Direct discrimination and costs awards: Tabidi v BBC [2020] EWCA Civ 733

By Craig Ludlow
3PB

Background

1. Between October 2014 and February 2017 the Claimant ('C'), Mr Khalid Tabidi, worked for the Respondent BBC's ('R's') Arabic Service on a freelance basis as a broadcast journalist / producer.

2. In December 2016 he applied for employment in 1 of 2 roles as a Broadcast Journalist ("BJ") in the Arabic Service as part of a new project called "World 2020". He was 1 of 8 shortlisted candidates and underwent a structured interview, in which each candidate was asked the same questions, the panel members noted their answers, and made comments and assigned scores, on an "interview grid".

3. On 7 February 2017 C was told that he had been unsuccessful. The successful candidates were both women. He resigned and commenced proceedings against R in the Employment Tribunal ('ET'). His original ET1 complained of unfair (constructive) dismissal and breach of contract.

4. On 18 July 2017 C gave details to the ET of his sex discrimination claim. In summary, what he said was that an important element in the new BJ role was what he referred to as the "Women agenda", and that the interview panel assumed that he had no knowledge of women's affairs or issues because he is male and they had determined to choose women for the role for that reason. The job description for the new role did not in fact say anything about a "women agenda", nor, C said, was anything said about it at interview. However, he relied on an email from a female member of the interview panel to an HR executive giving her information in connection with a request by C for feedback on why he had not been appointed, which read:

   "*Just a quick note to explain that BJ 20/20 is a special project to cater for Gulf and North Africa rather than the usual day to day radio.*

This project is aimed to younger audience with emphasis on Women agenda.

Digital formatting and social media integration were essential parameters that we have been assessing candidates according to.

And of course being a casual BJ in Radio not a grantee [sic] to be selected even if this is for 2 years."

5. As regards the allegation that the panel assumed that as a man he would have no knowledge of women's affairs or issues, C relied essentially on the fact that he was better qualified for the role than the successful female candidates, specifically because "both had been working at other departments than radio at the time of their selection" whereas he had 2 years' experience as a broadcast journalist in the Arabic Service.

6. At a case management hearing on 23 August 2017 Employment Judge ('EJ') Lewis gave C permission to amend in order to make a claim for sex discrimination – the essence of C's case being that, as above, the 2 successful candidates for the World 2020 BJ role were preferred because they were women.

7. At a subsequent hearing on 9 / 10 November 2017 it was held that C was not an employee, and his unfair dismissal claim was accordingly dismissed. The ET provided written reasons to this effect on 12 December 2017.

8. On 28 November 2017 R sent an email to C's Counsel which was headed "without prejudice save as to costs", essentially stating that if he withdrew his claim by the end of 1 December 2017 it would not pursue him for its costs incurred up to that date, but that if he did not withdraw his claim and it was unsuccessful (it being R's case that C's sex discrimination claim had no reasonable prospect of success) it would pursue him for all of its costs including those incurred up to and after 1 December 2017.

9. Between 6 - 14 December 2017 R provided disclosure of various documents.

10. Witness statements were exchanged on 15 December 2017.

11. On 21 December 2017 R provided C with redacted interview grids for the other 7 applicants for the role for which he had applied (amounting to 72 pages). These redacted grids were provided despite previous opposition from R to doing so.

12. The sex discrimination claim was heard over 3 days between 3 - 5 January 2018. Both parties were represented by Counsel. The claim was dismissed and R made an

application for costs. The ET ordered C to pay R's costs in the sum of £4,550 (representing R's Counsel's fees for the hearing).

The relevant law

13. What constitutes direct discrimination is provided for in section 13(1) of the Equality Act 2010 ('EqA'):

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

Section 23 EqA provides:

"*On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*"

14. The definition in section 13(1) on its face incorporates 2 elements – (a) whether A has treated B "less favourably than" he or she treats or would treat others, and (b) whether he or she has done so "because of the protected characteristic". Those 2 elements are generally referred to as the "less favourable treatment question" and the "reason why question". The former element is inherently comparative in character, requiring a comparison between the treatment of the claimant and the treatment of "others", who may be actual ("treats") or hypothetical ("would treat"). Two points about that definition which are particularly relevant for this case emerge from the leading case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337:**

(1) At paragraphs 7 – 12 of his speech Lord Nicholls makes the valuable point – regularly repeated since, but still sometimes insufficiently heeded – that in fact the 2 questions are intertwined and that it will often be simpler for a tribunal to approach the reason why question first: if it is able to decide the protected characteristic was not the reason (even in part) for the treatment complained of it will necessarily follow that a person whose circumstances are not materially different would have been treated the same, and there will be no need to embark on the task, which is not always easy, of constructing a hypothetical comparator.

