



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107178/2019

5

Held in Glasgow on 15 and 16 October; and 9 December 2019

Employment Judge S Cowen
Members Mr J Burnett
Mrs EA Farrell

10

Mr D Odigie

Claimant
Represented by:
Mr B Kadirgolam -
Solicitor

15

Argyll And Bute Council

Respondent
Represented by:
Ms A Weaver -
Solicitor

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that, for the reasons given in an oral judgment, the
25 Claimant's case was dismissed.

25

REASONS

1. This case was heard by EJ Sally Cowen, together with Mr Burnett and Mrs Farrell on 15 and 16 October 2019 and was continued on 9 December 2019. After deliberation, an oral judgment was provided to the parties, the same day.
- 30 2. The parties were told of their right to request written reasons within 14 days of the oral judgment and were reminded of the fact that written reasons will be posted on the online register of Tribunal judgments and therefore open to the public to search on the internet.
3. The Claimant was represented by Mr B Kadirgolam, solicitor and the
35 Respondent was represented by Ms A Weaver, solicitor.

35

4. A request for written reasons was made within the relevant timeframe. The provision of these written reasons has been delayed and apologies are provided to all parties for any inconvenience caused.

5. The following reflects the decision given in an oral judgment.

5 **The Claim**

6. The sole issue was identified at the start of the hearing as one instance of direct race discrimination, when the Claimant was unsuccessful in his application for two possible jobs with the Respondent. The Claimant is of Black African ethnicity.

10 7. The Claimant relied upon a number of aspects of the process of selection from which he considered that the Tribunal can infer that discrimination on grounds of his colour had occurred.

15 8. The Tribunal read the witness statements and heard oral evidence from the Claimant, and from Mr MacKinnon, Ms Middleton and Ms Raines on behalf of the Respondent on 15 and 16 October 2019. The hearing reconvened on 9 December 2019 where both parties supplied the Tribunal with written submissions and supplemented them with oral representations. In submission both parties addressed the Tribunal on aspects of the selection procedure which had been adopted by the Respondent and whether the process was tainted by discrimination. The Claimant's case was a little jumbled at times which made the task of the Tribunal difficult.

20 9. The Respondent asserted that the reason the Claimant was unsuccessful in his application was due to a lower score than other candidates. When asked for feedback the Claimant was told that others with better experience were chosen and that his communication was also not as good as the successful candidates.

25 **The Facts**

10. The Claimant applied on 23 February 2019 for two separate positions with the Respondent, as a Regulatory Service Officer. The jobs applied for were the

same, although one position was to be based in Oban and the other in Dunoon.

11. The Respondent decided to carry out one set of interviews for both posts as there were two applicants who had applied for both positions. Ms Rains, Environmental Health Manager (East Team) was asked to be the lead interviewer. She carried out a leeting exercise to identify the candidates who should be called for interview by considering the application forms and then conducted a conference call with the other interview panel members Ms Middleton, Environmental Health Officer and Mr MacKinnon, Environmental Health Manager (West Team) to decide who to interview.
12. Ms Rains drafted questions for interview which were approved by the other interviewers as was a pre-interview exercise. She also allocated questions for each of the interviewers to ask.
13. The Claimant was invited for interview on 20 March 2019.
14. On the day before the interview Mr MacKinnon told Ms Rains that he had to attend a Civic Government Hearing, to replace a colleague. This was at the same time as the Claimant's interview was due to occur. Mr MacKinnon thought that it would not take long and he would be able to return to the interview part - way through.
15. Mr MacKinnon was delayed at the Civic Government Hearing and Ms Rains made the decision, after waiting for approximately ten minutes, to proceed without Mr MacKinnon. None of the panel had met the Claimant prior to the interview. The Claimant was told at the start of the interview that there was a panel member missing and that he would join them. However, Mr MacKinnon did not return during the Claimant's interview.
16. The Claimant was the only black candidate who was interviewed. Those on the interview panel did not know the ethnic origin of the candidates prior to meeting them.
17. The panel met together on 22 March 2019 to discuss their scores. The panel discussed the Claimant's performance and that of the other candidates. Mr

5 MacKinnon did not participate in the discussion about the Claimant's performance at interview. A post- interview assessment was produced by Ms Rains. Only Ms Rains' scores were uploaded to the TalentLink programme on the Respondent's system. The scores of the other two interviewers were not recorded.

18. Ms Rains telephoned the Claimant to tell him that he had not been successful in his application. When the Claimant asked her why he had not been chosen, she told him it was because there were communication issues.

