



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON
Ms J Bird
Ms S Lansley

BETWEEN:

Mr S Harrington

Claimant

AND

ABM Aviation UK Limited

Respondent

ON: 26 and 27 April 2021

Appearances:

For the Claimant: In person

For the Respondent: Mr A O'Neill, Solicitor

Written reasons provided pursuant to a request from the Claimant

Introduction

1. The Claimant's claim of race discrimination was dismissed following a hearing conducted by CVP before a full tribunal panel on 26 and 27 April 2021. Given the problems of the pandemic at the time this was a reasonable manner in which to conduct the hearing. The parties consented and the witnesses all gave evidence clearly and could be seen and heard by all parties. The Tribunal was satisfied that each witness was giving evidence on their own account and there is no question that their evidence was interfered with in any

way in the course of giving evidence.

2. The Claimant made an application for written reasons on 18 June 2021, which was within the specified time limit within the Tribunal Rules, the judgment having been sent to the parties on 4 June 2021. Unfortunately the Claimant made an application for reconsideration simultaneously, which was premature as the written reasons had not yet been given – Rule 71 of the Tribunal Rules envisages that an application for reconsideration should follow after the written reasons have been sent. The request for written reasons was overlooked by the judge, for which apologies are offered to the parties.
3. As regards the request for reasons, the Claimant did not remain present when the Tribunal was giving the oral reasons for its decision at the end of the hearing, after the panel had adjourned to reach its decision. It was not clear at the time whether he had become disconnected from the hearing involuntarily or whether he had chosen to leave the hearing. The reasons set out below are those delivered at the end of the hearing. It is not clear therefore that the Claimant made the application for reconsideration on a fully informed basis. He may make a renewed application in light of the written reasons set out below if he considers that there are grounds for a reconsideration and he does so within the time limit set out in Rule 71 of the Tribunal Rules.

The claims and the legal issues

4. By a claim form presented on 13 January 2018 the Claimant brought claims of race discrimination and whistleblowing detriment against the Respondent. The case had been case managed a number of times, most recently on 20 July 2020 by Employment Judge Cheetham QC who recorded as follows in his case management orders:

2. This claim was brought on 13 January 2018 and there have been previous hearings on 27 July 2018 and 13 May 2019, the result of which was to establish that the claim is restricted to direct race discrimination relating to the Claimant's dismissal on 4 August 2017. He does not have sufficient continuity of service to bring a claim for "ordinary" unfair dismissal, having been employed for less than 2 years.

3. Most of this hearing was spent in confirming and explaining that the only issue before the tribunal will be: what was the reason for his dismissal? The Claimant says it was because of race, in that the decision to dismiss him was influenced (consciously or otherwise) by race; the Respondent says it was by reason of capability or "some other substantial reason".

4. It is fair to say that the Claimant does not see things in that way and is concerned that the tribunal is acting unjustly in limiting his claim. However, as I explained, two other employment judges have already looked very carefully at what issues will be decided at the final hearing. There may be some matters that are relevant background and which the Claimant feels strongly that he must explain – which is why I have given a generous word limit for the witness statements - but the issue is clearly defined.

5. At the hearing the Tribunal heard evidence from the Claimant himself and on behalf of the Respondent from Mr R Stefanovic, senior commercial manager of the Respondent and Mr F Ahmed, head of station for Norwegian Airlines at Gatwick Airport. All of the witnesses had prepared written statements, which

the tribunal read before the hearing and there was a bundle of documents containing 292 pages. References to page numbers in these reasons are references to page numbers in that bundle.

6. The Claimant raised concerns at the start of the hearing about documents and what he said was the Respondent's failure to include certain documents in the bundle that he wanted to rely on. The Tribunal was satisfied after hearing from both parties, including Mr O'Neill's description of the disclosure process, that documents had been discussed at length at the hearing before Judge Cheetham and the Claimant had had plenty of opportunity since that hearing to send to Mr O'Neill any documents that he wanted to have included. Mr O'Neill had included one such document – the photograph at page 254 - at the Claimant's request and assured the Tribunal that the Claimant had not asked for anything else to be put in. The Tribunal was therefore satisfied that the Claimant had not been prevented from including the documents he wished to rely on and the absence of any such documents from the hearing bundle was the result of decisions taken by the Claimant himself. When cross examining Mr Stefanovic the Claimant sought to take the Tribunal to documents that were not in the bundle and we declined to permit him to do so, on the basis that it would not have been fair to the Respondent to rely on those documents at such a late stage and there had been no obvious reason not to send them to the Respondent for inclusion in the usual way after the last hearing.
7. There was only one issue before the Tribunal and that was whether the decision to terminate the Claimant's employment at the end of his probationary period was tainted by race discrimination and thus a breach of section 13 Equality Act 2010 which prohibits less favourable treatment of a person because of a range of protected characteristics, one of which is race. Section 39(2)(c) of the Equality Act prohibits an employer from discriminating against an employee by dismissing them.
8. In a discrimination case it is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

