



EMPLOYMENT TRIBUNALS (ENGLAND & WALES)

Mr J Coke
Claimant

V

Prospero Recruitment Ltd
Respondent

HELD AT: London Central ON: 29-31/10/2019
Employment Judge: Mr J S Burns
Members: Ms P Hornby and Ms M Jaffe

Appearances

For Claimant: In person
For Respondent: Mr N Caiden (Counsel)

JUDGMENT

The claim for direct Race Discrimination is dismissed.

REASONS

1. This is a claim for direct race discrimination relying on a hypothetical comparator. The claim was clarified in paragraph 3 of a case management order signed on 9/4/2019. In addition, the Claimant added a further issue at the beginning of the hearing.
2. He explained that his claim has nothing to do with his skin colour but relates solely to the fact that he had an expired Nigerian passport containing Hong Kong immigration visas which he believes the Respondent's employees unreasonably declined to accept as adequate evidence of his good character while he had been in Hong Kong.
3. We heard evidence from the Claimant and from three Respondents witnesses namely Mr D Kulatunga, Ms D Sleet and Ms O Shanny. The bundle contained 679 pages. We were handed written final Respondent submissions and also received oral submissions from both sides.

Facts found

4. The Claimant is a well-educated person originally from Nigeria who lived and studied for many years in the UK before living in Hong Kong for 6 years between 2010 and 2016 after which he returned to the UK, where he subsequently obtained British Citizenship. He is living in the UK.

5. The Respondent is a recruitment agency with standard policies and procedures which is applied through its compliance department to all teaching applicants, to ensure that teachers it supplies are fit and proper persons, adequately qualified and not a risk to children. These include a requirement that where an applicant has been outside the UK for more than 6 months in the last 5 years, that he/she should provide a "no criminal conviction check" (NCCC) from the police in the foreign country in which the applicant has been residing, covering the whole period of foreign residence. In cases in which this is difficult or impossible then the Respondent will accept a "Letter of Good Conduct" (LGC) from a suitable foreign employer or other person such as an accountant which is able and willing to provide suitable assurances. Finally, if an applicant is unable to provide either of these, the Respondent is willing to offer the applicant's services to potential UK employers but only if the proposed employer is informed of the situation and signs a disclaimer accepting the applicant on that basis.
6. The requirement of a full police check is in accordance with Home Office Immigration Guidelines (229) and also with UK government statutory guidance "Keeping Children Safe" (228) and also in accordance with the formal standards of the Respondent's professional accreditation body The Association of Professional Staffing Companies (APSCO). The latter body carries out spot checks on the Respondent to ensure that the proper checking standards are maintained.
7. In most cases Hong Kong police will only provide a check on whether a person has been convicted of sexual offences, which falls short of a NCCC. Furthermore, even the limited Hong Kong sex offence check is usually provided for Hong Kong purposes only and it has to be accessed by means of phoning a number on a Hong Kong based telephone using a time limited code. We have seen evidence in the form of blogging on the internet to suggest that this situation in Hong Kong frequently causes difficulties for people who have lived there and who subsequently try to evidence in the UK that they have a previous clean record.
8. For some of the time while the Claimant had worked in Hong Kong he had done so for an employer (Science Workshop Limited) (SWL) but for most of the time he had been self-employed.
9. The Claimant first contacted the Respondent on the telephone on 23 January 2018 and spoke to Mr Kulatunga. The Claimant provided by email a CV which disclosed to Mr Kulatunga the fact that the Claimant had been living abroad for a lengthy period. Mr Kulatunga told him about the requirement for a NCCC or an LGC. The Claimant sent in a letter from the Hong Kong Police dated 19/9/2016 which was not a check result in itself but which provided an access code which expired on 30/3/2018 whereby a check could be made before that date as to whether or not the Claimant had any convictions for sexual offences in Hong Kong. The Claimant did not draw Mr Kulatunga's attention to the fact that the code was due to expire. We find that even if Mr Kulatunga tried to do so from the UK he would not have succeeded because the access code had to be phoned from Hong Kong, and in any event the check result, had it been

accessible, would not have covered all possible criminal offences, but only sexual ones.

