



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 1 and 2 February 2021

Claimant: Mr Francisco Fernandes

Respondent: Deluxe Services Limited

Before: Employment Judge Fowell

Ms S MacDonald

Mr N Shanks

Representation:

Claimant: In person

Respondent: Mr Scott, for DWF Law LLP

JUDGMENT

1. The complaint of direct discrimination on grounds of age is upheld
2. The complaint of direct discrimination on grounds of marriage or civil partnership is dismissed.
3. The complaint of direct discrimination on grounds of race is dismissed
4. There was not an unlawful deduction from wages.
5. The respondent was not in breach of contract.
6. The claimant is awarded compensation in the sum of £4,707.

REASONS

Introduction

1. The respondent company is a small recruitment agency based in Hounslow. There are three or four members of staff there, plus two directors, and other members of staff at two other offices. Altogether, at the relevant time, the business involved about ten people.
2. In May 2019 they contacted Mr Fernandes about a vacancy with the agency itself, having seen his CV online. There was an initial phone discussion, and then an interview the following day, 21 May 2019. After that he spent a few hours in their offices on 28 May; they say that this was part of the selection exercise, he says that he had already been offered the job at the interview, or at least that he thought the job was his. He did not get the job in the end. On 5 June 2019, having heard no more, and having concluded that he was not going to, he wrote to them to say that this was discrimination on grounds of age – he was 45 at the time. He said that there had been a number of questions about his age, including whether he was married, whether he had any children, and how old they were. As a result he referred to discrimination on grounds of marital status too, and also on grounds of race. Mr Fernandes is from Goa, in India.

The complaints

3. Subsequently he raised complaints of discrimination on grounds of age and marital status in his claim form on 15 September 2019. This was amended to include a further complaint of race discrimination at the preliminary hearing on 18 February 2020. Finally he seeks unpaid wages for the day of the assessment.
4. The company rejects all these complaints. They say that they did not ask his age, only whether he was over 18 and as part of their normal process, that the details about his family only emerged in response to an invitation to tell them about himself, and that his Goan heritage only came up in response to questions about his right to live and work in the UK.
5. For completeness, the complaints we have to resolve are as follows:
 - a. direct discrimination on grounds of age / marriage or civil partnership / race under section 13 Equality Act 2010 (EqA);
 - b. unlawful deduction from wages under section 13 Employment Rights Act 1996 (ERA), alternatively breach of contract in relation to that day's pay.
6. Under section 13 EqA:
 - (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.

7. So, for the discrimination claims, we have to decide whether the company, in not appointing him or withdrawing an offer, treated him *less favourably* than it treated or would have treated someone else in the same circumstances apart from his age group, race or someone who was not married or in a civil partnership.
8. As to the wages claim, the question is simply whether he was entitled to be paid for the induction day, either as a matter of law or by agreement.

Burden of Proof

9. Discrimination is rarely expressed openly, and may have to be inferred. There is a particular provision at paragraph 136 EqA dealing with the burden of proof which provides:
 - (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.
10. This was considered by the Court of Appeal in **Ayodele v CityLink Limited** [2017] EWCA Civ 1913, where the Court explained that this involved a two-stage approach: in the first stage the claimant has to prove facts from which the Tribunal *could* conclude, in the absence of an explanation from the respondent, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case.

Procedure and evidence

11. This hearing was carried out by video link (CVP) with only minor technical difficulties. In addressing these issues we heard evidence from Mr Fernandes, and on behalf of the company from:
 - a. Ms Soluchna Goraya (generally known as Ritu), the Managing Director, who conducted the interview;
 - b. Mr Sohail Shamsi, the Operations Director, who was also at the interview; and
 - c. Mr Haroldas Bendziunas, the Payroll Manager, who carried out an internal investigation.
12. We should say at the outset that we found some difficulties with the account presented by the respondent. There were a number of inconsistencies and implausible features, which we will detail below, whereas the account given by Mr Fernandes was, we felt, consistent, detailed and plausible throughout. Our findings

therefore reflect the totality of the evidence presented, but we will deal with the points one at a time.

