EMPLOYMENT TRIBUNALS

Claimant: Mr C Niba

Respondent: Platt and Hill Limited

HELD AT: Manchester **ON:** 30 June 2017

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person
Respondent: Mrs M Peckham, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's complaints are struck out pursuant to rule 37(2)(a) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. By a claim presented to the Tribunal on 8 March 2017 the claimant made complaints of race and age discrimination.

2. In summary, the claimant's position factual complaint was this.

3. He had seen an advertisement for a position with the respondent which operates a mill at Oldham for a warehouse operative on the universal job match website maintained by the Department of Work and Pensions in early December 2016. He was required to apply by sending an application by email.

4. He maintained it took him a couple of days to get his application together. In the meantime he looked at the website of the company, which described itself as a family owned and run company. It stated, according to the claimant's ET1 form, "…for customers …trust is an integral part of the relation. The management are not faceless individuals who hide away in the far boardrooms". It listed people who were said to be "key personnel".

5. The claimant's case was that on 5 December 2016 he submitted his job application and CV.

6. It is common ground that he identified his age as 47, but not his race, in that email. After seven days, and having no acknowledgement, he emailed again.

7. A Mrs Curley replied on 13 December 2016 saying, "I haven't received your CV. Please could you re-send it?". The claimant did and at 1.18pm on 13 December 2016 his CV was received and he received an acknowledgement for that. Mrs Curley wrote:

> "I have passed it to our Despatch Manager who will be in touch if necessary."

8. The claimant's case is that he heard nothing after that from mid December until on 8 January 2017 he emailed Mrs Curley again. He described himself as being in "shear confoundment, frustration and feeling very humiliated". His case was that his email was totally ignored and as a result on 17 January 2017 he emailed Mrs Curley what he described as "a comprehensive email outlining his concerns about his treatment and alleging discrimination" and he said that he pointed out what proper employment practices were.

9. He received a reply from Mrs Curley on 17 January 2017 which he described as "ambivalent" but which said:

> "I acknowledge your email and I can assure you our managers are aware of the employment law practices. As you can appreciate we have many applications for each job we advertise and we cannot reply to them all. However, your CV is still on file and will be considered if anything suitable arises. Kind regards."

10. Mr Niba described that email as clearly seeking to dismiss him or be rid of his enquiries. He drew attention to the fact that Mrs Curley was not the recruiter but a despatch manager was, and he had not heard directly or indirectly from the despatch manager and that one could "use the expression 'faceless' … about 'this entity'." He said if not replying to him was a "neutral policy" it had disadvantaged him.

11. For those allegations of discrimination he claims compensation of a year's pay.

12. By its response the respondent denied the claim. It did not take issue with the facts pleaded in terms of the process, but went on to plead that the respondent was not aware of all the ages or nationalities of the applicants. In submissions Mrs Peckham told me there were some ten applicants. One of them was a man who was interviewed for the role on 12 December 2016, it was said, because of his previous warehouse experience. After that because of a downturn in business over Christmas he was not offered the job and he was not informed that he had not got the position. The age of that particular applicant was not known to the respondent.

13. The respondent applied to have the claim struck out as having no reasonable prospect of success.

14. A preliminary hearing under rule 53 to identify the issues was convened for 24 April 2017 but the claimant, as I understand through ill health, did not attend, though Mrs Peckham did.

15. Because there was no attempt to contact the Tribunal or provide an explanation for his non attendance Regional Employment Judge Robertson made a Case Management Order requiring the claimant to show cause why the claim should not be struck out, and saying that if he did so, that is show cause, the claim would be listed for a further preliminary hearing to consider whether the claim should be struck out under rule 37 or made the subject of a deposit order under rule 39.

16. That caused the claimant to write in on 6 May 2017 explaining why he had not attended. Regional Employment Judge Robertson was, on the basis of that, persuaded that it would be disproportionate to strike out the claim because of the claimant's non attendance and therefore listed the matter for this preliminary hearing to consider whether the claim should be struck out or made the subject of a deposit order or list it for a hearing and directions made.

17. That is what led to the hearing before me.

18. For the respondent Mrs Peckham said that she maintained the application to strike out, submitting that there was no pleaded link with any protected characteristic, and that to give no response to an application for a job, or not interviewing a candidate or not offering a job, do not in themselves raise a presumption less favourable treatment in respect of or because of a protected characteristic.

19. I invited the claimant to make submissions. He submitted that the fact that the respondent did not reply “showed their standards of behaviour” and was in contrast to their website that where they describe themselves as “a friendly company”. He reiterated the history that I have set out above.

