Neutral Citation Number: [2024] EAT 60

Case No: EA-2021-001227-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 April 2024

Before:

JASON COPPEL KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR SOLOMON DEMBA

Appellant

- and -

CARE UK COMMUNITY PARTNERSHIPS LTD

Respondent

- -
- -

The Appellant (in person)
Mr N Caiden (instructed by DAC Beachcroft LLP) **for the Respondent**

Hearing date: 9 January 2024

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JUDGMENT

SUMMARY

RACE DISCRIMINATION, VICTIMISATION

The tribunal rejected claims of direct race discrimination and victimisation but did not apply the discrete legal test for identifying victimisation under s. 27(1) of the Equality Act 2010. That failure undermined its decision not to embark upon a reconsideration of the merits of the victimisation claim and it was not inevitable that the tribunal would reach the same conclusion, and refuse to reconsider the victimisation claim, applying the correct legal test.

JASON COPPEL KC, DEPUTY JUDGE OF THE HIGH COURT:

Background

1. The appellant, a registered nurse, applied for a position with the respondent in April 2019. He was offered the job, conditional on references and a DBS check, and accepted the offer. There was then a lengthy process of consideration within the respondent regarding his DBS check, which disclosed a criminal conviction, and his references. Eventually, in late August 2019, the appellant became impatient with the process. He first complained informally and then submitted a grievance claiming that the delay in his being permitted to start work was due to race and age discrimination. On 24 September 2019, the offer of employment to the appellant was withdrawn.

2. The appellant claimed to the employment tribunal (*inter alia*) that the delay in commencement of his employment and the withdrawal of the offer of employment constituted age and race discrimination and also victimisation in consequence of having done a protected act, which was alleged to be the submission of the grievance. The employment tribunal rejected all of his claims. The critical passages in its judgment on the merits of the claim ("the merits judgment") concern the reasons for the appellant's treatment. It stated (paragraphs 29-40):

> *"29. Turning to the heads of claim, there was plainly a delay in starting the Claimant's employment. That was understandable until early July, or perhaps the beginning of August by reason of holidays. From then on there was a combination of Mr O'Leary not doing perhaps what he should have done, and Mr Demba not keeping appointments. Mr O'Leary left in September 2019 but we were not told why. We were told that Ms Kingsmill was on long-term sick and then resigned, and so we heard from neither of them.*
>
> *30. It is inexplicable that no one emailed Mr Denba [sic], and equally inexplicable that he did not email them about this. It is clear that Mr O'Leary and Ms Kingsmill had concerns about both references and the DPS [sic] check. Nothing appears to have happened after there was reference by Ms Kingsmill to the DBS panel in June, and so why there was*

reference to the panel in supportive manner is unclear.

31. However, there is no reason to doubt that the two people at the home, Ms Kingsmill the manager, and Matt O'Leary the business manager did have concerns they wanted to address, to the extent back as far as June they were having doubts about whether to employ him at all.

32. None of that relates to race.

33. The withdrawal of the offer of employment was a decision made by Ms Knight on the basis of the information provided to her, largely by or through Mr O'Leary, all of which was to the effect that he had tried and failed to have a meeting with Mr Demba to clarify these matters.

34. It was certainly unwise simply to terminate the arrangement given the grievance lodged by Mr Denver [sic]. Ms Knight's evidence in her witness statement was that she knew that he had filed it, but that it was not the reason for her decision. Her oral evidence was that she had forgotten about it. Clearly she knew that it was him. While she manages many homes, they [sic] cannot be very many letters in complaining about age and race discrimination, from potential employees. It was referred to in an email asking if the offer could be withdrawn given that he had now raised a grievance.

35. However, and after giving the matter much thought, from Ms Knight's point of view she was faced with having a post vacant for many months. Because an offer had been made to Mr Demba the post could not be filled permanently and had to be staffed with agency staff. The first item on her meeting with every home manager was the cost of agency staff. It was entirely understandable that she wished to resolve the situation. Plainly she did not give it very much thought because of the speed of the email exchange.

36. It is also relevant that there is a very large attrition rate between application and the start of employment, as given the shortage of nurses many people offered jobs take up other offers, often not letting the Respondent know.

37. However, there is nothing to suggest that this is anything to do with Mr Demba being black, save the fact that one follows the other. That could be enough, but given the information available to Ms Knight the panel concludes not, particularly given the workplace environment.

38. It is highly relevant to the panel's conclusion that nurses are in enormously short supply. The Respondent is seeking to recruit nurses from abroad. Any company that sought to discriminate against nurses from any particular ethnic background would be limiting its pool in a most ineffective way. That applies to individual home managers as well as the Respondent as a whole. Plainly there are a large number of black nurses working for the Respondent. Even if Mr Demba is right in saying that promotion is difficult (and we make no finding of fact that this is so) that would be no reason to discriminate against a hands on nurse manager.

