



EMPLOYMENT TRIBUNALS

Claimant: Mr G Hylton

Respondent: Institute of Directors

Heard at: London Central

On: 16-20 September 2019

Before Panel: Employment Judge Henderson; Ms D Olulode; Ms L Jones

Representation

Claimant: Mr B Knight (Lay Advocate)

Respondent: Ms S Omeri (Counsel)

JUDGMENT

It is the unanimous decision of the Tribunal that the claimant's claims for direct race discrimination contrary to section 13 of the Equality Act 2010 are dismissed.

REASONS

The claim

1. This was a claim for direct race discrimination contrary to section 13 of the Equality Act 2010 (EQA) brought by an ET 1 lodged on 18 September 2017. There had been a period of Early Conciliation with ACAS from 21 August 2017 to 13 September 2017. The claimant had been employed by the respondent as a Member Relationship Manager on 3 March 2017 and was subject to a 6-month probationary period. The claimant was dismissed on 6 July 2017 by non-confirmation of his employment. It was accepted by both parties that the claimant did not have the requisite continuity of employment to bring an unfair dismissal claim.

Background

2. The case was originally listed for a 5-day hearing before a full Tribunal Panel in March 2018 for liability only. On Days 3 and 4 of that hearing the respondent raised various concerns which resulted in the recusal of the Tribunal Panel and which necessitated a re-listing of the hearing before a

differently constituted panel. There were no findings of fact made at the initial hearing. The current Tribunal stressed that this was a fresh hearing and that the parties could not (and should not seek to) rely on any evidence given at the hearing in March 2018.

Issues

3. At the commencement of the hearing the parties were referred to the issues which had been agreed at a Case Management Hearing on 14 December 2017. The parties' representatives confirmed that these were the issues for determination by the Tribunal. These were as follows:
 - whether the respondent had treated the claimant less favourably than it treated or would treat others by:
 - a. dismissing him on 6 July 2017;
 - b. relying on his lateness as a ground for dismissing him, when others had also been late without adverse consequences;
 - c. relying on his absence from his desk during working hours and alleged sleeping at his desk as grounds for dismissing him, despite the fact that his revenue was good;
 - d. relying on the fact that he had been entering incorrect data into the respondent's computer system (CRM);
 - e. failing to raise with him prior to his dismissal any of the grounds relied on and mentioned above; if so
 - whether such less favourable treatment was because of the claimant's race, which the claimant described as black British;
 - the claimant said at the commencement of the hearing that he relied on the following colleagues as comparators in relation to his lateness, namely BK (who was white British) and SS (who was white Iranian);
 - the claimant also relied on a hypothetical comparator namely someone in the same or not materially different circumstances but of a different race (section 23 EQA).
4. The EJ reminded the claimant of the burden of proof which it must apply – section 136 EQA. The claimant must show facts from which the Tribunal could decide that there had been a breach of the relevant statutory provision, in the absence of an adequate explanation from the respondent.
5. During the course of the hearing Mr Knight (on behalf of the claimant) extended the list of Issues. Evidence emerged during the hearing that the claimant's managers, Mr Ladwa and Mr Moore had claimed to find the claimant intimidating, and found it difficult to raise with the claimant concerns or issues which may be critical of him. Mr Knight then introduced a further issue: namely whether this view of the claimant's managers was based on a stereotypical race profile, that as he was black, tall and "well-built" he would be aggressive.
6. The claimant had also (as part of his oral evidence) extended the ambit of his discrimination claim by saying that he believed his protected characteristic was not simply his race (black British) but also the fact that he had management ambitions (see Findings of Fact below) and there were no senior managers in the respondent organisation. When it was pointed out that the Deputy Chairman of the respondent (Sir Kenneth Olisa) was of Nigerian descent, the claimant refined the description to the fact that he had a sales background and that Sir Kenneth had not worked his way up through the ranks to reach his appointment. The Tribunal notes first that these additional characteristics identified by the claimant are not

protected characteristics under the EQA and do not necessarily flow from the claimant's race and secondly that these characteristics were raised by the claimant for the first time at the hearing.

