



THE EMPLOYMENT TRIBUNALS

Claimant **Mr O Odukoya**

Respondent **Mr T Hopkins**

HELD AT: **London Central**

ON: **4-18 April 2019**

EMPLOYMENT JUDGE: **Mr J Tayler**

Members: Mr S Soskin
Mr PM Secher

Appearances

For Claimant: **In person**

For Respondent: **Mr B Adams, Counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. By a Claim Form received by the Employment Tribunal on 8 June 2015 the Claimant brought complaints of age discrimination, race discrimination, disability discrimination and sex discrimination. The claims were brought against (1) Tim Hopkins. (2) The Charity Commission and (3) Red Snapper Recruitment Limited "Red Snapper".
2. On 12 August 2015 a Preliminary Hearing for Case Management was held before Employment Judge Lewis. The Claimant did not attend. The Claimant was ordered to provide additional information in respect of his claims on or before 1 September 2015. A Preliminary Hearing was fixed for 25 September 2015 to consider whether certain of the claims were out of time, and whether any claims should be struck out or subject to deposit Orders.
3. On 24 September 2018 the Claimant sent a document apologising for not attending the Preliminary Hearing for Case Management before Employment Judge Lewis, stating that he had not received the correspondence fixing the hearing. He provided additional information in respect of his claims.

4. On 25 September 2015 a Preliminary Hearing was held before Employment Judge Stewart. Employment Judge Stewart noted that the Claimant was advancing a claim of unfair dismissal. That claim was struck out as out of time. The Claimant was Ordered to provide further additional information and a further Preliminary Hearing was listed to consider whether any of the claims under Equality Act 2010 should be struck out or be subject to deposit order.
5. On 17 December 2015 a Preliminary Hearing was held before Employment Judge Glennie who struck out the claims against the Mr Hopkins and Red Snapper as being out of time and made deposit orders of £50 each in respect of the 15 claims against the Charity Commission.
6. On 4 March 2016 a Preliminary Hearing for Case Management was held before Employment Judge Hodgson who gave directions for the hearing of the complaint against the Charity Commission. The Claimant had sought a reconsideration of the Judgment of Employment Judge Glennie. Time for payment of the deposit order was extended to allow consideration of the reconsideration application.
7. On 15 March 2016 the Claimant paid a deposit of £100.
8. On 30 March 2016 the Claimant served a Notice of Appeal against the Judgment of Employment Judge Glennie.
9. On 1 April 2016 Employment Judge Glennie rejected the Claimant's reconsideration application.
10. The Hearing of the Claim against the Charity Commission came on before Employment Judge Baty from 18-22 July 2016.
11. On 8 September 2016 the Judgment of the Baty tribunal was promulgated. Allegations 12 and 14 of the claim were dismissed on the merits and the remainder were held to have been submitted out of time.
12. On 9 February 2017 the appeal against the Judgment of Employment Judge Glennie was heard in the EAT by His Honour Judge Shanks.
13. On 2 March 2017 His Honour Judge Shanks gave Judgment allowing the appeal in part, holding that as allegations 12 and 14 were made against the Mr Hopkins in addition to the Charity Commission all claims against the Mr Hopkins should not have been held to have been out of time. The decision that it was not just and equitable to extend time in respect of the earlier allegations was upheld. The claim against the Mr Hopkins (hereafter referred to as the Respondent) was remitted for re-hearing. If allegation 12 and 14 failed that would be an end of the claim against the Respondent. If they succeed they might form part of an act continuing over a period, together with the earlier allegations.
14. I considered the matter at a Preliminary Hearing for Case Management on 18 April 2017. I Ordered a stay of the proceedings on the basis that there were ongoing appeals brought by the Claimant in the Court of Appeal.

