



EMPLOYMENT TRIBUNALS

Claimant: Miss A Clarke

Respondent: Alternative Futures Group Limited

Held at: Liverpool

On: 16, 17 & 18 July 2018
and 9 August 2018 (in
chambers)

Before: Employment Judge Holbrook
Ms F Crane
Mr J Murdie

Representation:

Claimant In person

Respondent Miss S Johnson, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of unfair dismissal and breach of contract are dismissed upon withdrawal.
2. All remaining claims in these proceedings fail and are also dismissed.

REASONS

INTRODUCTION

1. By an ET1 claim form presented to the Tribunal on 6 November 2017, Andrea Clarke makes a claim of race discrimination against Alternative Futures Group Limited. Additional claims made in the ET1 (of unfair dismissal and breach of contract) were subsequently withdrawn by Miss Clarke. These additional claims were formally dismissed by the Tribunal at the beginning of the final hearing.

2. Miss Clarke claims that, at a meeting with one of the respondent's employees on 29 June 2017, she was subjected to harassment related to race. Miss Clarke also claims that the respondent directly discriminated against her on racial grounds, either by withdrawing from a contract under which she had agreed personally to do work, or by not offering her such a contract.

3. The respondent denies these claims.

4. The Tribunal heard oral evidence and submissions over three consecutive days in July 2018. It reconvened on 9 August 2018 to consider its decision in the absence of the parties. At the hearing in July, Miss Clarke had given evidence herself and she had called two additional witnesses in support of her case: Joseph Gresham (a friend) and Dorothea Jones (a race advocacy worker). The respondent had called four witnesses: Cory Isham (the respondent's head of professional leadership and quality); Karen Martin-Rodriguez (formerly employed by the respondent in the role of clinical lead); Nalini Patel (regional business manager); and Anna Moore (procurement and contracts manager). Each witness had provided a written statement of their evidence, and the Tribunal was also referred to various documents in a substantial hearing bundle.

FACTS

5. The principal facts which are relevant to the issues in this case are summarised below. However, for ease of presentation, additional facts are also set out in the 'Discussion and conclusions' section of these reasons.

6. Miss Clarke is a self-employed yoga teacher living and working in Manchester. In terms of her race, Miss Clarke describes herself as black and British.

7. The respondent is a large health and social care charity which provides care services and support to people with care needs across the UK. In July 2015, the respondent embarked upon a project to establish a new in-patient rehabilitation service in Ardwick, Manchester. The service was to be aimed at women with complex mental health problems and was to be provided from a 24-bed hospital facility being set up by the respondent. It was envisaged that the new facility, which was to be known as Tesito House, would open in April 2017.

8. In October 2016, Miss Clarke attended an open day at Tesito House at which she was introduced to Cory Isham, a member of the respondent's senior management team who had responsibility for the start-up of the Tesito House project. They had a conversation about the possibility of Miss Clarke providing yoga services as part of the offering to service users there, and Mr Isham suggested that she should get in touch with him again to discuss the idea further.

9. Miss Clarke took Mr Isham up on his suggestion and, on 9 January 2017, they met to discuss the matter. On 11 January, Miss Clarke submitted a written proposal to provide yoga services at Tesito House.

10. On 18 January 2017, Mr Isham emailed Miss Clarke advising her that the respondent's management team was on board in principle. A further meeting took place on 27 January, when Mr Isham told Miss Clarke that the available budget for

yoga services was limited to £2,300. He suggested that she might therefore provide 23 yoga sessions for a fee of £100 per session.

11. Mr Isham also asked the respondent's procurement manager, Mrs Anna Moore, to prepare a contract for the respondent to enter into with Miss Clarke.

12. There were further exchanges between Mr Isham and Miss Clarke in February 2017 concerning the nature and cost of equipment which would need to be acquired for yoga sessions to be delivered at Tesito House. Mr Isham also asked Miss Clarke to provide details of her insurance cover and he assured her that matters were in hand regarding the preparation of a contract.

