 2009

Before

THE HONOURABLE MR JUSTICE WILKIE

DR K MOHANTY JP

MR T STANWORTH

DALESIDE NURSING HOME LIMITED

APPELLANT

MRS C MATHEW

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR P PRESCOTT (One of Her Majesty's Counsel) Instructed by: Messrs Beech Jones de Lloyd Solicitors The Old Bank 56 Shrewsbury Road Prenton Wirral CH43 2HY
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE: Costs

Where at the heart of a claim is an explicit lie alleging racial abuse, the Employment Tribunal was in error failing to find that the Claimant acted unreasonably in bringing or conducting the claim and should have made an order for costs against her.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is an appeal by Daleside Nursing Home Limited against one element of the decision of the Employment Tribunal held at Liverpool on 10 March 2008, namely: the dismissal by the Tribunal of the Appellant's application before them for costs to be awarded against the Claimant,

Mrs C Mathew. The Tribunal had at that stage unanimously dismissed her claims against the Appellant for direct race discrimination, constructive unfair dismissal and unlawful deduction of wages.

2. In the Respondent's answer to the appeal, Mrs Mathew indicated that she wished to crossappeal the substance of the decision. However in an exchange of emails with the EAT on 13 and 17 February she, through her partner and representative, Mr Alexander, made it clear that she was withdrawing her crossappeal. Furthermore, having been informed that the hearing would proceed on the Appellant's appeal in relation to costs, she has confirmed by further email yesterday at 6.34 pm that she would not appear and would not be represented at the appeal, but submitted certain written submissions which, it is fair to say, do not really address the issue of costs save to the extent that it confirms their continuing upholding of their substantive claim.

3. Mr Prescott QC, who has addressed us briefly and at greater length in a written skeleton argument, has indicated that this is a case which raises an important issue of principle for employers. We understand that may be so; however the actual case itself does not raise any issue of legal principle of general application, and we want to make it clear that we have approached this appeal on the basis of the particular clearcut facts of this case and that nothing that we say is intended to set out any more general statement of legal principle.

4. The issues at the Tribunal were, effectively, two in number. One concerned a series of incidents between Mrs Mathew and management which she said constituted direct race discrimination. The other concerned the payment to her by the new owners of the establishment at which she worked after they took it over at an hourly rate of pay 50 pence less than she had

previously been receiving.

5. The Tribunal concluded in respect of the three incidents which were said to comprise racial discrimination that the Claimant did not surmount the first hurdle of the test in **Igen v Wong**, [2005] ICR 931. In other words she did not establish that facts had been proved from which the Tribunal could conclude, in the absence of explanation, an act of discrimination. It therefore meant that her claim fell at the first hurdle.

6. Two of the three complaints did not concern any allegation of explicit or direct race discrimination and, at its highest, any allegation of discrimination arose by way of inference from what, on the face of it, would appear to have been neutral incidents.

7. However, at the heart of the claim of direct race discrimination was an unambiguous contention of explicit racial abuse. The allegation was that, on 18 May 2007, the Claimant's manager, Miss Rankin, had telephoned her in order to see what pain relief was required for a particular resident. The Tribunal found as a fact, in paragraph 10, that the Claimant was less than forthcoming with the information Miss Rankin needed, and they concluded that Miss Rankin was both exasperated and frustrated at her attitude, but that there was much justification for this attitude.

8. The complaint, however, made by the Claimant was that Miss Rankin had called her "a black bitch". That was an allegation which Miss Rankin hotly denied. The Tribunal recorded in paragraph 11 of their decision that:

"There is a clear and stark difference between the evidence of Miss Rankin and Mrs Mathew in relation to that comment and we have resolved that conflict as explained in the decision

part of this judgment below.”

9. The reference to the passage later in the judgment is a reference to paragraphs 24 and 25 which read insofar as is relevant as follows:

“24. We find that the words “a black bitch” were not used by Miss Rankin and our reasons are set out below.

25. We looked at all the surrounding circumstances and the background to this case and preferred Miss Rankin’s evidence over Mrs Mathew’s evidence. If the claimant had been called “a black bitch” she would not have waited for nearly three weeks to raise the issue and done so only because it looked as though she herself might be taken through a disciplinary process. She raised the issue on 6 June 2007 when she was resigning. Such a phrase is so offensive it is incomprehensible that she would not have made her objection much sooner. Mrs Mathew had no explanation for the delay.”

10. In our judgment that is a clear finding by the Tribunal that the allegation of explicit and offensive racial abuse was false, and that it had been made up some weeks later in a context whereby the making of the allegation was a method of deflecting attention from disciplinary matters which the Claimant was anticipating. It necessarily involves in our judgment a finding by the Tribunal that it was a deliberate and, to an extent, cynical lie. It was that particular allegation, of course, which lay at the heart of the claim for direct race discrimination, as it was that allegation which, had it been accepted as true, would plainly have influenced the way in which the Tribunal looked at the other two incidents which were otherwise neutral.

