



EMPLOYMENT TRIBUNALS

Claimant: Ms H A Olayiwola
Respondent: Newham College Training and Education Centre
Heard at: East London Hearing Centre (by Cloud Video Platform)
On: 6 and 7 May 2021
Before: Employment Judge Gardiner
Members: Mrs M Legg
Mr P Lush

Representation

Claimant: In person
Respondent: Mr S Liberadzki, counsel

JUDGMENT was sent to the parties on 11 May 2021. The Claimant wrote to the Tribunal on 25 May 2021 requesting written reasons.

WRITTEN REASONS

1. The Claimant, Ms Hidiat Olayiwola, is of Black African ethnicity. She was employed by Newham Training and Education Centre, known as NEWTEC. She was dismissed with effect from 10 May 2019 as part of a business reorganisation. At the time, she was aged 58.
2. Her complaint in these Employment Tribunal proceedings is that her race and her age is at least part of the reason why she was not redeployed but instead was dismissed. She says this was direct race and age discrimination. NEWTEC denies these allegations.
3. When these proceedings were originally issued, Ms Olayiwola also brought other complaints. These were that her dismissal was an unfair dismissal, and that she had suffered an unlawful deduction of wages, and a breach of contract.
4. At this Final Hearing, the Claimant has represented herself. Mr Liberadzki, counsel, has represented NEWTEC, the Respondent. Only two witnesses gave evidence by

reference to their witness statements. This was the Claimant herself, and Mrs Jennifer Marshall, who at the time was the Head of Young People and Higher Education. In that role she was a member of NEWTEC's Senior Leadership Team. Both witnesses were cross examined and answered questions from the Tribunal. Reference was made to pages in an agreed bundle, which was 217 pages in length. At the end of the evidence both sides made oral closing submissions.

Factual findings

The Respondent's structure

5. At the beginning of 2019, NEWTEC provided both childcare services and vocational training in care for young people, adults and employers. As set out in a document at page 111, there were 19 members of staff who were engaged in Adult Learning. The Claimant had been employed on the teaching staff since 18 August 2014. Her original role, as described in her employment contract, was that of Maths Teacher. Originally, she taught students enrolled on GCSE Maths courses. Subsequently, NEWTEC did not enrol students on GCSE Maths courses and her role was restricted to teaching Functional Skills Maths. In that role, she taught maths to students engaged on vocational courses and apprenticeships, to enable them to pass the maths elements of these qualifications. There was also a Functional Skills English Teacher, Chhavi Dhatti, who was still within her probation period. She had an equivalent role to that of the Claimant, but in relation to assisting learners with the English requirements of the qualifications. The Claimant reported to a Team Leader (Functional Skills).
6. There were two Health & Social Care Teacher/Assessors. They had experience in the Health and Social Care Field and were engaged by the Respondent to teach the vocational skills that were integral to the vocational qualifications being provided. It was an essential requirement of the role that they had a Level 3 qualification or higher in the subject area in which they were teaching [99]. The Teacher/Assessors were line managed by a Team Leader (Professional Services).
7. These roles were positioned within the Adult Learning department. The Head of Adult Learning was Ms Bola Stevens. Ms Stevens' ethnicity was Black African.

The Respondent's decision to restructure

8. The Respondent's income was dependent on the number of students that enrolled on its programmes. It would receive funding for its Apprenticeship and Professional Services learners within Adult Learning through third party contracts. The funding would only continue for the period in which the students were expected to achieve their qualifications. As Mrs Marshall described in her evidence, by early 2019 NEWTEC was experiencing significant financial difficulties. This was because it had only been able to recruit a small proportion of the target numbers of students for each of its courses. Those students who had been recruited were not at the standard expected from students on these courses. As a result, the students took longer to achieve their qualifications, but NEWTEC was not provided with additional funding to reflect this additional time.

