



EMPLOYMENT TRIBUNALS

Claimant

Mr Osinuga

Respondent

First Security (Guards) Ltd

v

HEARING

Heard at: Watford

On: 12, 13 & 14 March 2018

Before: Employment Judge Bartlett, Ms Bhatt and Mrs Sood

Appearances:

For the Claimant:

Mr Ocloo

For the Respondent:

Mr Smith, of Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The tribunal finds that the claimant was not subject to direct discrimination.
2. The tribunal finds that the claimant's claim of victimisation was fundamentally flawed and could not succeed for the reasons set out below.
3. The claimant's claims of direct discrimination and victimisation are dismissed.
4. The claimant's claim for holiday pay is stayed under the conditions set out below.
5. The claimant's claim of direct discrimination was dismissed and was subject to a deposit order. The deposit of £50 will be paid to the respondent in accordance with the Employment Tribunal Rules of Procedure 2013.

REASONS

Background

6. The claimant was employed by the respondent as a security guard from 16 October 2014. His employment is ongoing. The claimant was on a zero hours contract as part of the pool of London security guards working on the

respondent's contract for the BBC. This was the situation until 1 May 2017 when the claimant obtained a permanent full-time position with the respondent working at the BBC matrix Park Royal site, working 7:30 AM to 7:30 PM Monday to Friday. The claimant was working in this position at the date of the hearing.

7. The claimant claims arise from his application to be appointed to an 8 month fixed term contract (the "Contract Role") for the respondent at the BBC Elstree Borehamwood site. The claimant attended an interview with Mr Vickers of the respondent on 4 November 2016. At the hearing, the claimant disputed that he had attended an interview because his claim was that he had not been asked any questions. However for the purposes of clarity, the tribunal refers to this meeting on 4 November 2016 as an interview.
8. The claimant was not successful in his application and 2 other individuals who were not employed by the respondent were appointed to the 2 roles available for contract role. The 2 successful candidates were one white man and one Asian man.

The Claim

9. The issues to be decided in this claim are set out in the case management summary which took place on 1 June 2017 and set out the following:

"EQA, section 13: direct discrimination because of race

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

Not offering the claimant the eight month fixed term contract following his interview on 4 November 2016.

Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators: James O'Leary (white male), Samir Bharat (Asian person).

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 the protected characteristic?

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

Section 27: Victimisation

Has the claimant carried out a protected act? The claimant relies upon the following:

The claimant's letter to the respondent dated 10 December and/or the claimant's further letter to the respondent dated 28 December 2016.

The claimant's alleged detriment is his removal from his position on 13 January and the allocation of that position to Timothy James.

Unpaid annual leave – Working Time Regulations

The claimant claims, as an unlawful deduction from his wages, payment in respect of holiday pay. The claimant claims that he was informed he had accrued 159 hours of holiday pay entitlement yet the claimant claims he was paid for only 90 hours holiday pay entitlement.

The claimant claims outstanding payment in respect of 69 hours of holiday pay entitlement as an unlawful deduction from his wages.”

10. At the Preliminary Hearing Judge Skehan made a deposit order in respect of the claimant's allegations of direct discrimination.

Comparators

11. At the start of the full merits hearing the claimant set out that he no longer relied on James O'Leary and Samir Bharat as the comparators. Instead he relied on Mr Pearce and Mr Hussain as comparators. The latter were the 2 individuals who were successfully appointed to the contract role. The former were 2 individuals who were appointed to a role for which the claimant had not applied. In these circumstances, the tribunal permitted the change of comparator. The tribunal recognises that the claimant was not legally advised at all times and that lay people may struggle with the concept of comparators.

The Evidence

12. The tribunal heard from 3 witnesses who had each prepared a witness statement and was subject to cross examination.
13. The tribunal will not repeat the evidence here however it will provide a brief summary.
14. The claimant appeared as a witness and adopted his witness statement. The claimant's evidence was that he applied for the contract role and was informed that he would have an interview with Mr Vickers on 4 November 2016. His oral evidence was that this meeting took place and the claimant was informed by Mr Vickers about the hours of the role, the duties and requirements but he was not asked a single question by Mr Vickers. His oral evidence was that he was told by Mr Vickers that the 2 other candidates for the 2 roles had been successful and the claimant was not successful. However, the 2 other candidates had to go through vetting procedures and the claimant was asked to cover the contract role until vetting had been successfully completed and both individuals started on site.

