THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
MS B LEVERTON
MR P MILLS

BETWEEN:

Mr J Edwards

Claimant

AND

Home Lettings Ltd (1)
Mr P Willis (2)
Ms S Stewart (3)

Respondents

ON: **18 December 2018**

For the Claimant: **In person**
For the Respondent: **Ms Y Montaz, Consultant**

JUDGMENT ON REMISSION FROM EMPLOYMENT APPEAL TRIBUNAL

The claimant was not discriminated against.

REASONS

Procedural Background

1 The claimant's claims of direct race discrimination and harassment related to race were first considered by this Tribunal over 5 days of hearing in 2016 and then in chambers on 6 January 2017. Our Judgment that all claims failed was signed on 18 January 2018 and promulgated on 1 February 2018 ('the original Judgment').

2 The claimant appealed that decision on various grounds. After an oral hearing it was allowed to proceed on a limited basis, namely:

'The next ground of appeal is that the ET erred in law in accepting W's [Mr Willis] evidence that he did not say 'You're not right for me'. If it is right that this finding is contradicted by

W's witness statement and what he is recorded as having said at the appeal, then this finding, lacking any explanation by the ET, is arguably perverse.

The fifth ground of appeal is that the ET erred in law in when considering the question of direct discrimination because its view of the evidence was tainted by its findings in paragraph 50. It is said that the ET put too much weight on W's denials. This ground does not raise an arguable point of law. The weight given to the evidence is for the ET.

It is not arguable that the ET's reasons were insufficient, apart from its reasons for accepting W's evidence that the (sic) did not say 'You're not right for me'. That comment is potentially relevant to ground 5, so ground 5 is arguable to that extent.'

3 In summary the decision by HHJ K Tucker that followed was that there was an inconsistency in the evidence in respect of the disputed comment with which we needed to grapple and then explain why we made the decision we did in a reasoned conclusion. She was not satisfied that we did so on this occasion and therefore allowed the appeal on the basis of a flawed finding of fact that had not been explained adequately. Further, she found that if the comment was made, we would need to look at the respondent's explanation as to why it was said and set out our conclusion on that point and then consider it in the context of the analysis of the overall explanation for the dismissal and consider whether or not to draw an inference of discrimination.

4 On remedy the matter was remitted to us with the following guidance:

'…look at the evidence about the making of that particular comment carefully and weigh and balance each piece of evidence relating to it carefully and against the evidence as a whole, before making the decision on the issue of fact of whether or not the statement was made. The Tribunal must then explain carefully, having regard to that evidence and evidence of inconsistency on the part of Mr Willis and the Respondent organisation, what consequence, if any, flowed from that and explain its conclusions. Then it should revisit its ultimate conclusion and apply to it the provisions relating to the burden of proof, as recently clarified in the judgement in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913. The Tribunal may find it useful to look at the passages cited within that judgement (Elias LJ) which draw the distinction between the acceptance of, on the one hand, a fact and, on the other hand, the explanation.

The Tribunal must be astute to ensure that it is clear on its findings that there is no discrimination - that must mean conscious or subconscious discrimination - and it must grapple with whether or not within this particular workforce there was evidence of subconscious discrimination at play because of, for example, the lack of equal opportunities training or the use of outdated, or as what many would see as offensive, terms by individuals within that organisation.'

5 At a preliminary hearing on 20 July 2018, at which both parties were represented, it was agreed that no fresh oral evidence would be required. Orders were made for the parties to seek to agree a note of the evidence given at the hearing in October 2016 relevant to the disputed comment and for that to be filed with the Tribunal on or before 17 August 2018 and to file written submissions no later than 7 days before a one-day hearing at which oral submissions were also invited. In due course the matter was listed for that hearing on 4 October 2018.

6 In breach of those Orders, no note of evidence or submissions had been

filed by 3 October 2018 and therefore that hearing was postponed and relisted for 18 December 2018 with the same procedural arrangements. A very short summary 'recollection' of Mr Willis's evidence was emailed to the Tribunal by the claimant in person on 16 November 2918. The respondent confirmed on 14 December 2018 that that note was agreed. No written submissions were filed in advance of the hearing but the respondent did bring some with them on the day. The claimant, in person, made oral submissions on the day. Our decision was reserved.

7 We are grateful to the claimant that he was able to supply the Tribunal with his copy of the original trial bundle as unfortunately the Tribunal's copy could not be located. We note that the EAT had a supplementary bundle before it. We have not been provided with that but have been able to cross refer any references to documents within it to documents in the trial bundle.

Relevant Law

8 In addition to the law set out in the original Judgment and the matters set out in HHJ Tucker's Judgment, all of which we have had regard to, it is useful to set out a passage in Laing v Manchester City Council [2006] ICR 1519, referenced in Ayodele, to which we have been specifically referred in respect of the burden of proof.

