EMPLOYMENT TRIBUNALS

Claimant: **Ms. S. Messi**
Respondents: **Pret-a-Manger (Europe) Ltd**

London Central: Remote Hearing (CVP) **On: 4 March 2021**

Before: **Employment Judge Goodman**
Mr P. de Chaumont-Rambert
Mr D. Carter

Representation
Claimant: in person (in part)
Respondents: Mr O. Holloway, counsel

JUDGMENT

The race discrimination claim fails.

REASONS

1. This claim of race discrimination arises from a job interview on 20 June 2019 for a post as interim ledger assistant in the respondent's accounts department. The claimant was unsuccessful. She is black. The successful candidate was white.

2. It has been agreed that it is not necessary to name the successful candidate in the proceedings - though his identity is known to the claimant – and in this decision he will be called SC.

Evidence

3. To decide the claim we heard evidence from two former employees of the respondent who interviewed three candidates for the position: **Mr. Hiren Pandya**, who was to line manage the successful candidate, and **Ms Indre Matiuskaite**, the Finance Operations Manager. As she had not provided a witness statement, we relied on the claim form for her account. The respondent's witnesses affirmed to tell the truth, and confirmed the content of their statements with small corrections (page numbers, and the fact that neither still worked for the respondent). The Tribunal asked questions of the witnesses to make sure that we understood the context of this selection process. The claimant, **Sandra Patricia Messi**, did not give evidence, (in circumstances described below), and declined to ask questions of respondent's witnesses. She left the hearing before they were called.

4. There was a bundle of documents. It contained the CVs of the claimant and SC, the job advertisement and the job description which set out the experience

required, the interview notes, and correspondence with the claimant about why she had not succeeded. The claimant already had the job advertisement and job description as part of her job application, and she was sent the interview notes on 13 July 2019, when she asked for feedback on why she had not got the job.

5. Unknown to the respondent, the claimant had recorded the job interview on 20 June 2019, but when ordered on 4 March 2020 to send the recording and transcript to the respondent by 2 April 2020, she declined to do so, saying that she wanted only to play it the final hearing. She has not sent it to the tribunal. That evidence is not therefore before the tribunal.

6. The claimant had included information about her subsequent job search, to show mitigation. The bundle also included the claim form, the response, and previous case management orders.

Claimant's Application to Postpone Hearing

7. As noted, the claimant declined to participate, and so we will set out the history of the claim, and the claimant's reasons for her decision.

8. The claimant presented her claim to the employment tribunal on 24 September 2019. She completed the claim form with a description of what occurred, and the reasons she was given for lack of success. The respondent filed a response denying there was any discrimination and gave a full account of the reasons for the decision in a four-page document.

9. There was a case management hearing on 4 March 2020 before Employment Judge James. The hearing record shows that the claimant did not attend at 2.15 pm, and that she had emailed the respondent's solicitors that morning to say that she would not attend because she had three other hearings on the same day, including one at Bromley County Court starting at 10 a.m., and another employment tribunal hearing (although in fact that had recently been adjourned to a date in April 2020). She said that having three hearings on one day caused her anxiety and aggravated her existing mental health. The judge declined to consider strike out, as invited by the respondent's counsel, but of his own initiative considered whether to make a deposit order. He indicated that on review of the claim form and response the claim had little reasonable prospect of success, but invited the claimant to supply information about her ability to pay by 13 March. At that time the claim was listed for hearing on the 9 and 10 July 2020.

10. On 27 May 2020 Employment Judge James made a deposit order. The claimant was to pay £250 by 10 July as a condition of being permitted to advance her claim. He noted that since 4 March the claimant had objected to the deposit order, saying she had evidence to support the claim, being the disclosure provided by the respondent's representative, but she had not sent this to the tribunal. The respondent however did send documents the tribunal. After considering this and the claimant's evidence of means Employment Judge James did make the order. t is not known to this tribunal whether the claimant paid the deposit, we proceed on the basis that she did. At the same time he postponed the final hearing, as due to Covid restrictions it was not at that time possible to hold three-person panel hearings remotely, and arranged a further case management hearing on 24 July 2020.