Findings of Fact

Discrimination

13. Mr Fernandes was 45 at the time and had over 20 years working experience, mainly in accounts. He was qualified to ACCA level and had been earning £24,000 a year with the NHS. The respondent agency deals mainly with manual workers such as warehouse operatives.
14. Mr Fernandes put his CV on an online forum called CV library. Ms Goraya spotted it and thought he would be suitable to fill a vacancy they had at the agency. One of the recruitment consultants had given notice and was leaving in May 2019.
15. She called him on 20 May to see if he would be interested in a role as recruitment consultant. There is a sharp disagreement about what was said. He says that she asked him his age or date of birth three times and each time he did not give her the information. She says that she only asked him if he was over 18, one of their standard questions.
16. We prefer the evidence of Mr Fernandes on this point, and it seems to us a telling one. Ms Goraya already had his CV. It states that he had over 20 years' experience, so it makes little sense to ask someone in those circumstances if they are over 18. Given our overall view of Mr Fernandes' credibility we accept that he was asked repeatedly about this point, which seems to have been the main concern about his appointment. He clearly had a good record of employment, with a strong CV. It shows his IT skills, customer service skills and professional qualifications.
17. In any event, Ms Goraya invited him to come in for an interview the next morning, which he agreed to do. The office was busy so they went a few doors down to a KFC for a coffee. This time both Ms Goraya and Mr Shamsi were there.
18. Mr Fernandes and Mr Shamsi had to wait for Ms Goraya to arrive. While they were waiting, Mr Shamsi told him that 90% of their temporary workers were from India, out of which 60%-70% were from Goa. He was already aware from his accent that Mr Fernandes was from Goa and this was meant to be encouraging.
19. When Ms Goraya arrived she said they needed someone to start immediately as a member of staff had given leaving notice. We accept that, because she said at this hearing that they left in May. There was also some discussion about how he would get to work and whether he drove. He explained that he lived nearby and could walk to work.
20. They went on to discuss Mr Fernandes' immigration status and right to work. We accept that, given the nature of their work, this is an important consideration which

may have been raised in interview rather than, as is more usual, when an offer of employment is made.

21. Mr Fernandes says that he was asked if he had a Portuguese passport, and that Mr Shamsi pulled a face when he said no. That may have been a misunderstanding on Mr Fernandes' part. There is no obvious reason why this would make any difference. He is still in Indian national but has indefinite leave to remain in the UK – what is known as 'settled status' – and has had for over ten years. Indeed, from the company's point of view being from Goa was an advantage, given that some many of their workforce is from there. Oddly, at this hearing, both directors appeared to think that Mr Fernandes did have a Portuguese passport, so his answer does not seem to have registered with them.
22. In any event, we prefer the view that these were direct questions put to him rather than simply volunteered by him in general conversation. The two directors may have started by asking Mr Fernandes to tell them about himself but he was clearly reluctant to do so. Perhaps with his NHS background he was aware that such questions are often inappropriate and may indicate some prejudicial thinking. (His ACCA training covered such procedures.) That reluctance is shown by his refusal to give his age in the initial telephone conversation with Ms Goraya. He also explained in his witness statement that he always removes his wedding ring before interviews, for the same reason.
23. It seems to us most likely that there were also then further questions from Ms Goraya and Mr Shamsi which revealed that he was married, had a son, the age of the son and where he went to school, and that that information was given reluctantly.
24. We formed the view that while Ms Goraya was keen to appoint Mr Fernandes straight away, Mr Shamsi was averse. We take that view partly because Ms Goraya contacted him, having seen his CV, and because there was an immediate vacancy. Equally, on the other hand, Mr Shamsi took steps to find other candidate immediately after this interview.
25. There was also a discussion about salary. Ms Goraya said it was £19000 per annum, which he agreed to. Mr Fernandes' account is that she simply offered him the job at that point and said that she would train him, suggesting that he come in on 28 May for 4 hours. That seems to us plausible as the only obvious shortcoming he might have was lack of experience in recruitment. However, Mr Fernandes went on, Mr Shamsi objected and said "Not now Ritu; we will give him a call later and give him the outcome'.
26. We accept that there was some such exchange. Hence, Ms Goraya was keen to recruit him but Mr Shamsi was not. It is not clear to us however how matters were left. Mr Fernandes certainly believed that he had been offered the job and was coming in on 28th to have some training, and be paid. Equally clearly, when he turned up that day, there was no training from Ms Goraya, and in fact they hardly