15. The claimant's oral evidence was that he had family commitments as a result of having a wife and 4 children and he struggled with the uncertainty and varying pay arising from zero hours contract. He was hurt and disappointed not to be given the contract role and felt aggrieved by the situation.
16. The claimant raised a grievance on 10 December 2016. This was in fact a series of questions to the respondent about the procedure used for recruiting to the role. The respondent treated this as a grievance. Mr Vickers responded in writing on 19 December 2016.
17. The claimant was given the right of appeal and he exercised this. An appeal meeting took place on 2 February 2017 with the claimant and Mr McCann. The claimant attended the meeting with a union representative. At the start of the meeting he brought a written document which Mr McCann asked him to read out. The meeting was subject to a number of breaks. The claimant denied that he had acted aggressively at the meeting.
18. Mr McCann sent a written grievance response to the claimant on 23 February 2017 which did not uphold the claimant's grievance.
19. The claimant's cover of the contract role ceased on 13 January 2017. The claimant was offered work under his zero hours contract but refused all work after 13 January 2017 until he commenced the full-time role with the respondent on 1 May 2017.
20. Mr Vickers' appeared as a witness at the hearing where he adopted his witness statement. Mr Vickers' evidence was that he had interviewed the claimant on 4 November 2016 and had asked him the standard questions set out in the interview questionnaire document. In response to questions from the tribunal Mr Vickers stated that he did not have a clear and comprehensive recall of the interview with the claimant but he remembered attending site and that he would have asked the questions set out in the questionnaire. His evidence was that he was the only interviewer and he would have completed the interview questionnaire after the interview.
21. Mr Vickers' evidence was that on 4 November 2016 he told the claimant that he was interviewing two other candidates but asked the claimant to cover the contract role on a temporary basis until the process was complete.
22. Mr Vickers evidence was that he interviewed another candidate on 4 November 2016 but did not interview the final candidate until 17 November 2016. It was only after he completed all of the interviews that he made his decision. He would have made his decision and informed the HR team at head office who would then have contacted all the candidates to let them know the outcome. He believed that this was around 19 November 2016. His oral evidence was that the reason the claimant was not successful was because his performance at interview was worse than the other 2 candidates. The interview questionnaire sets out that the

claimant performed averagely in relation to most questions, but he performed poorly in relation to customer service.

23. Mr McCann appeared as a witness and he adopted his witness statement. Mr McCann's evidence was that at the grievance meeting he had given the claimant the opportunity to identify what was his main concern and the claimant had declined to do so. His evidence was that proximity to site was simply one of the factors amongst many others that the respondent considered in its decision-making. The claimant lived a long way from the Elstree site as the claimant was based in North Woolwich, which is the other side of London.
24. Mr McCann's role with the respondent was head of risk in respect of the BBC contract. Prior to this he had spent 15 years in the Army. It was put to Mr McCann repeatedly that the claimant had not acted aggressively at the grievance meeting and had simply been forceful. Mr McCann's evidence was clear and unwavering that the claimant had been aggressive. Mr McCann's evidence was that they had taken a short break near the start of the meeting, after Mr McCann asked the claimant to explain what his complaint of discrimination was. After this break he said that the tone of the meeting changed and the claimant became aggressive.
25. The tribunal also had the benefit of an agreed bundle running to over 230 pages, all of which has been considered even though it is not referred to in this judgement.

Findings of Fact

26. In oral evidence the Claimant stated repeatedly that he did not have a genuine interview on 4 November 2016. His oral evidence was that he was not asked any questions at the interview. The Claimant did not claim he had not been asked any questions at the interview in any other part of his evidence: it was not mentioned in his grievance, his appeal from the grievance outcome nor was it expressly set out in the ET1.
27. The tribunal found that the Claimant was not credible and preferred the evidence of Mr Vickers. The Claimant's evidence was inconsistent examples include:

27.1 the claimant's oral evidence and the ET1 set out that the claimant was told on 4 November 2016 by Mr Vickers that he was not successful in applying for the contract role and would only be permitted to cover it whilst the successful candidates underwent vetting. In direct contradiction to that evidence the claimant emailed the respondent [p89] on 5 December 2016 stating "*I have decided to continue with the Security Officer post for the 8 months contract that I have applied for on the 2 November.*" In addition [p98] an email from the Claimant to Mr Vickers dated 6 December 2016 set out "*I do not accept that I had any discussion to accept to work at BBC BOREHAMWOOD ELSTREE; 8 month contract on a temporary basis.*"