11. The claimant did attend that hearing. The case was listed for a three-day final hearing starting today. Disclosure had taken place some time ago. The bundle was to be prepared by 28 August and witness statements exchanged by 3 October 2020. A note was made that the claimant had requested a French

interpreter, and that she would need 'more frequent breaks to her mental health issues'. Another note was made that her witness statement must contain a statement of the amount of compensation she is claiming and an explanation of how it had been calculated.

12. The claimant has never sent the respondent or the tribunal a witness statement. In September 2020, a month ahead of the exchange date, the respondent's solicitor wrote to ask if she was ready, as she had said she was going to be away. When the exchange did not take place the respondent wrote to ask for an unless order. Reviewing the correspondence on 3 November, Employment Judge E Burns directed that unsigned witness statements could be sent as password protected documents and signed later. At that stage the claimant was still fit for work – the first fit note we have is dated 27 November. In January 2021 the claimant wrote to the tribunal complaining that the respondent's representative kept "chasing applications for exchange witness statements when in any event it can be done 2- 3 weeks before the final hearing or even on the first day of the hearing and also seems to ignore the advice of my GP". In February, she said that she had difficulty preparing a witness statement because she does not have a keyboard or a scanner and libraries have been closed since December. Yesterday the tribunal asked the claimant to send her witness statement to the tribunal, including a Skype address which I could access. She did not reply, but she did use the Skype address to copy me into a message to the respondent's solicitor saying: "Your tactics will not work. I will wait to see what will happen in my absence and will take action accordingly. I will not be forced to attend the hearing which can aggravate my mental and physical health".

13. On 16 February 2020 she asked for the hearing to be postponed on the grounds of mental health. This was accompanied by a GP fit note saying that she was unfit for work until the end of March by reason of anxiety and depression. In the hearing bundle are similar fit notes going back to the end of November 2020. The application was refused by Employment Judge James on 26 February. He pointed out that while unfit for work, she might be fit to participate in a hearing from her own home. The claimant has replied that her GP is not prepared to provide a further note.

14. Yesterday I emailed the claimant directly asking her to join the hearing this morning when we could discuss the postponement application, and explaining that it may be possible to conduct the hearing without a witness statement from her, using her claim form. This morning she joined the hearing soon after 10 am. I explored a number of matters with her to supplement the information provided to Employment Judge James, and to assess what would be best in the interests of justice. On her health, she said she had a disability, and asked what this was, she said it was sciatica. Later, she added that she had depression. She has been prescribed Sertraline (an anti-depressant), and takes Co-codamol for the back pain. I explored how long her condition was likely to last, explaining that if this hearing was postponed, it would be necessary to set a date for a new one. She said: "when the sicknote runs out", and confirmed this was the end of March.

15. I explained to her that I was aware that she had participated in a case management hearing on 11 January 2021 before Employment Judge Walker on another claim, suggesting that despite the fit note at the time she could participate, though another London Central case management hearing had been postponed on 2 March 2020 because of her health, when it was noted by the judge that there three other similar claims that should be consolidated with it.

16. I explored the language issue with her. It is evident both from her written documents and emails, and listening to her speaking, that she writes and speaks fluent English, and sounds like a native speaker. She has attended school in

England since she was 14, left school at 16, and on the evidence of the CV has worked here continuously since 2000. She agreed her language was good, but said she needed an interpreter because she might not recognise technical legal terms. The tribunal said that any terms she did not understand could be explained, as many litigants in person who only speak English do not understand legal terms, and could also be explained in French, as the panel has some French language competence.

17. I was concerned that she was only able to participate by phone, having no other screen. I understand from emails in another case that this was raised by the tribunal in connection with an open preliminary hearing next week; the respondent had been asked to provide hardcopy bundles, which were delivered to her address and signed for in the name of "Messi", but which the claimant said she had not received. In this case the respondent said they had tried to deliver hardcopy bundles, but been informed by Royal Mail that there was a redirect on the claimant's address. The claimant told this tribunal that she lives at the address given, and does not know about the redirect, although, confusingly, she added that she was not going to give the respondent her address. The respondent proposed to courier the bundles to her again today so we could start tomorrow. Meanwhile she has had the electronic bundle for some time and so has had the opportunity to read it at leisure, even though it will be difficult to do this in the hearing. The tribunal notes that most of the few relevant documents in the bundle are items she has already seen, and that the relevant material was provided to her as long ago as July 2019.

