



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110531/2021

Hearing held remotely in Glasgow on 14 – 17 September 2022

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Employment Judge D Hoey

Members: F Paton and S Keir

Mr L Ramos

**Claimant
In Person**

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**Lady Coco Ltd t/a Shamela's Fresh Hot and
Cold Food**

**Respondent
Represented by:
Ms Yeo -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal was issued orally (with reasons) to the parties with the judgment being sent to the parties on 16 September 2022. Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

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REASONS

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1. This was a claim for sex discrimination raised in a claim form presented on 28 July 2021. The hearing lasted 3 days (which included deliberation, issuing oral judgment and dealing with an application for a preparation time order in respect of which an oral judgment was issued). The case had been subject to considerable case management following a number of applications by the claimant.

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2. The claimant had also sought reconsideration of the judgment and detailed written reasons were issued explaining why there was no reasonable prospect of successfully revoking the judgment.

3. As the parties not legally represented the case begin with a discussion as to the rules with regard to the claim being made and the procedure followed and how evidence is led and a decision reached. This covered the importance of the overriding objective, of the need to ensure that all decisions are just and fair and that the parties work together.
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4. The parties had provided their own papers to which the Tribunal had regard. The claimant had produced one bundle with 26 documents with further documents produced. The respondent produced a number of documents (including copies of other claims raised by the claimant and responses to issues the claimant had raised).
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5. The respondent had accepted that an advert which they had placed online to work in a Chinese restaurant in Glasgow stated "female takeaway staff needed" which the respondent accepted was unlawful. The only issue was whether the claimant genuinely wished to apply for the position since if he had, he had been unlawfully discriminated against but if he had not, there was no less favourable treatment.
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6. The hearing was conducted remotely. While there were some connection issues, both parties were able to fully participate in the hearing. The claimant gave evidence orally with him having submitted a written witness statement and a number of written submissions which the Tribunal considered. Only the claimant gave evidence which he did orally and having provided a written witness statement (running to 16 pages which was produced on the morning of the hearing).
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Facts

- 25 7. The Tribunal was able to make the following facts from the evidence presented orally and in writing having assessed the evidence led.
8. The claimant was born in 1964 and stayed in Hounslow London. He came from France in the 1990s. He had been a legal adviser, worked in a factory and restaurant and had been a self-employed interpreter and market researcher. He had a masters degree in international trade law and
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accountancy and had an AAT Certificate in accounting. He had worked in market research and IT. He received an income from part time translation work and market research.

- 5 9. The claimant had last worked in hospitality in the 1990s. He had no connection with Scotland nor genuine interest in moving his life to Scotland. He was settled in Hounslow, London.
10. The respondent was a Chinese restaurant based in Ruchill, Glasgow.
- 10 11. The claimant searched online and saw the advert for the position in Ruchill, Glasgow. The advert said: "Takeaway female staff who can speak English fluently needed to join Shamila's café near the beautiful area of Ruchill park. The candidate needs to help in customer service and helping in the kitchen. The selected candidate also needs to work the weekend full time but he/she will have 2 days off during the week. The salary is negotiable and depends on your experience". A mobile number then followed for contact details, with the location being given.
- 15 12. The role was based in Ruchill, an area of high deprivation with social challenges in Glasgow.
- 20 13. The claimant did not contact the respondent to enquire about the role nor take any steps to seek information about the position. He did not apply for the role nor contact the respondent to discuss it.
14. The claimant had not applied for other roles in Scotland. He had applied for a number of roles in England and Wales (usually where there was a similar advertisement).
- 25 15. The claimant had raised a number of claims against employers who had placed similar advertisements seeking compensation arguing the advertisements were unlawful sex discrimination. Judgments were issued and the applicable law was clear. See (for example) 2601315/2021, 3302095/2020, 1402393/2020, 3331562/2018, 2303987/2018, 3318989/2019, 1805271/2019, 3313977/2019, 2206048/2019, 30 3327155/2019, 2204604/2020 and 3318988/2019. There are others. Some of

those judgments set out the legal position, including that jurisdiction for unlawful adverts rests with the Equality and Human Rights Commission (see paragraph 33 of 2204604/2020) and around costs, including vexatious conduct (see paragraph 31 to 32 of 2204604/2020).

