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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107585/2017

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Held in Glasgow on 5 June and 30 August 2018

Employment Judge: Lucy Wiseman

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**Members: Kenneth Thomson
James Burnett**

Mr Naseh Ahmed

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**Claimant
Represented by:
Ms L Campbell
Solicitor**

McCurrach UK Ltd

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**Respondent
Represented by:
Mr N Shah
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 22 December 2017 alleging he had been discriminated against because of the protected characteristic of race. The claimant asserted the respondent had deliberately
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failed to investigate or gain access to the Home Office Online Checking Service to verify his entitlement to work in the UK and had dismissed him.

2. The respondent entered a response admitting it had dismissed the claimant for some other substantial reason, but denying the allegations of discrimination. The respondent asserted the claimant had been asked to provide relevant documentation to enable them to check his right to work in the UK but had failed to do so.
3. We heard evidence from the claimant; Ms Laura Farrell, Recruitment Manager; Ms Charlene McSherry, HR Shared Service Administrator and Ms Vanessa Gallagher, HR Shared Services Manager. We were also referred to a jointly produced file of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

4. The respondent is a field sales agency employing 1,223 employees.
5. The claimant commenced employment with the respondent on 14 September 2016. A Statement of Terms and Conditions of Employment was produced at page 50.
6. The claimant, prior to commencing employment, was required to produce documents verifying the right to work in the UK. The claimant was unable to produce his documents because he was in the process of making an application to switch his visa to a permanent one.
7. The claimant asked his solicitor to produce a letter confirming this information. A letter was produced on 26 August 2016 (page 54A) confirming the information and that the claimant's documents were with the Home Office as part of the application. The letter further confirmed the claimant's original visa was until 8 February 2017 and that he continued to have the right to work whilst the Home Office considered his application.
8. The respondent sought advice from the Home Office and were informed they could not rely on the solicitor's letter as proof of right to work in the UK, but

they could rely on the solicitor's letter (as an original document having been seen by the employer) in order to carry out a check using the Employer's Online Checking Service.

5 9. The respondent undertook this check which confirmed the claimant had the right to work in the UK. The result of the check was valid for six months and so expired on 6 March 2017.

10 10. The respondent is required, upon expiry of the check, to carry out another check to confirm the ongoing right to work in the UK. The respondent cannot rely on the same document (in this case the solicitor's letter) for the subsequent check.

15 11. The claimant was initially employed for a fixed term until 23 December 2016. The sales developer role which the claimant had carried out, ceased on 23 December 2016 and the claimant (and others) applied for other roles. The claimant applied for, and was offered, a Territory Sales Manager position on the Nestle contract.

20 12. The Nestle contract is a seasonal contract whereby employees work for a period of 7/8 months, after which the contract temporarily ceases. Employees retain continuous service with the respondent (although they are not paid during this period) and are free to either take the time off or look for work on another contract until re-starting work on the Nestle contract.

13. The respondent wrote to the claimant (and others) on 11 April 2017 (page 59) to confirm the last working day for that period would be 13 April 2017, and that he was due to return to work in September 2017.

25 14. The respondent carried out a full right to work audit for all employees to ensure all employees had the right to work in the UK and to ensure the respondent held the correct documentation for all employees. This audit was carried out because a sister company of the respondent had recently been fined because an employee's right to work had expired and another check had not been carried out because this had not been noticed.

15. The audit results (page 67) were coded red risk (checks had expired or no documents on file), amber risk (documents not verified) or green risk (where employment pre-dated the coming into force of the legislation). There were a number of cases in the amber risk category, and two cases in the red risk category. The cases in the red risk category involved cases where the respondent had missed the expiry date on checks and had accordingly not carried out a follow-on verification check. One of the red risk cases was the claimant and the other was a Ghanaian employee.
16. The claimant and the other employee concerned were asked to provide their documentation to allow the line manager to carry out another verification check. The other employee produced his documents and a positive verification check was completed. The claimant did not respond to the requests of his line manager.
17. Ms Vanessa Gallagher, HR Shared Service Manager, wrote to the claimant on 28 April 2017 (page 201) referring to the conversations the claimant had had with his line manager regarding him providing evidence of his eligibility to work in the UK. Ms Gallagher acknowledged the claimant was currently on the “off season” part of his contract, however advised that the respondent required him to submit the appropriate right to work documentation by 12 May, otherwise the respondent may have no alternative but to terminate his employment.
18. The claimant responded to this letter on 12 May (page 202) stating he had an outstanding application with the Home Office, and was waiting to get his documentation back from them. The claimant referred to the Employers Checking Service and asked the respondent to use this to check his right to work in the UK. The claimant confirmed he was living and working in the UK legally and that he had the right to work whilst his application was outstanding with the Home Office. The claimant confirmed his name, date of birth, nationality, home address and Home Office reference number.

