EMPLOYMENT TRIBUNALS

Claimant: Mr S Mutangadura

Respondent: The Home Office

Heard at: Manchester **On: 25,26 October 2022 and 8 March 2023**

Before: Employment Judge Leach, Mrs A Jarvis, Dr H Vahramian

REPRESENTATION:

Claimant: In person

Respondent: Mr D Tinkler (Counsel)

JUDGMENT

The unanimous Judgment of the Tribunal is that the claimant's complaint of direct discrimination (protected characteristic, race) does not succeed and is dismissed.

REASONS

Introduction

1. This case is about the claimant's application for employment with the respondent. He successfully applied for 2 roles; an administrative officer role and an executive officer role. He was offered employment, subject to security clearance.

2. The respondent has 3 levels of security clearance. The level applicable to these roles was a basic clearance level called CTC. Unfortunately the claimant was told that he needed the next level of security clearance called SC. The claimant alleges that he was singled out for the higher clearance level because of his race.

3. It became apparent during the Tribunal process that the claimant's complaint also included allegations that he was discriminated against when he raised queries and concerns about the level of security clearance that was applied.

4. A final hearing in this case took place on 6,7 and 8 August 2019 when all of the claimant's complaints were dismissed.

5. The claimant appealed to the Employment Appeal Tribunal (EAT) against 2 findings made by the Employment Tribunal. By Judgment dated 1 July 2021, Judge Keith upheld his appeal against one of these. Judge Keith remitted the case to the Employment Tribunal to determine the finding that had been overturned on appeal. It decided that the same Tribunal should determine the complaint.

This Tribunal

6. One of the members of the Tribunal (the Employment Judge) has now retired. The 2 members, Dr Vahramian and Mrs Jarvis, were on the Tribunal that heard and determined the claim in August 2019. The Regional Employment Judge appointed Employment Judge Leach to sit on the Tribunal for the purposes of this hearing.

The issues for determination.

7. We need to decide whether, through the actions of one its employees called Shyla Pillai (SP), the respondent directly discriminated against the claimant. The issues relevant to this outstanding complaint were identified in discussion with the parties at a case management hearing on 10 September 2021 and set out in the Case Management Summary document sent to the parties following that hearing. They are as follows:-

> *(1) Are there facts from which the Tribunal could conclude that in sending her email to the claimant on 14 November 2017 Shyla Pillai treated the claimant less favourably because of his race than a hypothetical comparator of a difference race would have been treated?*
>
> *(2) If so, can the respondent prove on the balance of probabilities that there was no contravention of Section 13 Equality Act 2010 because the claimant's race was not a reason for the treatment?*
>
> *(3) If not, what is the appropriate remedy for race discrimination?*

8. We refer below to the email from Shyla Pillai to the claimant on 14 November 2017 as "the Email."

This hearing.

9. The hearing was listed to take place over 2 days, 25 and 26 October 2022. The Tribunal had been allocated reading/refresher time before the hearing itself.

10. Unfortunately, counsel instructed by the respondent was too ill to attend on 25 October 2022. We were able to speak with Ms Khan of the Government Legal Service and with cooperation from both parties, resolved to begin the hearing at 09.30am on 26 October 2022. The respondent was able to instruct alternative counsel, Mr Tinkler,

who was aware of the case having represented the respondent at the Employment Appeal Tribunal. We were unable to reach our decision on 26 October 2022 and we reconvened (in Chambers) on 8 March 2023.

11. We had a file (bundle) of documents that had been prepared for the purposes of this second final hearing. Reference to page numbers in this Judgment are to that bundle.

12. We heard from the following witnesses:-

a. The claimant
b. Stephen Cooke, Risk, Resource and Accommodation Safety Senior Manager, based in the respondent's offices in Liverpool ("SC")
c. Shyla Pillai, Helpdesk Officer in the respondent's departmental security Unit ("DSU") based in the respondent's offices in Croydon ("SP").

