# EMPLOYMENT TRIBUNALS

**Claimant** **Respondent**

**Miss Olayinka Yusuf** **v Mitie Care and Custody Limited**

**Heard at**: Watford (by CVP) **On**: 21-22 July 2020

**Before:** Employment Judge Alliott
**Members:** Ms A Brosnan
Mr D Sagar

**Appearances**

**For the Claimant:** Mr Joseph Font (Legal Advocate)
**For the Respondent:** Mr Hamed Zovidavi (Counsel)

# JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims are dismissed.

# REASONS

## Introduction

1. The claimant was employed on 28 July 2014 by a company called Tascor E & D Services Limited. On or about 1 May 2018 she was "TUPE" transferred to the respondent. On 23 July 2018 her contract of employment was terminated on 4 weeks' notice. The effective date of termination of her employment was 19 August 2018.

2. By a claim form presented on 12 December 2018, the claimant brings complaints of unfair dismissal, direct race discrimination and a claim for redundancy pay. The claims are resisted.

## Remote hearing

3. This has been a remote hearing by Cloud Video Platform. The Employment Judge and Members were in attendance at Watford Employment Tribunal

and sat together in a hearing room. The remaining participants attended remotely by video link. The material before the tribunal is recited below.

## The issues

4. The issues were recorded by Employment Judge Wyeth in a case management summary following a hearing on 11 September 2019. The issues were as follows:

Unfair dismissal claim

4.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was some other substantial reason being the requirement to pass security clearance.

4.2 If so, was the dismissal fair or unfair in accordance with ERA, s.98(4), and, in particular, did the respondent in all respects act within the so called "band of reasonable responses"?

4.3 In particular, did the respondent follow a fair procedure generally and was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

4.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities, that the claimant actually committed any culpable and blameworthy conduct.

4.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Section 13: Direct discrimination because of race

4.6 The claimant relies on the fact that she is black British for the purposes of this complaint.

4.7 Has the respondent subjected the claimant to the following treatment falling within s.39 of the Equality Act? namely:

4.7.1 Failing to provide or send her the link for security clearance on 30 April 2018 or thereafter;

4.7.2 Failing to provide information to the claimant about ring-fenced roles available and not offering the claimant redundancy until October 2018 (after dismissal);

4.7.3 Conducting meetings with the claimant on 1st, 10th and 24th May 2018 that featured questions about the claimant's immigration status;

4.7.4 Dismissing the claimant on the pretext of security clearance failure.

4.8 Has the respondent treated the claimant as alleged less favourably than it treated, or would have treated, the comparators? The claimant relies on the following comparators:

4.8.1 Nilesh Lemos;
4.8.2 Tahani Kauser
4.8.3 Debra Pitman;
4.8.4 Hena Dingankar;
4.8.5 Vashti Notay;
4.8.6 Tiffany Hunt.

4.9 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.10 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time/Limitation issues

4.11 The claim form was presented on 12 December 2018. The claimant commenced Acas early conciliation on 13 October 2018 and a certificate was issued on 13 November 2018. Accordingly, and bearing in mind the effects of Acas early conciliation, any act or omission which took place before 14 July 2018, is potentially out of time, so that the tribunal may not have jurisdiction.

4.12 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

4.13 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

Redundancy payment

4.14 Was there a redundancy situation in existence in accordance with s.139 ERA 1996?

4.15 If so, was the claimant dismissed by reason of redundancy?

4.16 If so, the claimant will be entitled to a statutory redundancy payment totalling 4 weeks gross pay.

Remedies

**The law**

5. Unfair dismissal

5.1 It is for the respondent to establish what was the principal reason for dismissal. The respondent relies on some other substantial reason. As such, it is for the respondent to establish that it is of a kind such as to justify the dismissal of an employee holding the position which the employee held.

5.2 S.98(4) of the ERA 1996 goes on to recite that:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

5.3 Mr Zovidavi made submissions on two cases concerning third party pressure to dismiss, which, in our view, are not directly relevant to this case.

Direct race discrimination

Comparator

5.4 Section 23(1) of the Equality Act 2010 provides:

> "On a comparison of cases for the purposes of s.13, 14 or 19, there must be no material difference between the circumstances relating to each case."