19. Ms McIntyre, HR Shared Service Administrator, responded to the claimant's letter by asking him to forward a copy of his passport or permit card again.
20. The claimant responded on 15 May (page 204) stating his "leave to remain" was submitted to the Home Office along with his passport and that he was waiting for the return of his documents and accordingly could not produce them. He again referred to the Employers Checking Service and the fact he had provided the Home Office reference number.
21. Ms McIntyre responded to the claimant by email on 23 May in which she wondered whether he had received his documents back from the Home Office.
22. The claimant responded the following day asking the respondent to use the Employers Checking Service to check his right to work in the UK.
23. Ms Charlene McSherry, HR Shared Service Administrator, telephoned the claimant regarding the situation because the respondent required sight of an original document in order to carry out a check on the Employers Checking Service. The respondent was required to confirm on the online system that they had seen an original document before the system allowed them to proceed. The solicitor's letter produced by the claimant initially could not be used again. The claimant told Ms McSherry he would obtain another solicitor's letter, but he did not do so because he did not consider it necessary.
24. Ms Gallagher took the decision to terminate the claimant's employment because the claimant had, since April, been asked to produce documents to allow the employer's check to be carried out and he had failed to do so. Ms Gallagher considered there was a risk to the respondent business if she failed to take action to address the situation. The claimant's employment terminated on 31 July 2017.
25. The claimant had been due to re-start work on the Nestle contract on 5 October. The claimant was a highly regarded employee and the respondent would have retained him in employment if he had either presented his

documents or produced a solicitor's letter to allow them to use the employer's checking service.

26. Ms McSherry remained in contact with the claimant following the termination of his employment. Ms McSherry advised the claimant, on 7 August 2017 (page 210) that an employer's check had been submitted and she was waiting for the Home Office response. Ms McSherry had carried out a check, using the claimant's Home Office reference number, because the circumstances had changed insofar as the claimant was no longer an employee of the respondent and no longer a risk to the business.
27. The employer's check took 4/5 weeks to process and, upon receipt of the positive verification, Ms McSherry contacted the claimant to advise there were currently no positions available in the area, but she would retain his details and also pass them to the respondent's sister company.
28. The claimant was contacted in December and offered a position in Dundee on a salary of £18,200, but he declined the offer.

Credibility and notes on the evidence

29. There were no issues of credibility in this case: all of the witnesses gave their evidence in an honest and straightforward manner, and their evidence reflected their understanding and explanation for what had happened.
30. Ms Farrell had a lead role in ensuring the respondent company complied with the legal requirements regarding the right to work in the UK and to ensure the respondent did not incur a fine because of the same errors made by the sister company. Ms Farrell prepared a PowerPoint presentation for managers (pages 136 – 147) to explain the right to work process and their responsibilities as managers. All of the information in the presentation was taken from the Home Office website, including the list of acceptable right to work documents (page 141).
31. We accepted Ms Farrell's evidence regarding the process to be followed when carrying out an employers' check, and the reason why the respondent could

not proceed to carry out a verification check on the basis of the claimant's Home Office reference number whilst he was still in employment.

5 32. The claimant's position was that he had provided all of the necessary information to the respondent to allow them to carry out the employers' verification check, but the respondent had deliberately failed to do so. He maintained the respondent had assumed that because he was a Pakistani national, his right to work in the UK had expired.

