EMPLOYMENT TRIBUNALS

Claimant: Mr S Khan

Respondent: JD Sports Fashion Plc

HELD AT: Manchester **ON:** 2 & 3 October 2018 (in tribunal) 22 October 2018 (in chambers)

BEFORE: Employment Judge Tom Ryan
Mr M Gelling
Mr W K Partington

Appearances:
Claimant: Ms E Soler, claimant's wife
Respondent: Mr B Randle, Counsel

JUDGMENT

The judgment of the Tribunal is that the complaint of race discrimination is not wellfounded and it is dismissed.

REASONS

Introduction

1. Although this claim has a complicated procedural history, by the outset of this hearing the sole issue for the tribunal to determine was whether the respondent discriminated against the claimant on racial grounds when on 28 September 2017 he failed an induction process as a result of which he was not offered employment with the respondent.

2. It is not necessary to set out the totality of the procedural history. It is largely summarised in the judgment and reasons of Employment Judge Horne sent to the parties after a hearing on 18 May 2018. In that hearing EJ Horne granted the application by the claimant to extend time to permit the claimant to argue that, "the respondent directly discrimination against him by treating him as having failed an induction on 28 June 2017 because of his race." EJ Horne also refused an application by the claimant to amend his clam to pursue other allegations.

3. We refer to EJ Horne's preliminary hearing for two other reasons. At paragraph 711 of his reasons EJ Horne makes findings of fact relating to the background. We incorporate and repeat those findings in our findings of fact as set out below. EJ Horne also made case management orders in preparation for this hearing which he also listed.

4. It is clear from EJ Horne's notes that there was a question as to whether he should hear evidence from the claimant himself at that preliminary hearing. Although Mr Khan has some ability to express himself in English, his first language is Urdu and it is clear that EJ Horne considered that if Mr Khan were to give evidence he would need the assistance of an interpreter. In the event, at the preliminary hearing Ms Soler gave evidence, as she did before us. Ms Soler's first language is French. Her spoken and written English is better than her husband's. For the sake of completeness we record that they communicate with one another in English. It appears that before EJ Horne Ms Soler said that she did not need an interpreter.

5. We record that at no stage prior to this hearing did Ms Soler express the wish that she too should have an interpreter. It does not appear that any specific request was made for there to be an interpreter for Mr Khan. No direction was given to that effect by EJ Horne.

6. At the outset of our hearing Ms Soler raised this issue, for an interpreter for her husband, again. We adjourned briefly and it was discovered that an Urdu interpreter could have been made available from 2 p.m. on the first day. We explained to the parties that we intended to spend the first morning reading the papers and the witness statements and commence the oral evidence with Mr Khan's testimony when the interpreter had arrived. Ms Soler then told the tribunal for the first time that her husband had obtained employment which he had started the previous day in Rochdale and he needed to be there at 2 p.m. in order to start his 3-9 p.m. shift.

7. Mr Randle for the respondent resisted a suggestion by the tribunal that the tribunal could hear the respondent's witnesses first. It was therefore agreed by Ms Soler and Mr Khan that the tribunal would attempt to hear his evidence in English so that he could then go to work.

8. This the tribunal attempted to do. Mr Khan answered questions from the tribunal which he appeared to understand when simply expressed. However, when crossexamination began and it was suggested to him that his evidence was different from things that he had written or said earlier, it was quickly apparent that his spoken English was insufficient to the task. After a short period we came to the

conclusion that there was a risk that proceeding in that way might render the hearing unfair. With the agreement of the respondent we stood Mr Khan down as a witness until 10 a.m. on the second day. In the remainder of the morning we heard Ms Soler's evidence and we then adjourned that day.

9. We heard evidence from Mr Khan and Mrs Soler. On behalf of the respondent we heard evidence from Charlotte Brown, and HR business Partner with Touchstone HR Limited. Touchstone HR provide HR support to the respondent on behalf of Assist Resourcing UK Ltd. We heard evidence also from Jennifer Hayward an HR manager with the respondent.

