



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr D Mukunde**

**v United Biscuits (UK) Limited t/a  
Pladis**

**Heard at:** Watford

**On:** 9 and 10 March 2020

**Before:** Employment Judge Andrew Clarke QC

**Members:** Mr R Leslie  
Mr P Miller

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr D McCrum, solicitor

## **JUDGMENT**

The claims for unlawful discrimination relying upon the protected characteristics of race, age and sexual orientation are all dismissed.

## **REASONS**

### **Introduction**

1. The claimant identifies as a Black British man of African origin. He was 41 at the material times. He brings claims of direct age, race and sexual orientation discrimination and also claims for harassment and victimisation relying upon the same protected characteristics. The protected act relied upon for his victimisation claims is the submission of a grievance on 2 March 2018.
2. The claims arise out of the respondent's failure to recruit the claimant and its handling of a consequent grievance which he raised. We heard evidence from the claimant and from one of the two employees of the respondent who interviewed him (the other having left its employ and having proved to be untraceable). We also heard from an observer at the interview and from the HR professional who dealt with the claimant's grievance.

### The facts

3. The respondent is a food manufacturing company with operations across the UK, employing some 4,000 employees. It has a site at Harlesden employing some 620 employees.
4. In December 2017 the claimant was working in a warehouse. A friend and former colleague told him of jobs which were available at the respondent's Harlesden factory. The claimant made an online job application for a production job and his CV was also sent in by his friend.
5. His application form made clear that he had experience driving forklift trucks in a warehouse, was black British of African origin, was heterosexual and aged between 40 and 44.
6. The respondent was recruiting for both production line jobs and warehouse jobs, all of which were at TM2 grade. The interviews for each would follow a standard pattern and interviewers were to follow a script. That would require them to ask a series of 13 questions. They were to make notes on a pro forma sheet against each, where they wished to record something. They would then score each answer on the scale of 1 (the poorest) to 5 (the most outstanding). To be employable an interviewee had to score 3 or more in respect of each question.
7. The recruitment process was being handled by Ms Vachova, from whom we heard. She had been engaged on a fixed term contract and left the respondent's employee in April 2018. She considered the claimant's application. She decided that it was such as to justify sending him for assessment. She herself supervised the assessment day. Only those passing that stage would be interviewed. She also decided that, as the claimant had warehouse skills and experience (as set out on his CV), he should be considered for both types of role for which the respondent was recruiting. The warehouse role required a forklift truck driving licence, but as his application referred to his driving a forklift truck, she assumed that he would have one.
8. On 30 January 2018, the claimant was assessed and he passed that assessment. The letter from Ms Vachova inviting him to interview gave the wrong date for that assessment. The claimant alleged this to be an act of discrimination, but that claim was struck out at a preliminary hearing in May 2019. We are satisfied that this was indeed an error by Ms Vachova.
9. The claimant was later interviewed by Ms Vachova and the warehouse team manager, Mr Adamovicz. Ms Prinsley was observing for training purposes. The claimant was unaware that he was to be considered for a warehouse role in addition to a production role. He assumed that he was being interviewed only in relation to the production role for which he had applied. He sees great significance in this. It is his case that he was interviewed only for the warehouse role and that this was done by Ms Vachova and Mr

Adamovicz because they wanted him to fail. He asserts that their desire that he should fail was because of his race, or his age, or his sexual orientation (as they perceived it to be).

