

Laboratory Supervisor and Ms G Herbert Head of HR. The respondent also tendered the witness statement of Salman Mohammed who was unable to attend the hearing. The claimant represented herself and gave evidence on her own behalf.

2. There was a bundle of documents to which reference will be made where necessary.

ISSUES

3. The issues for this hearing, as decided at an earlier preliminary hearing, were:

1. Section 13: Direct discrimination on grounds of race.

1.1. The Claimant says she has been discriminated against because of the protected characteristics of her colour and nationality. She is of Indian nationality.

1.1.1. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely terminating her employment on 29 September 2017?

1.2. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators: Arthur (from Pakistan) and Anneta (from Poland) who started employment around the same time.

1.3. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

1.4. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

2. Section 19: Indirect discrimination on grounds of race.

2.1. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely that the Claimant was required to improve her communication skills?

2.2. Does the application of the provision put other people of the Claimant's colour and nationality at a particular disadvantage when compared with persons who do not have this protected characteristic?

2.3. Did the application of the provision put the Claimant at that disadvantage in that she was dismissed because of her poor communication skills and other reasons?

2.4. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

3. Remedies

3.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

3.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

FINDINGS OF FACT

4. The claimant was interviewed by Ms Haylock and Linda Heath, Global Talent Manager. Although the claimant had not worked for some time, her scientific skills were supported at interview by various certificates and qualifications she had gained over the years. Whilst English was not the claimant's first language, she was able to understand English sufficiently well for the purposes of the respondent. The interviewers considered that the claimant had the basic skills which were needed for the laboratory technician role.

5. The claimant was employed by the respondent from January 2017 until September 2017 as a laboratory technician in the testing team. The team is responsible for conducting laboratory tests of the foam products that the company produces. The company manufactures foam products which are used in a wide variety of products and industries.

6. At the time the claimant was employed, there were around six people in the team with Ms Haylock in charge of them. At the time, she reported to Dr Leena-Marie Wilson, who was Technical Support Manager.

7. The employees of the respondent are ethnically diverse reflecting the local area to some degree, as it is based in south London. The workforce as a whole is broken down as follows for 2017:

Black/Black British – 11%

Asian – 19%

European – 16%

White British – 51%

8. The laboratory testing team is also ethnically diverse. When the claimant joined comprised the following:

Claimant – Indian

Aneta - Polish

Marzena - Polish

Patricia - Irish

Dharam - Indian

Myself - Greek

Leena – German

Jacob - British

There were also two students in the department who come from different Universities. At January 2017, one was a Chinese female called Katie, and the other was a male student called Nasir, who was from Pakistan.

9. The testing process is an essential component of the manufacturing of the company products. The team's work was split into two main types of work – firstly, product testing on the products manufactured for customers; secondly, carrying out tests on products produced by the Research and Development Team, on new products that they were producing with a view to potentially bringing them to market. Testing products for customers would vary in complexity. There are 20-30 tests that are carried out regularly on the foams and there are a variety of instruments within the laboratory to conduct those tests. Some of those tests would involve more manual and physical work than others. The testing requirements for a product depended on the product itself, and also the requirements of the customer. The respondent would agree with customers the testing that was to be carried out on their foam and Ms Haylock would organise the team to ensure that the right tests were carried out. It was her responsibility to make sure that the tests and the record keeping was accurate. A product could be in the testing laboratory for up to two weeks.

10. The product testing process does not involve just physical tests of the foam. The testing team are responsible for using a software system, called AX, for the product testing work that is done. The AX system requires the technician to correctly input data into the system. Once the results are inserted and a Quality Order is validated on the system, the decision then can be made to issue a "Pass" for the product. Ms Haylock is responsible for the decision to issue a "Pass" for the product. If a mistake is made in the testing process, not only can it cost the company significant sums of money and reputational damage but these products are going into safety critical environments where any failure might give rise to serious consequences.

11. R&D testing is slightly different to product testing, although some of the same tests are carried out. It involves carrying out tests following internal requests made by anyone in the company. This could be from the new development team or even a customer complaint that needs investigating. This testing is just as important but generally not as urgent. Excel is mainly used to record data in relation to R&D testing. It is therefore essential that Lab Technicians are proficient with Excel.