13. The Tribunal heard from the claimant and SC at the (first) final hearing in August 2019. SP did not give evidence at that hearing. In his judgment in the EAT, (para 58) Judge Keith said this:

> *"In remitting the matter back to the original ET, I reiterate the preserved findings and the point that the Appellant's case is not that he was the subject of systemic discrimination. The only remaining claim to determine is in relation to Ms Pillai's email. Whether the Respondent now seeks to adduce evidence from Ms Pillai is a matter for it, as she may not even still be employed by the Respondent and may not be contactable."*

14. Ms Pillai is still employed by the respondent and attended this (second final) hearing to give evidence.

Findings already made

15. At the first final hearing, the Tribunal made many findings of fact that are not now challenged. The findings already made provide relevant contextual information. They are set out in the full reasons for the Judgment, sent to the parties on 5 November 2019 (we call this the 2019 Judgment). Those that are directly relevant to the issues we need to decide are at paragraphs 21 and 22 (page 87).

16. By way of brief summary:

a. In 2017, the claimant applied for 2 roles with the respondent, an Administration officer (AO) and an Executive Officer (EO).
b. The claimant's applications were successful. The EO was the more senior role. He was offered that role second (and a few months later than the AO role) and, once offered, that is the one that the claimant proposed to progress.
c. The offers to the claimant were subject to a security check.

d. The respondent has 3 levels of security check. The name of the level of check that should have been applied to the claimant is CTC. That is the lowest level of security check.
e. In fact, what the claimant was told was that he was to undergo the second level of security check called SC. That was an error made, not by the department that the claimant was being recruited in to but by a department called Government Recruitment Service (GRS).
f. The error was by a civil servant working in GRS, called Mr Holding. He input the wrong information in to the respondent's recruitment system.
g. The claimant was pretty sure that he was being made to undertake the wrong check and raised this with the respondent on various occasions between October 2017 and March 2018
h. It took many attempts on the part of the claimant over those months before the respondent finally acknowledged that an error had been made.
i. By that stage the claimant decided that he no longer wanted to progress with the recruitment and he did not take up the employment offered to him.

17. It is clear from the conclusions reached at the first final hearing that the treatment of the claimant was unacceptable in putting him on the wrong security clearance and then failing to correct this, even though the claimant provided the respondent with multiple opportunities to do so. As for what led to the claimant being initially required to undertake the SC clearance level, the Tribunal has already decided that it was a result of avoidable human error on the part of Mr Holding (a witness at the first final hearing but not at this second final hearing). That human error was caused or contributed to by a lack of training, lack of supervision, and high workload. (paragraphs 9-14 and conclusion at paragraphs 54-56 of the 2019 Judgment). There was no direct discrimination.

18. It is also clear from the decision (not challenged) that some of the tardiness in responding to the claimant's queries about the security level were due to (or contributed by) under resourcing and some "chaotic" circumstances in the relevant department; again the finding was that there was no direct discrimination (see particularly findings of fact at para 44-47 and conclusion at para 59)

Our fact finding

19. There is little in dispute about the relevant facts.

20. The claimant queried with Mr Holding the level of security clearance being applied and was told by Mr Holding on 31 October 2017, to contact Home Office security enquiries (page 155).

21. On the same day the Claimant then emailed the Home Office security enquiries helpdesk at the email address he had been provided (page 156). He received an automated reply telling him that there were unusually high volumes of queries impacting on response times.

22. The claimant had still not received a reply by 13 November 2017 and so, on that day, he sent a second email to the security enquires email address.

23. The second email (13 November) contained nearly the same information that he had sent on 31 October but he had not received a reply to. We set it out below:-

> *Hi,*
>
> *I have submitted the Security Questionnaire for the HOM/610/17 AO role. My understanding is that the for the HOM/610/17 role, the level of security check required is counter-terrorist check. This is confirmed in the job advert and in the Candidate Information Pack for this role. I believe that the questionnaire which I submitted was for SC clearance. I thought that for the CTC level of security check, a personal finance/credit check was not carried out. In the SC questionnaire, it asked for information on financial history, financial circumstances, assets and liabilities. I think that I may have been accidentally sent the link for SC clearance instead of CTC clearance. Can you please advise if an applicant's credit score/credit profile will have any bearing on whether an applicant gets security clearance for this role.*
>
> *I am looking forward to hearing from you.*

