Appeal No. UKEAT/0197/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 13 December 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

BDW TRADING LIMITED — APPELLANT

MR J KOPEC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS A REINDORF (of Counsel) Instructed by: Pinsent Masons LLP 55 Colmore Row Birmingham B3 2FG
For the Respondent	MR J KOPEC (The Respondent in Person)

SUMMARY

HARRASSMENT – Conduct

The tribunal erred in law in deciding that the respondent could be liable for harassment of the claimant by the third parties, which the respondent had not taken seriously and had failed to prevent and failed properly to address, without any finding that the respondent's officers themselves had any discriminatory motivation.

The matter would be remitted to the same tribunal for further consideration.

THE HONOURABLE MR JUSTICE KERR

Introduction

1 This is an appeal against the unanimous decision of the employment tribunal sitting at London Central comprising Employment Judge Stuart sitting with Mr D Schofield and Mr I McLaughlin. The hearing below was from 19 to 22 November 2018. The tribunal unanimously decided that the claimant's complaint that he was unfairly constructively dismissed succeeded. Complaints of direct discrimination were dismissed, and his complaints that he suffered harassment related to his race and apparent sexual orientation succeeded in part but not in full. Finally, the complaint that he suffered harassment related to his age failed and was dismissed. The reserved judgment with reasons was dated 15 January 2019 and sent to the parties on 29 January 2019.

2 I shall refer to the appellant as the respondent (as it was below) and to the respondent to the appeal, Mr Kopec, as the claimant, as he was below.

3 Soole J directed that there should be a full hearing of the single ground of appeal.

4 That ground is that the tribunal erred in law in concluding that the respondent subjected the claimant to harassment contrary to section 26 of the **Equality Act 2010** by failing to react in relation to abuse perpetrated against him by third parties when it had expressly found that the employer's failure to act was not, itself, tainted by any discriminatory motive.

The Facts

5 The facts as found by the employment tribunal were as follows. I omit much of the account which is not necessary for this appeal.

A

6 The respondent is part of a large group of companies. The respondent manages properties including flats in Fulham where the claimant was employed as a concierge from 28 May 2014. The claimant identifies himself as a heterosexual man from Poland. His line manager was a Ms Lane, who in turn reported up to other managers.

B

7 The claimant was identified as needing to improve his "softer skills," i.e. putting people at ease and not annoying them by manner and body language as well as discourse.

C

8 The respondent had certain equality policies which went unnoticed by the managers and by Ms Lane in particular; she had not read them.

D

9 An incident (incident (1)) occurred on 16 December 2016. The claimant was racially abused by a delivery driver. Ms Lane was appalled by the racial abuse but also blamed the claimant for being unhelpful.

E

10 Omitting irrelevant matters, a further incident (incident (3)) occurred on 6 June 2017. The claimant was racially abused by another driver, a man called Darren Skeed. Mr Skeed also made a homophobic abusive remark to the claimant.

F

11 In the aftermath of that incident, Ms Lane again acknowledged the rudeness of the driver but again blamed the claimant for his manner and demeanour which she said did not help the situation.

G

12 Ms Lane decided that a formal process was needed because the claimant was not prepared to discuss further his own shortcomings as a contributor to the treatment he was

H

receiving. The claimant, meanwhile, was demanding a written apology from Mr Skeed, who was subsequently charged with an aggravated public order offence, but not convicted.

13 On 9 June 2017 the claimant was invited by a letter to a disciplinary hearing for showing discourtesy to clients, customers and suppliers. The employer of the (unnamed) driver in incident (1) intervened in support of the claimant, saying she was not happy that the respondent was using that incident against the claimant.

14 The disciplinary hearing took place on 28 June 2017. The claimant received a verbal warning and was told there would be an "informal capability improvement plan" to be carried out by Ms Lane.

15 The claimant sent a text message to Mr Skeed on 5 July 2017 saying Mr Skeed had been reported to the police and asking him to tell the truth about incident (3). Ms Lane found out about the text message and asked HR department and her line manager whether what the claimant had done was "sackable".

16 On 10 July 2017 Ms Lane suspended the claimant for sending the text. The same day, the claimant appealed against the verbal warning decision. The next day, he resigned, citing discrimination and harassment and abuse. The respondent accepted his resignation but treated his complaints as a grievance to be addressed despite his resignation.

17 A meeting was then held on 9 August 2017 but, as the claimant was told by letters of 18 August 2017, the grievance was not upheld; and the appeal against the verbal warning failed. The claimant's resignation remained effective.