- 5 16. In relation to the current role, the claimant had no genuine intention of applying for the position with the respondent. His sole aim was to seek money from the respondent (which he would seek to do by raising an Employment Tribunal claim against the respondent and thereafter seek compensation from the respondent during the process and then withdraw his claim).
- 10 17. The claimant received an income from being a self employed interpreter and from some market research work he did. He was an articulate and intelligent person who was capable.

Observations on the evidence

- 15 18. The Tribunal did not find the claimant to be credible and found him lacking in candour. The claimant argued that he was genuinely interested in the role and said he thought about moving to Glasgow as the cost of living was less than in London. The Tribunal did not accept the claimant's evidence.
- 20 19. The claimant had not worked in hospitality since the 1990s. The claimant had made no effort to research life in Scotland, life in the location or the role in question. While the claimant had said he wished to move to Scotland because the cost of living was less, the Tribunal considered that was an issue the claimant had contrived as an explanation following the raising of this claim. The claimant was not convincing. The Tribunal was satisfied the claimant in fact had no intention of applying for this particular role.
- 25 20. The claimant argued that another reason he wished to move to Ruchill was because the advert had referred to the location as being near a "beautiful park". The claimant had made no effort to test the veracity of that assertion to check whether the place the claimant was allegedly intending to live and work was in fact suitable for him (or anything about the "beautiful park").

21. The claimant presently lived with a friend in Hounslow and argued that he would move to a hostel in Glasgow, but had made no effort to locate any such hostels. The Tribunal did not accept this evidence and considered that he was seeking to justify the position after the event.
- 5 22. The claimant said he changed his mind soon after applying and that was why the claimant had made no other applications for work in Scotland. The Tribunal did not consider that the truth given the claimant's earlier assertion that he considered the location to be near a beautiful park and the cost of living was (allegedly) less. Instead the Tribunal found that the claimant did not
10 in fact want to work in Scotland at all.
23. The claimant was articulate and intelligent and capable of carrying out this role and others and given his qualification and earning capacity he was clearly able of applying for any such role he wished. The Tribunal did not accept his evidence that he had genuine intention of moving to Scotland to start a new
15 life given the nature of the particular role, the claimant's background and the surrounding circumstances. The claimant was wholly unconvincing.
24. The claimant had not made an application for the role, arguing that he was deterred because of the nature of the advertisement. The Tribunal did not accept that assertion. While the claimant had found some evidence to back
20 up that assertion, the Tribunal considered that this had been material the claimant found after the event in an attempt to seek to persuade the Tribunal as to the position. As a matter of fact, the Tribunal did not consider the claimant to be at all deterred from applying for the role. He was clearly capable of doing so and clearly capable of setting out his position. He was articulate
25 and understood the law. If the claimant was genuinely interested in applying for the role he would have contacted the respondent (whether in writing or otherwise) and asked to be considered. Had he done so, it was highly likely he would have been considered for the role and could even have been successful. The claimant was demonstrably able to explain what he was
30 seeking and why. The existence of the advert in no way materially affected that matter or the claimant.

