[1980] IRLR 427

Seide v Gillette Industries Ltd

Employment Appeal Tribunal

[1980] IRLR 427

17 September 1980

CATCHWORDS:
Race relations -- Definitions -- direct discrimination -- Definitions -- racial grounds or group -- race -- Definitions -- racial grounds or group -- ethnic origins -- Discrimination by employers -- detriments

HEADNOTE:
The facts: Mr Seide, who is Jewish, is employed by the respondents as a toolmaker. Prior to 15.5.78, he was employed on a two-shift basis, working in a team of three. One of his fellow employees was a Mr Garcia. During 1977, Mr Garcia made a number of anti-Semitic remarks to Mr Seide. On 23.9.77, this led to Mr Seide leaving work without permission. When the respondents investigated, they gave Mr Garcia a written warning about his behaviour and gave Mr Seide a written warning for leaving work without permission. Mr Seide was also transferred to the other shift, so that he was now working alongside a Mr Murray.

In April 1978, Mr Murray asked for a transfer from the section because of the relationship that had developed between him and Mr Seide. He claimed that Mr Seide was trying to involve him in the antagonism with Mr Garcia. The management decided that Mr Seide should be removed from two-shift working and go on to day shifts. In this way, he could be supervised by more senior officials of the company.

Mr Seide complained about the company's decision, which resulted in a loss of wages, through the internal grievance procedure. When his appeals proved unsuccessful, he complained to an Industrial Tribunal that he had been treated less favourably on racial grounds contrary to the Race Relations Act.

An Industrial Tribunal dismissed Mr Seide's complaint. The Industrial Tribunal concluded that the company had not been activated by anti-Semitic motives, that they had properly carried out the grievance procedure and that the decision to move Mr Seide had not been taken on racial grounds.

The EAT held: The Industrial Tribunal had not erred in concluding that the appellant's transfer from a two-shift system to day shifts, which resulted in a loss of earnings, was not on racial grounds contrary to the Race Relations Act, notwithstanding that the appellant might not have been transferred had he not been Jewish.

In determining whether there has been unlawful discrimination, the question is whether the activating cause of what happened is that the employer has treated a person less favourably than others on racial grounds. Where there is more than one ground for an employer's action, it might be enough if a substantial and effective cause for the action is a breach of the statute. However, it is not sufficient merely to consider whether the fact that the person is of a particular racial group within the statutory definition is any part of the background or is a causa sine qua non of what

happens. Thus the argument on behalf of the appellant that if an employee's racial origin is a factor in the chain of causation then as a matter of law it must be taken to be one of the grounds on which the employer acted could not be accepted.

In the present case, although the history of the matter began with anti-Semitic remarks made to the appellant by a fellow employee on the same shift, there was evidence before the Industrial Tribunal that a third employee, who was found not in any way to be activated by anti-Semitic feeling, was unwilling to work with the appellant because the appellant was seeking to involve him in the antagonism which had arisen. Having also found that the company's officials were not activated by anti-Semitism, the Industrial Tribunal were entitled, therefore, to conclude that the ground upon which the respondents acted in transferring the appellant was not that he was Jewish but because of the difficult industrial situation which had arisen within the particular section of the factory.

Nor had the industrial Tribunal misdirected themselves by looking at whether the company had behaved fairly and equitably and in accordance with the grievance procedure. At the end of the day, the Industrial Tribunal had asked themselves the essential question whether on racial grounds the employers had treated the appellant less favourably than other people. Had the Industrial Tribunal come to the conclusion that the company had behaved unfairly and inequitably contrary to the grievance procedure, however, that might have been material from which they could begin to draw an inference that there had been unlawful discrimination.

Neither had the Industrial Tribunal erred in considering whether the respondents' motives or intentions were discriminatory on racial grounds. The Tribunal looked at the position in the round and considered whether in fact there was racial discrimination whatever the motives. They did not approach the matter simply on the basis of the company's motives or intentions.

