EMPLOYMENT TRIBUNALS

Claimant: **A KUMAR**

Respondent: **THE CABINET OFFICE**

Heard at: **Newcastle Upon Tyne** **On:16-17 March 2020**

Before: Employment Judge O'Dempsey,
Ms Kirby, Mr Greig

Representation

Claimant: Self

Respondent: Dominic Bayne (counsel)

JUDGMENT

The Claimant's complaint of unlawful racial discrimination is dismissed.

REASONS

1. These reasons expand upon the oral reasons given at the hearing, in response to a request in writing by the claimant. This document also contains the unanimous judgment of the tribunal.

Introduction and preliminary matters

2. By a claim form dated as received on 19 April 2019 the claimant complains of direct race discrimination contrary to sections 13 and 39 (1) (a) of the Equality Act 2010. He alleges that because he is Asian he was treated less favourably then an actual job applicant who is not Asian and who is referred to as NM.

3. At the start of the hearing the panel, concerned about the proximity in which they and the parties had to sit in the tribunal room, and concerned at the outbreak of Covid 19, canvassed with the parties (who were similarly having to sit closer together than public health advice suggested) whether everyone felt comfortable with proceeding with the case. The parties, counsel, the treasury solicitor and their witnesses all indicated that they wished nonetheless to proceed.

4. At the start of the hearing the claimant made an application for the proceedings to be recorded by the tribunal.

5. The claimant referred to the disadvantages for litigants in person. He said it would be impossible for him to note down everything that might be relevant and he was concerned that he might, as a result miss relevant matters. He said that he had attended other tribunals which had recorded proceedings. He explained that the difficulties he was referring to were those that would be experienced by any litigant in person before the employment tribunals. We asked him whether he wanted to rely on any personal circumstances. He explained that he experienced anxiety issues. He did not seek to produce any medical evidence of any impairment that might adversely affect his ability to function. He was concerned that if the tribunal were going to be biased against him it would be difficult to prove this on appeal without a recording. He explained that the difficulty that not being able to keep a complete note of what was going on in the hearing was that he would not be able to compose his argument as well as he would wish because he would lose track and get distracted during the hearing.

5. We considered the claimant's arguments in a short adjournment, during which we also considered the applications relating to the list of

issues (below). However we rejected the application by the claimant that the tribunal should record proceedings.

6. We are very aware that any litigant in person is likely to feel at a disadvantage when the other party is professionally represented, and well resourced. However we felt that if the claimant needed time he could ask the tribunal for time to gather his thoughts, and we would be sympathetic to any application he might want to make for a short adjournment to do so. This was explained to the claimant.

7. There are no facilities, at present, for the tribunal to record its proceedings. So the tribunal explained that it would be keeping a note of the evidence in the usual way. There is no reason to deviate from the tribunal's ordinary practice in this case. The claimant made reference to his own health, but did not produce any medical evidence in support of the idea that he might have any kind of disability save for the general disability he alleges all litigants in person suffer. In those circumstances the tribunal rejected his application that it should record these proceedings. The claimant has not made an application to record proceedings himself, however we did have regard to the principles in **Heal v The Chancellor, Master and Scholars of the University of Oxford and others UKEAT/0070/19** but considered that the claimant had not made us aware of any circumstances that might result in the discretion we have under those principles being exercised in his case in his favour.

8. There was also a dispute over the list of issues which we also considered at the outset. When the case was last supposed to come to hearing there was an agreed list of issues drawn up which did not reflect the respondent's pleadings in a crucial respect. It missed the point that the respondent wanted to argue that the claimant was not a genuine applicant for the job and hence that the tribunal had no jurisdiction to hear the complaint. On the face of things, it appeared to us that the respondent's application to include this point in the list of issues, which the claimant opposed, was a strange one to be made at the start of a hearing several months after the list of issues had been drawn up, and we remarked that it was odd that the respondent, a responsible civil service department, represented by the Treasury Solicitor and counsel, was raising this point again at such a late stage

and in respect of such an obvious omission from its case. Understandably the claimant felt that he was being ambushed.

9. We have to consider all of the circumstances of this application. By the time this list of issue was assembled witness statements on both sides had already been drawn up. We also have to consider that the list of issues is not a pleading. The parties' cases are set out in their pleadings. The point concerning whether the claimant was a genuine applicant for work was pleaded by the respondent. So we permitted the respondent to include that issue in the list of issues. We considered that although his unhappiness was understandable, the claimant could not (ultimately) legitimately complain of prejudice because he had dealt with the issue in the witness statement.

10. Ultimately, as can be seen from what follows the respondent's argument on this point was rejected as we found that the claimant was a genuine job applicant.

11. The tribunal wishes to record its thanks to the participants in the proceedings for the way in which the hearing was conducted before us. The tribunal heard from the Claimant and Mr Weldon for the respondent. It is unfortunate that Mr Chand, who was brought to the tribunal by the claimant, and whose witness statement had been in the possession of the respondent since late last year, was not ultimately required as a witness because the respondent indicated that it did not intend to ask him any questions. We would like to thank Mr Chand for attending in those circumstances. We would also hope that in future parties would make a decision on the need for a person to attend a tribunal as a witness at a much earlier stage than was done in this case, having regard to the overriding objective in its totality.