24. On 14 November 2017 (2 weeks after the claimant first emailed HO Security Clearance, but 24 hours after his most recent email) the claimant received a response as follows:-

> *Hi Simbirai*
>
> *The level of security clearance is requested for SC NOT* [typed in red font and capitals] *CTC.*
>
> *Many thanks*
>
> ***Shyla Pillai***
>
> *Security, Science & Innovation Directorate*
>
> *Home Office*

25. In his evidence, the claimant has referred to the Email as "cruel;" saying it led him to having a panic attack, that it was "unjustifiably vile."

26. We accept that the Email was sent to him at a stage when he had already queried the security level, when some of his emails appear to have been ignored and others had got him nowhere. We are sure that he was very frustrated.

27. We do not however find that it would be reasonable to describe the Email in the way that the claimant has. We maintain the description given to it in the 2019 judgment – that it was "curt" (see para 58). We would also describe it as; unhelpful, abrupt. It

does not engage in the level of detail provided in the claimant's query. It does not answer the query about credit score

28. SP says (and we accept) that she has no recollection of sending the Email itself. In this second final hearing, the claimant questioned SC about her evidence that she dealt with 50-70 queries a day and did so throughout the year. We accept that SC was dealing with a high volume of email traffic at the relevant time and spending substantially all of her working day doing this. We accept that, when dealing with emails, SP was aware of the extent of unanswered emails awaiting her attention. We also accept:-

a. that late 2017 was a busy year for SP. She worked on the security clearance helpdesk with one colleague only. There was significant recruitment taking place in 2017/18 due to the need to process residency for EU Citizens residing in the UK. This increase in recruitment activity meant that her team was particularly busy which required her to deal with a high volume of email queries on a daily basis.
b. that as of November 2017, the helpdesk on which she operated, had just stopped dealing with telephone queries. Therefore all queries were received by email.
c. when necessary to review data entries for a candidate for employment (held on a system called the DSU database) SP accessed the first page only on almost all occasions. This provided basic information only which would not include for example a candidate's nationality or ID details.

29. We accept that the Email was one of many transactions what will have been carried out by SP on the relevant day and that it is understandable that SP does not recall the Email. We believe her when she says she does not recall dealing it.

30. We have also taken account of the fact that the respondent did not initially pick up that the claimant had a specific complaint about the Email. Whilst this hearing has necessarily focussed on the Email, the case the claimant issued with the Employment Tribunal was principally about the decision to impose a higher security check than was required of other candidates. That meant that SP was not questioned about the Email until relatively recently. We comment further on this below.

31. As SP could not recall the Email, she had to provide evidence based on her recollection of the circumstances generally at that time and also to give evidence on what she would normally do and why, but without any specific recollection of sending the Email to the claimant.

<u>The claimant's complaint about the Email.</u>

32. It is relevant to note the following:-

a. that on 11 March 2018 the claimant raised concerns/complaints to the respondent about the way he had been treated. In this email the claimant noted that he had not received replies to some emails and that *"Some*

people within the Home Office security /pre-employment check set up were not very helpful."

b. That on 22 March 2018 the claimant said that he had been treated unfairly in the vetting process but did not specifically raise the Email.
c. In the Claim Form (ET1) dated 29 April 2018, the claimant makes no reference to the Email. The focus is on the decision to put the claimant through the wrong vetting process and arguments that was due to race and/or (at the time) disability discrimination. At part 8.2 of the claim form the claimant states *" The reason why I want to take the Home Office to Employment Tribunal is because I was required to undergo the SC vetting process while other applicants only had to undergo the less stringent CTC vetting process. I am black and I noticed that almost all of the applicants that I saw at the assessment centre were white."*
d. In a case management hearing held on 18 July 2018, it was noted that the claimant's complaint of race discrimination included the way that the respondent communicated with him about the security vetting issue, but no specific reference to the Email.
e. A preliminary hearing took place on 23 October 2018 when applications for strike out/deposit orders were considered. The judgment arising from this hearing noted specifically the Email (paragraph 13 of the Judgment, at Page 31 when the Email was described as *"somewhat terse"*).
f. In his written submissions provided at the first final hearing (a copy of which is at pages 43-70) the claimant puts forward the argument that the treatment that he received from Shyla Pillai is *"part of the overwhelming evidence directly connected to Mr Holding and a lot of evidence indirectly connected to Mr Holding which points to racism being the reason why I had to undergo the SC level of security check."* In other words, the focus of the case was on the respondent's decision to require the higher level of security check and to persist with this requirement in the face of the claimant's queries.
g. However in the same submissions made at the (first) final hearing, the claimant also makes specific allegations about the Email (see page 63 *"In light of the fact that I am a black man of African descent with an African name who was trying to apply to work for an organisation which does not have many black Africans working for it and all the surrounding facts, the reason why Ms Pillai subjected me to the less favourable treatment is because of my race. There is simply no other logical explanation for her vile treatment of me."*.