9. A further feature in relation to the length of time that students took to complete their qualifications may have been a restriction placed on the Respondent entering students for exams, given past conduct by the Respondent in relation to certificates. We do not need to make specific findings as to the extent to which this may have prolonged the duration of student's courses. We do not make any criticisms of the Claimant for the length of time that students took to complete their courses. In addition, those students were often recruited through external recruitment companies who would charge a recruitment fee. This had a further negative impact on the Respondent's finances.
10. As a result, the senior leadership team at the Respondent reviewed its staffing structure. It came up with a proposal to reduce staffing expenditure by a minimum of £100,000. This was to be done by removing roles or reducing hours.
11. The senior leadership team decided that the functional skills required in both Maths and in English as part of the vocational qualifications offered by the Respondent should no longer be taught by specialist Maths and English teachers. Instead, they would be taught by the Teacher/Assessors who were providing vocational training. This was possible because Teacher/Assessors only needed to have the equivalent of a GCSE pass in Maths and English to be able to teach the necessary functional skills in Maths and in English. It was proposed that the Claimant's role and that of the Functional Skills English Teacher would be deleted. It was part of the skills and abilities listed in the Personal Specification for Teacher/Assessors that they would be able to support learners in gaining Functional Skills qualifications [99].
12. Before the proposed restructure, the Respondent had the role of "Team Leader (Professional Services)". This role was occupied by Ms Stefka Appostolova, who is of White Eastern European Ethnicity. Ms Appostolova was aged 58. She had joined the Respondent's staff in January 2017 [105] as a Teacher/Assessor as a result of a transfer from another training provider. However, in January 2019 she had been assigned the role of Team Leader under a temporary contract. This role started on 21 January 2019 and was expressed to continue until the end of 19 July 2019 "or if your services are no longer required, whichever is the sooner". Her contract said, "At which time, you will revert back to your substantive post and terms and conditions".
13. As part of the proposed restructure, it was proposed that Ms Appostolova's role of Team Leader would be deleted. As a result, Ms Appostolova would not continue in this role until 19 July 2019. She would revert back to her substantive post of Teacher/Assessor as was envisaged in her temporary contract.
14. It was also proposed that all posts that were currently vacant would be deleted and there would be a freeze on any further recruitment.

Implementation of reorganisation

15. The proposed reorganisation was set out in a Business Alignment Paper which was sent to those affected, by email on 29 April 2019. The email was sent by Ms Marshall. Her evidence to the Tribunal was that this reorganisation would normally have been supervised by Ms Bola Stevens, given her role as Head of Adult Learning. Unlike Ms Marshall, Ms Stevens had never led on such a reorganisation

in the past. As a result, Ms Marshall was asked by the senior leadership team to lead on the reorganisation, with Ms Stevens shadowing her.

16. Following this email on 29 April 2019, there was a series of consultation meetings. Ms Marshall led the first meeting on 30 April and Ms Stevens led the second meeting on 1 May 2019 for those who could not attend the first meeting. The Claimant attended this second meeting.
17. On 2 May 2019, the Claimant emailed John Marchington with the subject "Feedback". She mentioned that she was going to be 63 in October and said that she needed "to know the exact date that [the reorganisation] will take effect. My mum is over 90 years old and her day-to-day expenses depend on me. As age is not on my side, I need to readdress a lot of things". She did not suggest that the decision to delete her post was taken because of her age or her race.
18. There were further meetings held on 3 May 2019 and on 7 May 2019. At the meeting on 7 May 2019, the Claimant explained she did not want to attend any one-to-one meetings. She wanted to know when her last day of employment would be so she could leave.
19. On 10 May 2019, the Claimant was sent a letter headed "Notice of termination of your employment by reason of redundancy" [128]. She was told that her employment would end on 10 May 2019, and she would be paid in lieu of notice. The letter offered her a right of appeal. It was signed by Bola Stevens.
20. The Claimant had a meeting with John Marchington from HR on 16 May 2019. She did not suggest that her dismissal had been an act of race or age discrimination. The discussion focused on the financial payments to which she was entitled following her termination.
21. In Ms Appostolova's case, she was sent a letter dated 16 May 2019 confirming that as from 13 May 2019 she would revert to her substantive post of Tutor/Assessor. There was a factual dispute as to whether Ms Appostolova was subsequently engaged in teaching vocational qualifications. The Claimant has argued that the signature on the timesheets on pages 171-175 is not that of Ms Appostolova. We do not need to decide this signature issue. We are prepared to accept the evidence of Mrs Marshall that, having reverted to her substantive position of Teacher/Assessor, Ms Appostolova did carry out the duties associated with that role. The paperwork in the bundle is only a small sample of all the timesheets of all the students who were taught at this time. We consider that Ms Appostolova was engaged in teaching Maths during a limited number of revision classes for those students on vocational courses.
22. On 22 May 2019, the Claimant exercised her right to appeal against the decision to dismiss her. She was asked to clarify the grounds of her appeal. In a second email sent on 24 May 2019 she listed four grounds of appeal [150]. Three concerned the financial payments she had received following the ending of her employment. The first argued that it was wrong to make her redundant "when the role still existed".
23. An appeal hearing took place on 13 June 2019. It was chaired by Pat Edwards, the Respondent's CEO. Mr Edwards is of Black African Ethnicity. She attended the

appeal meeting with a union representative. Ms Stevens attended the appeal meeting to present the management case. At no point during the appeal meeting did the Claimant allege that the failure to redeploy her to another role or the decision to dismiss her was an act of discrimination. At one point, Ms Stevens said that there were eight learners who should have finished their courses by now. She said that she had a duty of care to learners to get them through and for them to complete their courses. For this reason, she had had to utilise the skills of her existing teachers that are available. This was a reference to the skills of the Teacher/Assessors who were also covering the maths elements of the courses.

