Appeal No. UKEAT/0587/06/CEA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 2 March 2007

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MS P GRAVELL — APPELLANT

LONDON BOROUGH OF BEXLEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS P GRAVELL (The Appellant in Person)
For the Respondent	MR N De SILVA (of Counsel) Instructed by: Bexley Council Civic Offices Broadway Bexleyheath Kent DA6 7LB

SUMMARY

Race Discrimination

Racial harassment (s3A). Effect of House of Lords Judgment in **Pearce v The Governing Body of Mayfield School** re. **Burton v de Vere Hotels Ltd** on s3A claim. Employment Tribunal strike-out. Need for fact-finding. Appeal allowed.

HIS HONOUR JUDGE PETER CLARK

1. This case is currently proceeding before the Ashford Employment Tribunal. The parties are Ms Patricia Gravell, Claimant, and the London Borough of Bexley, Respondent. I shall so describe them.

2. The appeal presently before me is brought by the Claimant against part of the Judgment given by a Chairman, Ms V G Wallis, sitting alone at a PHR held on 4 September 2006 whereby she struck out two specific allegations of racial harassment. That Judgment with Reasons was promulgated on 20 September 2006.

Background

3. The Claimant was, until her dismissal on 15 January 2007, employed by the Respondent as a Prevention and Advice Officer within their Housing Department. She is white and of British/English nationality.

4. As appears from the Chairman's Judgment the Claimant presented four form ET1s to the Employment Tribunal. Some parts were permitted to proceed to a full hearing; others were not. This appeal is concerned with what have been described as allegations (iv) and (v) in claim no. 1101963/2005 (the relevant claim). It is a claim of racial harassment contrary to s3A **Race Relations Act 1976** (RRA). Section 3A provides:

> **"3A Harassment**
>
> **A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1(1B) where, on ground of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of—**
>
> **(a) violating that other person's dignity, or**
>
> **(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.**
>
> **(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."**

5. At para 35 of her Reasons the Chairman summarised the relevant claim in this way:

   (i) at the start of her employment with the Respondent in June 2001 the Claimant was told that it was the Respondent's policy to ignore racist comments from customers and that she could not tell customers that any such comments were unacceptable;

   (ii) from that date, the Claimant had to listen to racist comments made by customers without being able to point out that such comments were unacceptable;

   (iii) in September/October 2001 the Respondent's Chief Executive Officer explained at an Induction course that it was the Respondent's policy not to challenge racist comments or behaviour;

   (iv) in September 2001 [sic] [2005] the Claimant was at court with a customer who used the word "paki" twice which offended and upset the Claimant;

   (v) on 6 October 2005 the Claimant received a text from a work colleague to her private mobile telephone conveying a racist joke, with further racist jokes sent to her by the same method on 31 October 2005 and that when the Claimant complained about these text messages the Respondent took no action.

6. Her reasoning in striking out allegations (iv) and (v) appears at paras 38-40 of the Reasons, which I should set out.

> **"38. The Chairman concluded that claims (i) and (iii) cannot constitute harassment under the Act. With regard to the complaint about racist remarks by third parties, the Chairman accepts the submissions by Mr Sheridan on behalf of the Respondent in respect of the House of Lords decision in the cases of *McDonald v Ministry of Defence* and *Pearce v The Governing Body of Mayfield School* [2003] ICR 937. In that case, the previous decision in *Burton v De Vere Hotels Ltd* [1997] ICR 1 was disapproved. Consequently, it is highly unlikely that a**

Claimant could successfully bring a complaint against their employer in respect of comments made by third parties.

39. In respect of the Claimant's complaints about the text messages from her work colleague, the Chairman concluded it unlikely that the Tribunal would decide that this amounted to harassment of the Claimant on the ground of race or ethnic or national origin. The "jokes" may well have been distasteful and even offensive as far as the Claimant was concerned. However, they do not amount to harassment within the meaning set out in the Act.

40. Accordingly, the Chairman has concluded that all of the claims under the *Race Relations Act* in Case Number 1101963/2005 have no reasonable prospect of success and they are therefore struck out."

Striking out

7. The Chairman noted (para 6) the guidance given by Elias P in relation to striking out claims under Employment Tribunal Rule 18(7)(b) (no reasonable prospect of success) in **Ezsias v North Glamorgan NHS Trust** (UKEAT/0705/05 and 0612/05. 25 July 2006). **Ezsias** was *inter alia* a claim of automatically unfair dismissal by reason of the Claimant having made protected disclosures (**Employment Rights Act 1996** s103A). At para 66 of the Judgment Elias P said this:

> **"66. I also bear in mind some observations of Lord Steyn in** *Anyanwu v South Bank Students Union and another* **[2001] IRLR 305 at para 24 when he said this:**
>
> > **'Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.'**
>
> **Admittedly that was in a different context where the claim had been alleged to be *res judicata.* Mr Pitt-Payne** [for the employer] **further submits that the public interest in discrimination cases is stronger than in whistleblowing cases. Even if that is so, it nonetheless seems to me that there should be a fair and proper examination on the merits, and that means where they are properly tested."**

8. I would add to that observation the words of Lord Hope in **Anyanwu**, para 37. He said:

> **"37. …I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. This was the point which Pill LJ was making in his dissenting judgment in the Court of Appeal [2000] IRLR 36 when he said, at p.41, that the acts**

complained of and the alleged conduct of the university and the students' union which preceded them are so entangled upon the facts alleged that it would not be appropriate to separate them at this stage."

