



EMPLOYMENT TRIBUNALS

Claimant**Respondent**

Mr L Garcia

v

British Airways

Heard at: Watford

On: 27 January 2020

Before: Employment Judge Smail

Appearances:

For the Claimant: In person

For the Respondent: Ms K Hosking, Counsel

JUDGMENT having been sent to the parties on 27 January 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 27 July 2018, the Claimant claimed age discrimination in respect of his failure to progress beyond the morning part of an assessment day selection process for a role of customer service representative, Spanish speaking. In the original claim, his case was put on the basis that because he was asked to show proof of ID, which had his date of birth on it, age could have come into the decision. The assessment day was 7 March 2018, the Claimant's date of birth is 28 April 1964, making him 53 years old on the day of the assessment. It is worth observing that as it stands, the Respondent takes a time limits point which, if we get to a full merits hearing, will be a matter to be looked at in the course of that hearing.

The Applications

2. Disclosure took place on 28 November 2018. The Claimant's assessment scoring was disclosed. On 5 March 2019, the Claimant applied to add to his claim, claims of disability discrimination relating to a stammer and race discrimination relating to the fact he has a French accent. He has lived in the United Kingdom for over 20 years, he is a Spanish national who grew up in France, hence the French accent. I have assumed that there is no difficulty in him claiming race discrimination based upon his French accent, even though he is a Spanish national. So, I am assuming that in his favour.

3. On 19 March 2019, the Respondent made an application to strike-out alternatively for a deposit. There had been a preliminary hearing before Employment Judge R Lewis on 7 November 2018, the full merits hearing was listed for 21 and 22 May 2019. That was vacated because of insufficient judicial resources and in the meantime, it was thought appropriate to hold a preliminary hearing in public to deal with the various outstanding applications. I have all the documentary evidence that is relevant to the case before me. I am in position to assess the evidence.

The Employment Tribunal Rules 2013

4. By rule 37(1) at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds (a) that it is scandalous or vexatious or has no reasonable prospect of success.
5. An application to amend is an application for a case management order. The Presidential Guidance on case management (2018) provides at paragraph 5.2 that if a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether the claim is out of time, if so, whether the time limit should be extended. If the amendment has been allowed, and time taken into account, it can only be challenged on appeal. An application for leave to amend should be dealt with at a preliminary hearing. This paragraph reflects the Selkent guidelines, see below.

The documentary evidence

6. Tables disclosed from the Respondent show that as a result of this recruitment round, 29 people were appointed to the role the Claimant applied for. The role was deemed necessary in such numbers, because the BA parent company had acquired Iberia and it was projected that there would be more Spanish speaking customers passing through Heathrow. Successful candidates would have to pass the first assessment half of the day - and I will come onto the detail of that shortly - and then if successful, sit a Spanish exam and a further numeracy test. Those that were successful in these tests, as well as the morning assessment centre, would then go to a ten-week training course and would have to not fail it.
7. The Claimant, then, left this process after the morning assessment. He did not sit the Spanish exam, nor the further numeracy test and he did not undergo the ten-week training. After that period, five over 50s were confirmed in post, a 50 year old, a 51 year old, two 52 year old's and a 54 year old. So, five out of the 29 successful candidates were 50 or over; and on the day of his assessment, one candidate aged 52 was ultimately appointed.
8. The job description has been disclosed and the competency test was designed in relation to it. The job purpose was 'to meet the language needs of the Spanish speaking customers, to host all the customers

throughout the ground customer journey, to deliver a world class customer experience on the ground, exceeding all the customer's expectations, to ensure any problems were resolved efficiently and with minimal inconvenience, to build, strengthen and enforce the relationship with all customers, including executive card holders, those travelling in premium cabins and other commercially important customers, to identify, exploit and maximise revenue opportunities and collect payment for ancillary revenue.'