10. We were provided with witness statements and a bundle of documents to which you refer by page number and outline submissions in writing on behalf of the respondent at the conclusion of the evidence.

Findings of Fact

11. We set out in the next four paragraphs the background facts as found by EJ Horne at the earlier preliminary hearing by way of a summary.

12. JD sports is a large, well-known sportswear retailer, operating under numerous premises, including a warehouse in Rochdale. Many of its staff are supplied by an employment agency, Assist. The degree of integration of Assist and its agency workers into JD sports' business is evident from the fact that assist has its own onsite office in the Rochdale warehouse.

13. The claimant is a Pakistani national. His first language is not English. He is married to Mrs Soler, whose first language is French. Until 3 July 2017, Mrs Soler was employed by Assist to work at the Rochdale warehouse. She has had her own difficulties with JD sports and Assist and has since ceased to work for them.

14. In June 2017 the claimant applied to Assist so that he could do agency work at the Rochdale warehouse. On 28 June 2017 he attended the warehouse for an induction training day. He was one of a group of people being trained by Mr Jason Howarth. Whether it would have been apparent to the claimant at the time who Mr Howarth's employer was, it is now clear that he was actually employed by JD Sports.

15. Part of the induction involved reading, understanding and writing on forms containing written health and safety information. The claimant was told that he had not successfully completed this part of the induction. Consequently, he was not offered any agency work at the warehouse.

16. It is that, not being offered work at the warehouse, that the claimant alleges was the act of discrimination.

17. With the benefit of the evidence that we heard and read we are able to make further findings of fact as to what occurred on that day and thereafter.

18. However, by way of preamble, we record that the claimant through Mrs Soler complained also about the way in which Assist had dealt with him in the lead up to

this process, particularly in relation to requiring him to complete aptitude tests. However, it was clear that this was not a matter that was dealt with by JD Sports or its staff and we do not consider that we need to make specific findings of fact about that.

19. The claimant's aptitude test is set out at pages 57-59. It consists of a set of simple written instructions under the headings Observation, Stock Checking and Simple Arithmetic. It requires the candidate to sort different sizes of clothing, put random words into a complete sentence, follow a set of arrows and directions to identify the destination according to a small diagram and to match a series of numerical codes. It also includes some simple comprehension. The claimant did not complete the two questions in relation to stock checking. His results in respect of the remaining questions gave him a pass which enabled him to attend the induction at JD Sports.

20. The induction process to which we will next turn required candidates to read more complex written instructions in relation to the operation of machinery and processes and health and safety and to sign to signify that they had read and understood them. Both Ms Hayward and Ms Brown accepted that the induction test operated by Assist did not test English comprehension at a sufficient level to ensure that candidates would be able to comprehend the more complex instructions at the next stage. Ms Hayward said that the respondent was taking steps now to ensure that this process was adjusted.

21. There was a dispute of fact between the claimant and the respondent as to what happened on the induction day. It was the respondent's case that a PowerPoint presentation was made after which the candidates were required to read the material which we will describe. Mr Khan was adamant that no such PowerPoint presentation was given.

22. Mr Howarth who administered the induction, having left JD Sports, did not give oral evidence before us as to what happened on the day. At page 118 there was a short, but unsigned, account which we were told was provided by Mr Howarth by email to the respondent of what occurred. We did not see the email which might have shown that it emanated from Mr Howarth. The account was:

> "I confirm I was doing a training day for Assist on Wednesday 28th June from around 10 a.m.
>
> During the basic training, everything was going okay with all the operatives, however, when we came to the paperwork, I noticed 2 males named Salam Khan and Tofojjoi Miah (trainees) in the group who were struggling with the paperwork. I went to help as I had realised both were unable to read or understand the questions and I had to rephrase the question is for them to understand. I asked if both understood but they weren't too sure. This occurrence was for a large part of the basic training pack, due to this I referred both trainees back to assist staff and explained that they were struggling a great deal with the basic training pack and I was having to spend a great deal of time with them both which meant I could not support all the other operatives.

