



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON  
Ms J Forecast  
Ms C Edwards

**BETWEEN:**

**Mr M Langley**

**Claimant**

AND

**FDM Group Limited**

**Respondent**

**ON:** 25 June 2019

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr J Bellm (Solicitor)

## **Written Reasons Produced Pursuant to a Request by the Claimant**

1. By a claim form presented on 25 June 2018 the Claimant brought a claim of sex discrimination which the Respondent resisted. At a case management preliminary hearing on 14 September 2018 it was determined that there was a single issue for the full hearing, namely whether the Respondent had subjected the Claimant to the treatment of adopting a prejudicial approach and applying a negative assessment of the Claimant's input and conduct on the day of an assessment for its Getting Back to Business Programme. The Claimant confirmed to this tribunal that he relied on a hypothetical comparator.

### **The relevant law**

2. The relevant law is set out in sections 13 and 39 Equality Act 2010 which provide as follows:

#### **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.**

#### **39 Employees and applicants**

- (1) **An employer (A) must not discriminate against a person (B)-**
  - (a) **in the arrangements A makes for deciding to whom to offer employment;**
  - (b) **as to the terms on which A offers B employment;**
  - (c) **by not offering B employment.**

3. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.
4. We heard evidence from the Claimant and from the Respondent's witnesses Jennifer Holme, Head of the Getting Back to Business Programme and Sarah Parkinson, the Recruitment Manager. There was a bundle of documents comprising 266 pages in addition to the pleadings.

### **Findings of fact**

5. The Respondent is a global professional services provider with an emphasis on IT and business consultancy. The factual background to the Programme is set out in paragraphs two to eight of Ms Holmes's witness statement which were not challenged by the Claimant. Ms Holmes provided the Tribunal with additional factual information about the size and composition of its workforce, also unchallenged.
6. The Claimant applied to the Programme in April 2018 (pages 1-3). His application was initially rejected because he did not appear to meet the

criterion of having been out of work for at least a year. His CV suggested that he was currently engaged on an ongoing project. The Claimant had seen the advertisement on Mumsnet and he complained about his rejection on 1 May 2018 suggesting that he might have been discriminated against (page 16) on the basis that he had seen the advertisement on Mumsnet and returnees after absence are often women. The Respondent's Senior Legal Counsel Victoria Penfold replied on 14 May resisting the suggestion that there had been any unlawful discrimination in the way that the Programme had been advertised or selections made. She invited the Claimant to tell the Respondent if it had misunderstood his circumstances in any way. The Claimant replied explaining that contrary to appearances he had in fact been unemployed and seeking work since 2008. The Programme team then reassessed his application and he was interviewed by telephone at the end of May. Following that call he was invited to an assessment centre at which a number of candidates would be selected for participation in the Programme.

7. There were nine participants in the assessment centre of which five were women and four were men. Participants were invited by a letter (page 25) which stipulated that they should dress in smart business attire and bring a passport and proof of address not more than three months old. It also set out the criteria that would be used to select individuals for inclusion in the Programme. There were three elements to the assessment – two 15 minute interviews on sales and culture, a 45 minute written test and a group exercise. There was also a lunch at which participants were encouraged to network with each other. The letter explained in some detail the criteria that would be applied in assessing performance in the tests. Ms Holmes' evidence was that the Respondent was testing a candidate's previous experience and aptitude, career aspirations, transferable skills, motivations for returning to work, their ability to work in a team and their ability to lead and support others. Even allowing for the fact that the Claimant was not professionally represented we accepted Ms Holmes evidence about the purposes of the assessment.
8. The Claimant took part in the assessment day on 18 June 2018. He was unsuccessful. Out of the nine participants two women and two men were chosen. We accepted Ms Holmes' evidence that there was no restriction on the number of candidates who could be selected but to be selected candidates needed to meet the published criteria.
9. The assessments were recorded on printed forms. The interview forms included standard questions that were intended to be put to all candidates and set out the competency expected in relation to each question. The Claimant's interview forms were at pages 28 to 30 (sales) and 31 to 33 (culture). A different person conducted each interview. The Tribunal noted that the form relating to the Claimant's sales interview was not properly completed and the Respondent acknowledged that this had led to the interviewer concerned being given additional training. The form merely recorded that the Claimant had struggled to answer questions and that each one was answered with a 'story'.
10. The Claimant's written assessment was at page 34 – 36 and notes from the

Claimant's group task at pages 151-153. The bundle contained redacted copies of the paperwork relating to the other eight candidates. A summary of the Claimant's overall performance prepared after the 'wash-up' session was at page 27. The outcome, which was communicated to the Claimant on 20 June 2018 was at page 159.

