EMPLOYMENT TRIBUNALS

Claimant: Miss S Bedward

Respondent: Sigma UK Group Limited

FINAL HEARING

Heard at: Birmingham (in public; partly by CVP) **On:** 4 January 2022

Before: Employment Judge Camp Members: Mr P Kennedy
Mrs B Hicks

Appearances
For the claimant: in person
For the respondent: no appearance

REASONS

1. This is the written version of the reasons given orally at the hearing for the unanimous decision of the Tribunal in the respondent's favour, the claimant having asked for written reasons by an email of 5 January 2022.

2. The claimant was employed by the respondent from June 2018 until her dismissal with effect on 16 October 2019. Latterly, she was Head of Leadership and Management. She was dismissed, without prior warning or consultation, at a meeting on that date which had been billed as an Employment Review meeting. The given reason for dismissal was a business restructure due to a downturn in work. She was told that her performance and conduct were not in question.

3. The claimant has one claim before the Tribunal: a single complaint of direct race discrimination, her allegation being that she was dismissed (and, possibly, that her appeal against dismissal was rejected) because she is black.

4. There are two issues for us to deal with. The first is: was there 'less favourable treatment' in a technical sense, in accordance with sections 13 and 23 of the Equality Act 2010 ("EQA"). The claimant has to show that she was treated less favourably than others in materially the same circumstances – "comparators" – were or would have been. She names as comparators three white individuals who were also Heads of Department but who were not dismissed. The second issue is: if the claimant was less favourably treated by being dismissed, was this because of the protected characteristic of race.

5. So far as concerns the relevant law, this is contained in sections 13, 23 and 136 of the EQA. In terms of case law, our starting point is paragraph 17, part of the speech of Lord

Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

6. The focus of our decision-making has, though, been EQA section 136 and the burden of proof; and specifically whether there are facts from which we "*could decide, in the absence of any other explanation*" that unlawful discrimination has taken place. The critical issue has been whether there is evidence that was a factor. Although the threshold to cross before the burden of proof is reversed is a relatively low one – "*facts from which the court could decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[1] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the Tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

7. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

8. To summarise our decision in one sentence: the claimant's claim has failed because the facts that have been established show the possibility of race discrimination; they are not facts which would, if unexplained, justify a conclusion that there had actually been race discrimination.

9. There are very few relevant factual disputes. The key issue is not what happened, but why it happened.

10. The only witness who gave evidence before us was the claimant herself. The respondent's representative came off the record last week and no one attended on the respondent's behalf. A small amount of internet research by the Employment Judge suggests that the respondent has probably ceased trading. It remains on the register of companies only because someone – not the claimant apparently – objected to it being struck off.

11. This case was originally due to be heard in May 2021 and it was postponed at the last minute on the Tribunal's own initiative. At the May hearing there were to have been two witnesses for the respondent and a further two witnesses for the claimant. We have statements from all of them.

12. The respondent's witnesses from whom we have statements are:

    12.1 a Ms M Craig from HR, who made, or was at least involved, in the decision to dismiss the claimant;

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[1] i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, in the present case race.

12.2 Ms S Mann, who was Finance Manager of the respondent, and who dealt with the claimant's appeal against dismissal.

13. The further two witnesses on the claimant's side are:

13.1 Ms S Palentine, who is from a company who the respondent worked with and who confirmed that the claimant accompanied her to meetings with customers or potential customers of respondent which had positive outcomes;

13.2 Mr A Newby, a former employee of the respondent and colleague of the claimant who gave evidence about a meeting with someone called Sarah, who is white and who had apparently been offered the job as the respondent's new Operations Manager shortly after the termination of the claimant's employment.

14. We take these four witnesses' statements into account, but give their evidence limited weight, in light of their absence from the hearing and the fact that they haven't confirmed the truth of their statements on oath or affirmation and haven't been cross-examined. That said, we note that, based on the contents the respondent's witness statements, neither Ms Palentine's nor Mr Newby's evidence appears to be substantially in dispute.

15. In addition to the statements, there is a hearing file or 'bundle', which consists of 150-odd pages. One of the documents in it is an organisational chart. It is not entirely agreed, but the fundamentals of it seem to be. At the top of the organisational chart is the Chief Executive Officer, a Mr Hand. Until late September / early October 2019, there was, below him, the Director of Operations and Delivery, who was called Ms Pearman. Below her were the heads of various departments, including the claimant herself.