9. So that was the job purpose, the principal accountabilities were 'to provide language support to the Spanish speaking customers at key customer touch points within the terminal; to host the customers and to exercise flexibility to deliver a personalised service; to understand and act on the different requirements of Iberia and BA customers to ensure that they are delighted with the service they receive; to build relationships with customers and anticipating their requirements and pro-actively meet and exceed expectations; to provide full service checking; to assist customers to drop luggage, including those customers who require full service check-in; to be accountable for ensuring punctual boarding process and excellent customer proposition at the gate; to deal with difficult conversations tactfully and efficiently with offloaded standby and other disrupted customers; where necessary escort unaccompanied minors and those customers requiring further assistance; to commit to being multi-functional in all duties required to serve the customers and to exercise flexibility as operationally demanded; to work in a variety of areas around the airport, both airside and landside; to facilitate the end to end customer ground journey; to ensure personal customer compliance with all aspects of safety and security according to Airport Authority regulations.' Key 'interfaces' were all customers travelling on Iberia and British Airways services, including executive card holders, those travelling in premium, cabins and other commercially important customers, Airport Authorities, Heathrow Airport Limited, the police, Heathrow customer services team, various operational departments across Iberia and BA for example Operations and Load Control.
10. Then were set out a person specification. It is clear that the assessment centre activities were designed to enable candidates to demonstrate competences relevant to appointment in such a role. No previous experience was necessary and there was going to be a ten-week training course, but of course it would only be worth appointing candidates who displayed likely suitability to hold that role.
11. It is worth observing that the Claimant had performed well in online testing to be invited to the assessment day. There is something like a 35% pass required to be invited to the assessment day. The Claimant passed the online test with 72% so it was entirely right that he was invited to the assessment day and of course the assessment day was designed to enable candidates to show various competencies. He passed perfectly satisfactorily a business information test. He had to analyse a graph and statistics dealing with network departure punctuality information. He passed with an overall 2, you will see that an overall 1 is the best, and overall 2 is a pass and an overall 3 is a fail, and an overall 4 is a bad fail. The comments made by Mr Patrick Marcinin were that the Claimant understood stats well, he passed the communication with positive

indicators which meant he had to speak clearly and confidently in discussing the information and possible implications. He passed but it was noted “but a very strong French accent”. Pausing there, it is right to say that the Claimant does have a very strong French accent. He does speak fluent English but it is very accentuated in that way and we will return to that in due course.

12. Mr Marcinin happens to be of Slovakian origin, a matter pointed out by the Claimant. There is nothing to suggest that Mr Marcinin cannot assess the competencies required for this job. There was an interview designed to assess candidates - or give candidates the opportunity of providing evidence - against the following criteria: *motivation*, *faster* (shorthand for prioritisation of customer needs in a challenging situation and taking accountability in resolving any issues), *leaner* (which is shorthand for emphasis on working in a safe manner and being able to use initiative to resolve problems), *smarter* (which means adaptable in terms of making quick decisions in difficult situations and shows customer awareness), *together*, (which means ability to build strong relationships with a focus on doing the right thing for BA and its customers). All candidates were asked the same questions.
13. The questions asked under *motivation* were “why are you interested in this role?”; “what attracted you to work for British Airways?”; “what would you say are your key strengths for this role?”; “what would you say your development areas are?”; “what do you think the challenges are that you would face in this role?”. The question for *faster* was “describe a time when you were faced by a challenging situation, talk me through the steps you took, why was it important to take these steps?”, “how did you prioritise what you did?”. *Leaner*, the question was “when have you had to ensure health and safety procedures were followed at work, why was it important, what part does this role play in the safety and security of our staff and passengers?”; *Smarter*, the question was “describe a time when you identified a problem with a process and took action to improve it, what steps did you have to take to improve the problem?”, *Together* tell me about a time you worked with team members to improve a situation, what did you personally do?, what was difficult about this situation and talk me through a time when you made a situation better for a customer/another person, what made you take that route, what did the situation teach you?”. So, the idea was that the candidate would give examples from their experience which would illustrate those matters.
14. I have already observed that prior experience was not essential, but perhaps it is worth just recording what the Claimant’s work history was to perhaps consider how easy it was going to be for him to give relevant examples. So, going in reverse chronology, based upon his CV, the Claimant has worked:
 - 14.1 From July 2013 – letters of credit specialist, corporate advisor and market researcher. He provided those services to an export company on a self-employed basis;
 - 14.2 June 2011 – July 2014– IT Tutor;
 - 14.3 August 2012 – December 2012 Spanish & French market researcher;