7. Mr Knight also sought to introduce further issues, such as the fact that the appeal hearing of the dismissal, held by Mr Fitzwater on 21 July 2017 was also a discriminatory act. However, as it was clear that this had never been raised in the ET1 or at the Case Management Hearing or in the claimant's witness statement, this issue was not one which the Tribunal would allow in its consideration of the claimant's case. In his oral evidence the claimant said that he had not initially believed that Mr Fitzwater was biased but after he had reached his appeal decision, the claimant believed that he was biased and had discriminated against him as he had carried out a minimal investigation and simply accepted Mr Moore's version of events. The Tribunal notes that Mr Fitzwater's appeal outcome is dated 4 August 2017 and the claimant would have had plenty of time to couch his claim before the Tribunal based on his belief that Mr Fitzwater had also discriminated against him.

Conduct of the Hearing

8. The hearing was listed for 5 days.
9. On the first morning, the Tribunal clarified the Issues with the parties. It was also confirmed that there was a main hearing bundle (of 572 pages) which was agreed between the parties: page references in this Judgement and Reasons are to that bundle unless otherwise specified. A supplementary bundle had also been produced containing approximately 400 pages. The respondent confirmed that on reflection it did not intend to refer to this bundle. The claimant said that he did wish to refer to the supplementary bundle and did so on one occasion (to pages 353 and 354 of that bundle).
10. Mr Knight indicated that he may wish to request a Witness Order for Lucy Webster (former HR manager with the respondent) to attend the hearing. However, upon further consideration he confirmed that no such application would be made. The respondent had produced a witness statement from Ms Webster signed on 9 March 2018, but only limited weight could be attached to that witness statement as Ms Webster was not attending to give evidence in person. She had been the subject of a Witness Order applied for by the respondent, but was out of the country on holiday at the relevant time.
11. On the afternoon of Day 1 and on Days 2 and 3, Tribunal heard evidence from the claimant and on behalf the respondent from; Ajay Ladwa (Senior Relationship Manager in the Membership Development team-formerly Team Leader in the Membership Development team from April 2017 to November 2017); Vicky Taylor (Head of HR); Scott Dale (Senior Business Relationship Manager from December 2016 to September 2018), who attended in pursuance of a Witness Order and Alan Fitzwater (currently Regional Engagement Director and Director of National Events).
12. Each of the witnesses adopted their written witness statements (signed as at March 2018) as their evidence in chief and were cross-examined and asked questions by the Tribunal Panel. The respondent did not produce a witness statement for Stephen Moore, who was the manager who carried out the non-confirmation meeting with the claimant on 6 July 2017. Mr Moore had been the subject of a Witness Order applied for by the

respondent, but had been unable to attend the hearing as he was out of the country at the relevant times. Ms Taylor provided a supplementary witness statement dated 13 September 2019 which set out her attempts to obtain witness orders for Ms Webster, Mr Moore and Mr Dale and to ensure, where possible, their attendance at the hearing. There was no cross examination of Ms Taylor as regards her supplementary statement.

13. The Tribunal also listened (on Day 3) to a recording of a meeting between the claimant and Mr Moore on an unspecified date: the claimant said in his oral evidence that the meeting had probably taken place in the last week of June 2017. The recording had been made covertly by the claimant and an agreed transcript of the recording was at pages 510-512. The claimant had requested that the Tribunal listen to the recording as evidence that he had not been aggressive or intimidating towards Mr Moore or Mr Ladwa.
14. The Tribunal was assisted on Day 4 by written submissions from Mr Knight and Ms Omeri and used the remainder of that day and the morning of Day 5 to reach their decision. This was delivered to the parties on 20 September 2019 in Tribunal. The claimant asked for written reasons to be provided.

Findings of Fact

15. The respondent is a professional body established in order to provide support and advice to company directors in their professional development and to represent their views and those of their businesses. The respondent relies on the financial contribution of its members, which currently number approximately 32,000. The claimant was employed in the Membership Development team which aims to develop long term relationships with new and existing members and to gain new members and to encourage existing members to renew their membership.
16. It was agreed that the claimant had been employed by the respondent from 3 March 2017 under the Terms and Conditions Employment dated 1 February 2017 (pages 530-533). The claimant's accepted that he was on a six-month probation period and during that period he would be entitled to 2 weeks' notice of termination of employment. He accepted that he had received 2 weeks' pay in view of such notice. The claimant also accepted that he had seen and read the respondent staff handbook (pages 540-555).
17. The claimant had three direct contemporaries who were on probation who were also black British namely: Pamela Phillips (PP), Valerie Philip (VP) and Duval James (DJ).
18. The claimant accepted that he had been interviewed for the post by Mr Moore who had offered him the role (offer letter at page 538) and that Mr Moore had been aware of the claimant's race at all relevant times. However, when it was put to the claimant that it was therefore unlikely that Mr Moore would discriminate against him on grounds of race, the claimant said that he believed it was not simply his race but also the fact that he had indicated that he wished to be a manager within 3-5 years of commencing his employment. He said it was his ambitions and aspirations to management combined with his race that had led to the discrimination.
19. The claimant also said in his oral evidence that he believed that another reason for the discriminatory treatment against him was because the hate and envy of his managers (especially Mr Ladwa) as the claimant was the "top salesman". It was put to the claimant in cross-examination that if this

