# EMPLOYMENT TRIBUNALS

**Claimant** Miss F. Mubayiwa

**Respondent** Cygnet Health Care Ltd

v

**Heard at**: Watford

**On**: 12 March 2018

**Before:** Employment Judge Heal
Mrs J. Smith
Mrs. G. Binks MBE

**Appearances**

**For the Claimant:** Dr. M. Ahmad, counsel
**For the Respondent:** Miss S. Bowen, counsel

## JUDGMENT

1. The complaints of race and age discrimination are dismissed.
2. The provisional remedies hearing listed for 16 July 2018 is vacated.

## REASONS

1. By a claim form presented on 6 April 2017 the claimant made complaints of race and of age discrimination.

2. We have had the benefit of an agreed bundle running to 341 pages. (We have not however read all the pages of the bundle and we told the parties at the outset that we would read those documents to which they directed our attention.)

3. We have heard oral evidence from the following witnesses in this order:

Ms Filis Mubayiwa, the claimant
Mrs Elizabeth Sinclair, Head of Human Resources Projects and
Mrs Julia Wilkes, sometime Recruitment Team Manager.

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called, and then the witness was cross examined and re-examined in the usual way.

5. Each party provided us with a short chronology and the respondent also provided us with a cast list. Miss Bowen for the respondent produced a written skeleton argument.

6. At a preliminary hearing on 20 October 2017 (orders sent to the parties on 1 November 2017) Employment Judge Wyeth refused an application by the claimant for specific disclosure of metadata for the respondent's assessment day score sheets, tables and notes of shortlisted candidates, and attempts to amend an advertisement.

7. We agreed with the parties that this hearing would deal with liability only, as previously ordered.

***Issues***

8. The parties agreed that the issues were those identified by Employment Judge Bartlett on 22 June 2017. Those issues (with our additions in italics) are:

8.1 Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act, namely:

8.1.1 Rejecting the claimant's job application submitted on 7 March 2017.

8.2 Has the respondent treated the claimant as alleged less favourably than it would have treated a comparator?

(*The claimant confirmed to us that this meant she was relying upon a hypothetical comparator*.)

8.3 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of a protected characteristic? (*i.e. her race or age*.)

8.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

***Facts***

9. We have made the following findings of fact on the balance of probability.

10. The respondent is a private limited company which operates a number of hospitals providing specialist mental health services.

11. The respondent has a recruitment and selection policy and procedure. This refers to the respondent's equality and diversity policy which is intended to ensure that no employee - existing or potential - is discriminated against on grounds of age, sex, gender, marital status, race, religion or belief, sexual orientation, colour or disability.

12. The policy says that job descriptions/person specifications indicate the minimum essential requirements which an applicant must meet to be able to carry out that job to the necessary standard. This, says the policy, helps to improve the effectiveness of the selection process and avoids discrimination.

13. The policy provides further that once a vacancy has been approved, a vacancy template should be completed and sent to the recruitment team.

14. Potential applicants have to apply for a job vacancy by filling in an online application form on the respondent's website which would allow candidates to upload their CVs. Applicants are then shortlisted centrally by the recruitment team within 3 working days of the advert' closing date or upon receipt of the application form/CV.

15. In the quarter from 1 January 2017 to 31 March 2017, 28% of white staff were appointed from shortlisting compared to 31% of BME staff. These statistics however are not broken down so that it is not possible to see what the percentages are for staff at different levels of seniority.

16. The entire Executive Board of the respondent is white.

17. In 2017 the respondent wished to appoint 2 graduate management trainees to its Future Leaders Program. The respondent approaches this exercise using a different method to that used for recruitment to conventional vacancies, as set out above. It uses an external specialist graduate recruitment agency ('the agency') to help find suitable candidates.

18. On 20 December 2016 the respondent sent to the agency a draft of the advert to be used in the graduate recruitment exercise.

19. That advert was subsequently finalised and a person specification was sent to the agency. The agency conducted the advertising process and received the applications. Applicants sent to the agency their CVs and also short videos of themselves. The agency received around 1000 applications which it processed using the person specification provided by the respondent, thereby reducing the 1000 applications to an initial shortlist of 68.

20. The agency sent that shortlist to the respondent. Liz Sinclair together with a colleague then reduced it to a list of 13.

21. On 17 February 2017, Mrs Sinclair wrote to the agency giving it the list of 13 names and asking for the CVs and videos to be sent over by email for ease of viewing by the CEO and COO. The respondent's intention was to reduce the list of 13 to 8 applicants who would then be invited to an assessment day in March 2017.

22. The respondent needed to have the 13 applications within its own computer system however. This was so that at the appropriate time it could conduct reference and DBS checks. Until this point, the applications were held in the agency's computer system. The mechanism adopted by the respondent to

achieve this change was to ask the applicants to input their details into the respondent's computer system by means of a response to an advert.

23. On 2 March 2017 the respondent therefore sent each of the 13 applicants a link which they could follow in order to input their details as required.

24. That link took the applicants to an advert which had been set up by the respondent to enable the applicants (in effect) to reapply, this time directly to the respondent. This advert was open to be seen and responded to by the general public. It should have included, but by mistake did not, words saying that the position was only open to current shortlisted applicants.

25. When the respondent realised that it was receiving applications from external candidates who were not on the pre-existing list of 13, it was alerted to the missing words limiting the advert to shortlisted candidates. On 6 March, Mrs Wilkes therefore attempted unsuccessfully to add those words to the advert.

