



EMPLOYMENT TRIBUNALS

Claimant: Mr James Orior

Respondent: British Broadcasting Corporation

REASONS

(requested by the claimant on 15.3.22)

1. These are the written reasons for the Tribunal's Judgment dated 15 March 2022 and sent to the parties on 16 March 2022, striking out the claimant's claims.
2. This was an application to strike out the claims of race, age and disability discrimination on grounds that they had no reasonable prospect of success or alternatively, for a deposit order on grounds that they had little reasonable prospect of success.
3. There was a further application to determine whether the claimant was disabled at the relevant time. In the event, it was not necessary to deal with that application and for the purposes of the strike out application, disability was assumed.
4. The claims arose out of the claimant's failed application for the position of UX design trainee. The claimant was not shortlisted for interview and he contended that the decision amounted to age, race or disability discrimination. The complaints are of direct and indirect discrimination pursuant to sections 13 and 19 respectively of the Equality Act 2010 (EqA).
5. I did not hear any evidence in relation to the application as this was not required. However, the parties provided written submissions which they spoke to. I was also provided with a joint bundle of documents and a bundle of authorities. References in square brackets are to pages within the bundle.

The Law

6. This application falls to be dealt with under Rules 38 and 39 of the Employment Tribunal Procedural Rules 2013. These have been set out in full at paragraphs 23 and 27 of the respondent's submissions and I have therefore not set them out again. Similarly, sections 13 and 19 of the EqA are set out at paragraphs 16-18 of those submissions.

7. Paragraph 19 of the respondent's submissions sets out the burden of proof in discrimination cases. There are a number of preliminary points to make about the burden of proof:
 - a. The claimant has the initial burden of proving facts from which the Tribunal could conclude discrimination. In discharging that burden, it is not enough for the claimant to simply show a difference in treatment and a difference in protected characteristic, he has to show more. The case of Madarassy v Nomura International PLC [2007] IRLR 246 held that such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination."
 - b. In the case of direct discrimination, the claimant must show that he has been treated less favourably than an actual or hypothetical comparator. In doing so, he also has the burden of showing that their circumstances were the same or similar to his. The claimant compares his treatment to actual comparators – i.e. those selected for interview.
 - c. In cases of indirect discrimination, the burden is on the claimant to prove the PCP and that it placed or would place persons that share his protected characteristic(s) at a particular disadvantage compared to others. Nelson v Carillion Service [2003] IRLR428
 - d. In determining whether there has been less favourable treatment, the Tribunal is entitled to go straight to the reason why the claimant was treated as he was.
8. I have borne in mind that discrimination cases are generally fact sensitive and so Tribunal's should be slow to strike them out as having no reasonable prospects before the evidence has been tested. However, I do not consider that this case falls within that category as the factual scenario is pretty contained and there was no employment relationship between the parties.

Background facts

9. Below are the background facts which I do not believe are in dispute:
10. In 2020, the respondent recruited for four roles within its UX Design Trainee Scheme. The role of a UX designer is to design digital experiences. 1340 people applied for 4 roles. 26 applicants were shortlisted for interview based on their applications and accompanying portfolios. Portfolios were said to be assessed against 4 criteria:
 - (a) brief and idea generation;
 - (b) design process;
 - (c) interaction design; and
 - (d) visual design / aesthetic sense.

11. On 4 August 2020, the claimant was informed that he had not been shortlisted for interview.
12. The claimant requested feedback and in response, he received the following feedback from the respondent:
 - *More attention to the craft and detail of your design work - thinking about the typography, brand, interaction design and the layout of your designs.*
 - *Further and more in-depth thinking about solving user-centred problems in new ways by trying out new and emerging techniques and technologies.*
 - *More than two projects to showcase a more diverse range of work and tackling different sorts of problems.*

Conclusions

13. Having considered the background facts, the parties submissions and the relevant law, I have reached the following conclusions on the application:

Age

14. The claimant puts his age group at 30-35 and contends that he was treated less favourably than those below that age group and above it.
15. Generally speaking, an employer who is going to discriminate because of age will do so because they have a preference for those in either a younger group or older group. It would be highly unusual for it to be both in the same context. The claimant provides no explanation for this. Indeed, when asked by the respondent in further and better particulars to specify which age/age group was treated more favourably by the respondent, his response was "*Not fully known*" [36]
16. The respondent contends that those responsible for the selection and hiring of candidates to this role did not know their ages. That is supported by the recruitment policy which provides:

Roles of three months' or longer duration will be advertised as widely as possible in the circumstances to encourage a diverse range of applicants. For all schemes, applications and CVs will be anonymised by the BBC recruitment team before they are passed to the BBC hiring manager - i.e. removing names and ages [137]
17. The claimant will not be able to refute that evidence. Indeed, in his replies to further and better particulars, he says that he has never said that the hiring manager was aware of his age [37]
18. In order for the direct claim to succeed, the alleged discriminators must know of the claimant's age group. The claimant contends that by process of deduction, the respondent would have worked out that he was not 20 years old. However, none of the shortlisted candidates were. Two of the candidates shortlisted were within the claimant's

age group [Candidates A and H] A number of candidates straddled the bottom end of the group. That included candidates B and N, who both went on to be appointed. [156]

19. In light of the above matters, I find that there is no reasonable prospect of the claimant's direct age discrimination claim succeeding.