Burden of proof

5.5 It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination.

5.6 If a prima facie case is established by the claimant then what is the employer's explanation?

**The evidence**

6. We have been provided with a hearing bundle running to some 239 pages. During the course of the hearing we were provided with additional documents as follows:

   6.1 Marked 'A', an extract from the Home Office contract with the respondent.

   6.2 Marked 'B', a bundle of emails from the claimant.

   6.3 Marked 'C', a document from the claimant in relation to disciplinary action.

   6.4 Marked 'D', an envelope confirming the date the appeal outcome was sent to the claimant.

7. We have five witness statements from the claimant and the respondent's four witnesses. We heard oral evidence from the following:

   6.5 The claimant;

   6.6 Mr Barry Clark, Chief Executive of Cataphract Limited, the respondent's security vetting provider;

   6.7 Ms Stacey McClymont, employed by the respondent as an HR Business Partner.

   6.8 Mr Carl Blackford, Head of ICE, escorting services. Mr Blackford made the decision to terminate the claimant's employment.

   6.9 Mr Paul Morrison, Contract Director, Escorting services, Care and Custody. Mr Morrison held the claimant's appeal hearing.

**The facts**

8. The claimant was employed by Tascor E & D Services Limited ("Tascor") on 28 July 2014 as an Admin Assistant. She was based at an office in Heston and she would work from home on average two or three times a week.

9. Tascor undertook custody services for the Home Office concerning detainees awaiting removal from the UK. The claimant provided business and admin support. She had no involvement in security or custody duties.

10. The claimant's contract of employment with Tascor indicated that her employment was subject to employment checks, which could include vetting conducted by the UK government, if necessary, for the contract or site on which she was required to work. Her contract of employment states:

> "5.1 Security vetting and references
>
> … Should you fail to successfully complete or maintain the necessary level of security or employment vetting your employment would be terminated."

11. The claimant's contract of employment with Tascor also contained a clause which provided for her to be moved to work at another reasonable location.

12. In 2014, the claimant applied for security clearance and was rejected. The claimant told us that initially she applied to Tascor to work as a Detainee Custody Officer. We have a screen shot of a Home Office "Attend" file that indicates that on 2 February 2014 the claimant applied for security clearance for the post of "DCO Escort". There is a manifest error on the information recorded, as her birth place is given as Lagos (correct) and her country of birth as the UK (incorrect).

13. No one, including the claimant, could tell us why the claimant failed her security clearance. Mr Clark told us that enquiries he made at the Home Office revealed that it was to do with her immigration status. We doubt that a simple clerical error in relation to her stated country of birth would have resulted in her failing security clearance. The inference we draw is that it must have been something else, in all probability to do with her immigration status.

14. We have been provided with a Home Office letter dated 24 June 2014, which states as follows:

> "I am writing to inform you that on the basis of the information made available to the Detention Services, Certification Team (DSCT), we are not satisfied that the following person has demonstrated that they are a "fit and proper person", within the terms of the Immigration & Asylum Act 1999. Therefore, Olayinka Yusuf will be unable to discharge the duties permitted within this legislation.
>
> This does not mean that he (sic) cannot perform other available duties within your company, but not on a Home Office contract.
>
> Name: Olayinka Yusuf"

15. Notwithstanding the reference to not working on a Home Office contract, the claimant continued to work for Tascor on its Home Office contract. We have no evidence on what basis she continued to do so, whether there had been some dispensation or if it was an oversight.

16. The claimant went on maternity leave on 19 May 2017. She returned to work in March 2018 taking outstanding holiday and physically returned to work on or about 3 April 2018.

17. In September 2017 the respondent was awarded the Detention and Escorting Services contract by the Home Office. The claimant and a large number of Tascor's employees were due to be "TUPE" transferred to the respondent.

18. In January and April 2018 the respondent sent letters to Tascor concerning the TUPE transfer and the implications for its workforce. In particular, information was given as to the impact the TUPE transfer would have on jobs going forward and there were a range of possible outcomes which included, as far as the claimant was concerned:

> "Ring fence for consideration – there has been significant change to the existing post and the post has been regraded to a higher/lower salary or the post has been deleted. The employee occupying the post is "at risk" of redundancy. This includes situations where the requirements for employees to undertake work of a particular kind have diminished and/or have ceased, and the number of full time equivalents required for a particular post has therefore diminished or ceased.
>
> In such circumstances, where new or additional posts have been created, employees "at risk" will be given the opportunity to apply for a vacant post in this structure. This will involve a competitive recruitment process and application for these posts will not be restricted to those who have been ring fenced for consideration, however, ring fenced candidates will be automatically short listed."