- 27.2 In contradiction to the claimant's emails of 5 and 6 December 2016 emails from Mr Vickers dated 22 November 2016 and 21 November 2016 to the Claimant repeatedly state that the claimant was only covering the contract role temporarily and he would drop back into the London pool of employees. The tribunal finds that the claimant's emails of 5 and 6 December 2016 indicate that the claimant is prepared to say whatever he wishes to further his own ends even if he does not genuinely believe what he says;
- 27.3 Further, the document the Claimant submitted at his grievance appeal [p149B] states "*I was perplexed with DV's ambiguous response that he would allow me to cover the position temporarily pending the outcome of the HR vetting of the 2-new applicants...he also mentioned that he would instruct the duty managers to include me on the rota at BBC Matrix PR pending management decision on the vacancy requirements that could be made in the next 3 months.*" This contradicts both of the other ways the claimant put his claim;
28. The tribunal finds that the direct contradiction in the claimant's evidence on such an important matter fundamentally undermines his credibility.
29. This is a case where the tribunal is asked to choose between the claimant's version of what happened on 4 November 2016 at the meeting between him and Mr Vickers and what Mr Vickers said happened. In light of the discrepancies in the claimant's evidence and the consistencies in Mr Vickers evidence as set out below the tribunal prefers the evidence of Mr Vickers which is that an interview was carried out on 4 November 2016 and the claimant did not perform well at the interview.
30. The tribunal accepted Mr Vickers' evidence about what happened during the 4 November 2016 interview for the following reasons:
- 30.1 His evidence is supported by interview records for the 3 interviewed candidates;
- 30.2 Mr Vickers' evidence was consistent with some parts of the claimant's evidence about what was discussed during the interview in terms of the client requirements and information about the role;
- 30.3 Mr Vickers accepted that he did not have a clear recollection of the 4 November 2016 interview due to the time lapse, the number of interviews he carried out and he left the respondent some time ago. The Tribunal considered this to be plausible given that this was an interview for a contract security role and Mr Vickers carried out many interviews for similar roles over the years;
- 30.4 Mr Vickers' evidence that he had told the claimant at the 4 November 2016 interview that the Claimant was covering the role on a temporary basis and that a decision was not made until after all 3 candidates had been interviewed was supported by various contemporaneous emails.
31. The Tribunal finds that:

- 31.1 On 4 November 2016 Mr Vickers conducted an interview with the claimant in the true sense of the word and that he asked him questions;
 - 31.2 the claimant did not perform as well at interview as the other candidates, particularly in relation to customer service requirements and that this and no other reason was why he was unsuccessful in obtaining the contract role;
 - 31.3 the claimant was informed on 4 November 2016 that he would be covering the contract role temporarily whilst other candidates were interviewed;
 - 31.4 the claimant was informed on or around 19 November 2016 that he was not successful in obtaining the contract role and that he would continue covering the role temporarily whilst the successful candidates went through the vetting procedure;
 - 31.5 the claimant was sent a letter on or around 6 December which informed him that he would cease providing temporary cover for the contract role on 13 January 2017.
32. There are other minor background factors which do not assist the claimant's claim that Mr Vickers did not give him the contract role because he was a black man:
- 32.1 There were several opportunities for Mr Vickers to exclude the claimant from the recruitment process. He did not do this instead he took opportunities to allow the claimant to go through the interview process for the contract role;
 - 32.2 In 2015 Mr Vickers was the investigating officer in a disciplinary process against the claimant. It is not disputed that Mr Vicker's did not uphold the disciplinary allegation against the claimant;
 - 32.3 Mr Vickers allowed the claimant's application for the contract role to proceed despite the claimant not applying through the portal;
 - 32.4 Mr Vickers accepted the claimant as a shortlisted candidate;
 - 32.5 Mr Vickers encouraged the claimant to apply for a full time role at the BBC Matrix site which the claimant was ultimately successful starting that position on 1 May 2017. This is despite the claimant failing to attend for an interview for that role;
 - 32.6 Mr Vickers interviewed the claimant for the Matrix role and put him forward as a successful candidate. A role which the claimant continues to hold to date and which is substantially easier to commute to from the Claimant's home.
33. The tribunal does not consider that these are actions of an individual (Mr Vickers) who had committed direct discrimination against the claimant in relation to the contract role in the circumstances claimed by the claimant.
34. The claimant alleged that fabricated various documents. The tribunal rejects these allegations:
- 34.1 The claimant claims the 6 December 2016 letter was entirely fabricated. The claimant's own evidence was that from 4 November 2016 he had been told he was only covering the contract role temporarily. There is no reason why the 6 December 2016 letter would be of assistance to the respondent over and above the numerous preceding emails setting out