10 33. There was one dispute between the evidence of the claimant and Ms McSherry and that concerned whether the claimant had offered to obtain a second solicitor's letter. The claimant's position was that Ms McSherry had told him to do this. We preferred Ms McSherry's evidence regarding this matter. Ms McSherry told the Tribunal that she was careful to use the language used in the Home Office guidance and so she always referred to "supporting documents" rather than actual documents. We, on this basis, found as a matter of fact that it was the claimant who told Ms McSherry that he would obtain a second solicitor's letter in order to allow the respondent to carry out a second verification check.

20 34. The claimant also invited the Tribunal to believe that the only reason Ms McSherry had subsequently carried out an employers' verification check after the termination of his employment was because he had made reference to seeking legal advice. Ms McSherry rejected that suggestion. We preferred Ms McSherry's evidence on this point because the explanation for carrying out a check at that time was linked to the risk to the business.

Claimant's submissions

25 35. Ms Campbell submitted the claim was one of direct discrimination in terms of section 13 Equality Act and that the claimant had been treated less favourably because of the protected characteristic of race when the respondent failed to carry out an employers' verification check and when they dismissed the claimant. The respondent had, it was submitted, made an unlawful

assumption regarding the expiry of the right to work in the UK because of the claimant's nationality.

- 5 36. The claimant was in the process of making an application for permanent leave to remain in the UK as a parent and had had to lodge all of his documents with the Home Office. An Employers' Verification Check had been done prior to his employment commencing. The respondent subsequently requested the claimant's right to work in the UK documentation in April 2017. The claimant, in response to these requests, repeatedly provided the details the respondent requested. The claimant had the right to work in the UK due to his application being considered.
- 10 37. Ms Campbell submitted the respondent's position was not consistent because they had initially told the claimant a solicitor's letter was not sufficient, but subsequently they wanted him to obtain another solicitor's letter.
- 15 38. Ms Campbell submitted the respondent had not wanted to carry out an employers' verification check because they were afraid the right to work in the UK had expired and their concern stemmed from the fine imposed on the sister company.
39. The claimant had done all that he could to allow the respondent to make the necessary checks.
- 20 40. The claimant relied on a hypothetical comparator and sought to argue that a British national would not have been treated in this way. The respondent believed, because the claimant is a Pakistani national, that his right to work in the UK had expired.
- 25 41. Ms Campbell invited the Tribunal to uphold the claim that the respondent had discriminated against the claimant because of his nationality and make an award of compensation as set out in the schedule of loss.

Respondent's submissions

42. Mr Shah noted that prior to employment commencing, the claimant had provided the respondent with a solicitor's letter to enable the respondent to carry out an employers' verification check. The positive verification lasted six months, and the respondent then contacted the claimant with a request for him to produce his documentation. It was the claimant who had offered to obtain another solicitor's letter.
43. Mr Shah submitted there is an obligation on employers to prevent illegal working - that is, employing a person who cannot show s/he has the right to work in the UK - and this applies equally to all employees. The respondent's audit applied to all employees. The claimant and one other employee were identified as having an expired employers' verification check.
44. The respondent did not doubt the claimant had had to send all of his documents to the Home Office in support of his application, however the Home Office guidance states employers must be reasonably satisfied of such an application before doing an employers' verification check. Mr Shah submitted the respondent had been entitled to ask for evidence of a live application in April 2017.
45. Mr Shah submitted the claimant knew the employers' verification check had to be done, and he knew he needed to obtain a solicitor's letter regarding the ongoing application. The claimant did not provide either his documents or a solicitor's letter: the respondent could not carry out an employers' verification check and accordingly his employment was terminated.
46. Mr Shah noted the respondent had subsequently carried out an employers' verification check based on the claimant's Home Office number. He submitted the circumstances had changed, inasmuch as the claimant was a prospective employee, and this had allowed the respondent to make the check.

