A2/2014/3925

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Neutral Citation Number: [2016] EWCA Civ 34

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 13 January 2016

B e f o r e:

LORD JUSTICE JACKSON

LORD JUSTICE UNDERHILL

LORD JUSTICE LINDBLOM

Between:

SIRUNYAN

Appellant

v

NCO EUROPE LTD

Respondent

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(Official Shorthand Writers to the Court)

The Appellant appeared in person

Mr J Bacon (instructed by Mark Owen Solicitors) appeared on behalf of the **Respondent**

J U D G M E N T

(Approved)

LORD JUSTICE UNDERHILL:

Introduction and the outline facts

1. The Appellant is a national of Armenia. Her husband, Robert Markarian, is a French national who at the time material to the case was exercising his treaty rights to work in the UK. It followed that the Appellant was also entitled to work here without the need for any prior authorisation. It is, however, usual for persons in her position to apply for a residence card which contains an official confirmation of their right to work. She applied for such a card in January 2012. It was refused by the UK Border Agency ("UKBA") in February 2012 on what appears to have been a completely mistaken basis. She applied again and was again refused, this time in September 2012. She then sought an internal review which eventually led to UKBA issuing a card on 28 January 2013.

2. In the meantime the Appellant had applied for employment with the Respondents, by whom her husband was already employed. On 18 December 2012 she was offered a post as accounting manager, with the employment to commence on 10 January 2013. She was told that the offer was conditional on her supplying evidence of her eligibility to work in the UK. That condition reflected the Respondents' liability to a penalty under section 15 of the Immigration, Asylum and Nationality Act 2006 if they employed anyone subject to immigration control without the necessary leave to work. That liability would be subject to an "excuse" under section 15(3) if the Respondents were able to prove that they had complied with the requirements of the Immigration (Restrictions on Employment) Order 2007. I need not set out those requirements in full, but the essence of them is that

the employee should have produced to the employer one of a series of specified types of document showing that he or she was entitled to work in the UK, as itemised in two lists scheduled to the order, list A and list B.

3. Typically, someone in the Appellant's position who had not yet received a residence card would be able to supply a so-called "certificate of application" from UKBA (or, now, the Home Office) which states that an application for a residence card has been made and contains a note to employers confirming that the employee is entitled to work. Such a document is one of the documents specified in list B, provided that the certificate is less than six months old at the date of production and provided the employer obtains confirmation from UKBA's Employer Checking Service that the application is still current.

4. At a meeting on 8 January 2013 with the responsible administrator in the Respondents' office, Danielle Thompson, the Appellant provided various documents in response to the request for proof of eligibility to work in the UK. These included a certificate of application relating to her application for her residence card the previous January, but that of course was more than six months previously. She was not able to provide any other document of the kind specified in either of the lists. Instead, she produced evidence of her marriage to Mr Markarian and that he was a French citizen. The Respondents of course already knew that he was exercising his treaty rights here because they were his employers. She also provided some other items of evidence in support of her claim of eligibility to work, including a document showing that she had a national insurance number.

5. Ms Thompson did not regard that information as sufficient, but she hoped that matters

could be put right by submitting an enquiry to the Employer Checking Service, which she did the same day. That was strictly inappropriate because the only certificate of application that she had was more than six months old, but she either overlooked that point or thought, which would not have been unreasonable, that if there was indeed a pending application for a residence card UKBA would confirm it notwithstanding the unusual delay.

6. The Appellant started work on 10 January 2013 pending UKBA's response. That response was received on 14 January. The material parts read as follows:

> "This individual has presented themselves as being able to work in the UK on the basis of a certificate of application that has been issued within the last six months. I have checked our records and I can confirm, based on the evidence we currently have, that this individual is not currently entitled to work in the United Kingdom on the basis of an outstanding application for a residence card as the family member of a European national. Unless your prospective employee is able to provide you with appropriate evidence of their entitlement to work, you will not have a statutory excuse against liability for payment of a civil penalty for employing an illegal migrant worker. The job applicant should contact the UK Border Agency to confirm their status."

Ms Thompson e-mailed back asking UKBA for confirmation that if the individual provided documentation that she was married to an EEA national she would be able to work in the UK while her application was being processed. There was no reply to this e-mail, but Ms Thompson made two phone calls to UKBA to check if the response was correct and it was confirmed that it was.

7. That situation was reported to the responsible manager, Deborah Ogden. She took urgent advice from the Respondents' employment advisers and was told that as UKBA had stated

that the Appellant did not have the right to work in the UK there was no option but to terminate her employment.

