Neutral Citation Number: [2025] EAT 42

Case No: EA-2022-001363-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 March 2025 (original Judgment)
Date: 11 April 2025 (revised Judgment)

Before:

THE HON. LORD FAIRLEY, PRESIDENT

- -

Between :

MR JOHN J CAMPBELL

Appellant

- and -

1) SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST

2) MR WESLEY HAMMOND

Respondents

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- -

Mr Simon Cheetham K.C. (instructed by **Thompsons Solicitors LLP**) for the **Appellant**
Mr Sam Proffitt, of Counsel (instructed by **DAC Beachcroft**) for the **1st Respondent**

Hearing date: 20 March 2025

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JUDGMENT

REVISED

SUMMARY

Race discrimination; conduct "in the course of" employment; employer's defence of "all reasonable steps" to prevent discrimination

The appellant was employed by the first respondent and worked on a full-time basis as Branch Secretary of a recognised union. The second respondent, who was also an employee of the first respondent, had been a member of the union but had decided that he wanted to leave. During a discussion between the appellant and the second respondent about ongoing deduction of union subscriptions from his wages, the second respondent became angry and made a remark to the appellant which was capable of amounting to racist abuse. The tribunal found that the remark had been made, but concluded on the evidence that it had not been made "in the course of" the second respondent's employment in terms of section 109(1) of the **Equality Act, 2010**. It also found that, in terms of section 109(4), the first respondent had taken all reasonable steps to prevent the second respondent from making the remark or from doing anything of that description.

The appellant submitted that the tribunal had erred in law (i) in its application of section 109(1) by focussing solely on what was said rather than looking at on the totality of the facts; and (ii) in its application of section 109(4) by failing to ask the second of the two questions referred to in **Canniffe v. East Riding of Yorkshire Council** [2000] IRLR 555.

Held, refusing the appeal:

(1) The tribunal had not reached its decision under section 109(1) solely on the basis of what was said. Rather, it had considered the whole context and balanced the factors for and against the argument that the comment was made "in the course of" the second respondent's employment. The weight it attributed to those factors was pre-eminently a matter for the tribunal as an industrial jury.

(2) The tribunal had also correctly considered and applied the terms of the section 109(4) defence.

THE HON. LORD FAIRLEY, PRESIDENT:

Introduction and procedural history

1. This is an appeal from a judgment dated 14 October 2022 of an employment tribunal (Employment Judge Cox sitting with two lay members) at Sheffield.

2. In a claim form presented on 18 March 2021, the appellant made a complaint that he had been racially abused (and thus harassed) by the second respondent on 20 October 2020. The appellant submitted that the first respondent was liable for that harassment in terms of section 109(1) of the **Equality Act, 2010**.

3. Following a full hearing over three days between 6 and 8 September 2022, the tribunal dismissed the appellant's complaints against both respondents. It did so because it concluded that although the comment in question had been made by the second respondent as described by the appellant, it was not made in the course of the second respondent's employment.

4. The appellant's appeal against that decision was presented on 1 November 2023, and was allowed to proceed to a full hearing. The full hearing Orders required each respondent lodge and serve an Answer to the appeal within 28 days of 1 November 2023. The second respondent did not do so. By Order of the Registrar dated 1 August 2024, the second respondent was, therefore, debarred from taking any further part in this appeal. The first respondent has lodged an Answer and Grounds of Resistance to the appeal.

Relevant facts

5. At the time to which the complaints related, the appellant was employed by the first respondent. He worked on a full-time basis as Branch Secretary of a recognised union, UNISON.

The second respondent was also an employee of the first respondent. The appellant had an office in the same part of the first respondent's premises as that in which the second respondent worked as a domestic assistant.

6. The second respondent was formerly a member of the union, but had decided that he wanted to leave. In spite of having intimated this to the union, membership subscriptions were still being deducted from his wages by check-off. He had spoken to the first respondent's HR and payroll departments and had been told that he needed to speak to the union directly. Prior to 12 October 2020, the second respondent had spoken to the appellant on several occasions to complain about the ongoing deduction of subscriptions (ET § 6).

