Appeal No. UKEATS/0031/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16th December 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MRS L CHALMERS — APPELLANT

AIRPOINT LTD & OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mrs L Chalmers (The Appellant in Person)
For the Respondent	Ms H MacLean (Solicitor) Law at Work Kintyre House 205 West George Street Glasgow G2 2LW

SUMMARY

TOPIC NUMBER(S):

SEX DISCRIMINATION – 4; VICTIMISATION – 32

The Claimant submitted that the Tribunal had erred in finding that there was no "protected act" for the purposes of ss26 and 27 of the **Equality Act 2010**. It concluded that the Claimant could not have been harassed or victimised on the ground of sex since the protected acts relied on Respondents were not based on her protected characteristic, sex. The Claimant further submitted that she was entitled to allege victimisation under s. 27 of the **Equality Act 2010** on the basis that she had disclosed an intention to raise tribunal proceedings based on her protected characteristic. Held that the Tribunal was on the facts entitled to conclude that the offending email did not allege sex discrimination and that the EAT could not disturb its finding. Held further that the Claimant was not entitled to seek to prove an intention to raise proceedings as they had not given notice of this ground of discrimination under s. 27(1) of the **Equality Act 2010** and that the evidence said to establish the protected act was not apt to support the Claimant's appeal.

THE HONOURABLE LORD SUMMERS

1. In this case the Claimant alleged that she had suffered unlawful discrimination on the ground of sex. She relied on sections 13 (direct sex discrimination), 19 (indirect discrimination), 26 (harassment) and 27 (victimisation) of the **Equality Act 2010**. The Claimant also sought to establish that she had been constructively dismissed under s 95(1)(c) of the **Employment Rights Act 1996**. In addition, she sought certain pecuniary remedies. The Employment Tribunal in Glasgow refused these claims.

2. The Claimant appealed and after sundry procedure she was given leave to appeal grounds 8 and 9 of her Notice of Appeal. The appeal comes before me on those two grounds.

Background

3. The background to the case was as follows. The Claimant was a business support manager and carried out some HR functions for the Respondents. They employed 15 people in Leicester and Glasgow. She worked in the Glasgow office. Most of the staff in the Glasgow office were software developers. The Claimant and Ms Raijan, a software developer, were the only women in the Glasgow office. Mr Whyte was the managing director of the Respondents and Mr Hughes her line manager.

4. The Claimant alleged that she had been discriminated against and raised a grievance. She complained that the Respondents had organised a Christmas night. She was not able to attend on the night in question. Nor was her fellow employee Ms Raijan. She alleged that the

failure to accommodate her constituted an unlawful act of discrimination. She also alleged that she had been discriminated against by being excluded from a "hardware refresh" and in other connections. The grievance was not upheld. The Claimant then began proceedings at the Employment Tribunal, as mentioned above.

The Interpretation of the email of 27 January 2017

5. Ground 8 focussed on a finding by the Tribunal at paragraph 152 of the Judgement. It was based on the Claimant's grievance of 27 January 2017 which read (so far as material)

> **I do not find you approachable of late, your manner is aggressive and unhelpful. As such I prefer to have a written record of work instructions.**
>
> **My work is mostly ignored and I have been excluded from both the Christmas night out and from the hardware refresh, neither of which is acceptable to me and both of which may be discriminatory**

6. The grievance was sent to Mr Hughes and copied to Mr Whyte.

7. The Claimant submitted to the Tribunal that her grievance was a protected act under the **Equality Act 2010** since it alleged that she had been discriminated against on the ground of sex, a protected characteristic. The Tribunal found –

> **… the grievance submitted by (the Claimant) to the respondents on 27 January 2017… did say that the exclusion of (the Claimant) from the Christmas night out and from the hardware refresh "may be discriminatory". It referred however to (the Claimant) finding Mr Hughes unapproachable of late and to his manner being aggressive and unhelpful. (The Claimant) was experienced in HR. She is articulate and well educated. There was in the grievance no complaint or allegation that someone had contravened EQA.**

8. Ground 8 of the Notice of Appeal focusses on the terms of the Claimant's grievance on 27 January 2017. The Claimant submits that the Tribunal erred in construing the email as a complaint of "general unhelpfulness and aggression" and had ignored "her explicit statement"

of sex discrimination. The Claimant submitted that the Tribunal's conclusion could not be supported as there was no evidence that supported its conclusion, that it had adopted a substitution mindset and that its conclusion was, given the facts established, perverse.

