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# England and Wales Court of Appeal (Civil Division) Decisions

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**Neutral Citation Number: [2009] EWCA Civ 454**

Case No: A2/2008/2385

IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL  
HHJ McMULLEN QC  
UKEAT/0315/08/LA

Royal Courts of Justice  
Strand, London, WC2A 2LL  
20/05/2009

Before:

LORD JUSTICE MUMMERY  
LORD JUSTICE RIX  
and  
LORD JUSTICE MOSES

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Between:

<b>RANK NEMO (DMS) LIMITED &amp; Ors</b>	<b>Appellant</b>
<b>- and -</b>	
<b>MR LANCE COUTINHO</b>	<b>Respondent</b>

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MR NOEL DILWORTH (instructed by Goodman Derrick LLP) for the Appellant  
MR LANCE COUTINHO the Respondent appeared in person  
Hearing date: 20th March 2009

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HTML VERSION OF JUDGMENT

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Lord Justice Mummery :

### Introductory

1. What protection does the law extend to an ex-employee against acts of discrimination and victimisation by a former employer after the termination of their employment relationship? The wealth and variety of judicial opinion in the **Rhys-Harper** group of appeals are evidence of the difficulties in settling on a single test: see **Relaxion Group plc v. Rhys-Harper; D'Souza v. Lambeth LBC; Jones v. 3M Healthcare and other appeals** [2003] ICR 867, [2003] UKHL 33. Parliament, after relevant consultation on the different tests in **Rhys-Harper**, needs to enact just one reasonably workable test for determining discrimination liability in the sensitive area of expired employment.
2. Unless that is done soon the tribunals and courts will regularly face the difficulties that confronted the Court of Appeal in **Woodward v. Abbey National plc** [2006] ICR 1436. Ward LJ posed the question (at paragraph 23) "What did **Rhys-Harper** decide?" He proceeded, with judicial caution, through a valuable analysis of the five opinions to some conclusions (at paragraphs 49 to 53) and ultimately to a declaration of surrender (at paragraph 69), in which I would also join, that it was not "right or proper for us at this stage, and in the absence of argument about it, to spell out exactly what test their Lordships have laid down."
3. Is Mr Coutinho (the Claimant) entitled to *claim* the post-termination protection sought by him in this case? The question is put that way because the issue is whether his case should be accepted for adjudication at all. He has acted in person throughout. That is not easy. Nowadays it is not unusual. Citizens who are neither rich nor powerful find that they have been priced out of legal representation in the civil courts and tribunals. There is the safety net of pro bono advice and advocacy services on which the civil courts and their users are increasingly reliant. The services available through the Citizens' Advice Bureaux, Law Centres and the Solicitors' and Bar Pro Bono Schemes are much in demand. However, despite his lack of legal representation and an apparent inequality of arms, the Claimant has achieved considerable success on a point on which judicial opinion is not unanimous.
4. The context of the case is an unexplained failure to honour an employment tribunal award of compensation for unfair dismissal and unlawful racial discrimination (Mr Coutinho is British Asian.) This is not an isolated instance of an employer contesting a case in the employment tribunal system, but then, having lost, failing to respect the legal authority of the system of adjudication in which he has participated. After we had reserved judgment the Justice Minister issued a statement (unconnected with this particular case) proposing to "name and shame" the culprits by entering employment tribunal awards in the Register of Judgments, which is open to public inspection. It is not for a court of justice to "name and shame" in this way. Its only function in this appeal is to decide a cold, dry jurisdictional question: did the employment tribunal (ET) err in law in holding that it had no jurisdiction to entertain the claim for victimisation of the Claimant against a party which was bound by the ET award, but failed to honour it?

