EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR S ROUBAHIE-FISSA		LYCEE FRANCAIS CHARLES DE GAULLE

Heard at: London Central

On: 13-15 March, 2019

Before: Employment Judge O Segal QC
Members: Ms P Breslin, Ms S Boyce

Representations
For the Claimant: In person
For the Respondent: Ms C Rooney, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The Claimant's claims of direct and indirect discrimination are dismissed.

(2) The Claimant's claim of harassment succeeds; and the Claimant is awarded £6,500 in that regard.

REASONS

1. The Claimant brings claims of direct and indirect discrimination relating to the non-renewal of a one-year fixed-term contract by the Respondent, and of harassment in relation to things said to him in two meetings by the Headmaster of the Respondent – on all cases by reference to the protected characteristic of the Claimant's French nationality.

2. The Claimant represented himself and the Respondent was represented by Ms Rooney of Counsel. We express our gratitude for the way in which both conducted the proceedings.

Evidence

3. We had an agreed bundle of 227 pages. We had witness statements and heard live oral evidence from:

   3.1. on the Claimant's behalf: himself, and Mr Frederic Oppenheim, a teacher and trade union representative at the Respondent.

   3.2. for the Respondent, Olivier Rauch, who was at the material time the Headmaster of the Respondent.

4. We also read without objection a statement of a parent of a pupil in one of the Claimant's classes, Ms Ana Kanellos Furlong.

5. We comment at the outset that we consider that all the witnesses were doing their best to assist the Tribunal.

Facts

6. There were few if any disputed facts (unless one includes people's reasons for doing or not doing things). In setting out the material facts below, we exclude those which we have decided are not relevant to the issues we have to determine.

7. The Claimant is French national and French is his first language. He speaks what we would describe as fluent English with a French accent. No English speaker would have the slightest difficulty in understanding his spoken English, any more than that

of someone born in the UK with, say, a Scottish accent. However, it is obvious that English is not his mother-tongue.

8. The Respondent is a well-known independent school in South Kensington, managed by the French National Ministry for Education and the Agency for French Teaching Abroad (AEFE), comprising a primary and secondary school.

9. The large majority of its pupils are French nationals and it primarily teaches the French curriculum in French. Since 2013 there has, inter alia, also been a growing International Section, where the French curriculum is taught partly in French and partly in English. The students in the International Section are often bi-lingual; certainly the aim of their parents in enrolling them in the International Section is that they should receive a bi-lingual education, and it is clear that some of them are vociferous in seeking to ensure that such a bi-lingual education is provided. All witnesses testified to the "very high expectations" and the "pressure" put on by such parents.

10. One of the subjects taught in the International Section is 'History and Geography' (HG), which are, in the French system, taught as effectively one subject by one teacher. The Claimant had qualified as such a teacher – as, originally, had Mr Rauch. The Claimant had additionally obtained a *Discipline Non Linguistique* (DNL) qualification, authorising him, as a native French speaker, to teach inter alia in International Sections abroad.

11. The Respondent recruited various HG teachers into the International Section from 2013. They included in the main those whose first language was English, but also a Ms Faucher whose English was apparently excellent but whose first language was French.

12. In 2017, the Respondent advertised for the position the Claimant secured. The advertisement, published in English and French, seeks a secondary HG teacher, who is either a qualified teacher from an English-speaking country with some knowledge of French, or a French qualified teacher with an excellent command of English. The French version of the advertisement suggests a preference (*De preference …*) for the first category of applicant.

13. The position was first offered, on a permanent contract, to an English applicant who declined it. It was then offered to a French applicant, on a permanent contract; he initially accepted but then in July withdrew. The Claimant, the third choice applicant, was offered the position only in July, on a one-year fixed-term contract. He accepted.

14. We accept that the reason for offering the Claimant only a fixed-term contract had nothing to do with his country of origin, but was the result of the Headmaster having to make a quick decision whilst not at school and perhaps due to some reservations about choosing to appoint the third-choice candidate.

15. The Claimant began work in September 2017. He was given proper and significant support by his more experienced colleagues. In his first lesson(s) the Claimant introduced himself for some 10 minutes in French. This, together with reports of his having a French accent, caused consternation amongst some (but by no means all) parents, who wrote complaining about that to the school.