12. The claimant complains that his complaint to the respondent (a civil service employer) made on 5 December 2018 about the result of a verbal reasoning test in relation to a post (numbered 160 4288) was refused, whereas a similar request made by NM in respect of a different post numbered 1610 4130 was permitted on 4 December 2018. Moreover a further request was permitted on 7 December 2018.

13. Second, he complains that on 7 December a complaint about the outcome of the verbal reasoning test for post number 16103450 was refused out whereas NM received better treatment in respect of his to request to be able to resit the test. This is also referred to as "resetting" the test (which is taken on line). We have considered the following law in this case

13.1. Section 13 of the Equality Act in respect of race (section 9) together with section 39 and section 136 of that Act. We do not set out those provisions in full save the relevant part of section 13 and of section 136:

Section 13(1) provides:
(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.

Section 136 provides:
"(2) If there are facts from which the court" [defined to include an employment tribunal] "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."

Facts

14. In terms of the facts on which we need to make findings, there was not in the end all that much difference between the parties.

15. The Government Recruitment Service uses verbal reasoning tests as part of its recruitment process for a number of different roles within government departments. The test works by use of a bank of questions from which questions are selected by a computer using an algorithm. The algorithm establishes the applicant's ability by reference to these questions. Essentially the answer to the earlier questions in the series determines the number and complexity of the questions which follow. The aim is to permit applicants to give evidence of their abilities.

16. On around 1 November 2018 the recruitment service asked its supplier (IBM) to change the algorithm. The concern was that if a candidate answered “can't say” (one of the multiple choice options) to all questions this would result in an artificially high ranking for that candidate. In other words there was a route through to a high mark by failing to engage properly with the questions that were being asked.

17. Prior to 1 November 2018 there had been a number of applications by the claimant for posts through the recruitment service. He achieved good marks on the verbal reasoning test falling within the 90% percentile range.

18. On 12 November the claimant applied for an administration administrative officer role in the Animal and Plant Health Agency (role 160 4288). In the verbal reasoning test he was assessed on the 1st percentile.

19. He made a complaint on 16 November and made further complaint to the government recruitment services complaints email on 29 November 2018.

20. He then made the other application. This time it was for an Executive Officer role in the DWP operations in Yorkshire (role number 1610345). Again he received an assessment on the 1st percentile. So on 3 December he made a further complaint which was handled by the customer service team. That team made enquiries of IBM the supplier and they referred the answer to Mr Weldon who was the only witness from whom we heard for the respondents. He has a role as the head of online tests and assessments for the Government Recruitment Service.

21. When clarification was sought the feedback from IBM was that

the test had worked as it should in respect of role 01604288. Accordingly the customer services team rejected the complaint by the claimant. The documentation relating to this is about page 140 through to page 144 of the bundle.

22. On 7 December the customer services team also rejected the complaint in respect of role 161 0345 (page 151).

23. Meanwhile, on 3 December, the claimant's comparator NM applied to the HMRC to become a Compliance Caseworker (role 1610413) and NM was assessed on the 1st percentile.

24. He asked to resit the test and he referred to other people who had been given that opportunity. The respondent gave evidence that there had been a number of such requests at this time due to the rectification of the “can’t say” issue with the test.

25. It appears that there were three different operation teams handling these three applications. A point which troubled the tribunal was the way in which the information concerning the handling of these matters and indeed some of the basic facts had emerged from the respondent in the course of these proceedings, and this is a point to which we will refer below.

26. However we conclude that there were three different operations teams involved in the handling of the different applications and the team dealing with HMRC applications had made a decision in the light of a number of complaints about the test that everybody who was on the 1st percentile result and who requested a resit should be offered one. Mr Weldon believed, according to the evidence he gave before us, that this was an erroneous decision.

27. In contrast to the claimant, therefore, when NM requested a resit, he was granted one along with everyone else on the first percentile who had complained in respect of the HMRC position.

28. NM went on to fail the test. However on 6 December he requested a further resit (page 257D). Meantime the decision to

grant the generic resit given to everyone on the 1st percentile was reversed on 7 December.

29. NM's second request to resit was initially granted on 11 December (page 257). However before NM could take the test he was informed that the reset had been sent to him as result of an administrative error. He was told that the test had been checked and found to be working correctly. Therefore he would not be permitted to resit again (see page 257A-B).

30. Mr Chand, in the meantime, had asked for a resit for the same HMRC post (1610413) on 10 December 2018. By this stage the respondent had investigated the scoring with IBM and was not permitting generic resits to take place. He was seeking what NM had originally sought and had been given (it seems erroneously).

31. It is not in dispute that the claimant has applied for many jobs with the civil service. We do not think it is necessary to get into the details of the numbers of the jobs that he applied for. It was suggested that it was around 280 there is evidence that he is recorded as having withdrawn from a number of these and on occasion withdrawn after the interviews were offered. There is also some evidence of him being recorded as having failed to attend interviews without withdrawing and of about 22 job offers being made to him before the claimant started working for the Civil Service in May 2019.