18. She agreed she had seen the respondent's two witness statements, which were sent to her after the postponement application was decided, but added that she had not "read them properly". The tribunal stated that if the hearing went ahead, there could be an adjournment of one to two hours so she could read the statements properly and make a note of questions to ask the witnesses.

19. After hearing from the respondent, which objected to postponement because of delay now that the matter complained of was nearly 2 years ago, both witnesses having left their employment and now working for others, and that there has been no material change in circumstances since Employment Judge James refused the application on 26 February, the panel adjourned to discuss how to proceed.

20. We returned at 11 am to say that the hearing was not to be postponed, and gave brief reasons. There would be an adjournment for the claimant's reading (the panel had already read both statements and the relevant documents, which are not extensive). At this point the claimant said that she did not agree, and she would not participate. She would go to the Employment Appeal Tribunal, and she left.

21. In view of the stated intention to appeal, we set out here the reasons for not postponing.

    21.1 The claimant's health. She has been certified unfit for work by reason of anxiety and depression for just over three months. There is no indication of when she may be fit, and given her conduct in other respects on claims she is conducting in London Central employment tribunal, the tribunal is not confident that she will be fit next month. Judging by the frequency and lucidity of her emails to various respondents and the tribunal, the antidepressant medication is effective and she is able to read, write and reason. She may not be fit for work, but she is fit to conduct a remote hearing which focuses on a single job interview.

    21.2 In relation to only having a small single screen, there were very few

documents relevant. There could be pauses and adjournments to make sure that she had time to read witness statements, and check the documents referred to. Her conduct in relation to delivery of hardcopy bundles to accommodate her lack of a second screen for the hearing suggested some deliberate lack of cooperation, seeking to avoid a hearing, such that it was probably not worthwhile adjourning to the following day for a further attempt at delivery as she would still refuse to participate. There was the opportunity to do this, as the claim is listed for three days, one being set aside for deliberation and judgement, but we judged it more than likely we would be in the same position tomorrow morning, and with an interpreter booked.

21.3 On the witness statement, she had known from last July that she had to write a witness statement by 3 October. She decided not to do this, and maintained she should send it just before the hearing. So any difficulty with lack of access to a computer to write it she has brought on herself; even so, there is no reason why she could not write it out by hand, as litigants in person used to do, and sometimes still do, and then post it or photograph it. Again, this lengthy period of failing to comply with the order to write or send her witness statement, which predates any doctor's notes about her mental health, suggests that she is reluctant for the case to be decided. This is relevant to whether we believe the postponement is the right outcome: we are concerned that she will later apply to postpone any further hearing that is listed. In view of the narrow compass of fact on which this claim is based, we would be prepared to hear the case on the basis of the claimant's oral evidence by question and answer to deal with points arising from the response and the respondent's witness statements, and dispense with a witness statement as the claimant has been reluctant to provide one.

21.4 In our judgement, she was able to participate fully in the hearing in English; had we doubted this we would have postponed the case to the afternoon, or more likely tomorrow, to arrange for the attendance of an interpreter.

21.5 A decision about postponement has to be made in the light of the overriding objective to deal with cases justly. This includes seeing parties are on an equal footing, saving expense and avoiding delay, and making sure that measures are proportionate to the complexity and importance of the issues. The matter at issue is not complex but it is important. Cost is a factor, and what weighed with us that we might postpone until tomorrow, and resume after a further attempt at delivery, and an interpreter, and additional cost to the respondent and inconvenience to the witnesses, and still the claimant would absent herself so wasting additional costs. Delay is a particular concern in this case where the matter complained of was nearly 2 years ago. If it is true that the claimant has a recording of the interview, the frailty of human memory would be of less concern, but as she has never been prepared to disclose it, it is of little use. If human recollection is all the evidence available, the hearing should not be postponed, the more so when it is so uncertain when the prognosis may improve. Even if she does have a recording, it is still important that justice should not be delayed. Under article 6 of the ECHR the respondent as well as the claimant is entitled to a fair and public hearing of their rights and obligations within a reasonable time.

21.6 Taken overall, the tribunal did not believe that the claimant was unable to participate fully in a hearing today, or tomorrow, if the start was postponed by a day. There were real grounds for fearing that the real reason for seeking a postponement was not the claimant's inability to participate, but her reluctance to obtain judgement in her claim.