- allegation were true then any less favourable treatment was not because of his race - the claimant eventually agreed with that statement.
20. The claimant also accepted that he had not previously mentioned this element in his discrimination claims in his ET1 nor in his witness statement prepared in March 2018. He accepted that he was raising it for the first time in his oral evidence at the hearing, but said he had not realised how important this point was. However, the Tribunal notes that the claimant also referred in his evidence to the fact that he had previously worked in HR which is not consistent with his statement that he had not realised that he should make his concerns about discrimination clear.
 21. The claimant accepted in his oral evidence that he had not specifically raised his belief that he was discriminated against on grounds of his race at the non-confirmation meeting with Mr Moore on 6 July 2017 nor at the appeal meeting with Mr Fitzwater on 21 July 2017. The claimant said that he had been nervous at the appeal meeting and so had not raised his concerns about race discrimination.
 22. It was accepted by the respondent's witnesses that the claimant's immediate line manager was Mr Ladwa but that Mr Moore was the overall manager responsible for the team. In his oral evidence Mr Ladwa said that although this was the technical structure, he had found it very "uncomfortable" to have difficult conversations or to give negative feedback the claimant and had therefore abrogated the responsibility for this to Mr Moore. Mr Ladwa accepted that the claimant was not made aware of this.
 23. However, the Tribunal was referred to pages 534-537 which showed one to one meetings between the claimant and Mr Ladwa on a weekly basis from 25 May to 22 June 2017, at which Mr Ladwa does give negative feedback to the claimant about CRM entries and the need to increase improve his acquisitions records. Mr Ladwa does not raise any complaint with regard to the claimant's lateness on 8,22 May or 21 June which he could have done.
 24. Mr Ladwa also said in his witness statement (at paragraph 14) that he would pull the claimant up informally on any mistakes he made on telephone calls as he could overhear these as he sat very near the claimant. Mr Ladwa's evidence does appear to be inconsistent on the matter of his direct engagement with the claimant as his line manager, in that he manages certain aspects of the claimant's performance but not others.
 25. In the meeting recorded by the claimant, Mr Moore says that Mr Ladwa is the claimant's line manager and not himself. This is also inconsistent with Mr Ladwa's evidence that he did had agreed with Mr Moore that he would not manage the claimant.
 26. The Tribunal does not accept Mr Ladwa's evidence that he abrogated responsibility for line managing the claimant to Mr Moore, but does accept that he did find it difficult to manage the claimant, possibly on matters not directly related to sales, such as lateness, absence from his desk etc. Mr Ladwa was a newly appointed Team Leader and so was experience in sales matters but not in management skills generally. Mr Ladwa relayed his concerns to Mr Moore but did not approach HR and not formally seek to have the claimant's line manager changed as he said it would not be possible within the Team structure.
 27. As regards whether Mr Ladwa was intimidated by the claimant, he said that the claimant was aggressive in tone and that Mr Ladwa felt