### Background

5. The Claimant worked for Vision Information Services (UK) Limited (Vision) as a project leader from January 1997 until he was made redundant in March 2004. In July 2004 the undertaking in which he had been employed was transferred to the appellant, Deluxe Media Services Limited, now called Rank Nemo (DMS) Limited (Rank Nemo).
6. The Claimant took his case of automatic unfair dismissal and race discrimination to the employment tribunal (ET), which, for reasons given in judgments of 6 June 2006 and 5 October 2006, awarded him compensation totalling over £72,000. There were unsuccessful appeals to the Employment Appeal Tribunal (EAT) (1) by Vision on liability and (2) by the Claimant on the amount of compensation.
7. Liability for the award had passed to Rank Nemo by virtue of Regulation 5(2) of the Transfer of Undertakings Regulations (TUPE.) The ET held that the dismissal by Vision was automatically unfair for a TUPE-transfer related reason: see Regulation 8(1) TUPE. The award was not honoured, even after the Claimant obtained an order in the Slough County Court on 15 December 2006 for the total sum of £72,508.75. A county court judgment was required, as the ETs have no powers to enforce their own judgments. The main reasons advanced by Rank Nemo for contesting this victimisation claim in the ET, the EAT and in this court are that (1) the Claimant relies on enforcement powers which the ET does not possess and (2) his claim is not linked to his former employment. As it relies only on the fact of non-payment of the award, the claim is outside the jurisdiction of the ET and it does not constitute the statutory tort of victimisation contrary to sections 4(2)(b) and (c) of the Race Relations Act 1976 (the 1976 Act).

8. On 30 April 2008 the Claimant presented a complaint to the ET against Rank Nemo seeking redress for victimisation. A number of individual respondents were also joined. They are accused of aiding the victimisation of the Claimant by Rank Nemo, as they were responsible for its conduct.
9. On 2 May 2008 the ET decided that the victimisation claim could not be accepted. It held that it had no jurisdiction to consider it and said-

"It is a question of enforcement which is not a matter which the employment tribunal has power to interfere with. Any potential victimisation claim would have to flow on link between the bringing of the claim and the less favourable treatment."

10. On 20 May 2008 the ET refused the Claimant's application for a review of the decision.
11. This appeal, brought with permission granted by Pill LJ on 18 December 2008, is from the decision of the EAT (HHJ McMullen QC), which allowed his appeal on 16 September 2008 concluding (paragraph 24) that

"...this case cries out for determination on the facts rather than for it to be stopped even before a strike out is reached."

12. The rival arguments are quite simple. Rank Nemo's case is that in substance the claim of victimisation based on detriment or deprivation of a benefit by less favourable treatment consists of nothing more than an allegation that it has not honoured the ET award or satisfied the county court judgment. It was open to the Claimant to enforce the county court judgment by invoking the legal procedures available to all judgment creditors. The ET is not an available forum for the enforcement of the county court judgment either directly or indirectly through victimisation proceedings.
13. Further there has been no victimisation contrary to the 1976 Act. The treatment which the Claimant alleges is not based on a current employment relationship, nor is it sufficiently proximate to or closely connected with a past employment relationship and the loss of benefit alleged cannot be regarded as an instance, incident or benefit of that relationship for the purposes of a victimisation claim. Putting it another way the Claimant is a judgment creditor who has chosen not to enforce the benefit of his judgment, rather than an ex-employee with a justiciable post-termination discrimination complaint whether based on the loss of an employment benefit or on detriment. Their Lordships opinions in **D'Souza** (see above and below) are cited in support of those contentions.
14. The Claimant's response is that none of this begins to answer his claim. He does not in these proceedings invoke any jurisdiction to enforce the ET award or the county court order. He accepts that the ET has no enforcement powers. His claim rests not so much on the fact of an unsatisfied judgment as on the reason why and the circumstances in which the judgment debt has not been paid, in particular the unexplained less favourable treatment of him when compared with the other creditors who have not done a protected act and whom Rank Nemo have paid. It is premature, he says, to reject his claim at this stage on jurisdictional grounds. The facts of a prima facie justiciable claim should proceed to full investigation by the ET.
15. The Claimant strongly disputes the contention that his claim has no link with his past employment. In the previous ET proceedings he established that he was the victim of discrimination in his employment. In the new proceedings he alleges that this discrimination continues in the form of detrimental and less favourable treatment for what he did in seeking to claim his employment rights against his former employer. The Claimant described Rank Nemo's conduct as "retaliation" for bringing and winning his discrimination claim.