16. Mr Rauch asked a senior colleague whose first language is English to observe one of the Claimant's classes to see if there was any problem with his language skills. That happened and the report came back that the Claimant's English was excellent, he did not use French at all during the lesson, his accent was not problematic and moreover, the lesson had been clear and well-structured. Mr Rauch wrote towards the end of September to the parents who had written in complaining, making those points in a straightforward way. In doing so, he took the opportunity of correcting one parent's recollection that he had previously given parents an assurance that all lessons taught in English would be taught by a native English speaker; he wrote that this was true of English literature and language, but not of other subjects, indeed that as regards HG there was an obvious advantage of having a French qualified teacher in that 'subject' who had excellent English.

17. Regrettably, some parents gained the impression that the Claimant was continuing to use French in some of his classes and complained to the school about that. Mr Rauch raised that with the Claimant, who assured him on 10 October 2017 that it was not true. It seems Mr Rauch accepted that, but he commented that nonetheless the continued complaints "were difficult to ignore".

18. Other concerns (unrelated to language) were also raised by some parents about the Claimant, including at parent delegate meetings in November 2017: in particular about some of his teaching methods and a failure to provide grades or feedback to pupils.

19. By that time it was known to Mr Rauch that a visit was due from an AEFE inspector and that the Claimant had volunteered to have one of his classes observed by her. Mr Rauch decided that in view of the issues that had been raised, he would also observe that lesson, which was to be one of the minority of those the Claimant taught in French.

20. That took place on 4 December 2017. Mr Rauch judged that the Claimant's performance in that lesson had been poor, particularly given the notice he had that this lesson would be observed. He spoke to the inspector on the day who, he says, formed similar views. A written report was to follow from the inspector.

21. Also in December, 'class councils' for the first term were held, where student and parent representatives attend to discuss the progress of classes with teachers. Teachers of each subject are required to produce reports for each student in advance setting out grades and feedback. It is not obligatory (and sometimes not possible) for a teacher to attend each relevant council, but they are expected to attend those they can and to say in advance if they cannot. The Claimant did not attend 4 of the 9 material councils and had not provided the grades and feedback for 2 classes, or the feedback for a third. This caused Mr Rauch concern.

22. Mr Rauch said that by December, and very much primarily on the basis of the lesson he had observed himself, he had made his mind up not to renew the Claimant's contract. He knew that the Claimant would most likely need to apply for a new post before 1 March 2018 (the deadline for applications in France) and wanted to tell the Claimant of his decision before that date. However, he also wanted to obtain a copy of the inspector's written report, which he chased more than once and received at the end of January 2018. That report (from which we do not need to quote) recorded concerns about the Claimant's lesson in three areas and gave strong advice about the need to address those concerns, but expressed a confidence that the Claimant would in time succeed.

23. Mr Rauch met with the Claimant on 2 February. There are no notes of that meeting and in one respect the accounts of it differ. What is common ground is that Mr Rauch told the Claimant of his decision, which surprised and upset the Claimant; and that he did not give the Claimant a copy of the written inspection report (because he did not want to do so whilst still awaiting the reports in relation to other teachers assessed). It is also agreed that Mr Rauch, when asked, told the Claimant that although he could apply for the job when advertised, he would likely not get it.

24. What is disputed concerns what Mr Rauch said about his reasons for not renewing the Claimant's contract.

    24.1. The Claimant says that he was told that those reasons were that he was not a native English speaker and that Mr Rauch had concerns about his abilities and conduct. He says Mr Rauch said "Maybe if you had been a non-native speaker and impeccable, I could have considered extending your contract …"; and made it clear that in recruiting for a replacement the school would be "looking for a native speaker".

    24.2. Mr Rauch says that he did not say that part of his reason for the non-renewal was the Claimant not being a native English speaker, though he did confirm that excellent English was critical.

25. In light in particular of what we find below was said on 21 March, we find on the balance of probabilities that Mr Rauch did refer to the problem of the Claimant not being a native English speaker in the context of explaining his decision and did say that he would be trying to recruit a native English speaker to replace the Claimant. It is not possible to make a finding as to whether or not Mr Rauch expressly said that part of the reason for his decision was that the Claimant was not a native English speaker.