9. The Claimant submitted that the Tribunal erred in law in concluding that the reference to discrimination in the email was a reference to discrimination in general. She submitted that although her email later referred to "general unhelpfulness and aggression" on the part of the Respondent it was clear that the reference to discrimination was a reference to sex discrimination. The reference to unhelpfulness and aggression should have been interpreted as a separate complaint not as an example of discriminatory behaviour.

10. In order to assess ground 8, it is necessary to consider the factual context. It is not necessary to consider the reference to the "hardware refresh" in the Claimant's email. The Tribunal's conclusions in that connection are not the subject of the appeal before me. The exclusion of the Claimant from the Christmas night out is at the root of the Claimant's appeal.

11. The Tribunal addresses the circumstances of the Christmas night out in December 2016 at paragraph 36 of the Judgement. I summarise the evidence as follows. Mr Whyte indicated during a telephone call on 2 December 2016 that he would be in Glasgow 12-14 December 2016 and expressed a preference for the party to be on 13 December. No one said that they were unable to attend on that date during the call. Mr Hughes circulated an email inviting staff to the party to be held on 13 December. For staff in Leicester it was necessary to travel north to Glasgow. Flights were booked on 2 December. Hotels for Mr Hyte, Mr Middleton and Mr Parmer were booked on 5 December. After these arrangements had been made the Claimant intimated that she would not be able to attend. Ms Raijan said she could attend but only from 7:30 onwards. Both the Claimant and Ms Raijun said they were free on 12 December. At

paragraph 41 the Tribunal notes that while there was some variation among staff, most were content with 13 December and were flexible about 12 December. Mr Whyte examined the position on 6 December. He knew flights and hotels had been arranged and that it would be difficult to alter these arrangements. The Tribunal sets out the factors that influenced Mr Whyte at paragraph 43 of the Judgement. Ms Raijan thereafter discovered that she had another commitment on 13 December and could not attend. Mr Whyte contacted the Claimant explaining the position and expressing his regret that she could not attend. The Tribunal then sets out other factors that persuaded Mr Whyte to stick with 13 December 2016 as the best date for the party/night out at paragraph 47. The Claimant and Mr Whyte met on the morning of 13 December. The Claimant expressed her dissatisfaction with the arrangement for the night out. The Tribunal found that the Claimant did not say at the meeting that the failure to accommodate her and Ms Raijan was discriminatory on the ground of sex.

12. At paragraph 54 the Tribunal found as a fact that the decision to set the date for the Christmas party on 13 December was not an act of discrimination nor was the decision to stick to that date.

13. The Tribunal's conclusion on the question of whether the email of 27 January 2017 was a protected act for the **Equality Act 2010** appears at paragraph 154. If the grievance disclosed a complaint that the Claimant had been discriminated against on the ground of sex then the email was a protected act and it was unlawful harass or victimise her in any way. As I indicate above, the relevant part of the email is in the following terms –

> **… the grievance submitted by (the Claimant) to the respondents on 27 January 2017… did say that the exclusion of (the Claimant) from the Christmas night out and from the hardware refresh "may be discriminatory". It referred however to (the Claimant) finding Mr Hughes unapproachable of late and to his manner being aggressive and unhelpful. (The Claimant) was experienced in HR. She is articulate and well educated. There was in the grievance no complaint or allegation that someone had contravened EQA.**

Discussion and Conclusion

14. Paragraph 152 consists of a series of factual propositions. The Tribunal does not set out the inferences it drew from the matters to which it alludes. I consider that it is reasonably clear what the Tribunal deduced from these propositions. This may explain why Ground 8 is not based on the Tribunal's failure to give reasons for its decision. Ground 8 is based on a lack of evidence, substitution and perversity. The Tribunal notes that the Claimant said she "may" have been discriminated on the ground of sex. The email does not positively assert that she had been discriminated against on the ground of sex. Before me the Claimant explained that her choice of words was deliberate. She submitted that it was not for her to say whether her exclusion was unlawful discrimination. That was a matter for a tribunal. She submitted that while she believed she had been discriminated against she had chosen not to affirm this positively. She was not the ultimate arbiter of that matter. While that is one possible explanation of the wording in the email it is not the only one and perhaps not the obvious one. It would have been surprising if the email was written at this early stage with an eye on legal proceedings. The email complains in clear terms about other matters. It might be thought surprising that she should refrain from expressing her opinion in this connection when she was forthright in other connections.

15. I accept that the Tribunal was not obliged to interpret her words literally and that it could have held that the phrase "may be discriminatory" was an affirmation that the Claimant had been discriminated on the ground of sex. I accept that some people do express themselves cautiously and that a tribunal might have inferred that the words were a disclosure of the Claimant's belief that she had been discriminated against and that this was therefore a protected

act. A great deal would depend on the context and the Tribunal's assessment of the evidence, including its assessment of whether the Claimant struck it as a person who was likely to have expressed herself cautiously.