that the claimant was providing temporary cover for the duration of the vetting procedure;

- 34.2 The claimant claims the interview record in respect of the claimant's 4 November 2016 meeting were fabricated by Mr Vickers. The tribunal found Mr Vickers to be a credible witness and rejects this claim.
35. The claimant relied on rotas with which he was issued which set out that he was covering the contract role until the end of March 2017 as evidence that he either had been given the contract role successfully for the full 8 months or that he should have been covering it until the end of March. The former contention is in direct contradiction to the claimant's own evidence which is that he had always been informed he would be covering the role temporarily while the vetting process of the other 2 individuals was completed. The tribunal does not consider that the rotas were a sufficient basis for the claimant to presume that he would be covering this role until the end of March when there are clear written communications dating back to November 2016 which repeatedly inform him that he was only covering the contract role on a temporary basis. These communications are unambiguous and the claimant could not have legitimately or genuinely had any expectation that he would cover the contract role beyond the completion of the vetting process.
36. The grievance procedure is not one of the main issues to the case. However the tribunal prefers the evidence of Mr Vickers and Mr McCann as it found them to be credible witnesses.
37. In relation to the allegations of victimisation, as is set out above there are clear written communications from November 2016 onwards which set out that the claimant was only covering the contract role until the vetting process was completed in respect of the 2 successful candidates. It was not until the letter of 6 December 2016 that the claimant was told the exact date when he would finish. The claimant alleges that this letter was fabricated and relies on the fact that this letter was unsigned. The tribunal finds that it is common practice for the signed copy of letters to be sent out to employees and an unsigned version kept on company records. Therefore the tribunal finds that the unsigned nature of the letter is of little significance. Further, as the tribunal has found the claimant not to be credible, it prefers the evidence of Mr Vickers and the respondent which is that the letter was set out to the claimant on 6 December 2016 and that he was aware from then onwards that he would finish the temporary cover on 13 January 2017.
38. The tribunal finds that the claimant was aware on or around 6 December 2016 that he would cease the temporary cover of the contract role on 13 January 2017. This is before the claimant committed the protected act, which is his grievance letter of 10 December 2017. Therefore the tribunal finds that the claimants claim in relation to victimisation must fail because he did not suffer a detriment as a result of the protected act. Further, the tribunal finds that the claimant has not suffered any detriment. The tribunal finds that pursuant to the claimant's oral evidence he was informed on 4 November 2016 and repeatedly afterwards that he was only covering the contract role on a temporary basis. The claimant covered the contract role for approximately 6 weeks which is consistent

with how long vetting process would take and the respondent's actions were in accordance with the information communicated to the claimant on 4 November 2016.

39. The tribunal does not accept the claimant's evidence that Timothy James was told by Mr Vickers that he would be covering the contract role from 13 January 2017 onwards instead of the claimant. The tribunal notes that there were 2 identical contract roles. The claimant was covering one role and the tribunal considers that any discussions with Timothy James were in relation to the role the claimant was not covering.

40. **Burden of Proof and Conclusions**

41. The tribunal has given due consideration to section 136 of the Equalities Act and relevant case law including but not limited to **Igen v Wong 2005 IRLR 258** and **Madarassy v Nomura International plc 2007 ICR 867**. The tribunal recognises that there is a 2 step process to the burden of proof. Initially the burden lies on the claimant to establish a prima facie case of discrimination.