26. Letters of support for the Claimant were sent to Mr Rauch by his department and by a union representative Mr Hugon, who commented in his email that *"The fact that he was not a native speaker clearly played against him"*. This comment is opaque; indeed the Respondent relies on the email as showing that the Claimant must be wrong about Mr Rauch saying that he was not renewing the contract because the Claimant was not a native English speaker, because if Mr Hugon had understood that

to be so he would certainly have raised it in terms as a matter of importance to the union. It may be that Mr Hugon had in mind only parental expectations or complaints. The Respondent points to the fact that Mr Oppenheim about 4 weeks after the decision had been communicated to the Claimant also did not raise that issue at a collective meeting. We did not find the evidence of these letters and what was said/not said at the collective meeting persuasive either way.

27. The Claimant and Mr Rauch met again on 21 March 2018, with Mr Oppenheim accompanying the Claimant. No one took notes during the meeting, but the Claimant made some notes immediately afterwards, which he showed to Mr Oppenheim. The typed version of those notes was before us. Mr Oppenheim said, with some confidence, that he considered them to be accurate. In fact, the vast majority of those notes are not disputed and following Mr Rauch's oral evidence it became clear that the areas of dispute were really quite narrow.

    27.1. It is agreed that the Claimant asked Mr Rauch whether his not being a native English speaker was the reason his contract was not renewed. It is agreed that Mr Rauch spoke about the advantages of being a native English speaker and of the school's problems in trying to recruit and then in recruiting non-native speakers (the latter being the Claimant), and of the desire if possible to recruit a native English speaker next time.

    27.2. It is also agreed that Mr Rauch spoke about the significant weaknesses he considered the Claimant had as a teacher.

    27.3. Again, what is not agreed is whether the issue of not being a native English speaker was stated to be a reason for non-renewal. The notes record that and the Claimant and Mr Oppenheim recall that. Mr Rauch is adamant that is not correct.

28. We find on the balance of probabilities that Mr Rauch did refer to the problem of the Claimant not being a native English speaker in the context of explaining his decision.

29. The Claimant went off sick in May 2018 and was replaced temporarily by Ms Fauchet. A permanent replacement took up the post in September 2018; that person is a native English speaker. The recruitment process was the same as the previous

year and several French applicants applied, although none had the experience and/or language skills to merit an interview.

30. As a French civil servant, qualified as a teacher, the Claimant would – assuming he made the relevant application(s) at the right time – be guaranteed employment as a teacher in France (effectively, for life).

The Law

Direct race discrimination

31. Section 13 EqA 2010 provides that

"A" discriminates directly against "B" if B establishes the detrimental action relied upon (e.g. dismissal), and A treated B less favourably that A treated or would treat others (an actual or hypothetical comparator) whose circumstances are not materially different to B's and the less favourable treatment is because of a protected characteristic.

32. Language is generally not an exact proxy for nationality, so discrimination on the basis of language alone cannot be direct discrimination: Gwynedd CC v Jones [1986] ICR 833 at 836A-B; Essop v Home Office [2017] 1 WLR 1343 at [17].

33. In respect of both direct and indirect discrimination, if one of the effective reasons/causes for an act is discriminatory, the act is discriminatory, even if that is not the only or the main reason.

Indirect discrimination

34. Section 19 provides that

A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice [PCP] which is discriminatory in relation to a relevant protected characteristic of B's

… a [PCP] is discriminatory in relation to a relevant protected characteristic of B's if - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts … B at that disadvantage, and

(b) A cannot show it to be a proportionate means of achieving a legitimate aim.

Harassment

35. Section 26 provides that

A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a protected characteristic and

(b) The conduct has the purpose or effect of-

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Burden of proof

17. Section 136 provides:

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 … [unless] A shows that A did not contravene the provision.

18. There is an initial burden of proof on the Claimant and the Tribunal must look at the entirety of the evidence to establish if the first stage of s136 is reached (Ayodele v Citylink Ltd and anor [2017] EWCA Civ 1913).

19. The tribunal bore in mind the guidance in the Igen, Madarassy, and Hewage cases in relation to what is now s. 136. We acknowledge that something more than simply unfavourable or less favourable treatment is needed in order to "shift the burden of

proof", though that does not need to be a great deal: Deman v CEHR [2010] EWCA 1279.

20. Finally in this context, we bear in mind the observation of the EAT in Chief Constable of Kent v Bowler EAT 0214/16, that *"Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic."*

The parties' submissions

21. We summarise the main points made in submissions.

22. The Respondent submitted that the direct discrimination claim had to fail as one could not equate language, even native speaking, with nationality.

23. The Respondent argued that one could infer the reason for non-renewal as a matter of chronology: the language issue had been dealt with in September; thereafter it was concerns about teaching and conduct that led to the decision not to renew.