26. The claimant saw the advert – without the words limiting it to currently shortlisted applicants - and, knowing none of the background set out above, made an application to the respondent in response to it.

27. She made her application on 7 March 2017 at 23.25 hours.

28. On 8 March 2017, Mrs Wilkes arrived at work early at about 7am. She logged onto the respondents 'Change Work Now System' which enabled her to view job applications. She opened the claimant's application to look at the name on the application. She did not look at the content of the application and so could not have seen any information which would have led her to deduce the claimant's age. She compared the name on the application with her list of 13 names of candidates shortlisted by the agency and subsequently reduced by the respondent. Seeing that the claimant's name was not on that list, she clicked 'reject' which generated a pre-drafted email to claimant, telling her that her application had been unsuccessful. That email contained standard wording which was not in fact apt to the situation. It did not say that the application had been rejected because the claimant was not one of the previously shortlisted candidates (although that was the case). It said,

'*Unfortunately, on this occasion, your application has been unsuccessful. This decision is not a reflection on your individual skills but more a comparison of your overall qualifications/experience with other candidates under consideration*.'

29. The following day, 8 March, at 7:13 am the claimant received that reply rejecting her application.

30. Twenty-seven other external candidates had applied to the advert as the claimant had, no doubt not realising that it was closed to anyone who was not already on the shortlist. Of those candidates, 12 were white British, 2 were white 'of other background' and one was white Irish. Three were of mixed race and 7 were black (one of Caribbean and the others of African origin). One applicant

was of Asian origin and one was of 'any other ethnic origin'. Mrs Wilkes rejected them all for the same reason as she rejected the claimant.

31. The respondent did not collect information about the ages of the different candidates.

32. Knowing none of this, the claimant took the view that in the short time it took for her application to be rejected, there had not been time for the respondent to make a comparison of her overall qualifications and experience with those of other candidates. Consequently, she did not believe the wording of the rejection email.

33. Therefore at 6:10 pm on 8 March the claimant sent an email to the respondent making a complaint that her application had not been given the attention it deserved and had not been considered in an objective manner. She said that she met the essential and desirable criteria in relation to the role.

34. Unfortunately, that email was sent to an address which the respondent was no longer able to check. The person holding the password to that email address had left the respondent's employment. Therefore, the claimant did not receive a reply to her complaint.

35. The claimant then telephoned the respondent but her messages were not passed to Mrs Wilkes.

36. Ultimately, the claimant issued these proceedings.

***Concise statement of the law.***

37. We have reminded ourselves carefully of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258:

> (1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

38. Expanding on that, it is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all

stages to satisfy the tribunal on the balance of probabilities that the treatment had been by reason of race or age. What then, is that initial level that the claimant must prove?

39. In answering that we remind ourselves that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves.

40. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether a reasonable tribunal could properly conclude that there had been discrimination (*Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] IRLR 246).

41. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

42. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he or she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

43. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group at a certain level in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

44. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. This is particularly likely to be so where, as in this case, a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as she was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion

can only be reached however once the basis for the treatment of the claimant has been established.

***Analysis***

45. The claimant has proved that she applied for but was rejected by the respondent for a place on the graduate training scheme.

46. She relies upon a hypothetical comparator. Such a person must be the same as or not materially different from the claimant. So, the comparator is another external applicant who responded on 7 March to the advert placed by the respondent. The evidence we have accepted shows that respondent rejected every external applicant to that advert whose name was not already on its shortlist as provided by the agency, no matter what that person's age or race. Accordingly, another person who was white or of a different race to the claimant or who was of a different age group (say, in his or her 20s) would also have been rejected by Mrs Wilkes.

47. Dr Ahmad has placed substantial reliance of the absence of the metadata from the respondent's disclosure. He said in submissions that the respondent could easily have provided us with the metadata to show when Mrs Wilkes tried to make the changes to the advert. A failure to give disclosure of *relevant* evidence may be a reason to find that the burden of proof has passed to the respondent (*Barton v Investec Henderson Crosthwaite Securities Limited* [2003] ICR 1205, [2003] IRLR 332 at paragraphs 30 to 32): that is it may be primary fact from which a reasonable tribunal could properly infer discrimination.

48. However, the employment tribunal at a preliminary hearing refused an order for disclosure of the metadata evidence on the basis that the material sought held very little, if any, evidential weight, and it would be wholly disproportionate to order specific disclosure, if indeed the respondent was able to produce it, which was in itself doubtful. That decision has not been appealed. We do not think that it would be proper for a reasonable tribunal to draw an inference of discrimination in that circumstance.

49. Moreover, that stage of reasoning (the question of whether the burden of proof passes to the respondent) only arises once the claimant has proved the primary facts of her case. It is for her to prove that her application was rejected, which she has done. It is also for her to prove difference in treatment: that a hypothetical comparator would have been treated more favourably than she was treated. She has not succeeded in proving this for the reasons we have set out, so the question of whether the burden of proof passes to the respondent does not arise.

50. Therefore, this complaint of discrimination fails. Even if the burden of proof were to pass to the respondent, we have accepted the 'reason why' the respondent rejected the claimant's application. Mrs Wilkes rejected the application because the claimant was not on her list of previously shortlisted candidates.

51. Dr Ahmad rightly and fairly accepts that given that Mrs Wilkes sought no information about the claimant's age, she could not have discriminated against the claimant on grounds of age.

52. In any event, we have also found that Mrs Wilkes did not discriminate against the claimant on grounds of race for the reasons set out above.

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Employment Judge Heal

Date: 13.3.2018

Sent to the parties on: .....

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For the Tribunal Office