'… First, the onus is on the complainant to prove *facts* from which a finding of discrimination, absent an explanation, could be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an *explanation*. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race:…'

Findings of Fact

9 The references in the pleadings and evidence to the disputed comment are as follows:

a. In the details of claim attached to his Claim Form, the claimant said (paragraph 8) that Mr Willis confirmed the reasons for the claimant's dismissal as being 'You're not right for me' together with the other comments set out at paragraph 3(c) (ii)-(v) of the agreed list of issues appended to the original Judgment.

b. At paragraph 8 of the Response, the first respondent (then the only respondent) contended that the comments made during the meeting:

'…such as 'you're not right for me, you're not right for the company….' were made with reference to the Claimant's inability to perform the role, and highlighted how the Claimant's inexperience did not fit within the current business set-up, where an experienced negotiator was required.'

This is clearly an admission that the disputed comment was made. Mr Willis's evidence at the 2016 hearing was that the Response was

prepared by a third party and he could not remember looking at it or discussing it before it was filed. On balance we find it more likely than not that Mr Willis, despite being the owner of the respondent, did not engage with the drafting of the Response before it was filed.

c. In Mr Willis's written witness statement (para 27), by reference to the allegation at para 8 of the details of claim, he accepted that he made 'those comments' (which include the disputed comment). However in supplementary questions he denied making it. His oral evidence was that he said 'You're not right for us or the company. Not sure which.'

d. In cross examination Mr Willis consistently denied making the disputed comment.

e. Mr Willis prepared a note of the dismissal meeting at some point after its conclusion. That note is silent as to the disputed comment.

f. The claimant, in an appeal letter sent to Mr Willis on 19 May 2015, asked for a detailed explanation of the disputed comment as well as the others. On an unknown date, but before the appeal hearing, Mr Willis inserted his comments on that appeal letter and in relation to the request for a detailed explanation he wrote:

> ''I did not use the term 'me' but said us i.e. the company Home Lettings. I made this comment having explained the concerns we had with his work and that we had come to the conclusion that he was not right for our company.'

g. The disputed comment was discussed in detail between the claimant and Mr Willis during the appeal hearing chaired by an independent third party, Ms Steinmetz. Before Mr Willis joined the hearing the claimant confirmed that the disputed comment had been made. After Mr Willis joined, the discussion quickly became bad tempered. The claimant asked Mr Willis to explain the disputed comment to which Mr Willis said:

> 'I have already done that, on more than one occasion explained to you what I meant by that.'

This is an implicit admission that the disputed comment was made.

h. In answer to a request from the appeal manager to repeat that explanation Mr Willis said:

> 'I made the point in relation to the fact that you, your, the way that you worked, ok, your knowledge, the apparent knowledge that you seem to portray of the industry once you had arrived was different to the situation we really had felt when we interviewed you, ok, and that, not only that but you did not seem to take instruction that easily, there were a number of occasions where I had decided that you, because of your experience and the way that you worked and it was totally to do with you work nothing whatsoever to do with anything else, that was the reason that I felt that you were not right for us.'

i. There then followed an exchange in response to the appeal

manager's question about when Mr Willis first knew that the claimant was black. Again this discussion became bad tempered concluding with the claimant saying he took exception to Mr Willis denying saying what he had said, he felt insulted and disgusted. In response to that Mr Willis said:

> 'I did not say it and I would not, I do not know full well, and I certainly would not admit to something that you say I said when I know full well that I did not make that comment and furthermore I have never ever made any comment to you in relations to your colour. Or your origin.'

Having considered the minutes, we conclude that in saying this Mr Willis was denying making the disputed comment.

j. In a subsequent undated report, the appeal manager set out on account of the appeal process together with submissions made by each individual and her findings. At paragraph 49 she set out the disputed comment and then said:

> '…it is accepted this was reference to the 'fit' for the role John [the claimant] was required to do - and what was believed he could do. It was not a reference to race or colour.'

10 Having again considered the evidence and pleadings regarding the disputed comment, we find it is almost evenly balanced as to whether the comment was made or not made. We do have particular regard, however, to the conclusion reached by the independent appeal manager who had the benefit of hearing first-hand the claimant and Mr Willis debate whether the comment was said relatively shortly after the events in question. We attach some weight, therefore, to her conclusion and find that that tips the balance in favour of concluding, and we do so conclude, that the disputed comment was made together with the other comments alleged at paragraph 3(c) of the list of issues.

11 The key findings of fact made in the original Judgment that we have had regard to in this further Judgment are as follows:

a. The respondent had six employees and was owned by Mr Willis who worked part-time. It had an equal opportunities policy but neither Mr Willis nor any other director or employee had received any equal opportunities training.

b. The previous incumbent of the claimant's role was black and there was nothing to suggest that there had been any problem between her and the respondents.

c. The decision was made to appoint the claimant to the role notwithstanding that he did not exactly meet the advertised criteria and that Mr Willis had some misgivings about his administration skills. The advertised salary range for the role was £16-£20,000 pa. The claimant was offered £18,000. At the time the claimant had eight months experience in the letting industry.