spoke. The company's position is that this was simply an assessment. Doing the best we can with the information available it seems most likely that Ms Goraya wanted to appoint him at that interview, but did not absolutely commit herself to doing so, and shortly afterwards either went cold on the idea or was talked around. In fact she seems to have had little involvement in the process from then on, which was handled by Mr Shamsi.

27. So, Mr Fernandes left that interview believing that he had been offered the job. That was certainly not Mr Shamsi's intention. He was handling the recruitment process and he wanted to make sure that they got the best candidate for the job. Consequently, shortly after that interview and on the same morning, he uploaded a job advert online.
28. The wording of that advert is also revealing. It refers to successful candidate displaying passion and energy, phrases which are often used to imply a younger person.
29. That evening he sent out emails to those candidates who were to be invited to an interview. That email made no sense in Mr Fernandes' case, since he had just had an interview. He must however have realised that it was automatically generated.
30. He also rang Mr Fernandes that evening. It is not clear why, since they had met the day before and agreed that he was coming into the office on 28th. Mr Shamsi makes no mention of it in his witness statement. It seems most likely to have been an attempt to make clear to Mr Fernandes that it was just for an assessment, but if so it was unsuccessful, since he turned up that day still believing he had been appointed.
31. When Mr Fernandes came in on 28 May he was met by a member of staff called Queency Rodrigues. She is no longer there. He was expecting to meet Ms Goraya on his first day at work but Ms Rodrigues explained that Ms Goraya did not get in till 12. There was then some waiting about. He was asked to enter his own details on the computer system, as though he was a candidate for temporary work through the agency. Then he was asked to input the details of a couple of candidates who came into the office, so he interacted with them and checked their documents, before going through the same data entry process.
32. Mr Shamsi was in the office but had little or no interaction with Mr Fernandes. Ms Rodrigues was the only member of staff he had any real dealings with. After three to four hours he was told by Ms Goraya to go home and they would let him know. That made clear to him that he had not got the job and was still just a candidate. He did not see or say goodbye to Mr Shamsi.
33. There was no written recruitment process. In fact there was no evidence of the process followed in the case of any of the candidates, let alone their qualifications or experience. There is no CV or original record relating to the successful candidate

either. It also seems that only those without recruitment experience were required to come in for an assessment.

34. Further, no written assessment made by Ms Rodrigues about Mr Fernandes at the time or later, and he was not required to carry out any other tasks apart from this data entry. She gave brief verbal feedback to Ms Goraya and Mr Shamsi that Mr Fernandes seemed fine.
35. There is a contrast between the respondent's written and oral evidence on this assessment. According to Mr Shamsi's witness statement at paragraph 19:

During the assessment stage, I took note of:

 - a. How long it took the candidate to register themselves and others;
 - b. How accurate the registration was and whether there were any errors; and,
 - c. The interaction between the candidate and the applicants looking to be registered.
36. However his oral account was that he hardly saw Mr Fernandes that day - something Mr Fernandes agrees with – that he was doing other work as well and that Ms Rodrigues was carrying out the assessment. The information he had about Mr Fernandes all came from her.
37. There a more contemporaneous account from Ms Rodrigues at page 72 which shows that she simply asked him to complete his own registration and those of two work-seekers, then got on with her other work.
38. We conclude that Ms Rodrigues was the only one dealing with this assessment, and that it was a superficial exercise. It also became clear that no one looked at his HR Form that he completed, or the forms that he did for the candidates who came in to be registered. So all that was considered was how quickly he completed the task.
39. As a footnote, one consequence of Mr Fernandes putting his own details into the system is that it generated a temporary worker's contract for him. He also began to receive a stream of information from the agency about temporary posts, none of which were of any interest to him. They continue to this day.
40. It is hard to see any real point to this assessment. It does not seem to have assessed many of the skills required of the role, save for data entry. Even that was not monitored or recorded. The main advantage appears to have been for the respondent to get Mr Fernandes to register himself on their system.
41. On 5 June 2019 Mr Fernandes noticed the online advertisement for the role which had been posted on 21 May, just after his interview. He was indignant and felt that he had been misled. He had been told, for example, that experience in recruitment was not needed, but the advert said otherwise. He then wrote his letter setting out

his version of events.