16. I am not the finder of fact. My role is to decide whether there was evidence capable of supporting the Tribunal's conclusion. The email is a source of evidence. The Tribunal was entitled to interpret the email according to its natural meaning. In my opinion the wording chosen by the Claimant permitted the Tribunal to conclude that the email did not allege that she had been discriminated against on the ground of sex. The word "may" might usually be thought to signify doubt or uncertainty.

17. The absence of a reference to "sex" discrimination is also a factor that supports the Tribunal's conclusion. In assessing the evidence represented by the email the Tribunal was entitled to take into account the Claimant's experience in HR. The Tribunal does not spell out what significance it attached to her work experience. It is clear however that the Tribunal considered it relevant. I feel able to conclude that the Tribunal thought that the Claimant's background in HR qualified her to take an informed view as to whether her non-invitation to the Christmas night out was an act of discrimination on the ground of sex. That being so her failure to assert sex discrimination in the email undermined her submission that the email was an explicit allegation of sex discrimination.

18. The Tribunal also relied on the fact that the Claimant was articulate and well educated. In my judgement this reveals that it considered the possibility that the absence of the word "sex" and the use of the word "may" were due to a lack of facility with words or a limited appreciation of the concept of sex discrimination. The Tribunal evidently took the view that if she had wished to assert sex discrimination in the grievance she would have done so.

19. The Tribunal referred to the Claimant's complaint about Mr Hughes's behaviour towards her. This raised the possibility that the discriminatory behaviour may have been based on grounds other than the Claimant's protected characteristic. I accept however that the Tribunal's reasoning in this connection is not set out. Given however that the Claimant does not rest Ground 8 on inadequate or insufficient reasoning I need take that matter no farther.

20. The Tribunal had regard to **Durrani v London Borough of Ealing** EAT0454/12 and **Fullah v Medical Research Council & Anr** EAT0586/12. It was conscious of the possibility that a bare allegation of discrimination may, if the context permits, be interpreted as a protected act. There is no indication that the Tribunal erred in law by neglecting that guidance. I accept the guidance of Sir John Donaldson in **Martin v Glynwed Distribution Ltd** 1983 ICR 511 when he stated -

> **Where a right of appeal is confined to questions of law, the appellate tribunal must loyally accept the findings of fact with which it is presented … it must resist the strong temptation to treat what are in truth findings of fact as holdings of law or mixed fact and law. The correct approach involves recognition that Parliament has constituted the (employment tribunal) as the only tribunal of fact and that conclusions of fact must be accepted unless it is apparent that, on the evidence, no reasonable tribunal could have reached them.**

21. In view of the guidance in **Martin** I do not consider that it is open to me to disturb a finding that was plainly open to the Tribunal. I must loyally accept its conclusion. It is not possible to accept the Tribunal's conclusion is perverse.

22. The other ground relied on in the Notice of Appeal is that the Tribunal substituted its view for the Claimant's view. As I understand it this is a complaint that the Tribunal substituted the view that her email complained of "a general unhelpfulness and aggression" for the claimant's complaint of discrimination. "Substitution" in employment law is usually shorthand for the "substitution mind-set". But that occurs when the tribunal substitutes its view of the facts for the view of the employer in unfair dismissal cases. Here the issue is whether the

Claimant communicated her belief that she had been discriminated against on the ground of sex and that as a consequence suffered detriment under the **Equality Act 2010**. The employer conducted a grievance hearing and rejected her claim. The Tribunal likewise rejected her claim. The Tribunal did not substitute its view for the employer's view. The real complaint is that the Tribunal has adopted a view of the email which the Claimant submits "substitutes" its interpretation of the email for the true interpretation. In other words, the issue is whether the Tribunal was entitled to interpret the email as it did. This is dealt with above.

23. The Claimant submitted to me that the Respondents had not challenged the Claimant's assertion that the email was a protected act. The Claimant submitted that since the Respondents had not cross examined her or presented contradictory evidence the Respondent was not entitled to say that the grievance email was not a protected act. This approach misunderstands the way in which matters are conducted before a tribunal. Even if her interpretation was not formally challenged, it was plain from the Respondent's case and its submissions that her interpretation was not admitted. There was no need for contradictory evidence. The evidence that informed the Tribunal's findings is the email that the Claimant sent interpreted in the context of the case. There was no need to cross examine on this point if the Respondent considered that it was in a position to make appropriate submissions based on the text of the email read in the context of the evidence. The Claimant's submission in this connection is misconceived. In any event this ground is not foreshadowed in the Notice of Appeal and is not open to the Claimant.