d. Ms Stewart told Mr Willis on 30 March 2015 that the claimant was black and therefore Mr Willis knew that, when he had a telephone interview with the claimant on 1 April 2015 and when he confirmed to Ms Stewart that he was happy for her to recruit him.

e. In their first face-to-face conversation on 14 April 2015, Mr Willis was not surprised to find out that the claimant was black and there was nothing awkward or untoward about that conversation.

f. On 24 April 2015 Ms Stewart made the 'what do I call you, coloured or black?' comment.

g. Ms Stewart had concerns about the claimant's performance by the end of his first week of employment and she had raised those concerns with Mr Willis by the end of his second week. At that stage Mr Willis's advice to her was to discuss the issues with the claimant.

h. Ms Stewart did so in a meeting with the claimant on 28 April 2015 when she raised performance issues with him as reflected in her contemporaneous handwritten notes. She agreed with the claimant, who was about to go on holiday, that he should take on board what she had said and come back to start afresh.

i. Ms Stewart continue to be concerned about the claimant's performance after his return from holiday and by 15 May 2015 she had decided that it was not appropriate to continue to employ him as she had seen no improvement. She spoke to Mr Willis and it was agreed that Mr Willis would deal with his termination as Ms Stewart was finding the situation stressful.

j. Mr Willis terminated the claimant's employment in a face-to-face meeting on 15 May 2015 at which he made all of the comments alleged at paragraph 3(c)(ii)-v) of the list of issues.

Conclusion

12 Having concluded that the disputed comment was made, we then consider what consequence, if any, flows from that and revisit our ultimate conclusion.

13 Ms Montaz confirmed that the disputed comment, if made, amounted to less favourable treatment and a detriment. Having found that it was made the burden of proof therefore passes to the respondents and we consider the explanation given for the comment. Of course, on the facts Mr Willis denied making the comment and therefore has not given an explanation for making it, but in the context of the very similar comments he did admit making and all the circumstances of the case, we conclude that the explanation for the comment was Mr Willis's view, based on his discussions with Ms Stewart, that the claimant was not performing satisfactorily.

14 There is nothing overt or inherent in the disputed comment related to race.

Of course it might be appropriate to conclude, in the context of all the circumstances, that an apparently neutral comment is in fact related to race. In these circumstances, however, we conclude that that is not the case. Mr Willis knew the claimant was black before he was appointed, the previous incumbent of the role was black, Mr Willis had said to Ms Stewart when she first raised the claimant's performance with him that she should have a discussion with the claimant (as opposed to, for example, at that stage going straight to dismissal) and Ms Stewart came to a genuine view that there were performance issues with the claimant. All this suggests that there was no conscious discrimination against the claimant.

15 Of course that is not the end of the matter. Just because someone has recruited a black person does not mean that they are not then later subconsciously biased against them. In considering that issue, there are matters that could indicate subconscious discrimination was at play, namely:

a. the lack of equal opportunities training - which Mr Stevenson at the first liability hearing described as fertile ground, for subconscious discrimination;

b. the inadvisable use of language by Ms Stewart during the course of the claimant's employment ('what do I call you, black or coloured?');

c. the reference by Mr Willis, during his evidence at the 2016 hearing, to the claimant as 'coloured'; and

d. the very short timescale in which it was decided that the claimant did not have the necessary skills.

16 Matters that could indicate subconscious racism was not at play are:

a. the contemporaneous notes showing that Ms Stewart had real performance issues with regard to the claimant;

b. the fact that the first respondent is an extremely small employer with limited capacity to carry an underperforming employee;

c. the fact that Mr Willis and Ms Stewart recruited the claimant in even though he had limited experience and Mr Willis had concerns about his administration skills. Effectively they gave him the benefit of the doubt which on balance seems unlikely if they were prone to subconscious discrimination.

17 Having considered and weighed in the balance all those matters, our conclusion is that there was no subconscious discrimination underpinning the making of the disputed comment. We accept the respondents' explanation for the comment and find that it had nothing to do with race. It did not amount to direct race discrimination or harassment.

18 Having reached those conclusions in respect of the disputed comment in isolation, we then revisit our ultimate conclusion in the original Judgment as

directed by HHJ Tucker. We have considered it again taking into account the matters set out above as to whether conscious and/or subconscious discrimination was at play, as well as the matters referred to in paragraph 64 of the original Judgment and whether it is appropriate to draw any inferences in the claimant's favour.

19 We remain of the view that the allegations at paragraphs 3(a) & (b) of the list of issues have not been proved as facts by the claimant. Those at paragraphs 3(c) & (d) have been proved and therefore the burden passes to the respondents to provide an explanation.

20 Their explanation is as set out above - the claimant's performance. In the context of our findings of fact regarding Ms Stewart's concerns about his performance, her discussions with Mr Willis regrading those concerns and their decisions first to discuss them with the claimant but then to dismiss him when in their view there was no improvement, we are satisfied that that is an adequate explanation. It had nothing to do with the claimant's race.

21 Consequently it remains the case that the claim fails and is dismissed.

_____
Employment Judge K Andrews
Date: 9 January 2019