Once I had referred to assist, they had taken both Salam and Tofojjoi away to do further conversations and assessments before making a decision."

23. The claimant agreed that there appeared to be another person in the group who were undergoing induction who were struggling with the written forms. Notwithstanding that this account was not given in the form of a witness statement we consider on the balance of probabilities it must have been written by the person who did administer the task that day. For that reason, we accept the account was written by Mr Howarth. However, we note that there is no reference to the earlier part of the process and a PowerPoint presentation.

24. Ms Hayward gave evidence that there would have been such a PowerPoint presentation because that was the normal process, albeit she had only joined JD Sports two or three months after the training day. No printed copies of such a PowerPoint presentation were put before us.

25. On the state of the evidence, we accepted that there was no PowerPoint presentation given to the claimant that day. When he answered questions from the tribunal before cross examination it was clear that he understood the type of machinery that was being described for the moving of goods within the warehouse. He explained that before he had come to the United Kingdom he had work experience in Pakistan with similar machinery. In our judgment, the claimant was likely to have a good recall of the events of that day since they had led to his failing to gain employment with the respondent. We had no specific reason to doubt his account as to what occurred on that day.

26. Mr Howarth's account refers to the training pack. A copy of such a training pack is set out at pages 77 to 91. The respondent accepted that this was not the training pack that was actually presented to the claimant and which at least he completed in part. The claimant said that it was in a different format to the one that he was given to complete, but he agreed that it contained the same elements.

27. On the first page there is a list of the seven elements and tasks and areas of knowledge that the new starter is required to have: manual handling, pump truck, manual shrink wrap, roll cages & picking trolleys, pallet standards, safety knives and build and close a carton. On the pages that follow there are a list of descriptors and tasks under each heading, a column in which (presumably Mr Howarth) could indicate whether the standard had been achieved or the knowledge demonstrated and a further column for comments.

28. The claimant's evidence was that there was a presentation about lifting but not about manual handling or personal protective equipment or any of the other elements except for the cartons. He said the only thing that was demonstrated was the building and closing of a carton. The trainees had to demonstrate also that they were able to undertake that task. It was towards the end of that that he was required to read & the various elements of the training pack.

29. The claimant's evidence was that he was only given five minutes to read and signify that he had understood the various tasks and standards, that he did so despite it being written in English. He said that he did not complete one page because it was

printed on the reverse of another and he did not notice that. He suggested that he had failed the test because he had not completed that reverse page.

30. The claimant said that Mr Howarth pointed out to him that he had not completed one page and that he had told Mr Howarth he would complete it but he was told that he was out of time and it was at that point that Mr Howarth said to him, "You have failed."

31. We asked the claimant if he could describe the group who were present at the induction. He said there were about 15 people present. They were all strangers to him. He said one person was Chinese, one was black, the others were British although there was one other Asian member of the group to whom he spoke and discovered he was from Bangladesh.

32. Notwithstanding that there were some inconsistencies in the claimant's account, for example in the number of times that he passed the aptitude test, which were explored at length in cross examination by Mr Randle we were satisfied that so far as the events described above were concerned the claimant's account was one that we could and did accept.

33. In his written closing submissions Mr Randle invited the tribunal to determine the case on the basis that the respondent, in what he described as "the very clear contemporaneous evidence" of Mr Howarth had provided a non-discriminatory explanation of why the claimant was not offered employment. He described the claimant's complaint as being largely based upon the fact that having passed the aptitude test he should not have been subject to testing as to his English. He made, in our judgment, the entirely reasonable argument that the induction focusing as it did on reading and comprehending materials about health and safety, then, if the claimant failed to demonstrate the ability to understand that information it was reasonable for the respondent to choose not to employ him.