24. The appeal was partially successful, in that the financial sums she received following the termination of her employment were increased. However, her appeal against the decision that she should be dismissed by way of redundancy was rejected. The appeal outcome letter stated that the maths element of the courses was covered by a Health & Social Care Teacher embedding Maths and did not require a specific Maths Teacher.
25. The Claimant has argued that she ought to have been offered the vacant position of Functional Skills Maths Teacher [115]. This position had been vacant since the holder had been dismissed in January 2019. The teaching requirements associated with this role had been carried out a trainee teacher placed at the school during her teacher training course at Greenwich University. The trainee was not paid by the Respondent and was treated as being a volunteer. The substantive role was deleted in the reorganisation, although the evidence was that the trainee teacher continued teaching until December 2019.
26. There was no other role to which the Claimant could be redeployed. She could not be redeployed to the role of Teacher/Assessor because she did not have the vocational experience or qualifications required for the role.
27. There was a further reorganisation at the end of 2019, prompted by the need to achieve further savings in the Respondent's operating costs. As a result of this reorganisation, Ms Appostolova was made redundant with effect from 14 January 2020.
28. The Tribunal has been presented with evidence as to the ethnicities of the staff at the Respondent, both before and after the reorganisation. This shows that white staff were in a minority, both before and after the reorganisation. Before the reorganisation, there were 33% black/Black British staff. After the reorganisation it was 32% black/black British. We have also had evidence that at least one of those made redundant in the reorganisation was white – Faith Bolitho.
29. The data indicate that the proportion of staff who were aged over 55% was 16% before the restructure and the same percentage after the restructure [195/191].

The law

30. Section 13 of the Equality Act 2010 is worded as follows:
 - (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.

31. The Claimant seeks to compare herself against the treatment of Ms Appostolova. Ms Appostolova must in all respects other than her race or her age be in a comparable position to the Claimant.
32. The focus is on the mental processes of the person that took the decision said to amount to discrimination. The Tribunal should consider whether the decision maker consciously or unconsciously was influenced to a significant (ie a non-trivial) extent by the Claimant's age or race. Their motive is irrelevant.
33. Section 136(2) of the Equality Act 2010 is worded as follows:

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
34. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).
35. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the Claimant's failure to be offered another role and the decision to dismiss her was in part the result of her age or her race.
36. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that a unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristics of age or race and the detrimental treatment, in the absence of a non-discriminatory explanation.
37. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristics formed no part of the reasoning for the decision not to offer the Claimant an alternative role but instead to dismiss her.

Conclusions

38. The Claimant has chosen to restrict her case to a comparison with the treatment received by Ms Appostolova. She clarified in the course of closing submissions that she is not arguing she was treated unfavourably by comparison with how a hypothetical younger or White British Maths teacher would have been treated.
39. As a result, we need to consider first whether Ms Appostolova is an actual comparator for the purposes of a discrimination claim. This requires that she is in the same position or an equivalent position to that of the Claimant. The tribunal finds that Ms Appostolova is not an actual comparator. Both she and the Claimant had had a role in teaching Functional Skills in Maths to students on vocational courses. However, Ms Appostolova was engaged in a different role at the time of the restructure to that of the Claimant. Her role, albeit on a temporary basis, was that of Team Leader. Her teaching area was different to that of the Claimant. She was qualified and experienced as a Teacher/Assessor teaching vocational skills in the area of Health and Care. The Claimant did not have any teaching experience or qualifications to teach vocational skills in this area. The Claimant had a superior level of qualifications and experience in teaching Maths. This meant that Ms Appostolova was potentially of more assistance to the Respondent in its future teaching. Unlike the Claimant she could teach all aspects of the vocational courses offered by the Respondent.
40. As a result, it is not necessary for us to consider the extent to which there are facts from which we could infer that the reason for any difference in treatment was the Claimant's race or her age. However, for completeness, we consider whether there are any such facts. We do not consider that there are any facts established here from which the Tribunal could infer race or age discrimination in the absence of a non-discriminatory explanation from the Respondent. The caselaw makes it clear that there must be something more than difference in status and difference in treatment. Here there is nothing more.
41. In relation to race, we have found that white members of staff were a smaller proportion of the staff than black members of staff. There is no evidence that the reorganisation had a detrimental impact on the proportion of black members of staff on the staffing team. There is no evidence in particular that Ms Appostolova's white ethnicity was potentially a factor in her retention or that the Claimant's black African ethnicity was a factor in her dismissal. The letter dismissing the Claimant was written by Ms Stevens, who herself is of Black African ethnicity. The appeal against her dismissal was rejected by Mr Edwards, who is also of Black African ethnicity.
42. So far as age is concerned, there is no evidence that the Claimant's age was referred to, still less taken into account in the decision that she should be dismissed. The age gap between the Claimant and Ms Appostolova was only four years. No evidence has been advanced, still less established that these four years would have been any basis for differentiating between Ms Appostolova and the Claimant. The only reference to her age was made by the Claimant herself in drawing the Respondent's attention to the potential impact it would have on her and her ability to provide for her elderly mother.

