



EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Parkdean Resorts UK Limited

Heard at: Manchester

On: 29 May 2019

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: In person (attending my telephone)

Respondent: Mr B Williams of Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. In case number 3303673/2018 the complaint of race discrimination is dismissed upon withdrawal and the complaint of age discrimination is struck out on the ground that it has no reasonable prospect of success.
2. In case number 2500128/2019 the respondent's application to strike out the claims of disability discrimination are refused.

REASONS

1. This hearing related to applications in a case that was served and transferred to Manchester in case 3303673/2018, which I am calling the "Manchester complaint", and complaint to 2500128/2019 registered in Newcastle and then transferred to Manchester which I am going to call the "Newcastle complaint". They are both complaints of discrimination by Mr Taheri against a prospective employer, Parkdean Resorts UK Limited.

2. The Manchester complaint was registered and lodged at Watford on 31 January 2018 and by that, and I refer to the bundle that was put before me by page

number, at page 6 the claimant indicated he wished to claim age and race discrimination, and in support of his claim he wrote this:

“I have been in touch with Parkdean Resorts since June last year and despite two interviews I’ve been fobbed off again and again. It is my belief that I have been actively discriminated against because of my ethnic background and age. They have failed to respond to my allegations so reluctantly I am/have no option but to institute litigation.”

3. The respondent originally responded taking jurisdictional points. The matter came before EJ Sherratt at a preliminary hearing for case management on 4 January 2019 (31-33) and clarification of the claims was given and recorded in paragraphs 1, 2 and 3 of that Order.

4. Mr Taheri, who then attended in person, confirmed that he was making a claim of direct or indirect discrimination based on the characteristics of age and race, and they arose from an email sent to him on Friday 12 January 2018 by the respondent.

5. In summary, EJ Sherratt recorded that the claimant’s case was that he was not offered a role at one of the respondent’s resorts in Scotland on the basis that he is Iranian and not Scottish, and because the respondent stated that it was looking for “less experienced sales people”. EJ Sherratt recorded that the claimant compared himself with a hypothetical person who is Scottish and/or of a younger age group than the claimant who is aged 58 or thereabouts. The opportunity was afforded for the respondent to make an application to strike out or amend the response and apply to strike out the claim, and by an application dated 30 January 2019 (34-37) the respondent did the latter.

6. The application to strike out was made on the basis that cases which do no more than plead a difference of treatment and a difference of protected characteristic can be struck out as having no reasonable prospect of success. The authority for that is now well-established: **Chandhok v Tirkey [2015] IRLR 195**.

7. The respondent submitted in writing that the claimant had not even pleaded a difference of treatment, and all that he had done was complain that he was not appointed or given a job for which he had applied and that is a constant theme of Mr Williams’ submissions in support of these applications.

8. Having regard to the email that the claimant relies upon, it is set out in that application and I quote it in full:

“Hi David,

The position we discussed was at Granny’s Heilan’ Hame. Unfortunately the hiring manager is looking for a different skillset to yours. I have many hiring managers currently looking for less experienced sales people so they can train them up. I won’t be able to progress your application unfortunately. Good luck with your job search, David.

Regards

Sarah”

9. The claimant alleged that effectively because he is of Iranian descent and the respondent was something to do with Scottish ancestry that amounted to race discrimination, and then he pleaded that Sarah James told him that the respondent was looking for someone with a different skillset.

10. The respondent submitted that he had failed to establish a prima facie case for discrimination. The true position, they say, is that when Ms James, the author of the email, referred to the fact that the respondent was looking for someone with a different skillset she was referring to the fact the respondent wanted a candidate with industry experience. The claimant did not have experience in the respondent's industry. In fact the successful candidate was not of Scottish origin. He appears to be of Spanish nationality, and had considerable experience in the industry. That was supported by the curriculum vitae of the successful candidate. I infer his nationality and ethnic origin was Spanish because he was educated in Spain and speaks English, Spanish and Thai and had worked in Malaga. As will be apparent to the claimant appears to accepted that also.