10. There is a dispute about whether the Claimant came into the Respondent's offices on 24 January 2018, to show Mr Kulatunga the Claimant's expired Nigerian passport. Mr Kulatunga has no recollection of this meeting. It is clear that the Claimant was not registered as a client of the Respondent in January. We do not need to make a finding about whether or not this meeting took place because even on the Claimant's version of events, he did not suggest in January that his old Nigerian passport containing Hong Kong visas should be accepted in lieu of a full NCCC or a LGC.
11. On 25 May 2018 the Claimant did visit the Respondent's office and met two Respondent employees namely Sri Morar and Olivia Shanny. He filled out an application form which disclosed that he had been born in Nigeria. He was registered as a client of the Respondent. Ms Shanny told him about the outstanding requirements he would have to provide. This included an NCCC from Hong Kong.
12. On 12 October 2018 the Claimant contacted the Respondent again. Although in January he had sent the link to the Hong Kong check on sex crimes, it was evident by October that the Claimant had not provided an NCCC. Ms Shanny suggested that he obtain an LGC instead (124). This would have to be provided by a former Hong Kong employer.
13. On 5/10/2018 the Claimant emailed details about SWL as his former Hong Kong employer. Ms Shanny immediately started corresponding with a Miss Lee at SWL in Hong Kong asking if she could provide an LGC. Miss Lee provided a factual reference on 19/10 but was unable or unwilling to provide an answer to the safeguarding question which had been asked. Eventually on 8/11/2018 Miss Lee emailed to state that the Claimant had worked for SWL in Hong Kong only as a part-time teacher with not a lot of working hours in total, and that Miss Lee did not know the Claimant very well from such a short period of time and was unable to vouch for his conduct on behalf of SWL. Ms Shanny also emailed the Hong Kong Police to see if a police check could be obtained, but without success.
14. Hence by November 2018 the Claimant had provided neither a foreign NCCC or an LGC from a previous foreign employer.
15. He discussed this situation in a series of telephone calls with Miss Shanny over the period 9 – 14 November 2018. During these calls he suggested for the first time that the Respondent should accept his expired Nigerian passport with Hong Kong visas in it, alongside his other information (such as his clean UK enhanced DBS check and his good UK academic references) as sufficient evidence of his good standing such that he could be put forward as a suitable candidate to teach in the UK. He made the same argument in his email on 14/11/2018 at 12.04 (185).
16. Ms Shanny, having consulted with the Respondent's Head of Compliance Ms D Sleet, sent the Claimant an email (188) explaining that it had not been

possible to complete the normal checks but that the Respondent was willing to offer the Claimant for work with any school or college which was happy to proceed based on the Claimant's completion of all other vetting checks but in the absence of a current HK police check and LGC from the previous employer.

17. The Claimant then broke off communications and issued his ET claim the same day.
18. We have been shown in the bundle and accept examples of numerous other cases in which the Respondent has successfully registered and placed Nigerian teachers in UK schools, (231). The first two of these cases involve persons who had Nigerian passports with visas, but in those cases the said documents were not relied on to establish the good conduct of the persons involved. We have also been shown and accept other cases in which applicants of other races and nationalities who have been absent abroad have been required by the Respondent to provide the same standard references and checking documentation including either a NCCC or an LGC.(232) One of these cases (candidate 54 – of British nationality) had also worked in Hong Kong and was asked to meet the same requirements as was the Claimant.

Law

19. Section 13 of the Equality Act 2010 states that 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. Race (which includes the concept of nationality) is a protected characteristic.
20. Section 136 provides a transferring burden of proof which requires in the first instance facts from which the tribunal could decide in the absence of another explanation, that discrimination has occurred, at which point the tribunal must find in the claimant's favour, unless the respondent shows that it did not discriminate.
21. Unreasonable conduct by a respondent, even if it is established does not amount in itself to prima facie evidence of race discrimination. Bahl v Law Society 2003 IRLR 640 approved by the CA.