Relevant Legal framework

34. Sections 13 and 39 of the Equality Act 2010 define direct discrimination and make it unlawful for an employer to discriminate by not offering a person employment.

35. Section 136 of the Act provides for the burden of proof.

36. Notwithstanding the fact that this provision is expressed in different terms from earlier formulations the guidance given by the Court of Appeal in **Igen Ltd v. Wong** [2005] IRLR 258 in respect of the statutory provisions replaced by the Equality Act 2010 is still applicable.

37. In summary, to succeed in a claim of direct discrimination the claimant must prove facts from which the tribunal could conclude that he or she was subjected to some detriment by the respondent and that he was thereby treated less favourably than the employer treated or would have treated an appropriate comparator of a different race. The comparator need not be a real person. The tribunal may need to construct an hypothetical comparator. S. 23 provides that on a comparison for the

purposes of s. 13 there must be no material difference between the circumstances relating to each case.

38. In order to prove the facts which would cause the burden to pass it is not enough for the claimant simply to prove less favourable treatment amounting to a detriment and a difference in race. Something more is needed to show some link between the treatment and the difference in race. See: **Madarassy v. Nomura International Plc** [2007] IRLR 246 CA.

39. If the claimant does prove such facts then the burden of proof shifts to the respondent to prove, on the balance of probabilities, that race was not any part of

the reason for the claimant's treatment. It is permissible for a tribunal to determine this element of the test first. If it is apparent on all the evidence that the reason for the treatment was nothing to do with any difference in race, then the tribunal can decide the complaint without having to consider whether the burden of proof would pass or not.

Conclusions

40. Having regard to our findings of fact and the legal framework set out above we draw the following conclusions.

41. The claimant has established that he was treated differently to others in the induction group on the day in question. Whatever the position in relation to the other candidate, Mr Miah, who was said to be struggling with comprehension of the written materials, at least by implication others of different groups were not failed at that point and on the balance of probabilities these included persons of other races.

42. Were we to find that the burden of proof passed we would not have found it possible to accept Mr Randle's submission that the account provided in the email by Mr Howarth would have provided a sufficient non-discriminatory reason. Whilst it might be sufficient to indicate such a reason, it was not evidence that could be tested. We accept that it was consistent at least in part with the claimant's suggestion that he was failed because he had not completed the form. But without hearing from Mr Howarth it would not be possible for a tribunal, in our judgment, to reach a safe conclusion that his decision-making was done without any form of conscious or unconscious discrimination. We do not think we could reach a safe conclusion on that.

43. So, the crucial question is whether the tribunal has before it evidence upon which it could conclude, consistently with the judgment in **Madarassy** that the burden of proof had passed to the respondent. In short, there was simply no evidence of any other race-related factor that might suggest that this employer did act in such a way. Even the claimant's account of the racial mix of the group that day suggested that race did not play a part in the decision-making.

44. Moreover, it is not sufficient in order to establish direct discrimination to assert that a person for whom English is not their first language is subjected to a detriment for

that reason alone. That might give rise to a claim of indirect discrimination. But it is self-evident that there are many people of different racial origins who can speak and comprehend English to a sufficient standard to meet health and safety requirements of an employer just as there are many white British people whose English, regrettably, is insufficient for that purpose.

45. For the avoidance of doubt, we are more than sure having heard the claimant explain his abilities and experience he would have been a conscientious employee who could perfectly well have observed the health and safety requirements that this role would have comprised. Notwithstanding the level of his English language ability we are certain also that he could, with sufficient time, have comprehended the instructions and satisfied Mr Howarth that he had understood them. But this case does not turn upon our view of the claimant's ability. An employer in the position of the respondent is entitled to make its own judgment, based upon the information available to it at the time, provided it does not do so in a discriminatory way.

46. For all those reasons we find that the complaint of race discrimination is not well-founded and the claim is dismissed.

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Employment Judge Tom Ryan

Dated 22 October 2018

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

31 October 2018

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FOR THE TRIBUNAL OFFICE