25. The Tribunal did not accept the claimant's evidence that a reason he had not applied for the role was because (in his opinion) the advert was "fake". The Tribunal was satisfied the advert was genuine and the claimant's assertion had been contrived following the raising of the claim to seek to support his position. There was no reasonable basis at the time the claimant saw the advert for him to believe the advert was fake. The claimant saw the advert and believed this was an opportunity for him to seek money from the respondent given the unlawful nature of the advert. The claimant argued that the advert was fake because it asked for a female when there was no need for a female. The Tribunal did not accept that the advert was fake and the claimant's submission was based solely on a belief with no attempt whatsoever to contact the respondent or to verify the position in some way. The Tribunal did not accept the purpose of the advert was for identity fraud and there was no plausible evidence of this. While the advert referred to a female worker it did refer to "he/she" and if the claimant was interested in the role he would have made some contact with the respondent or taken some steps given the impact upon the claimant's then current circumstances.
26. The Tribunal considered that the claimant's explanation that he wished to avoid conflict (and hence did not contact the respondent to apply for the role which he believed would be contentious as he was a man) lacked credibility. The claimant was capable of setting out his position given his clear understanding of the law and his skills. He was articulate. If he genuinely wished to be considered for the role there was no basis in fact that prevented him from contacting the respondent nor from at least applying for the role.
27. The Tribunal did not accept the claimant's explanation (in his written case which did not feature in his oral evidence) that the reason he did not apply for this position was because he did not meet all the criteria and each time he provides his CV to a third party that is confidential information which increases the chance of ID fraud. He wrote that he could only take this risk when there is a chance to be successful where he meets all the criteria, including being a female. He then said that he "cannot afford to waste time replying to discriminatory adverts for positions which he had no chance to be successful".

The Tribunal found this not to be the factual position. Firstly the claimant is no different to every other genuine applicant for a role with regard to production of a CV and if an applicant wishes to be considered for the role a CV should be provided. There was no evidence that the chance of ID fraud from a CV was anything other than relatively low (and the claimant was no different in this regard from anyone else who genuinely wished to be considered for the role and could filter his CV accordingly). Secondly, the claimant made no effort to check with the respondent. While reference in the advert was to “female” the advert referred to “he/she” (which makes sense given the role is not obviously a role that only female could do, a point known by the claimant given he notes this was not a role only a female could do) and there was no reasonable explanation for the claimant not making enquiries in this case. If the claimant was genuinely interested in this position, given the context of this case, he would have taken some steps to contact the respondent and research matters. He did none of that.

28. The claimant also argued that he did not want to mislead the respondent by applying and had he applied he could be accused of being dishonest “by applying only to claim compensation because the claimant knew he had no chance to be successful because he is not female”. This was illogical. Had the claimant genuinely wished to apply for the role he would have done so. He knew the role was a role that did not genuinely need a female only. It was ironic to say he did not apply in case he was believed to be seeking compensation and then seek compensation when not applying for the role.

29. The claimant also suggested in his written submission that it was common sense that a male would not apply for the role. That would be so if the male was not genuinely interested or the role was obviously not suited but a male who was interested in this particular role, in the Tribunal’s view, would take some steps and make an application.

30. With regard to applying for other roles, the Tribunal found the claimant evasive and lacking in credibility. The claimant had been asked about other roles for which he had applied but he refused to answer the question. The claimant alleged he was at risk of “victimisation” if he disclosed the fact that he had

5 applied for other similarly advertised roles, such a question was relevant given it affected the claimant's credibility (since the respondent argued that the claimant's approach was to raise claims in similar situations where the claimant had no intention of applying for roles). The claimant had been advised that such an issue was potentially relevant and could be raised at the hearing during discussion at an earlier preliminary hearing.

10 31. The claimant was warned that his refusal to answer the question would be taken into account in assessing matters. The claimant continued to refuse to confirm that the claims the respondent had identified (as set out above) were claims the claimant had raised, which were public judgments issued on the Employment Tribunal website, despite the details of such claimants being identical to that of the claimant.

15 32. In short, the Tribunal was satisfied from the evidence presented that the claimant had no genuine desire of applying for the role the respondent had advertised. He was solely using the Tribunal process to seek money from the respondent.

Legal principles

20 33. In order to claim unlawful discrimination there requires to be less favourable treatment. The authorities are clear that there is no less favourable treatment if the claimant had no genuine intention of applying for the role. In other words the protection does not apply to individuals who had no intention of taking a job even if offered it – as there would be no detriment in being rejected. See **Keane v Investigo** UKEAT/389/09.