(2) Lord Scott and Lord Rodger in their speeches both make the point that even where there is no actual comparator, because there is no-one who was more favourably treated whose material circumstances are the same, the treatment of other people

whose circumstances were sufficiently similar might still be relevant in establishing how a hypothetical comparator would have been treated.

15. Section 136 EqA regulates the burden of proof in discrimination cases. It requires a 2 stage process, authoritatively elucidated in the judgment of Mummery LJ in **Madarassy v Nomura International Plc [2007] EWCA Civ 33, [2007] ICR 867**: a claimant must first prove facts from which the tribunal "could" conclude that unlawful discrimination had occurred ("a *prima facie* case") and if he does so the burden shifts to the respondent to satisfy the tribunal that it did not[1].

16. Rule 76 of the ETs (Constitution & Rules of Procedure) Regulations 2013, schedule 1 materially provides:

> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that-*
>
> *(a) ….*
>
> *(b) Any claim or response had no reasonable prospect of success; [or*
>
> *(c) …..*

17. Rule 76(1) thus imposes a 2 stage test requiring ETs to consider first whether the ground for making a costs order is made out, and, if so, secondly to exercise a discretion as to whether or not to actually award costs: **Monaghan v Close Thornton Solicitors EAT 0003/01**; **Beat v Devon CC and anor EAT 0534/05**; **Lewald-Jezierska v Solicitors in Law Ltd and ors EAT 0165/06**; **Anderson v Cheltenham and Gloucester plc EAT 0221/13**; and **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255**[2].

The ET proceedings

18. The ET's essential finding was that C performed poorly at interview. Specifically, it found that he had failed to do any research into the new role and had assumed that all that would be necessary was to rely on the quality of his previous work as a freelancer. The ET found that his answers were unsatisfactory in other respects too.

[1] Paragraphs 10 – 12 of the judgment.
[2] Per Mummery LJ at paragraph 50.

19. It set out that C said that it could conclude that there was sex discrimination from the following facts:

(1) he scored 13 and the two successful women candidates scored 18.5 and 17.5, i.e. more than him;

(2) he is a man and they are women;

(3) 6 months before the interview the HR Business Partner for the Arabic Service had reminded managers in the service that women were under-represented and that needed to be addressed;

(4) the selection criteria for the role had changed and that R had added a criterion about targeting a female audience but it had not formulated a question in the interview to assess this. It had done so by having regard to the gender of the candidates, i.e. it had made an assumption that women would be better able to target female audiences.

20. The ET's primary finding was that C had not established a *prima facie* case, with the result that the claim failed at the 1st stage. However, it proceeded to hold by way of alternative that in any event R had proved that there was no discrimination and gender played no part whatsoever in the panel's scoring at interview.

21. The ET explained its approach in relation to costs as follows:

"*We considered the Respondent's application for costs and we are satisfied that the threshold is established and crossed in this case, in that the claim had no reasonable prospect of success. That is evident from our conclusion that the Claimant failed to establish a prima facie case and the factors upon which he relied were incapable of establishing sex discrimination. Having decided that we nevertheless still have a discretion as to whether we make an award for costs, and if so, how much? In deciding how to exercise that discretion, we took into account the fact that a costs warning letter was sent to the Claimant highlighting the weaknesses and the difficulties in his case. We accept that at the time that letter was sent witness statements had not been exchanged and some of the evidence which was relied upon in this Tribunal had not been disclosed to the Claimant. However, the witness statements were exchanged and all the evidence was disclosed before this hearing started. At that stage it ought to have been abundantly clear to anybody that the claim had no reasonable prospect of success. Although the deadline to for withdrawing had expired, it was still open to*

the Claimant and/or his representatives to engage with the Respondent and to enquire from them as to whether they would still be willing not to pursue costs if the Claimant withdrew his case. In our experience it is very likely that if such an approach had been made at that stage the Respondent would have extended the deadline and agreed not to pursue costs. Had they failed to do so then the Claimant obviously would have been in a much stronger position today in front of us defending the application for costs but that was not what happened. We, therefore, think that it is appropriate to make an order for costs.

…We think that it is right to [award] the costs of the hearing because they could have been avoided had the Claimant engaged with the Respondent after the disclosure of the witness statements and the evidence….".