13. Mr Isham also included Miss Clarke in certain matters concerning the start-up of Tesito House more generally. He sent her a copy of a draft Operational Policy containing background information about the project, which he asked Miss Clarke to treat in confidence. He also invited her to attend staff training sessions for new staff at Tesito House, on 20 and 27 March 2017. Miss Clarke duly attended those training sessions, which were delivered by Mr Isham to a group of between 10 and 15 people. One of the sessions was attended briefly by Karen Martin-Rodriguez, the newly appointed manager of Tesito House.

14. On 6 April 2017, Mr Isham emailed Miss Clarke to inform her that Mrs Moore should be contacting her to finalise the contract and that Ms Martin-Rodriguez (together with another manager, Paul Hammersley) would be Miss Clarke's main points of contact from then on. Mr Isham also told Miss Clarke that the anticipated opening date for Tesito House was now the end of April 2017.

15. Subsequent discussions between Mr Isham and Mrs Moore led to the realisation that, because the anticipated costs of the yoga sessions exceeded £1,000, the respondent's procurement policy (which is called the Scheme of Reservation and Delegation, or "SORD") required the responsible managers to obtain three written quotes for those services before a contract could be entered into.

16. On 3 May 2017, Mr Isham emailed Miss Clarke, stating:

"Our procurements manager has recently thrown me a curve ball and is now asking that we get three quotes for yoga provision at Tesito. Frustrating."

17. He added that the respondent would be putting together a request for proposals for the provision of yoga services and that he would make sure that Miss Clarke received this in case she wished to revise the proposal which she had already made. Mr Isham apologised for the complication and stated that he wished this had been clarified months previously.

18. Tender documents were circulated later in May, and copies were sent to Miss Clarke. In response, she submitted a slightly revised proposal. The respondent also received a proposal from a second prospective external supplier, identified at the hearing as "Candidate S".

19. After some discussion between the respondent's managers, it was decided that Ms Martin-Rodriguez should meet with both prospective suppliers before making a decision about yoga services for Tesito House. Those meetings were duly arranged,

and Ms Martin-Rodriguez met with Miss Clarke at Tesito House on 29 June 2017. There is considerable disagreement about what was said at that meeting. Indeed, allegations about what Ms Martin-Rodriguez said form the basis of Miss Clarke's claim to the Tribunal for racial harassment.

20. On 4 July 2017, Ms Martin-Rodriguez emailed Mr Isham, confirming that she had met with Miss Clarke and commenting that Miss Clarke had appeared to be under the impression that she already "had the gig".

21. Nevertheless, Ms Martin-Rodriguez decided not to award a contract for yoga services to either of the prospective external suppliers. She emailed each of them on 12 July to inform them of this. The emails she sent were brief and they were sent within ten minutes of each other on the evening of that day. Ms Martin-Rodriguez informed Candidate S that the respondent had decided not to proceed with yoga therapy due to funding issues, but that this was no reflection on her interview. Miss Clarke, on the other hand, was told only that it had been a difficult decision, but that she had been unsuccessful in the selection process. Ms Martin-Rodriguez told both candidates that she would like to keep their details on file in case opportunities arose in the future. Miss Clarke replied on 18 July, seeking clarification about the kind of future opportunities Ms Martin-Rodriguez had in mind. She received no response to this enquiry.

22. On 7 September 2017, Miss Clarke submitted a formal written grievance to Mr Isham. She complained that she had been assured that her contract would be finalised, but that "everything seemed to change once I had met the staff" at the training sessions on 20 and 27 March. Miss Clarke asked why the need to obtain three written quotes for yoga services had not been spotted earlier and she complained, in particular, about the way her meeting with Ms Martin-Rodriguez had been conducted. Miss Clarke said that she was surprised to have been asked very little about her work and her services at that meeting but, instead, had been asked about her ethnicity. Miss Clarke stated her belief that she been treated less favourably because of her race.

23. Miss Clarke's grievance was investigated by the respondent, in the person of Nalini Patel. Miss Patel interviewed various individuals, including Miss Clarke herself, for the purpose of her investigation. She also interviewed Ms Martin-Rodriguez, who denied that she had asked Miss Clarke about her ethnicity, but commented that:

"[Miss Clarke] was always going to be difficult as she was under the impression she had been offered the job and she said to me she had been on the training and met with Cory."