The Industrial Tribunal had correctly concluded that they had jurisdiction to deal with the appellant's complaint. Although discrimination on the ground of religion is outside the provisions of the Race Relations Act, "Jewish" can mean a member of a race or a particular ethnic origin as well as being a member of a particular religious faith. The Industrial Tribunal had correctly concluded that what happened in the present case was not because the appellant was of the Jewish faith but because he was a member of the Jewish race or of Jewish ethnic origin.

COUNSEL:
Appearances: For the Appellant: Mr I MACDONALD, For the Respondents: Mr M BELOFF.

PANEL: Slynn J(P), D Ewing, R J Hooker

JUDGMENTBY-1: MR JUSTICE SLYNN

JUDGMENT-1:
MR JUSTICE SLYNN: Mr Seide has been employed by Gillette Industries Ltd since 15.8.56 as a toolmaker. Prior to 15.5.78 he was employed on a two-shift basis. On 15.5.78 he was transferred to work on a day-shift basis, which resulted in a loss of wages to him. Mr Seide is Jewish and he says that the transfer from the two-shift system was in breach of the Race Relations Act 1976. It was, in his contention, due to the fact that he had complained to the management of the company about anti-

Semitic harassment on the part of a fellow worker. He said that, contrary to s.1(1)(a) of the 1976 Act, his employers, on racial grounds, had treated him less favourably than they treated or would treat other persons and that as a result he had been unlawfully subjected to a detriment within the meaning of s.4(2)© of the Act.

He made an application to an Industrial Tribunal. His case was heard over a period of seven days and in a reserved decision the Industrial Tribunal unanimously concluded that he had not made out his claim that there had been unlawful discrimination contrary to the 1976 Act and his claim was dismissed. He now appeals to this Tribunal.

The Industrial Tribunal found that in the period up to 1977, Mr Seide had been working with a fellow employee, a Mr Garcia, on the same shift. Mr Garcia was a maintenance fitter and Mr Seide was a spark eroder working in the particular section of the company's premises. There was another man engaged on this shift. That shift alternated with a shift where a Mr Murray, who did the same job as Mr Seide, was employed together with two other men.

The history of the matter really begins with incidents which started in May 1977. The Tribunal found that Mr Garcia had made offensive remarks of an anti-Semitic nature. He made other offensive racial remarks in June, July, August and September of that year. We do not find it necessary to repeat the remarks which were made by Mr Garcia but they were clearly to be deplored. On 22 September, Mr Seide had been away from work because it was the Jewish Day of Atonement. When he came back on the following day another incident occurred. Mr Garcia made other anti-Semitic remarks which understandably made Mr Seide feel very angry. He clearly both resented and was hurt by these remarks which had been made throughout the period by this particular fellow employee. As a result, because he was feeling tired or unwell, he went home without permission. That led to the officials of the company looking into the reasons for his absence. In the result Mr Garcia was given a written warning about his behaviour which the Tribunal found was designed to provoke Mr Seide; Mr Garcia was told that this behaviour must cease and if it were repeated there would be a second warning under the company's disciplinary procedure. At the same time Mr Seide was given a written warning in the presence of his union representative. He was told that he should not have left work without permission and was also told that if further problems arose with Mr Garcia, then he should discuss the matter with his immediate superior. In the meantime he should try not to react so strongly if these remarks were repeated. He was informed that future behaviour of the kind which had occurred would result in the second warning being given.

From September 1977 Mr Seide, in fact, was transferred from the shift on which Mr Garcia worked to the other shift so that he was now alongside Mr Murray as a fellow spark eroder. Mr Garcia continued to work with the other man who had been a member of the previous three man shift.

The Tribunal find next that on 24 April a Mr Taylor, an official of the company, saw Mr Seide and he told Mr Seide that Mr Murray had asked for a transfer from the section in which he and Mr Seide worked to another section. Mr Seide was asked to comment on the reasons for the application given by Mr Murray. Apparently Mr Murray had said that he wanted to move because of the relationship which had developed in the particular section. There was apparently some tension which had built up over the period and it was brought to a head on 22 April. Seemingly it was said that Mr Murray had arrived late and Mr Garcia had said something to Mr Murray

about his late arrival. Mr Seide took this as being a concealed reference to, and criticism of, himself and he told Mr Murray about this point of view. Mr Murray said that he really felt he could not continue to work in the atmosphere which was prevailing at the time. He felt that he was being brought into the antagonism which existed between Mr Garcia and Mr Seide and Mr Seide's reaction to it. Mr Murray did not want to be involved. Moreover, he had some personal difficulty with Mr Seide's habit of incessantly humming in a tuneless way which he found, particularly with the relationship which existed in the section, made it very difficult for him to work to the fine tolerances which were required in the particular section.