The appeal to the Employment Appeal Tribunal ('EAT')

22. The only ground which was allowed to proceed in relation to liability was as follows:

"*The ET erred in law in failing to consider whether [the Appellant] had been treated les favourably than his comparators; either the actual comparators in terms of the other candidates or a hypothetical comparator constructed using the cases of the other comparators*".

23. In HHJ Eady's explanation for her decision for allowing this ground to proceed which accompanied the reasons, she said:

"*Although the answer to this objection might simply lie in the ET's acceptance of the Respondent's evidence as to the selection process (and, in particular, the reason for the Appellant's non-selection), I was persuaded that a reasonably arguable question had been raised by the ET's apparent focus on the Appellant's case, without scrutiny of the cases of the (actual / hypothetical) comparators. That seemed to give rise to two potential points, (1) whether the ET properly had regard to the specific cases of the higher scoring female candidates – it being the Appellant's case that they did not have the relevant experience to meet the requirements of the job specification and that there were aspects of their performance at interview that were no different from that of the Appellant, which had been criticised in his case but not theirs (e.g. the news story used by the Appellant, referenced by the ET at para. 18); alternatively, (2) whether the ET considered how a hypothetical comparator in the Appellant's position would have been treated, constructing that candidate from the other (female) candidates, whether or not they were ultimately successful. The Appellant's point is that if the ET only*

focused on his case, and his failings and weaknesses, it would not have taken into account any comparable failings and weaknesses of the higher scoring female candidates, which – if ignored by the selection panel – might well provide grounds for an inference of unlawful discrimination."

24. Since the Court of Appeal was concerned on the appeal with the reasoning of the ET, it was not believed to be useful to set out the reasoning of Soole J in the EAT on the liability issue.

The Court of Appeal ('CoA') Judgment

25. The only ground as regards liability on which Bean LJ granted permission corresponded to the ground which HHJ Eady had allowed to proceed in the EAT.

26. In giving the leading judgment on the liability issue, Underhill LJ stated that in so far as C was contending that the ET had failed to compare the treatment of C and the successful candidates at all, that was plainly wrong.

27. Its conclusion that the reason why they were appointed, and he was not, was that they were genuinely regarded as having performed better than him in interview was, obviously, an exercise in comparative analysis. The ET fully appreciated that in principle it was concerned not only with the panel's assessment of C but also with its assessment of comparators – finding that the reasons why the panel gave the scores that it did to all candidates had nothing to do with gender[3].

28. In giving the leading judgment on the costs issue, Morgan J's view was that the ET's order for costs should be set aside and that there should be no order as to costs in the ET. He considered that the ET's finding that if C had offered to withdraw the claim then it was very likely that R would not have pursued its costs was not a finding it was entitled to make. There was no evidence to support the finding which could therefore only be based on inference. He did not think that such an inference could be drawn[4]. It followed that when exercising its discretion as to costs the ET took into account an impermissible consideration[5].

[3] Paragraph 32 of the Judgment.
[4] Paragraph 94 of the Judgment.
[5] Paragraph 96 of the Judgment.

29. The considerations which Morgan J said weighed with him were:

i) When C was given permission to amend his claim to add the sex discrimination claim, the ET held that R had a case to answer and the claim appeared to be arguable;

ii) There was no case for ordering C to pay costs before the point when witness statements were exchanged;

iii) There was no case for ordering C to pay costs before he received the interview grids for the other candidates on 21 December 2017;

iv) The costs warning email did not lead him to make a different finding; that email was sent before much of the disclosure and before the witness statements; the email did not contain any analysis of the merits of the claim and did not do much more than assert that the claim would fail;

v) C was not unreasonable in not accepting the offer in the email; the period of time for acceptance was very short and the offer included a term that he give up his appeal against the decision that he was not an employee; when the email was sent, R had not given its full disclosure nor had it provided its witness statements;

vi) Between 21 December 2017 and the start of the hearing on 3 January 2018, time was very short particularly bearing in mind the Christmas and New Year holidays;

vii) C was entitled to take advice from Mr Sheppard as to the effect of the documents disclosed on 6, 8 and 14 December 2017, the effect of the R's witness statements and the significance of the interview grids for the other candidates;

viii) It would take many hours of work after 21 December 2017 before C could be given reliable legal advice as to the strength of his claim in the light of the new material; this would have to be in a period when there was not much time available;

ix) In the light of the above, he would not criticise C for not withdrawing the claim before the hearing; there was simply not enough time before the hearing to

reach the conclusion that he should now give up a case which had been described earlier as an arguable claim;

x) The earliest point at which it could be said that C ought to have considered making an offer to R to withdraw the claim was on the 1st day of the hearing;