19. The claimant has stated that during February 2018 she was informed that she was to be TUPE transferred. She went back to the office in April 2018 to assist with the transitional process.

20. The date of the TUPE transfer was set for 1 May 2018. The respondent had agreed with the Home Office that it would operate from the Home Office building at the Heathrow Immigration Removal Centre ("IRC").

21. This would have required the claimant to work in a Home Office building.

22. An email dated 17 April 2018 lists the claimant as one employee who would transfer to Heathrow IRC on Day 1.

23. On 20 April 2018 the claimant was invited to an induction day on 1 May 2018 at the Sheraton Hotel, Colnbrook. This was within walking distance of the IRC.

24. On 26 April 2018 a final list of those who were to work at Heathrow, which included the claimant, was produced. The email makes clear that the Home Office had the list and that the respondent had someone working to ensure that all employees had security clearance. For those without security clearance the suggested way forward was escorting them onsite whilst the vetting was being undertaken.

25. On 30 April 2018 the respondent was provided with a list of nine employees who did not have security clearance. This included the claimant.

26. The respondent liaised with the Home Office as to how to deal with those employees without security clearance. It was pointed out to the Home Office that they were not detainee facing and did not handle detainee information and would be escorted on site at all times.

27. Initially no objection was taken by the Home Office, subject to confirmation. However, on 30 April 2018, the following email was received by the respondent:

> "I will check all the names tomorrow as well as ensuring we have packs for them, Olayinka Yusuf cannot enter HO property or work on HO contracts, she was refused security clearance in 2014."

28. On 1 May 2018 the claimant attended the induction at the Sheraton Hotel. The claimant told us that she was approached by a Claire Jeffries and told to go home as her security clearance was not approved.

29. The respondent's operating structure and business was very different to the model used by Tascor. We have a three-page document that makes clear that the respondent had undertaken a detailed mapping exercise and prepared a proposed role impact, matching current job titles with new roles. Neither party has advanced any case or argument involving consideration of "ETO" factors.

30. We have been provided with a letter addressed to the claimant dated 1 May 2018 stating that she was ring fenced for consideration for a post. We were told that the posts the claimant was ring fenced for consisted of four roles with seven posts and that there were eight potential candidates.

31. The claimant has stated that she was not handed the letter dated 1 May on that date but received it shortly thereafter. The letter of 1 May 2018 specifically sets out information concerning the ring-fenced roles available to her. As such we find that there was no failure to provide that information.

32. Mr Clark was on standby prior to 1 May and became involved with the claimant due to her lacking security clearance. On 1 May 2018 Mr Clark got a call from an individual at the Home Office stating that the Home Office had rejected the claimant's security clearance in 2014 and that Tascor had been advised she could not work on any Home Office contract. Mr Clark was tasked by the respondent with seeking security clearance for all those without it.

33. Thereafter, we find that the respondent made reasonable efforts to assist the claimant in discovering why she had failed her security clearance and whether anything could be done about it. To this end, the claimant had a meeting on 10 May with Mr Clark and Ms McClymont. The purpose of the meeting was to see if they could understand why it was that the claimant had not passed her security clearance. Given that the respondent understood that the reason was to do with her immigration status, so we conclude that it was perfectly reasonable to make enquiries of the claimant's immigration status to attempt to understand why it was that she had failed security clearance. For whatever reason the claimant was not really able to provide any further useful information. The claimant told us that she sent an appeal around 27/28 June 2014 but said she did not get a response. It does not appear to have gone any further.

34. A further meeting was held on 17 or 23 May 2019. This was between the claimant and Mr Clark. The purpose of the meeting was to see if she had been able to obtain further information about her visa history. No further information was forthcoming which made an appeal and/or further

application to the Home Office difficult. In any event, any such appeal/fresh application would have to be made by the claimant, albeit with the assistance, if appropriate, of Mr Clark.

35. On 1 June 2018 the claimant was written to and invited to a formal meeting on 7 June regarding her employment and to look at and consider suitable redeployment opportunities in the respondent. That letter advised the claimant that the hearing could result in the termination of the claimant's employment on the grounds of some other substantial reason.