16. The respondent's business is the provision of training. The heads of departments' job titles reflected the types of training they were responsible for. For example, the claimant, as Head of Leadership and Management, was in charge of training in leadership and management. The Head of Performance (taking in compliance and quality, and responsible for a training centre in Walthamstow, in east London) was Ms T Perry. There was also a Ms T Allison, who was Head of Health and Social Care [training] and finally, in terms of heads of department, there was Ms M Johnson, who was Head of Manufacturing (responsible for manufacturing-related training).

17. These other Heads of Departments are the only people the claimant accepts were at the same level as her and they are her chosen comparators. The respondent disagrees, but in the absence of live witness evidence on the point from the respondent, we will assume that the claimant is right about that.

18. The respondent says it was looking to save money, which is why it dismissed the claimant and two others – not heads of department – as well. There is some evidence to support that, namely the agreed fact that the claimant and one of her subordinates, a Mr O'Connor, and one other more junior member of staff, a Ms Gray, were dismissed within the same two-week period in October/November 2019.

19. The claimant suggests that Ms Gray and Mr O'Connor, both of whom are white and who were dismissed up to two weeks after the claimant was, were dismissed because the claimant made allegations of discrimination when she appealed against dismissal. What she said to us was to the effect that they were dismissed to bolster the respondent's defence to those allegations by apparently showing that the respondent

was dismissing some white people and not just her. That allegation seems to us to be far-fetched. It is inherently highly unlikely to be true and there is no discernible evidence to support it other than the claimant's belief that it is so.

20. Neither the claimant nor, so far as we can tell, Ms Gray or Mr O'Connor were replaced after they were dismissed. The fact that there was a reduction in headcount, with both white and black staff being dismissed, supports the respondent's case. There are, though, one or two anomalies or factors which arguably point to the respondent's true motive potentially not being financial.

21. The first is that, at the claimant's recommendation, the respondent recruited someone to a junior position under the claimant or another Head of Department two weeks or so before the claimant was dismissed. This is not really addressed in the respondent's witness statements. However, it seems to us that Mr O'Connor and/or Ms Gray have rather more to complain about in relation to this than the claimant herself does. The claimant's position was at a higher level than the position to which this individual was recruited. Also, they were recruited to deliver training, which was not part of the claimant's role.

22. The second factor – one heavily relied on by the claimant – is the fact that the respondent recruited a replacement for Ms Pearman around the time or shortly after it dismissed the claimant. The person recruited was the woman called Sarah who is referred to in Mr Newby's statement. The claimant asks: why would the respondent recruit a replacement for Ms Pearman, a senior employee with a salary to match, if it was looking to save money?

23. Even if the respondent had fully gone through with Sarah's recruitment, which it didn't as we shall explain in a moment, we don't think this would provide very much assistance to the claimant's case. Ms Pearman was the line manager of all of the heads of department. Without someone in her role, there was no one between the Chief Executive Officer and them. There is nothing odd or inconsistent about the respondent deciding that it could do without someone in the claimant's position but that it could not do without someone as Operations Director.

24. Moreover, the respondent ultimately did not employ a replacement for Ms Pearman. After one or two preliminary meetings, Sarah turned the job down and Mr Hands took over the reins. What happened therefore further supports the respondent's case that the claimant was not being singled out and that her dismissal was part of a wider process that was going on.

25. Whether or not the respondent was in financial difficulties or not at the time (and the respondent's evidence on this is poor to non-existent), and whatever label the respondent gave to what it was doing, this evidence suggests that the respondent's motives at least included reducing head count to save money. And the fact that white staff were dismissed too points away from race being a factor.

26. This is a convenient point to mention the fact that all relevant staff – that is, all heads of department, Ms Gray and Mr O'Connor – had less than two years' service with the respondent. It is an unfortunate legal truth that if someone has less than two years' service an employer can treat them as badly as it likes, so long as there is no unlawful discrimination or anything like that. It is commonplace for employees with less than two years' service to be dismissed 'unfairly' in a non-technical sense, without the employer

following any kind of proper procedure and without even offering an appeal like the appeal that was offered to the claimant.

27. At the core of the claimant's complaint is an allegation that if the respondent was making redundancies – as it appears to have been; we agree that that was indeed what the respondent was doing – the respondent should and would have gone through a conventional redundancy procedure, including 'pooling' her with the other heads of department. But as none of the heads of department had two years' service, none of them was entitled to bring a so-called 'ordinary' unfair dismissal claim or had a right to a statutory redundancy payment. In the circumstances, why would the respondent go through such a time-consuming and disruptive process?[2] We do think the claimant was treated badly and we think that to dismiss her as the respondent did – without previously even hinting to her that her employment was threatened and giving her one week's notice – was thoughtless and unkind. However, the claimant had no right as a matter of law to fair and reasonable treatment and the fact that she didn't get it is not that surprising and is not something from which we could infer that her race was consciously or unconsciously in the respondent's mind.