xi) If C had offered to withdraw on the 1st day of the hearing, it is not possible to know what the response of R would have been; Morgan J would not hold that C had any right to expect that R would agree to no order for costs in that event; if anything, the terms of the warning letter and the fact that R had incurred costs after 1 December 2017 might lead one to think that they would ask for their costs after 1 December 2017 or at least ask for their costs of coming to the hearing;

xii) Even if C ought to have considered, at the beginning of the hearing, that his previously arguable case was now likely to fail, Morgan J would not criticise him for continuing to present it at the hearing which had been arranged and for which both sides were prepared and ready to go;

xiii) Morgan J would not distinguish between the fee charged by R's counsel for the 1st day of the hearing and the 2 refreshers;

xiv) There were no other features such as unreasonable behaviour which were relied upon in support of R's application for costs.

30. Accordingly, the order for costs in R's favour made by the ET was set aside and replaced with no order as to costs.

Commentary

31. Indicative of the CoA's judgment adding nothing substantively new to the law relating to direct discrimination, both Underhill LJ and McCombe LJ lamented that if the "second appeals" criteria applied to this jurisdiction permission to appeal would have been refused[6].

32. However, does this judgment make it even more difficult than before for respondents to obtain costs orders in respect of unmeritorious claims? In my view it does not. For reasons set out in more detail below, this case should be quite easily distinguishable

[6] Paragraphs 41 and 45 of the Judgment respectively.

on its own specific facts. It follows that if claimant representatives start citing this case in ETs as good authority for ETs not making costs orders even where claims are found to have no reasonable prospects of success, that submission should be quite easily rebutted by respondents.

33. Nonetheless, even in a jurisdiction in which awards of costs to a successful party is known to be very rare, in the circumstances of this case and where both Underhill LJ and Morgan J specifically state that the ET's decision that it had jurisdiction to make an award of costs could not be impugned (following its conclusion that the claim had no reasonable prospects of success)[7], R might be forgiven for feeling somewhat aggrieved at the CoA's judgment. One might also be forgiven for thinking that the CoA missed the point that the reason generally respondents make costs warning letters / emails / offers pre-disclosure is to avoid the need for the substantial costs that usually go hand in hand with disclosure and the preparation of witness statements.

34. Morgan J's starting point for the decision for allowing C's appeal against costs was that as the ET had given C permission to amend in order to make the sex discrimination claim, the ET had held that there were "*sufficient facts to raise questions for the respondents to answer*" and that C had "*what appears to be an arguable claim*". However, he accepted (as above) that its finding at the conclusion of the proceedings that the claim had no reasonable prospect of success could not be challenged. Therefore it sensibly follows that just because EJ Lewis had allowed the amendment to include the discrimination claim at the case management stage, that did not mean that allowing such an amendment (and thereby accepting in principle that the claim was arguable) will preclude an award of costs at a later stage if it turns out that such a claim does not have reasonable prospects of succeeding.

35. In an effort to extract some sort of principled guidance from the CoA judgment when ET practitioners inevitably look down the list of matters which Morgan J said 'weighed' with him in making the decision on costs, it might be that if there had not been such short periods of time between disclosure and / or exchange of witness statements and trial, there had been more of a detailed analysis as to why C's claim was bound to fail in the costs warning email (perhaps with reference to as yet undisclosed material / evidence – if it had been available when the email was sent), and a further costs

[7] Paragraphs 42 and 86 respectively.

warning had been sent immediately after disclosure and / or exchange of witness statements, then the costs order may not have been set aside.

36. However, even taking into account all of these factors above, ultimately the CoA discounted as impermissible owing to a lack of evidence on the point the fact that the ET had taken into account what most ET practitioners might think was sensible Judicial Notice - that if C had approached R with an offer to withdraw his claim it would not pursue him for costs. Consequently, it may now be sensible prior to making a costs application in a similar factual situation, to have a pre-prepared witness statement from an instructed solicitor on the issue of costs and / or such solicitor being present at the ET when the application is made.

37. Nonetheless one is perhaps left wondering whether it is in fact the application of the "second appeals" criteria to this jurisdiction that needs addressing (as per Underhill LJ and McCombe LJ), or rather whether it is instead (or in addition) the costs regime in the ET system which should be reformed or at least the existing one which should be applied more robustly in an effort to deter unmeritorious claims proceeding and thereby taking up valuable ET time.

5th July 2020

Craig Ludlow

Barrister
3PB

01865 793 736
Craig.ludlow@3pb.co.uk

3pb.co.uk