After Mr Seide had given his account of the matter, a Mr Harrison made a report on the situation as a whole. He found that this incident was yet another step in the poor relationships which (to quote) 'were creating a provocative atmosphere in the toolroom between Mr Seide and other members of it' and he decided that Mr Seide should be removed from the double day-shift working and go to the day-shift section. That was to ensure that the situation could be supervised by more senior officials of the company, as the company felt that because Mr Seide had chosen to involve Mr Murray and unrest had arisen, the situation had to be kept under control. And so Mr Murray's application to be transferred was not acceded to. Instead Mr Seide was put on the day-shift and, as we see it, the company was not really making a decision either way as to who was to be blamed for the position which had arisen. They found that there was a situation which had to be dealt with. This was the way in which they chose to deal with it.

Mr Seide complained in writing about the decision and he said that Mr Harrison was strongly biased against him. He complained that although he was glad during the period between September and May not to have worked with Mr Garcia, nonetheless, he had always felt that there was an underlying animosity on the part of Mr Murray himself. Following that complaint, Mr Seide was seen by Mr Wright on 11.5.78 and he was told that there was here a way of trying to see that there would always be somebody around with Mr Seide whilst he was working on this day-shift which overlapped with the two alternating shifts. After that meeting the transfer to which we have referred took place.

Mr Seide did not let the matter rest. He went one stage further in the grievance procedure. With his union representative and his staff representative he saw a Mr Taylor to discuss his grievance arising from the transfer. He admitted that he had made a mistake in asking Mr Murray to carry a message to Mr Garcia following the incident on the Saturday, telling him in effect to stop abusing him, harassing him and making derogatory remarks about him. But he felt that still Mr Murray had shown this antagonism towards him. Having considered the matter, Mr Taylor came to the view also that it was right to transfer Mr Seide to the day-shift where the supervisor of the shift would have the opportunity of seeing what was going on around Mr Seide.

The matter went further and on 17.5.78 Mr Seide saw Mr Harrison and made it clear that he thought Mr Harrison was biased against him. Mr Harrison stressed that everything was biased in his favour and that the only reason for delaying what had been done was to seek to restore good order in the working relationship in the toolroom and to make it possible for somebody to see what was going on around Mr Seide. Mr Harrison took the view, and told Mr Seide, that the reason this was being done at this time and in this way was because Mr Murray had been involved in the position and the delay was not as a result of the earlier incidents in which Mr Garcia

had made the offensive remarks to Mr Seide. Now Mr Harrison listened to the comments which Mr Seide himself made and he was told by Mr Seide that he considered that not only was Mr Garcia anti-Semitic but also Mr Murray himself was anti-Semitic in his attitude and had made derogatory remarks about him.

On 17.5.78 Mr Seide wrote to the management and said that he further complained about the decision and he once again said that Mr Murray had aided and abetted Mr Garcia in the past and that they had an affinity of views which he could not share.

Next the matter came before a Mr Pickard on 23 May, in the presence this time of the vice-chairman of the staff representatives group. Mr Pickard went into the matter and he reported to the company that the individuals in this section held equally strong views of the rights and wrongs of the case and as to who was the aggrieved person. Mr Pickard said that Mr Garcia and Mr Murray had cited times when Mr Seide had said and done things which had led to tension and disagreement. He recorded that it was their view that Mr Seide was making too much of the situation and tending to assume that people were saying things about him when they really were not. He came to the view that it was very difficult for the management to know who really was to blame. What really mattered was that the situation had to be sorted out. He thought that, in view of Mr Seide's objection to going on the day shift, the right and fair course would be to reinstate him on the alternating shifts so long as everybody agreed that they would undertake to exercise self-control and discipline and not cause unnecessary aggravation and subject to the fact that if any more trouble occurred the company would take steps. That did not produce any solution acceptable to Mr Seide and the matter went one stage further in the grievance procedure.