32. We were concerned that the respondent had not made proper disclosure of the documents which are in its possession on its server and would have provided the details of why the claimant withdrew in many cases. The claimant was understandably in a difficult situation when trying to respond to substantial cross examination questions concerning the reasons why he withdrew from jobs and some of the detail surrounding his course of conduct. We were told that relevant documents were not disclosed to the claimant (either by list or copy) because it was not felt to be proportionate to do so. We were surprised, in the light of that, that the respondent sought to cross examine on the issue to the extent it did.

33. We heard evidence from the claimant that he very much wanted to work for the civil service and we accept that evidence. We considered that there was clear evidence that the claimant was a genuine applicant for the job in question and for the other jobs he

applied for. In reality this was an individual who was devoting considerable time and personal resources to obtaining a job in the civil service.

34. There is plenty of evidence to show that he was living cheaply to say the least in order to try and fund his travel to the interviews. He gave us compelling evidence that he was trying to plan job interviews so as to be able to minimise the expense of getting to these job interviews. We are very happy to accept that he was a genuine applicant for these jobs and nothing that the respondent has said against that points in the other direction particularly in the light of the respondent's failure to make disclosure either by way of list or by disclosure of documents of the detailed material which would have related to this point. We should say that we reach the conclusion that he was a genuine job applicant irrespective of the inferential point concerning the respondent's failure to make disclosure.

35. We next turned to the question of whether there was less favourable treatment. The respondent conceded that the comparator was given a resit on 4 December and accepts that there was less favourable treatment in relation to that episode accordingly.

36. The respondent does not accept, however, that there was less favourable treatment in relation to 11 December because the NM reset was withdrawn before it could be used. We accept the respondent's case on that issue on the basis that no reasonable applicant could consider that a reset issued in error which could not be used would amount to a detriment or indeed less favourable treatment.

37. We next turned to the question of whether the burden of proof shifts from the claimant to the respondent in considering whether there was sufficient evidence that the less favourable treatment was materially influenced by the claimant's race. We do not accept the respondent's submission that the height of the claimant's case is that there was a difference in treatment between him and an Asian friend as against the treatment of a non-Asian colleague on the other hand.

38. The explanations that existed for the treatment of the claimant need to be seen in the general context of the respondent's behaviour. The claimant was rightly concerned about the email sent by Mr Errington into which he was blind copied. It is not clear from the respondent's evidence of how its system works as to whether or not

Mr Errington had any bearing on the decision-making process. Mr Weldon's explanation was not challenged but we did not find the bare assertion that Mr Errington had nothing to do with the decision making process cogent or compelling. We do not know why the email was written.

39. We also take account of the respondent's behaviour in respect of disclosure of documents in this case and we consider that there is material on the basis of which it could be inferred that discrimination might have taken place. The effect of that conclusion is that the respondent must provide a cogent explanation *for the less favourable treatment.* To be clear, the less favourable treatment is the less favourable treatment of being given the reset on 4 December only.

40. In this regard the respondent's explanation is based on Mr Weldon's evidence. This amounts to the fact that the comparator was given a reset because of the decision made by the HMRC applications team, whereas the claimant's decisions were made by a different and differently structured team. Thus, in the case of the claimant, it was the team handling the claimant's complaint whereas it appears that the decision was made by the HMRC team handling the recruitment in the case of the comparator. Mr Weldon's evidence was that the generic reset which benefited NM was due to an error by that team. This of course raises the question of the significance or otherwise of Mr Chand's application for a reset. There was no challenge to the explanation that was put forward on this point: by the time Mr Chand applied for resit the HMRC team had stopped approving the generic reset. The respondent relied on page 256A.

41. When we consider all of the evidence we do think that the respondent needed to explain its behaviour and we have every sympathy with the claimant's concern about the information or lack of information with which he was provided.

42. We were concerned that the explanation provided by the respondent came out only when Mr Weldon came to give evidence. However we have to assess the case on the basis of the evidence in front of us and we did not believe that Mr Weldon was lying or unreliable in his evidence.

43. For those reasons we have to dismiss the claimant's complaint but we do want to emphasise that we have considerable sympathy with the claimant's position on this case. Had the full explanation

been fairly and transparently given to the claimant of how the system worked in may well be that this litigation could have been avoided. We also have sympathy with the claimants unhappiness at having his intentions when making these job applications impugned. However we need to assess the case on the evidence.

44. We should consider one other argument that Mr Kumar relied upon. Mr Kumar wanted to assert that there was a difference between individuals within a team making a decision and a team as a whole making a decision. This was, he argued, an area in which the policy of the respondent would have meant that people higher up the management chain would have known about decisions concerning the generic resits. Unfortunately, however, the claimant did not put that point to Mr Weldon for him to be able to comment upon it.

45. In those circumstances we assess the case on the evidence before us and although we have sympathy with the claimant's position in this case and we would like to commend the courteous and fair way in which he conducted himself in presenting this case, we have to dismiss the complaint.

Employment Judge O'Dempsey

Date 3 June 2020