12. Each morning Ms Haylock would have a team meeting with the laboratory technicians and would discuss the priorities for the day. They would discuss the rotations for the technicians. By rotations, what is meant is that there was a wide variety of different tests that needed to be done. Some of these tests were more physical than others and it was important for the team to act together to agree what rotations they would do in terms of conducting the different tests. As a general rule, Ms Haylock expected the team to rotate between different machines and different parts of the testing process. In this way, they would develop their skills and confidence so that they were able to work on any stage of the testing process once they had received training in all the tests.

13. The respondent monitors the progress of all new starters during their six-month probationary period through their progress review form. The claimant's progress form gives a snapshot of her initial progress [65]. In the first few weeks, Ms Haylock found that the claimant really struggled to pick up the procedures and tests that were undertaken. She did not seem to be able to listen and absorb what she was being told and she did not take notes. Her approach was sometimes confrontational but Ms

Haylock tried to adopt a sympathetic approach and tried to address these issues in review meetings with the claimant, and the Form would then be updated [65].

14. Ms Haylock considered that the claimant was comfortable on three or four main tests – density, compression and tensile. This was not a significant issue at the time (April to July 2017) as there were 7 technicians to cover all the work.

15. Around 10 April 2017, Ms Haylock filled in the progress review form and inserted some scores before she met with the claimant. What can be seen from the form is that she initially put in some marks of “2” under various categories e.g. “getting things done”, “team playing”, “continuous improvement” and “overall satisfaction”. However, before she met the claimant, she decided to increase the scores as she was keen to encourage the claimant and to send her a positive message. She increased the numbers in the progress form for month three and moved some scores from “2” to “3”.

16. In May 2017, Ms Haylock again discussed the scores with the claimant. Ms Haylock considered that the area where she felt she still needed to improve was around her communication with the team. She knew she would need to be trained on more tests. Training would be done when the lab was quiet. Month five was in June 2017 and the form reflects that whilst the claimant had continued to improve in some areas, she still needed to be more of a team player. The final review in the form is in July 2017 when Ms Haylock commented that the claimant was progressing well but that she needs to communicate more with the team.

17. By July 2017, the claimant was confident on the tests that she was able to do – she would spend all her time carrying out three or four of the key tests – compression, density and tensile. She was allowed just to do those tests, and would not carry out rotations in the same way as the rest of the team. By giving her a positive message in June and July 2017, Ms Haylock thought it would build her confidence up such that she would be able to develop her skills and confidence in carrying out the full range of tests the respondent carried out, as well as accurately record the data on AX and Excel. At that point, the claimant was carrying out only a fraction of the full role of a lab technician but she was of value to the team because the team was sufficiently big so that others could cover the tests that the claimant was not able to do. Ms Haylock told the claimant that she would continue to try to train her up on the other tests, which she did during the summer of 2017.

18. What Ms Haylock found was that she would train the claimant on a test and then, when she came to do it, she would often make silly mistakes. She was very inconsistent, she might get a test right one day and then the next day get it wrong.

19. Ms Haylock was also continuing to have problems with the way the claimant was communicating with the rest of the team. On occasions, she would upset other team members by questioning the work that they were doing and querying whether they were checking their own work. They did not appreciate her asking these questions of them, particularly given that she was making mistakes herself. The claimant’s failure to mix with her team meant that she would not learn from their experience and develop as a more rounded technician. She would just go ahead to do what she thought was in order and then Ms Haylock would have to correct her mistakes and re-test the

samples. She tended to work at her own pace which sometimes presented problems as the product testing in particular would have strict deadlines to ensure the customer's expectations were met.

20. From August 2017, there were discussions between Ms Haylock, Dr Leena-Marie Wilson, Technical Support Manager and Karl Hewson, Director of Technology and Development over the structure of the testing team going forward. Mr Hewson wanted to split the team between its two different core functions – product testing and R&D testing. He said that he wanted Dr Wilson to lead the R&D testing team and for Ms Haylock to lead the product testing team.

21. Dr Wilson sent Ms Herbert some proposed job descriptions by email on 17 August 2017 [71]. They had further conversations in early September 2017 around the business rationale of the proposed restructure [85]. Ms Herbert helped Dr Wilson draft a proposed consultation letter which was used as part of the initial phase of consultation [89]. Dr Wilson then began a consultation process with the lab team, including going through proposed new job roles. Ms Haylock started the consultation by sending the announcement on the morning of 4 September 2017. The proposal stated that 3.8 full time equivalents would carry out production work reporting to Ms Haylock and 2.6 full time equivalents would carry out the R&D work reporting into Dr Wilson.