7. On 12 October 2020, the second respondent went to the appellant's office during a break from his work to discuss the subscription issue. He told the appellant that he wanted the subscriptions that had been deducted to be refunded. The appellant told him that he would not be reimbursed. The second respondent left the office but returned shortly afterwards to continue pressing the issue (ET § 6 and 7). In the course of that second meeting, the second respondent became angry and repeatedly referred to the appellant as a "fucking muppet". As his frustration grew, he then referred to the appellant as a "fucking monkey" (ET § 12-15). The potential significance of this, the tribunal noted, was that appellant is black and the second respondent is white.

8. The tribunal accepted (ET § 8) that there were several connections between the incident and the fact that the second respondent was employed by the first respondent. It took place during the second respondent's working day, albeit during a break. It happened in an office that was situated a few hundred metres from the ward on which the second respondent mainly worked. It related to the

deduction of subscriptions for union membership that entitled the second respondent to the support of a union recognised by the first respondent and in which the appellant had an important role.

The tribunal's reasons

9. Looking at the evidence as a whole, however, the tribunal concluded that the incident was not "in the course of" the second respondent's employment. The tribunal noted that the second respondent did not have to be a union member to be employed by the first respondent. His membership was a matter of personal choice. The conversation in which the comment was made related to a personal dispute he had with the union about deduction of subscriptions.

10. The core of the tribunal's reasons on this issue is seen at ET § 9 where it stated:

> "The tribunal does not accept that the legislative intention was to hold an employer liable for abuse that might occur in a conversation between a union official and a union member about union membership matters, even if it did happen on the employer's premises and during working hours. The tribunal finds that, applying the ordinary, everyday meaning of the term "during the course of employment", the interaction between Mr Hammond and Mr Campbell did not occur during the course of the Mr Hammond's employment by the Trust."

11. In the alternative, the tribunal found that the first respondent had, in any event, taken all reasonable steps to prevent the comment being made. It listed the steps taken at ET § 18. They were:

a) an induction session attended by the second respondent at which the issue of "acceptable behaviour at work" and the first respondent's core values of "affording dignity, trust and respect to everyone" (referred to as "the PROUD values" were emphasised;

b) annual performance assessment of the second respondent which covered the issue of whether the second respondent was acting in accordance with PROUD values;

c) the display of the PROUD values on posters in areas where the second respondent worked; and

d) mandatory training of the second respondent on equality and diversity issues every three years, most recently on 1 October 2020, when training was conducted in small groups and involved the second respondent going through a PowerPoint presentation. The presentation referred to the promotion of "a positive attitude towards equality and diversity by showing respect for others, valuing people's differences and treating people with dignity".

12. At ET § 19 the tribunal stated:

> "These findings are sufficient for the Tribunal to accept that the Trust took all reasonable steps to prevent Mr Hammond abusing his colleagues, including although not limited to, racially abusing them. If the Tribunal had accepted that Mr Hammond had made the monkey (*sic*) in the course of employment, it would have concluded that the Trust was not liable for it because it had taken all reasonable steps to prevent Mr Hammond committing acts of racial abuse."

13. Finally, at ET § 20-25, the tribunal considered a further aspect of the appellant's case related to the way in which the first respondent dealt with his grievance about the second respondent. The tribunal's conclusions on that issue are not an issue in this appeal.

The grounds of appeal and appellant's submissions

14. The first of two grounds of appeal is that the tribunal, having correctly directed itself on the terms of section 109(1) of the **Equality Act, 2010**, erred in focussing solely on what was said rather than on the totality of the facts.

15. Senior counsel submitted that the tribunal had placed too much weight upon what it described as the "personal" content of the conversation. This, it was submitted, had led it to disregard important factors that:

a) the incident occurred during working hours and in the workplace;

b) there was a *nexus* between the second respondent's employment and his trade union membership, in that the membership arose from his employment;

c) the subscription entitled the second respondent to support from the union, as a union recognised by the first respondent; and

d) the subscriptions were taken by "check-off" thereby linking them to his overall remuneration.

16. It was accepted that the statutory test was not satisfied merely because, but for the employment relationship, the incident would not have occurred. The proscribed conduct had to be "in the course of" the employment. Senior counsel was clear, however, that this ground was not advanced as a perversity challenge.