11. The advertisement for the job at Grannie's Heilan' Hame near Dornock in Scotland was to a holiday home sales employee, selling caravan holiday homes and lodges to new and existing customers (87-89).

12. The claimant's CV (90-91) identifies his education and training in archaeology from which he then moved to become a Sales and Marketing Director in a company which he set up, Price League Marketing in 1990-1995. Although he told me that company was selling timeshares or holiday purchases of a similar effect to the job for which he was applying to the respondent, the CV does not contain that information. The CV shows he then worked as a Mortgage Adviser, a self-employed Sales and Marketing Representative in Australia between 2002-2011. He then returned to Oxford as an archaeologist for three years. He then became a sales adviser on alternative energy products such as solar panels in Haydock in Lancashire in 2014-2016. He most recently commenced a job in Preston in 2016 selling replacement windows and doors. That job ended, I infer from what he told me today, several months ago.

13. There is no doubt that the claimant has extensive sales experience in a variety of areas. What he did not make clear in that was that it was in a similar or in fact the same industry, and I have no reason to take a different view from the respondent that selling property timeshares is similar but it may not be the same precisely as selling caravan homes and lodges.

14. The situation changed when this hearing began because the claimant at the outset said that he no longer sought to pursue the allegation of race discrimination in the Manchester claim. That was on the basis he said he had been provided with information by the respondent which showed that race (i.e. not being Scottish) was not a characteristic upon which he could base a claim having regard to the fact he appears to have accepted that the successful candidate was in fact Spanish or of Spanish origin.

15. However, he wished to pursue the age discrimination claim and it is in respect of that characteristic that the respondent maintained the application to strike out.

16. On behalf of the respondent, Mr Williams submitted that the claimant's claim was based on a total misreading of the email of 12 January 2018.

17. The claimant pointed to the fact that there were other emails (78) indicating that in 2017, as a result of an interview in Wales at Pendine Park, he had made a positive impression there. Sarah James, the author of the letter of 12 January 2018, wrote to Denise Woods of HR, describing the claimant as someone who would "fall into the mix quite quickly", that she liked his maturity and the owners would like him too. She said, "I think with David what you see is what you get. I'm not sure he'd set the world alight but he'd be accountable and have a go", and she said she was more than happy to consider him in the future.

18. The fact remains that the claim form, at its highest, simply pleads a possible difference in characteristic and a possible difference in treatment. The entirety of the claimant's pleaded case is quoted above. The material words now are:

"I've been fobbed off again and again. It is my belief that I have been actively discriminated against because of my ... age."

19. As the court in **Chandhok v Tirkey** said: that no more than sets up the possibility of discrimination.

20. The claimant's case in argument was that the letter of 12 January suggests by the expression "less experienced sales people" being looked for suggests that the respondent is necessarily seeking younger rather than older people. But that is to take the expression out of context.

21. In my judgment on the totality of the information before me, the proper construction is likely to be that this hiring manager is "looking for a difference skillset to yours", i.e. somebody who had more relevant experience and that there are other managers looking for less experienced sales people, i.e. with less experience in the industry, so they could train them up. In my judgment, there is no reasonable prospect of a Tribunal at all finding it bears the inference that is contended for by the claimant that they were looking for younger sales people. I take into account the fact that the author of the email was also the author of the positive feedback suggesting that the claimant was somebody whom the company might employ.

22. In those circumstances I am satisfied that the claim of age discrimination in the Manchester claim has no reasonable prospect of success. I reach that conclusion notwithstanding that the tribunal will order, unless compelled to take an alternative approach, to ensure that claims of discrimination are dealt with at a full hearing.

23. The claimant's second claim, the Newcastle claim, though it is not the subject of a separate application but an application on the same basis, is made in the response which the respondent has presented in relation to that. That application is described on page 7 of that ET1 in this way: it is for disability discrimination, it is said that the disability is prostate cancer, and the claimant said:

"I applied for four posts with the respondent and have not heard back so it is my belief that they are continuing to discriminate against me but this time because of my disability."

The claimant gives four reference numbers. Those numbers, he says, relate to the online applications he had made up to 8 January 2019 and he, as I say, also identified that the disability was prostate cancer.