8. Ms Ogden accordingly had a meeting with the Appellant straightaway. The Appellant told her that, as her husband was entitled to work in the UK as a citizen of the EEA, then so was she. Although she had applied for a residence card, that was optional and the fact that she did not yet have one did not prevent her from working. She pointed out that she already had a national insurance number. She said that the letter from UKBA was wrong and that they were incompetent. After taking some time for consideration, Ms Ogden told the Appellant that she was being dismissed with immediate effect because in the light of the letter from UKBA, she could not prove her eligibility to work. The Appellant was then escorted off the premises.

9. Although it is understandable that what Ms Ogden referred to was the letter from UKBA, very strictly speaking the position was that the Appellant had not complied with the requirements of list A and list B, for the reasons which I have already referred. But nothing turns on that. The substance of the matter was that she was being dismissed because she was not able to prove her entitlement to work in the manner specified in the Regulations.

10. Ms Ogden wrote to the Appellant the following day confirming that her employment had been terminated with immediate effect because she had failed to produce satisfactory evidence of her eligibility to work in the UK and that the Respondents had accordingly formed the belief that she was not so eligible. She was offered a right of appeal.

11. There was subsequent correspondence, which I need not describe in detail save to note that the Appellant was offered two opportunities to attend a meeting with the Respondents, which she declined, though she repeated in some detail in correspondence her position that she had already offered ample proof that she was entitled to work. Ms Thompson wrote to her on 22 February 2013 explaining the Respondents' decision in more detail. In that letter she said:

> "The reason given for your immediate termination is that you have failed to produce satisfactory evidence of your eligibility to work in the UK. We at NCO Europe work very closely to the strict guidelines given by the Home Office on the prevention of illegal work in the UK. Every individual must prove that they have the right to work in the UK. Even a British citizen must provide sufficient evidence to prove who they are in order to work in the UK. There are two lists that must be followed in hiring employees which I have enclosed for your information. List A is used mainly for British or EU nationals. List B are for non-EU nationals. Unfortunately, you did not match any of these combinations which would have proved your right to work in the UK. As no original passport and visa was provided, the certificate of application misfired and the confirmation letter from the employer checking service was negative (attached). Unfortunately, with a negative confirmation from the Home Office, no valid passport with visa to hand, we had no choice but to dismiss you with immediate effect."

The letter ended:

> "I would also like to state that it is unfortunate that we had no choice but to come to this decision as we were very keen to have you starting with us at NCO and that you showed great promise on our hot wire department. I hope this incident would not defer you from reapplying in the future once you have resolved your situation with the Home Office and have the relevant documents to provide your eligibility to work in the UK."

12. One oddity about the case is that neither up to or at the point of receipt of that letter did the Appellant produce to the Respondents the residence card which had by that time belatedly been issued: she had received it at the beginning of February. She did eventually inform

the Respondents that she had received it, as part of a pre-action letter in March. In response to that Ms Thompson again expressed a willingness in principle to rehire the Appellant, but that was not taken up.

13. On 9 April 2013 the Appellant started proceedings in the Employment Tribunal. She could not of course claim for unfair dismissal because she did not have sufficient qualifying service. Instead, she advanced a claim for direct racial discrimination, breach of the right to be accompanied at a disciplinary meeting and breach of contract.

14. The claim was heard by an Employment Tribunal chaired by Employment Judge Sherratt in Manchester on 20 August 2013. By a reserved judgment sent to the parties on 3 September, the Appellant's claims were dismissed.

15. The Appellant appealed to the Employment Appeal Tribunal. The appeal was rejected on the papers under rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended), but she exercised her right to request an oral hearing under rule 3(10). That hearing took place on 13 May 2014 before Simler J. She confirmed the rejection of the appeal.

16. The Appellant then sought permission to appeal to this court. It was granted by Lewison LJ on the papers, but only in respect of the discrimination claim.

17. On this hearing the Appellant has been represented by Mr Markarian, who also represented her in the Employment Tribunal and before Simler J, though I should say that she also has addressed us briefly herself. The Respondents have been represented by

Mr Jeffrey Bacon of counsel, although we have not had to call on him.

The relevant law

18. The Appellant's direct discrimination claim is of course based on section 13 of the Equality Act 2010. The only relevant provision for our purposes is sub-section (1), which reads:

> "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."