This time it came on 21 June before a Mr Leftwich who looked into the position. He was satisfied that the warning given in the previous September about Mr Seide leaving early without permission was justified and he thought that the decision in May to move Mr Seide, in all the circumstances, was a fair one because of the need to safeguard industrial relations and harmony in the toolroom. Mr Leftwich upheld Mr Harrison's view as being the right one in all the circumstances because the problem which had arisen was, as was put by the Tribunal, a continuing source of annoyance to a growing number of people in the toolroom.

Mr Seide listened to the proposals which were made by Mr Leftwich and which were very much on the basis of Mr Pickard's statement. Having considered Mr Leftwich's statements, he agreed to discontinue his grievance and begin the two-shift working.

However, on 29 June, after further consideration, he said that he was going to continue with his grievance and he rejected the report which had been made by Mr Leftwich.

The next step was that Mr Seide saw his elected staff representative again and, at the end of that discussion, Mr Seide agreed that he would discontinue the grievance and an agreement was, as we understand it, reached that he would go back much on the terms of Mr Pickard's report. But after consideration, which the Tribunal say was against a certain amount of domestic pressure from his home, he revoked his agreement to going back on the undertaking proposed by Mr Pickard. So the grievance procedure was reinstated.

This time he came before the managing director of the company at a time when the

United Kingdom director of the company group was present. The Tribunal found that on this occasion Mr Seide was given a full and fair hearing. The managing director came to the view that Mr Harrison's decision to remove him was a fair and positive way of dealing with the matter and so Mr Seide remained on the day-shift. He remained there, in fact, we are told, until 11.8.80. He is since that date back on the shift working with Mr Murray although not with Mr Garcia.

The Industrial Tribunal, having considered all this evidence which came before them, were quite satisfied that there was no racial discrimination on the part of the individuals concerned in the management. They thought that Mr Harrison and the others, in doing what they had done, had not been activated by racial or anti-Semitic motives. They also found that the company did not in any way, as one would expect, condone the anti-Jewish remarks which had been made by Mr Garcia. The Tribunal felt that the company had handled the matter with care and patience at each stage. They had properly carried out the grievance procedure which was democratic and fair. They thought that the company had taken such steps as were reasonably practicable to deal with the situation in all the circumstances. It was felt that Mr Pickard's proposals were fair and reasonable and that if they had been accepted by Mr Seide, without his acceptance being revoked, the problem could have been resolved and that if there had been any other, what they called, 'deplorable' behaviour on the part of Mr Garcia, the company would have taken steps to put a stop to it in view of the disruption which it was causing. The Tribunal considered whether in all the circumstances in May 1978 Mr Murray should not have been moved to work with Mr Garcia, as we understand Mr Seide was suggesting and as prima facie seemed a possible course for the company to take.
The Tribunal, having heard all the evidence, were of the view that this question of what step should be taken was really a matter for the management so long as what was done did not amount to treating Mr Seide less favourably than the others on racial grounds. So they came to the view that the decision not to move Mr Murray in the way Mr Seide had suggested was not a decision which was taken by the company on anti-Semitic or on racial grounds.

Finally they said that the reason for the transfer of Mr Seide to the day-shift was not done on racial grounds at all. They found no evidence of unlawful racial discrimination in dealing with Mr Seide. They were satisfied that the fact that Mr Seide was Jewish played no part in the decision making of Mr Harrison, Mr Pickard or Mr Leftwich -- they were not anti-Semitic and they did not succumb to anti-Semitism. They did not move Mr Seide because they thought Jews needed some special protection and indeed this point was not taken on Mr Seide's behalf. There was no evidence to suggest that Mr Murray was anti-Semitic; he was prepared to be moved himself or even risk his job rather than be involved with Mr Seide.