Findings of fact

9. The facts in outline were set out in the Respondent's chronology and were not

themselves disputed by the Claimant. Hence we found that the Respondent is an established national company providing passenger, security, coaching, cleaning and retail services to airports and airlines. The Claimant commenced employment with the Respondent on 1 December 2016 as a passenger service agent subject to a six-month probationary period. Following the start of his employment the following incidents and issues arose:

- a. He raised an issue about Mr P Ivanov and a door code on 4 December 2016;
- b. On 18 December 2016 Mr Ivanov wrote to Vanessa Branch, an employee of Norwegian raising a concern that the Claimant was going from one passenger lead to another asking for re-rosters and other favours. In an email at page 140. This led to the Claimant raising a grievance on 5 January complaining, amongst other things that Mr Ivanov had referred to him as a 'player'. The grievance was at pages 143-144.
- c. The Claimant met with Suzanne Cox, Head of Manning for the Respondent on 6 January 2017 and confirmed that he wished to raise a grievance. Ms Cox suggested mediation. A grievance meeting took place with Ms Cox and HR adviser Palvi Sharma Bains on 20 January 2017 and again mediation was suggested. The Claimant however decided to continue with the grievance process, which was predominantly focused on Mr Ivanov's use of the term 'player'.
- d. The grievance investigation was protracted as a result of shifts and holidays, which was regrettable, but on the evidence unavoidable. However a grievance meeting took place on 12 May 2017 and the Claimant made it clear that what he was seeking was Mr Ivanov's dismissal. He received the grievance outcome on 17 May 2017, from Ms Cox. His grievance was not upheld, but he was given feedback about his relationships with colleagues and communication style and warned that these needed to improve. He appealed against this outcome to Mr Stefanovic by letter of 22 May 2017. We pause here to note that neither the grievance itself nor the grievance appeal letter contained any reference to race, but that there was a generalised reference to discrimination in two paragraphs of the final page of the appeal letter. That referred to 'a dishonest and apparently discriminatory style of leadership' by Mr Ivanov and 'open instances of dishonesty, intimidation and discrimination'. No particulars were given, however.
- e. The Claimant then attended an appraisal meeting on 25 May 2017. A number of issues were identified including, timekeeping, issues with colleagues feeling intimidated by his abruptness and unwillingness to accept others' opinions, a need to communicate better with colleagues, a failure to go above and beyond the call of duty or accept the advice of others (page 68). The Claimant was very unhappy at this feedback and sought to appeal the appraisal rating, alleging that his managers had been unfairly influenced in favour of Mr Ivanov. He did not allege that his race had played any part in the outcome, but suggested that it had been influenced by his having raised a grievance (page 71-72).
- f. On 1 June 2017 the Claimant received a letter from Ms Cox confirming

the extension of his probation. Her letter included the comment 'made steady progress in the last month so keep the continued improvement up' (page 79). The Claimant was also given the direct telephone number of Ms Branch with a clear indication that the Claimant could reach out to her at any time for advice and support. The Tribunal finds that the letter was supportive and whilst the Respondent could have dismissed the Claimant at that point, it chose not to do so, but to continue his employment with an offer of support and advice. We heard from Mr Stefanovic, whose evidence we accepted, that the reason for this was not, as suggested by the Claimant, a shortage of staff, as there was in fact a waiting list for available positions at the time. The Claimant did not avail himself of the offer from Ms Branch and told the Tribunal that he did not think any purpose would have been served by doing so.