24. Following her investigation, Miss Patel concluded that, although there had been failings in the respondent's procurement processes, there was no evidence that Miss Clarke had been discriminated against because of her race. She also concluded that no contract had been entered into between the respondent and Miss Clarke for the provision of yoga services. Indeed, due to financial viability constraints and operational challenges, the respondent had not awarded such a contract to anyone. Instead, a decision had been made to utilise existing staff resources to provide yoga sessions at Tesito House, at no additional cost to the respondent.

25. Miss Clarke appealed against the outcome of her grievance. The appeal was dealt with by the respondent's finance director, but the outcome ultimately remained unchanged.

LAW

26. Section 39(1) of the Equality Act 2010 makes it unlawful for an employer to discriminate against a person in the arrangements it makes for deciding to whom to offer employment; as to the terms on which it offers her employment; or by not offering her employment.

27. Discrimination includes direct discrimination as defined by section 13 of the Equality Act: an employer directly discriminates against an employee if, because of race, the employer treats her less favourably than it treats or would treat others. For this purpose, race includes colour; nationality; and ethnic or national origins.

28. Section 40 of the Equality Act makes it unlawful for an employer, in relation to employment by it, to harass a person who has applied to it for employment. The circumstances in which harassment occur are defined in section 26. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic (including race), and that conduct has the purpose or effect of violating B's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has such an effect, it is necessary to take into account the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

29. For these purposes, anything done by a person in the course of their employment must be treated as also having been done by the employer.

30. In any claim relating to a contravention of the Equality Act, the claimant must prove facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the relevant provision of the Act. If the claimant proves such facts, the Tribunal must hold that the contravention occurred unless the respondent shows that it did not contravene the provision.

DISCUSSION AND CONCLUSIONS

Contractual status

31. The respondent denies that it ever entered into a contract with Miss Clarke for the provision of services by her. Nevertheless, it accepts that Miss Clarke had applied to it for 'employment' within the meaning of section 83 of the Equality Act because the proposition under discussion was a contract personally to do work. We agree.

32. However, we are satisfied that no such contract ever came into existence between Miss Clarke and the respondent. Although she attended training events, Miss Clarke did not start providing services to the respondent. It is also clear that both parties anticipated that the terms of any contract between them would be embodied in a formal written agreement. There was plenty of discussion about the preparation of such an agreement, but a draft of it never materialised.

33. Nevertheless, Miss Clarke had gained a clear and reasonable impression that completion of the contractual formalities would be just that: a formality. Mr Isham had led her to believe, over the course of a number of months, that the respondent would almost certainly be taking her on to provide yoga services at Tesito House. During that time, Miss Clarke was given no indication that a final decision on the matter would actually depend upon the outcome of a competitive tendering exercise and, indeed, upon an overarching assessment of the affordability of the proposal. As a result, Miss Clarke invested considerable time and effort in preparing to run the yoga sessions, and it is not at all surprising that she felt both frustrated and angry about the eventual outcome and about the way the respondent handled the process. Whether its conduct was lawful or not, there is plenty here for the respondent to reflect upon in terms of improving the way it deals with prospective contractors.

Harassment claim

34. Miss Clarke's claim for racial harassment depends upon her proving that, at the meeting on 29 June 2017, Ms Martin-Rodriguez asked her questions about where she is from and about her ethnicity. The Tribunal heard directly conflicting witness evidence on this issue: Miss Clarke is sure that such questions were asked. Ms Martin-Rodriguez is equally sure that they were not. We have the difficult task of resolving this conflict, but we must do so having regard to the principle that it is for the claimant to prove, on the balance of probabilities, the basic facts upon which her claim depends.