11. The Respondent's reasons for rejecting the Claimant as set out at page 27 were as follows:
  - a. Poor attitude evidenced by a negative question - Ms Holmes said that his question was about how to leave the programme;
  - b. Not mingling with the other participants over lunch but sitting apart from them;
  - c. Not listening to the questions put to him;
  - d. Coming across as negative and flippant;
  - e. Giving technical answers that were poor on methodologies, risks and systems;
  - f. Not being able to articulate his strong technical experience;
  - g. Not giving specific examples;
  - h. Being negative, confrontational and lacking in collaborative skills in group work;
  - i. Sitting away from the stage during the presentation at the end of the group work;
  - j. Being unsuitably dressed in a leather jacket;
  - k. Presenting unprofessionally with a joke about 'Cillit Bang' and demanding that the audience 'pay attention to me';
  - l. Giving a weak answer to an audience question; and
  - m. Not completing the written assessment and using unprofessional language without insights or recommendations.
12. These points were summarised in the outcome letter. The Claimant's response, which he admitted in evidence was sarcastic and insulting, was at page 161.

## **Conclusions**

13. This case is about the Claimant's perception of the manner in which he was evaluated by the Respondent during its assessment day. The issue we need

to decide is whether the Respondent had discriminated against him under sections 13 and 39 Equality Act by adopting a prejudicial approach and applying a negative assessment of the Claimant's input and conduct on the day. If the Claimant was advancing a claim of direct discrimination based only on the outcome of the day it would have been bound to fail because two men were put forward at the end of the day as well as two women. The decision not to choose the Claimant cannot therefore have been merely because he was a man – other men were chosen for the programme. As we understand the Claimant's case he is alleging instead that the negative assessment of his performance was stereotypical and involved discriminatory assumptions related to his sex.

14. We do not find that to have been the case. We asked ourselves whether the assessment of the Claimant involved any conscious or unconscious bias and whether there was any evidence that the Claimant was unfairly marked and if so whether that arose because of any discrimination in the thought process of the decision makers. Notwithstanding that there were gaps in the documentation relating to the Claimant's performance and allowing for the fact that processes of this nature are bound to involve a degree of subjectivity, we were satisfied that the process overall as described to us was sufficiently objective and robust and contained sufficient safeguards to prevent decision being tainted by discrimination in the way suggested by the Claimant. There was a moderation process at the end of the day which was an important safeguard. There were clear and objective criteria. Although all of the assessors were female, two of those who assessed the Claimant also assessed another male candidate who was chosen for the Programme.
15. We accepted Ms Parkinson's evidence that the confrontational stance taken by the Claimant during the group exercise was very unusual. A hypothetical female candidate who had conducted herself in a similar way would in our judgment have received a similarly poor assessment. We do not accept the Claimant's assertion that there was a prejudicial misinterpretation of his conduct. If it is the Claimant's case that he was deliberately marked down in other areas of the assessment because of his sex that case is undermined by the fact that two male candidates were chosen. If it is his case that discriminatory assumptions were at work in the way that his performance was evaluated that is also undermined by the fact that two men were chosen. It must therefore have been the nature of the Claimant's conduct and performance during the day itself rather than the fact that it was assumed to be stereotypically male, that led to the decision not to offer him a place on the programme.
16. At its highest the Claimant's case was that the criteria used were not objective at all but tainted by discriminatory assumptions about male behaviour. Again the truth of that assertion is belied by the fact that the successful candidates included both men and women. That shows that the Respondent was not making any assumptions about whether men or women would be better able to demonstrate the kinds of behaviour or aptitudes that it sought in candidates for its programme. On the contrary it designed a selection process that allowed all candidates to demonstrate their potential.

17. For all these reasons the Claimant's claim of sex discrimination fails and is dismissed.

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Employment Judge Morton  
Date: 12 July 2019