

“racial grounds” or “racial consideration”?

Precisely how wide, or narrow for that matter, is the meaning, “racial grounds”, as referred to under section 3(1) of the Race Relations Act 1976?

Interestingly, the genre of racial grounds did not first appear in our race relations legislation with the 1976 Act, it was previously enshrined in the 1976 Act’s predecessors, the 1965 and 1968 Acts albeit in a slightly different guise. Section 1(1) of the 1965 and 1968 Acts stated, “It shall be unlawful for any person...to practise discrimination on the ground of colour, race, or ethnic or national origins against persons...” and “For the purposes of this Act a person discriminates against another if on the ground of colour, race or ethnic or national origins he treats that other...” respectively. The meaning of “racial grounds” under the 1976 Act is, ““racial grounds” means any of the following grounds, namely colour, race, nationality or ethnic or national origins”. Looks familiar? Therefore, it would not be wrong to say over 40 years after the legal construct appeared on our statute books, we are still trying to grapple with the correct application of “racial grounds” in ‘its’ proper context. However, a recent Court of Appeal (“CA”) decision provides assistance to the correct approach to be taken when dealing, in the words of Mummery LJ, “in this sensitive area of the law”.

Redfearn v Serco

Redfearn v Serco Ltd (trading as West Yorkshire Transport Service)

[2006] EWCA Civ 659, [2006] All ER (D) 366 (May) is an interesting case on point. Mr Redfearn, who is white, was employed by Serco Ltd (“Serco”), who supplied transport services to, among others, Bradford City Council (“the Council”). Its buses were used to transport adults and children with physical or mental disabilities in the Bradford area, the majority of whom were of Asian origin. On 26 May 2004 an article appeared in the Bradford Telegraph and Argus identifying Mr Redfearn as a candidate for the British National Party (“BNP”) in the forthcoming local elections. According to the BNP’s constitution its membership was confined to “white people” and it was, among other things, “...wholly opposed to any form of integration between British and non-European peoples.”

On 27 May 2004 Serco received a letter from UNISON saying that many of its members found Mr Redfearn's continued employment a “significant cause for concern, bearing in mind the BNP’s overt and racist/fascist agenda.” 70% to 80% of Serco’s customers was Asian, as was 35% of its workforce. UNISON said that it looked to Serco, “to take immediate action to ensure that our members are not subjected to the kind of racist hatred promoted by the BNP and its supporters.” Representations were also received from the GMB union and from employees about personal safety and company property.

On 15 June 2004 Mr Redfearn was elected as a local councillor for the BNP and on 30 June 2004 was summarily dismissed, as it was alleged his employment would have presented a risk to the health and safety of Serco's employees and passengers; it would have given rise to considerable anxieties to passengers and their carers, who had placed a great deal of trust in Serco's drivers and escorts; and it would potentially jeopardise Serco's reputation, possibly leading to the loss of its contract with the Council. It is worthy to note, there had been no complaints about Mr Redferan's work or his conduct at work. Furthermore, regarding his performance, he was deemed a satisfactory employee and, as he alleged, had an Asian supervisor with whom he got on very well and who had nominated him, Mr Redfearn, for an award of first class employee status.

Employment Tribunal decision

Mr Redfearn presented a complaint to the employment tribunal, alleging direct race discrimination against Serco in that, he alleged, it had treated him less favourably under section 1(1)(a) of the 1976 Act (a person discriminates against another in any circumstances relevant for the purposes of any provision of the 1976 Act if on racial grounds (s)he treats that other less favourably than (s)he treats or would treat other persons) "by dismissing him, on the ground of the Asian race and ethnic origin of the people [Mr Redfearn] transported." The employment tribunal rejected Mr Redfearn's claim and found, "insofar as direct discrimination is concerned we are satisfied that if any discrimination [unfavourable treatment] existed against [Mr Redfearn] it

was not on racial grounds. We are satisfied that if there was discrimination [unfavourable treatment] it took place on health and safety grounds, which was brought about by [Serco] discovering [Mr Redfearn]’s candidature as a BNP Councillor, which automatically meant that [he] was a member of the BNP and also his subsequent election, having regard to the high preponderance of passengers and significant number of employees who were of Asian origin.” Furthermore, it did not believe the action taken against him, because of Serco’s concern in relation to its passengers and employees of Asian origin, gave Mr Redfearn any grounds for suggesting that Serco directly discriminated against him.

Employment Appeal Tribunal judgment

Mr Redfearn appealed successfully to EAT (see October Newsletter), which criticised the decision of the employment tribunal for its failure to comply with binding authority and not construing “on racial grounds” sufficiently broadly and for dealing with the claim for direct discrimination “extremely shortly”. Also, the EAT held the employment tribunal had failed to address the question “whether racial grounds had a significant influence on the outcome”.