Indirect Age

20. The PCP that the claimant relies upon are:

- a. Requiring candidates to have more than 2 projects to showcase their portfolio
- b. Requiring candidates to be "geeky"

21. The respondent does not accept that these were PCPs but for the purposes of this application, I will assume that they were.

22. For the indirect claim to succeed, the claimant must show that persons of his age group were at a particular disadvantage in complying with these requirements compared to other age groups.

23. The claimant has provided no basis for asserting group disadvantage in relation to the first PCP nor can such disadvantage be inferred.

24. In relation to the second PCP, the claimant relies on an article by the Illinois News Bureau from March 2009. That article seeks to explain the difference between the stereotypes "Nerd" and "Geek"

25. The article expresses the view that "Nerd" has negative connotations and is typically represented by a white male with glasses and large sets of obscure data committed to memory. "Geek" on the other hand is more positive and is viewed as chic, tending to indicate expertise and passion about something. It is about what you can do.

26. The article expresses one person's view and cannot be relied on as an authoritative statement on the matter. Nevertheless, even taking it at face value, it does not assist the claimant in showing that persons of his age group would be at a disadvantage in being able to demonstrate "geeky" traits.

27. I find that there is no reasonable prospect of the claimant's indirect age claim succeeding. The claim is struck out.

Race Discrimination

28. The claimant describes himself as Black African Nigerian.

29. It is common ground that there were no Black Africans amongst those selected for interview but all that points to is a difference in race and a difference in treatment. As the Madrassey case points out, that is not enough to shift the burden.

30. The respondent has provided statistical data showing that out of the 1340 candidates, 9.85% (132) were black and of these 3.20% (43) were black African. Only 1.94% (26) of the total number candidates were selected for interview and 4 hired. Given those

statistics, the claimant's chances of being selected for interview were always slim. The majority of the candidates (98%) were not selected for interview. Given those odds, a full Tribunal would be unlikely to draw any inferences from the claimant's non selection.

31. The respondent's reasons for not selecting the claimant are set out in the respondent's email of 13 August. The claimant contends that these are made up reasons. He says that because he has not seen any paperwork supporting it. That is an assertion without any basis.
32. The claimant also makes much of what he refers to as the unfair selection process. He contends that the respondent's process was not demonstrably objective and asserts that the respondent failed to retain the paperwork relating to the recruitment process in breaches of the ECHR code of practice.
33. The respondent's selection criteria is at page 121 of the bundle. On the face of it these are reasonably objective and a full Tribunal would be unlikely to have an issue with these. However, even if the claimant is correct, then the so called unfair process was applied to all of the candidates, not just those with the claimant's protected characteristics. This is therefore not evidence of discrimination.
34. I find that there is no reasonable prospect of the direct race discrimination claim succeeding. It is therefore struck out.

Indirect discrimination

35. The claimant relies on the same PCPs as for age. My findings in relation to age apply equally to race. The claimant will not be able to show group disadvantage arising from the application of the stated PCPs. There is no reasonable prospect of the indirect claim succeeding and it is struck out.

Disability Discrimination

36. The claimant relies on Type 1 diabetes, adjustment disorder and a stammer, individually and collectively, as his qualifying disabilities. Disability is not conceded but for the purpose of this application, I have assumed that the claimant was at the relevant time disabled.

Direct clam

37. The respondent's case is that 159 (11.87%) of the candidates were disabled and of those, 3 were selected for interview and 1 was appointed. The claimant seeks to challenge the disability of those candidates on the basis that their disability was not declared in their application forms. That is not evidence of them not being disabled, all it shows is that they did not declare it in their application forms. The respondent says it was declared elsewhere within the process. The claimant is unlikely to be in a position to challenge this at a full hearing. These statistics do not suggest that the respondent had an aversion to recruiting disabled people.
38. Further, for the reasons stated in relation to race discrimination, I find that the claimant will not be able to discharge the initial burden of showing facts from which the Tribunal

could conclude disability discrimination. The direct claim has no reasonable prospect of success.

Indirect

39. The claimant has adduced no evidence at all to show that persons with his disabilities would be at a particular disadvantage and he is unlikely to be able to do so at a full hearing. The indirect claim has no reasonable prospect of success and is struck out.

Employment Judge Balogun
Date: 21 March 2022