

CA. Application for permission to appeal and an extension of time, before Sedley LJ. 16th July 2002.

JUDGMENT : LORD JUSTICE SEDLEY:

1. Dr Jiad - who is of Iraqi origin and, it appears, is the only Iraqi employee of the BBC, something which may matter - has an unhappy and already litigious relationship with his employer. The present Employment Tribunal proceedings were issued by him because he had been embarrassed and upset to a point which, he asserts, required medical attention by an approach made to him by the third respondent, an in-house solicitor at the BBC; and also because, he submits, the other three respondents failed in their responsibility to do anything about what he argues was an act of harassment by the third respondent.
2. His claim was one of direct discrimination on grounds of race and of victimisation. Employment is, of course, one of the situations in which the Race Relations Act protects people from discriminatory treatment. Discrimination is very carefully defined in the Act and, for present purposes, includes a requirement on the applicant to show that the respondents have treated him less favourably than in the same or similar circumstances they treat or would treat other persons.
3. Essentially, what happened in this case, according to Dr Jiad, was that the third respondent approached him in the canteen when he was giving coffee to a visitor and guest and interrupted by demanding to speak to him. When Dr Jiad told her it was not a suitable time to do so the third respondent waited by the lifts for him and accompanied him against his will to his office. The correspondence which ensued produced no satisfactory response for Dr Jiad. It was accepted that the third respondent needed to speak to Dr Jiad about his on-going litigation against the BBC. It was said that she had to approach him in person because he had not provided any means of telephone or other contact for her, and to this I will return.
4. The Employment Tribunal on the application of the respondents - in effect the BBC, although the BBC was not separately sued - struck out the claim on the ground it had no conceivable prospect of success and, in addition, ordered Dr Jiad to pay £3,500 costs on the ground that he had acted vexatiously in bringing the claim. He appealed against this to the Employment Appeal Tribunal who, under the presidency of Mr Justice Burton, dismissed his appeal. He now seeks the permission of this court to appeal further. He does so in the knowledge of the potential costs implications of appealing unsuccessfully to this court.
5. I do not accept Dr Jiad's initial argument - and I am not going to give him permission to advance it - that inadequate reasons are given by either of the tribunals below. On the contrary, their reasons are very full. His case as he has developed it today is that those reasons are wrong, and that I think is arguable. In short, it seems to me arguable that the Employment Tribunal in paragraph 20 of its reasons has misdirected itself by taking it to be the case that direct discrimination requires a comparator to be advanced, in other words, that it has to depend on the limb of the legislation which distinguishes how the applicant has been treated from how a person of other ethnicity has been treated. That, in my understanding, is not the full ambit of the provision. It is equally legitimate, on my understanding of the law, to demonstrate in a direct discrimination case that the applicant has been treated differently in the way in which someone of different ethnicity would be treated. That is in some respects a harder enterprise to undertake than if one has a direct comparator. In the present case Dr Jiad seeks to take the step in a way which, on the face of it, seems to me perfectly tenable. He says he is the only Iraqi employee of the BBC and he is the only person who has been treated in this, as he asserts, hectoring and humiliating way. Other people whom the BBC solicitors need to approach in-house are approached privately, ordinarily by telephone, and not in these embarrassing circumstances. If that is right it seems to me not only that the description by the Employment Tribunal of the degree of detriment which he claims to have suffered is sufficient in any event, but that the detriment is not necessarily that tenuous. Detriment does not require medical attention. It may very well be that public or personal humiliation is a perfectly sufficient detriment to attract the attention of the Race Relations Act.

6. Moreover, Dr Jiad has shown me today a letter which was evidently on the file all along but which appears to have escaped the attention of the tribunals below. It is a print-out of an E-mail from him to Lesley Granger dated 13th January 2000 - that is to say, some three weeks before the episode complained of, which was on 7th February 2000 - which below his signature gives his BBC extension number, his home telephone number, his mobile number and his private E-mail address. If that is the case then the reason which was accepted in the subsequent correspondence by the remaining three respondents as sufficient to answer any case of harassment, namely that the third respondent had no option but to approach the applicant directly, does start to require some scrutiny. So far it has not had it.
7. All of this, it is quite true, falls some way short of conclusively demonstrating less favourable treatment on racial grounds; but the jurisprudence of this court has made it clear for many years that tribunals of fact are not able simply to sit back and say that unless there is overt proof of racial motive the claim fails. Where there is (a) a difference of race and (b) a difference of treatment, tribunals are expected to look carefully to see what the reason is. If a satisfactory non-racial reason does not emerge then they are further entitled to infer that the reason was racial.
8. I have no idea what the ultimate conclusion might be in the present case, but it does seem to me, having heard Dr Jiad, to be distinctly arguable, first, that he did have a tenable claim for race discrimination and possibly victimisation too which was entitled to go to a full hearing and, secondly, and in any event, that there was in any event no basis for the punitive award, because that is what it is, of £3,500 costs against him in the Employment Tribunal for having initiated his claim.
9. All I have to decide today is whether there is an arguable case; it seems that on the grounds I have indicated there is.
10. The risks as to costs for both parties are very considerable. It does not follow from my grant of permission that the case has to go to a full appeal hearing. I would very strongly commend two things. I would commend to both parties an immediate attempt to resolve this - and if there are other outstanding disputes, those as well - by some appropriate form of alternative dispute resolution. This court has resources which it will make available to the parties in order to assist them to find a suitable mode of resolution. It seems to me that this is an unhappy situation which it is to no one's advantage to carry through to litigious and expensive conclusions, and to every one's advantage to resolve by an amicable and sensible understanding.
11. The second thing that I would like to say is that if the matter does proceed in this court, I think Dr Jiad ought to make every effort to be represented. He is a highly intelligent man who presents his case moderately, but he is not a lawyer. I think this case, like most discrimination cases of any seriousness, needs a lawyer. But lawyers are not necessary for mediation; indeed, lawyers frequently get in the way of mediation. I hope mediation will take first place in what now follows.
12. Subject to these conclusions, permission to appeal is granted.

Order: Application granted. Extension of time allowed with liberty to BBC to set it aside at own risk re costs. Transcript of judgment to be made available to both sides at public expense.