25 34. In **Berry v Recruitment Revolution** UKEAT/190/10 at paragraph 29 the President of the Employment Appeal Tribunal (LJ Underhill) said: "*We wish, however, to emphasise that the purpose of the Regulations is not to provide a source of income for persons who complain of arguably discriminatory advertisements for job vacancies which they have in fact no wish or intention to fill, and that those who try to exploit the Regulations for financial gain in such circumstances are liable, as happened to the Claimant in the **Investigo** case, to find themselves facing a liability for costs.*"

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35. These principles were applied to the predecessor to the Equality Act 2010 but have recently been confirmed as equally applicable to the current law. This was applied in **Garcia v Leadership** 2022 EAT 22 where Williams J set out the law as follows: “48. *In terms of the relevant circumstances that will give rise to unlawful direct or indirect discrimination, section 39(1)(a) Equality Act provides that an employer must not discriminate in the arrangements he makes for deciding to whom to offer employment. In contrast to some of the other forms of conduct by employers that are included in section 39, there is no explicit requirement that the person in question (B) must have been subjected to a detriment. However, the EAT has determined that the claimant must have been genuinely interested in the advertised job to be able to rely upon section 39. In **Keane v Investigo & Ors** UKEAT/0389/09 (“Keane”) the claimant unsuccessfully argued that it was unnecessary for her to show that she was genuinely interested in the roles advertised and it was sufficient if the terms of the advertisement indicated age discrimination. Underhill P observed that the definition of direct discrimination, requiring “less favourable treatment” and the concept of indirect discrimination requiring the claimant to have been put at his or her “disadvantage” both connoted the need to show a comparative detriment on the part of the claimant and if she was not interested in the positions she could not be said in the ordinary sense of the word to have suffered a detriment (paragraphs 20 and 21). In **Berry v Recruitment Revolution** UKEAT/0190/10/LA, paragraph 15 Underhill P endorsed his earlier approach in **Keane**. He concluded his judgment by noting that “the purposes of the Regulations is not to provide an income for persons who complain of arguably discriminatory advertisements for job vacancies which they have in fact no wish or intention to fill” (paragraph 29).”*

Submissions

36. The claimant had prepared a detailed legal submission (a “skeleton argument”) running to 7 pages which set out what the key facts and law was from the claimant’s perspective. The Tribunal considered the submissions together with the applicable law and the facts as found. The Tribunal also considered the respondent’s submission. It is not necessary to repeat the

submissions here and they are in the Tribunal's case file. The Tribunal took time to consider both parties' submissions. The issue in this case was narrow and amounted to whether or not the claimant genuinely wished to apply for the role. The Tribunal took time to consider the evidence that had been presented before it and reached a unanimous view.

Discussion and decision

37. The Tribunal was unanimous in its view having carefully considered the evidence in this case.

38. The claimant had no genuine desire of applying for the role nor of in fact working in it. The sole purpose of the claim was to seek money from the respondent. The claimant was not credible in his evidence and from the surrounding circumstances the Tribunal was satisfied the claimant had no desire to apply for the role and the claim is accordingly unsuccessful.

39. The Tribunal was satisfied the claimant's motivation was solely for financial gain. The Tribunal found the claimant lacked credibility. He was evasive and we did not find him to be genuine. The Tribunal found from the evidence before the Tribunal that the claimant had no desire to fill the vacancy in question and as such the Tribunal finds that the claimant was not subjected to less favourable treatment.

40. The Tribunal was satisfied the claimant had no intention of applying for this role and his only purpose in raising this claim was to seek money from the respondent. His claim is therefore ill founded and it is dismissed.

41. The claim was accordingly dismissed.

Employment Judge: D Hoey
Date of Judgment: 14 October 2022
Entered in register: 19 October 2022
and copied to parties