



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

Claimant
Mr Lorenzo Garcia v

Respondent
Software Academy Limited
Ali Reza Nemati

Heard at: Watford (by CVP)

On: 7 January 2021

Before: Employment Judge Alliott
Members: Mr D Sagar
Mrs A Brosnan

Appearances

For the Claimant: In person
For the Respondents: Mr A Nemati (Director)

JUDGMENT

1. The majority judgment of the tribunal is that the claim is dismissed.

REASONS

1. By a claim form presented on 5 December 2019, following a period of early conciliation from 1 to 8 November 2019, the claimant complains of sex discrimination. The claim relates to an advertisement placed by the First Respondent on a job recruitment website called "Indeed".
2. The advertisement the claimant complains about is as follows:-

“Female leaflet distributors

Job summary

Female leaflet distributors are required for handing out our company’s leaflets outside schools when kids go home and parents are there to pick them up.

Job/category

This is a self-employed position with 0 hours contract.

The working hours are from 2.30pm to 5.30pm, 3 hours per day, 5 days a week.
The rate is £10 an hour (£30 a day)

We will run a DBS check on candidates if they pass the interview before the starting date.

Required education, skills and qualifications

No previous experience is required but due to the nature of the job you shouldn't be shy and very friendly with kids and parents."

The law

3. The relevant section is section 13 of the Equality Act 2010 which states:-

"(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."

4. By reference to the IDS Employment Law Handbook Discrimination at Work at 15.27, the following is set out:-

"In two cases brought under Regulation 3(1)(a) of the Employment Equality (Age) Regulations 2006 SI 2006/1031 the EAT rejected discrimination claims because the job applicants had no genuine interest in the job they had applied for. Consequently, they could not argue that they had suffered less favourable treatment when they were not offered the job (in fact, one of them had not even sent in an application before bringing his claim).

In Keane v Investigo and others EAT 0389/09 the claimant, a woman in her late 40s, unsuccessfully applied for a number of junior accountancy roles for which she was over qualified. She conceded that she had not been genuinely interested in the jobs, but nonetheless argued that she had suffered discrimination. The Appeal Tribunal, presided over by its then President, Mr Justice Underhill, noted that the definition of direct discrimination requires "less favourable" treatment of the complainant. This element is commonly and usefully referred to as "detriment". An applicant, such as the claimant, who is not considered for a job in which he or she is not interested cannot in any ordinary sense of the word be said to have suffered a detriment - or, to be more precise, to have been (comparatively) unfavourably treated.

...

Underhill P was again presiding over the EAT in the second case, Berry v Recruitment Revolution and others EAT 0190/10. There, B, a man in his 50s, had brought a number of age discrimination claims against employers and employment agencies, even though he had not even applied for the jobs which he claimed were advertised in a discriminatory manner. The EAT held that since B had no intention of applying for the jobs in question, the terms of the advertisements could not be said to have deterred him from doing so, with the result that he suffered no detriment. Interestingly, Underhill P noted that B had apparently contacted numerous employers about alleged age-discriminatory job advertisements, reaching out of court settlements with some of them. While not expressing a view on B's motivation, he emphasised that discrimination legislation is not intended to provide a source of income to people who complain about discriminatory job advertisements but who have no desire to fill the

vacancies in question. Underhill P added that those who try to exploit the legislation for financial gain were liable to have costs awarded against them.....”

Remedies

5. Remedies are governed by section 124 of the Equality Act 2010. This provides that, if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1):-

“(2) The tribunal may –

- (a) Make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
 - (b) Order the respondent to pay compensation to the complainant;
 - (c) Make an appropriate recommendation.”
6. An award of compensation must be calculated in the same way as damages in tort (section 124(6)). Obviously enough, the compensation awarded in discrimination claims can include an award for injury to feelings and in that context we have the Vento guidelines.