- antagonised and belittled and undermined in front of colleagues. He did not feel under threat physically and in fact continued to sit next to the claimant and attend review meetings with him.
28. The Tribunal finds that Mr Ladwa's difficulty in managing the claimant was not because of the claimant's race. Mr Ladwa said that he had no problems managing DJ who was of the same race and physique as the claimant, which supports this finding.
 29. As regards whether Mr Moore was intimidated by the claimant, Ms Taylor said in her oral evidence that Mr Moore had told her that he was concerned that the claimant was difficult if he was being given constructive criticism or negative feedback; was pushy in his opinions and was challenging for Mr Moore and Mr Ladwa as managers. There were also complaints made to Anne Marie Graff (who was Mr Ladwa's co-Team Leader) from the claimant's team members about giving them unsolicited training, which he had not sanctioned with his managers in advance.
 30. Mr Moore had told Ms Taylor that he was concerned about the non-confirmation in post meeting to be held on 6 July 2017 and that he was fearful about how the claimant would receive that message. He used words such as "intimidated" and said he was worried that things may "escalate". At paragraph 5 of her witness statement Ms Taylor said that Mr Moore was concerned that if he raised issues about the claimant "falsely claiming commission" and about the claimant's attitude and behaviour that the claimant could become violent and given the claimant's physique and his background as a personal trainer, Mr Moore appeared afraid for his safety.
 31. Ms Taylor said that she would always wish to ensure her employees' safety and so she discussed with Mr Moore the possibility of having someone accompanying him to the non-confirmation meeting. Mr Moore asked Mr Dale to attend the meeting. Mr Dale inferred that the reason why Mr Moore had asked him to attend was because Mr Moore may be concerned about the claimant's reaction, but he said that no one had specifically told him this.
 32. The claimant said that Mr Moore's concern about the claimant's reaction to the non-confirmation meeting and his fears for his own safety were racial stereotyping, in that Mr Moore created a racial profile of the claimant as a tall well-built black man, which then assumed that he would be aggressive and potentially violent. The Tribunal does not find that Mr Moore had carried out such racial stereotyping. He had recruited the claimant and was therefore fully aware of his race and physique. There was no evidence presented to the Tribunal that Mr Moore was intimidated by or had problems in managing DJ who would have had the same race and physical qualities of the claimant.
 33. The claimant presented his recording of a meeting with Mr Moore in late June 2017 as evidence that Mr Moore was not in fact intimidated by him and that Mr Moore was himself the aggressor at that meeting and generally, whereas the claimant was calm and measured. This argument appears to be contradictory to the argument raised about racial stereotyping.
 34. Having heard that recording, the Tribunal finds that on that occasion, Mr Moore appeared irritable and agitated (possibly because of an email sent by the claimant -which Mr Moore read out during the meeting- criticising Mr Moore's lack of availability to discuss the non-payment of commissions to the team). Mr Moore did not appear fearful or intimidated by the

claimant. However, the non-confirmation meeting would present a different situation, namely the termination of the claimant's employment and therefore it was not unreasonable for Mr Moore to anticipate that the claimant's reaction may be more extreme, hence the concerns which he expressed to Ms Taylor. This does not mean that Mr Moore was generally intimidated by the claimant or in fear of physical violence.

35. In fact, Mr Dale observed in his evidence that the claimant was surprisingly calm during the non-confirmation meeting and did not challenge any of the reasons given by Mr Moore for his dismissal.
36. The Tribunal also notes that Mr Fitzwater, Mr Dale and Ms Taylor all said that they had not found the claimant to be intimidating, although their interaction with him was limited. Mr Fitzwater also said that the appeal meeting with the claimant in July 2017 was as pleasant as such a meeting could be.

Lateness

37. The respondent's records on lateness of the whole team are on page 252. These show that other team members had more instances of lateness than the claimant.
38. It was accepted that the claimant's start time was 9.30 am. The respondent alleged that there were 5 instances of the claimant being late, one of which related to his being unwell which was disregarded. However, Mr Fitzwater said that at the appeal hearing the claimant referred to and accepted 6 occasions of being late: 3 of which were due to delay of trains but 3 of which he accepted were his own fault (page 516).
39. BK and SS as cited as comparators. The respondent's witnesses said that the comparators were not in the same material circumstances at the claimant. BK was a permanent employee and so the managers allowed more flexibility as he had a proven track record of making up time. SS was on his probation but Mr Ladwa said that he would explain his absences and would make-up the time and regularly attended evening work meetings to do so.
40. The Tribunal also notes that PP (who was black British) had many more lateness instances than the claimant, but she had spoken to Mr Ladwa about her childcare issues and made up the time during her lunch hours.
41. The Tribunal finds that the respondent's complaint about the claimant was essentially not about the number of incidents of lateness but the fact that he did not explain them to his managers and did not offer to make up the time. Mr Ladwa said that he did not feel able to approach the claimant about this and left it to Mr Moore, who also did not raise this with the claimant until his dismissal.
42. The Tribunal finds that this was unfair on the claimant (and less favourable treatment) and is a symptom of the lack of line management by Mr Ladwa and Mr Moore. However, the Tribunal does not find that this treatment was because of the claimant's race.

Absences from desk

43. The evidence presented to the Tribunal on this matter (from both parties) was scant. Essentially Mr Ladwa had observed (due to his proximity) that the claimant was frequently away from his desk, which the respondent felt was inconsistent with the sales figures which the claimant was recording on the CRM and the commission which he was claiming to be paid (as set out in the appeal outcome letter at page 501).