42. He asked them to delete all the information they had, he suggested, dishonestly obtained about him, and they then deleted all evidence of the recruitment exercise, not just the data he had entered on the system. It seems that his email address has not been removed, hence the continuing job offers.
43. There was an internal investigation carried out by Mr Bendziunas, the Payroll Manager, but this did not involve speaking to Mr Fernandes, and he was more junior than the two directors he was apparently investigating. His conclusion was that there was no discrimination, on the basis of their accounts, but we did not find that of much assistance on the key issues of what happened at the interviews and at the assessment, having heard from both sides at this hearing.
44. We heard oral evidence from Mr Bendziunas and Ms Goraya that the successful candidate was a lady called Amelia. Written details about her were given to Mr Fernandes before he presented his claim, according to which she was from Romania, aged 33, married with one child and had experience in recruitment. She has now returned to Romania and left in March 2020, when the first lockdown began. There is nothing from her or, again, any original record of her employment, but these facts were not challenged, Mr Fernandes had made checks on LinkedIn about her, and so we accept that those basic details are correct.
45. A table was provided at page 85 of the bundle setting out the nationality, age, ethnicity, and marital status of each member of staff, and for the same reasons we accept that as accurate. It shows that of the nine listed, which did not include Amelia, four were of Indian origin, one Pakistani, one African and three Caucasian – Lithuanian, Polish and Romanian. Of these, only four were recruitment consultants, as opposed to managers or directors. They included:
 - a. a Romanian, Female, aged 25 to 30, married with no children;
 - b. a Portuguese national, of Indian ethnicity, Female, aged 25 to 30, married with no children;
 - c. another Portuguese national of Indian ethnicity, Female, aged 20 to 25, married with no children;
 - d. a Polish national, Female, aged 30 to 35, single with children.

Conclusions

46. Applying these facts to the relevant tests the first question is whether Mr Fernandes has satisfied the initial burden of proof, i.e. whether there are facts from which we could decide, in the absence of any other explanation, that the respondent had discriminated against him. In reaching our conclusions on this aspect we have had regard to the totality of the evidence and our findings as a whole.

Race

47. We did not see any real basis for concern on Mr Fernandes' part about this aspect. It seems to us clear that being from Goa was clearly a bonus. It may well have been why he was contacted in the first place. We accept that the majority of the candidates for work are from Goa, and more generally, over half the staff are of Indian or Pakistani ethnicity.
48. He suggested that Mr Shamsi wanted to know at interview if he had a Portuguese passport and then decided against him when he told he did not. As already noted, that makes little sense. He had indefinite leave to remain, so having a Portuguese passport would make no difference to his immigration status.

Marital Status

49. The suggestion here is that they wanted to know if he had any domestic commitments. If not, that was better for them as he could work longer hours. However, protection from discrimination on grounds of marriage or civil partnership is very narrow. It only covers those who are married etc, rather than those in a long-term relationship. It is about legal status, not domestic responsibilities. We are not satisfied that the respondent had any interest in the legal status of his relationship. In any event, all but one member of staff was married, including the successful candidate, Amelia.