The Prospect of Future Proceedings

24. The Claimant was also granted leave to argue Ground 9 in her Notice of Appeal. This ground arises from her claim under section 27 of the **Equality Act 2010**. Section 27 provides so far as relevant as follows

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

25. The Claimant submitted that she had been victimised because the Respondents believed that she might do a protected act. The protected act in contemplation was the commencement of tribunal proceedings under the **Equality Act 2010**; see 27(1)(b). The Tribunal does not address the possibility that the Claimant was victimised because the Respondents apprehended that she

might bring tribunal proceedings. In support of the proposition that its failure to do so represented an error in law I was referred to passages in the Judgement which it was said supported the proposition that the Claimant was as a matter of fact contemplating legal proceedings. I was referred to paragraph 312 of the Judgement. This paragraph appears in a part of the Judgement (commencing at paragraph 265) where the Tribunal sets out the Respondents' submissions. In particular it appears in the part setting out the Respondents' position on victimisation (see paragraph 307). In this section the Respondents deal with the question of whether the three protected acts relied on by the Claimant (paragraph 307 line 17) were causally connected to the detriments relied on by the Claimant. At paragraph 311 the Tribunal records the Respondents' response to the Claimant's submission that inept investigation by Ms Marshall was a detriment following from a protected act. Part of the detriment relied on by the Claimant entailed a discussion of settlement. At paragraph 312 line 10 the Respondents submits that an offer to discuss settlement was not a detriment. The Respondents submitted that there was no causal connection between the Claimant's grievance, which the Claimant submitted was a protected act, and the Claimant's complaints about her settlement discussion with Ms Marshall.

26. The Judgement records that in these discussions the Claimant is said to have indicated that she could not return to the workplace because "she would risk her complaints becoming time barred". The Respondents submitted to the Tribunal that this was a "clear indication that tribunal action was being contemplated".

27. I accept that these words indicate that proceedings under the 2010 Act were being contemplated and that Ms Marshall is to be treated as the Respondent's representative so that communication to her is communication to the Respondents.

28. I was also referred to an email from Mr Whyte on 24 February 2017 (Core Bundle p. 279). It refers to a request from the Claimant to get access to her pc. Mr Whyte in refusing the request comments that if access was given it would assist her in "building a case" against the Respondents. It would not appear that this email was referred to by the Tribunal in its Judgement and there is therefore no discussion of its meaning. I accept that this might be thought to show that the Respondent considered that the Claimant was thinking about legal proceedings. That said the email and its provenance is not discussed in the Judgement. But I accept that it would be surprising if the Respondents did not appreciate that the Claimant had legal proceedings in contemplation; and the email supports this.

29. I was referred to part of the disciplinary report compiled by Ms Marshall. It runs as follows –

> **KM – (The Claimant) feels that she was treated differently and the result was she was discriminated against because she is a woman. What would you say to that?**
>
> **AW – in relation to what?**
>
> **KM – she has highlighted the Christmas night out in particular. (Core Bundle p 278)**

30. This excerpt of Ms Marshall's interview with Mr Whyte is based on the proposition that the Claimant believed she had been discriminated against on the ground of sex. As I understand it the question posed by Ms Marshall is tendered as proof that a further allegation of discrimination was made by the Claimant to Ms Marshall in the course of Ms Marshall's investigation and this question refers back to that protected act. No record of the allegation was produced to me. However that may be I am willing to accept that the question (above) might reasonably be thought to proceed on the basis of such a complaint. It is also possible however that Ms Marshall's question is based on the Claimant's grievance email of 27 January 2017.

Discussion and Conclusion

31. I do not consider that this ground of appeal can succeed. The Claimant did not seek to persuade the Tribunal that she was victimised because she was proposing to raise proceedings under the 2010 Act. Her claim was based on three protected acts set out at paragraphs 150-153. The Claimant's conversation with Mr Whyte about the Christmas night out on 13 December 2016 and the grievance submitted on 27 January 2017. The third protected act, namely the commencement of tribunal proceedings, was subsequent in time to the allegations of victimisation and could not therefore have caused the detriments complained of. In my opinion the absence of any reference to s. 27(1)(b) in the claim form or in the submissions made to the Tribunal is fatal to this argument. It is fatal because a claimant must disclose the legal grounds upon which he seeks a remedy in his or her tribunal application. Were it otherwise it would be unfair to the respondent. The respondent would have no notice that a point was to be taken and would therefore not be able to muster suitable evidence or suitable submissions. In the ordinary course of things a respondent is entitled to conduct his or her defence on the basis of the case advanced against it. That failure is sufficient to dispose of this submission.