35. Given that there is no independent witness evidence to assist us in this matter, we have considered whether there is other evidence pointing in one direction or the other. Miss Clarke argues that there is other evidence which indicates that Ms Martin-Rodriguez's attitude towards her was influenced by improper – indeed racist – factors. Miss Clarke says that this makes it more likely that she is correct about the questions she alleges were asked on 29 June. Miss Clarke alleges that Ms Martin-Rodriguez's attitude (and indeed the attitude of other staff) towards her was negative when they first met at a training event in March 2017; that she appeared disinterested in Miss Clarke's proposal when they met on 29 June; that the email Ms Martin-Rodriguez sent her on 12 July was inadequate (and differed from the email sent to Candidate S); that she failed to respond to Miss Clarke's follow-up enquiry; and that she later told Miss Patel that Miss Clarke "was always going to be difficult". Miss Clarke also points to the evidence of Dorothea Jones as confirmation of her claims.

36. On the other hand, the respondent asserts that there is evidence to indicate that, throughout its dealings with Miss Clarke, it was she who had tended to raise questions about the ethnicity and national origins of particular individuals, rather than any of the respondent's employees. The respondent alleges that Miss Clarke asked Mr Isham about his American origins, for example, and that she also asked Miss Patel where she was from. In addition, the respondent says that it was Miss Clarke, not Ms Martin-Rodriguez, who raised the subject on 29 June, by stating that she had not expected Ms Martin-Rodriguez to look the way she did because of her surname and that she had expected to meet someone Spanish.

37. Dealing first with the allegations made by Miss Clarke (summarised in paragraph 35 above), we do not consider that any of the available evidence supports her very serious accusation that Ms Martin-Rodriguez's actions were motivated or influenced by racism. We make the following findings and observations in this regard:

37.1 There is no evidence to support Miss Clarke's assertion that, at the March 2017 training event, Ms Martin-Rodriguez's attitude towards her was negative. Nor is there any evidence that Miss Clarke was treated negatively by other members of staff. Nothing untoward was noticed by Mr Isham, who was leading the session. Indeed, the evidence indicates that Miss Clarke and Ms Martin-Rodriguez did not actually meet on this occasion: Ms Martin-Rodriguez was merely introduced to those attending the event as a group. She had no separate conversation with Miss Clarke.

37.2 Miss Clarke alleges that, when she met Ms Martin-Rodriguez on 29 June, it was apparent that Ms Martin-Rodriguez had not read her proposal document and appeared disinterested in it. Ms Martin-Rodriguez assured us that she had read the proposal in advance of the meeting, however, and we accept that to be true. Ms Martin-Rodriguez also told us that her principal focus at that meeting was to assess Miss Clarke in terms of her personal suitability to work with Tesito House's service users and as a member of the professional team there. Ms Martin-Rodriguez did not consider it necessary to ask many questions about the proposal itself, with which she was already familiar. It was not the case that she was disinterested in the proposal.

37.3 In our view, the email which Ms Martin-Rodriguez sent to Miss Clarke on 12 July 2017 was indeed inadequate given Miss Clarke's prior dealings with the respondent. Miss Clarke deserved a much fuller explanation of the reasons for the respondent's apparent change of mind in relation to the provision of yoga services at Tesito House and – in our view – an apology for the procedural confusion that had taken place. Ms Martin-Rodriguez accepted this criticism when she gave her evidence to the hearing. She also conceded that there are differences in the content of the emails she sent to Miss Clarke and Candidate S: she attributed these differences to the fact that she had assumed that Miss Clarke would have known by then that the Tesito House project was experiencing serious financial difficulties, whereas Candidate S would not have known this (and so would need to have it explained). However, Ms Martin-Rodriguez insisted that any inadequacies in the email she sent to Miss Clarke had nothing to do with Miss Clarke's race. In the absence of any credible evidence to the contrary, we accept that Ms Martin-Rodriguez is right about this.

37.4 Similarly, we are not persuaded that Miss Clarke's race was a factor in Ms Martin-Rodriguez's failure to respond to the follow-up enquiry sent by Miss Clarke on 18 July 2017. Ms Martin-Rodriguez now accepts that this enquiry did deserve a response, but we accept that the reason why Ms Martin-Rodriguez did not provide one was that her son had just been admitted to hospital and so she had more pressing matters on her mind at this time.