24. In its response the respondent, in the grounds of resistant, identified in paragraph 6 that in fact the four applications were submitted: one was on 4 January 2019, on the same day that he was attending the Manchester Employment Tribunal, and three were on 8 January 2019. The claimant had applied through the website and was unsuccessful on each occasion. The 4 January application was a holiday home sales adviser at Todber Valley Holiday Park, which I am told is a location not far from the claimant's home in Rossendale. The respondent's case is that that vacancy was to replace an employee who was transferring to a different Park and when the employee decided to stay at Todmer Valley the vacancy was withdrawn.

25. On 8 January 2019 another position of a holiday home sales adviser at Todmer Valley Holiday Park: 17 people applied for that role; three people were shortlisted; shortly after shortlisting the respondent made a decision it did not have the budget to recruit an additional adviser and no-one was appointed to the role.

26. On 8 January 2019 the claimant applied for the position of holiday home sales adviser at Pendine Sands Holiday Park in Carmarthen (I pause to say that the claimant relies on the fact that was where he attended an interview where he got a positive response). There were 49 applicants for three roles. The successful candidates all had previous experience in the hospitality leisure industry. The respondent it is said, and I quote "generally favours industry experience over sales experience when shortlisting candidates", and reiterated that the claimant does not have any previous industry experience.

27. Finally, on 8 January 2019 a holiday home sales manager at Lower Hide Holiday Park on the Isle of Wight. The advert for this role specifically requested industry experience, which the claimant did not have. The ET3 continued: four people applied for that role, three of them had industry experienced. The successful candidate was an internal candidate who was on a development programme to become a manager with the respondent and was ready for the next step. The respondent's case is that the claimant was unsuccessful either because other candidates had more relevant experience or because the role was not filled by anyone.

28. The claimant submits that he was a strong candidate for that. His reason for saying that the reason for his dismissal was or was related to the protected characteristic of disability was that he had informed the Tribunal and the respondent at an earlier stage that he hearing that eventually took place on 4 January 2019 was adjourned from a date in October 2018 because the claimant had to go into hospital for a surgical procedure in relation to a consultation with a consultant neurologist, who confirmed the diagnosis of cancer. The solicitors for the respondent therefore were aware of the cancer.

29. The claimant would have on his part to show that the people who the decisions to reject him for the four applications that I have identified were at least aware of the cancer, and indeed it is positive defence to a claim of discrimination because of something arising in consequence of disability, which it is more likely this claim would be, that the respondent neither knew nor had any reason to know that

the applicant was a disabled person. That will be an uphill struggle for the claimant. The withdrawal of one of the vacancies because of a lack of budget and the internal promotion were, I think, where the claimant is more likely to struggle to prove facts from which the Tribunal could infer discrimination, and it is clear to me that on one hand the claimant seeks to object to the respondent referring to his history of claims, yet at the same time he has made, he tells me, over 30 applications to this particular employer and, notwithstanding his rejection and indeed to other employers, has made a number of other claims as well.

30. The fact is it seems to me that there is the possibility of the claimant establishing knowledge of disability, and although he has sought to conflate age and disability as reasons for his rejection, that does not mean that if the claimant proves sufficient facts he cannot show that the fact of disability was a not trivial part of the reason for rejection.

31. In a nutshell, whilst I have borne in mind very much the powerful submissions of Mr Williams that this is a serial litigant, I am dealing with him as a serial litigant: I have not considered his other litigation except in one respect to which I will come in a moment. What I have considered is whether it can truly be said that there is no reasonable prospect of success, and although, to put it colloquially, I think Mr Williams gets close, I do not believe he gets quite close enough. However, he does cross the hurdle of saying that the claimant has little reasonable prospect of success in establishing those four applications were rejected for a discriminatory reason.

32. I therefore refused the application strike out the claim in the Newcastle case 2500128/2019. I have made a deposit order having received information about the claimant's means. The order and the reasons for it are contained in a separate document.

Employment Judge Tom Ryan

Date 8 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
19 July 2019

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