This decision of the Industrial Tribunal is attacked on a number of grounds. Firstly, a question which had to be considered by the Industrial Tribunal was whether they had jurisdiction to deal with this matter at all. The point was quite rightly raised as to whether what had happened here was on the ground of Mr Seide's religion. If it was, then it appeared to be outside the provisions of the Race Relations Act. On the other hand, if it was on the ground of his race or ethnic origin then it would be within the ambit of the Act. Both sides accept and the Tribunal accepted that 'Jewish' could mean that one was a member of a race or a particular ethnic origin as well as being a member of a particular religious faith. The Tribunal, on that basis, found that what happened here was not because Mr Seide was of the Jewish faith but because he was a member of the Jewish race or of Jewish ethnic origin.

It seems to us that their approach to this question was the right approach, as agreed by the parties, and that they were perfectly entitled to find on the facts of this case that Mr Garcia's remarks were on the basis of Mr Seide's race or ethnic origin.

What, however, is said by Mr Macdonald who has appeared on behalf of Mr Seide is that the Tribunal have misdirected themselves in considering whether the respondent company's motives or intentions were discriminatory on racial grounds. He submits that it is no answer in a case where there has been discrimination on racial grounds to say that it was done with a good intention or a good motive. Nor is it an answer that what was done was done in the interests of good administration in the company. In support of that he relies upon the decision of this Tribunal in the case of Grieg v Community Industry and Another [1979] IRLR 158. Mr Beloff, who has appeared on behalf of the company, accepts that that is the right approach. He submits that here the Tribunal had not approached the matter simply on the basis of the motives or intentions of the company. He says that they looked at the position in the round; they have considered whether in fact there was racial discrimination whatever the motives and he relies in particular upon paragraph 50 of the decision which we have read. We think Mr Beloff is right in this submission. The Tribunal clearly looked to see whether what had happened was done on racial grounds and they found that it was not.

Secondly, it is said that the Tribunal have failed to consider properly whether one of the reasons why Mr Seide was transferred in the way he was, was because of the fact that he was of Jewish ethnic origin or had been subjected to ill-treatment by a fellow employee because of this. Mr Macdonald submits that if this is but one of the reasons then that is sufficient, and he submits on this basis that the Tribunal here should have decided that there was racial discrimination.

Mr Beloff accepts that if what had happened here was that the company had moved Mr Seide because they were anti-Semitic, and also if the company had transferred him because another employee was anti-Semitic and the company was not willing to move the latter, that would amount to racial discrimination within the meaning of the Act. It would be the same as the situation which has arisen from time to time where a company has either refused to appoint or promote or has demoted someone because of racial attitudes on the part of, not the employers, but their employees.

But Mr Beloff submits that really was not the decision of the Tribunal in this case. He says that the Tribunal were actually finding that the reason why Mr Seide was removed was because Mr Murray, and maybe others, found it becoming intolerable to work in the atmosphere which had arisen, and that it was because of this attitude on the part of someone who as a fact was found not to hold anti-Semitic views that the employers acted in the way in which they did.

Mr Macdonald says that really is ignoring the position which had occurred here. He says that if one takes into account the fact that Mr Seide was of Jewish origin and was subjected to these repeated acts of abuse by Mr Garcia and was transferred, with a loss of earnings which is accepted to be a detriment, then the only possible conclusion which can be reached is that the company had subjected him to a detriment. Mr Macdonald says that part of this whole story is the fact that Mr Seide was Jewish and he says that, as the chain is traced along, the only conclusion which can be reached is that the fact that Mr Seide was Jewish is the reason why he was transferred. He submits that this is a question of fact and that one has to look at the

chain of causation to see whether that Mr Seide was Jewish was the cause of the employers acting in the way in which they did.

