



EMPLOYMENT TRIBUNALS

Claimant: Mr Kirk Josephs

Respondent: Sainsbury's Supermarkets Ltd

Heard at: London south Employment Tribunal
On: 24 May 2017

Before: Employment Judge Martin
Ms S Campbell
Ms C Oldfield

Representation
Claimant: In person
Respondent: Mr Jolley - Counsel

REASONS FOR THE TRIBUNAL JUDGMENT DATED 24 MAY 2017

1. Full oral reasons were given at the conclusion of the hearing. These written reasons are produced at the request of the Claimant.
2. There was a case management discussion on 20 March 2017 during which the issues were agreed. The claimant's claim is of less favourable treatment on the grounds of his race.

Direct discrimination

3. S13 Equality Act 2010

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

4. The provisions as to the burden of proof are now set out in section 136 of the 2010 Act.

5. 136 Burden of proof
 - (1) This section applies to any proceedings relating to a contravention of this Act.
 - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
 - (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
 - (5) This section does not apply to proceedings for an offence under this Act.
 - (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) – (f)
6. In considering the claim of direct discrimination, the first task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases the task of the Tribunal is to ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any

The Tribunal's findings and conclusions

7. By a claim presented by the claimant on 23 January 2017 he made a claim of race discrimination in relation to an application he made to work for the response which was not successful. The Respondent defended the proceedings in its response dated 7 March 2017 in which it said the reason for not proceeding with the Claimant's application was because he could not provide the documents required to show he had the legal right to work in the United Kingdom.
8. The Tribunes heard evidence from the claimant and for the Respondent from Mr Felix Oziwo – Store Manager. There was a bundle of documents comprising 129 pages.
9. This is a claim brought by the claimant against the respondent in relation to an interview process and which he had with Mr Oziwo. The respondent has various policies relating to recruitment including a right to work policy which

includes a checklist setting out the steps to take in an interview and a checklist of what documents an applicant needs provide in order to establish a right to work in the United Kingdom. The claimant did not challenge those documents. The Tribunal is satisfied that Mr Oziwo was trained when he joined the Respondent in equal opportunities, and there was other training he undertook which specifically dealt with the right to work. In particular there was training just before the interview with the Claimant as there had been some changes to the permitted documents to be produced by a candidate.

10. There were two interviews between the claimant and Mr Oziwo. At the first interview on 18 November 2016, Mr Oziwo did not consider the claimant had brought the documentation which was required to prove his right to work in the UK, and therefore a second interview was set for 22 November 2016 to give the claimant the opportunity to provide the documentation which the claimant said he had. The immigration rules had changed just before the interview. Previously it was acceptable to show a right to work for the indefinite leave to remain endorsement to be in an expired passport. The claimant had a Jamaican passport which had expired, which had that endorsement in it. However, a few weeks before these interviews, there was a change in the law and an endorsement in an expired passport and was no longer one of the documents, which was acceptable for an employer to see as proof of the right to work in the United Kingdom. What was then required was for a current passport to have this endorsement. The claimant accepted that his current passport does not have that endorsement.
11. There was some dispute about what documents the Claimant showed Mr Oziwo. The Tribunal started by considering the documents taking the claimant's case at it highest and took it that the documents the claimant says he produced to Mr Oziwo were produced without necessarily going through and making determinations about what documents were actually produced to Mr Oziwo. This was a first step to see whether those documents would have complied and with what was required. If they did comply then we would have gone on to consider what documents were produced.
12. The claimant's case is that he provided a copy of his expired Jamaican passport which had the endorsement, a copy of his current passport, which did not have the endorsement and letters from the immigration office. One dated 1993 which the Claimant says satisfied the requirement of an immigration status document which is set out in annex a list of acceptable documents for right to work checks, and which is part of the respondent's policy and reflects the legislation. The question is whether these letters do satisfy that requirement.
13. Mr Oziwo gave evidence that he is familiar with Immigration Status Documents having seen them during his time as a manager and he regularly interviews people to work at Sainsbury's. He described a document which is a formal document with a photograph and is divided into four sections on a single sheet of paper. The Tribunal looked at the way the document is described in the annex first looking at page 97 of the bundle and noted that the words 'Immigration Status Documents' are capitalised indicating it is a title of a document rather than just a document which says that you may have the right to work. We also looked at the next page of this document and, whilst recognising that the list shown there was not a list which applied to the claimant, noted that when talking about Immigration Status Documents said that that this document contains a photograph issued by the Home Office to the holder with a valid endorsement indicating that the person may, work in

the UK. That is an indication to us of the type of document that the Immigration Status Document is. The Tribunal's finding is that this document is as described by Mr Oziwo and is a formal document with a photograph and endorsement from the Home Office. The Tribunal's finding is that the letters from the Home Office relied on by the Claimant do not satisfy that requirement and further do not satisfy any of the list of acceptable documents required to demonstrate the right to work in the UK.

14. Therefore, even on the claimant's best case he did not satisfy the documentary checks that employers have by law to take before they employ someone. We accept that if a person is employed, then the employer must take copies of the documentation to prove that they have done the necessary checks. So even if the documents were false, they have a statutory defence on that basis. This is the reason why Mr Josephs interview was terminated both at the first occasion and on the second occasion in accordance with the Respondent's recruitment policy which states that an interview cannot go ahead unless the candidate produces the documents required to prove a right to work in the UK. The Claimant was not treated less favourably on the grounds of his race. The reason for not continuing with the interview was that the Respondent would have been in breach of statutory requirements and could be liable to a hefty fine. This is an explanation for the refusal to continue with the interview process which is not related to the Claimant's race. The Claimant's claim of race discrimination is dismissed.

Employment Judge Martin

Date: 27 June 2017

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.