15. On 4 July 2017 the Respondent wrote and suggested that the claim should continue as the appeals to the Court of Appeal had been concluded. On 25 August 2018 the Employment Tribunal wrote on my instruction to the Claimant seeking his comments. He did not reply.
16. I held a Preliminary Hearing for Case Management on 2 October 2017. On 4 October 2017 a strike out warning was issued on the basis that the Claimant did not appear to be actively pursuing the claim.
17. On 7 November 2018 I struck out the claim on the basis that it had not been actively pursued.
18. On 10 November 2017 the Claimant made an application for reconsideration. He stated that he had been unaware of the Preliminary Hearing for Case Management and the strike out warning as he had not been able to pay proper attention to his affairs due to and that he had only become aware of the strike out Judgment when he sought to submit documents to the EAT.
19. By a Judgment sent to the parties on 4 September 2018 I revoked the strike out Judgment on reconsideration.
20. I conducted a Preliminary Hearing Case Management on 19 October 2018. I fixed this hearing and identified the issues for consideration:
 - 20.1 Was the Claimant in February/March 2015 subject to Victimisation; Discrimination because of race, disability or against a former carer by the Respondent failing to consider him for an investigative officer with the Charity Commission.
 - 20.2 Was the Claimant in April 2015 subject to Victimisation; Discrimination because of race, age, disability or sex by the Respondent failing to consider him for a MO vacancy with the Charity Commission.
21. Although on various occasions prior to this hearing the Claimant has indicated that he proposed to apply to amend the claim, he did not make such an application.
22. At the commencement of this hearing the Claimant sought permission to amend the claim to vary the issues set for determination at this final hearing and seeking to add as further respondents; namely, the Home Office, Red Snapper and the Charity Commission.
23. The claims that the Claimant brought against the Charity Commission and Red Snapper have been dismissed. The dismissal of those claims has not been successfully challenged.
24. The remission from the Employment Appeal Tribunal was limited. It was held that there were two allegations that Employment Judge Glennie had thought were made against the Charity Commission only, but they were also made against Mr Hopkins, as an individual Respondent. As those complaints

potentially could be time there was a remission to consider the validity of those complaints and, if valid, the possibility that they formed part of conduct extending over a period. The remission was limited to these issues only. The EAT specifically upheld the finding that matters that were not brought within the primary time limit were out of time. Accordingly, if the Claimant is to succeed in this claim he must demonstrate that at the two remitted allegations are made out factually so that he has complaints that are within the limitation period.

25. The application to amend is not easy to follow. Firstly, the Claimant seeks to amend the issues which were set out as in my order of 19 October 2018. He seeks to amend them by changing the timeframe over which the alleged discrimination occurred and adding an allegation that he was discouraged from applying for roles. In addition, the Claimant suggests there may have been other recruitment exercises, not currently set out in the identified issues, when Mr Hopkins has failed to consider him for roles. The allegation that the Claimant has been discouraged from applying for roles is not particularised. The Claimant has not stated when he was discouraged, but it would appear that it must have been during the period of the Claimant's engagement at the Charity Commission; and therefore outside of the normal 3 month time limit (plus the additional time for early conciliation). It would not be a matter in respect of which the tribunal would have jurisdiction unless it could be established that there were valid complaints that were made within time together with which it could form part of conduct extending over a period (subject to any just and equitable extension). The Claimant gives no particularity of when there has been a failure to consider him for other roles and precisely how he contends that Mr Hopkins was involved
26. The Claimant also seeks to reinstate claims against Red Snapper and the Charity Commission and to add the Home Office as a Respondent for the first time.
27. In considering the application to amend I had regard to **Selkent Bus Co v Moore** [1996] ICR 836 at 843F. Mummery J as he then was, stated that whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J noted a number of relevant factors; including, the nature of the amendment and the applicability of any time limits and the timing and manner of the application. Those are examples of factors that should be taken into account. Essentially, the approach in **Selkent** is at one with the overriding objective: the focus is on the balance of hardship in allowing or refusing the amendment, which is a key component of dealing with cases fairly and justly. This is also the approach set out in the Presidential Guidance.
28. At the Preliminary Hearing for Case Management on 19 October 2018 the issues for determination at this hearing, based on the terms of the remission from the EAT were set out in clear terms. The Respondent has prepared for this hearing on the basis that those will be the allegations he faces. Although he suggested he might do so, the Claimant has not until the day of the hearing made this application to amend. The application is insufficiently particularised.

While we accept that the Claimant has had period of ill health he has not suggested that his health has prevented him from making an application to amend at an earlier stage. The manner of the making of this application would cause a grave injustice to the Respondent should it be permitted. This hearing could not proceed if the amendment was permitted. The Respondent is prepared for the hearing and would be put to very considerable further cost were a further hearing required.

