THE EMPLOYMENT TRIBUNALS

Claimant **Mr D Tsiboe**

Respondent **Mitie Limited**

HELD AT: **London Central**

ON: **30 October to 1 November 2018**

EMPLOYMENT JUDGE: **Mr J Tayler**

Appearances

For Claimant: **In person**
For Respondent: **Mr M Salter, Counsel**

JUDGMENT

The Judgment of the Tribunal is that the Claimant was subject to direct race discrimination in the manner in which the second interview was conducted for the role of Security Manager at the Allianz House site in July 2018 and by not being considered when the position became available again in August 2017.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 9 March 2018 the Claimant brought complaints of race discrimination.

2. When the matter came on for hearing a full panel was not available. I gave the parties an opportunity to consider whether they wished the matter to be heard by me sitting alone; in which case in accordance with section 4(3)(e) Employment Tribunals Act 1996 they would need to provide their consent in writing. After taking time to consider the matter the parties stated that they did want me to hear the claim sitting alone, and provided their written consent.

Issues

3. At the outset of the hearing I considered the issues with the parties and identified them as follows.

   3.1 The Claimant describes his race as Black African

   3.2 Was the Claimant subject to discrimination because of race by Rian Barnard and Dane Morriseau when he was not appointed to the position of Site Supervisor[1] in July 2017. He compares his treatment to that Darren Ward who describes his race as white British.

   3.3 Was the Claimant subject to discrimination because of race by Mr Morriseau not asking any questions in the interview on 28 July 2017

   3.4 Was the Claimant subject to discrimination because of race by not being asked a full set of questions on 28 July 2017

   3.5 Was the Claimant subject to discrimination because of race by Rian Barnard when he was not appointed to the position of Site Supervisor in August 2017. He compares his treatment to that of Mohamed Houggi who describes his race as French Algerian

   3.6 The Claimant stated he was not claiming that he was subject to race discrimination claim in his grievance or appeal

Evidence

4. The Claimant gave evidence on his own behalf.

5. The Respondents called:

   5.1 Syed Shah, Operations Manager

   5.2 Rian Barnard, Regional Manager

   5.3 Dane Morriseau, Account Manager

   5.4 Dean Samuels, Operations Manager

Findings of fact

6. In 2007 the Claimant was employed by Corps Security as a Security Officer working at Allianz House in the City of London.

7. On 4 October 2010 the Claimant's employment as a Leading Security Guard at Allianz House was transferred to the Respondent.

8. On 2 September 2015 the Respondent sent the Claimant a letter confirming employment as a Leading Security Guard (p31).

[1] In fact the correct title for the role was Security Manager

9. From March to May 2016 the Claimant acted as a temporary supervisor appointed by his then manager, Adam Rawlings.

10. In late May 2016 Nicholas Carroll, described by the Claimant as a white man, was appointed as Supervisor. The Claimant states that he did not have knowledge of the systems operated at Allianz House. The Claimant stated that he was asked to train Mr Carroll by Mr Rawllings. As different security systems are used at the sites at which the Respondent operates I do not consider it significant that Mr Caroll did not know how the system operated at Allianz House or that the Claimant was asked to train him on the system.

11. In June 2017 Mr Carroll left the Supervisor role at Allianz House. The Claimant was appointed acting supervisor by his new manager, Syed Shah. The Claimant alleges that Mr Shah promised he would be appointed to the substantive role. There are a number of occasions on which the Claimant contends that Mr Shah "promised" he would get the permanent role. However, on questioning the Claimant stated that Mr Shah said that he "wanted" the Claimant to get the job. I hold that Mr Shah was expressing the wish that the Claimant should obtain the substantive position rather than promising it: it was not in his gift.

12. Mr Shah arranged a meeting with the Area Manager, Mr Barnard and Mr Morriseau. Mr Shah told the Claimant that Mr Morriseau was not comfortable with the idea that the Claimant should be appointed Supervisor and stated that the Respondent was going to advertise the position. I do not consider that this suggests any more than that Mr Morriseau considered that the Respondent should adopt their normal procedure and advertise before appointing to a permanent position.

13. I accept Mr Shah's evidence that the role was advertised as Security Manager, rather than Supervisor, as the Respondent wanted to enhance the site and develop the post holder to bring them in line with other contracts of a similar size.