37.5 As far as the comment Ms Martin-Rodriguez made about Miss Clarke being "difficult" is concerned (see paragraph 23 above), Miss Clarke submits that what Ms Martin-Rodriguez meant by this was that Miss Clarke was always going to be difficult because she is black. However, we can find no evidence to support this suggestion. The remark was made at the end of Ms Martin-Rodriguez's interview with Miss Patel on 9 October 2017, in response to a question about whether Miss Clarke had asked for feedback as to why she had not been offered the contract. In responding, Ms Martin-Rodriguez had said that

she thought she had responded to such a request from Miss Clarke but was not sure. She then made the comment set out in paragraph 23. In her evidence to the Tribunal, Ms Martin-Rodriguez explained that the comment merely reflected her view that Miss Clarke was very likely to be frustrated and annoyed by the decision not to award the contract given the serious delays for which the respondent was responsible. Ms Martin-Rodriguez thought that this was why Miss Clarke would be “difficult”, not because she is black. We accept Ms Martin-Rodriguez’s evidence about this: there is nothing to suggest that the remark in question had anything to do with Miss Clarke’s race.

37.6 Miss Clarke first contacted Ms Jones for advice and support at the end of July 2017. She was upset about her treatment by the respondent and sought advice about the possibility of making a discrimination claim. Miss Clarke told Ms Jones that Ms Martin-Rodriguez had pressed her for information about her ethnicity and that she felt traumatised by the experience. We have considered this evidence carefully, but we have concluded that it has little probative value. Although it demonstrates that Miss Clarke has been consistent in her complaint about Ms Martin-Rodriguez since she first contacted Ms Jones, that was a month after the incident allegedly occurred. Moreover, as Ms Jones quite properly accepted, she was able to do no more than repeat to the Tribunal allegations which Miss Clarke herself had made. Ms Jones has no first-hand knowledge of the events in question.

38. Turning to the counter-allegations made by the respondent (see paragraph 36 above), we note that Miss Clarke denies remarking upon Ms Martin-Rodriguez’s surname and appearance. However, she accepts that there was a brief discussion of the fact that Ms Martin-Rodriguez comes from Lancashire. Miss Clarke also denies asking Miss Patel where she was from, but says that reference was made to India during an informal discussion about yoga at the end of her interview with Miss Patel on 19 September 2017. Similarly, Miss Clarke says that she had had a casual conversation with Mr Isham (who is American and has an American accent) about their shared knowledge and experience of living and working in California.

39. As far as Miss Clarke’s meeting with Miss Patel is concerned, we have noted the evidence of Joseph Gresham (who was Miss Clarke’s companion at that meeting). Mr Gresham did not hear Miss Clarke ask Miss Patel where she is from. However, he agreed that he might not have heard everything that was said towards the end of the meeting when everybody was packing up to leave. This is the point at which Miss Clarke is alleged to have asked Miss Patel where she is from.

40. None of the allegations made by Miss Clarke satisfy us that it is more likely than not that, at their meeting on 29 June 2017, Ms Martin-Rodriguez asked her where she is from or about her ethnicity. On the other hand, the respondent’s evidence about what Miss Clarke herself allegedly said on this, and other, occasions casts doubt on whether Miss Clarke’s version of events is correct. Miss Clarke maintains that the respondent’s witnesses are mistaken in their recollections of the events in question. Our impression of those witnesses, however, was that they were honest and that their evidence was credible. Whilst that evidence does not disprove Miss Clarke’s allegations, it certainly does not support them.

41. Taking all this into account, we are not satisfied that Miss Clarke has discharged

the burden of proving that she was asked where she is from, or about her ethnicity, during her meeting with Ms Martin-Rodriguez on 29 June 2017. It follows that Miss Clarke's claim for harassment must fail.

Direct discrimination claim

42. It is important to note that there is a distinction between treatment which is poor, sub-standard, or shabby, and treatment which is "less favourable". There is no doubt that aspects of the way in which Miss Clarke was treated by the respondent fell below the standards of professionalism she might reasonably have expected. However, a claim of direct discrimination will only succeed if it can first be shown that the claimant was treated less favourably than the respondent treats, or would treat, others. A comparison must therefore be made between the treatment of the claimant and that of another person whose circumstances are not materially different (save for the relevant protected characteristic – in this case, their race). The comparator can be an actual person, or it can be a hypothetical comparator.