36. The 7 June 2018 meeting was held between the claimant, Miss McClymont and Mr Carl Blackford. The claimant attended with a colleague. The claimant's position was discussed, in particular in relation to her lack of security clearance. Although the claimant professed to be keen to appeal the Home Office decision she had not actually done so. The claimant was advised as to how she could set out about appealing against the Home Office decision and it was agreed that she would be allowed time to make contact with the Home Office and/or apply for other vacancies within the respondent organisation. The meeting was adjourned.

37. The next day, on 8 June, the claimant sent an email querying whether she should be dealt with as a redundancy and not a termination.

38. On 12 June an email was sent within the respondent, by Ms McClymont, requesting that the claimant was provided with a list of the internal vacancies as soon as possible. The claimant was copied in and asked to review the vacancies. Unfortunately, the internal vacancies were confined to contracts for the Home Office or based in the IRC which the claimant's lack of security clearance debarred her from.

39. On 14 June 2018 the claimant was provided with the link to all external Mitie jobs.

40. The claimant applied for three external Mitie jobs but, unfortunately, did not secure any of those positions.

41. In June 2018 the HR Team pulled together potential redundancy costs for those at risk of redundancy. As far as the respondent was concerned, as the claimant was not at risk of redundancy, so she was not put on the redundancy package.

42. All the comparators cited by the claimant did not have security clearance at the time of the TUPE transfer. However, as has already been observed, the Home Office was content for them to work at the IRC subject to conditions whilst their vetting was in process. This interim arrangement was not, however, available for the claimant as she had already been rejected.

43. One of the comparators is a white woman called Debra Pitman. She was not ring fenced for the same roles as the claimant but worked in a different capacity. We were told that she was ring fenced for one role and that there were two candidates. Debra Pitman applied for the role but was unsuccessful. It would appear that the application for her clearance was

only made in July. Debra Pitman was offered redundancy and left before her clearance was confirmed.

44. The claimant was invited to a further meeting on 23 July with Miss McClymont and Mr Blackford. Again, the claimant was accompanied by a work colleague. The claimant advised that she was liaising with the Home Office with regard to her clearance status and that, whilst she had applied for roles, she had not been successful.

45. The decision was taken to terminate the claimant's employment. The confirmatory letter of 23 July 2018 states as follows:

> "It was advised that due to the Home Office requirements for individuals to require CTC clearance to work at Heathrow IRC and your individual circumstances where the Home Office have stipulated that you are unable to work on any Home Office contract, this leaves the company no option but to terminate your employment."

46. The claimant appealed and her appeal was heard on 3 September 2019 by Mr Morrison. The appeal was refused.

## Conclusions

47. It is clear beyond doubt and accepted by the claimant that upon TUPE transfer she did not have security clearance as this had been declined in 2014.

48. Whatever may have been the position whilst working for Tascor, the Home Office had made it expressly clear that the claimant could not work on a Home Office contract or in Home Office premises.

49. We find that the respondent was aware from before the TUPE transfer that the claimant would not be able to work in any capacity on a Home Office contract.

50. Whether the wholesale reorganisation of the TUPE transferred workforce fell into the category of an Economic, Technical or Organisational change to the workforce was not argued before us. We find that the terms of the ring fencing of posts did potentially present a redundancy situation.

51. However, we find that the claimant was dealt with outside any redundancy situation.

52. We find that the principal reason for the claimant's dismissal was some other substantial reason, namely that she did not have the security clearance to do the new role that she was identified as potentially eligible for.

53. We find that the reason was genuine and was not a pretext.

54. We find that the decision to dismiss the claimant was both procedurally fair and substantively fair. Obviously, the respondent's size and administrative

resources are considerable. However, it is clear that internal vacancies were not suitable for the claimant. The respondent delayed dismissing the claimant for 12 weeks to allow her the opportunity either to regularise her position as far as the Home Office is concerned or apply for other vacancies within the respondent organisation.

55. Accordingly, we find that the dismissal was fair.

56. As regards the direct race discrimination claim, we find that there was no failure to provide or send to the claimant a link for security clearance whether on 30 April 2018 or thereafter. The claimant was advised how to appeal.

57. We find there was no failure to provide information to the claimant about ring fenced roles available. She was advised.