Conclusions

22. The specific allegations of less favourable treatment relied on by the Claimant in this case as set out in the case management note and at the beginning of the Claimant's witness statement are indicated by italicised text below and our conclusions in ordinary text:

The failure to accept the sexual conviction check supplied in January 2018

23. The Claimant's dealings with the Respondent in January were with Mr Kulatunga but in his oral evidence the Claimant expressly confirmed that he made no suggestion that Mr Kulatunga was guilty of race discrimination. The Hong Kong police letter supplied did not amount to a check in itself and the

Claimant did not point then to the imminent expiry date of the code. In any event the Hong Kong letter even if used in time would not have produced a full NCCC. Ultimately the Respondent refusal to recommend or put forward the Claimant on an unqualified basis without either a full NCCC or an LGC was simply the standard application of its procedures which it applied equally to all applicants regardless of their nationality.

In May 2018 the requirement to provide a letter of good conduct which was raising the bar once documents originally required had been supplied

24. This allegation is not made out. The Respondent did not raise the bar. The possibility of seeking an LGC was always available as an alternative to the provision of a full NCCC. This was the Respondent's standard policy. In any event the Claimant had not provided all other necessary documents at that stage.

Failure to respond to evidence and follow-up calls in the period October to November 2018 culminating in a failure to respond to the Claimant's summary of concerns in his email of 14/11/2018

25. This is not made out. Ms Shanny was active in October and November trying to work with the Claimant and emailing Hong Kong to try to resolve the Claimant's problem. She also responded in full correctly and the same day to the Claimant's email of 14/11/2018. In his oral evidence the Claimant confirmed that Ms Shanny was courteous and professional in her conduct towards him throughout.

On 14/11/2018 giving the Claimant a "nuanced pass"

26. The Respondent was unwilling to put forward the Claimant on an unqualified basis given the fact that no NCCC or LGC was available. That was not because of the Claimant's nationality but because it wanted any potential work provider to accept the claimant only on a fully informed and transparent basis.

Refusing to accept a Nigerian passport with employment visa stamps as an alternative to a NCCC or LGC

27. The evidence referred to above shows that in suitable cases the Respondent does accept applicants with Nigerian passports. There is no evidence that visa stamps in any nation's passports have been accepted by the Respondent in lieu of a NCCC or LGC and we accept the evidence that it does not. The reason for that is not particular nationality but because the Respondent's standard practices and policies do not permit such an approach. The Respondent also does not know about foreign visa requirements and it sensibly declines to draw inferences from such material. In any event, even if such an approach was to be found to be unreasonable or overly bureaucratic, that does in itself show

discrimination, but simply the application of a procedure which is supported by and consistent with UK guidance and the APSCO requirements.

28. We do not find that the Claimant has adduced facts from which we could conclude that he has suffered discrimination. In any event we are satisfied by the Respondent's non-discriminatory explanation. The Respondent would and has on other occasions treated all applicants (regardless of their race) in the same material position in the same way that it treated the Claimant.
29. The Claimant had a clean record and good references for many years before he went to Hong Kong and we have no reason to doubt that he has a clean record since returning in 2016. He has good references and an excellent academic record. He feels nevertheless that his experiences with the Respondent have left him under a cloud or with a question mark over his good standing in the UK.
30. The Tribunal do not agree with that assessment. On the evidence before us the Claimant's problems arose not from any identified misconduct by him (of which there is no evidence whatsoever) but from a clash between the UK compliance standards and Hong Kong bureaucracy, and in particular the unwillingness of the Hong Kong police to provide a full NCCC for non-HK purposes or at all. It is clear that this problem has affected other people also. In the Claimant's case the problem was compounded by the fact that he had worked on a self-employed basis for a long time in HK and therefore could not get an employer to provide an adequate LGC for him.
31. This is a situation for which the Respondent was not responsible and which the Claimant himself can explain to potential employers. It is unreasonable to expect the Respondent to take the risk of losing its licence or its contracts with potential employers by deviating from standard safeguarding procedures and requirements in the Claimant's case. Indeed if it had done so that very deviation could lead to complaints from others to whom the standard requirements are applied.
32. For these reasons the claim fails.

Employment Judge

31/10/2019 London Central
Date and place of Order

For Secretary of the Tribunals

31/10/2019
Date sent to the Parties