22. Mr Hewson discussed the team members and who would be suitable for the testing roles within R&D. These roles were more of an analytical role, where they would need to think for themselves and maybe do some analysis of the results. The claimant had limited testing skills, and no analytical skills that had been observed. R&D required a good working knowledge of Excel and whilst in interview the claimant had said she was able to use Excel, it became obvious that she did struggle with Excel. It was clear that the claimant would not be suitable for a R&D testing role.

23. Both Mr Hewson and Dr Wilson had previously discussed with Ms Haylock the concerns they had about the claimant. They were of the view that the company should not have allowed her employment to continue beyond her probationary period. There was discussion whether, if the proposed restructure took place, the claimant would be suitable for one of the production testing roles if the teams were split into two. The concern was that production testing is about having a broad range of skills and abilities to test on all of the machines, but also to do so in accordance with the strict timescales set by the customers. The production testers have to work at pace and with accuracy to be able to advise the production team to release product for delivery. If the Team was going to remain large then the company might have been able to accommodate the claimant with her focussing on just the three or four tests she was comfortable on. However, with a small team of 3 or 4 doing production testing, the respondent needed employees who could do all the tests accurately and at pace. The respondent also needed the small team to work closely together and to communicate constantly to organise their priorities and the rotations, and the claimant had shown an unwillingness to do this. It was decided that the claimant would not be suitable for either an R&D testing role, or a product testing role in the new structure.

24. The claimant has compared her treatment to two other employees. The first is Aneta Miernik who is Polish and began working in the laboratory as a lab technician

on 30 January 2017. The other person is Athar Malik, who also started in January 2017. He is from Pakistan and started as a lab technician, although has changed role and is a trainee Process Engineer.

25. Aneta and Athar are themselves from ethnic minorities but are not Indian. The team is made up of people of all different ethnicities and backgrounds. Aneta and Athar joined in the same month as the claimant. Ms Haylock also completed progress review forms for them [67 and 68].

26. With Aneta, her Form shows that from the start of her employment she was performing well. She has scores of 3s in virtually every category for her first week, and she moved up to 4s for everything by the end of her first month. She quickly became confident in many of the tests, and developed into a good technician and team player.

27. Athar's progress review form shows a similar picture to Aneta. He quickly developed into a good technician and a good Team player. The scores on his Form reflect his good progress. Athar and Aneta's scores were better than the claimant's simply because they were performing to a much higher standard – doing a broader range of tests, with accuracy and they had become good team players.

28. On 29 September 2017, Ms Haylock asked the claimant to come into her office. Ms Haylock told her that unfortunately she had to terminate her employment. The claimant was clearly shocked and asked why. Ms Haylock explained that it was taking her too long in the laboratory to get to an acceptable standard in terms of the work that she should have been doing. The claimant immediately became very agitated. Ms Haylock asked her to calm down. She went on to accuse people of having shouted at her and mentioned people hitting her with rulers and pushing her in the back. Ms Haylock asked her who had done this to her and she didn't answer. At one point, the claimant reached for the computer mouse on her desk and threw this at her. She then threw her entry card and high visibility jacket at her. Ms Haylock was shaken by what had happened and went back to her desk and sent an email to herself at 18:04 setting out what had happened [93].

29. The respondent sent a letter to the claimant confirming that her employment had been terminated for poor performance [99]. She was provided with the right to appeal and she wrote a handwritten letter of appeal [101]. When Ms Haylock heard that the claimant had appealed, she prepared a note of her thoughts for the appeal manager [107-108].

30. The appeal took place before Ms Herbert on 10 October 2017. She took notes which were typed up [115]. Dr Wilson was in attendance. The claimant was asked what her grounds of appeal were. She said that she felt that she had done well whilst working for the company, and mentioned that she had given training to new people in the testing team. She accepted that she had made some mistakes in critical situations but that she had corrected them. She felt that she had paid a lot of attention to her work. She had said that she had been given twelve TRF's to do on 29 September 2017 which she did in the morning, and that she had some training from Ms Haylock in the afternoon. She explained what then happened at the end of the day with Ms Haylock terminating her contract. Ms Herbert went on to ask the claimant what feedback she had received about her performance. The claimant said that it had

always been excellent or brilliant. Dr Wilson referred the claimant to some of the comments in her progress review form where it said, for example, that she needed to work on her team work. The claimant said that she did not agree with the comments but that she had just signed the form anyway. Ms Herbert asked the claimant what she was seeking from the appeal process and she said that she did not want to come back to Zotefoams. At no point during the meeting did the claimant say anything about her race or about race discrimination or suggest that she felt she had been discriminated against on any basis. Ms Herbert and Dr Wilson agreed the decision to dismiss the appeal and rationale, and this is set out in the appeal outcome letter [117].

