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Bowing to the mob: a 'business case' defence?

Omooba v Michael Garrett Associates Ltd (1) Leicester Theatre Trust Ltd (2) ♦ [2024] EAT 30; March 6, 2023

Implications for practitioners

The judgment of the EAT seems to mean that employers, service-providers and others which bow to external pressure to discriminate will not be liable for discrimination if the reason they acted as they did was to protect their business interests, and not out of a discriminatory motivation of their own. The case seems vulnerable to being overruled, and practitioners should proceed with caution in basing advice on it.

Facts

Ms Seyi Omooba (SO) is an actor who was cast to play a lesbian character, Celie, in a stage production of *The Color Purple*. When SO's casting was announced, an actor in another West End production tweeted a screenshot of a 2014 Facebook post in which she had expressed her belief that homosexuality was a sin, adding:

> *@Seyiomooba Do you still stand by this post? Or are you happy to remain a hypocrite? Seeing as you've now been announced to be playing an LGBTQ character, I think you owe your LGBTQ peers an explanation. Immediately.*

A social media storm ensued. SO refused to retract her earlier statement, and her agent and the theatre both terminated their contracts with her. The theatre dropped SO from the role, explaining that the production was *'seeking to promote freedom and independence and to challenge views, including the view that homosexuality is a sin'*, but paying her in full the contractual sum. SO's agent also dropped her, fearful that the social media storm could threaten its viability.

SO brought employment tribunal claims of discrimination and harassment on grounds of religion and belief against both the theatre and the agent (as well as a breach of contract claim, which it is not necessary to discuss in this note). Shortly before the hearing of her claim, SO read the script of the play, and volunteered that she would have felt unable to play the part of Celie, and would have resigned in any event. Nevertheless, she continued with her claims.

Employment Tribunal

The ET held (mostly although not wholly by concession) that all SO's relevant beliefs were protected under the Equality Act 2010 (EA). But it held that the decisions of both the theatre and the agent were motivated not by SO's protected beliefs, but their concerns about the commercial risks to their respective businesses, so the direct discrimination claim failed. Dealing with harassment, the tribunal held that it was not reasonable for the respondents' actions to have had the requisite effect of violating SO's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

The tribunal dismissed all SO's claims. It awarded costs against her on the basis that her harassment claim had lacked any reasonable prospect of success, and further that in light of the effect on the value of the claim of her concession that she would have had to withdraw from the role of Celie in any event, her refusal of a 'drop hands' offer in relation to her direct discrimination claims (i.e. not to seek costs if she withdrew) amounted to unreasonable conduct of proceedings.

♦ [2024] IRLR 440

Employment Appeal Tribunal

The EAT dismissed the appeal. In relation to direct discrimination, it held:

> *[T]he operative reasons (the commercial reality facing the theatre; the threat to the agency's survival) were not informed by, or dependent upon, the claimant's belief: faced with a similar reality or threat arising from an equivalent social media storm, but relating to an entirely different belief, the ET was plainly satisfied that the decisions would have been the same.*

SO's argument that because the social media storm arose directly from her belief, the tribunal should have held that her belief was part of the operative reason for the treatment was rejected as confusing reason with context. The appeals against the tribunal's harassment and costs decisions also failed.

Comment

The interesting part of the EAT's judgment is the dismissal of SO's appeal from the tribunal's judgment on direct discrimination. SO was dropped by both respondents as a result of a social media storm which blew up because third parties found her earlier public expression of her protected belief unacceptable. Those third parties undoubtedly acted as they did because of SO's protected belief; but because what motivated the two respondents was not SO's protected belief itself, but their fears for the impact of the social media storm on their businesses, the ET and the EAT held that direct discrimination was not made out.

... the question of less favourable treatment brought about by discriminatory pressure from third parties owing no duties of their own to the claimant has received surprisingly little attention from the courts before now.

This is a surprising result. If a hotel refused accommodation to a black guest because its other guests objected to his presence, one would not think that in 2024 he would have to fall back on the common law duties of innkeepers (as the West Indian cricketer Leary Constantine did in 1944: see *Constantine v Imperial Hotels* [1944] KB 693); nor that faced with comparable discrimination in the employment context brought about by the employer's capitulation to the racism of third parties, he would be left without any remedy at all.

Nevertheless, the question of less favourable treatment brought about by discriminatory pressure from third parties owing no duties of their own to the claimant has received surprisingly little attention from the courts before now. A sheriff court in Scotland seems to have taken it as axiomatic that third party objections could not provide an alleged discriminator with a *'business case defence'* (*Billy Graham Evangelist Association v Scottish Event Campus Ltd* 2022 SLT (Sh Ct) 219; [2023] Briefing 1059). In *Commission for Racial Equality v Westminster City Council* [1985] IRLR 426, the Commission for Racial Equality served a non-discrimination notice on the council, having found it to have discriminated against a black road-sweeper by withdrawing an appointment for fear of racially-motivated industrial unrest. The council's application for judicial review of the discrimination notice failed: the court held that there was material on which the commission could have been satisfied that the council had discriminated as alleged. But in neither case is the question of the reason for the less favourable treatment squarely addressed. For the moment the law in this respect must be regarded as unsettled.

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