24. It suggested that the tribunal should accept Mr Rauch's evidence about what he said at the two meetings on the basis that the Claimant and Mr Oppenheim had misinterpreted what he had said by reference to parental complaints as being concerned only with language concerns, whereas in fact he was referring at that time to concerns about teaching, etc. As found above, we did not accept that submission.

25. Ms Rooney pointed to the fact that the Respondent is quite open about applying a PCP of requiring a native English speaker to teach English in the International Section, so there is no reason to infer that it was covertly applying the same PCP to the HG position. We see the force of that submission, but note here that the PCP alleged in this case is not a strict requirement but rather a marked preference.

26. Ms Rooney accepted that the burden of proof shifted to the Respondent given what had been said (even on the Respondent's case) about the potential advantages of being a native English speaker, but said that the Respondent had given a good and plausible explanation for the non-renewal of the Claimant's contract, being real

concern about the Claimant's teaching abilities. She pointed to the fact that the Claimant was immediately replaced by a non- native English speaker, Ms Fauchet.

27. In the alternative, she argued that any indirect discrimination could be justified by reference to the demands of the International Section and of the parents of pupils there to have a native English speaker teaching HG.

28. As to the harassment complaint, the Respondent argued that, objectively, the alleged remarks did not violate the Claimant's dignity, etc.; Ms Rooney also queried whether comments about not being a native English speaker were "related to" the Claimant's nationality.

29. The Claimant made the following main points:-

    29.1. The context was tremendous parental pressure, which led the Respondent to apply the requirement or strong preference for a native English speaker.

    29.2. That was made clear by the way the 2017 and 2018 recruitment processes had been conducted, including the French version of the advertisements.

    29.3. He contrasted his treatment with Mr Rauch having agreed that he had extended the contract of a previous part-time teacher who was a native English speaker, despite concerns about his teaching (although Mr Rauch's evidence was that the Respondent would not have made his position permanent and the school had no option at the time but to continue to employ that person for 6 hours teaching a week).

    29.4. He unsurprisingly placed considerable stress on his recollection and record, supported by Mr Oppenheim, of what was said at the two meetings – which we have broadly accepted.

    29.5. He denied any preference for a native English speaker could be justified, given that he had proven himself, by qualification and later by observation, to have more than adequate English for the role, regardless of parental expectations and demands.

29.6. As to harassment, he said it was predictable that he would find the alleged comments offensive.

Discussion

The reason(s) for non-renewal

24. The one factual issue which we must determine, as a matter of inference, is whether it was an effective reason for Mr Rauch deciding not to renew the Claimant's contract – even if not the main reason – that he was not a native English speaker.

25. At this point we record that the parties assisted in attempting to define that phrase, native English speaker; and in the end were all but agreed on what was meant by it in the relevant meetings and documents. Namely, someone whose first language or joint first language (if they are bi-lingual) is English; the Claimant would add that they do not speak with a foreign accent.

26. We address the issue of the Respondent's reasons on the basis that – as the Respondent conceded we must, given the primary facts we have found – we could decide in the absence of any other explanation that the Respondent contravened s. 19 and therefore that we must so find unless the Respondent has shown that it did not contravene that provision.

27. We each of us found this issue difficult. On the one hand, there is Mr Rauch's clear evidence about his reason (being only the concern about the teaching ability, etc.); as well as the fact that on the documents the language issue had been largely put to bed by him in late September 2017, whereas the decision not to renew was made immediately or shortly after the lesson observation and class council issues in December. On the other hand, the way Mr Rauch spoke (as we have found) at the meetings on 2 February and 21 March suggested otherwise.

28. In the end, two of us decided on the balance of probabilities that the Claimant not being a native English speaker did not form part of Mr Rauch's reason for not renewing his contract; and those two of us believe that had the Claimant been a native English speaker who had performed as he did during the observed lesson (and to a

lesser extent in relation to the class councils), Mr Rauch would still have decided not to renew at around the same time as he did.

29. One of us decided on the balance of probabilities that the Claimant not being a native English speaker did form part of Mr Rauch's reason for not renewing his contract; and believes that had the Claimant been a native English speaker who had performed as he did during the observed lesson (and to a lesser extent in relation to the class councils), Mr Rauch would probably have not made the decision not to renew in December/February, but would have attempted to further assist the Claimant to surmount any teaching or conduct concerns.