39. The failure to investigate the grievance was utterly incompetent, as was much of the rest of the history, but there is no reason to think that either Ms Nixon or Ms Knight did so by reason of Mr Demba's race.

40. One can entirely see why Mr Demba thinks this was race discrimination. The Tribunal has considered carefully whether such an utter shambles is sufficient explanation but ultimately concluded that was what it was."

3. The appellant applied to the tribunal for reconsideration of its judgment. The primary point made in the application for reconsideration was that the tribunal should have found there to be

victimisation in light of Ms Knight being aware of the appellant's complaint of race discrimination, deciding to ignore that complaint and instead withdrawing the offer of employment to him. The application stated that: *"the Tribunal should have concluded that the Respondent's decision to withdraw my employment was motivated by the complaint raised as there was no reasonable explanations for it"*.

4. The tribunal chairman, Employment Judge Housego, rejected the application for reconsideration without notifying the respondent or involving the other members of the tribunal. Although the judgment on the application for reconsideration ("the reconsideration judgment") does not say so in terms, this was a decision pursuant to rule 72(1) of the Employment Tribunal Rules that there was no reasonable prospect of the original decision being varied or revoked. The reconsideration judgment stated (paragraphs 7-11):

> *"7. The first [ground on which reconsideration is sought] is that "I believe that I was victimised as my employment was withdrawn because of the racial discrimination complaint I raised on the 28th of August 2019". He adds "Ms knight [sic] in her evidence made it clear she knew very well that I made a racial discrimination claim complaint but decided to "ignore it" as confirmed in the Tribunal's judgement Para 28." That was not what paragraph 28 said, which was "It is accepted that this was, in effect, ignored." That is not a finding that it was a decision to ignore it. The decision recorded (at paragraph 34) was that "Her oral evidence was that she had forgotten about it." By way of explanation of the difference, I accept that Mr Demba has reason to feel that I ignored his request to reconsider the judgment, and it was ignored, but most certainly not intentionally.*
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> *8. Mr Demba correctly states (in effect) that this was a primary fact from which the Tribunal could infer race discrimination, so that the burden of proof shifts to the Respondent, and he invites me to consider that they did not discharge that burden. The Tribunal considered that carefully, and expressed its conclusion at paragraph 35-39. It was*

satisfied that (while completely unsatisfactory) the Respondent had shown that it was not race discrimination.

9. Mr Demba refers to unconscious discrimination as a possibility. There was an underlying concern that was nothing to do with race, and the Tribunal could see that this was the driver of the issue about employing Mr Demba. The Tribunal could see no reason why the way that issue was handled was any different for Mr Demba than it would have been for a hypothetical white comparator.

10. Mr Demba indicates that something that the Tribunal described (in paragraph 40) as "an utter shambles" is very likely to be discriminatory given his protected characteristic. The Tribunal looked very carefully at that issue, and decided that in all the circumstances (set out in the judgment) it was satisfied that it was not the case.

11. This application is, in reality, to disagree with the decision, which is not reason to reconsider it."

5. The appellant sought permission to appeal against both the merits judgment and the reconsideration judgment. However, his appeal against the merits judgment was instituted out of time and he was not granted an extension of time. He was granted permission to appeal against the reconsideration judgment on one ground only, as follows;

"The Tribunal erred in law by failing to apply section 27 of the Equality Act 2010 in that, at paragraph 38 of its judgment it held that the withdrawal of the job offer/termination of the job on 24 September 2019 had nothing to do with the Appellant's race. As the Claimant alleged that this was both victimisation and direct discrimination, the Tribunal ought to have considered whether the withdrawal had anything to do with the doing of the admitted protected act as well as whether it had anything to with race. In the reconsideration judgment, the Tribunal, at paragraph 8, have again fallen into the same error."

The ground of appeal

6. The tribunal made clear findings in the merits judgment that the withdrawal of the offer of employment to the appellant was not because of his race such as to constitute direct race discrimination contrary to s. 13(1) of the Equality Act 2010. Those findings were not sufficient to dispose of the appellant's claim of victimisation: the (different) issue raised by that claim was whether the reason why the respondent withdrew the offer of employment was that the appellant had submitted his grievance which, it was accepted, was a "protected act" within s. 27(1) of the Equality Act 2010.

7. There is nothing in the merits judgment to suggest that the tribunal appreciated that distinction and sought separately to apply the relevant legal test under s. 27(1). Having, in paragraphs 34-37, discussed and made certain findings in relation to, the grievance and subsequent withdrawal of the offer of employment, the tribunal concluded in paragraph 38 that "*there is nothing to suggest that this is anything to do with Mr Demba being black..*" That conclusion was adverse to the claim of direct race discrimination but did not dispose of the claim of victimisation.

