EMPLOYMENT TRIBUNALS

Claimant: Mr A Mbeng Obi
In person

Respondents: Vodafone Ltd
Represented by Mr S Wyeth (Counsel)

2207858/20

Heard on: 12 November 2021, London Central Employment Tribunal by CVP video platform.

Employment Judge: Mr D A Pearl

JUDGMENT

The tribunal makes the following Judgment:

1 This claim is struck out as having no reasonable prospect of success

REASONS

1 This was the application by the Respondent to strike out the claim, alternatively for a deposit order. The hearing involved submissions only and consideration of a bundle of documents.

2 In my judgment, the material facts are unlikely to be in dispute, for reasons that I will come to, below. This is, therefore, unlike most discrimination claims, where factual disputes may be sizeable. The claim arises from an online application made by the Claimant for employment. There was a question about nationality/immigration work status which could only be answered by entering an option on a drop down menu. The Claimant gave the correct answer. His application was rejected. He suspected the answer he had given was the reason for this and he submitted a new application where the only difference was that he selected as an answer that he was either a UK or EU citizen. (It does not matter which was selected.) This application was accepted. He drew matters to the Respondent's attention and they apologised, said it was a computer error and

they offered to proceed with his application. The Claimant declined and has brought this claim. I shall elaborate a little on the facts in paragraphs 4 to 7 .

3 The Claimant in preliminary discussion made very clear that he was claiming direct discrimination only. He has an excellent law degree and has presented his arguments with some subtlety and care. I have no doubt that his opting for direct discrimination is a considered view and I respect it.

4 The drop down menu (page 89) has 5 options. "I am a national of the country I'm applying to; I am an EU citizen; I don't have a visa, I require sponsorship from Vodafone; I hold another type of visa that is not listed above; I hold a student visa." The Claimant selected the fourth option, the other visa. The application was made on about 25 September 2020 and the Respondent states that "the system automatically marked the application as unsuccessful." It is contended that this was an error; the Claimant ought to have been asked further information about the other type of visa. Some further background to the error is set out in paragraph 6 of the ET3 particulars. However, for these purposes, I note the logic of the Respondent's averral. It would be strange to refuse an application where an applicant states s/he has another type of visa without asking what it is. Computer error seems the only explanation.

5 In his email of 6 October, after the Claimant's second application, he referred to it being "interesting that in the application where I am a non UK nor EU citizen my application was automatically unsuccessful." He was alleging a system error and stated in terms that the system automatically discriminates on the basis of nationality. He said he had indefinite leave to remain. In the response of the next day, the Respondent said that his application could be accepted, there was an apology for the "confusing question" and the Claimant was invited to continue. On 9 October, he replied, saying that the company had breached the Equality Act and given an evasive reply. He referred to the possibility of legal action.

Submissions

6 Both Mr Wyeth and the Claimant presented highly cogent submissions. Mr Wyeth's main point was that nationality could not have been the reason for the rejection and that, as in cases referred to below, including **Khan**, the ground or reason or cause of the rejection was not the protected characteristic. Here, he contended, it was a computer error. He submitted that the claim was vexatious; and that the Equality Act should not be used to police the setting up of the Respondent's computerised application process. He characterised the Claimant's arguments as a 'but for' test. By this, he meant that but for the Claimant's nationality, which in his circumstances had also led to being granted indefinite leave to remain, he would not have been rejected. He submitted that this is an incorrect test.

7 The Claimant based his submission on the Respondent having provided what he termed 'one qualification option'. This was either UK or EU nationality. He was therefore rejected because he did not have those nationalities; and this satisfied the test in section 13 for direct discrimination. In his closing submissions he said that his claim was 'about how the system was set up. Humans set up the system. They must ensure it functions properly.' He returned

to the point that there was one qualification option, when there should have been multiple options.

8 In discussion, I raised the case of **Amnesty International v Ahmed** [2009] UKEAT 0447. In this case Underhill (P) analysed direct discrimination in depth and I am aware of no later qualification arising in subsequent case law. Both the Claimant and Mr Wyeth were able to consider the case before the hearing ended.

Conclusions

9 It is well known that it is a drastic step to strike out a discrimination claim and the tribunal will do so only in plain cases. As has often been said, these cases are frequently 'fact-sensitive'. In **ABN AMRO v Hogben** [2009] UKEAT 0299/09 Underhill (P) said at paragraph 7: "I was also referred to the well-known observations of Lord Steyn in **Anyanwu v South Bank Students Union** [2001] ICR 391 about the caution to be exercised in using the power to strike out in a discrimination case: see para. 24 (at p. 399). This too was not controversial, but it is fair to note that the force of those observations will inevitably vary depending on the nature of the particular issues; and Lord Hope in the same case made clear that in an appropriate case a claim for discrimination can and should still be struck out if the tribunal can be satisfied that it has no reasonable prospect of success: see para. 39 (at p. 404)." He made similar remarks in **Ahir** (below).

10 There are cases where, even though facts are in dispute, strike-out may be appropriate, where there is no reasonable prospect of the Claimant's factual assertions being made out. **Ahir v British Airways Plc** [2017] EWCA Civ 1392, relied on by Mr Wyeth, is an example of such a case: the theory advanced by the Claimant was fanciful and had no evidential support. There are other cases where the application of the law to the facts appears to raise no case with reasonable prospects of success. **ABN AMRO**, a complex age discrimination claim arising (inter alia) out of an enhanced redundancy scheme for City executives, was one such. As the Courts have always emphasised, each case will turn on its own facts and circumstances.