30. For the reasons we give below, that failure to agree on this matter of factual inference is not in the end determinative of any of the Claimant's claims.

Direct discrimination

31. We dismiss this claim. As the Claimant accepted, having English as a first or dual first language is not a proxy for nationality. We all have no doubt that the Claimant's nationality had nothing to do with any decision or act complained of.

Indirect discrimination

32. However, a requirement or preference for a native English speaker to perform the Claimant's role, as the Respondent agreed, would constitute a policy, criterion or practice (PCP) which would put French nationals at an obvious disadvantage compared with nationals of the UK or other Anglophone countries.

33. On the majority view that there was no application of such a PCP in Mr Rauch's decision not to renew the Claimant's contract, the claim must fail.

34. However, we did go on to consider carefully what our decision would be if we accepted (as one of us does) that the application of such a PCP was part of the reason for non-renewal.

35. As to that, we all agree that:-

    35.1. The PCP is best characterised as a strong preference (as at the material time) to employ a native English speaker in that role.

35.2. That would clearly be contrary to s. 19 unless the Respondent shows that applying that PCP in the material circumstances was a proportionate means of achieving a legitimate aim.

35.3. It was, or would have been, a proportionate means of achieving a legitimate aim, for the Respondent to have applied that PCP in the material circumstances.

36. We say so because:

36.1. We consider it is a legitimate aim for the Respondent to have a strong preference for a native English speaker (in the sense the parties used that phrase) to perform the Claimant's role, in circumstances where a significant number of parents are demanding in principle, and specifically as regards teaching of HG, that the role be filled by a native English speaker; and more objectively, where the Respondent had undertaken to provide a bi-lingual education in its International Section.

36.2. We consider it was/would have been a proportionate means of seeking to achieve that aim, in February 2018, to decide not to renew the contract of a teacher who was not a native English speaker in circumstances where:

36.2.1. the Headmaster (supported to some extent by an independent inspector) had considerable concerns about the Claimant's abilities and conduct, which might not be capable of being addressed at the Respondent;

36.2.2. the Claimant, if he was told that his contract was not renewed in February, would have the guarantee of a teaching post in France, his home country; and

36.2.3. the Respondent would, if it was able to start the recruitment process in March 2018, have good prospects of recruiting an otherwise qualified native English speaker to fill that role from September 2018 (as they in fact did).

Harassment

37. We uphold the Claimant's claim of harassment.

38. Ms Rooney accepted that if we found the Claimant's accounts of the meetings on 2 February and 21 March to be broadly accurate, it would constitute unwanted conduct. In particular, we so find in relation to the comment about the Claimant not being a native English speaker on 2 February, and to the comments on 21 March that "the school needs an English speaker …I have had enough of non-native speakers, I gave enough with the previous one … With a native English speaker, at least I can be sure of the quality of the language … I cannot afford to have a non-native …".

39. Despite some tentative resistance from Ms Rooney, we consider it obvious that those remarks adverse to non-native English speakers are "related to" the Claimant's nationality.

40. Equally, we consider it clear that those adverse remarks, both subjectively and objectively, had the effect of (at least) creating an intimidating and humiliating environment for the Claimant, a young teacher who had been recruited at short notice on merit and had been glowingly assessed in relation to his language skills whilst teaching at the Respondent.

Remedy

41. Given that we have upheld only the harassment complaint, it seems clear that there is no direct financial loss and that the injury to feelings award should be in the lower Vento band (up to £8,600). The comments, mainly at the March meeting but also at the short February meeting, are of the nature of one-off incident. They are not the most serious examples of comments constituting harassment.

42. The Claimant suffered considerable anguish, and eventually depression, following the events we have described. It is obvious from his evidence (and as a matter of common sense) that most of that reaction was caused by his losing his job and the undermining of his core skills as a teacher.

43. Nonetheless, the comments about not being a native English speaker, etc., did in and of themselves cause the Claimant distress. His evidence was that those comments were "upsetting and offensive" and "inappropriate". He also told us, and we accept, that those comments added to his insecurity as a teacher because they undermined his

confidence to teach in English, led to him being scared to make mistakes in his English and to decide he could not look for work in an English school.

44. In all the circumstances, we award the Claimant £6,500 for injury to feelings.

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Employment Judge Segal

_____
Date 15 March 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 March 2019

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FOR THE TRIBUNAL OFFICE