Lies in good faith and the burden of proof in discrimination claims

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Base Childrenswear Limited v Otshudi [2019] EWCA Civ 1648

The Facts

The Respondent's business is selling childrenswear and the Claimant was employed as a photographer, taking photos of clothes for use in marketing materials. The Claimant was employed between 16 February and 19 May 2016. She is of black African ethnicity and from the Democratic Republic of Congo.

On 19 May, the Claimant was called by the Managing Director to his office where another manager was present. The MD informed the Claimant that she was being made redundant with immediate effect. The dismissal came out of the blue.

The Claimant immediately told the MD that she did not believe that redundancy was the true reason for dismissal and that she thought she was the victim of discrimination by others within her team and that was the real reason for her dismissal.

The MD responded by calling in another manager, whom he asked to confirm that there was a redundancy situation, which he did. The MD said he was very upset by the allegation of discrimination and disappointed that the Claimant had made it. He said he dared her to repeat it which the ET characterised as an attempt to intimidate the Claimant into taking no further action.

Five days later the Claimant raised a grievance alleging a discriminatory dismissal alongside complaints of discriminatory treatment by colleagues. It was completely ignored.

The ET

The Claimant lodged her claims under the EA. Unusually, this was labelled as harassment and that is how it proceeded at trial.

The ET3 was lodged by the Respondent's MD without legal assistance. The grounds of resistance were of poor quality but effectively stated that the Claimant had been made redundant "purely for financial/economic reasons". The ET states that the response included "a strident assertion" that he had no racial motivation, which he described as "a vile accusation".

The Claimant applied for disclosure on the redundancy issue. Around three weeks prior to hearing, solicitors instructed by the Respondent lodged an amended grounds of resistance. These raised for the first time a wholly new explanation for the dismissal. What was pleaded was that earlier on the day of the dismissal a manager and a warehouse assistant employed by the Respondent, found "concealed" in the photography department (a space only ever used by the Claimant) a create containing five items of new designer clothing. Clothing required for the photoshoot should have been in the stockroom and there was no reason why it should have been lift in the photography department. The warehouse assistant stated that he saw the Claimant taking the same clothes from the photography department to the stockroom, talking over the phone in French, in what appeared to him to be in a suspicious and agitated manner.

The warehouse assistant told the MD and another manger. The conclusion drawn was that the Claimant was intending to steal the clothes. No investigation into this was undertaken but the MD decided she was guilty of theft and should be dismissed. They decided to tell her it was redundancy to "minimise the potential confrontation". They maintained race had nothing to do with the decision at all.

The ET concluded that the evidence of any attempted theft was "flimsy" and the MD gave a false reason for dismissal at the time. The ET concluded this was because he recognised that he would not be able to prove the allegation.

In approaching the theft issue the ET identified that the correct approach was to consider whether the belief that the Claimant had intended to steal was genuine and whether it was reached in a way influenced by her race.

The ET was sceptical about the Respondent's evidence and especially that of the MD. The inconsistent explanations in the grounds of resistance were of a great impact on the decision because it initially provided a "false" explanation.

Due to that background the ET concluded that the decision was tainted by considerations of the Claimant's race:

> *"The Tribunal considered that the reaction of Mr Granditer to the discrimination allegation on 19 May and in a context where he knew he was not being truthful with the Claimant and his subsequent reaction to the discrimination grievance and the allegation of discrimination in the claim form not simply by a denial but by the asserting of a contrary false case when his current case is that he had a valid defence for his actions led the Tribunal to the inference that he was trying to cover up what was a dismissal which was tainted by considerations of the Claimant's race."*

The ET considered the MD's conduct to be intimidatory:

> *"160. Mr Granditer's strong reaction to the allegation of discrimination followed by his unsatisfactorily explained failure to make use of what he says was the genuine reason for dismissal until three weeks before the hearing some 15 months later led the Tribunal to reject the suspected theft explanation for the dismissal on the balance of probabilities.*
>
> *161. The Tribunal considered that a big question was raised about why the Respondent reached such an adverse conclusion so readily about the Claimant's integrity based on rather flimsy evidence and no investigation.*
>
> *162. It was appropriate in all the circumstances to infer that there was a racial element which had contributed to or caused the dismissal.*
>
> *163. The Tribunal took into account in assessing whether it was appropriate to draw the inference of race in Mr Granditer's favour that there was no background of Mr Granditer treating the Claimant unfavourably indeed on the contrary he had given her permission to work separately as she had requested. The Tribunal considered that such background evidence was highly material but was not determinative of the question whether it was appropriate to draw the inference. In this context the Tribunal also took into account Mr Granditer's ready acceptance that the Claimant was a*

talented photographer and was an asset to the company. There was therefore no good reason why he should not have treated her well up to that point."