- 14.4 February 2012 - March 2012 Spanish & French video transcriber;
 - 14.5 January 2011 to December 2011 Spanish & French market researcher;
 - 14.6 June 2008 – December 2009 – Legal secretary and costs draughtsman;
 - 14.7 May & June 2008 – Export assistant;
 - 14.8 October 2007 – June 2008 – English tutor.
15. So, none of that history, in truth, immediately suggests itself as being immediately appropriate for a Customer Relations Person at Heathrow Airport. His experience is other than from a sort of background that one might predict suitability for this role. He sustained, it has to be said, very low marks in the interview. He got an overall 3 in *motivation*; an overall 4 for *faster*; overall 3 for *leaner*; overall 3 for *smarter* and overall 3 for *together*. He failed *communication* - the description for a failure was “finds it hard to know what to say, where to start, illustrates low confidence and struggles to get to the point or give clear answers”.
16. There were four potential role plays of which each candidate had to perform two. The Claimant's first role play was 'B', the scenario was “you are working on the BA Executive Lounge when a family of three, two adults and one small child attempt to enter. After checking their boarding passes you discover that you can only allow two of the party into the lounge as it states “main traveller & one guest”. The lounge operates a strict policy on who is allowed to enter due to the size of the lounge; most other lounges across the network allow family members, however, this lounge does not. The family seem very upset with this news and are refusing to move”. In that scenario, he got an overall 3 for *faster*, marked by Vanessa Dubrin, 4 for *smarter*, 4 for *together* and he failed communication. There is a comment “lack of information to justify explanation but good non-verbal body language, struggled to articulate”.
17. He also had to do role play 'D'. The scenario was “you are working next to the British Airways self-service, check-in kiosks when you are approached by a customer who looks very upset. The customer advises you that one of your colleagues has spoken to her in a very unpleasant manner whilst trying to resolve a check-in query that she has. You do your best to resolve the customer's query as she has had difficulty locating the correct reference number for her flight and she does seem happy when she leaves and thanks you for her time. You then approach your colleague about the customer concerned and how she was treated, your colleague seems annoyed and disinterested in the complaint.” He scored an overall 4 for *leaner*, an overall 4 for *together*. He also failed communication and it was noted “poor level of English”. There are also notes in respect of *leaner*. It says “data report complaint from client to messenger, no empathy, should calm customer down, role is to explain to client”. So, reasons are given for the various marks.
18. There is an overall score which tells you what you need to pass. So, to pass you need all 1s and 2s, or five or fewer boxes showing a final score of 3, and pass on all communication. A fail is six or more 3s or any 4s or two or more communication fails. The Claimant got five 3s and five 4s and he had three fails but one pass on communication. So, one has to say

that this was a very comprehensive fail of the interview and role plays. The Claimant did not get close to progressing to the next stage.

