



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr O Ogedegbe

v

ADT Fire & Security plc

Heard at: Amersham

On: 20 May 2019

Before: Employment Judge Smail
Mr D Sutton
Ms S Bury

Appearances:

For the Claimant: In person
For the Respondent: Mr L Ashwood (Solicitor)

JUDGMENT having been sent to the parties on 31 May 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 9 February 2018, the claimant claims direct race discrimination. Two acts of discrimination are relied upon.
 - 1.1 The respondent removed the claimant's name from the list of candidates put forward by the respondent's recruitment agency for interview. The agency was called Recruitment Answers. This was on or about 4 January 2018.
 - 1.2 The respondent did not invite the claimant to come to interview after having removed the claimant's name from the list of candidates. The point here being the respondent did not ask the claimant to attend for interview outside any arrangement with Recruitment Answers, for example, directly on its own initiative.
2. The job was a sales person for ADT Alarms with the salesmen to operate in the field, albeit to be attached to one of the offices in the south east. Both of the factual matters alleged in these issues are accepted by the respondent, save that the respondent denies that it was on the grounds of race that it took those decisions.

The Law

3. Direct discrimination is defined by section 13 of the Equality Act 2010. By subsection 1, a person, A, discriminates against another, B, if because of a protected characteristic A treats B less favorably than A treats/or would treat others. The protected characteristic is race in this case, the claimant is a black Nigerian man.
4. Burden of proof is important in discrimination cases. By section 136 subsection (2), if there are facts from which the court could decide, in the absence of any other explanation, that the employer had contravened the provision concerned, the court must hold that the contravention occurred. By subsection (3), subsection (2) does not apply if the employer shows that the employer did not contravene the provision. What this means is that the employee must establish facts which amount to a prima facie case of discrimination. If the employee does that, the burden transfers to the employer to show that discrimination played no role whatsoever in the relevant decision making: Igen v Wong [2005] IRLR 258 (CA).

Findings of fact

5. The respondent's explanation for removing the claimant from the list and for not inviting him otherwise to come to interview, is that the 'talent acquisition specialist', as she is called, engaged by the respondent's group of companies, Miss Victoria Elliott, noticed that she had an application in or about August 2017 from the claimant. The claimant, she says, had applied directly for an earlier advertised sales vacancy but too late for the assessment day in question. She claimed to have telephoned him to advise him that he was too late on that occasion but with the intention of ascertaining his intentions for the future. She found him in the telephone conversation, from her perspective, to be abrupt and rude. She invited him, she says, to make contact with her if he were interested in pursuing the opportunity and he did not telephone her.
6. The mechanism of the application in August 2017 is important. It was an expression of interest made by the claimant, expressed on a jobs website which filtered through to the respondent. The claimant was seeking a sales job in August 2017. He was in work at that time but was seeking a different job. What is likely to have happened is that he clicked on an anonymous job description which in fact was the respondent's job. The expression of interest then got forwarded to the respondent. The respondent used a recruitment software called 'Broadbeam' which linked to a number of job websites as a recruitment tool. The claimant's CV was accessible on this website. We see that Ms Elliott viewed the CV in October 2017, pursuant to a search, that is prior to the application in January 2018. Ms Elliott viewed his CV following a search recorded on software. Ms Elliott further says that through this software, on a window with a record we do not have, she saw his CV in an application in August 2017. This was not a search undertaken by her but in an application forwarded to the respondent via this software. She says when she rang the claimant, she had visibility of his CV such that later on in January, she recognised his name. She maintains that in August 2017 she wrote down his name in a notebook. We have seen a notebook entry from Ms Elliott, she says it relates to the claimant. His name is not

accurately spelt in this note. His first name should be spelt Obhioise; it was spelt Obhiosie; and his surname Ogedegbe; and that was spelt Odgedebe, with the first 'd' in the wrong place by three spaces. Ms Elliott is adamant that this, nonetheless, relates to this claimant, because she recollects his CV which she saw not just in October and January but, also, she says in August 2017 she recognised the name and she remembers the person from talking to him on the telephone.