20. The respondent’s submissions were that it received some ten applications. A number of applicants had recent warehouse and driving experience. The claimant's experience was only as a warehouse operative some 17 years previously. Mrs Peckham was not aware if anybody else was interviewed other than the person identified in the ET3 to whom a job would have been offered. She did not know whether the other CVs had been treated in the same manner as that of the claimant, namely by sending no reply unless they were chased. She acknowledged that perhaps the company could have done better and perhaps acted more courteously in replying to Mr Niba. She submitted that effectively Mr Niba’s case, that there was a dishonest omission to reply to his application, did not raise a prima facie case of discrimination.

21. Claims of discrimination, as has often been said by the Employment Appeal Tribunal, are important and the Tribunal should be slow to strike them out without a hearing of the evidence. However, rule 37 provides in material part:

> “At any stage of the proceedings a Tribunal may strike out all or part of a claim on any of the following grounds –
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> ….that it has no reasonable prospect of success.”

22. Direct discrimination is defined in section 13 of the Equality Act 2010:

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

23. For the purpose of determining claims of discrimination the Act provides for the burden of proof in section 136 which provides that the section applies in any proceedings under the Act, and it goes on at subsection (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, but subsection (2) does not apply if A shows that A did not contravene the provision."

24. What that means, as has been clarified by the Court of Appeal in particular in the case **of Madarassy v Nomura International Plc** [2007] IRLR 246 CA, is that, in order for the burden of proof to pass to the respondent, it is not enough for a claimant to assert to the Tribunal, which for these purposes is the Court, that he has a protected characteristic, and has been less favourably treated than an actual or hypothetical comparator was or would have been treated. If the burden of proof does pass then the employer has to show that the protected characteristic was not the reason for the less favourable treatment. If the burden of proof does not pass the claimant's case must fail at that point.

25. The claimant's case here is that he did not receive a reply to his application but that somebody of a different characteristic did receive a reply. The obvious inference he seeks to make is that the person who was interviewed must have received a reply and so he can demonstrate less favourable treatment than another person received.

26. For the sake of argument and in order to consider the application upon the scenario most favourable to the claimant, I am prepared to assume that that person was of a different race and a different age group, although as a matter of fact the contrary might be the case.

27. **Madarassy v Nomura** explains that that is not enough. Those facts alone even taken at their highest, could not be sufficient to cause the burden of proof to pass to the respondent to prove, in accordance with the principles in **Igen v Wong**, no discrimination whatsoever on the ground of the characteristic. What is required is something more. That something more, might come in a variety of ways. It could be a failure to respond to a questionnaire. It could be some other evidence about the recruitment practices of the respondent or the employer. It could be comments overheard by an applicant for employment made by an employer. It could be a pattern of showing that the employment practices of the respondent favour one racial group or one age group against another. These examples are intended to be illustrative rather than prescriptive.

28. What is required is something of this sort. I asked the claimant if he was able to identify the "something more" that he relied upon. What I have recorded above is what he told me. He said he did not feel it was fair to add to his case. I explained that if he could identify a fact which would enable me to find that the burden or proof might pass in this case then that was something that he could identify to me in the hearing and the decision could be taken on that basis. The claimant could not do so.

29. In my judgment, even if the claimant is right, and I am not sure that I can find that he is at this stage, that there was a *dishonest* failure to reply to his application, in other words a deliberate decision for some dishonest reason, whatever that might be, even that would not be enough to cause the burden of proof to pass. A dishonest reason is not necessarily a discriminatory reason. Unless there is a reasonable prospect that the burden of proof would be found to pass the claim has no reasonable prospect of success.

30. I acknowledge that it is unusual in claims of discrimination, which are fact sensitive and should, usually, be determined after hearing evidence, to be struck out at this stage. But a balance has to be struck between the interests of the parties. If the claimant cannot even assert a potential factor which could cause the burden of proof to pass then the respondent is entitled to say to the tribunal, "why should we be put to the expense of defending a claim which cannot succeed even taken at its highest?"

31. In those circumstances a balance can be struck between the interests of the parties. Balancing all those matters, I regret to say that I am persuaded that because of the way the case has been put by the claimant, in his claim form and in his submissions, this case can properly be said to have no reasonable prospect of success. For that reason it is struck out.

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Employment Judge T Ryan

Date_____26 July 2017_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON
28 July 2017

FOR THE TRIBUNAL OFFICE