11 Section 13 of the Equality Act 2010 states that "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." By section 9(1), race includes nationality.

12 As I have noted, the factual basis of this claim is clear. The Claimant sensibly declines to say that there was a discriminatory motive behind the computer programme. He states that people are responsible for the programming and that they created something that amounted to direct race discrimination, based on nationality. There is, I conclude, no realistic possibility of a tribunal finding that this happened other than in error. The option of another type of visa plainly required a follow-up enquiry. It would be a convoluted scheme of dishonesty to trick applicants into clicking this option as part of a deliberate plan only to recruit UK or EU citizens. That is not being alleged. I would add, parenthetically, that I do not know whether these two nationality routes were the sole qualification option, as the Claimant says, because we do not know what would happen if a person with a student visa had selected that option. Nevertheless, I am prepared for these purposes to assume that there was only

one way of having the computer accept the application, namely by selecting either the first or second options.

13 The first citation in **Amnesty** I would refer to is in paragraph 30:

“We should refer also to **Khan** (see para. 22 above). We need not in this case summarise the facts, but the following passage from the speech of Lord Nicholls (at para. 29) requires quotation:

"Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2000] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

14 This was a preliminary observation. Paragraphs 32 to 36 are relevant:-

32. To begin at the beginning. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations ... There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).[4]

33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in **Nagarajan** (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.

35. Lord Goff himself in **James v Eastleigh** recognised the distinction between the two types of case. In the passage from his speech quoted at para. 28 (3) above he characterised them as, on the one hand, cases where a "gender-based criterion" was applied and, on the other, cases where the complainant's sex is "the reason why the defendant acted as he did" or where the treatment occurs "because of his or her sex": he gives as an example of the latter case where "the defendant is motivated by an animus against persons of the complainant's sex" (p. 772 C-D). (The distinction is again referred to in the second passage, quoted at para. 28 (4).) Although the terminology used is not entirely consistent with Lord Nicholls'[6], it is clear that the distinction intended is essentially the same as we have identified above: in the former case, the grounds for the putative discriminator's action can be found in the "criterion" itself, whereas in the latter it is necessary to look into his mental processes (which will include his motivation though not his motive).

36. There is thus, we think, no real difficulty in reconciling **James v Eastleigh** and **Nagarajan**. In the analyses adopted in both cases, the ultimate question is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

15 The Claimant's case here has to be a James v Eastleigh type of claim. It is not based on an allegation of a discriminatory motivation requiring an investigation of mental processes. The treatment complained of is inherent in the act itself, which the Claimant characterises as the 'one qualification option'. The difficulty with this is that it ignores the computer or software error that produced the automatic rejection. This is not less favourable treatment on the grounds of race for a beneficial motive, as in Amnesty. It is an unintended consequence of a technical error. If the question is asked, was the Claimant rejected because of his race/nationality, the answer, in my judgment is negative. He was rejected because of a computer error.

16 This is why the Respondent argues, in older and conventional legal language, that the claim is based, wrongly, on a 'but for' test. Underhill J in **Amnesty** turned to this in paragraph 37:

"Thus, although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment. That point was clearly made in the judgment of this Tribunal in **Martin v Lancehawk Ltd.** (UKEAT/0525/03, BAILII …"

17 He also referred in this paragraph to the older 1980 case of **Seide v Gillette**. In this case and in **Martin** (and in other cases such as **Khan** or **Martin v Devonshires Solicitors**) the protected characteristic (or act, in Khan) was said by the claimants to be the reason for the treatment. In all of them there was either another or a later or a different factor that explained the treatment. In **Martin** it was the breakdown of a relationship rather than the Claimant's gender. In **Seide** it was the events after the initial antisemitic abuse in a different department from which he had been moved, so as to escape the harassment. In **Devonshire** it was the nature of the untrue allegations and the other surrounding circumstances in which they were made.

18 In this case, I consider the tribunal bound to conclude that the treatment was because of a different factor than the protected characteristic, namely the technical error. The Claimant's nationality was "part of the circumstances" or the setting for the treatment; but the treatment was not because of race or nationality. Had the Claimant been a UK or EU national he would not have been rejected, but that is not the correct test. He said in answer to the computerised question that he had another visa (not in itself a statement about his nationality) and he was rejected because the computer programme had been wrongly set up. I have therefore come to the conclusion that Mr Wyeth's argument is correct on the unusual facts of this case and that the claim should be struck out as having no reasonable prospect of success.

19 Were I to be wrong, it would seem to follow that there can be no defence to the claim, as to liability. A strike out of the defence would be possible, the equivalent of summary judgment for the Claimant. But that is a different matter and it is not the conclusion I have come to. On the basis that the statute requires the Respondent to have treated the Claimant less favourably because of race or nationality, I consider that he must inevitably fail to make out his case. Accordingly, it is the claim here that should be struck out.

Employment Judge Pearl
Date 25/12/2021

JUDGMENT & RESERVED REASONS SENT TO THE PARTIESON

.30/12/2021.

FOR THE TRIBUNAL OFFICE