7. There is a substantial conflict of evidence on this phone call. The claimant says that the phone call never happened. He says that Ms Elliott has 'made this explanation up' conveniently in a way that has proved untraceable, there being no record in a bill or a printout of any description of the phone call in August 2017. We have had to decide whose account we prefer and we go on the balance of probability. We do not know for sure, we were not there, we go on the balance of probability and normally what makes best sense of the situation points to what is most likely on the balance of probability.
8. On the balance of probability we do prefer Ms Elliott's account. It explains why Mr O'Connor, the recruitment agent, e-mailed on 4 January 2018, saying that ADT had called saying they had received the claimant's CV directly and therefore his application needed to go through them directly. The respondent had the claimant's CV on file from August, meaning he had approached them previously. The likelihood being, as we have found, that he clicked on an anonymous job description back in August 2017. And - this is the important point - because they already had his CV, Recruitment Answers would not be able to receive any commission and that is part of the reason why the claimant's name was recognised: because in order to make sure there is no duplication between those CVs in the respondent's possession and those CVs genuinely introduced by Recruitment Answers, Ms Elliott would check the names and she spotted the claimant's name. That was one of the reasons why his name was removed, to avoid exposing the respondent to the possibility of paying a commission fee. Further, the second part of the reason was the belief by Ms Elliott that the claimant had expressed himself in a rude and direct manner. It may be that that interpretation of his behavior was honestly held but mistaken. We have heard the claimant today. He expresses himself in a forthright and frank manner. Perhaps over the phone that could be interpreted as being rude. But the way that Ms Elliott describes the phone call, when she rang, rather than say 'hello' or something like that, the claimant said 'what' and the rest of the conversation followed suit.
9. We have looked whether there are other features which point to the contrary explanation put forward by the claimant, namely that it was because he has the name of a Nigerian person who therefore is likely to be black, that the name recognition caused Ms Elliott to give the instruction to remove his name. However, we have seen the successful list of candidates. We see there are three Asian names there and we know that one of the successful candidates was a black male from Zaire. His UK passport is in the bundle which shows not only his colour, but also the fact that he is from Zaire and for what it is worth, we do not think it matters significantly that the respondent has chosen to redact the passport number, or the signature. That will have been done for security reasons, rather than

indicating that the passport was not held by one of the successful candidates. We accept the explanation of the respondent's documentation that because it was known about this case, the passport was photocopied.

10. So, we reject the claimant's account that the phone call did not happen. We accept from Ms Elliott that otherwise it is in her interest to fill the posts and she would remember those events which had proved an obstacle to filling posts. These explanations, as we say, make best sense to us.

Conclusions

11. There is, we find, no prima facie case of less favorable treatment on the grounds of race. The explanation is two-fold. First of all, the CV was there in the first place anyway, so the matter could not be pursued through the agency as they would get no commission. Secondly, Ms Elliott had an understanding, a perception, rightly or wrongly that the claimant had behaved in an impolite fashion. For that reason, she was not interested in the claimant as a candidate.
12. Prior to the outcome of an internal grievance, it had been believed by the claimant that the person who made the decision not to progress his application was Aaron Scott, the hiring managing. The internal grievance investigation discovered that it was Ms Elliott who had given the instruction. For what it is worth, we noted the claimant's theory as to why Mr Scott would discriminate against him. The claimant was floating the theory that Mr Scott lives in Romford and that 70% of Romford residents voted 'Brexit' and there have been race attacks in Romford. No doubt all of those things are true but that does not mean that Mr Scott was racist or made any decision on the grounds of race. As a matter of evidential conjecture that is far too unscientific and itself prejudicial. But in any event, it was not Mr Scott, it was Ms Elliott who made the decision. We have set out the basis for her decision. There was no discriminatory feature to it.
13. So, in all the circumstances, this claim is unsuccessful.

Employment Judge Smail

Date:27/6/2019.

Judgment sent to the parties on

.....1/7/19.....

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For the Tribunal office