Racist comments by a third party

9. The Chairman struck out this claim (allegation (iv)) essentially on the basis that the House of Lords in **Pearce v The Governing Body of Mayfield School** [2003] ICR 937 had disapproved the EAT decision in **Burton v de Vere Hotels Ltd** [1997] ICR 1 (Smith J), a case on which Ms Gravell relies in support of her claim of racial harassment.

10. That proposition requires further analysis. **Burton** was decided before the statutory tort of harassment was inserted into RRA by s3A on 19 July 2003. The black waitresses who were the butt of racist jokes told by Mr Bernard Manning at a private dinner held at their employers' hotel brought claims against the employer of direct race discrimination contrary to s1(1)(a) RRA, coupled with the detriment which they suffered under s4(2)(c). The EAT, Mrs Justice Smith presiding, held that racial harassment of a black person was in itself less favourable treatment on racial grounds. The Claimants were subjected to a detriment. Unlawful direct discrimination was made out.

11. In **Pearce** the Claimant was a lesbian teacher who was subjected to a sustained campaign of taunts, abuse and harassment by pupils at the school at which she taught by reference to her sexual orientation. The principal finding in her case by the House of Lords was that sex discrimination in the context of s1 of the **Sex Discrimination Act 1975** (SDA), on which she relied, meant gender and did not include sexual orientation. I pause to observe that discrimination on grounds of sexual orientation is now rendered unlawful by the Employment Equality (Sexual Orientation) Regulations 2003.

12. However, their Lordships also went on to consider a second point, namely whether, even if the pupils' harassment constituted discrimination on grounds of sex, that treatment would not per se have constituted discrimination so as to render the school liable under s1(1)(a) and 6(2)(b) SDA. In the relevant opinions, their Lordships concentrated on the need for the Claimants to show less favourable treatment on the grounds of sex; see for example Lord Nicholls paras 31-37; Lord Hope, paras 101-103. **Burton** was disapproved. Although strictly *obiter*, I do not accept Ms Gravell's contention that the fully expressed opinions of their Lordships on this aspect can be disregarded on that basis alone.

13. Two points arise. The first is a question of law. What is the effect of the introduction of the statutory tort of harassment on the reasoning of the House of Lords in relation to **Burton**? As Ms Gravell points out, in **Wandsworth NHS Primary Care Trust v Obonyo (No 1)** (UKEAT/0237/05/SM. 8 February 2006) sitting with members, I considered a submission by leading Counsel for the Trust (Transcript page 3) that the comparative exercise under s1(1)(a) RRA was also required under s3A. We held that it did not, referring to **Pearce** and Lord Nicholls's anticipation of the new harassment provision (at para 20). Mr De Silva does not challenge that proposition in this appeal.

14. Thus, it seems to me at the strike-out stage that there is considerable scope for argument as to whether the observations of the House of Lords on **Burton** in **Pearce**, based on s1(1)(a) RRA, also hold good in a claim of s3A harassment. No decided case on the point has been shown to me.

15. Secondly, and I return to the observations of Lord Steyn and Lord Hope in **Anyanwu** cited earlier, what of the need for fact-finding before deciding the legal questions in this case? In **Pearce** Lord Hope returned to the need for careful fact-finding at paras 102-103. He said:

> **"102 A finding by the employment tribunal that the steps which could and should have been taken by the school could have prevented or reduced the extent of Ms Pearce's sexual harassment would not have been a mere formality. Burton J in the appeal tribunal, p935, para 20, said that, if the school was to be found liable and other schools were to avoid being held so liable, there must be careful findings of fact, after full investigation, leading to the conclusion that the steps which the school could have taken and failed to take would have prevented or reduced the extent of the discrimination. I agree. And in the Court of Appeal [2002] ICR 198 Judge LJ, at pp 217-218, paras 60-62, with whom Henry LJ agreed at p 224, para 88, drew attention to the very real problems that would arise if one were to apply the test of "control" to educational establishments. As he said, it is difficult to equate the process of education with the sort of "control" that a hotel can exercise over its customers.**
>
> **103 This is not to say that Ms Pearce was not entitled to protection against the abuse which she suffered, which was plainly unacceptable. In this respect she was in the same position as any other member of staff. It was the responsibility of the school to face up to the problem of abuse by pupils irrespective of the form in which it might come and against whom it might be directed. Whether the steps which it could have taken to instil the necessary sense of respect and discipline would have prevented or reduced the extent of the sexual harassment is another matter. I agree with the majority in the Court of Appeal that the employment tribunal failed to address this vital issue, and that their decision on this part of the case cannot be supported. But I also think that the practical difficulties which its approach reveals provides a further reason for departing from the *Burton* control test."**

16. In the present case the Claimant contends that it was the Respondent's long-standing policy, endorsed by the then Chief Executive Officer, not to challenge racist comments or behaviour by customers. As a matter of fact this contention is hotly disputed by the Respondent. I refer to paras 9-12 of the Respondent's grounds for resisting the relevant claim.