29. If the additional parties were joined a postponement of the hearing would be inevitable. They would need to have an opportunity to be heard and to seek a revocation of any joinder to the proceedings. The proposed additional parties are not here and have had no opportunity to contest the proposed amendment. The complaints that the Claimant brought against the Charity Commission and Red Snapper have already been finally determined and the Claimant's appeals have failed. Those matters are determined and there is no proper basis for the Claimant seeking to re-open them. In part the Claimant is seeking to return to arguments that he has previously made. That is no proper basis for permitting him to do so. To the extent there are any new arguments they are matters that could and should have been raised in the original proceedings.
30. The Respondent has prepared for this hearing on the basis of the issues as set out on 19 October 2018. Claimant has on occasions suggested he might seek an amendment of the claim. The Respondent wrote to the Claimant on 29 January 2019, 7 February 2019, 4 March 2019, 18 March 2019 and 1 April 2019 asking that Claimant to state his intentions. The Claimant did not reply to any of that correspondence. He had ample opportunity to make an application. The Claimant has not put the proposed additional Respondents on notice of this application. Furthermore, the Claimant has showed no signs until today the he was engaging with Case Management. For example, the Claimant has not provided a witness statement for this hearing despite being ordered to do so.
31. We consider and that there is no proper basis permit this amendment. It is time that this matter reaches a final determination.
32. The Claimant suggested on a number of occasions during our hearing that he was minded to make applications. He suggested that he might apply for a postponement. However, he did not make an application. The Claimant suggested that no Judgment should be given pending an appeal of my order of 19 October 2018 but did not make application for a postponement. In any event, the evidence and submissions having been heard, we do not consider there would be any proper reason for us not to give our Judgement in the matter.
33. The Claimant also suggested that he has been minded to seek an order barring the Respondent from defending the claim on the basis that he has never specifically pleaded by way of ET3 to allegations 12 and 14. That application was not pursued. In any event, it is to be noted that in the Claim Form, the allegations are not specifically said to be made against Mr Hopkins. The response included a general denial of all allegations. It was only in further particulars that the specific claim against and Mr Hopkins was clarified as

including allegations 12 and 14. The Claimant has been on notice, including at the Baty Tribunal and that the Investigation Officer role was sifted by others than Mr Hopkins and that the Respondent's position was that that the Claimant was not considered for the Monitoring Officer role because he did not apply for it. He is well aware of the defence to the allegations that were only specifically introduced in further particulars. There would be no proper basis for refusing to permit the Respondent to rely on their defence.

34. We heard evidence from the Claimant. The Claimant had not, in accordance with my order of 19 October 2019, exchanged a witness statement specifically for this hearing. He was permitted to rely upon the witness statement produced for the Baty hearing. In addition, we heard evidence from the Respondent set out in a brief witness statement.
35. The Respondent stated that he had taken no part at in the consideration of applications for the Investigation Officer role and that, although he had been on the panel considering applications for the Monitoring Officer role, the Claimant had not been considered for the role because he had not applied.
36. The Claimant took us to documentation and gave evidence about the period before and during his time at the Charity Commission. His contention was that in any discrimination claim the tribunal would need to consider evidence covering a potentially lengthy period of time in order to determine whether there was evidence from which we could draw an inference of discrimination.
37. In particular, the Claimant relied on email exchanges with the recruitment agency shortly before his engagement with the Charity Commission. The Claimant was originally put forward by the agency for a Monitoring Support Officer role. He was not successful in obtaining that position on his first application. However, he was deemed as appointable to the position.
38. The Claimant took us an email dated 16 November 2014 in which Mr Hopkins wrote to Mr Grocott of Red Snapper stating:

“Can you send me the name of the applicant that passed the recent round of recruitments but who wasn't appointed because ... scored higher.”

39. Mr Grocott responded that day stating:

The candidate was Remi Odukoya.

He actually interviewed for the support post we gave ... In his interview I got the impression that he thought the job was more like the Visit Officer post and his examples and answers all were geared towards demonstrating he could fulfil the role visiting charities, as opposed to providing administrative support for the programme.

Both myself and Morag felt he would have been a good fit for the Visit Officer post, but clearly we did not offer him that job or confirm with him that he was actually interested in that post, although as I say many of his answers were geared towards how he felt he would contribute and deliver out on visits.

Do you want me to contact Matt Smith at Redsnapper and see if he is available and open to taking up the Visit Officer post?

