VICTIMISATION DISCRIMINATION

St Helens MBC v Derbyshire & Others [2005] EWCA Civ 977, [2005] IRLR 801 (CA)

(Mummery, Jonathan Parker, Lloyd L JJ)

INTRODUCTION

In *St Helens MBC v Derbyshire & Others*[1] the Court of Appeal was asked to consider alleged victimisation discrimination by an employer in the course of litigation brought by 39 employees seeking to enforce their rights under the Equal Pay Act 1970. The case illustrates the difficulties litigation poses to the employment relationship. Once proceedings are commenced, the parties are not only employer and employee but also adversaries in litigation. The proximity of such an ongoing relationship can, and frequently does, create further difficulties. For example, to what extent can the employer take steps to preserve its tactical position in the litigation? If the employer fails to protect its position as employer sufficiently, it risks undermining its litigation position. Conversely if it adopts an aggressive strategy toward the litigation, it leaves itself as employer vulnerable to the possibility of an additional claim for victimisation from the employee-litigant. The present case is a model example of such conflicts in practice.

THE FACTS

In 1998, 510 female schools catering staff employed by St Helens MBC ("the Council") brought equal pay claims against the Council. The majority of the applicants agreed to settle their claims against the Council. However 39 employees, including Mrs Derbyshire, did not accept the settlement and proceeded with their claims. Some two months prior to the hearing, the Council's acting Director of Environmental Protection, Mr Sanderson, drafted and sent two letters.

One letter was sent to all catering staff, including the applicants. It referred to the forthcoming tribunal hearing and the costs of a successful equal pay claim. It stated, *inter alia*, that:

> The above costs will make provision of the service wholly unviable. In such circumstances the council will be forced to consider ceasing the provision of the service other than to those who are entitled to receive it by law i.e. free school meal provision. Only a very small proportion of the existing workforce would be required for this . . . Regrettably, although many of you have chosen to work with the council to address the issues of equality outside of the tribunal by way of single status/job evaluation process, the continuance of the current claims and a ruling against the council will have a severe impact on all staff.

The second letter was individually addressed to each of the remaining 39 applicants. It stated:

> I am greatly concerned about the likely outcome of this matter as stated in the letter to catering staff. . . . The original offer of settlement remains open to you and I would urge you to consider this, together with the information provided in this and my other letter

[1] [2005] EWCA Civ 977, [2005] IRLR 801.

> regarding our commitment to achieving equality by other means, aimed at preserving the service and jobs ... I cannot overstate the impact that the current course of action will have on the service and everyone employed within it.

CASE HISTORY

The applicants brought claims of victimisation under the Sex Discrimination Act 1975 ("the Act") against their employers. They claimed that the letters had caused them considerable distress and would adversely impact upon their working relationships. An initial employment tribunal dismissed the complaints. The Employment Appeals Tribunal ("EAT") then allowed an appeal against that decision and remitted the case to a fresh employment tribunal for rehearing in order to consider the issues of less favourable treatment, detriment and the reason for any less favourable treatment. The second employment tribunal upheld their claims unanimously and the Council appealed to the EAT. The EAT upheld the applicants' complaints of victimisation and the Council was given leave to appeal to the Court of Appeal.

THE LEGAL ISSUES

The main question for the Court of Appeal was whether the sending of the two letters by Mr Sanderson breached section 4 of the Act.[2] Section 4 (1) of the Act is concerned with discrimination by way of victimisation within the arena of sex discrimination. It states that:

> A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has –
> (a) brought proceedings against the discriminator or any other person under this Act or the Equal Pay Act 1970 ...
> or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

Upon reading the above, it is apparent that the section involves asking two distinct, albeit related, questions. First, did the applicants receive less favourable treatment? Secondly, if so, was it by reason of their having brought proceedings under the Equal Pay Act 1970? For the purposes of clarity, this case will be analysed by reference to the above questions. However, it should be remembered that the two issues significantly interact with one another and, often "the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue";[3] a point recognised by Mummery LJ in the present case.[4]

[2] Section 6 (2) (b) of the Act was also relied upon by the applicants, although it received little attention in the Court of Appeal's judgment.

[3] Per Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, at para 8.

[4] [2005] EWCA Civ 977, [2005] IRLR 801, para 24.