The Proceedings

18 He presented his claims to the employment tribunal on 9 September 2017. The claims were for constructive unfair dismissal, direct discrimination on the grounds of his age, race and apparent sexual orientation; and harassment related to his age, race and apparent sexual orientation. After a trial the employment tribunal provided its written judgment and reasons.

19 The employment tribunal noted that in support of both the direct discrimination and harassment claims, the claimant relied on three incidents, including incidents (1) and (3); and on the disciplinary steps taken against the claimant up to and including his suspension. A large part of the claimant's case below centred on the respondent blaming the victim, i.e. him, rather than the perpetrators of incidents (1), (3) (and another incident, incident (2), which was said to be age discrimination, an allegation that failed).

20 The employment tribunal set out the issues, uncontroversially except that they set out the burden of proof issues derived from section 136 of the **Equality Act 2010** with reference to the direct discrimination claims but not with reference to the harassment claims.

21 The employment tribunal then set out the facts, including in more detail those I have outlined above. They then set out the law, again largely uncontroversially. They set out section 13 (direct discrimination) and section 39 (the prohibition against direct and indirect discrimination). They set out section 26 (harassment) but not section 40 (the prohibition against harassment).

22 They cited standard case law but none on the subject of discriminatory motivation in a harassment claim. They did not cite **Unite the Union v Nailard** [2019] ICR 28, in which the

A Court of Appeal had given judgment about six months before the hearing. The case was not drawn to their attention.

B 23 The employment tribunal upheld the constructive unfair dismissal claim. They found that the implied trust and confidence term had been breached in six respects.

C 24 First, the respondent had shown a complete lack of awareness of the seriousness of the claimant being subjected to racist and other discriminatory abuse.

D 25 Second, the respondent's managers had never read the respondent's equality policy documents nor received any equality or diversity training, until after the claimant's resignation.

E 26 Third, Ms Lane had reacted to incident (1) by blaming the claimant for it instead of the driver who had subjected the claimant to the racist abuse in that incident. Ms Lane had failed utterly to recognise the part played by subjection to discriminatory abuse when considering the issue of the claimant's "softer skills." The seriousness of the abuse was "thereby implicitly denied."

F 27 Fourth, Ms Lane had unfairly assumed the claimant's guilt in relation to incident (3). She sided with the other persons involved in the incidents without proper analysis of what had

G actually occurred. Passages blaming the claimant for what had happened were excised from contemporary documents sent to him during the disciplinary process.

H 28 Fifth, the disciplining officer, Mr Manikon, knew that the claimant had been subjected to racist and homophobic abuse, yet he did not trouble to acquaint himself with the respondent's

written policies bearing on those matters. He too therefore downplayed their importance during the disciplinary process.

29 Sixth, the verbal warning would not be a breach of the trust and confidence term in itself, but in context contributed to the repudiatory conduct; there was also procedural unfairness in the process followed by Mr Manikon, who failed to hear from a relevant witness who supported the claimant's position.

30 These matters taken cumulatively, the tribunal found, amounted to a repudiatory breach of the implied term of trust and confidence and justified the claimant's resignation, which was caused by the breach.

31 The employment tribunal went on to consider the claims for direct discrimination, applying the shifting burden of proof approach. Citing in particular the failure to deal with the claimant's allegation of racial and homophobic mistreatment, the officer's ignorance of the respondent's equality policies and the absence of any training leading to unawareness of those policies, they found that the burden shifted to the respondent to provide a non-discriminatory explanation of its treatment of the claimant.

32 The respondent would have to explain, said the tribunal, and the tribunal would have to consider, whether the respondent would have treated a hypothetical comparator any differently from the way it treated the claimant. The hypothetical comparator, they said at paragraph 58,

> **"…would be a male day concierge with the same work history and characteristics as the Claimant, including his weak performance in the softer skills, save that he is of a non-Eastern European ethnicity, and who had had …suffered equivalent racial and/or homophobic abuse at the hands of delivery personnel and/or contractors".**

33 They rejected the suggestion that Ms Lane was prejudiced against Eastern Europeans. They accepted as genuine and not founded on prejudice her concern about the claimant's softer skills. They acquitted her of treating the claimant as she did due to his Eastern European ethnicity; she would have treated "the hypothetical comparator, displaying the same conduct and with the same history of incidents, in exactly the same way…" as she treated the claimant.