44. The Tribunal was not referred to any actual comparators. However, the Tribunal heard no evidence from the claimant as to why he said that a hypothetical comparator in the same circumstances would have been treated more favourably. This ground for dismissal is not therefore because of his race.
45. The claimant said that this issue was never raised with him by Mr Ladwa, which was not denied. This is another example of poor line management by the respondent but is not race discrimination.

Sleeping at desk and at a meeting

46. The claimant denied sleeping at his desk, but he did accept that he had “nodded off” during a training meeting. He also accepted that he had never observed any of his colleagues (regardless of their race) falling asleep. Mr Moore had discussed this matter with HR and Ms Taylor had (quite properly) suggested that he ask the claimant if this might be related to a medical condition. The claimant said he had an iron deficiency. There was then a misunderstanding as to whether Mr Moore expected the claimant to contact his GP to confirm this or whether Mr Moore was to arrange for the claimant to see the respondent’s company doctor. This misunderstanding resulted in no further action being taken. The claimant said he had chased Mr Moore about this, but there was no documentary evidence of this.
47. Although on this ground the issue was raised with the claimant, but Mr Moore had not arranged a medical appointment for the claimant, there was no evidence presented to the Tribunal that this was because of the claimant’s race.

CRM

48. The respondent’s complaints about the claimant’s CRM entries do not appear to be justified by the evidence presented to the Tribunal. The claimant accepted that he had been trained along with his colleagues on using the CRM system as part of his induction and had had some follow-up training. However, the claimant said that he had believed that he complied with the instructions given to him and in fact had copied exactly what Mr Ladwa did on CRM entries. The Tribunal was referred by the claimant to examples of Mr Ladwa’s CRM entries in the supplementary bundle (pages 352-353) which do look very similar very similar to those of the claimant, which the respondent complained of. Mr Ladwa said that his entries were supported by further details in the “notes” section of CRM but the respondent was unable to produce the additional notes which Mr Ladwa referred to. The claimant had made similar observations, namely that although he appeared to include very brief descriptions these were supported by more detail in the notes section.
49. At paragraphs 5 and 6 of Ms Taylor’s witness statement she refers to Mr Moore discussing with her the reasons for the claimant’s dismissal, which included (1) “falsely claiming commission” and (2) that the claimant was “unmanageable”. Mr Moore was concerned about raising these matters directly with the claimant as he had concerns about him being “bad tempered” and his “unpredictable nature”.
50. The Tribunal have found that whilst Mr Moore was not generally intimidated by the claimant (as per the finding of fact on the recording), nevertheless the dismissal meeting was a different situation and the claimant’s reaction would be exacerbated by allegations of “falsely claiming commission”.

51. Ms Taylor, recognising her duty to keep all her employees safe, advised Mr Moore that whilst best HR practice would be to inform the claimant of the full list of reasons for not confirming him in post, due to Mr Moore's concerns about the claimant's reaction (which the Tribunal have found were not because of his race) and as there were other reasons for non-confirmation, it would not be necessary for Mr Moor to communicate specifically to the claimant the two issues referred to above (i.e. false commission claims and the claimant being unmanageable).
52. Ms Taylor said in cross examination that if she had suspected or had any hint that Mr Moore's decision to dismiss or his reaction to the claimant was connected to his race, she would have halted the process and commenced an investigation into the circumstances, which could have had adverse consequences for Mr Moore. The Tribunal accepted Ms Taylor's evidence on this point. This was because of her long HR experience and training and also the fact that she had commenced the investigation into allegations (which included race discrimination) against the former IOD Chair, Lady Barbara Judge, which had led to Lady Judge's departure from the organisation. Ms Taylor said her involvement in that case demonstrated that she had a passionate commitment to ensuring equal treatment and avoiding discrimination in the workplace and was not afraid to raise such matters if she perceived discrimination was occurring or likely to occur. The Tribunal accepted her evidence on this matter.
53. Mr Ladwa did raise deficiencies in the claimant's CRM entries during their review meetings, though there was reference to some improvement in due course. In his notes to Ms Taylor (page 484) Mr Moore does cite the problem with CRM entries as one of the reasons for non-confirmation of the claimant's probation and refers to it "significantly impacts the wider business as we have no real understanding of what our members want/need. Sales management metrics are also impacted (forecasting productivity)" but makes no reference to the possibility of false commission claims.
54. Clearly, the claimant was subjected to less favourable treatment by not having his employment confirmed following his probation period. The respondent has not presented evidence to the Tribunal which shows why the claimant's CRM entries were not regarded as satisfactory, given that the evidence which has been presented tends to show that these were the same as those completed by Mr Ladwa. Given Ms Taylor's evidence (referred to above) the respondent did not fully explain their reasons for dismissing the claimant which related to the CRM entries, namely the possible false commission claims.
55. There were no actual comparators raised by the claimant. The question for the Tribunal is whether someone without the claimant's protected characteristic (being black British) but in the same material circumstances would have been treated the same?
56. The Tribunal is mindful of section 136 of the EQA and also of the Court of Appeal's guidance in the case of **Igen v Wong [2005] ICR 931**, which states that in considering whether there is an inference which can be drawn from facts as presented, the Tribunal must assume that there is no adequate explanation for that behaviour. Following that guidance, the Tribunal finds that the claimant has not shown such primary facts on a balance of probabilities from which the Tribunal could conclude that the respondent's behaviour on this issue is because of the claimant's race.