Accordingly, the ET concluded that the decision to dismiss was motivated by race.

The CA

(*Lord Justice Underhill, Lord Justice Newey, Lord Justice Haddon-Cave*.)

The Respondent appealed the decision on the basis that it considered EJ Hyde had misapplied the burden of proof under s136 EA. It contended that, there was not enough to shift burden of proof to the Respondent. It relied on trite law which is usefully summarised in paragraph 34 of the judgment. The Respondent also appealed on the basis that it was not clear why the Tribunal had rejected the Respondent's explanation as to the reason for the dismissal.

Whilst the EAT acknowledged that the ET judgment did not make express reference to the burden of proof in its conclusions that it was "adequately clear" that it had them in mind noting that the judge was highly experienced.

The ET was entitled to reach a prima facie case of discrimination on the following:

(a) The MD's strong and intimidatory reaction to the Claimant's allegation of discrimination, in a context where he gave a false reason for dismissal – he "protested too much".
(b) The refusal to address the grievance.
(c) Persistently advancing a false allegation for dismissal in the ET proceedings when the supposed reason for the original lie (to minimise confrontation) was no longer operative.

The EAT appears to have endorsed the conclusion that this meant that the MD realised that race had played a part in his decision. Accordingly, the ET's decisions transferred the burden of proof to the Respondent under s136(2) EA. It was therefore incumbent for the Respondent to show that the Claimant's race played no part in the dismissal.

The reason advanced under s136(3) was that the MD thought the Claimant had been stealing. The ET rejected that explanation and was entitled to do so for essentially the same

reasons as establishing the prima facie case. Therefore, the Respondent's explanation failed and the claim succeeded.

Discussion

Lord Justice Underhill actually stated in the judgment that he was not sure he would have reached the same conclusions as the ET on the initial burden of proof and referenced it as a borderline case. However, he emphasised that they were findings of fact open to the ET on the facts of the case (para 37). The persistence in maintaining a false reason for the dismissal was enough in his view to justify the ET's conclusions:

> "If the Tribunal had relied only on Mr Granditer's expression of outrage at the dismissal meeting it might be a different matter, since that seems to me equivocal at best: even if it indicated a guilty conscience, that would be readily explicable by his having been caught out giving a false reason for the dismissal. But his persistence in lying about that reason seems to me a defensible basis for the Tribunal's conclusion. Giving a wholly untruthful response when discrimination is alleged is well-recognised as the kind of conduct that may indicate that the allegation is well-founded. Of course it will not always do so: Judge Stacey referred in her judgment to the fact (often stressed in criminal cases) that lies may be told for many different reasons. But in this case the Tribunal explicitly considered the explanation given for the initial lie – to minimise confrontation, or soften the blow of dismissal – and pointed out that that ceased to be operative once the Claimant had brought proceedings. Even so, it could be argued that once Mr Granditer was committed to the initial lie it was understandable that he would feel obliged to persist with it, so that there is no need to treat it as a tacit acknowledgment of guilt (and discriminators are not always themselves even aware of their own discriminatory motives). But once we are into debates of that kind it seems to me that we are in the realm of legitimate differences about matters of fact; and it is important to bear in mind that the Tribunal had the opportunity to observe Mr Granditer as a witness." (para 37)

The case is an obvious reminder of the perils of not being accurate in a grounds of resistance or inconsistency in the explanation for treatment. By being inconsistent in documentation a party runs the risk that their explanation for any inconsistency or change in explanation will simply not be believed. In discrimination cases this can result in a very difficult obstacle to any defence. These points will be obvious to practitioners but it is a useful reminder of how finely balanced inferences under the burden of proof can be.

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