58. We find that, although the respondent did discuss with the claimant her immigration status at meetings in May 2018, that treatment did not constitute less favourable treatment than any comparators, whether real or hypothetical. We find that it was entirely reasonable to discuss someone's immigration status in circumstances where the employer is trying to understand the immigration problem that has caused that individual not to have security clearance. Further, even if it was less favourable treatment, we find that it was not on the grounds of the claimant's race. We find that any nationality or race in the same position as the claimant would have faced the same questions.

59. We have already found that dismissing the claimant was not a pretext.

60. As regards the failure to offer the claimant redundancy, there is a difference of opinion within the tribunal.

61. The respondent did not offer the claimant redundancy.

62. Two of us did not consider that this constituted less favourable treatment than the named comparators. The principal comparator involved is Debra Pitman. Two of us found that she was in materially different circumstances to the claimant. Firstly, although she did not have security clearance, the expectation was that she would apply for it and probably get it. The claimant had already applied and been rejected. Debra Pitman was able to work in HO premises and on HO contracts on an interim basis. Secondly, Debra Pitman had applied for a role and had not got it. As such, she was treated as redundant.

63. Mr Sagar regarded Debra Pitman as a proper comparator. Like the claimant Debra Pitman did not have security clearance. Mr Sagar concluded that as Debra Pitman had been offered redundancy, so not offering redundancy to the claimant was less favourable treatment.

64. There was a difference of opinion in the tribunal as to whether, if the claimant was treated less favourably, whether that was on the grounds of her race. Two of us concluded that it was not on the grounds of her race

and that the respondent had provided a non-discriminatory reason for any proven treatment, namely because the claimant did not have security clearance. Mr Sagar did conclude that it was on the grounds of the claimant's race.

65. Mr Sagar's minority judgment is as follows:

"**Minority judgement: O Yusuf v Mitie Care and Custody**

1. I find that the claims of redundancy/redundancy pay and race discrimination were made out in the following respects.

2. I did not find Mr Barry Clarke, for the respondent, a credible witness. He appeared to be the person mainly charged with handling security vetting with the Home Office and with contacts into it. His witness statement was not referenced correctly into the bundle of documents and in contrast to other respondent witness statements was probably drafted earlier against an earlier set of documents. He reported that he received from the Home Office and then gave the respondent information on the security clearance issue of the claimant on 1 May 2018. However, the respondent had emails between 26 and 30 April 2018 indicating they were already aware of the issue. Mr Clarke gave evidence that the Home Office rang him to say that the claimant had worked illegally with the previous employer but there was no corroboration of this evidence. On the balance of probabilities I inferred that Mr Clarke had ended up trying too hard to help the respondent or knew more of reasons behind refusal by the Home Office of the claimant's security clearance than he was reporting.

3. Ms McClymont of the respondent gave evidence that if she had placed the claimant on the redundancy list she would have had to give her interviews to more jobs. She accepted that the claimant had been ring-fenced to apply for a role (but could not in the event) and was provided vacancies information.

4. I concluded that Debra Pitman, who is white, to be an appropriate comparator. She had been put into the same ring-fenced category as the claimant with mention of being "at risk". She also did not have Home Office clearance to work on that contract, albeit she had to apply to possibly receive it whereas the claimant had to appeal her previous rejection.

5. The claimant provided evidence that she kept asking the respondent to apply for more jobs. She also asked the respondent if she could be redeployed from home or could be provided redundancy. However, she was dismissed on 23 July 2018.

6. Debra Pitman on the other hand was allowed to compete for the ring-fenced role. She failed. She was then given redundancy by the respondent on 19 June 2018 with three months' notice due as well as redundancy pay. The respondent applied for her security clearance from the Home Office only on 19 July 2018. It was unclear from the evidence why Mitie chose to apply after she had been made redundant already."

66. We find that there was in general a potential redundancy situation but that the claimant was not treated within that. The dismissal was not wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind had diminished. The dismissal was because the claimant did not have security clearance and could not do the job at all. We find that the claimant was not dismissed by reason of redundancy and, consequently, was not entitled to a statutory redundancy payment.

**Time Limitation issues**

67. We consider that all the claimant's complaints were a series of actions leading up to her dismissal. As such, in so far as it may be relevant, we do not find that there is any jurisdictional time bar to the claimant's claims.

68. For the above reasons we find that the claimant's claims stand to be dismissed.

Employment Judge Alliott

Date: 28/08/2020

Sent to the parties on: 17/09/2020

Jon Marlowe
For the Tribunal Office