Disruptive behaviour

57. The claimant accepted that he had offered unsolicited training to his colleagues so that he could share his successful sales techniques with them. He said that he did this in stages with 2 people at a time. Claimant accepted that this meant that he and the relevant colleagues were away from their desks. The claimant also accepted that he had not discussed giving this training with his managers nor had he obtained any prior permission from them. HD one of his colleagues had complained that she had found the claimant's conduct patronising and other team members indicate they had found it disruptive.
58. Mr Knight raised with Mr Dale in his cross-examination the fact that a member of his team (unnamed) had carried out similar training on CRM matters and there had been no adverse consequences for him. However, Mr Dale pointed out that the relevant employee was not on probation but was a permanent employee; there had been no concerns about this employee's performance; the employee had discussed the training with Mr Dale in advance, there were therefore material differences to the situation as regards the claimant and this employee could not be considered to be a relevant comparator.
59. The Tribunal finds that the claimant has not shown any primary facts from which it could establish discrimination on the grounds of the claimant's race, but in any event the respondent had provided adequate explanation as to why this conduct had been objected to, namely the response of the claimant's colleagues and his failure to obtain authority from his managers in advance.
60. That claim was lodged with the Tribunal on 18 September 2017; given the usual Tribunal process it would have been unlikely to have been served on the respondent by the Tribunal before late September/early October 2017. The claimant confirmed that he had not given the respondent advance notice that he had lodged a claim with the Employment Tribunal. It is therefore unlikely that the respondent's confirmation in post of the employees referred to above was in response to the claimant's race discrimination claim.

Meeting 6 July 2017

61. This meeting was with Mr Moore (with Mr Dale present) to notify the claimant that he was not confirmed in post. There is no note of that meeting produced to the Tribunal. Mr Dale said in his evidence (paragraph 14 of his witness statement) that in fact the claimant had been surprisingly quiet and calm during the meeting. He observed that the claimant did not challenge any of the reasons given by Mr Moore and appeared to accept what he was being told – focussing on the financial payments he would receive on termination of his employment.
62. Mr Dale said that at that meeting the claimant did not make raise any reference to his race being the reason for his dismissal. This was not challenged by the claimant in cross examination.
63. The dismissal was confirmed in a letter from Mr Moore dated 7 July 2017. Mr Ladwa had said in his evidence that this was a joint decision taken by him and Mr Moore. However, Ms Taylor's evidence mentioned only discussions with Mr Moore. She said that the final decision would be Mr Moore's as the senior manager in the team, but she thought he would have consulted Mr Ladwa. The Tribunal finds that the decision to dismiss was taken by Mr Moore. Mr Ladwa had on his own evidence ceased to

manage the claimant and he had no input into the dismissal letter which was signed by Mr Moore; Mr Ladwa had not seen even a draft of that letter for comment.

64. The claimant appealed the dismissal decision on 7 July (page 487). His main complaint was lack of management support (which the Tribunal has found was a justified complaint). The claimant does raise a question about the number African or Caribbean employees recruited into the claimant's department and about those whose probation periods were not confirmed. The claimant did not raise in the notice of appeal any of the issues which he raised at the hearing relating to his treatment by Mr Moore or Mr Ladwa being because of racial stereotyping or racial profile.
65. In submissions Mr Knight said that this appeal notice was a "cry for help" from the claimant. The Tribunal recognises that the claimant's request for statistics relating to race should have raised some questions in the respondent's mind.