42. The tribunal finds that the claimant has not discharged the prima facie burden of proof. As is established by case law there must be something more than a mere assertion of discrimination. The tribunal finds that the claimant has not established anything more than a mere assertion of discrimination. The claimant's claim is that because one white man and one Asian man were successful in obtaining the contract role but that he, a black man, was not successful was direct discrimination. The tribunal does not accept that this establishes discrimination on a prima facie basis.

43. An alternative way of setting out the claimant's claim is that:

43.1 because he was already working for the respondent and the 2 successful candidates were not; and/or

43.2 because one candidate did not have a valid SIA licence;

the reason he was not successful in obtaining the contract role was race discrimination. The tribunal does not accept that this discharges the prima facie burden of proof.

44. In the alternative and if the claimant had discharged the prima facie burden of proof, the tribunal finds that the respondent has established that the reason why the claimant was not successful in obtaining the contract role was because he did not perform as well in interview as the other 2 candidates. The tribunal found Mr Vickers' evidence credible in this regard. Mr Vickers' evidence was supported by documentary evidence namely the interview sheets. The tribunal rejects the contention that these were fabricated for the purposes of the tribunal claim. In oral evidence the claimant was asked if he recognised that customer service skills were important for the contract role. This was an opportunity for the

claimant to demonstrate his skills in this area and why Mr Vickers' alleged assessment of him in this regard was fundamentally flawed and instead a sham used to hide the real discriminatory reason. The claimant's evidence was unpersuasive in this regard. At best, he demonstrated a minimal level of customer service skills. The tribunal concluded that it was open to Mr Vickers to conclude that the other candidates performed better at interview, that he had so concluded and that such decision making was not discriminatory.

45. For completeness the tribunal records that it finds that the claimant did not establish his claim that one candidate did not have an SIA licence at the time of the interview. The claimant made a mere assertion based on the SIA online registered which set out that one successful candidate's licence ran from 30 November 2016. The interview notes set out that the candidate was in the process of getting the licence and the tribunal accepts Mr Vickers evidence, as they found he was a credible witness, that the candidate had a licence and was renewing it at the time of the interview. The tribunal accepts Mr Vickers' evidence that head office would not have short listed an individual who did not have an SIA licence.

Holiday pay

46. On the first day of the hearing the claimant was unable to give details about what his holiday claim was. He was unable to identify the amount claimed and the number of holiday days. The tribunal instructed the claimant's representative to clarify the claim and inform the tribunal on the second day. On the second day the claimant was unable to clarify his claim until given further time after the evidence had been heard and submissions made on the other issues. In these circumstances the respondent was unable to provide evidence and address the claim fairly. A further confusion was that the ET1 identified the holiday claim as covering the period January 2016 to December 2016 the Schedule of loss covered the period January 2017 until May 2017 only.
47. The claimant identified his holiday pay as follows:

"The claimant claims that he is owed the sum of £730.71 (subject to tax).
That amount being the sum due for unpaid unused holiday for the period of January 2016 to December 2016.
The amount is calculated for 69 hours of unpaid holiday multiplied by £10.59 (hourly rate)."
48. The parties agreed that the holiday claim should be stayed as the parties were hopeful that an agreement could be reached. The tribunal consented to the stay and directions were agreed as set out below.
49. The tribunal records that a mere assertion of a claim to holiday pay by the claimant is not sufficient to be successful. The claimant must provide evidence to support his claim.

- 50. Further, in light of the claimant's inability to specify his holiday claim until the completion of the other evidence and submissions and the unfairness this caused to the respondent the tribunal reminds the claimant that he may be at risk of costs awards if he cannot reach an agreement with the respondent and the issue returns to be considered by the tribunal.

DIRECTIONS

- 51. The Tribunal makes the following directions in respect of the holiday pay claim:
 - 51.1 The Claimant is to write to the Tribunal and the respondent by 27 March 2018 notifying the amount of holiday that was taken in respect of the period January 2016 to December 2016;
 - 51.2 The respondent will by 10 April 2018 write to the Claimant to notify him of how much if any holiday pay is owed in respect of January 2016 to December 2016. The respondent will include a schedule of which days holiday have been taken, paid and/or remain outstanding;
 - 51.3 By 8 May 2018 the parties will notify the tribunal whether an agreement has been reached and if no agreement has been reached, the disputed issues must be identified in writing to the tribunal and a one day hearing will be scheduled.

Employment Judge Bartlett
14 March 2018

Sent to the parties on:

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For the Tribunal:

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