#### The law

16. s 15(1) Employment Tribunals Act 1996 provides that

"any sum payable in pursuance of a decision of an employment tribunal in England and Wales which has been registered in accordance with employment tribunal procedure regulations shall, if a county court so orders, be recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court."

17. Direct race discrimination is defined in section 1(1) of the Race Relations Act 1976 (the 1976 Act) as covering the case in which, on prohibited grounds, A treats B less favourably than he treats or would treat other person in the same circumstances.

18. The 1976 Act applies to discrimination in the employment sphere-

"4 (2) It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee-

(a)....

(b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or

(a) (c) by dismissing him, or subjecting him to any other detriment."

19. Discrimination by way of victimisation is defined by section 2

" A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does it by reason that the person victimised has-

(a) brought proceedings against the discriminator or any other person under this Act; or

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or

(c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do any of them."

20. Under section 33 of the 1976 Act a person who knowingly aids another person to do an act made unlawful by the Act is treated for the purposes of the Act as himself doing an unlawful act of the like description. An employee for whose act the employer is liable is deemed to aid the doing of the act by the employer.

### **EAT judgment**

21. The EAT gave the following reason for allowing the Claimant's appeal.

"21. So, the central issue is: is the Claimant enforcing the judgment debt? In my view he is not. Of course the background is that he has not recovered the debt. He has been put to the trouble of going to the County Court. An Order

was made which Rank Nemo has disobeyed. No explanation has been given to me why this Respondent who seeks justice in Employment Tribunal and EAT proceedings, is not doing justice in accordance with Orders of the Court. I indicated to Mr Dilworth, Counsel for the Respondent, that if this were a matter of discretion it would be one I would wish to take into account. It is not a matter of discretion. It is a matter of construction of the claim form and the Employment Judge's reason, set against the jurisprudence, beginning with **Rhys-Harper**.

22. In my judgment it cannot be said that there is no link between the acts said to be committed and to be wrongful in the Claimant's claim form, and the bringing of the proceedings. There is an expectation, not just that people will obey the Orders of the Court or a Tribunal but that a person engaged in litigation against his employer in which he is vindicated can expect that Orders will be observed. The Order for payment of compensation is inextricably linked to the employment relationship. The award is just and equitable, in the light of the statutory torts of race discrimination and unfair dismissal.

23. Looking at the claim form, it cannot be said that there is no such link so as to cause the Secretary and Employment judge to refuse to accept the claim. It is not necessary for me to say more, for this case should now proceed along its ordinary route. Since the Claimant has proved an error, the matter is now in my hands. I direct the claim be accepted."

#### **Rank Nemo's submissions**

22. The **D'Souza** case was the anchor of Rank Nemo's detailed submissions that there was no justiciable case of victimisation. Mr D'Souza obtained an order for re-instatement in ET proceedings for unfair dismissal, race discrimination and victimisation against his former employer, who told him that it was not willing to re-instate him. The ET subsequently held that it was not practicable to re-instate him and declined to make an order for compensation under section 71(2) (b) of the 1978 Act for the failure to re-instate him. The ET did make him an award of compensation for unfair dismissal having regard to the fact that the employer had failed to re-instate him. He had brought further proceedings for continuing race discrimination and victimisation in deciding not to re-instate him as ordered by the ET. The House of Lords, which was concerned only with those last proceedings, unanimously held that his claim fell outside section 4(2) of the 1976 Act and that the ET had no jurisdiction to hear it.
23. In his opinion Lord Nicholls concluded that the discriminatory conduct alleged by Mr D'Souza did not fall within s 4 of the 1976 Act.