47. Mr Shah further noted the claimant argued a right to work in the UK check had not been done by the respondent because they were frightened they may be in breach of the legislation. He submitted this was not correct, but even if it was, it did not amount to race discrimination.
- 5 48. Mr Shah referred to section 13 Equality Act and submitted the claimant needed to show less favourable treatment in comparison to a person in similar circumstances. The hypothetical comparator was said to be all non-EU staff, but Mr Shah submitted everyone had been subjected to the same audit and the Ghanaian employee had provided his documents.
- 10 49. The respondent, had they continued to employ the claimant without the check having been made, would have been in breach of the legislation. It was submitted the respondent had no option but to terminate the claimant's contract.
- 15 50. Mr Shah invited the Tribunal to dismiss the claim. If, however, the Tribunal found for the claimant, he submitted the claimant was not entitled to compensation until 5 October when the season on the Nestle contract started again. Further, he invited the Tribunal to have regard to the evidence of the respondent's witnesses, all of whom said the claimant had been a very good employee whom the respondent had wanted to retain. The claimant had been
20 offered a role in Dundee in December, but had refused it, and so any award of compensation should be limited to the 10 week period between 5 October and December.

Discussion and Decision

- 25 51. We had regard firstly to the terms of section 13 Equality Act which provide that an employer discriminates against a person if it treats that person less favourably than it treats or would treat others, and the difference in treatment is because of a protected characteristic (in this case the claimant's nationality). The claimant identified the less favourable treatment as (a) the respondent's failure to investigate or gain access to the Home Office
30 Checking Service to verify his entitlement to work in the UK and (b) his

dismissal. The claimant, in support of his position, invited the Tribunal to find the respondent had assumed, because of his nationality, that his right to work in the UK had expired.

52. We asked ourselves whether the less favourable treatment alleged by the
5 claimant had occurred. We noted there was no dispute regarding the fact the respondent did not carry out a second verification check regarding the claimant's right to work in the UK and, further, the respondent did take the decision to dismiss the claimant.

53. The claimant relied on a hypothetical comparator to argue he had been
10 treated less favourably than the respondent treated or would treat others in the same, or not materially different, circumstances. Section 23 Equality Act provides that there must be no material difference between the circumstances of the claimant's case and that of the comparator. The case of **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** made
15 clear that the "circumstances" relevant for comparison include those that the alleged discriminator took into account when deciding to treat the claimant as it did.

54. Ms Campbell submitted the hypothetical comparator in this case would be a
20 British national employee and argued s/he would not have been treated in the same way as the claimant. We considered this a very wide and general definition of the hypothetical comparator, and we concluded the hypothetical comparator would also have to be someone who had been asked to produce their paperwork to allow an Employer's Online check to take place and who had refused.

25 55. We, in considering the comparison, had regard firstly to the evidence of the respondent's witnesses (which was not challenged) that a company-wide audit had been carried out to check the right to work details and documents of all employees. This audit disclosed, amongst other things, that the respondent had missed the re-verification for two employees, being the
30 claimant and a Ghanaian employee. These two employees were treated in the same way insofar as they were each asked to produce their supporting

documents: the Ghanaian employee did so, a check was carried out and he continued in employment. The claimant could not provide his documents because they were still at the Home Office. The claimant offered to obtain another solicitor's letter, but subsequently did not do so because he was of the opinion that he had given the respondent enough information to carry out the employer's verification check.

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56. We acknowledge the Ghanaian employee is not the claimant's chosen comparator, but he was an employee who was in a position not materially different to that of the claimant and he did not have the claimant's protected characteristic. We considered it instructive to look at how the Ghanaian employee was treated. Put short, he was asked to produce his documents, he did so, an employer's online check was carried out and he continued in employment. The material reason for the different treatment of the Ghanaian employee and the claimant was the non-production of documents.

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57. We considered there was no evidence to support the claimant's position that he was treated less favourably than others in the same or not materially different circumstances were, or would have been. Ms Campbell invited the Tribunal to accept the respondent had made an assumption that because the claimant was a Pakistani national, his right to work in the UK would have expired. This was put to each of the respondent's witnesses and they each denied the suggestion. We accepted their evidence which was clear and straightforward: they did not make any assumptions, they simply did not know the position and had to do the check.

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58. We also accepted the respondent's evidence that it would have dismissed other employees who, like the claimant, refused to provide supporting documents or a solicitor's letter, because they were a risk to the business. We acknowledge there was no documentary evidence to support this, but in circumstances where the respondent was sensitive to the need to be compliant with the legislation regarding the right to work in the UK, we considered this explained and supported their position.