14. The Respondent has a detailed Recruitment and Selection Policy. It was not originally in the bundle but was provided on request. The policy appears to have been written with the Equality and Human Rights Commission code of practice in mind. Is it detailed and places great emphasis on standardised recruitment processes, including competency based interviews and the maintenance of records. The policy should be read for its full details. It has a useful set of question at the end which ask (with emphasis added):

> **Important points when implementing this procedure**
>
> **Questions to confirm compliance**
>
> To confirm compliance with this procedure you should be able to answer yes to all of the questions below:
>
> o Has authorisation been given to recruit for the position

o Have job descriptions/person specification been developed for the position
o Internal sourcing to take precedence over external sourcing for positions
o **At least one interview must take place with records maintained**
o Verbal screening must take place before the position has been offered.
o **All interview records must be retained for a minimum of 12 months by the relevant admin support**
o Has the P file been set up inline with the P file checklist
o Has the completed screening dossier been sent to the relevant admin support for the P file
o Has the relevant induction form been completed within 12 weeks and uploaded onto Mitsm skill code 001 for all indirect staff

15. On 24 July 2017 the Claimant sent an email to Mr Samuels about a possible move to Merton which is nearer to where he lives. I consider that, at least in part, the Claimant was investigating the possibility of the move as he was unhappy that he was not going to be slotted into the Security Manager position at Allianz House.

16. On 27 July 2017 the Claimant along with a number of others, including Mr Ward were interviewed by Mr Shah. Mr Shah scored the candidates. The Claimant and Mr Ward were the two top scoring candidates and were put forward to a second interview. Mr Ward scored higher that the Claimant at the first interview. Mr Shah did not keep the record of the interviews or the scores.

17. On 28 July 2017 the Claimant attended a second interview with Mr Shah, Mr Morriseau and Mr Rian Barnard, the Area Manager. I accept that Mr Barnard asked the Claimant only two questions, one a general question about himself and the second a question based the following scenario:

> "It is 5 minutes before you are about to leave the weekend when the client phones requesting your urgent attendance at a meeting. The meeting is 30 minutes in duration, at the end of the meeting you have been assigned several actions that require immediate attention however the deadline for overall conclusion is 09:00 hrs on the Monday morning. The list of actions that have been allocated he will take a minimum of two hours to complete. To complicate matters, you are attending a family function later on in the evening, how would you address this situation."

18. The scenario was designed to draw out a candidates ability to delegate tasks to subordinates so as to ensure that the client's needs were satisfied, but without the necessity of missing the family function. The Claimant stated that he would conduct all the tasks himself. That was the wrong approach to the question. The Claimant contends that he was asked no further questions by Mr Barnard.

19. The Respondent provided a set of 4 specific test questions in a table form with provision for a marking scheme. It was not suggested that this specific example was used. However, it was stated that something similar was used. It was put to the Claimant in cross-examination that he was asked all the questions and that Mr Barnard did not limit himself to just two questions.

20. It was contended by the Respondent that the Claimant was treated in the same manner as Mr Ward. I do not accept that that was the case and accept the Claimant's evidence that he was only asked only one of the specific questions by Mr Barnard whereas Mr Ward was asked the full set of specific questions.

21. That is consistent with the response given by Mr Morriseau when questioned about the matter during the Claimant's grievance (p47) when Mr Samuels asked the following question by email "Dominic also mentioned he was never asked many questions in his interview, is this correct?" to which Mr Morriseau responded "Yes, this is correct. The first response to Ryan's questioning was so off the mark, Ryan decided to end the meeting".

22. It is also consistent with what Mr Morriseau states in his Witness Statement at paragraph 9 (emphasis added):

> "I would describe Dominic as extremely nervous throughout the interview. There was one question in particular regarding delegation which Dominic seemed to get confused about. My recollection is that the question was about balancing a family event against a deadline on site (when the Deputy Supervisor was there). Dominic seemed to initially say that he would attend the site himself (which would not be delegating) but then became muddled and changed his answer which compounded his nervousness. **Rian took the decision to end the interview shortly afterwards.** The answer that we were looking for was that as long as the Supervisor was getting regular updates and had everything that they needed to know (including if the Deputy could handle the situation), There was no need for them to attend the site personally." **(Emphasis added)**"

23. When Mr Barnard asked Mr Morriseau if he had any questions he said he did not have any questions for the Claimant as he knew him well form the site. I accept that Mr Barnard was the person who was designated to ask the standard questions.

24. Contrary to the advice of the Equality and Human Rights Commission, and their own procedure, the Respondent did not keep any records of the interview including the scoring sheets that were allegedly used.

25. That evening Mr Shah contacted the Claimant by telephone and told him that he had not been awarded the job and that Mr Ward had been successful.