- g. On 4 June 2017 the Claimant reported an incident with Loxley, a black male senior gate agent by means of a handwritten note.
- h. The grievance appeal meeting with Mr Stefanovic took place on 16 June 2017 (pages 232-239). Between the grievance meeting and the outcome there was a further incident when the Claimant boarded seven passengers onto the wrong flight, in the context of a breakdown in the computerised boarding system. The incident took place on 24 June 2017 and the Claimant gave a contemporaneous account, accepting responsibility, on the same day, agreeing that he had 'mistakenly boarded them'. There was an investigation meeting on 27 June 2017 into that incident (pages 82-90).
- i. There was an altercation between the Claimant and a senior gate agent, Aba Minster on 28 June, arising out of Ms Minster's request that he cease boarding passengers because he was being too slow. On his own account, which he set out in a statement provided to Ms Sharma Bains on 30 June 2017 as part of an investigation into the incident, he resisted the management request, continued to board passengers and an argument later ensued. An investigation meeting took place on the same day.
- j. On 5 July 2017 the Claimant raised a complaint arising from an incident with Nikki Tulk, another Senior Gate Agent, arising from her request that he cease boarding passengers and assist her with bags. Again, on the Claimant's own account given at the time, he resisted the management instruction and asked a colleague to help Ms Tulk whilst he continued on the desk. His complaint appeared to be that the request itself was wrong and unfair and an example of a 'complacent, unprofessional and intimidatory' style of leadership. He sought an investigation. He suggested that his alliance with Lauren Norriss, a colleague and his grievance against Mr Ivanov, were contributing to what he considered to be an unacceptable style of management. Notably there is no reference to discrimination on grounds of race or otherwise. Ms Tulk gave an account on 7 July 2017 confirming that the Claimant had declined to help her.
- k. The Claimant received the grievance outcome the next day. His grievance was upheld in part on the basis that he had not been going from manager to manager as suggested. In other respects, the

- appraisal and probationary review processes were endorsed.
- i. Mr Stefanovic invited the Claimant to his probationary review by letter of 25 July. The Claimant sought to appeal against the decision to extend his probation (page 106 and 109) at the same time acknowledging that Mr Stefanov had done a remarkable job in upholding part of his grievance against Mr Ivanov. His request for an appeal was turned down on the basis that there was no right of appeal against a decision to extend probation.
 - m. The probationary review meeting took place on 3 August 2017. The meeting was not minuted (a surprising oversight in the Tribunal's view). Mr Stefanovic set out the reasons for his decision not to confirm the Claimant's employment in a letter dated 4 August 2017. The Claimant did not exercise a right of appeal.
 10. The probationary review outcome letter was short. It confirmed that the reasons for not confirming the Claimant's employment at the end of his extended probationary period were that there had been a report of him arguing with another staff member at a gate, the incident of mis-boarding seven passengers and concerns about the Claimant's productivity at the gate. Mr Stefanovic also said that staff found it difficult to work with the Claimant and considered him unwilling to take on board feedback. He acknowledged that the incident with Ms Minster should have been better handled.
 11. The Claimant did not appeal against his dismissal and told the Tribunal that by that point he had lost faith in the process.
 12. The Tribunal noted that the issue of race discrimination was not expressly mentioned once during the Claimant's employment and the numerous points of contact between the Claimant and his managers, many of which consisted of complaints on his part. There was no mention of discrimination at all save for the generalised references mentioned in paragraph 9(d) above. He sought to persuade the tribunal of a number of things at different points in his evidence:
 - a. That he had been too intimidated to raise the issue of discrimination during his employment;
 - b. That the reality of his situation was that there was a conspiracy amongst white managers who had previously been at a predecessor company, Servisair, to ensure that he was undermined and dismissed;
 - c. That some individuals had engaged in 'fabrication' and 'harassment' (we understood this to be a reference to his appraisal and the incidents in which managers gave him instructions which he then did not follow);
 - d. That some individuals were resentful of his relationship with Lauren Norriss.
 13. The Tribunal was wholly unconvinced by these suggestions by the Claimant. The Claimant sufficiently had been confident to raise multiple complaints and grievances and to expressly seek the dismissal of his manager. We did not accept that he was too intimidated to raise the issue of race. We considered more likely on the facts that he did not think of it at the time. There was no factual basis whatsoever for his suggestion that any individual was acting

singly or conspiring with others to secure his removal from the business on the grounds of his race. There was no evidence of any deliberate fabrication of management concerns or harassment because of, or related to, the Claimant's race. On the contrary we find that the Respondent continued the Claimant's employment and gave him encouragement despite him not meeting its standards at his probationary review. This was a step it did not need to take and was incompatible with the suggestion that it was bent on dismissing him. Accordingly we do not think that the Claimant shifted the burden of proof to the Respondent to explain its treatment of him.

14. But even if he had shifted the burden, we found nothing in to suggest that his race played any part in the Respondent's decisions whatsoever. We heard evidence from two very credible witnesses – Mr Ahmed and Mr Stefanovic. We were satisfied that the decision to dismiss the Claimant arose from his difficulty relating to his colleagues and a very serious gate error when he mis-boarded seven passengers. We saw at first hand during his evidence that he was highly resistant to accepting responsibility for his own actions. The Respondent was justified in deciding that he was not suitable for his role and we were entirely satisfied that his race played no part in that decision.
15. Accordingly the Claimant's claim of direct race discrimination fails and is dismissed.

Employment Judge Morton
Date: 18 October 2021