28. That brings us to the first issue: was there less favourable treatment?

29. The claimant's chosen comparators are, she argues, valid comparators in accordance with EQA section 23 because they were her peers, in that they, like her, were Heads of Department, and because she was perfectly capable of doing their jobs. In fact, in one case – Ms Perry, the Head of Performance – the claimant had been doing a significant part of her job when the claimant started working for the respondent.

30. What that argument ignores is the fact that it was the claimant's position that was being done away with. After her dismissal, the respondent was not planning on having a new Head of Leadership and Management. It was, however, still going to have all the other heads of department roles. The four head of department roles were not the same jobs and the respondent was not reducing four identical roles to three.

31. The reason the respondent gives for deciding to do away with the claimant's role (and with that of Mr O'Connor[3]) was that as of October 2019 it was not getting significant income from Leadership and Management training. Having asked the claimant about this, it seems to us that this is not in reality in dispute. She has produced evidence to show that she was wholly or partly responsible for getting significant work in for other departments, and that there was a good prospect of work coming in for her department in the near future. But at the point of time when the respondent decided to dismiss her, that work was not there.

32. To do away with the claimant's and Mr O'Connor's roles may well have been a bad decision in a commercial sense and an unreasonable decision in a general sense, but it is not inexplicable or unexplained. More fundamentally, the relevant comparator is not another head of department. She is instead an imaginary or hypothetical person in

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[2] We should make clear that we think it is bad industrial relations practice for an employer to dismiss any employee in the way the respondent dismissed the claimant. Apart from anything else, hardly anyone thinks they deserve to be dismissed and an employee who thinks they have been treated unfairly and can see no good reason for their mistreatment will tend to assume that there is a bad reason for it.

[3] Why Ms Gray's role was chosen is less clear.

the same position as the claimant in October 2019, i.e. Head of Leadership and Management, who was not black. The fact that if there had been a formal redundancy process, the other heads of department ought (arguably) to have been in the same pool as the claimant does not make them valid comparators under EQA section 23. It therefore does not follow from the fact that they were not dismissed and the claimant was that she has been less favourably treated; and there is no substantial basis in the evidence for thinking that the correct comparator would have been treated any differently from her.

33. Nevertheless, if we had decided that the claimant was less favourably treated when she was dismissed and when her appeal against dismissal was rejected, would there be enough evidence to shift the burden of proof in accordance with EQA section 136? In other words: are there facts from which it could be assumed, in the absence of another explanation, that unlawful discrimination has taken place?

34. The Employment Judge questioned the claimant at length as to what facts she relied on for these purposes. The claimant's answers amount to no more and no less than this: she was treated very unfairly; she was the only black head of department; she was the only head of department who was dismissed.[4] Is that enough?

35. It may well be cold comfort to the claimant, but we do have a great deal of sympathy for her. However, we cannot, as a matter of logic or a matter of law, infer why the claimant was treated badly and unfairly simply from the fact that she was treated badly and unfairly. Similarly, we cannot infer that the reason was her race from the fact that others who are white were treated better; we cannot do so any more than we could infer that the reason was her age from the fact that others of different ages[5] were treated better.

36. We rather regret having to make the decision we have made. We are conscious of how difficult direct discrimination is to prove and it has certainly not been disproved by the respondent. We don't doubt the strength and genuineness of the claimant's belief that she has been discriminated against and none of us have the claimant's lived experience of routinely encountering discrimination in everyday life. But we can only apply the law as set out in the EQA and as interpreted by higher Courts and Tribunals whose decisions are binding on us.

37. In conclusion, the claimant has not discharged the burden of proof that is on her in accordance with EQA section 136 and we therefore dismiss the claim.

Employment Judge Camp

02 February 2022

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[4] The claimant also at one point during the hearing mentioned her theory, which had been no part of her case on paper and which the respondent can have had no notice of, that although the individuals who ostensibly made the decisions to dismiss her and to reject her appeal against dismissal may not have been racial prejudiced against her, her dismissal was in fact brought about by Mr Hand, who – she alleges – was racist. This theory is not founded on any evidence that has been put before us.

[5] Everyone, even identical twins, has a different age.