The appeal meeting and process

66. Mr Fitzwater heard the appeal on 21 July 2017 and notes of that meeting are at page 513-524 and show that he went through the matters raised as the reasons for dismissal with the claimant. During that appeal meeting there is no record of the claimant raising any allegations that he believed that his dismissal was racially motivated. The claimant says that the reasons given for dismissal had been fabricated but did not link this to his race. The claimant said that he had been nervous at the appeal meeting. The Tribunal accepts this evidence; however, it finds that it is not plausible that the claimant would raise issues of fabrication but not then link them to his belief that this had been done because of his race.
67. Mr Fitzwater said that he had given the claimant several opportunities to raise other issues at the meeting and he pointed to references to this in the notes. The claimant did not challenge this on cross examination. In fact, at the appeal meeting the claimant admitted several of the accusations made against him; he accepted three instances of lateness due to his own fault; he accepted "nodding off" at a training meeting possible due to an iron deficiency and he accepted that he had held the training sessions taking colleagues away from their desks. The statistics requested by the claimant were not discussed at the appeal meeting, nor was the claimant asked why he had made the request.
68. Following the appeal meeting Mr Fitzwater met with Mr Ladwa on 24 July (notes at page 491) and Mr Moore on 28 July (notes at page 493) when he clarified with them issues which had been raised by the claimant at the appeal meeting. Mr Fitzwater confirmed that he had also been given supporting documents for the appeal (pages 495-499).
69. The claimant complained at the hearing that that Mr Fitzwater had not carried out a full and proper investigation of the facts which had been relied upon to dismiss him and had simply relied on what Mr Moore and Mr Ladwa had told him. The claimant made the same complaint about Ms Taylor. It was pointed out to the claimant that this had not been raised in the List of Issues before this Tribunal.
70. It was also confirmed with the respondent's witnesses that they did not regard their role as carrying out a disciplinary or grievance investigation. Further the claimant had raised no specific allegations of race discrimination which would have triggered such an investigation.

71. As regards the appeal hearing, Mr Fitzwater said that his decision was an independent one but he accepted that he had relied on information from Mr Moore and others, which he had to do as he had no direct knowledge of the claimant or his work. Mr Fitzwater said Mr Moore had described the claimant as “uncoachable and unmanageable” but had not said that he was intimidated by him. Mr Fitzwater had only met the claimant in passing and so was not aware of his personal characteristics; though he did say that he had not felt intimidated by the claimant at the appeal meeting – the claimant had not been rude or aggressive.
72. Mr Fitzwater sent the appeal decision dated 4 August 2017 to the claimant (page 500) This covers all the issues discussed at the meeting. In the conclusion Mr Fitzwater gives the claimant the statistical information he had requested; namely that over the last 10 years there were 4 other non-confirmations (3 were white/British or white other employees and 1 was a black African employee). Mr Fitzwater also stated, “I am satisfied that the decision not to confirm you is in no way linked to ethnicity or national origin”, but he did not set out his reasons for reaching this view.
73. Mr Fitzwater said that he would have halted the appeal if he had felt there was any racial motivation for the dismissal, but he had never felt that this was the case. The Tribunal has found that the claimant did not make any allegations of racial motivation or discrimination by the respondent at the appeal meeting (other than the request for statistics) and this fact supports Mr Fitzwater’s conclusion that race was not an issue.

The Tribunal claim

74. Following the appeal hearing the claimant brought his Tribunal claim. His particulars of claim (page 14) mentions racism and harassment but does not raise any of the allegations relating to racial stereotyping or race profile which were raised at the hearing. His complaints are more akin to an unfair dismissal claim relating to lack of process and failure to give warnings, than to the race claim as it was put at the hearing.
75. At page 13, the claimant raised the race demographic of the respondent saying that there were only 8 African or Caribbean staff in over 100 employees. The claimant also said he believed the respondent had no interest in investing in staff from his cultural background and he believed he was dismissed on false allegations.

Respondent’s Diversity Breakdown

76. At the Tribunal’s request, the respondent provided ethnicity statistics for the period 2007-2017. This was to put into context the figures provided about the ethnic breakdowns of non-confirmations (see above). This showed that 25 black British employees had joined the organisation during that period, which constituted 5.19% of the overall workforce. The respondent had produced evidence from the Office of National Statistics which showed that in 2011 3.3% of the UK population was black British. The respondent did not provide any more up-to-date information and nor did the claimant. These statistics were not challenged by the claimant and do not support the allegations he raised in his ET1 at page 13.