10 19. Ms Rains also said there were issues with the Claimant's qualifications, as he had said that he had a BSc in Environmental Health, but had been unable to provide certification to prove this. The reason for this was because the Claimant was undertaking his Honours year in this degree and therefore had not been provided with a certificate of his 'ordinary' degree. Whilst the Respondent's witnesses said they accepted this as a reason for not providing
15 the certificate, the Claimant was marked down for the lack of a certificate.

The Law

20. A claim for direct discrimination is made under s.13 Equality Act 2010;

"(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

20 21. In order to succeed in a claim for direct discrimination under s.13 Equality Act 2010 the Claimant firstly has to show that he was subjected to less favourable treatment.

22. In this particular case, the Claimant asserts that it is was the fact that he was not appointed to the post.

25 23. The Claimant's protected characteristic is race – the Claimant identifies as black.

Burden of Proof

24. The burden of proof in claims under the 2010 Act is set out in s136:-

“136 *Burden of proof*

(1) *This section applies to any proceedings relating to a contravention of this Act.*

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision. “*

25. The burden of proving the facts referred to in s136(2) lies with the claimant.
10 If this is satisfied, the burden then shifts to the respondent to show that it did not act in a discriminatory manner.

26. The Tribunal consider that it is useful to consider whether there has been less favourable treatment and if so, what was the reason for that treatment.

27. However, a difference in treatment and a difference in protected characteristic
15 is not enough to establish that the difference in treatment was caused by the difference in protected characteristic; “something more” is required (**Madarassy v Nomura International [2007] IRLR 246**). The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

20 28. It is important to remember that unreasonable or unfair behaviour is not enough to allow for an inference of direct discrimination (**Bahl v The Law Society [2004] IRLR 799**).

29. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court
25 of Appeal in **Igen v Wong [2005] ICR 931 (as approved by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870)**:-

“(1) *Pursuant to s 63A of the SDA 1975[now s136 of the Equality Act 2010], it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could*

conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

5

- (2) *If the claimant does not prove such facts he or she will fail.*
- (3) *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*
- (4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
- (5) *It is important to note the word 'could' in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
- (6) *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
- (7) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.*

10

15

20

25

- 5 (8) *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
- (9) *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*
- 10 (10) *It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*
- (11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*
- 15 (12) *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*
- 20 (13) *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."*

25 **Comparator**

30. In a claim of direct discrimination, the tribunal is obliged to consider a comparator as set out in s.23 Equality Act "there must be no material difference between the circumstances relating to each case".

31. The Claimant suggested that the successful candidates in this recruitment process were appropriate comparators and the Respondent agreed with this.
32. The Tribunal did not hear sufficient information to be able to conclude that the only material difference between the Claimant and those successful candidates was their colour. The Tribunal therefore considered a hypothetical comparator more appropriate.
33. The Claimant submitted in his closing submissions that a “white British national” who was successful in obtaining the post would be an appropriate hypothetical comparator. However, once again this did not comply with the requirement that there was no material difference, as the Claimant is not a British national.
34. The Tribunal therefore concluded that the appropriate hypothetical comparator is a white person with the same skills, experience and qualifications as the Claimant who applied for the job and it is against him that we compared the treatment of the Claimant.

Decision

The less favourable treatment

35. The Claimant asserted that the process which was applied to him was not the same as that applied to others and from that, the Tribunal could infer that he was not chosen because he was black. He relied upon a number of specific aspects of the process which we considered in turn.

i. Mr MacKinnon was not present at interview

36. The Claimant relied upon the fact that Mr MacKinnon was not present at his interview. The Tribunal considered this to be an unforeseen clash of dates. Mr MacKinnon did not know at the time he told Ms Rains of his need to be elsewhere that the Claimant was black. The Tribunal accepted the evidence that it was predicted by the panel that Mr MacKinnon would return and join in the interview as soon as he could. The panel members thought this would be about 10 minutes late. In fact, Mr MacKinnon did not return at all during the

Claimant's interview, but neither did he take part in the consideration of his interview. There was a clear business need for Mr MacKinnon to be elsewhere, at short notice. There was no evidence to suggest or infer that his absence was due in any part to the Claimant being black.

5 37. Further, The Tribunal also noted that the Respondent's own procedure for recruitment which was applied indicates that it is permissible for an interview panel to have two members, although ideally it should have three.