LESS FAVOURABLE TREATMENT

In Mummery LJ's opinion, the employment tribunal was entitled to conclude that the sending of the letters by the Council amounted to less favourable treatment of the 39 applicants. In this instance, the appropriate comparators were the Council employees who had either not brought claims or had discontinued them. Due to the imminent tribunal hearing, the applicants were particularly susceptible to pressure from the Council either to settle or to withdraw their claims. This pressure was only increased by the sending of letters to them and to their colleagues which detailed the possible consequences of successful claims. Indeed, "the more usual and acceptable means of communication would have been with the applicants' union or their solicitors".[5] Consequently, the receipt of the letters by the applicants was capable of provoking a reaction of fear, threat and intimidation, which the employment tribunal was entitled to conclude amounted to a detriment to, and less favourable treatment of, the applicants. Jonathan Parker LJ agreed with Mummery LJ, whilst Lloyd LJ did not comment specifically upon this issue.

"BY REASON THAT . . ."

It was upon the issue of causation that their Lordships significantly differed in their judgments.

The Council contended that the reason for sending both letters was not because of the applicants' proceedings under the Act, but rather its concerns over financial difficulties, the possible future of the school meals service and the protection of its litigation position in the proceedings. Mummery LJ disagreed. In his opinion, the Council went further than necessary to protect its litigation position. This was not an honest and reasonable attempt by the Council to compromise the proceedings, rather an attempt to intimidate the applicants. As the applicants were legally represented, the correct course of action would have been for the Council to enter into communication regarding settlement either with the applicants' legal representatives or their union.[6] Consequently, the employment tribunal was entitled to examine not only the contents of the two letters but also all relevant surrounding circumstances. In doing so, it was entitled to conclude that the reason for the sending of the two letters was the fact that the applicants had brought, and were continuing, claims against the Council.

Jonathan Parker LJ referred to the House of Lords' decision in *Khan*,[7] a claim of victimisation under the Race Relations Act 1976, which concerned the refusal to provide a reference whilst a race discrimination claim was pending. Significantly, he relied on Lord Nicholl's comment that:

> . . . Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation . . . An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings.[8]

[5] *Ibid*, para 27.

[6] See, in particula,r Mummery LJ's remarks, *ibid*, at para 38.

[7] *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] 1 WLR 1947.

[8] *Ibid*, para 31.

In both the opinion of Parker and Lloyd LJJ, the employment tribunal had misdirected itself and failed to consider whether the sending of the letters by the Council could be construed as an honest and reasonable attempt to compromise the proceedings. They therefore allowed the Council's appeal and remitted the case to the employment tribunal for its consideration on this specific point.

CONCLUSION

All three of their Lordships agreed that the employment tribunal had been entitled to conclude that the 39 applicants had been treated less favourably by the Council. However, whilst Mummery LJ considered that the tribunal was entitled to conclude that the reason for such less favourable treatment was the commencement and continuance of proceedings under the Act, Lloyd and Jonathan Parker LJJ disagreed. Applying the House of Lords' decision in *Khan* they reasoned that the tribunal had failed to consider whether the Council's actions amounted to an honest and reasonable attempt to compromise the proceedings.

There is nothing unreasonable in attempting to persuade an employee to agree to a compromise. However, in doing so, employers must behave honestly and reasonably if they wish to acquire the protection afforded by *Khan*. In this instance one must take into account the fact that the applicants had retained the services of legal advisers. In such cases one would expect all negotiations regarding a potential compromise of the proceedings to be directed to the applicants' solicitors. The Council's decision to contact the applicants directly may, at best, be viewed as poor judgment and, at worst, as a dishonest and unreasonable attempt to exert pressure upon the applicants which does not merit the exception provided for by *Khan*.

Coupled with this is the point that two letters were sent; one to only the 39 applicants and the second to all catering staff including the applicants. Whilst all judges involved in the decision examined the receipt of the letters by the applicants as one single event, it is submitted that they are best considered individually. When viewed in such a manner, subject to the concerns raised in the preceeding paragraph, it is arguable that the letter to the 39 applicants only could potentially be viewed as an honest and reasonable attempt to compromise the proceedings. Of greater concern, however is the second letter which was sent to all members of the Council's catering staff. There was, in fact, no need for the Council to communicate with these individuals for settlement purposes. When viewed objectively, it is reasonable to conclude that the Council's primary intention in sending these letters was to direct the other catering staff to believe that the applicants' actions were jeopardising not only the security of their jobs but the future of the catering service as a whole. Indeed, it is difficult to comprehend how correspondence from the Council to individuals not party to the ongoing proceedings could be viewed as action necessary for the purposes of preserving their litigation position. Consequently, in the absence of an adequate explanation from the Council, an employment tribunal would be entitled to conclude that they had committed an unlawful act of discrimination against the applicants. Further, as such correspondence was not for the purposes of a potential settlement, the protection afforded by *Khan* is inapplicable.

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