10. We are satisfied that Ms Vachova had decided that he could be considered for both types of job, which was an advantage to him. The interview was the same for each, with one difference. Those being considered for warehouse work were asked to confirm that they had a forklift truck driving licence. The claimant was asked that question, said he did not and was then considered only for the production roles. Ms Vachova and Ms Prinsley maintain that he was told this at the interview. The claimant says that he was not and that he was not told what he was being interviewed for, but that when he said he did not have a forklift truck driving licence the interview was abruptly terminated. However, he accepted that he was asked all 13 of the standard questions, which he answered.
11. We are satisfied that the claimant was told why the forklift truck question was being asked and as he did not have a licence the interview then proceeded to consider him only for production roles.
12. As they were leaving the interview room, the claimant asked Mr Adamovicz what he was looking for in a candidate. Mr Adamovicz said that honesty was a key factor for him.
13. The claimant scored 3 for only 2 of the 13 questions. For the remainder, both Ms Vachova and Mr Adamovicz scored him below 3. Therefore, he could not be offered a job. He was told that he was unsuccessful by email. He took up an offer made in that email for feedback and contacted Ms Vachova. He was told that his scores were insufficient for him to be offered a job.
14. We reject the claimant's suggestion that during the course of the interview Ms Vachova constantly interrupted his answers to questions saying that they were too complex. She did not interrupt his answers. However, we are satisfied that she did seek (unsuccessfully) to get the claimant to give more detailed and fuller answers to questions.
15. The claimant alleged that he was not engaged because of his race and/or his age. When shown the racial profile for the workforce at this particular factory, he said that the respondent wanted Polish workers and not black British workers. When it was pointed out that some 10% of the workforce identified as black British and only 5% as white Europeans who were non-British, he suggested that this provided support for his case as the respondent clearly wanted to boost the number of Polish workers and reduce the percentage of black workers. He suggested that his friend's dismissal for gross misconduct further supported this view as his friend is black British.
16. We do not consider that, without more, the statistics support his case. Having heard from Ms Vachova and Ms Prinsley we consider that there is no evidence of motivation by race in the decision making process.

17. The claimant could not explain the basis upon which he considered that the age profile of the workforce supported his case, although he maintained that it did. That profile shows a mean age in the mid 40s with a significant number of much older workers. We are satisfied that the age profile played no part in the relevant decision making. In other words, the claimant's age was entirely irrelevant to that process.
18. We now turn to the factual basis for the claimant's case of discrimination because of sexual orientation. It arises as follows. The claimant told the panel of his likely commute to the respondent's factory. It was lengthy and he said that if he got the job he intended to move to nearer the factory. Mr Adamovicz asked him whether he was married or had dependent children. He did so because he wanted to know if the claimant was likely to be able to move as quickly as he suggested. We reach that conclusion because Mr Adamovicz was questioned by Ms Prinsley after the interview about why he had asked the questions, as she was somewhat concerned. We note that he had asked similar questions to another candidate.
19. Mr Adamovicz considered that the claimant's answers were a point in his favour. Indeed, he said something along those lines to the claimant, pointing out (in response to the claimant's answers) that he appeared to have no responsibilities which might hamper his move.
20. The claimant was confused by the use of the term "responsibilities" and has now persuaded himself that Mr Adamovicz was accusing him of being irresponsible. He now believes that Mr Adamovicz was expressing that view as to his irresponsibility because he (Adamovicz) considered that as he had no wife or children, he (the claimant) was homosexual. We note that the claimant did not raise this in his grievance. That made claims in respect only of harassment on the grounds of race and age arising from the questions relating to marital status and children and from the response from Mr Adamovicz to the effect that the claimant had no responsibilities. We consider that this conclusion, that Mr Adamovicz was asking these questions in order to establish the claimant's sexual orientation, is a conclusion reached by the claimant subsequently when trying to explain how he could have thought that Mr Adamovicz considered him to be irresponsible as the result of the answers that he gave to those questions.
21. Asking such questions as these carries a real risk of unlawful discrimination. Had the claimant been married and had Mr Adamovicz been motivated against making a job offer at least in part because he thought for that reason the claimant might not move, that could well amount to direct marital discrimination. We suggest that the respondent should carefully consider the guidance it gives to interviewers as to the use of such questions. Indeed, we would have thought that in most circumstances the use of such questions should be forbidden.
22. Following the interview, the claimant was concerned about having been accused of being irresponsible (which accusation was, in fact, not made). He was not at the time concerned about any suggestion that he was

homosexual. He had not yet perceived that to be what concerned Mr Adamovicz.