The facts

7. The First Respondent company was established in 2016 and at no time had more than about six or seven employees.
8. The First Respondent company sought to develop business by distributing leaflets. An advertisement on “Indeed” was first placed on 21 February 2019. We do not have a screen shot of that initial advertisement but Mr Nemati told us and we accept that the job description was ‘Leaflet Distributors’ and the requirement was for someone to hand out the company’s leaflets outside schools and put them through letterboxes.
9. Mr Nemati told us and we accept that during the course of 2019 two things became apparent to the respondents; firstly, that putting leaflets through letterboxes did not generate any business and was a waste of resource; secondly, following a discussion with a local mosque, that in order to distribute leaflets to female attendees within the part of the mosque reserved for females only, it would be necessary to have a female member of staff to gain admission.
10. We have an application for the job from a man dated 14 August 2019 which suggests that the advert had not been changed at that stage.
11. Mr Nemati told us and we accept that the advertisement was changed by his brother sometime in September 2019. His brother added the requirement for a ‘Female leaflet distributor’ and deleted the reference to putting leaflets through letterboxes. Thus it is that we have the advertisement complained of by the claimant.

12. Following the claimant's complaints through Acas in November 2019, the advertisement was changed. It still sought female leaflet distributors but the job summary was characterised as follows:-

“Female leaflet distributors are required for handing out our company's leaflet at females only social gathering events such as schools, meetings, mosques, temples, gyms, saloons [sic] and so on.”

13. Mr Nemati told us and we accept, that the aim of the job was principally to distribute leaflets within the female section of a mosque but that in all other respects, it was to distribute leaflets inside female only venues and not outside them.
14. The claimant saw the advertisement and on 11 October 2019 applied for the post.
15. The claimant told us that following his application he was telephoned by someone at the respondent who told him that his application was rejected because a female was necessary.
16. Mr Nemati told us that he himself distributed leaflets outside schools. He readily accepted that there was no occupational requirement for a female to undertake that task. Consequently, we have no hesitation in finding that the job was advertised in a discriminatory manner. It clearly treated male and female applicants differently.
17. We have gone on to consider whether the claimant himself was treated less favourably.
18. The respondent has placed before us a number of employment tribunal decisions relating to claims brought by the claimant in the employment tribunal for similar allegedly discriminatory job advertisements. In particular, we have a judgment from Employment Judge Bloch QC and members following a hearing on 4 March 2020 in the case of Garcia v The Gift Corner, 3 Wishes Ltd and another 3318988-19. That judgment is a matter of public record. We note that the claimant's credibility was called into question and the factual basis of that case involved the claimant noticing an advert in a shop window and thereafter covertly filming the interior of the shop with his iphone camera and making enquiries about the job before presenting a claim to the employment tribunal. There was also before that tribunal a number of previous tribunal judgments involving claims by the claimant. Having dealt with the case on the merits, the tribunal went on to hold:-

“The tribunal concluded, unanimously, that this was indeed a vexatious claim. Having heard from the claimant and having read his written evidence we did not think that this was a genuine claim in which the claimant has suffered true hurt as a result of any discrimination practiced on him. Instead, the tribunal concluded that this was a cynical attempt by the claimant to profit from legal proceedings brought against these respondents. The evidence indicates a pattern of behaviour in which the claimant seeks to find prima facie discriminatory conduct and then to bring proceedings to profit from that discovery. While the claimant is right to say that bringing multiple claims of discriminatory behaviour is not necessarily unjustified, this conduct in denying under oath that he had anything to do with the other claims before the tribunal and the other factors we have referred to,

indicating that he had no intention of applying for this particular job, show a cynical pattern of behaviour and an awareness that this conduct would be regarded by the tribunal as unacceptable. Plainly such behaviour should be discouraged.”