By section 4, race is specified as a protected characteristic, and section 9 provides that race includes nationality. I should also refer to section 23(1), which provides as follows:

> "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

19. On the face of it, section 13(1) asks two questions: (1) whether B has been treated less favourably than others - the others being referred to in the jargon as "comparators", whether actual or hypothetical; and (2) whether that less favourable treatment is because of the protected characteristic. However, the two questions are two sides of the same coin, and in a much-quoted and much-followed passage in his opinion in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337, Lord Nicholls said that it would often be more helpful to start with the second question, which would usually necessarily also provide the answer to the first: see paragraphs 11 and 12 at page 342.

The Employment Tribunal's reasons

20. The Employment Tribunal's reasons start by setting out the facts. I have already done so

sufficiently for the purpose of this appeal. At paragraphs 37 to 43 the parties' submissions are summarised. So far as the discrimination claim is concerned, Mr Markarian's submissions on behalf of the Appellant are recorded as follows:

> "For the claimant it was submitted that the UKBA document was a recommendation. The Company should have been secure knowing that Mr Markarian was already an employee of the Company and as the spouse of the claimant, the company was fully aware of his and her right under the EA Law to live and work in the UK. It was discrimination against a non-European national. A British person would not be asked to confirm their right to work. Neither would a citizen of the European Economic Area. The residence document was an optional one. Directive 2004/38 and various articles therein prohibited discrimination. He did not say that the UK's rules were themselves discriminatory. They were logical."

21. I need not set out in full the summary of the submissions of the Respondents' representative, but I should read paragraph 42 of the Tribunal's reasons, which reads as follows:

> "As to a comparator in her submission it would be someone who was not a citizen of the UK and not a citizen of the EU where the UKBA had indicated that the person was not eligible to work. It would be someone who was not a citizen of the European Union or the United Kingdom married to someone who is and who is not a Armenian. The claimant has to show that the respondent would have acted differently for this comparator where the same information was provided by the UKBA. In her submission, the Company would have acted in the same way. There was no less favourable treatment."

22. At paragraphs 44 to 49 of the reasons, there is a brief summary of the law, but nothing that I need record here.

23. The Tribunal's decision and reasons on the discrimination claim are at paragraphs 50 to 53 and read, so far as material, as follows:

> "50. With regard to the allegation of direct discrimination we must first consider the identity of the appropriate comparator. A comparator in this will be hypothetical because no actual comparator has been put forward. It should be a person who does not share the claimant's protected characteristic

but who is not in materially different circumstances from the claimant.

51. In this case the hypothetical comparator is, in our judgment, the spouse of a citizen of an EEA country with the right to live and work in the UK who is not himself or herself a citizen of the UK or the EEA and in respect of whom the UKBA had provided a letter in response to an Employer Check stating that the person was not currently entitled to work in the United Kingdom on the basis of an outstanding application for a Residence Card as the family member of a European national. By way of example, a comparator could be the American spouse of a Belgian national working in the UK seeking employment in the United Kingdom.

52. We next ask ourselves the question as to why the respondent treated the claimant as it did and conclude that the reason for the treatment of the claimant was not because of a protected characteristic, i.e. her race, but was because of the information provided to it by the UKBA. On the evidence we are satisfied that the Company would have treated the hypothetical comparator in the same way on receipt of an identical letter from the UKBA.

53. The Tribunal sympathises with the claimant, who clearly was entitled to take up employment with the respondent, but the Tribunal does not find that there was any act of direct discrimination against the claimant..."

The decision of the Employment Appeal Tribunal

24. I should start by reading a passage from the beginning of Simler J's judgment at paragraph 4 where she says:

> "The main terms of employment that the Appellant signed made clear that her employment was conditional on her providing evidence of her eligibility to work in the UK and to satisfy other standard checks which are not material to this appeal. The Respondent contended in its ET3, and this has not been contested by the Claimant on appeal or in the course of the hearing, that it asks all applicants, regardless of nationality, to produce evidence of their eligibility to work in the UK."

25. The Appellant's discrimination claim is dealt with at paragraphs 22 to 31 of the judgment. It was her case that the Employment Tribunal had failed to address the comparator on whom she relied, namely:

> "A British or other EEA national whose passport has been retained by a

> foreign embassy for processing, but who has managed to present the Respondent with a birth certificate and official documentation proving that his or her family member holds UK or EEA citizenship".

The detail that the passport is retained by a foreign embassy is of course merely illustrative: the point is that for some good reason the applicant in question is unable to produce the passport itself. Mr Markarian contended before Simler J that if the Tribunal had focussed on such a comparator instead of the comparison which it in fact made, it would have found that he or she would have been permitted to work, whereas the Appellant as a non-EEA national had not been.