Negative Comparators

77. Three near contemporaries of the claimant who were confirmed following their probationary periods were PP, VP and DJ all of whom are black British. Mr Ladwa said that PP and VP had been confirmed in post in early

September 2017 and that DJ had been confirmed in post early in October 2017. The claimant said in his oral evidence that none of them had any ambitions for management positions. Mr Ladwa said that DJ was ambitious and had applied for a Team Leader post for which he was unsuccessful, though he remains employed by the respondent.

78. The claimant also alleged that these colleagues had been confirmed in post by the respondent in order to “save face” following the claimant bringing his Tribunal claim.

Training at the respondent

79. All the respondent’s witnesses were asked in cross examination about diversity and equal opportunities training which they had received. All had received some training from external HR or legal organisations at 2-3 year intervals. Ms Taylor as a CIPD professional had received more regular and CPD training.

Conclusions

Claimant’s racial profile/stereotyping

80. The claimant’s submissions were that he was at “an immediate disadvantage” due to the need to dispel Mr Moore’s applied racial stereotype. The claimant said that the lack of any further investigation to ascertain evidence about his dismissal shows that others (such as Ms Taylor and Mr Fitzwater) had inherited Mr Moore’s bias unconsciously.
81. First, this is not supported by the evidence and the Tribunal’s findings of fact set out above. The Tribunal findings were that both Mr Ladwa and Mr Moore found it difficult to manage the claimant but that this was not linked to his race. Secondly, if the claimant perceived this stereotyping and bias “immediately” – it is not plausible that he would have not raised this earlier, with HR or at the very least at his appeal meeting following his dismissal or in his ET1.
82. The claimant’s submissions at paragraph 10 said that Mr Moore’s failure to communicate the full reasons for the claimant’s dismissal was because of his racial profile of the claimant; namely that he feared he would be violent. The Tribunal have found that Mr Moore was concerned about the claimant’s response to allegations of false commission claims and so omitted to raise them – this was not because of the claimant’s race.
83. The Tribunal does not accept the claimant’s allegations of racial profiling or stereotyping.

The Race Discrimination Claims

84. The Tribunal has considered in its findings of fact on each of the issues raised by the Claimant, whether he has satisfied the burden of proof set out in section 136 EQA and in the relevant case law (Igen v Wong) and has shifted the burden of proof to the respondent to provide an adequate explanation for the treatment.
85. The Tribunal also note the case of Nagarajan v London Regional Transport [2000] 1AC 501 referred to in the respondent’s submissions and Lord Nicholls’ comment that “..*discrimination requires that racial grounds were a cause, the activating cause a substantial reason or an important factor.*”
86. The Tribunal refers to its finding of fact above on each of the issues raised by the claimant. In each one, the Tribunal has found that the claimant has

not shown that the respondent treated him less favourably than it treats or would have treated others because of his race.

87. Where the claimant had raised actual comparators, these were not in the same material circumstances as the claimant. Further, the respondent could show on several of the issues that there were colleagues of the claimant's race and in the same circumstances (e.g. on probation with higher levels of lateness) who were not treated unfavourably and who were confirmed in post. This indicates that the claimant's treatment was not because of his race.

"Failing to raise with him prior to his dismissal any of the grounds relied on and mentioned above"

88. The Tribunal accepts that (other than some minor references to CRM entries) the respondent had not raised the issues relied upon for dismissal (or non-confirmation in post) with the claimant in advance. This was essentially linked to the poor line management of the claimant, which the Tribunal has found was not linked to the race or to racial stereotyping. The failure to raise these matters in advance was not because of the claimant's race.
89. Unfortunately for the claimant, the legal position in that the respondent was not under any obligation to raise such issues with the claimant prior to giving him notice during his probation period. Whilst this not necessarily best practice or in any way condoned by the Tribunal – as the claimant did not have two years' service he did not have the protection of employment law relating to the following of a fair and reasonable process on dismissal.
90. Ms Taylor's evidence was that Mr Moore chose not to raise all the reasons for dismissal with the claimant as he was wary of the claimant's reaction. The Tribunal have found that Mr Moore's apprehension was not because of the claimant's race. However, if employers are not open and honest with employees about the all the reasons for their dismissal (or non-confirmation in post), they must accept that they run the risk that such lack of transparency will open them to discrimination claims from employees who may perceive (in the absence of full and frank information) that the real reasons are discriminatory ones.
91. The claimant's claim for direct race discrimination is dismissed.

Employment Judge - Henderson

Date: 20 Sept 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/09/2019

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FOR THE TRIBUNAL OFFICE