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59. The claimant took issue with providing a second solicitor's letter for two reasons: firstly, he understood the respondent had been told by the Home Office that a solicitor's letter was "not sufficient" to protect them and secondly, he did not consider a second solicitor's letter necessary because he believed he had provided the respondent with all necessary information to allow them to carry out the check. We did not doubt this evidence reflected the claimant's understanding, but his understanding was not entirely correct. We accepted Ms Farrell's evidence when she told the Tribunal that the respondent had been told by the Home Office that they could not simply rely on a solicitor's letter as proof of the right to work in the UK, but that they could accept it as an original document and proceed to carry out an employer's verification check on that basis. The initial solicitor's letter could not be relied upon by the employer as a basis for the second online check.
60. We also accepted Ms Farrell's evidence that the respondent could not carry out an employer's verification check on the basis of a Home Office reference number alone.
61. Ms Farrell told us, and we accepted, that (a) an employer using the online employer's verification check must tick a box to indicate they have seen an original document (or solicitor's letter) produced by the employee and (b) if the employer does not tick the box they are not permitted to proceed to carry out the check. We, having accepted this evidence, concluded the respondent did not carry out a second employer's verification check because they had not seen a document from the claimant which would enable them to do so.
62. The claimant suggested the respondent had been frightened to do the check because if the right to work had expired, the respondent could face a fine similar to that of the sister company. This was put to each of the respondent's witnesses and they each rejected the suggestion. We accepted their evidence and considered it was supported by the fact the Ghanaian employee was in the same position as the claimant insofar as his verification check had expired, but the respondent proceeded to carry out the check once they had the supporting documentation. If the claimant had provided a second

solicitor's letter the respondent could have proceeded to carry out the verification check.

- 5 63. We concluded, having had regard to all of the above points, that the claimant was not able to establish that he had been treated less favourably by the respondent than it treated or would treat others. We concluded a hypothetical comparator who did not have the same protected characteristic as the claimant, but who had refused to provide paperwork to allow the respondent to carry out an employer's online check, would also have been dismissed. We reached that conclusion (a) having had regard to the reason for the difference in treatment between the claimant and the Ghanaian employee who were in the same position and each asked for their documents to allow a check to be done; (b) having had regard to the respondent's evidence concerning the documents required to allow them to process an employer's online check and (c) having regard to the desire of the respondent to ensure compliance with the right to work in the UK paperwork and checks.
- 10 64. We should state in addition to the above points that if we had been satisfied the respondent did not carry out the check because they were concerned they may be breaking the law (as alleged by the claimant), then that would have been the reason for the unfavourable treatment, and not the claimant's nationality.
- 15 20 65. The claimant challenged Ms McSherry why a verification check, based on his Home Office number, could be made after his employment had terminated. He suggested this had been done when he threatened taking legal advice and when Ms McSherry realised she had made a mistake. Ms McSherry rejected this suggestion and we accepted her explanation that once the claimant's employment had ended, he was no longer a threat to the business and, as a prospective employee, the respondent was prepared to carry out the check based on the Home Office number.
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66. We should state that we did consider whether, if the termination of the claimant's employment was less favourable treatment, it happened because of his nationality. We, as set out above, accepted the respondent's evidence that it would have dismissed any employee who had not provided supporting documents to allow an employer's check to be carried out regarding right to work in the UK. The respondent's evidence was not challenged and was, in fact, supported by the fact the company-wide audit had been carried out to ensure the respondent was compliant with the legislation. We concluded the reason for the less favourable treatment was because the claimant did not provide his documents, or a solicitor's letter, to the respondent to allow them to carry out an employer's online check regarding his right to work in the UK.

67. We concluded (a) the claimant was not treated less favourably than others in the same or not materially different circumstances were, or would have been and (b) even if the claimant had established less favourable treatment, that treatment did not happen because of the claimant's nationality.

68. We decided to dismiss the claim.

20 Employment Judge: L Wiseman
Date of Judgment: 26 October 2018
Entered in register: 31 October 2018
and copied to parties

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