34 At paragraph 61, the tribunal said this:

> **"The Tribunal unanimously concluded that all of those involved in the disciplining and suspension of the Claimant would have behaved in the same way in respect of the hypothetical comparator. Their ignorance of, and failure to adhere to, the Respondent's policies would have been the same, irrespective of the ethnicity of the member of staff in question, and was not due to the Claimant being of Eastern European ethnicity or any real or apparent sexual orientation."**

35 They therefore dismissed the claim for direct race discrimination and direct discrimination for apparent sexual orientation. They also dismissed the claim for direct age discrimination with which I am not further concerned in this appeal.

36 They went on to consider the claims for harassment. They reminded themselves that the claimant relied on the same factual matters in support of that claim as he did in support of the (unsuccessful) direct discrimination claims.

37 At paragraph 65, they said this:

> **"The authors of the abusive language used against the Claimant in (i), (iii) and (v) related to a protected characteristic (race or sexual orientation or age) but on each occasion the perpetrators were not members of staff or management."**

38 The references to the incidents at (i), (iii), and (v) were respectively these, as set out at the beginning of the decision: (i) was the incident of 16 December 2016; (iii) was the incident on 6 June 2017; (v) was incident two, which formed the basis of an unsuccessful age discrimination allegation.

39 Returning to paragraph 65, the employment tribunal then said:

> **"Allegation (ii) was equally by an outsider, but there was no content relating to one of the protected characteristics within Section 26. The Tribunal concluded that (iv), (vi) and (vii) – disciplinary steps taken by the Respondent itself - were not related to any of the Claimant's protected characteristics but were focussed on his conduct."**

40 Allegation (ii) was that "on 5 March 2017 the respondent treated the claimant as at fault when a resident's boyfriend subjected him to verbal abuse, where upon his Line Manager was offensive to him and removed his overtime working, leading to a reduction in income".

41 Returning back paragraph 65, the employment tribunal said,

> **"… the Tribunal concluded that (iv), (vi) and (vii) – disciplinary steps taken by the respondent itself- were not related to any of the Claimant 's protected characteristics but were focused on his conduct.''**

42 The incidents described as (iv), (vi) and (vii) were, as the tribunal said, disciplinary steps; (iv) was calling the claimant to a disciplinary meeting; (vi) was issuing the verbal warning; and (vii) was suspending the claimant after he had contacted the police and sent the text message to Mr Skeed.

43 At paragraph 66 of their decision, the tribunal then said this:

> **"However, the Tribunal unanimously concluded that the Respondent's failure to take seriously and to investigate the abuse suffered by the Claimant in incidents (i) and (iii) greatly exacerbated and perpetuated the hostile, degrading, humiliating and offensive environment which this third party verbal abuse created for him. The Respondent's failure to protect an employee in the workplace from racist and/or homophobic abuse was entirely contrary to the Respondent's own avowed and explicit policies, of which management at the material time were wholly ignorant, and was a serious matter which in itself had the effect of violating the Claimant's dignity and, at least in part, creating the hostile, degrading, humiliating and offensive environment in which he found himself. The Tribunal concluded that this failure to act in relation to harassment by third parties in the workplace fell within the ambit of 'conduct related to' the relevant protected characteristics, within the meaning of section 26 of the Act."**

44 At paragraph 67, the employment tribunal decided that the test for harassment was met in the case of incidents (1) and (3), but not incident (2) (in which a remark was made relating to the claimant age).

45 Finally, at paragraph 68 the employment tribunal said this:

> **"Accordingly, the Claimant's complaint of harassment to the extent of the Respondent failure to investigate and to pursue with due seriousness the third party racist and homophobic abuse which the Claimant suffered on 16 December 2016 and 6 June 2017, as it was obliged to do under the express terms of its own Equality and Ethics policies, including as against outside contractors and those having dealings with group. The respondent has accepted throughout that the verbal abuse of which the Claimant complains, actually took place."**

Submissions

46 Ms Reindorf, for the respondent, submitted that the employment tribunal overlooked the effect of the decision of Court of Appeal in **Unite the Union v. Nailard**, the case not cited to them. She took me to the detailed exposition of the legislative and case law history which had led to the current formulation of what is now section 26 of the **Equality Act 2010,** as set out in the judgment of Underhill LJ in that case. It is unnecessary for me to repeat that history here.

47 Under the present formulation of what amounts to harassment, in section 26(1)(a), the alleged harasser's unwanted conduct must be "related to" the relevant protected characteristic. That, as Underhill LJ explained in **Nailard** at [98] entails the following:

> **"I do not believe … that the mere use of the formula "related to" is sufficient to convey an intention that employers who are themselves innocent of any discriminatory motivation should be liable for the discriminatory acts of third parties, even if they could have prevented them. In my view the "associative" effect of the phrase "related to" is more naturally applied only to the case where the discriminatory conduct is the employer's own…"**

48 Ms Reindorf submitted that the employment tribunal had at paragraph 61 in the present case expressly acquitted the respondent's officers of any discriminatory motivation, when

A dealing with the direct discrimination claims. The result could not be different in the harassment claims, which relied on the same conduct, she argued.