"50. ....The effect of the relevant legislation can be summarised as follows. An order for reinstatement by an employment tribunal is an order that the employer shall treat the employee in all respects as if he had not been dismissed. It is one of the orders an employment tribunal may make, in the exercise of its discretion, if it upholds an employee's complaint that he was unfairly dismissed. If an employer fails to reinstate an employee as ordered the tribunal is required to make an award of compensation for wrongful dismissal, with an additional award where the employer fails to satisfy the tribunal that it was not practicable to comply with the order: see sections 68, 69 and 71 of the Employment Protection (Consolidation) Act 1978, now sections 112, 113, 114 and 117 of the Employment Rights Act 1996.

51. In my view the benefit acquired by an employee from a re-instatement order cannot be regarded as a benefit within the

meaning of section 4(2) of the Race Relations Act. It does not arise from the employment relationship. It derives from an order of the tribunal, made in exercise of its discretion, after the employee has been unfairly dismissed. Such an order is a discretionary statutory remedy for unfair dismissal, attracting its own sanctions in the event of non-compliance. Nor, for the like reason, can the employer's failure to comply with the order be regarded as a detriment within section 4(2).

52. Nor does the case fall within section 4(1). Lambeth's conduct is not readily characterised as "deliberately omitting to offer" Mr D'Souza employment within the meaning of section 4(1)(c). The nature of Lambeth's act was different. Lambeth was not in the normal position of a prospective employer. What Lambeth did was to fail to comply with a tribunal order which required the council to restore an employee to the employment from which he had been dismissed. That characterisation, coupled with the feature that the statute itself provides remedies for non-compliance with a reinstatement order, points strongly away from this circumstance being within section 4(1)(c) of the Race Relations Act. I would so hold."

24. Mr Dilworth emphasised that the essence of the Claimant's complaint was the same as Mr D'Souza's: a failure by a former employer to do what was ordered by the ET after the employment relationship had come to an end, in this case an order to pay compensation, in D'Souza an order to re-instate. Either way the ET had no jurisdiction to hear a case of victimisation based on failure to comply with the ET's order.
25. While agreeing that there is a similarity between **D'Souza** and this case, I am of the view that Mr Dilworth's submission is not a correct reading of the opinions of their Lordships in **D'Souza** and that, properly understood, that case is clearly distinguishable on the ground that the former employer's failure to reinstate as ordered has its own exclusive statutory remedy and that there is no other remedy such as compensation for victimisation.
26. As Lord Hope said

" 125. ...Failure to comply with an order for reinstatement by the tribunal will result in an award of compensation under the statute. There is no other remedy. What the 1996 Act does is to lay down a statutory procedure by which the employee obtains the benefit of the original contract..."

27. Lord Hobhouse said

"160. The problem for the applicant [D'Souza] is that his essential complaint remains that he was not reinstated. It is this act which he alleges amounted to discrimination and victimisation. But he has already, pursuant to the earlier decision of the employment tribunal, been compensated by the borough for the failure to reinstate and there is nothing further which can form the basis of a claim for compensation...."

28. Lord Scott, in agreeing with Lord Nicholls, said

" 205. (1) ....

(2) .....The statutory remedy of reinstatement is associated with the statutory alternative of compensation if reinstatement can be shown to be impracticable. It was so shown in proceedings to which the applicant was a party and by which

he is bound. There is no room for a complementary claim that the council's failure to reinstate him was discriminatory."

29. Lord Rodger agreed with Lord Nicholls: see paragraph 221.
30. Mr Dilworth added that the loss of benefit and/or detriment alleged does not relate to a right arising from the contractual relationship of employment. It arises from the ET's award or order itself. That is not the type of employment benefit or detriment that can fall within s 4(2) of the 1976 Act. The form and assessment of compensation awarded is qualitatively different from the benefits of an employee from the employment relationship, such as the benefit of a grievance procedure or the benefit of a reference discussed in the **Rhys-Harper** opinions.