23. The claimant raised a grievance on 2 March 2018. It was passed to Ms Frain, an HR professional at the Harlesden site, to deal with. The claimant alleged race and age discrimination in the ways indicated above. He referred to the questions about marriage and children and suggested that this “unwanted conduct” was linked to his race and/or age. How those questions, his responses and the comment about responsibility were linked to the two protected characteristics was nowhere explained.
24. Ms Frain obtained statements from all on the respondent’s side who had been involved in the interview process and looked at the relevant paperwork. She rejected the grievance. She accepted that the questions were asked, but concluded that they were asked because Mr Adamovicz wanted to test the claimant’s ability to relocate. She found no evidence of race or age discrimination.
25. The claimant was asked in evidence to explain his contention that her rejection of the grievance was discriminatory by reference to one or more of the three protected characteristics upon which he relies. He was unable to do so, save to say that he believed that he had been discriminated against and that as Ms Frain did not so find, she must also have discriminated against him. We find her conduct with regard to the grievance process to have been appropriate and the conclusion she reached to be one available to her on the material before her. We consider that she was in no way motivated by the claimant’s age, or race, or perceived sexual orientation (the latter of those three matters not even having been raised before her).

**The law applied to the facts**

26. The claimant has a law degree and understood the legal concepts in play in this case. There was no dispute as to them between him and the respondent’s solicitor. As this case turns largely on disputes of fact, we shall only briefly summarise the law in respect of each head of claims before applying it to the facts we have found.

Direct discrimination

27. The same nine instances of less favourable treatment are relied upon in respect of each protected characteristic. If it is established that the respondent did so treat the claimant, we must ask if the respondent would have treated others more favourably and, if so, whether the differential treatment was linked to the protected characteristic or characteristics relied upon.
28. We have reminded ourselves that it is sufficient that the protected characteristic is a reason for the differential treatment. It need not be the sole, or predominant reason. If it played some part (other than a *de minimis* part) in the decision making, that is enough.

29. We have not considered the special provisions relating to the burden of proof in cases such as this as we have been able to make findings of fact on all issues without that assistance. We consider each of the alleged instances of less favourable treatment below. We note that these instances of less favourable treatment were identified at the preliminary hearing attended by the parties on 22 May 2019.
30. Firstly, “at the interview on 21 February 2018, Mr Adamovicz asked the claimant in a hostile manner ‘if I am married’”. We accept that he did ask such a question. He was not hostile in so asking it. He asked it for the reason found above and he considered the claimant’s answer to be helpful to his application. The question would have been asked of any applicant in the claimant’s situation regardless of race, age or sexual orientation. There is no less favourable treatment established here and the claimant’s treatment was unrelated to any of those protected characteristics.
31. “At the same interview Mr Adamovicz made a comment in a similar hostile manner that the claimant had no responsibility at all.” The comment related to a lack of responsibilities, as explained above. Mr Adamovicz’s view would have been the same whatever the claimant’s age, race or sexual orientation. There is no less favourable treatment established and the treatment of the claimant in this regard was unrelated to any of those protected characteristics.
32. “At the same interview Mr Adamovicz in a similar aggressive manner asked if he had any children.” Our analysis and conclusion is the same as regards the question in relation to marital status.
33. “At the same interview intimidating the claimant each time he answered questions by Ms Vachova persistently objecting and stating that he was giving complex answers.” The factual basis for this allegation is not made out.
34. “At the conclusion of the interview, when the claimant asked exactly what Mr Adamovicz looked for in a candidate, being told by him, someone who tells the truth.” Mr Adamovicz did say that honesty was important to him. The claimant did not complain of this in his grievance and we consider that he did not see it at the time as a matter of any significance. There is nothing to suggest that the comment represented other than Mr Adamovicz’s view, which he would have expressed to anyone. There is no less favourable treatment established and the making of that comment to the claimant was unrelated to his age, race or sexual orientation.
35. “Interviewing the claimant for a TM2 Warehouse role when he had not applied for it and not informing him.” It is correct that the claimant had not applied for a warehouse job. He was considered for one (and told that this was the case) because of what he had said in his application and because Ms Vachova understandably considered that the fair thing to do, given that he appeared to be qualified for that role, was to consider him for it alongside considering him for the production role. She would have treated any applicant the same regardless of their race, age or sexual orientation.