B 49 The tribunal have then, at paragraphs 66 and 68, wrongly found liability for harassment in respect of incidents (1) and (3) on the untenable basis that the respondent had failed to take seriously and investigate the abuse from third parties. Failing without discriminatory motivation to prevent harassment by a third party is not unwanted conduct "related to" the C relevant protected characteristic - here, race and/or apparent sexual orientation.

50 Mr Kopec, ably representing himself with courtesy but without legal experience, D defended the employment tribunal's decision in respect of the harassment claims. He pointed out that the employment tribunal had found clearly that Ms Lane had, "sided with the other persons involved with the incidents without proper analysis of what had actually occurred," (paragraph 51(iv)). The employment tribunal also found at paragraph 68 that the respondent E had, "accepted throughout that the verbal abuse of which the claimant complains actually took place."

F 51 Mr Kopec therefore, argued, as I understood him, that there is room for a finding that the respondent's officers, and Ms Lane in particular, went beyond mere passive tolerance of third party harassment and strayed into supporting the third party harassment by siding with the G abusers and disciplining the victim.

52 If that was correct, it was not inevitable that the tribunal would find no discriminatory H motivation applying the correct test derived from **Nailard** case.

53 Ms Reindorf said there was no room for such a finding because the employment tribunal had expressly found that the relevant officers including Ms Lane lacked any discriminatory motivation when dismissing the direct discrimination claims.

Reasoning and Conclusions

54 The point is a short one and I can deal with it briefly. It is a matter of regret that the employment tribunal's attention was not drawn to **Nailard** case. In fairness to Ms Reindorf, who appeared below as well as before me and against an unrepresented opponent, I would have expected the judge below to be aware of **Nailard** case, given that the tribunal was faced with a case of third party harassment.

55 I am satisfied that the employment tribunal did not correctly apply the law as set out in that case. The upholding of the harassment claim against the respondent in respect of incidents (1) and (3) therefore cannot stand and must be set aside. Ms Reindorf is right to say that the employment tribunal appears to have found harassment established against the respondent on the basis of the respondent's failure to take seriously and prevent the harassment that occurred in incidents (1) and (3). The language of paragraphs 66 and 68 of the employment tribunal decision makes that clear.

56 Ms Reindorf invited me not to remit the matter back but to substitute what she said must be the only permissible outcome: that the harassment claim must fail and be dismissed in its entirety.

57 I am not persuaded that she is correct in that submission. It is true that paragraph 61 of the decision is phrased in terms that would appear to exonerate the respondent's officers from

A any discriminatory motivation. It is true, also, that the harassment claims shared the same factual content as the claims for direct discrimination. It may be that because of those two matters, the outcome should be the dismissal of the harassment claim as Ms Reindorf contends.

B

58 But I am not wholly persuaded that it must necessarily be so. The tribunal viewed the issue of discriminatory motivation through the prism of the law relating to direct discrimination and not the law relating to harassment. The wording of the relevant statutory provisions is

C different.

59 Furthermore, the tribunal formulated the hypothetical comparator in a particular way

D when considering the claim for direct discrimination. In a claim for harassment there is no comparator. Yet further, the tribunal has to apply the burden of proof provisions in section 136 of the **Equality Act 2010** in a harassment claim as it does in a direct discrimination claim, as

E Underhill LJ explained in **Nailard**. It did not do so, or did not overtly do so, at the last hearing.

60 I think the appropriate course is to set aside the finding of harassment in respect of incidents (1) and (3) and to remit the matter back to the same tribunal for reconsideration of the

F harassment claim in respect of those two incidents in the light of this judgment and **Nailard** case.

G 61 Ms Reindorf did not argue against remitting the matter back to the same tribunal rather than a fresh one if, contrary to her position, the matter should be remitted at all.

H 62 I was told that the remedies hearing in relation to the successful constructive dismissal claim has not yet taken place. It may be that the occasion of that hearing would be a convenient

to reconsider the harassment claims, since the same tribunal has to reconvene then anyway. But that is a matter of case management for the employment Judge.

63 For those reasons, the appeal is allowed, the finding that the harassment claim succeeds is set aside and the harassment claim, in so far as it succeeded on the last occasion, is remitted back to the same tribunal for reconsideration.