8. The appellant's application for reconsideration squarely raised the issue of whether his claim for victimisation had been adequately addressed in the merits judgment. The respondent invited me to read that application narrowly and as focused only on the proper consequences of the tribunal's finding that Ms Knight had ignored his complaint of race discrimination. The tribunal did not read it so narrowly, as is apparent from its reasoning set out in paragraph 7 above and nor would I, not least because of the appellant's composite complaint I have quoted in paragraph 3 above.

9. The reconsideration judgment did not achieve what the merits judgment had failed to do, namely to apply the distinct legal test for victimisation. On the contrary, the tribunal repeated, in paragraphs 8-10 of the reconsideration judgment, findings which were adverse to the claim of direct race discrimination ("*[The tribunal] was satisfied that (while completely unsatisfactory) the*

Respondent had shown that it was not race discrimination"; *The Tribunal could see no reason why the way that issue was handled was any different for Mr Demba than it would have been for a hypothetical white comparator"*; "*The Tribunal looked very carefully at [the issue of whether Mr Demba's treatment was discriminatory given his protected characteristic], and decided that in all the circumstances (set out in the judgment) it was satisfied that it was not the case*").

10. I accept the appellant's submission that the tribunal erred in law in its reconsideration judgment by failing to give consideration to his claim of victimisation as distinct from his claim of direct race discrimination. The tribunal should have recognised in the reconsideration judgment that the legal test for victimisation was different and did not depend upon whether the respondent had treated the appellant as it did because of his race.

11. In his oral submissions at the hearing before me, Mr Caiden for the respondent fairly did not seek to argue that the tribunal had sought to apply the legal test appropriate to the victimisation claim either in the merits judgment or in the reconsideration judgment. His principal submission was, rather, that it would be pointless to allow the appeal, and so pave the way for a full reconsideration of the merits judgment, when the tribunal had made findings of fact in the merits judgment which would be fatal to the victimisation claim when the appropriate legal test came to be applied. He pointed, in particular, to paragraph 33 of the merits judgment, where it is said that Ms Knight had withdrawn the offer of employment "*on the basis of the information provided to her, largely by or through Mr O'Leary, all of which was to the effect that he had tried and failed to have a meeting with Mr Demba to clarify these matters*". Mr Caiden submitted that the tribunal had found that the reason for the withdrawal of the offer of employment was the unsuccessful attempts to meet Mr Demba to resolve the issues raised by his DBS check and references, and not the submission of his grievance.

12. In circumstances where the tribunal has made an error of law, the appropriate course would usually be to require the tribunal to reconsider the matter afresh on the basis of a correct legal direction. It is a relatively high hurdle for the respondent to surmount in order to establish that that

would be pointless and that, in effect, the tribunal would inevitably reach the same conclusion, and refuse to embark upon a reconsideration of the merits judgment. Based on the tribunal's findings to date, I do not regard that outcome as inevitable:

(i) In paragraph 34 of the merits judgment, the tribunal noted, and rejected, Ms Knight's evidence as to why the grievance was not the reason for the withdrawal of the offer of employment, which was that she had forgotten about it.

(ii) In paragraph 35 of the merits judgment, the tribunal found that Ms Knight had been motivated by being "faced with having a post vacant for many months". I reject the respondent's submission that those words should be read as meaning that the post had already been vacant for many months at the time that the offer was withdrawn. A more natural reading is that Ms Knight's concern was forward-looking and was that the process of investigating and reaching a conclusion on the appellant's grievance would delay for some months the point at which the post for which he had applied could be filled on a permanent basis, with the respondent having to rely upon more expensive agency staff in the meantime.

(iii) On that footing, the tribunal might well conclude that the offer of employment had been withdrawn because the appellant had raised a grievance, the respondent preferring to recruit somebody else immediately rather than to wait until the grievance had been investigated and resolved. Such a conclusion would be at least highly material to the victimisation claim.

(iv) That analysis is not displaced by the tribunal's finding in paragraph 33 of the merits judgment that Ms Knight's information about the appellant had come from Mr O'Leary and that she had been aware of the difficulties which had arisen in communicating with the appellant. The tribunal did not find that those difficulties had been the reason for the withdrawal of the offer of employment.

(v) Nor is there anything in the reconsideration judgment which would undermine that analysis and make it inevitable that the tribunal would reach the same conclusion upon a fresh

consideration under rule 72(1) of the Employment Tribunal Rules, or upon a full reconsideration if that were embarked upon.

13. Accordingly, I allow the appeal against the reconsideration judgment and remit the appellant's application for reconsideration of his victimisation claim for fresh consideration by the tribunal pursuant to rule 72(1) of the Employment Tribunal Rules.