43. The treatment which Miss Clarke considers to be discriminatory is the respondent's failure to offer her a contract for the provision of yoga services at Tesito House. It is clearly right that Miss Clarke was not offered such a contract, but did this amount to less favourable treatment? In our judgment, it does not. The respondent did not merely decide not to offer a contract for yoga services to Miss Clarke, it decided not to offer such a contract to anyone. Thus, there is no actual person with whose treatment that of Miss Clarke may be compared and found to be less favourable. The most obvious person with whom to compare the respondent's treatment of Miss Clarke would be Candidate S (who was white). Ms Martin-Rodriguez told us that, in her view, Candidate S was well-qualified to provide yoga services and, like Miss Clarke, she was regarded as appointable for the role. Nevertheless, Candidate S was also ultimately rejected: no contract was offered to her either.

44. We must therefore ask whether the respondent would have offered a contract to some other, hypothetical, candidate if that candidate had possessed the same skills and suitability for the role as Miss Clarke, but if he or she had not been black. The answer is clearly 'no'. Ms Martin-Rodriguez told us that the sole reason for her decision not to offer a contract for the provision of yoga services, either to Miss Clarke or to Candidate S, was that the respondent could not afford to do so. After Tesito House opened, it did not receive the influx of service users that had been anticipated. As a result, neither did it receive the anticipated levels of associated NHS funding. We were shown evidence of the fact that, as at July 2017, Tesito House's operating budget was seriously in the red. In the end, the project's adverse financial position was the determining factor: it meant that no external supplier, whatever their skills and qualifications (and whatever their race), would be appointed to provide yoga services at that time. As Ms Martin-Rodriguez put it when she was interviewed by Miss Patel: "We were haemorrhaging money so made a decision not to take on a contractor".

45. If Miss Clarke's treatment by the respondent is viewed more broadly, it is clear that there were failings: the need to undertake a competitive tendering exercise was not identified sufficiently early; Miss Clarke had previously been led to believe that the decision to enter into a contract with her was virtually a foregone conclusion; and the preparation of a draft contract for her was not given priority. Moreover, the fact that the respondent could not afford to enter into a contract with her was not identified until late

in the day. Nevertheless, even if any of these matters may properly be regarded as “less favourable treatment” – and we very much doubt that they can – it is clear that the respondent can demonstrate that they occurred for reasons unconnected with Miss Clarke’s race.

46. We are satisfied that the respondent’s SORD policy did indeed require three written quotes to be obtained for the services in question before a contract could be entered into. Mr Isham should have known this, given that he was negotiating with prospective contractors on the respondent’s behalf. However, it appears that, because of a lack of adequate training, he had been completely unaware of the requirements of the SORD policy. Instead, he had allowed Miss Clarke to gain the impression that the respondent would be looking no further for a yoga teacher. Indeed, it is abundantly clear that Mr Isham wanted the respondent to give the contract to Miss Clarke. He was certainly not put off by the fact that Miss Clarke is black. Although Mr Isham did not alert Miss Clarke to the fact that overarching financial considerations might derail the plan to include yoga in the services offered at Tesito House, this was not because of race: the financial position which faced Ms Martin-Rodriguez in July 2017 would not have been apparent to Mr Isham earlier in the year.

47. Miss Clarke was frustrated by the failure of Mrs Moore to produce a draft contract. From Miss Clarke’s perspective, such frustration is understandable. However, during the period in question, Mrs Moore was overseeing the procurement of multiple services to enable Tesito House to open for business. It was a multi-million-pound project and Mrs Moore’s focus was on procuring essential equipment and services. She did not regard the proposed contract for yoga services as essential, or as a priority – particularly as Tesito House was yet to welcome its first service users – and it was for this reason that Mrs Moore did not turn her attention to the preparation of a contract. In any event, Mrs Moore had at that time been unaware of the fact that Miss Clarke is black.

48. For these reasons, we find that Miss Clarke’s claim of direct race discrimination also fails.

Employment Judge J Holbrook
Date: 17 August 2018

JUDGMENT SENT TO THE PARTIES ON

22 August 2018

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FOR THE TRIBUNAL OFFICE