32. If I ignored this principle it would cause actual injustice. The Claimant's submission relies in part on a submission made by the Respondents' solicitor Mr MacKinnon at paragraph 312. He is recorded to have acknowledged that the Claimant referred to time bar in her discussion with Ms Marshall. Mr MacKinnon acknowledged that this suggested the Claimant was thinking of raising proceedings. He would not have appreciated that in referring to this evidence his own words might be used to provide a new basis for the Claimant's claim of victimisation under s. 27(1)(b) on appeal. Had he known this he would no doubt have been more circumspect. I accept that it would not have been in the least bit surprising if the Respondents was thinking of raising proceedings and said so to Ms Marshall. But that is not

A the point. Not only have the Respondents lost the opportunity to consider the possibility of a s 27(1)(b) application and to prepare their case in light of that claim, but they have lost the chance to present evidence that she was not victimised because they discovered she might raise proceedings. The evidence upon which the Claimant relies as furnishing a fresh ground emerges from a discussion of whether she had suffered detriment because of other protected acts, and in particular the grievance.

B

C 33. There is furthermore no reference to s. 27(1)(b) of the **Equality Act 2010** in the Notice of Appeal. Choudhury, J refers to the evidence discussed above in granting permission to appeal. Having considered matters I do not consider that evidence that the Claimant was contemplating legal action has any bearing on Ground 9. Ground 9 was concerned with the proposition that a protected act, namely an allegation of sex discrimination, had been made in the course of the investigation by Ms Marshall. That is quite different from the possibility of a future protected act namely the commencement of Tribunal proceedings based on the 2010 Act. The latter proceeds under s. 27(1)(b) whereas the former proceeds under s. 27(2)(d). I do not consider that evidence that the Claimant was contemplating legal action fortifies Ground 9. It is irrelevant to it.

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F 34. Ground 9 in the Notice of Appeal proceeds on the basis that the question put by Ms Marshall to Mr Whyte (above) revealed that she knew that the Claimant was alleging sex discrimination as a result of her alleged exclusion from the Christmas night out. The Claimant submits that even if the Tribunal had correctly concluded that the grievance email of 27 January 2017 did not allege sex discrimination, the exchange between Ms Marshall and Mr Whyte during the investigation of the grievance did. The Claimant submits that the Tribunal failed to deal with this point and that it reasons were as a consequence not Meek complaint. The Claimant also alleged that the Tribunal's decision was perverse.

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35. This submission is misconceived. The Tribunal does not discuss the exchange between Ms Marshall and Ms Whyte for the simple reason that the Claimant did not rely on it before the Tribunal. The Claimant has the same difficulty in this connection as it has in connection with s. 27(1)(b). The wisdom of preventing new grounds of claim emerging on appeal except where they are based on pure issues of law or where they can be resolved by a remit back to the tribunal, is again evident. Because the matter was not explored at Tribunal there is no evidence to illuminate the basis of the discussion between the Claimant and Mr Marshall. It is not possible to know whether the conversation rests on Ms Marshall's understanding of the email of 27 January 2017 or another conversation between the Claimant and Mr Marshall or possibly both. Thus while the Tribunal explains why the email of 27 January 2017 was not a claim of sex discrimination (see above in connection with Ground 8) the Judgement makes no reference to a communication between Ms Marshall and the Claimant in which an allegation of sex discrimination was made. Section 27 requires a protected disclosure to pass between the Claimant and the Respondent. The interchange upon which the Claimant relies was between two representatives of the Respondent. The Tribunal would have had to be satisfied that Ms Marshall's question to Mr Whyte was based on a protected disclosure to her by the Claimant before s. 27 could be engaged.

36. The Claimant's submission requires the Tribunal to be satisfied that a protected act, that is an allegation of sex discrimination under s. 27(2)(d), took place. But no evidence of such an act was led. The only evidence led was of those alleged to have been occurred on 13 December 2016 and 27 January 2017. The Claimant had not at any stage prior to the appeal submitted that Ms Marshall's question to Mr Whyte presupposed a disclosure by the Claimant to Ms Marshall that she had been discriminated against by exclusion from the Christmas night out.

37. The Notice in my opinion is based on the proposition that there was a protected act under s. 27(1)(a) and (2)(d) during the grievance process. I consider that it is not open to the Claimant to argue at this stage that there was a protected act other than those outlined at paragraphs 150-153. In this circumstance a remit back to the Tribunal would serve no purpose. The evidence in the case has been led and there is no scope for leading fresh evidence.

38. In these circumstances the appeal is refused.