19. The claimant lives in Hounslow. The job advertised in this case was in Willesden Green and the claimant accepted that it would have been an hours journey each way. This would have involved him in some expense. The claimant told us that he was working at the time as a self-employed market researcher and that on occasions he undertook translation jobs. The claimant is clearly well qualified. We have his CV. He has an LLM in International Trade Law and a range of key skills. However, we accept there may be an economic imperative to obtain part-time employment, however modest in terms of pay and hours.
20. Further, we accept that the mere fact that a litigant has brought numerous claims of a similar nature in the Employment Tribunal does not necessarily mean that such claims are without merit. The law is there to be obeyed and applied and individuals and organisations may well have a legitimate interest in pursuing such claims to ensure compliance. However, we would expect such altruistic activity to be principally concerned with seeking a declaration and a recommendation as to future conduct and not to be solely seeking a substantial financial award. Any financial award is compensatory and not intended to be a penalty. Indeed, such altruism may well come at a price given the costs regime in this Tribunal. In addition, we would expect any such motivation to be openly declared and acknowledged.
21. We have considered the claimant’s motivation for bringing these proceedings. The majority finding is as follows: Two of us did not believe the claimant when he told us that when he applied for the job he was genuinely seeking employment. We have reached this conclusion taking into account a number of factors.
 - We find that it is inherently unlikely that someone of the claimant’s qualifications would have been genuinely looking at or interested in a three hour a day, £10 per hour part-time job distributing leaflets involving 2 hours travel a day.
 - The claimant has placed before us copies of other job applications that he made between October 2019 and April 2020. This was in order to support his contention that he was a genuine applicant for the respondent’s job as he was applying for other relatively modest jobs. There are, for example, about six applications for cleaner positions. However, we found this evidence unconvincing. Two applications were surprising, being for roles as a TV Presenter and a Trainee Private Investigator. We did not believe the claimant that these were genuine job applications and concluded that they were probably an attempt to bolster his assertion that he was genuinely seeking the respondent’s job. The claimant is aware that previous claims he has brought have failed due to findings that he was not genuinely seeking employment.

- We have taken note of the fact that the claimant has brought many similar claims, albeit against the caveats we have set out above. The claimant has not sought a declaration or a recommendation and has contended for an award of £8,650. He has not presented as someone seeking to identify and tackle wrongdoing for the common good. This all points to someone seeking to exploit the legislation for personal gain. We find that his motivation is financial gain.
 - The number of claims brought by the claimant is significant. He is either very unlucky in coming across so many job adverts that he is interested in and that are discriminatory or is actively seeking to find job adverts that are discriminatory. We find it is the latter. Two of us find that the probability is that the claimant uses a search word such as “female” on job advertisement websites in order to find advertisements that he can then base an application to the employment tribunal on in order to obtain a settlement or judgment for money. We note that the claimant in this case is contending that he should be paid £8,650 which is a large sum.
 - The claimant’s credibility in other proceedings has been called into question. We found the claimant lacked credibility in these proceedings too. He was evasive and we did not find him to be genuine.
 - Consequently, two of us found that the claimant had no desire to fill the vacancy in question and as such we find that the claimant was not subjected to less favourable treatment.
22. Mr Sagar was prepared to give the claimant the benefit of the doubt and accepted that the claimant did desire to fill the vacancy in question. Accordingly, Mr Sagar would have found that the claimant had been discriminated against and would have awarded him declaratory relief to that effect. Mr Sagar notes that following the complaint the wording of the advertisement was changed swiftly.
- (a) The employer, when told of the discriminatory advertisement, informed the claimant why and quickly corrected it. In any event, the respondent did not recruit a woman or anyone else.
 - (b) The claimant could have needed a job because it can be difficult to find supplementary hours of work and sometimes difficult for people with unusual names and many qualifications to find work.
 - (c) The respondent said he had received “500-odd” applications but still responded apparently the following day to the claimant while recruiting no one.
 - (d) Similarly, the respondent declared “0” against employees in the ET3 form which was incorrect. The respondent also has other businesses.
 - (e) The respondent also said he wanted women on 0-hour contracts for August to October which appeared to indicate recruiting for the following

year surprisingly; this and the previous points suggested gaps in the respondent's credibility.

- (f) However, the claimant was unable to satisfactorily establish if he would have attained the job or actually taken it if offered.
- 23. Given the finding of Mr Sagar, we go on to consider the issue of a compensatory award.
- 24. We are of the unanimous view that the probability is that the claimant would not have been offered the job. It was quite clear that the wording of the advertisement was in error and that the job principally entailed entering into the female section of a mosque in order to distribute leaflets. Other aspects of the job were for attendance at exclusively female events. In actual fact no-one was recruited. Following ACAS involvement, an existing female employee volunteered to undertake the tasks. Consequently, we would assess the loss of earnings claim at nil.
- 25. We go on to consider injury to feelings. We unanimously find that the claimant did not sustain any injury to his feelings. The Vento guidelines are only relevant if there is a claim for injury to feelings. We find that the claimant would, in all probability, have been pleased, indeed gleeful, to have discovered the advertisement as it would allow him an opportunity to bring a claim before the employment tribunal.

Employment Judge Alliot

Date: ...17/2/21.....

Sent to the parties on:

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For the Tribunal Office