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Well-Intended Dishonesty Backfires on Employer (UK)

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Good faith lying – an interesting concept ethically but, in practical terms, vital grease in the wheels of a civil society – "no, it was delicious, honestly, I'm just a bit full", "I love your parents" and (especially in the legal world) "with great respect".

But what if you lie to your employee in the genuine and quite reasonable belief that it will make things easier all round, and are then caught? How bad can it be and what credit do you get in the Employment Tribunal from trying not to upset the employee unnecessarily?

Very and none respectively, according to the Court of Appeal in Base Childrenswear –v– Otshudi this week. Otshudi's line manager thought that she was stealing from the business and so dismissed her, but told her that it was by reason of redundancy instead. Very decent of him, you might think, giving her a no-fault reason allowing a dignified exit, notice pay and a non-harmful reference in circumstances where a dismissal for theft would bring her none of those things.

No doubt somewhat ungratefully in Base's view, especially because she lacked service enough to claim unfair dismissal, Otshudi nonetheless alleged that in fact her dismissal was by reason of her race. Base ignored her grievance to that effect and its ET3 made it clear that her dismissal was "purely for financial/economic reasons".

Shortly before the hearing and some 15 months after Otshudi's dismissal, however, Base's position suddenly shifted. The manager now said that in his view Otshudi was stealing or planning to steal some Base stock. There was some fairly tangential evidence, including the allegation that Otshudi had been "*talking … in French … in an agitated and suspicious manner*", which seems to have been regarded as settling the issue, really, or at least as enough for Base to decide not to ask Otshudi about any of it. The redundancy lie had been to "*minimise the potential confrontation*" and had nothing to do with her race, it said.

The issue for the Court of Appeal was what impact, if any, this notionally well-intended fib had on the relevant burden of proof. In particular, was it enough to suggest race as a possible explanation for the manager's conduct and so push the burden of disproving it onto Base?

There were other factors in the mix too – blanking the grievance was clearly a bad call, for example, and why did Base leave it so long to run the theft case in circumstances where it was obvious from both the grievance and the Tribunal claim that the confrontation it was trying to avoid was clearly both real and not in any way minimised? On the other hand, there is high-level authority that discrimination should not be inferred simply on the basis that the employer has acted unfairly or unreasonably, and there was nothing obviously race-related said or done to Otshudi.

In the end, the Court of Appeal did not disturb the Tribunal's inference that the lie was just Base seeking to cover up a dismissal tainted by considerations of Otshudi's race. What tipped it into a race issue was that it was allegations of race discrimination that Base had ignored in Otshudi's grievance and responded to dishonestly in its Tribunal defence. However, it was a close-run thing. "*I am bound to say*," noted the Judge, "*that I am not sure that I would have reached the same conclusion as the Tribunal*" (which is essentially another well-meaning white lie meaning "I am entirely sure that I would not have done"). But pursuing that divergence of view would be a question of fact, and appeals can only be made on issues of law, so the Tribunal's view stood.

That moved the burden of disproving a racial element to Base. Not a heavy one, you might think – given her short service (hence no unfair dismissal claim), Base had to show only that it genuinely believed in the theft, not that it was a fact or even that its belief was reasonable. And so it did, up to a point. That point, unfortunately for Base, was that while the manager's belief was found genuine, it was so scantily supported by evidence or investigation that the Tribunal concluded it to be the product of his stereotypical views of black Africans as likely to steal. As a result, Base failed to show Otshudi's dismissal to be unrelated to her race, and so it lost.

Quite aside from nearly £30,000 compensation plus interest and a 25% uplift for Base's disregard of the Acas Code, the Tribunal also showed its disapproval of the misrepresentation of the grounds for dismissal by an order in Otshudi's favour for her costs in dealing with the completely spurious redundancy argument in Base's ET3.

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