26. Simler J acknowledged that the Tribunal had not, or in any event arguably had not, considered the right comparator in the passage which I have quoted, but she held that any error in this regard was immaterial because its decision was unarguably right. Following the approach recommended by Lord Nicholls in Shamoon, she addressed first the question of what was the reason why the Appellant had been dismissed. She said at paragraph 26:

> "In this case, had the Employment Tribunal asked the question why the Claimant was treated as she was, in my judgment, the inevitable answer given its findings of fact, would have been that it was because of the letter from the UK Border Agency stating that the Claimant had no right to work here as the family member of a European national and warning that, absent appropriate evidence of an entitlement to work, the employer would have no statutory excuse against liability for payment of a civil penalty. That reason had nothing whatever to do with her race or nationality and everything to do with the letter received from the Border Agency. The Employment Tribunal's conclusion was plainly and unarguably correct on this basis. Moreover the hypothetical comparator the Claimant has identified, is a British or EEA national whose passport has been retained by a foreign embassy and cannot put forward evidence of eligibility to work as required. This does not satisfy the requirements of section 23 of the Equality Act 2010, that a comparison of the two cases for the purposes of direct discrimination claims must be such that there are no material differences between the circumstances of each case. What is missing from the circumstances of the hypothetical comparator put forward by the Claimant is the letter from the UK Border Agency stating that the individual had no right to work in the UK

> as a family member of a European national and warning about the possibility of a civil penalty absent appropriate evidence. In the light of the Tribunal's findings, such a letter received by the Respondent in circumstances where the individual applicant for employment had had their passport retained by a foreign embassy and was unable to put it forward as eligibility to work and therefore had produced only a birth certificate, would inevitably have led to precisely the same conclusion. The Respondent would have treated that comparator in precisely the same way as it treated the Claimant."

27. Simler J went on to address the other issues raised in the appeal, but I need not deal with them because the Appellant does not have permission to appeal in the relevant respects.

The appeal

28. Lewison LJ gave the Appellant permission to appeal only, as I have said, on the discrimination claim. That was encapsulated in ground two of the grounds of appeal served with the appellant's notice as follows:

> "As the ET and EAT judged wrongfully in violation of the UK's EU legislations and previous case-Judgement, the requirement to treat all nationality residing under the EU scope, with the same procedures in terms of acceptance of theirs right to work by extension of those principles to the Equality Act 2010, was not taken into consideration, thus the comparators were not accurate. Also, in this case, there is no material differences between non-EU and EU nationals. Therefore an accurate application of the Equality Act's Section 4, 9, 13, 23 is required."

29. The first question, it seems to me, is whether the Respondents required every applicant for employment, irrespective of nationality, to provide proof of entitlement to work in the UK of the kind specified in the 2007 order - that is, more precisely, in documents of the kind specified in list A or list B. As Simler J recorded, it was their pleaded assertion from the start that they did so require, and that was also asserted by Ms Thompson in the letter of 22 February 2013 from which I have quoted. There would be nothing in the least surprising in that being their universal practice, since the official guidance from UKBA and the Home Office has always been that such proof should be required of all applicants,

even though no penalty could be applied under section 15 if the employee was in fact not subject to immigration control. It was indeed the Respondents' case that they had been anxious to stick to the letter of that guidance, following criticisms made on an inspection in 2010.

30. The Tribunal was obliged to accept the Respondents' case in that regard unless reason was shown why it should not do so. Simler J in the passage quoted above confirms that it was unchallenged in the Tribunal and before her. Nevertheless, Mr Markarian sought to argue before us that the documents to which I have referred actually showed the contrary. Irrespective of whether the point is open to him, I am prepared to address what he says.

31. I take first the passage from the Respondents' ET3 to which the judge referred. That reads:

> "21. The Respondent has a clear policy in place regarding the employment of non-British nationals. The Respondent follows the guidance of the UK Border Agency in determining work eligibility.
>
> 22. The Respondent conducts a UKBA work eligibility check on all applicants who cannot produce documents from the UKBA list 'Documents which Provide an Ongoing Excuse'. The Respondent strongly refutes the Claimant's allegation that this is discriminatory under s.13 of the Equality Act. The Respondent is obliged to carry out such checks in accordance with sections 15 - 25 of the Immigration, Asylum and Nationality Act 2006 which places onus on employers to carry out checks in relation to work eligibility. The Respondent asks all applicants, regardless of nationality, to provide evidence of their eligibility to work in the UK."