### Discussion and conclusion

31. This is without doubt a novel claim. An understandable initial reaction is to question the necessity for victimisation proceedings in the circumstances of this case. Such a claim would not be available to an ordinary judgment creditor. There are available to the Claimant, as there are to other creditors who have had to pursue their cases to judgment, purpose-made procedures for the recovery of judgment debts. It is true that employees are given special statutory protection against victimisation by their employers, present and past. But what connection does this claim have with an employment relationship which terminated five years ago?
32. Despite initial reservations it is, in my judgment, premature to reject this claim without an investigation into the facts and an analysis of the law in the light of the facts found. I would make the following points in favour of dismissing this appeal.
33. First, it was not in dispute that, as this is a jurisdictional challenge to the Claimant's case, the facts alleged in his complaint of post-termination victimisation must be assumed in his favour, though they are disputed by Rank Nemo: see, for example, **Metropolitan Police Service v. Shoebridge** [2004] ICR 1690 per Burton J at paragraph 4.
34. Secondly, although Rank Nemo was not the Claimant's employer and did not do the acts giving rise to the liability to pay him compensation, it stands, as TUPE transferee, in the shoes of Vision, which incurred the liabilities to the Claimant.
35. Thirdly, this case is not, as a matter of law, concluded against the Claimant by the reasoning in the **D'Souza** case. As already explained there is an important distinction between a complaint that an award of compensation by an ET for unfair dismissal and discrimination has not been honoured, as in this case, and a complaint that an ET's order for reinstatement has not been honoured, as in **D'Souza**. In his case Mr D'Souza could not claim further compensation under the 1976 Act for the failure to reinstate him, as the unfair dismissal legislation (both the 1978 Act and the 1996 Act) itself provided an express and specific statutory remedy against an employer who failed to do what the ET ordered by way of reinstatement. That was the only statutory remedy available. There was no room for a victimisation claim for failure to re-instate.
36. Fourthly, I would reject the submission that this claim must fail on the ground that the ET has no power to enforce its decisions. The action is not brought to enforce an ET judgment or a county court order. It is brought on the basis that Rank Nemo's unexplained conduct in not complying with a judgment obtained by a former employee is unlawful because it is discriminatory in an employment context. The unlawfulness in that context lies in an alleged subjective reason for that conduct; a protected act in the form of the previous proceedings arising out of his employment; the alleged less favourable treatment of the Claimant, as compared with the treatment of other creditors, including staff subsequently made redundant who received payment of their contractual entitlement; and the loss of employment benefits (the contractual right to redundancy pay) or detriment alleged to have been suffered.
37. Fifthly, there is a specific statutory right of action under the 1976 Act for the wrong of discriminatory treatment in an employment context. That right not to be victimised for doing a protected act is neither expressly nor impliedly excluded by the legislation just because the employee is also a judgment creditor with rights to invoke enforcement procedures against his present or past employer.
38. I would reject the proposition that, as a matter of law, the current status of the Claimant as a judgment creditor has severed all possible links with his past employment and that he has in consequence lost all

his statutory protection from victimisation qua employee. His claim is not based solely on the respondent's failure to pay the judgment debt. That is only one ingredient of the right of action invoked by him. It is a cause of action which could, in principle, even survive the satisfaction of the judgment debt. It is necessary to inquire into the reason why the respondent has not paid the award since it was made and why it has not satisfied the judgment debt since the county court order was obtained. If it is established by direct evidence or by inference that the reason is, as alleged by the Claimant, retaliation against him for having brought proceedings for discrimination against the employer, then there could be a possible link to the previous employment relationship sufficient to support a claim for post-termination discrimination. Investigation of the facts may reveal that there is a sufficiently substantial close or proximate connection to his expired employment to satisfy the requirements of a victimisation claim in a post-termination situation. Subject to any considerations of double recovery there might then be no reason, in principle, why the Claimant should not be able both to enforce the county court judgment and to recover damages for any loss of benefit or detriment suffered in consequence of victimisation.

### **Result**

39. I would dismiss the appeal. The EAT rightly held that the ET had erred in law in rejecting the victimisation claim for want of jurisdiction. The ET has jurisdiction to accept the claim form. It is for the ET now to investigate the facts of the case, apply the law as laid down in the House of Lords and, in the light of the judgments in this case and other cases, to adjudicate upon the claim.

### **Lord Justice Rix:**

40. I agree.

### **Lord Justice Moses:**

41. I also agree.