11. In relation to the claim relating to underpayment the Tribunal decided against Mrs Mathews on the basis as set out in paragraph 31 that:

“31. Indeed the respondents were ignorant of the fact that Mrs Mathews had been paid £11.50 per hour under the old management. For some reason Mrs Mathew continued to work for Mrs ArmstrongShone for 14 months whilst being paid £11.00 an hour. That was the figure that Mrs ArmstrongShone reasonably assumed was the correct figure and she was not disabused of that notion by Mrs Mathew or anyone else.”

12. In effect, what the Tribunal concluded was that by failing to raise any objection to the hourly rate Mrs Mathews had affirmed a change in her contractual situation after the transfer by continuing to work without complaint for £11 per hour.

13. There was before the Tribunal a series of letters said by Mrs Mathew to have been sent to the Appellant at various dates, seemingly starting on 24 May 2006 and continuing until 16 December 2006, each of which made complaint about the reduction in her hourly rate. It is implicit in the Tribunal's decision and the reasoning in paragraph 31 that it concluded that the Appellant had not received any of these documents. The Tribunal did not go so far as explicitly to conclude that these documents were never sent and/or that they were fabrications prepared for the purpose of supporting this part of the claim, and in the absence of any such explicit conclusion Mr Prescott, in our judgment rightly, does not put that at the forefront of his argument, because it cannot be said that this Tribunal did make findings of fabrication of evidence against Mrs Mathew.

14. The application for costs was made at the end of the hearing when it was apparent that all claims had been dismissed. It was said that, by that stage, the costs of the Appellant were of the order of £20,000, but the Tribunal rightly did not have regard to that matter. They reminded themselves that their powers in relation to the award of costs were set out in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**, Schedule 1, starting at paragraph 38 and through to 41. In particular of course the focus is Regulation 40(2), which reads:

“(2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.”

15. The circumstances described in paragraph 3 include the following quote:

“(3) ... where the paying party has in bringing the proceedings, or ... in

conducting the proceedings, acted ... otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.”

16. Regulation 41 concerns the amount of a costs or expenses order. It limits the sum which may be awarded immediately by the Tribunal to £10,000, though it may be higher if subject to a detailed assessment process in the County Court.

17. Regulation 41(2), however, provides that the Tribunal or Chairman may have regard to the paying party’s ability to pay when considering whether it or he shall make a costs order or how much that order should be.

18. The Tribunal decided not to make any costs order and they did so, it would appear, on the basis that they concluded that neither the Claimant, nor her husband who was her representative, had acted unreasonably in bringing or conducting the proceedings. They expressed themselves in the following terms at paragraph 36:

“36. On balance we found that costs should not be ordered. We do think that the claimant and her husband who represented her did have a genuine belief that their claim had some merit. We do accept that they had been represented by The Royal College of Nursing and presumably received advice from that organisation prior to and during, certainly, the early stages of the process. Neither Mrs Mathew nor her husband by bringing the proceedings and conducting the claim in the way they did, acted unreasonably. We noted that the word “unreasonable” has its ordinary English meaning. Neither the claimant nor her husband persistently avoided reasonable requests of them or conducted themselves inappropriately. They genuinely felt they had a claim but were merely wrong and they lost. Costs should not be ordered where that happens unless there was more in their behaviour to criticise and we believe unanimously that there was not and it would be inappropriate to make an order for costs.”

19. The simple point which Mr Prescott makes and, in our judgment, makes well is that there is a stark inconsistency between the language of paragraph 25 in which the Tribunal find, effectively, that at the heart of the racial discrimination case was a deliberate and cynical lie, to the effect that the Appellant’s management was guilty of explicit offensive racial abuse on the one hand; and on the

other hand their conclusion at paragraph 36 that the Claimant in bringing or conducting the claim had not conducted herself unreasonably or inappropriately.

20. In our judgment, in a case such as this, where there is such a clearcut finding that the central allegation of racial abuse was a lie, it is perverse for the Tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably. Whatever may be their genuine feelings about the other matters of which a complaint is made, on the particular facts of this case it was the fact that the lie was explicit and so much at the heart of the case that, in our judgment, it is appropriate for us to conclude that this was an overwhelming case where the Tribunal has failed properly to address the point, and as a result has come to a perverse conclusion.

21. It therefore follows that, in our judgment, any Tribunal, reasonably applying themselves to the findings of fact which they made, must have come to the conclusion that the Claimant had acted unreasonably in bringing and conducting the proceedings, and furthermore was wrong in law in rejecting the claim for costs on that basis.

22. In our judgment this was plainly a case where some order for costs ought to have been made. How much that order for costs ought to have been is not a matter which we are in a position to judge, and Mr Prescott does not seek to persuade us to do so. We do not have the detailed breakdown of the sum claimed to have been expended by the Appellant in defending the claim and, of course, crucially, we have no information at all as to the means of the Claimant or her ability to pay. Whilst it is not obligatory for the Tribunal to have regard to that, it is something that they may have regard to, and no doubt in a case such as this where the sums involved are so great, that they

would undoubtedly wish to do so.

23. Therefore the conclusion of this appeal is that the appeal is allowed and the decision of the Tribunal is overturned.

24. We have decided that this is a case where the Tribunal should have made some award as to costs against the Claimant in favour of the Appellant, but we remit the question of how much that award of costs should be to the same Tribunal which will, no doubt, wish to hear argument on the amount of costs and evidence on the ability of the Claimant to pay.