EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr. M Langley

- and –

Proteus European Recruitment Limited

PRELIMINARY HEARING

HELD AT **London South** **ON 18 December 2017**

EMPLOYMENT JUDGE PHILLIPS

Appearances

For Claimant: **In person**
For Respondent: **Mr E MacDonald, of Counsel**

JUDGMENT

1. *The Claimant's application to strike out the Respondent's grounds of resistance was rejected.*
2. *The Respondent's application for a deposit order in respect of the Claimant's direct discrimination claim was rejected.*
3. *The Claimant withdrew his indirect discrimination claim.*

REASONS

1. There were over-lapping cross applications by the parties. The Claimant was seeking to strike out the Respondent's grounds of resistance (ET3) while the Respondent was seeking deposit orders under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, in respect of the Claimant's direct and indirect age discrimination claims.

Factual background giving rise to the claim

2. The Respondent is an "employment service-provider" within the meaning of section 56 of the Equality Act 2010. The Claimant had been on the Respondent's books for some time, and over the course of that time had applied, unsuccessfully, for a number of vacancies advertised by the Respondent. In the instance giving rise to this complaint of age discrimination, on 8 September 2017, the Respondent had emailed the Claimant about a vacancy for a Network Engineer. The Claimant had submitted his CV. The Respondent's Ms Cowling had replied by email to say:

> "Many thanks for sending me your CV for the Network Engineer role.
> I've had a look though it and although you are a match for some of the requirements I think given your skills and experience, you would be better suited to a more senior role.
> Many thanks for your interest."

3. The circumstances and contents of the email are not in dispute, however there is a fundamental disagreement between the parties as to whether or not it constitutes unlawful discrimination.

4. The Claimant says that the email amounts to direct and indirect age discrimination. He says the email amounted to a rejection of his application and is therefore less favourable treatment on the grounds of his age. That is disputed by the Respondent, who says that, subsequently, on 28 September, the Claimant's application was passed on to the prospective employer. The Respondent therefore maintains that there was no less favourable treatment. The Respondent also maintains that, if there were any discrimination, which it denies, it can in any event justify such action as a proportionate means of achieving a legitimate aim. As far as the indirect discrimination claim is concerned, the Claimant says that the email is evidence that the Respondent was operating a "provision, criterion or practice" (PCP) which preferred applicants of lower rank or less experienced candidates. The Respondent denies there is a PCP that would cause discrimination and further says, if there were such a policy, it would be capable of objective justification.

The applications and submissions in support of them

5. The Claimant had prepared a bundle of what he considered to be the relevant documents for the Preliminary Hearing. The Respondent had been provided with a list of the documents that the Claimant intended to reply on, but not the actual bundle. These documents included the background email correspondence and letters between the parties. It also included the ET1 and the ET3, as well as some additional particulars that the Claimant had supplied to the Respondent on 22 November. The Claimant also helpfully included some relevant legal materials including extracts from the relevant Tribunal Procedure rules, the Equality Act sections relied upon and some guidance from Acas and the Department of Trade and Industry.

6. Both Mr Langley and Mr MacDonald made short oral submissions in support of their respective applications, which I will summarise briefly below.

7. The Respondent was seeking deposit orders under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, in respect of the Claimant's direct and indirect age discrimination claims. The Respondent provided a copy of the EAT's decision in *Hemdan v Ishmail,* 10 November 2016, UKEAT/0021/16, which although dealing primarily with the issue of the ability of a Claimant to comply with a deposit order, also helpfully sets out the background and purpose behind the making of such orders. As Mr MacDonald pointed out, deposit orders have to be made recognising that the facts have not yet been found. Paragraph 9 sets out Rule 39 in full. Mr MacDonald referred me to paragraph 10 of *Hemdan,* which sets out the consequences of a deposit order. The Respondent requested that the Tribunal made an order that the Claimant pay a deposit of £1,000 to be allowed to continue with each of his claims.

8. Mr MacDonald submitted that the email did not disclose any discrimination "because of" age. The Respondent's position is that the Claimant's allegations of unlawful discrimination on the grounds of age have little reasonable prospect of success, because: (1) there is no "less favourable treatment" and (2) even if there was the Respondent is highly likely to be able to establish objective justification. He said the email was clearly talking about the role and not the individual. Mr MacDonald submitted that there was no less favourable treatment, as the employment application had, in any event, been put forward.

9. As far as the indirect discrimination claim was concerned, Mr MacDonald submitted that the Claimant had failed to identify a "provision, criterion or practice" (PCP). Further, he said that there was no evidence whatsoever that the Respondent operated any sort of policy as suggested by the Claimant. Further, he said, even if there was an identifiable PCP, the Respondent was a recruitment agency and as a matter of common and commercial sense would not be refusing to submit applications on the grounds of age. Moreover, there were a number of legitimate aims that could be advanced which would justify the engagement of a less qualified person, as set out in the ET3. It is therefore highly likely, he said, that the Respondent would succeed in proving there was a legitimate aim.

10. The Claimant says the email is on its face clearly age discrimination, as it use the term "senior". he submitted that the use of the words "skills and experience" implied a PCP. He says that since "overqualified" candidates are more likely to be older, this is therefore indirectly discriminatory. He disputes the Respondent's arguments on objective justification. The Claimant repeated some of the arguments he had made in support of his application for a strike out, as set out at paragraph 11 and 12 below. He said the email of 8 September was clearly a rejection. He said he had heard nothing more about the progress of his job application since the Respondent's solicitor's letter of 28 September, saying the application had been submitted to the prospective employer. He says it was only as a result of his tribunal claim that the Respondent suddenly woke up and progressed it.

