Race discrimination – 'Coconut' – a recent analysis of comparators and striking out

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In Walters v Avanta Enterprise Limited [2017] UKEAT 0127 17 2112 (December 2017), Slade J in the Employment Appeal Tribunal considered a case in which the Claimant argued that being labelled a 'coconut' (i.e. being black on the outside, white on the inside) demonstrated a racially discriminatory motivation but her claim was struck out as having no reasonable prospect of success. The case examines how to correctly construct a comparator and also repeats the trite warning against striking out cases too readily at preliminary hearings. Joseph England appeared pro bono for the Appellant at the EAT for the r.3(10) stage, successfully obtaining permission to appeal and drafting the grounds of appeal that succeeded before Slade J.

Facts

The Claimant identifies as black Caribbean and worked in welfare to work and training provision. In December 2013 her manager distributed chocolates to her team and the Grounds of Complaint state that, "[the manager] jokingly suggested that she had chosen the chocolates for everyone's personalities and threw the Claimant a Bounty and exclaimed "I wasn't trying to say you're a coconut!!".

The Tribunal found, "the reference to bounty/coconut is a slur used against a black person who is perceived to be behaving like a white person (black on the outside and white on the inside). The insult is towards a black person who is effectively [being] accused of being a collaborator; it's [sic] not a slur about the colour of their skin".

The Claim complained of detriments after the coconut comment, including being placed on a performance improvement plan and the EAT noted "the phrase, Bounty bar/coconut used by Ms Choudhury to her in December 2013 was relied upon by her not as an act of discrimination in itself but as evidence of how her manager Ms Choudhury regarded her. Her claim was that Ms Choudhury in the next year treated her less favourably than she would a

hypothetical white comparator. It was said that because she was a black person who behaved as a white person she was treated less favourably than Ms Choudhury would treat a white person who behaved in the same way".

At a preliminary hearing, the Employment Tribunal struck out the claim on the basis that it had no reasonable prospect of success and the reasoning including a finding that, "there is no white comparator and it is not easy to see how this could be race discrimination". The Claimant appealed and after being initially refused permission to appeal, succeeded in gaining permission through pro bono representation from Joseph England appearing through the ELAAS scheme.

Comparators

At the EAT, Slade J considered the definition of race at s.9 of the Equality Act 2010, which compromises: "colour, nationality, ethnic or national origins". She distinguished between this statutory definition and "a black person who behaves as if they are white" because "accent, manners and behaviour which may mark out a black person as a "coconut" are learned characteristics". Slade J further distinguished this case from the description within Mr and Mrs Chandhok v Ms P Tirkey UKEAT/0190/14/KN relied upon by the Claimant, which held that a group with certain characteristics, in that case a caste within a wider ethnic group, could fall within the scope of s.9 Equality Act 2010.

The EAT's distinction between race and "learned characteristics" in this case may create an interesting debate in future cases about what element of 'race' is material. Is a Tribunal to try and determine whether a person's actions are because of their inherited race rather than a learned culture? Can an alleged perpetrator defend on the basis that their discrimination was not based on race but instead a more complex and learned choice of behaviour?

The key to avoiding such technical pitfalls for a Claimant may be in ensuring the proper construction of the comparator. In allowing Miss Walters' appeal, the EAT held that the Tribunal had erred in its consideration of a comparator. Slade J repeated the starting point of the statutory language defining a comparator at s.23 EA 2010, "there must be no material difference between the circumstances relating to each case", continuing that in this case:

> "as the Claimant is black in my judgment it is strongly arguable that the relevant comparator is a white employee in no materially different circumstances. It is reasonably arguable that the relevant circumstances include that the white employee speaks and

behaves as a white person, which was the behaviour which led Ms Choudhury to call the Claimant a "coconut" or a "Bounty bar" and that the comparison required by section 23(1) is with such a white employee."

The EAT's judgment therefore suggests that a person in no materially different circumstances would be a white employee who behaves 'as a white person'. Putting aside the difficulties in identifying and applying stereotypes of how a white person is expected to act, one could consider that this comparator does not solve the problems of identifying the correct comparator in this case because applying the prejudice inherent in the coconut comment, a white person who acts white is not behaving strangely, differently or betraying their race somehow, in contrast to 'a coconut'. There are therefore two differences for the white comparator, one is their race and the other is whether they are behaving differently in comparison to a perceived stereotype, therefore arguably they are in "materially different circumstances".

Conversely, the application of the comparator here as a white person who behaves white has the advantage of highlighting that the detriment suffered by someone labelled as a coconut is that it suggests that a white person can act white but not a black person. This does appear to address the underlying prejudice and complexities of this racial slur.

Applying the analysis of the comparator, Slade J upheld the appeal and directed a remission on the basis that:

> "the EJ erred in holding in paragraph 22 that because the Claimant "alluded to" a black comparator there was no white comparator. The basis of the Claimant's claim may have been difficult to understand. However in my judgment the EJ erred in failing to identify the real complaint. It was that the Claimant was treated differently and less favourably as a black person with white behaviour. It is strongly arguable that consideration should have been given by the EJ to how a hypothetical white comparator who behaved as a white person is expected to behave as did the Claimant and who similarly was not achieving their targets would have been treated"

Striking Out

In line with a long number of appellate cases, the EAT found the Tribunal to be in error in too readily striking out a discrimination claim at a preliminary hearing. Slade J repeated the well established position that:

> "the importance of not striking out discrimination cases in particular in any but the clearest of cases was emphasised in Anyanwu v South Bank Students' Union [2001] IRLR 305...the Court of Appeal in Ezsias v Glamorgan NHS Trust [2007] IRLR 603 held that it will only be in exceptional circumstances that it would be appropriate to strike out a claim where the central facts were in dispute and the evidence relating to them had not been heard. However within these parameters there is no special rule preventing the striking out of a race discrimination claim in an appropriate case."

Although Slade J held that, "in Ms Walters' claim the relevant facts were not in dispute", the Tribunal had nevertheless fallen into error. The Tribunal held that, "I also do not think that the Claimant would be successful in surmounting the burden of proof in relation to a race discrimination/harassment complaint". Slade J held that this was wrong in part at least because the Tribunal's assessment, or at least the language used, suggested that the Tribunal had not applied the statutory test for taking the draconian step of striking out. Reflecting on the language used by the Tribunal, Slade J explained the error because:

> "Not thinking" that the Claimant would not be successful in discharging the burden of proof of her race discrimination claim is not the same as applying the necessary and high threshold required by ET Rule 34(1)(a) of concluding that a claim has no reasonable prospect of success."

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