40. He went on state that the Claimant was still available and interested in a Monitoring Support Officer role.
41. Mr Hopkins said in his evidence when he sent the email on 6 November 2014 he was referring to the Monitoring Support Officer post. It put to him by the Claimant that logically his enquiry must have been about the Monitoring Officer post as Mr Grocott responded stating that it was not the post that the Claimant had applied for. The Claimant had applied for the Support Officer post. We consider that it is likely that the Claimant is correct in that interpretation. Mr Hopkins initially thought that the Claimant had applied for the Monitoring Officer post and was told that he had applied the Monitoring Support Officer post, but was thought to presented himself in a manner that made him a more appropriate candidate for the Monitoring Officer post.
42. The Claimant contends the email of 20 November 2014 shows that he was by then only considered for the Monitoring Support Officer post. He contends that this is a matter from which we could draw an inference of discrimination. Mr Hopkins stated that he could not recall why the Claimant was not immediately considered for the Monitoring Officer position. The Claimant was invited to an informal interview with Mr Hopkins for the Monitoring Support Officer role and was invited to start with the Respondent on 15 December 2014.
43. The Claimant also complained that had been asked to start with the Charity Commission just before Christmas. We see nothing to criticise Mr Hopkins in that respect. He understandably thought that the Claimant would wish to start as soon as he could. We do not see how this could support an inference of discrimination.
44. The Claimant's appointment lasted from 18 December 2014 to 8 January 2015. During that period the Claimant repeatedly asked to use a laptop belonging to the Respondent at home to progress litigation with other parties. That resulted in a disputes with his line manager, Sally Jones, and the eventual decision by Mr Hopkins that the engagement should be terminated.
45. Mr Hopkins explained his reasons to Red Snapper. They did not pass on what Mr Hopkins had said to the Claimant. When Mr Hopkins told the Claimant that his engagement was to be terminated he referred to a lack of work, rather than the way in which the Claimant had conducted himself in the office, particularly wishing to use the Respondent's equipment to conduct his litigation.
46. There is an email exchange in which the Claimant suggested that he would like to take the laptop home to complete an application for an Investigation Officer role that had become available as a direct appointment. He said that he had been told that he could use the computer to make the application.
47. On 11 January 2015 the Claimant applied the Investigation Officer role.
48. Mr Hopkins at produced notes of the termination meeting on 13 January 2015. He referred to the Claimant as being aggressive. The Claimant suggested that

this was something from which we might draw an inference of discrimination as it involved a stereotypical assumptions about him as a black person

49. On 15 January 2015 the Claimant sent a letter before action to the Respondent alleging that he had been subject to discrimination.
50. In about February 2015 a Monitoring Officer role became available.
51. A sift for the Investigation Officer role was undertaken on 23 March 2015. The applications were anonymized. The sift was conducted by Ms Butt and Mr Kington. Detail of what happened during that application process is set out in the findings of fact, of the Baty tribunal. The Claimant was rejected at the sift stage on 23 March 2015. Mr Hopkin's evidence was that he played no role at all in this exercise. The Claimant was not able to provide any evidence to suggest otherwise. The Claimant did not put to Mr Hopkins that he in some way improperly influenced the decision makers. There is no evidence to suggest that he was involved in the Investigation Officer sift process at all. That was a sift carried out on the papers on anonymized documentation.
52. The Claimant did not apply for the Monitoring Officer. When recruiting people to to permanent employment directly with the Charity Commission the Respondent applies Civil Service Commission recruitment principles that require recruitment to be based on merit after fair and open competition. This is an absolute requirement. Appointment have been held to have been made ultra vires where these provisions are not complied with. Fair and open recruitment requires that jobs are advertised publicly. As the Claimant did not apply for the role he was not considered for it by Mr Hopkins.
53. In the **Law Society v Bahl** [2003] IRLR 640 the Employment Appeal Tribunal, 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”.
54. The provisions that we are dealing are designed to combat discrimination. In that context, it is important to note that 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.
55. 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.
56. 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 he had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

57. 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 for the reversal of the burden of proof is now made by Section 136 EQA:
- 136 Burden of proof
- (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.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
58. 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 prove 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 the Claimant must establish a 'prima facie case' of discrimination including less favourable treatment than a comparator of a different race or gender with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was on the grounds of race or gender; (b) having done so, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.
59. 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.
60. 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 the reversal of the burden of proof: 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.
61. In considering surrounding facts from which an inference could be drawn there must be facts that could establish discriminatory conduct in respect of the specific complaints brought by the Claimant.
62. There is no specific legal protection for carers or former carers.