38. There was no evidence that it was Mr MacKinnon's choice not to be present at the Claimant's interview. The evidence was that he was absent as he was
10 required to attend at a Civic Government hearing in place of an absent colleague.

ii Downgrading and lack certificate

39. The Claimant acknowledged that he did not show a certificate of his degree. He explained that this was because he was undertaking an honours course and did not have a certificate for the ordinary degree level he had achieved.
15 The Respondent accepted that this was a sufficient reason. However, the records show that the Claimant was scored down from the pre-interview mark to the post interview mark on this point.

40. The Tribunal considered that the Claimant had therefore discharged the
20 burden of proof on this point, which could (without any other reasonable non-discriminatory explanation from the Respondent) infer discrimination. The Tribunal considered that the burden passed to the Respondent. The evidence of the Respondent's witnesses was that they marked him down because the Claimant's application form said that he had an Honours degree and he did
25 not. The Tribunal noted that a similar position was taken by the Respondent with regard to the omission by the Claimant on his application form, of a leaving date in relation to his most recent employment. The Tribunal considered that this was not related to race but was a concern by the Respondent as to the transparency shown by the Claimant in his application
30 form.

41. Similarly, the Claimant's score was also reduced as a consequence of the lack of an end date on his employment, as it transpired that he did not have the extent of experience which he had indicated. This too showed a lack of transparency by the Claimant and was therefore a non-discriminatory reason for the reduction of the score.

iii Errors in scoring

42. The Claimant submitted to the Tribunal that it could infer that the errors in scoring were related to his race. The Respondent submitted that Ms Rains had made a genuine mistake in calculating the scores. The Tribunal concluded that there were clearly lessons which the Respondent could learn from this application of this process, as it was clear that mistakes had been made by the Respondent in calculating and recording the scores.

43. However, the Tribunal also noted that; Firstly, the difference in scores did not make an overall difference to the Claimant's position in the ranking of the candidates; secondly, the Tribunal noted that in fact the scoring for many of the candidates was incorrectly calculated, but that the overall position was still the same.

44. The Tribunal concluded that these errors were not related to race, but due to human error in calculation.

iv Ms Rains as sole decision maker

45. The Claimant made an allegation in his closing submission that Ms Rains was in fact the sole decision maker as to who should be appointed to the posts. The Tribunal noted that this was not a point which was put to any of the Respondent's witnesses in cross examination and had not been pursued by the Claimant as part of the evidence.

46. The Claimant submitted that the fact that only one set of scores was entered on the computer system (Talentlink) indicated that Ms Rains was the sole decision maker. The Tribunal took into account the evidence of Ms Middleton who described a conversation between herself and Ms Rains and also with Mr MacKinnon, in relation to the remainder of the candidates. Further, the

Tribunal accepted that Ms Rains entered her scores on Talentlink because the system only required one set of scores. The evidence showed that she had discussed this with her colleagues and that her marks reflected their collective view.

5 v Communication

47. The Claimant asked the Tribunal to infer that the Respondent's reliance on 'communication' as a reason why he was not selected, was related to his race and thus amounts to a discrimination. The Tribunal struggled, despite questions put to the Claimant, to pinpoint what it was about his communication
10 which the Claimant said was related to his race. The Tribunal were aware that "communication" can refer to a number of different aspects of the consideration of a job application and the Claimant was not clear in exactly the way he relied upon this.

48. What was clear to the Tribunal was that the notes of the Claimant's interview
15 indicated that the panel considered his communication skills were poor; "oral and written answers seemed very rehearsed and merely repeated the Job Description."

49. There was no reference anywhere in the interview notes, nor in the telephone conversation between Ms Rains and the Claimant, as to an accent, or to the
20 Claimant's language being difficult to understand, as the Claimant asserted in his oral evidence. Conversely, Ms Middleton specifically told the Tribunal that there was no problem with accent or language. The Tribunal held that the reference to communication skills was to the lack of ability by the Claimant to get his point across in an easily understandable manner and that this was a
25 concern, as part of the job description was a requirement to engage with the public.

50. The Tribunal accepted that the Claimant explained to the interviewers the meaning of 'bereavement uplift' during the course of the interview, but did not accept that the generic technical terms set out in the Claimant's witness
30 statement were part of the discussion during the interview.

51. The Tribunal was aware that it was a key requirement of the job that the person had an “ability to be able to effectively communicate and deal with situations where there may be conflict or differing views”. The Tribunal held that it was this perceived lack of skill and nothing to do with race or colour that the Respondent was referring to.
52. The Tribunal therefore concluded that none of the reasons submitted by the Claimant amounted to discrimination and therefore this claim was dismissed.

Employment Judge: S Cowen
10 Date of Judgement: 20 April 2020

Entered in Register,
Copied to Parties: 20 April 2020