SUBMISSIONS

31. The Tribunal heard oral submissions from both parties.

LAW

32. Section 13 of the Equality Act 2010 (“EqA”) deals with direct discrimination. It states as follows:

“(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.”

33. Section 23 EqA deals with comparators. It states as follows:

“(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.”

34. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

35. The Equality and Human Rights Commission: Code of Practice on Employment 2011 (‘the Code of Practice’) sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

36. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant’s treatment first. This could include considering the employer’s treatment of a person whose circumstances are not the same as the Claimant

to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

37. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional Transport** [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

38. The crucial question is why the Claimant received the particular treatment of which he complains.

39. Paragraph 3.11 of the Code of Practice confirms:
The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

40. Paragraph 3.13 of the Code of Practice confirms:
In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

41. The burden of proof provisions in relation to discrimination claims are found in section 136.

42. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

43. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e. looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

44. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

45. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.

46. Section 19 of the Equality Act 2010 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. Subsection (2) goes on to explain that 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, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

47. Lady Hale has addressed the key difference between direct and indirect discrimination in a number of significant judgments of the Supreme Court. In **R (On the application of E) v Governing Body of JFS** [2010] IRLR 136 SC she said at [56]–[57]:

'The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA 1293, [2006] 1 WLR 3213, para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in *Elias* at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.'

48. In **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 SC, she said at [17]:

'The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified.'

49. And in the cases of **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] IRLR 558 SC, at [25] she held:

‘Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.’

DISCUSSION and DECISION

50. The claim is principally one of direct discrimination revolving around what the reason for the claimant’s dismissal was. Was it because of her colour or nationality? The claimant’s evidence was that she did not perform her job in the inadequate manner described by the respondent so her dismissal must have been because of her colour or nationality. The Tribunal accepted the evidence of Ms Haylock and Ms Herbert. The Tribunal is satisfied that the claimant’s work was less than satisfactory throughout her employment. Ms Haylock, who supported the claimant and treated her sympathetically was able to address any shortcomings prior to the reorganisation. The reorganisation implemented in September 2017 meant that it was essential for the testing work to be done accurately by the reduced numbers in the team. This meant that Ms Haylock would be unable to continue the same extent of her supervision and support of the claimant. Her evidence is concisely set out in a document prepared for the appeal [107] and was accepted by the Tribunal.

51. The Tribunal heard evidence about what happened when the claimant was dismissed on 29 September 2017. The evidence was not relevant to the claims but it accepted the evidence set out in the note [93] as against that of the claimant [133]. The statement of Mr Mohammed related to this incident and did not advance matters any.

52. The claimant did not raise any allegation of colour or nationality discrimination either in her letter of appeal [101-102] or at the internal appeal hearing [115] the notes of which were accepted as largely accurate. She said she only started to think about discrimination when she received the appeal outcome letter [117]. She did not accept that there were shortcomings in her work at any stage of her evidence.

53. If one adopts the comparative approach, the claimant names two comparators each of whom scored more highly than her in progress review forms completed by Ms Haylock for Athar Malik [68] and Aneta Miernik [67]. The comparison does not show less favourable treatment.

54. There was absolutely no evidence to suggest that the claimant's colour or nationality were an issue for any employee or manager of the respondent. Ms Haylock's treatment of the claimant was what would be expected of a very good and sympathetic manager. The reason the claimant was dismissed was that given by the respondent, poor performance in the context of the reorganisation. She was not discriminated against on account of her colour or nationality. The burden of proof at no stage transferred to the respondent.

55. The claimant accepts that the PCP identified in the issues was not applied to her and has not sought to identify a different one. This means that the claim of indirect discrimination cannot succeed.

56. The claims of direct and indirect discrimination are dismissed.

Employment Judge Truscott QC

Date 3 April 2019