Discussion

19. His original claim, as we know, was age discrimination. To my mind the disclosure simply contradicts the theory in the claim form. His claim form posits that his age could explain what had happened because he was asked to show his passport. He should not have been asked to show his passport, he says, until the job had been offered to him. The Respondent argues that they needed to check that he was able to be appointed nationality-wise and of course, as a Spanish person, he was suitable to be appointed. The Claimant floats the possibility - no more than that - that his age played a role. But we know that five people who got this job eventually were aged over 50. To my mind, his age discrimination claim has no reasonable prospects of success. The Respondent points to its' table which shows that five people aged over 50 got the job and it has an explanation for why the Claimant did not progress. There is nothing in the scoring to suggest that age played any role whatsoever in this. The Claimant's career history does not suggest suitability for the role. I have little doubt that this age discrimination claim has no reasonable prospects of success and the sensible thing is to strike it out. The Claimant does not show a prima facie case of age discrimination here. The burden does not transfer.
20. If I am wrong about strike out, then I would have ordered a £500 deposit. I would only have ordered one £500 deposit against the Claimant. I asked him what he could afford: he cannot afford £1,000 per claim but he can afford a grand total of £500.
21. Then there is the amendment application. Under the Selkent principles [1996] ICR 836, EAT, I have to take into account the fact that these claims are new claims in substance and that they are brought out-of-time. I take into account whether it would be just and equitable to extend time. This amendment is not made promptly following disclosure. It is made three months and seven days after disclosure. There is no good explanation for the delay in making the application. I accept that disclosure can in principle unearth discrimination. I consider whether prima facie discrimination is shown by the disclosure.
22. The Claimant essentially floats a disability discrimination possibility and he floats a race discrimination possibility. As to alleged disability: he does have a very mild stammer. I have been listening for two hours or so to the Claimant today, and there is a discernible, very mild stammer. I doubt very much it amounts to a disability. There is reference in the notes on communication about struggling to articulate. I do not understand that as being a reference to a stammer. It is a reference to struggling to explain how he would handle the scenarios. Even if there was an inkling of a stammer being relevant to this, the sheer weight of other evidence explaining this decision on the basis that the Claimant just did not demonstrate the right competencies for the job, show that any stammer played no effective role in this decision.

23. It is clear why the Claimant did not get this job. He did not demonstrate the competencies relevant to doing it. On my analysis of the evidence, there is nothing to do with his very mild stammer. In any event, this application made very late. The Respondent is already taking time points about the original claim. This extremely thin argument was not made in a prompt application to amend. There is insufficient cogency, there is insufficient prospects of success to allow this. There is no evidential basis for a prima facie case first, that the Claimant is disabled; and secondly, that a stammer contributed to this decision. Accordingly, the balance of hardship falls on the side of the Respondent. It should not have to resist an unmeritorious claim.
24. The next claim he wishes to put forward is race discrimination, namely having a strong French accent. It is true he does have a very strong French accent. One does have to listen carefully. But this was not used as a reason to fail the communication on the business information exercise, which he passed although there was a comment of "very strong French accent", and there was a comment in respect of one of the role plays that he has a poor level of English. To my mind, that is not wholly right - he expresses himself in English but with a very strong French accent. Is there sufficient evidence to suggest a prima facie case that being of French origin, if not nationality, was a contributory reason for not getting the job? I conclude there is insufficient evidence to amount to even the possibility of a prima facie case that the Claimant's French origin was a reason for not getting this job. The reason the Claimant did not get this job was because he did not demonstrate the competencies in the assessment day, and as I say it is not entirely surprising because there is nothing in his career history which suggests that he would be suitable or appropriate for this role.
25. So, again, I exercise my discretion not to grant this amendment. It is made too late and there is insufficient prospects of success to justify an amendment being made at this late stage. The balance of hardship falls on the Respondent's side. It should not have to resist an unmeritorious claim.
26. If I am wrong about that, then again, a £500 deposit would have been ordered in terms of the reason for the decision being anything other than the fact that that he did not display the competencies for it on the assessment day. It does not matter whether the posited reason is age, whether that reason is disability for the very mild stammer he has, or whether that is because he was of French origin. None of those matters, on the evidence before me, suggest themselves as an explanation for why he did not get this job. There is a strong weight of evidence that the Claimant did not display the competencies for the job. It is not his fault, I am not blaming him, but it is just a fact that he failed comprehensively at the assessment centre and one cannot be surprised about that looking at his CV history, which does not suggest itself as being relevant to this job application.

Outcome

27. So, in summary, the age discrimination is struck-out. I refuse the amendment for disability discrimination and I refuse the amendment for race discrimination. I observe in passing that if I were wrong about any of these decisions, I would have ordered a £500 deposit and that would have put the Claimant at significant cost risk if this matter progressed to a hearing. But to my mind it is simply not worth having that hearing because the reasons why he did not get this job are clear, and no discrimination is suggested.

Employment Judge Smail

Date:2 April 2020.....

Judgment sent to the parties on

.....1 June 2020.....

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For the Tribunal office