Age

50. This is the gist of the claimant's case. It begins with the fact that he was contacted by Ms Goraya, rather than applying for a job, and quizzed about his age. We have already accepted that.
51. That itself is a fact which from which the court could decide, in the absence of any other explanation, that she was reluctant to recruit him on grounds of age, and we do so. It is true that she went on to invite him to an interview the next day but that may well be because she was keen to appoint someone straight away.
52. She says that they were not concerned about his age but that is undermined by our findings that at the interview that was further exploration of Mr Fernandes' domestic circumstances, including about his son and even his son's age. We conclude that in doing so they were fishing for information about his age.
53. Those few facts suffice to persuade us that the initial burden on the claimant is satisfied and then burden shifts to the respondent to prove that they did not discriminate. This is a high hurdle.
54. To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of age: per **Barton v Investec Securities Ltd**. [2003] ICR 1205, approved by the

Court of Appeal in **Igen v Wong**, [2005] ICR 931. Further, the expectation in those guidelines is that cogent evidence is required.

55. Here, by contrast there is little or no positive evidence from the respondent to counter this impression, or about the recruitment exercise generally. The candidate they appointed was, at 33, considerably younger and in a different age group from Mr Fernandes. Further, all of the recruitment consultants are in a younger age group. The best argument for the respondent is that Mr Fernandes was invited back for the assessment exercise despite his age, but as already noted:
- a. the assessment seems extremely superficial;
 - b. no details were provided in advance;
 - c. there was no written plan;
 - d. there was no process for documenting what happened;
 - e. there was no process for comparing his work with that of other candidates;
 - f. it is not even clear whether the successful candidate had an assessment, since she had recruitment experience;
 - g. the exercise did little to address the skills required for the job; and
 - h. they did not follow up the outcome with him.
56. Overall, the impression gained is that they had washed their hands of him by the time he turned up for the assessment exercise. For all those reasons, the respondent has in our view fallen well short of the standard required to show that it did not discriminate, and the complaint of age discrimination is upheld
57. As to the wages claim, since we conclude that there was no definite offer of employment at the interview, it must follow that no wages are due for the time spent in the office on 28 May.

Remedy

58. Turning to the question of remedy, we heard submissions from the parties, firstly on the extent of compensation for injury to feelings.
59. The President of the Employment Tribunals has issued periodic guidance on the appropriate award in each Vento band, and this provides that for claims submitted after 6 April 2019 (under the Second Addendum):
- a. awards in the lower band should fall between £900 to £8,800;
 - b. awards in the middle band should fall between £8,800 to £26,300; and

- c. awards in the upper band should fall between £26,300 to £44,000, with the most exceptional cases capable of exceeding that upper limit.
60. Mr Fernandes submitted that an award in the middle band was appropriate, whereas Mr Scott submitted that the bottom of the lower band was the right area. We saw no basis for an award in the middle band. Although not a requirement, there is no medical evidence to show any marked effect on Mr Fernandes, and the episode itself was a brief one. It is a far cry from the position of someone enduring discrimination at work for any length of time. Further, we have to reflect the fact that he was unsuccessful in other aspects of his claim, and that age discrimination did not seem to have been a strong concern of his, even in his submissions. His main feeling appears to have been annoyance or vexation that he was invited for interview, offered the job (as he saw it) then put through a sham assessment, all for no reward. That is understandable, but the award of compensation has to reflect the extent of the award for injury to feelings on grounds of age discrimination. Taking all those factors into consideration we placed this award in the bottom half of the lower band, in the sum of £3,000
61. Interest is due on that sum at 8% from the date of discrimination, on 28 May 2019, which amounts to £405
62. As to financial loss, we had also to assess the prospects of him being appointed to that role, absent any age discrimination. On the one hand, he was very close to having the job confirmed, and for good reason. On the other, the respondent did choose to look at other people for the job, before confirming the offer, and that revealed the successful candidate, Amelia, and she had relevant recruitment experience. It may be however that without any discrimination in play, Mr Fernandes would simply have been offered the job. Doing the best we can with these competing considerations, we assess that there was a 50% chance of his being appointed in other circumstances.
63. He claims 2 months' gross pay by way of losses, but the calculation must be on a net basis, and given our 50% figure, the two months is reduced to one. Hence, one month's net pay is awarded, in the sum of £1,220, together with interest from the mid-point between 28 May 2019 and today, of £82. The total financial loss was therefore £1,302, and the overall total is **£4,707**

Employment Judge Fowell

Date 01 February 2021