43. Finally, we consider the explanation provided by the Respondent. We are wholly persuaded by the explanation advanced by the Respondent that the business reorganisation was carried out in order to redress a significant budget deficit by making significant reductions to the staffing costs. This restructuring decision was taken by the Senior Leadership team, although the final decision in relation to redundancies was taken by Mr Edwards, the CEO. There is no evidence that the ethnicities or the age of the Claimant was a factor in designing the reorganisation in the way that it was designed or removing the Claimant. Mr Edwards shares the same ethnicity as the Claimant – Black African. There was an evident logic to retaining those staff able to teach the vocational courses as well as the maths elements to these courses, rather than specialist Maths or English teachers.
44. We do not need to consider whether there was any unfairness in not offering the Claimant the teaching role carried out by the trainee teacher placed by Greenwich University. This may have been relevant on an unfair dismissal claim. When asked by the Tribunal why this trainee was retained in this role, Mrs Marshall said that it was not uncommon to use a trainee teacher in this role and that one advantage of doing this was that it saved the Respondent money in terms of staffing costs. We accept that, on balance, this was the explanation for this decision. Therefore, we accept the evidence of the Respondent that there was a non-discriminatory reason for not offering the Claimant this teaching role at the time of the reorganisation.
45. As a result, for these reasons, the Claimant's age and race discrimination claims fail.

Costs

46. The Respondent has made a costs application. The amount which is sought to be awarded is £6250 plus VAT, making a total of £7500. These are counsel's brief fees which have been incurred since the date on which a commercial settlement of £1000 was rejected. The basis of the application is the refusal of the offer and the unreasonable pursuit of the discrimination claim once the unfair dismissal and wages elements have been struck out. The lack of merit in the discrimination claim was explained in the email making the offer. It also warned her that the Respondent would be seeking costs in the event that the Claimant was unsuccessful at the final hearing.
47. We find that it was unreasonable for the Claimant to have continued the claim once the other elements had been struck out. There was limited factual dispute and no plausible basis for drawing an inference of discrimination based on the disparity of treatment between her and Mr Appostolova. It was not a claim that had any reasonable prospects of success. Therefore, we have jurisdiction to make a costs order if we consider that this would be an appropriate exercise of our discretion.
48. However, we have decided that it would not be an appropriate exercise of our discretion to make a costs order here. Very briefly, we have taken this view based on the length of the Claimant's employment with the Respondent, which included a period of at least a year at the start when she was working as a volunteer; the Claimant's genuine belief that she had been treated unfairly in being dismissed in circumstances where there was still a need for maths tuition and the Respondent had chosen to supply that need with a trainee teacher rather than herself as a qualified teacher; the admitted mistake made by the Respondent in the calculation

of her termination payment; the Claimant's ill health since the date of her dismissal as set out in her witness statement, which we accept; the fact that the Claimant has never had legal advice and was not able to get any detailed advice from the CAB; her current lack of work, which has been the case for the last 2 years; and her current finances in that the Claimant's only source of income is monthly state benefits, and she currently has an overdraft of almost £5000 on which she is having to make interest payments. Were we to have exercised our discretion, then the amount of any costs award would have been so small, relative to the amount of the costs incurred that it would not have made a significant impact on the Respondent's finances; but would potentially have been a further burden on the Claimant. Enforcement of any award is likely to be wholly disproportionate.

49. In rejecting the costs application, we do not criticise the Respondent for making it. As a charity it must do all it can to maximise its revenue and to reduce its expenditure. It is a sad tragedy of this case that the Claimant did not accept the commercial offer when it was made. Had she done so, then she and the Respondent would have been able to move on, which would have been to the advantage of everyone.

**Employment Judge Gardiner
Date: 30 June 2021**