32. Mr Markarian focuses on the words in paragraph 21 "regarding the employment of non-British nationals" as raising a clear implication that a different policy was applied to British nationals. But it is quite clear from the passage as a whole, and particularly the final sentence of paragraph 22, that what is being said is that the policy is applied to British

nationals, or perhaps more accurately, people claiming to be British nationals, as well as others. There is no inconsistency with the reference to the overall policy being "regarding the employment of non-British nationals". It is only the employment of non-British nationals which may expose the Respondents to the risk of a penalty; but in order to avoid that problem the requirements have in practice to be applied to everyone, not least though not only, in order - and this point is expressly made in the guidance - to avoid the risk of claims of racial discrimination.

33. As for Ms Thompson's letter of 22 February 2013, I have already set out the relevant passage. Mr Markarian fastens on the statement that "even a British citizen must provide sufficient evidence to prove who they are in order to work in the UK" and particular on the words "who they are". He says that that means that the Respondent would accept any sufficient evidence of British nationality and thus right to work and not necessarily a passport, which is the form of proof required in list A. Repeating the gist of his submissions as to the appropriate comparator, he says that what those words mean is that if a potential British employee came to the Respondents saying that he or she had lost their British passport but could provide, say, a police report saying that it was lost and a birth certificate or other sufficient proof of identity, he would then be allowed to work, whereas the Appellant, who had also provided unquestionable proof of her right to work, albeit not in the form required by either of the lists, was not allowed to work. But again it is necessary to read the whole passage. The following sentences make it quite clear that the way that even a British national is required to "prove who they are" is by satisfying the requirements of list A or list B - no doubt in practice list A.

34. In short, Mr Markarian was able to show nothing in the documents, still less in any other

evidence before the Tribunal, to support his contention that the Tribunal should have found that, contrary to the Respondents' case, the requirements of the 2007 Regulations would be overlooked in the case of a British citizen. I am satisfied that the Tribunal would not have been entitled to make such a finding.

35. I should perhaps briefly mention a variant of Mr Markarian's argument which the Appellant herself intervened to raise, namely that even if a British person without a passport might have been dismissed in the end, he would not have been dismissed as precipitately as the Appellant was, she having been marched off the premises on the same day as the problem arose. It is not clear that the case was ever put that way to the Employment Tribunal, but in any event the answer is the same: there would have been no basis in the evidence for such a finding.

36. That conclusion is fatal to any claim based on discrimination. The Appellant understandably believes, and Mr Markarian in both his written and his oral submissions emphasised, that it was unreasonable of the Respondents to insist on proof of entitlement to work in the form of a document of the kind required in list A or list B. Her entitlement to work, Mr Markarian submitted, did not depend on the existence of any such document. It was being required by the Respondents only to satisfy a policy which was aimed at protecting them from a penalty, in other words to provide a so-called statutory excuse. It was still less reasonable in circumstances where they were in fact at no risk of suffering such a penalty because the proof of her entitlement to work which she offered was incontrovertible, albeit not in the form required by the 2007 Regulations. I understand that, but we are not concerned with whether the Respondents acted fairly or reasonably but only with whether they acted discriminatorily. Even if their outlook might have been

regarded as unhelpfully rigid - though in fairness an employer's wish to stick rigidly to the book in this difficult and sensitive area is understandable - that is not a basis for legal liability in a discrimination claim.

37. I therefore conclude that this appeal should be dismissed. The Employment Tribunal may have identified the wrong comparator, but there was on the evidence no basis on which it could have found that the Respondents would have treated any British, or indeed EEA, nationals who failed to provide the evidence required by the 2007 Regulations any differently from how they treated the Appellant.

38. It is easy to feel some sympathy for the Appellant. This whole problem would not have arisen if UKBA had issued the residence card to which she was apparently plainly entitled at an earlier date and before her employment started. But of course that is not the Respondents' fault. I have also to say that my sympathy is rather mitigated by her failure to proffer the residence card even after it became available at the beginning of February. As I understand what Mr Markarian said about this, the Appellant was keen to establish as a matter of principle that the proof of entitlement to work that she had already submitted should have been treated as sufficient; but it must be questionable whether that was a sensible reason for not providing promptly the official evidence that would have allowed her to start work with the Respondents, even if a few weeks later than originally planned.

Lindblom LJ:

39. I agree.

Jackson LJ:

39. I also agree.