63. In a sense it is correct that the Respondent did not consider the Claimant for the Investigation Officer role. However, the evidence is clear. The reason was the Respondent had no involvement in that process. In those circumstances, whatever the surrounding facts, as he did not make the decision he cannot have made it on discriminatory grounds in respect of any of the protected characteristics relied upon by the Claimant or as a result of any protected act that the Claimant has done.
64. In respect of the Monitoring Officer role, the Claimant was not considered by the Respondent because he did not apply. We accept Mr Hopkin's evidence that he would not contact people and asked them to apply. In accordance with the Civil Service Code, there has to be fair and open recruitment. Candidates should apply for roles that are advertised and then be considered objectively for those roles. The position is different to when an agency role is available when there might be a possibility of a candidate being slotted into role without a formal procedure. We consider it is entirely clear that the only reason that the Claimant was not considered for the role of Monitoring Officer was the fact that he had not applied.
65. Mr Adams for the Respondent tried to identify a number of arguments that the Claimant put forward in his closing submissions. The Claimant argued that he may not have been considered for Monitoring Officer role because of disquiet about his conduct while he was engaged at the Respondent in respect of his use of his laptop for the purposes of his litigation. We conclude that was not the reason. The reason why he was not considered was the fact that he did not make an application. In any event, were that the reason it would not be discriminatory.
66. The Claimant argued that he had been deterred from applying for the Monitoring Officer role. That was part of the application to amend that we refused and accordingly that allegation was not before us. In any event, the the Claimant argued he felt deterred because Mr Hopkins was still at the Charity Commission. That does not involve Mr Hopkins doing any act. We do not accept that the Claimant was deterred from applying. He did not apply because he was unaware that the role was available on the Civil Service portal. The Claimant could have check the portal and applied for appropriate roles if he wished.
67. The Claimant argued that the Respondent was under an obligation to contact him and advise him of the role. We do not accept that there was any such obligation.
68. The Claimant raised the provisions of section 159 EQA that permit at an employer, where there are two equally qualified candidates for recruitment, to prefer a person who comes from an underrepresented group. That is a defence to what otherwise would be direct discrimination. There is no requirement on an employer to take advantage of the provision. Furthermore, were the Respondent to do so, the appropriate time would be after an application under the normal application process. It is only at the stage where two candidates have been determined to be equally qualified that there can be any question of an employer deciding to prefer a person from the

underrepresented group. The employer cannot simply assume from the outset that a person should be appointed because they are from one underrepresented group. There may be other people applying who are also from underrepresented groups. In any event, this argument does not alter the fact that the Claimant was not considered for the Monitoring Officer role because he did not apply for it.

69. The Claimant argued that he received a promise from Red Snapper that he could be directly appointed to a Monitoring Officer position. The feedback received by Red Snapper was positive and it was suggested that the Claimant could possibly be slotted into a Monitoring Officer position on an agency basis should it become available. That would be at an engagement through the agency to which the Civil Service Code would not apply. The position is different where an application is made for a permanent role in which case the Civil Service Code applies so there must be application before a person can be considered a role.
70. We were urged by the Respondent to consider whether we should identify this as a claim that was totally without merit. We consider that the question of whether a claim is totally without merit is to be objectively analysed. It does not turn on the whether the Claimant believes the proceedings have merit. We have been struck by how strongly the Claimant clearly feels about the way he believes he has been treated. He raised issues about the documentation around the time of his recruitment that he suggested could lead to an inference of discrimination. It is also clear at that he has felt very strongly that he was not told the real reason for the termination of his engagement by the Respondent who suggested it due to lack of work; rather than explaining the real reason which was his inappropriate use of the Charity Commission's resources to conduct his litigation and his resulting dispute with his manager. The Claimant genuinely believes his claims have merit.
71. Looking back at the history of this matter it causes pause for thought as to whether Preliminary Hearings are the best way forward in cases of this nature. The litigation has become extremely complex. It has led the Claimant to believe that his claim has been chopped into ever smaller pieces which has prevented him from properly advancing his claim. Considering that this litigation all arises out of such a brief period time it is hard not to wonders whether it might have been better had it simply come to one hearing for the determination of all matters.
72. That is not what happened. Respondents are entitled to apply for Preliminary Hearings. The matters were determined in their favourite at the Preliminary Hearings and those decision have been upheld on appeal. The consequence is that we are limited to this to the specific limited remaining allegations. When we step back and look at those allegations, putting aside the Claimant's very genuine feelings about his treatment, we conclude that the claims that were before us were, objectively, totally without merit. There was no basis upon which the claim could succeed. The Respondent had no involvement in considering applicants for the Investigation Officer role,. He could not have discriminated against the Claimant. The Civil Service Code was applied to the Monitoring Officer role. It was a permanent role which required an application for a person to be considered. The Claimant did not apply for the role and so

there was no basis on which it could be suggested that Mr Hopkins had discriminated against him by not considering him for the role.

73. While we appreciate that the great disappointment this will cause to the Claimant, we conclude that this claim fails and that it was a claim that was totally without merit. We suggest that the Claimant tries to take some time to consider carefully whether the time has come for this litigation to reach its conclusion.

Employment Judge Tayler

3 July 2019

Judgment and Reasons sent to the parties on

03/07/2019