Findings of Fact

22. The respondent placed an online job advertisement on 12 June 2019 for an interim ledger assistant to "support the delivery and completion of accounts payable; accounts receivable; cashbook and expenses activities". The tasks included the processing of invoices from receipt to payment, ledger maintenance including statement reconciliation, property accounts upkeep and reconciliation, and working with management accounts to ensure that costs were allocated to correct accounts and on time. The deadline for applications for 14 June.

23. The claimant applied and submitted her CV. The respondent's HR department reviewed the CVs and shortlisted 7 for possible interview. This selection was reviewed by Mr Pandya, whom the candidate was to assist, and his manager Ms Matiuskaite. Initially she rejected the claimant's CV in the belief that the salary she expected (she said that she was currently on £31,000 p.a. and expected a salary of £32,000- £35,000) was too high, but Mr Pandya was attracted by her long employment record, as there have been a lot of staff turnover and he would like someone who would stay the full 12 months of the temporary post, and she agreed they could negotiate on salary. So the claimant made the cut.

24. Mr Pandya telephoned her on 19 June asking her to come in for interview. The claimant has described this on the claim form as a first interview, but on the evidence it lasted two minutes 26 seconds and can only have been a check she was still interested and could attend.

25. The respondent interviewed three candidates for the job on 20 June 2021.

26. The witnesses said the claimant presented as confident and professional and gave some good answers. There was initial chat about travel, when the claimant explained that she done a great deal of travelling. This prompted closer examination of her employment record, as on the face of the CV t she has been continuously employed art from the year 2000, and had worked for her last employer from 2014 to the present. Probing showed that she had worked for her last employer from October 2014 to October 2017, possibly with some gaps in that, and then for a second period from February 2019, but was no longer employed. In another question about her CV, which indicated that she had worked in New York, where Pret has another office, the claimant laughed and said she had never worked in New York. Mr Pandya said he found her reaction "bizarre" and "a bit weird and noticeable", as if she was saying "why are you asking me that question". Both were concerned that she was trying to mislead, or if, as she said, she had not updated her CV, that she lacked attention to detail in a job where attention to detail is extremely important. They also explored her experience. It seemed that in her last employer she mainly dealt with expenses, which was 20% of their job. She had little experience of accounts payable, 40% of the role, and none of accounts receivable (15%) or of cash (25%). Within the interview, all candidates were asked what they thought their weak points were. The claimant said that her weakness was that if she emailed someone and they did not reply she would then go to see them to insist. The interviewers have some concern that this was not a good fit with Pret culture, which was to be open and friendly. Both thought she was a good candidate, subject to these reservations.

27. SC, the successful candidate, had not got the length of experience of the claimant, but he had a much broader experience, it was continuous, he could cover all the areas required and looked forward to bigger reconciliations to work on. No concern arose as to the accuracy of his CV. In answer to the weakness question he said he sometimes got frustrated with those who are not pulling their

weight at work, but he dealt with this by escalating issues in private, and with respect.

28. The third candidate, also unsuccessful, was a woman of Vietnamese origin. Her experience was not as extensive as SC.

29. Mr Pandya said the job was "pretty full on" and he needed someone who could cover all areas. If they had not had a candidate with the right range of experience they could have trained the claimant on the gaps.

30. On 21 June, SC was offered the job on a salary of £26,000 per annum. The claimant and the third candidate learned they had not been successful.

31. The following week the respondent posted an advertisement for a ledger assistant , a permanent role. The claimant did not apply, but believed her CV should have been considered for this role. Ms Matiuskaite told us it was not practice to go back to consider the suitability of unsuccessful candidates. On this occasion the successful candidate was a white man.

32. Mr Pandya's evidence was that at the time the team included two people of Asian origin, two British people, one black and one white, one white French person, a Lithuanian, and a Romanian. The evidence of the documents is that SC is from Poland.

33. On 26 June the claimant made a subject access request for the interview notes and the reasons for not sending her to the next stage. She also asked the salary and for interview feedback. She was sent the notes on 12 July together, with a two page statement of reasons. After a detailed analysis of her answers at interview they gave three reasons offering the role: her limited experience, that some of her answers "didn't meet the Pret behaviours" as a friendly, collaborative and equal team, and the inconsistencies and misleading information in the CV.