At paragraph 53 of the EAT’s judgment it held, among other things, “...We must therefore set aside the Judgment so far as it concerns direct discrimination because of the wholly flawed approach by the Tribunal: (1) in its disregard of the [**Showboat Entertainment Centre Ltd v Owens [1984] 1 All ER 836, [1984] IRLR 7**] line of authorities, and thus its lack of understanding of the broadness of the meaning of the words "racial grounds" and (2) by virtue of its approach to [**Nagarajan v London**

Regional Transport [2001] 1 AC 501, [1999] 4 All ER 65], that is entirely ignoring the crucial question as to whether racial grounds, as so broadly defined, had a significant influence in the outcome, by simply concluding that the discrimination took place on health and safety grounds without going on to consider whether those health and safety grounds themselves were significantly based upon or influenced, or accompanied, by considerations of race.” Serco appealed to the CA.

Court of Appeal judgment

The question for the CA to determine was whether there was an error of law in the decision of the employment tribunal that the dismissal of Mr Redfearn was not an act of direct discrimination. The answer, said the CA, depended, first, on the construction of the 1976 Act and, secondly, on its application to the facts found by the tribunal. “Regard must be had to the anti-discrimination purposes for which the legislation was enacted, the context of the direct discrimination provisions, the language in which those provisions were drafted and the consequences of adopting one possible interpretation of the expression “on racial grounds” rather than another possible interpretation. As the tribunals below appreciated, the decision of the EAT (Browne-Wilkinson J presiding) in Showboat and the later authorities which have followed it, are very much in point: see Weathersfield t/a Van and Truck Rentals v. Sargent [1999] ICR 425 at pages 429H and 434B; Carter v. Ahsan (UKEAT 0907/03 21 June 2004) at paragraphs 69-75.” It is clear from these authorities that

discrimination “on racial grounds” is not confined to less favourable treatment on the ground of the colour or race of the claimant. In other words, as demonstrated by Mummery LJ, it is accepted that a respondent can be liable for discriminating against a claimant on the ground of another’s colour or race.

Relying heavily on **Showboat**, it was accepted by Mr Redfearn that, as a matter of causation, it would have to be shown that race was a substantial and effective cause of the act or decision that constituted less favourable treatment, but, he argued, the employment tribunal had erred in ruling that a case such as his was outside the expression “on racial grounds” altogether, so that the causation stage was never in fact reached. It was argued by Mr Redfearn that Serco’s motive for acting as it did (to protect its customers and its workforce) was irrelevant to liability for race discrimination; that racial considerations did not have to be the sole reason for or influence on the treatment (see **paragraph 19 of Nagarajan**); and that the defence of justification (such as health and safety grounds) was not available in a case of direct discrimination (see **paragraph 31 of ex parte Westminster City Council [1984] IRLR 230**). It was submitted that, “Serco's decision to dismiss Mr Redfearn was based on considerations relating to the race of third parties, their perceived hostility to his views and his perceived attitude to the race of third parties. That was direct discrimination “on racial grounds.””

The ratio in **Showboat**

The CA held the ratio of **Showboat** advanced by Mr Redfearn was far too wide. “The essence of **Showboat** is that an employee who refuses to implement his employer's racially discriminatory policy is entitled to be protected from less favourable treatment under the 1976 Act. The use of the employee to implement the employer's racially discriminatory policy means that “racial grounds” operate directly in the less favourable treatment of the employee, whether the race or colour in question be that of the employee or that of a third party.”

The significance of the claimant's ‘race’

Remember, in **Redfearn**, the claimant's case was not so much that he was dismissed by Serco for his being white, but that he was by dismissed, “on the ground of the Asian race and ethnic origin of the people”, he transported. Therefore, to what extent is the claimant's ‘race’ relevant in a case of racial discrimination? Obviously, in some cases it would be paramount to the outcome, but not always. Mummery LJ gave examples that were demonstrable of where the ‘race’ of the claimant would be of little or no significance to the outcome of a claim of racial discrimination. For example, “white persons would also be treated less favourably than other white persons on the ground of colour in the following examples: the case of a white employer who dismisses a white employee for marrying a black person (see **Race Relations Board v. Applin [1975] AC at 289-290**) and, outside the employment context, the case of a white publican who refuses to admit or serve a white

customer on the ground that he is accompanied by a black person (see **Race Relations Board v. Applin** [1973] 1 QB 815 at 828A-E)". This leaves us with the difficult question of whether an alleged discriminatory act was on "racial grounds" or based on a "racial consideration".

"racial grounds" versus "racial consideration"

There is no question that the circumstances in which the decision to dismiss Mr Redfearn was taken included racial considerations. However, held the CA, "that does not mean that it is right to characterise Serco's dismissal of Mr Redfearn as being "on racial grounds." It is a *non-sequitur* to argue that he was dismissed "on racial grounds" because the circumstances leading up to his dismissal included a relevant racial consideration, such as the race of fellow employees and customers and the policies of the BNP on racial matters. Mr Redfearn was no more dismissed "on racial grounds" than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer. Any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race".

In consequence, Serco's appeal was allowed. However, one can reasonably foresee many cases where one person's "racial grounds" would be another's "racial consideration". There can be a fine line between the two. In **Redfearn**, the distinction was determinative of the appeal. However, despite the CA's

thorough examination of the relevant authorities in this area, it might be imprudent to believe Redfearn marks the last we will hear of “racial grounds” in the appellate courts.

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