On the other side, Mr Beloff accepts that this was plainly an important part of the story. The matter may not have occurred at all in the way in which it did had Mr Seide not been Jewish but he says that is not sufficient. He says that the Tribunal has to ask itself the question: 'Which was the effective or activating cause for the steps which were taken by the employers?' If Mr Seide's being Jewish is merely a factor without which the situation would not have arisen, that is not sufficient. It has to be established by an applicant to the satisfaction of the Tribunal that it is the effective cause and there may be factors of race in the background but that is not enough. Mr Beloff, I think, would accept that there can be more than one ground for a particular step being taken by an employer and if one of those - a substantial and effective cause for the employer's action - is a breach of the statute then that might well be enough. He says here that the Tribunal have effectively decided, as they were entitled to do on the evidence, that the only course here at the end of the day was the reaction of Mr Murray to the situation which had arisen on 15.5.78.

Mr Macdonald says that is not enough. If the fact of Mr Seide's being Jewish is still here in the background, is still there as a factor and has not, as he put it, entirely been snuffed out as the link in the causation, then it must be taken by the Tribunal as a matter of law to be one of the grounds on which the company acted.

We consider that on this Mr Beloff is right in his submissions as a matter of law. It does not seem to us to be sufficient merely to consider whether the fact that the person is of a particular racial group within the definition of the statute is any part of the background, or is (as is said in other cases) a causa sine qua non of what happens. It seems to us that the question which has to be asked is whether the activating cause of what happens is that the employer has treated a person less favourably than others on racial grounds.

So the question is, as Mr Macdonald - in our judgment - rightly submits, at the end of the day essentially one of fact. It is only if the Tribunal can be shown to have misdirected themselves in law or if they have reached a conclusion which on the material they could not reasonably have reached, that we have any power to interfere. Is there evidence here upon which they could reach their conclusion? Mr Macdonald says here that they had misdirected themselves because they had looked at the question whether the company had behaved in a fair, equitable and democratic manner. And he says because of that, in effect, they have really failed to consider the right question. It seems to us that they were entitled to consider whether the company had, in all the circumstances, behaved fairly and equitably and in accordance with the grievance procedure. They were entitled to do so first because the way they had behaved was attacked by Mr Seide in the course of his case. Also it seems to us they were entitled to do so because, if they had come to the conclusion that the company had behaved unfairly and inequitably contrary to the grievance procedure, that might be some material from which they could begin to draw an inference that there had been discrimination contrary to the Act. So we do not see here that they had misdirected themselves, having regard to these matters, so long as it can be shown, as we think it clearly is shown, that at the end of the day they asked themselves the essential question whether on racial grounds the employers had treated Mr Seide less favourably than other people.

We fully appreciate the point which was taken by Mr Macdonald on the basis of this

chain of events to which we have referred, beginning with the fact that Mr Seide is Jewish - and we hope we have already made it clear that, like the Tribunal and the company, we wholly deprecate the remarks which were made by Mr Garcia. But, at the end of the day, this is essentially a question of fact for the Industrial Tribunal. They spent seven days on it and had a lot of evidence, including the evidence of Mr Harrison himself, who said that whereas in September they had dealt with the problem of Mr Garcia's anti-Semitic views by transferring Mr Seide in the way they did, by April there was a different problem: the problem was Mr Murray's unwillingness to remain in a situation where Mr Seide was seeking to involve him in the antagonism which existed between Mr Seide and Mr Garcia, and where personal problems existed.

It seems to us, having considered all the findings of fact of the Tribunal here which they had before them, that they were entitled to reach the conclusion to which they came, that by May 1978 the ground upon which they had acted was the attitude of Mr Murray and the difficult industrial situation which had arisen within this particular section of the factory. They found that Mr Murray was not in any way activated by anti-Semitic thinking or feeling and that neither of the officials of the company was so activated. It seems to us that they were entitled to find (whatever sympathy they may have felt for Mr Seide in the earlier part of this saga, in having to put up with Mr Garcia's remarks) that here he had not established that, on racial grounds, the company had treated him less favourably than they treated or would treat other persons.

Accordingly, despite the able and helpful submissions which have been put forward by Mr Macdonald on Mr Seide's behalf, we hold that no error of law on the part of the Tribunal has been shown and this appeal must be dismissed.

DISPOSITION:
Appeal dismissed.

SOLICITORS:
Birnling & Co; Slaughter & May.