34. The claimant replied that she would shortly start a tribunal claim because she believed she was not offered the role due to race. Saying someone did not have the right fit was discrimination on grounds of race. She said "I have recorded the interview and the notes you sent me are malicious and dishonest". She was going to refer the matter also to the Information Commissioner's office, as there was no note of the telephone call on 19 June.

35. In December 2019 the claimant informed the tribunal that she was still looking for work.

Relevant Law

36. The Equality Act 2010 prohibits direct discrimination at section 13:

> (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.

37. Sex and race (race as defined includes nationality) are protected characteristics. The treatment invites comparison with either an actual person ("treats"), or a hypothetical comparison ("would treat"). The protection extends to people applying for jobs as well as those already in work.

38. When considering whether less favourable treatment was "because of" a protected characteristic, this means making a careful evaluation of the respondent's reason or reasons for the less favourable treatment (here, offering

the job to SC and not the claimant). This is in essence a finding of fact, and inferences to be drawn from facts, as a reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.** The real reason may not be the label attached to it by the employer, nor the reason advanced by ether party. It is for the Tribunal to make a finding – **Blackbay Ventures Ltd v Gahir (2014) ICR 747.**

39. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(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.
>
> (2) But subsection (2) does not apply if A shows that A did not contravene the provision."

40. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Discussion and conclusion

41. What has the claimant proved? The starting point for her claim is that she is black and the successful candidate was white. She adds: "I was informed that my application was unsuccessful because they believe I was aggressive in one of the question which I was asked which is not true and this is stereotyped due to my race by this manager". Nor did she believe that she did not have relevant skills and experience, otherwise she would not have been called to the interview in the first place. She had also been told that they would train the successful applicant in all aspects of the role. It was also "absurd and totally untrue" that there were inconsistencies and misleading information on her CV. She concluded by saying that the manager who interviewed her had "harassed, stereotyped, discriminated and victimised because of my race".

42. We considered whether the respondent saying she was not a good fit was evidence of a stereotypical attitude that black people are aggressive. Hypothetically, it can be, but on the evidence of the interview the claimant's reply to the weakness question about chasing colleagues who did not answer immediately was the basis for their concern about "good fit", given their aim of a friendly and collaborative team. They already had one black person in the small team, so another black person could well be a good fit.

43. As for harassment and bullying, the claimant has never given any detail of the behaviour complained of, and it is hard to deduce from the evidence we do have of what went on the interview. Had the claimant been prepared to disclose her recording of the interview, or explain in a witness statement or in this hearing what she meant, it would have been possible to make some findings. As it is, she has the evidence, but has not been prepared to set out what happened that amounted to harassment or bullying. There is no evidence on which we can make such a finding.

44. The context the interview does not assist the claimant. The team was small, so as a sample may not be representative, but even so two of the seven were not white.

45. As for experience, on the CV, the claimant had only worked on expenses from 2014. She had some prior experience on Accounts Payable and in posting invoices. She was nevertheless invited to interview. Absent other factors, an inference could be drawn that discovering she was black altered their assessment. The respondent established at interview that her experience of accounts payable and receivable was not extensive. The claimant has not supplied evidence to show their assessment was wrong. In any case, her experience may have been adequate, but SC's was better. An employer is entitled to prefer stronger and wider experience. If there had not been an interviewee with the range of experience they wanted they might have decided to take on the claimant and train her, but they did not have to.

46. The respondent decided to interview, despite her salary expectations, because of her long and solid employment record. This turned out to be more apparent than real, with a long gap in the time claimed with her last employer, a misleading statement that she was still employed, and a misleading claim to have worked in New York which she laughed off. There may have been reassuring explanations for these, but the claimant has not provided them. Given some reason for unease about the reliability of her claims to experience, they were entitled to prefer a candidate whose experience was not open to doubt in the same way.

47. The respondent's reasons for deciding she was good enough to interview, but then preferring another candidate were in our finding real, based on the claimant's answers at interview, and would have justified offering the job to SC if she had been white. She was good; he was better. We concluded that the difference in race had nothing to do with SC being offered the job and the claimant not. Accordingly the claim that the respondent discriminated does not succeed.

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Employment Judge Goodman

Date: 4 March 2021

Case No: 2203613/19

JUDGMENT and REASONS SENT to the PARTIES ON

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05/03/2021.

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FOR THE TRIBUNAL OFFICE