Hence, no less favourable treatment is established in this case and the treatment of which the claimant complains was treatment favourable to him and wholly unrelated to his age, race or sexual orientation.

36. "Not interviewing the claimant for a TM2 manufacturing role." The reference to manufacturing is equivalent to a reference to production, the terms are in the context of this case interchangeable. The claimant was interviewed for the TM2 production role. Hence, the factual substratum for this allegation is not made out.
37. "Not offering the claimant a TM2 manufacturing role." The claimant was not offered a manufacturing or production role due to his scores at interview. Those scores had nothing to do with his age, race or sexual orientation. Hence, there is no less favourable treatment made out and the scoring was unrelated to the protected characteristics.
38. "The handling of and the rejection of the claimant's grievance." His grievance was handled in a manner which would have been adopted in relation to anyone raising a grievance about the conduct of a job interview. The handling and rejection of the grievance were unrelated to the protected characteristics relied upon. Hence, there is no differential treatment.

### **Harassment**

39. We have reminded ourselves of the definition found in s.26 of the Equality Act 2010. The claimant relies upon each of the matters upon which he relied as instances of less favourable treatment as acts of harassment.
40. The questions about marriage and children were certainly unwanted conduct. However, they did not relate to any protected characteristic, for the reasons already given.
41. In any event, none of the conduct relied upon had the required purpose or effect. What concerned the claimant was not the asking of the questions, but the reference to "responsibilities" which he did not immediately understand and which he later concluded (see above) must have amounted to a suggestion that he was irresponsible and that he was irresponsible because he was homosexual. We consider that the impact on the claimant at the time of that comment fell considerably short of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. He was, at the time, more confused, or puzzled, than anything else. The suggestion that this amounted to harassment came much later.
42. The factual basis for each of the other allegations of harassment is not made out. It follows from what we have found as fact that either that which is alleged by the claimant is incorrect, or the conduct relied upon had no such impact of the kind required.

**Victimisation**

- 43. The submitting of the grievance was certainly a protected act for the purposes of s.27 of the Equality Act 2010. The detriments relied upon are firstly, rejecting that grievance and, secondly, not offering the TM2 production role.
- 44. The grievance was rejected because Ms Frain considered it to be without merit. She did so for good reasons, being ones unrelated to the claimant's race, age or the protected characteristic of perceived sexual orientation. She did not reject the grievance because in raising it the claimant had made some such allegations. Hence, the claim under s.27 cannot succeed because it requires that the claimant be subjected to a detriment because of the doing of a protected act. Here the detriment relied upon is the rejection of the grievance and the grievance was not rejected because of the doing of the protected act (the making of the grievance) even if that concept is read at its widest so as to include the nature and content of the grievance.
- 45. The other detriment relied upon, not being offered the job, similarly cannot give rise to a claim for victimisation. This is so for two reasons. The claimant was not offered the job because of his having raised a grievance, he was not offered it because of his low scores. Secondly, the rejection predated the protected act, hence cannot be relied upon as a detriment under s.27.

**Conclusion**

- 46. For the reasons set out above each of the claimant's claims must fail and is dismissed.

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Employment Judge Andrew Clarke QC

3 April 2020

Date: .....

Sent to the parties on: 22 April 2020

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For the Tribunal Office