17. It seems to me essential that that factual issue is resolved by an Employment Tribunal which has heard all the evidence. If the policy in practice is as asserted by the Claimant, it may be that the tort of harassment, for example creating an offensive environment, is made out.

18. In reaching that conclusion I have considered whether, as Mr De Silva submits, **Pearce** precludes an Employment Tribunal from finding that an employer has liability for harassment by a third party, here the customer of the Respondent, in the absence of control. In my view it does not. The case which the Claimant wishes to advance is that the Respondent's policy of not challenging racist behaviour by clients is capable of itself of

having the effect of creating an offensive environment for her. That, if established on the facts, is capable in my judgment of falling within s3A RRA. In short, the Chairman fell into error in concluding that the opinions of their Lordships in **Pearce**, dealing with a different statutory provision applied in **Burton**, had the effect in law of rendering this part of her claim without reasonable prospect of success.

The text messages

19. I see no insuperable difficulty facing the Claimant in fixing the Respondent with responsibility for an act of harassment by an employee, albeit that such act took place outside the ordinary scope of her employment, see **Jones v Tower Boot Co Ltd** [1997] IRLR 168. Whether or not the employee was acting "in the course of her employment" for the purposes of s32(1) RRA will very much depend on the facts, compare **Chief Constable of the Lincolnshire Police v Stubbs** [1995] IRLR 81 (EAT) and **Sidhu v Aerospace Composite Technology Ltd** [2000] IRLR 602 (CA). Mr De Silva does not argue to the contrary.

20. Further, contrary to Ms Gravell's submission, I do not understand the Chairman to have excluded the Claimant from bringing this claim because she is white and not a member of an ethnic minority. Again Mr De Silva does not argue to the contrary. Had that been the basis for decision it would be wrong in law: see **Showboat Entertainment Centre Ltd v Owens** [1984] 1 WLR 384, approved by the Court of Appeal in **Weathersfield v Sargent** [1999] ICR 425, 429, per Pill LJ.

21. The Chairman took the view that the two text messages were unlikely to amount to harassment of the Claimant. In her Particulars of Claim, the Claimant alleges:

(i) that her line manager was aware of racist texts and emails being sent, but did nothing to stop it, hence condoning the practice; and

(ii) that on 20 October 2005 she complained about racist text messages and again on 3 November.

22. In their Response, paras 13-24, the Respondent deals extensively with the Claimant's admitted complaint of 3 November and the steps which its says it took to deal with the complaint and the policy generally. It is denied in the pleading, contrary to the Claimant's case, that she made any relevant complaint prior to 3 November 2005.

23. Again, the facts need careful finding after hearing evidence. I detect, from the Respondent's pleaded case, that their policies may come under scrutiny. They may be relevant to any potential statutory defence under s32(3) RRA.

24. It is the Claimant's case that she made it clear to her fellow employer, Ms Moore, that she did not wish to receive racist jokes by text or e-mail, but Ms Moore continued to send them. If that is right, why is there no reasonable prospect of the Claimant showing that this amounts to harassment? The Chairman does not explain her reasoning. Arguably, at least, it is:

(a) unwanted conduct;

(b) on the grounds of race (Mr De Silva accepts that the so-called jokes are racist); and

(c) conduct which has the effect of creating an offensive environment for the Claimant which is capable of passing the test under s3A(2).

25. Whether or not it does amount to harassment of the Claimant within the meaning of s3A, still a comparatively new provision, seems to me a matter which must be decided by a Tribunal after hearing all the evidence and making findings of fact. In my judgment, the Chairman was simply wrong in law to strike out this part of the claim at the pre-evidence stage.

Disposal

26. It follows that I shall allow this appeal and reinstate the two in time claims raised in Employment Tribunal Case No. 1101963/2005. The earlier matters raised at paras (i)-(iii) of the Chairman's summary at para 35 of her Reasons are admissible by way of background rather than free-standing complaints.

27. I note from the Chairman's letter dated 24 January 2007 that if this appeal is successful, as it has been, the six-day Tribunal hearing of the Claimant's other complaints, fixed to commence on 7 March, will be postponed. For the avoidance of doubt I shall give that direction pursuant to my powers under s35(1) of the **Employment Tribunals Act 1996**. The hearing fixed for 7 March and following days is postponed. Any further case management decisions will be for the Employment Tribunal. Without in any sense questioning the professionalism of this Chairman, in view of the outcome of this appeal, the matter should in future come before a different Chairman.