26. Mr Ward, having visited the site, decided not to take up the role of Security Manager. Mr Shah again asked the Claimant to take on the acting role. Mr Shah again told the Claimant that he wanted him to be given the job permanently. He went so far as suggesting to the Claimant that he should consider who would be his deputy.

27. At about this time there was a potential redundancy situation at another of the Respondent's sites, the Financial Times, as a result of which the Security Manager was potentially at risk of redundancy. Mr Barnard decided that he should be redeployed to Allianz House as a result of which the Claimant was not considered for the role. This was not in accordance with the Respondent's procedures.

28. On 18 September 2017. The Claimant wrote to the Respondent stepping down from his position as Leading Security Guard at Allianz House, but stating that he wished to continue working as a Relief Officer.

29. On 17 October 2017 the Claimant raised a grievance about his treatment, alleging that he had been subject to race discrimination in respect of not being offered the role of Security Manager at Allianz House. The Claimant attended a Grievance Hearing held by Mr Samuels on 25 October 2017. The Claimant was sent the appeal outcome on 3 January 2018. The complaint of race discrimination was not upheld. Mr Samuels apologised that the correct procedure had not been followed when the role became available for the second time in that the role had not been advertised before Mr Hoggui was appointed. Mr Samuels accepted that this was a business decision.

30. The Claimant appealed against the grievance outcome on 10 January 2018. He attended a grievance appeal meeting before Steve Livens, Regional Manager, on 22 January 2018. He was sent an appeal outcome on 2 March 2018. The appeal was dismissed. The Claimant makes no complaint about the grievance or appeal process.

The Law

31. Race is a protected characteristic for the purposes of the Equality Act 2010 ("EqA").

32. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

33. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

34. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

35. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

36. Since exact comparators within the meaning of section 23 EQA are rare, it is may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

37. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision is now made by Section 136 EQA:

> 136 Burden of proof
>
> (1)This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> But subsection (2) does not apply if A shows that A did not contravene the provision.

38. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must established on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic.

39. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576:

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole

> ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

40. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on section 136 EqA: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment. If the burden of proof has shifted it is for the Respondent to establish that the treatment was not in any sense whatsoever because of the protected characteristic.

41. In **Cooperative Centrale Raiffeisen Boerenleenbank Ba v MR A R Docker** UKEAT/0088/10/CEA His Honour Judge Peter Clarke emphasised that the introduction of the burden of proof provision was designed to make it easier for Claimants to succeed:

> "18. To state the obvious, s54A (and its equivalents) changed our domestic law of unlawful discrimination. It was designed to and did have the effect of making it easier for claimants to succeed in such cases. The historical context is important. It is referred to in the judgment of Peter Gibson LJ, paras 6-7, in **Igen v Wong** [2005] ICR 931. In short, s54A represents a return to the position taken by Browne-Wilkinson P in **Khanna** [1981] ICR 653 and **Chattopadhyay** [1982] ICR 132, from which his Lordship resiled in **Zafar** [1998] ICR 120, in the light of the approach of Neill LJ in **King v Great Britain China Centre** [1992] ICR 516, 528-9, namely that where a claimant establishes a prima facie case of discrimination and the respondent fails to establish an explanation for the treatment complained of which has nothing whatsoever to do with his race, then the tribunal must, not may uphold the complaint.
>
> …
>
> 23. That said, we should emphasise that the permissible approach to be taken by an Employment Tribunal to the direct discrimination question is as stated by Lord Nicholls in **Shamoon**, para 12, as Mummery LJ reminds us in **Madarassy** (para 83):
>
> > **"The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."**

42. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer… discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.

43. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.

44. Pursuant to section 14 Equality Act 2006 provides the power for the Commission for Equality and Human Rights to issue statutory Codes of Practice.

45. Section 15(4) Equality Act 2006 provides:

> (4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code—
>
> (a) shall be admissible in evidence in criminal or civil proceedings, and
>
> (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.

46. The relevant Code of Practice is the Employment Statutory Code of Practice. Chapter 16 deals with avoiding discrimination in recruitment. It includes the following provisions (with emphasis added):

> 16.44
>
> An employer should ensure that these processes are fair and objective and that decisions are consistent. **Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination**.
>
> 16.45
>
> In deciding exactly how long to keep records after a recruitment exercise, employers must balance their need to keep such records to justify selection decisions with their obligations under the Data Protection Act 1998 to keep personal data for no longer than is necessary.
>
> 16.46
>
> The records that employers should keep include:
>
> • any job advertisement, job description or person specification used in the
> recruitment process;
> • the application forms or CVs, and any supporting documentation from every candidate applying for the job;

• records of discussions and decisions by an interviewer or members of the selection panel; for example, on marking standards or interview questions;
• notes taken by the interviewer or by each member of the panel during
the interviews;
• each interview panel member's marks at each stage of the process; for
example, on the application form, any selection tests and each interview
question (where a formal marking system is used);
• all correspondence with the candidates.

47. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:

> "(1) … proceedings on a complaint … may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

48. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link)** [2003] IRLR 434 is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule. In **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327 Lord Justice Auld noted that the comments in Robertson were not to be read as encouraging tribunals to exercise their discretion in a liberal or restrictive manner. The tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension. The tribunal may, where appropriate, gain assistance by looking at the factors applied in personal injury actions, see **British Coal Corpn v Keeble** [1997] IRLR 336. The tribunal may wish to consider the length and reason for the delay, the extent to which the cogency of the evidence is likely to effected by the delay, the extent to which the parties pursued has cooperated with any request for information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the Claimant to obtain appropriate professional advice. The fact that an employee is pursuing an internal grievance or other procedures is a factor that may be taken into account in determining whether time should be extended: **Apelogun-Gabriels v Lambeth London** BC [2002] ICR 713.

Analysis

49. I first considered whether the Claimant has established facts from which I could conclude, in the absence of an adequate explanation, that he had been subject to race discrimination. I have found as a fact that the Claimant was only asked a general question and one specific question by Mr Barnard, despite the Respondent contending that both the Claimant and Mr Ward were asked the same set of four specific questions, and scored against a scoresheet which it is contended has been lost. The witnesses did not suggest that Mr Ward was not asked all of the questions. Therefore, there was a difference of treatment and a different race between the Claimant and Mr Ward.

50. In addition, while unfair treatment alone cannot found an inference of discrimination, unexplained unfair treatment may. The Respondent has sought to establish that Mr Ward and the Claimant were treated in the same way, whereas I conclude that they were not. The Claimant's treatment was not in accordance with the Respondent's procedures. The treatment was not in accordance with the Equality and Human Rights Commission Code of Practice which I am entitled to take into account in determining this issue.

51. Overall, I conclude the evidence is sufficient to shift the burden of proof.

52. I have not been persuaded by the Respondent's evidence that the Claimant's treatment in not being asked the full set of questions was, in no sense whatsoever, because of his race. I accept that the Claimant answered the one specific question he was asked poorly. It was a question designed to test his ability to delegate tasks, whereas he would have taken the entire task upon himself. I can see why Mr Barnard thought the answer to that question was poor. However, the real issue is why the interview was brought to an end at this stage. Race need not be the sole, or even the principal reason for treatment. I am not satisfied that the decision to bring the interview to a close had nothing to do whatsoever with the Claimant's race in that it was one of the factors, unconscious or otherwise. Discrimination often occurs where a person is not given the benefit of the doubt or the same opportunities as others, rather than by being subject to overt discrimination. The Respondent has given no proper explanation as to why the interview was cut short preventing the Claimant from having the opportunity to answer the other questions; instead the Respondent has sought to persuade me that both candidates were treated in the same way.

53. I accept that Mr Morriseau did not ask any questions as he was not the person designated to ask the set questions. He knew the Claimant and had no general questions. He was following Mr Barnard's lead in bringing the interview to an end.

54. On an alternative analysis, I consider that the evidence supports the inference that the Claimant's race was at least a significant factor in the decision not to ask him the full set of question in the second interview when the role of Security Manager became available for the first time: even if the discrimination was unconscious.

55. Thereafter, when Mohamed Hoggui was appointed without the Claimant being considered or the role being advertised, I conclude that Mr Barnard maintained the adverse view that he had formed of the Claimant at interview and that this was, at least in part, because of his race. The Claimant's race was a factor, unconsciously or otherwise, in him not being asked all the questions at the second interview when the role first became available and not even being considered for the role when it became available again. Again, there is no adequate explanation for why the Respondent did not apply its procedures and advertise the role and give the Claimant the opportunity to apply.

56. In all the circumstances, I consider that the Claimant was subject to race discrimination by not being asked all the questions in the second interview when the role of Security Manager first became available and not being not being given the opportunity to apply for the role when it became available again; forming part of a continuing course of conduct that brings a claim within time.

57. On reflection I have decided that the question of how the Claimant would have been treated had he been asked all of the questions and properly considered for the role when it became available for the second time should be determined at the remedy hearing.

Employment Judge Tayler
14 January 2019

Sent out – 18 Jan. 19