17. The second ground of appeal relates to the tribunal's conclusion that the first respondent took all reasonable steps to prevent the second respondent from abusing his colleagues. Specifically, the appellant submits that the tribunal did not follow the two-stage approach required by **Canniffe v. East Riding of Yorkshire Council** [2000] IRLR 555. It asked itself only what steps the employer had taken – the first **Canniffe** question – but had then failed to ask itself whether there were any further preventative steps that the first respondent could have taken that were reasonably practicable.

Submissions for the first Respondent

18. Counsel for the respondent submitted that on a fair reading of the tribunal's reasons as a whole, it had clearly taken account of all of the evidence, including the factors founded upon by the appellant. Applying **Jones v. Tower Boot Company Limited** [1997] ICR 254, the question of

whether or not the incident occurred in the course of the second respondent's employment was a factual question for the tribunal as the industrial jury (**Jones** at page 265 C-D per Waite LJ).

19. Within ET § 5 to 9, the tribunal had plainly considered and balanced all potentially relevant factors and had come to a factual conclusion that was open to it.

20. On the question of the statutory defence, it was clear from the tribunal's reasons at ET § 16 to 19 that the tribunal had indeed properly considered the whole of the statutory test and concluded that the first respondent had taken *all* reasonable steps.

21. It was important to recognise that **Canniffe** was a case where the tribunal had concluded that the employer had taken *some* steps, and that the steps taken were reasonable. That was clearly an error of law. The tribunal's reasons in **Canniffe** were, however, materially different to the reasons given by this tribunal. In particular, at ET § 16 and 17, the tribunal clearly and correctly identified the statutory defence under section 109(4) as "all reasonable steps". It then listed the steps taken by the first respondent and accepted "that the Trust took all reasonable steps". That was a legitimate conclusion, particularly where no further potential steps had been identified either in the evidence or in submissions.

Law

22. Section 109(1) of the **Equality Act, 2010** states:

> "**109 Liability of employers and principals**
>
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer…"

Subsection (3) provides that it does not matter whether the thing was done with the employer's knowledge or approval. Subsection (4), however, provides the employer with a defence if it can

show that it took all reasonable steps to prevent A from doing the thing in question or anything of that description.

23. In **Jones v. Tower Boot Company Limited** , Waite LJ (with whom Potter LJ agreed) stated:

> "The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words "in the course of his employment" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances – within or without the workplace, in or out of uniform, in or out of rest-breaks – all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort."

24. In **Canniffe** the Employment Appeal Tribunal held that the correct approach to the section 109(4) defence was for the tribunal first to consider whether the respondent employer took any steps to prevent the employee from doing the act complained of in the course of his employment, and then to consider whether there were any further reasonable steps that could have been taken.

Analysis and decision

Ground 1

25. The appellant has expressly disavowed any suggestion that the first ground of appeal is based upon an argument that, on the facts found by the tribunal, its conclusion was perverse. This ground rests instead upon a suggestion that the tribunal placed too much weight on what was said, and thus ignored (or minimised) the significance of certain other factors.

26. Given what was said by the tribunal at ET § 8 and 9, I do not accept the submission that it ignored any of the factors relied upon by the appellant. It was clearly well aware of all of those matters. The tribunal balanced the factors for and against the argument that the comment was made

in the course of the second respondent's employment. The weight it attributed to those factors was pre-eminently a matter for the tribunal as an industrial jury. Correctly, it did not approach its task by asking simply whether the conduct was related to an employment relationship. Correctly, it focussed on the wording of section 109(1). The factors identified by it within ET § 8 and 9 justified its decision. As was noted in **Jones**, a different tribunal might equally properly have come to a different conclusion. I agree with the respondent's submission that a challenge to the tribunal's factual finding would have had to be based upon perversity. No such challenge is made, nor could it be. Inevitably, therefore, this ground must fail.

Ground 2

27. Since the first ground does not succeed, the second is moot. For completeness, however, I did not find it persuasive. The tribunal made a factual finding that, only days before the incident, the first respondent provided the second respondent with mandatory equality and diversity training in a small group. Whilst the tribunal did not express itself in terms of the two-stages of **Canniffe**, it is clear enough that it properly self-directed on the statutory defence of "all reasonable steps" and made a positive finding at ET § 9 that the respondent had discharged the burden of proving that defence. That is an entirely understandable conclusion, particularly where no further steps that could have been taken were suggested either in the evidence or referred to in submissions to the tribunal.

Conclusion

28. For these reasons, the appeal is refused.