11. The Claimant sought to strike out the Respondent's grounds of resistance (ET3) relying on s 136 of the Equality Act, (the burden of proof provision) on the basis that the email was prima facie evidence of discrimination and, absent any proper explanation, which he said there was not, his case must succeed. The Claimant maintains that the wording of the email was obviously discriminatory in that the common meaning of the word "senior" invariably pertains to age and that therefor the clear implication of the email is that the Claimant would not be well-suited to the vacancy due to his age. He said the email was "quite blatantly" less favourable treatment and the Respondent made no attempt to progress his application in anything resembling a diligent and timely manner. He said the subsequent "many thanks for your interest" is dismissive and implies a rejection.

12. The Claimant therefore argued that there were facts from which a court could now decide, in the absence of any other explanation, that the Respondent contravened section 13(1) of the Equality Act. Finally, he submitted that the Respondent's claim of objective justification did not get "even close" to passing the relevant test: he submits there arguments are based on "illegitimate, meaningless or absurd" grounds. He submits therefore that against that background, the Respondent's grounds of resistance should be struck out under section 136(3) Equality Act because the Respondent had not shown that it did not contravene section 13(1) and they had therefore failed to discharge the burden of proof imposed on them by section 136. Therefore, the Claimant says the ET3 could have no reasonable prospect of success and should be struck out. The Respondent said, in essence, that the Claimant's submission was based on a misunderstanding of s 136.

Conclusions

13. Having heard the submissions from both Mr Langley and Mr MacDonald on both applications, and having considered the requirements set out in sections 13, 19 and 136 of the Equality Act to enable claims of direct and indirect discrimination to be brought, it seemed to me that there were no grounds to strike out the Respondent's grounds of resistance. Section 136 Equality Act allows for a Respondent, where a claim of discrimination is raised by a Claimant, to defend it with evidence, both as far as the allegation that less favourable treatment occurred, as well as, where appropriate, to seek to justify any treatment that may be found to be discriminatory on the basis that it is a proportionate means of achieving a legitimate aim.

14. A long line of authority (for example, the Court of Appeal in *Igen v Wong,* 2005, and *Madarassay v Nomura,* 2007, and most recently reaffirmed by the Court of Appeal in the case of *Ayodele v Citylink,* handed down on 24 November, which overturned the EAT's August 2017 decision in *Efobi v Royal Mail Group*) has established that, under s 136, a Claimant has first to establish sufficient facts, *which in the absence of an explanation*, point to a breach, whereupon the Respondent then has to show that there was no breach. This therefore allows a Respondent the opportunity to provide an explanation – which it can only do by giving evidence at a hearing. I agreed with the Respondent's submission that they should be given the opportunity to produce evidence to allow a tribunal to determine whether they had made good their defences that (1) there was no less

favourable treatment; and (2) there was a justification defence available to them, even if discriminatory treatment were to be found.

15. I did not believe that, looking at the wording of section 136, which was how the Claimant's strike out case was put, that this was a straightforward knock out win for the Claimant, solely on the basis of the 8 September email. I was not therefore minded to strike out the ET3.

16. As far as the application for a deposit order in respect of the direct discrimination claim is concerned, in my judgment, the 8 September email amounts to a sufficient fact from which an inference arises that the Respondent needs to explain. There were therefore a number of factual matters on which evidence would need to be heard before any final determination could be made, including on (a) the meaning of the 8 September email, both in terms of the language it used and whether it was in fact a rejection; as well as (b) to the timing and motive of the progression of the application on 28 September. I was not persuaded that it could be said at this point that the direct discrimination claim had little reasonable prospect of success.

17. However, as far as the application for a deposit order in respect of the indirect discrimination claim was concerned, I felt this was a very weak claim. While a PCP can apply to recruitment policies and practices, on the facts here, not only had the Claimant not properly articulated a PCP, but the ones he had proffered were, in my judgment, premised on a wording that was not neutral but rather was discriminatory, and was positing what was, in effect, a direct discrimination claim. So, it was not clear what the PCP could be. Further, many of the underlying facts were covered by the direct discrimination claim.

18. Further, there was no evidence that the Respondent operated any sort of discriminatory policy as suggested by the Claimant. The evidence from the Respondent was that the Claimant had been on its books for several years and had made a number of applications. The Claimant did not seek to argue that any previous experiences gave rise to any sort of age discrimination. There was no other evidence about existence of any policy.

19. On this basis, I indicated that I was minded to order the Claimant to pay a deposit in respect of the continuation of the indirect discrimination claim, as I considered that the Claimant's allegations or arguments that the Respondent was operating an age discriminatory "provision, criterion or practice" had little reasonable prospect of success. When the Claimant understood this and that his direct discrimination claim was to continue, he indicated that he would withdraw his indirect discrimination claim. It was therefore not necessary for me to consider further the making of the deposit order or to assess the Claimant's ability to comply with the order. On that basis, the indirect discrimination claim is recorded as having been withdrawn.

Conclusion

20. The indirect discrimination claim is withdrawn. I was not minded to allow the Claimant's application to strike out the ET3, nor to make a deposit order in respect of the direct age discrimination claim, which continues.

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Employment Judge Phillips
18 December 2017
London South