33. The claimant's focus on the email and SP has increased throughout the life of these proceedings. Inevitably its importance to the claimant has increased significantly following his successful appeal. In November 2021 (soon after the claimant received the outcome of his appeal to the EAT) the claimant submitted a questionnaire to the respondent asking questions and requesting information relating to the Email. The response was that documentation no longer existed (see further paras 56 and 57 below).

34. In his witness statement prepared for the purposes of this hearing, the clamant does not specifically refer to the Email as being direct race discrimination in itself or make any allegation that Shyla Pillai discriminated against him because of his race. At paragraph 28 of his statement the claimant describes the email as “very nasty” “ very cruel” that there was no empathy and that it led to the claimant having a panic attack. On this, see our comments at 27 above.

SP’s actions on 14 November 2017

35. SP is a junior civil servant. She joined the service in 1998 as an administrative assistant and has had one promotion since then. SP told us that she did not want higher promotion. She was content with her role and grade. SP did not know, until about September 2021 that she may have to provide a witness statement about her actions on 14 November 2017.

36. We accept SP’s evidence that she works as part of a diverse and multi-cultural team, that she has a diverse customer base and has worked with people (and handled enquiries from) people of all nationalities, ethnicities and cultures. We accept that in over 20 years as a civil servant she has never received a complaint concerning her conduct or performance, about discrimination or otherwise.

37. As noted above, SP gave her evidence without specific recollection of sending the Email. We find that she did so to the best of her ability, truthfully and candidly.

38. Having heard from SP, the claimant and considered the relevant documents, we make the following findings:-

a. On the occasion of the Email, SP’s department processed the emailed query within its target of 48 hours. It had failed to do this with the claimant’s first email of 31 October 2017. We find this gives an indication of the pressure the department was under at the time. The reason for this delay was the work pressure that the department was under.
b. Before replying to the claimant, SP accessed the relevant information on the respondent systems (contained on a database called DSU).
c. Having accessed that database, SP saw the level of security clearance required of the claimant to be the higher level (SC) and that is what informed SP’s reply to the claimant.

39. Having made these findings, we have gone on to consider:-

a. Why SP left matters there and did not query with others at the Home Office, whether the SC clearance was correct.
b. Why SP responded in the form that she did (particularly using red font and capitals).

40. We accept SPs evidence that she would not have queried the information provided by the DSU database and we find that she did not do so on that occasion. We accept that this was particularly the case in the pressurised working environment

at the time. It is possible that in a less pressurised environment SP could and would have signposted him elsewhere. But SP was not in that less pressurised environment.

41. As for the use of the red font and capitals:-

a. We accept SP's explanation this method of communication was sometimes used by her for emphasis.
b. She did not apply any thought to how the recipient might receive the email. Sometimes careful thought is given to the language and style of electronic communications. SP did not have the luxury of the time to give such careful thought. Also:-
    i. We accept her evidence that she had used this method before and not been criticised for it.
    ii. An emphasis in messages by using font changes, appears to have been in practice at the time. We note the bold and underlined font on part of a standard message dated 20 April 2018 (page 212) and an emphasis of part of a message by displaying it in red font - on an email dated 21 March 2018 at page 192 and in red font, bold and underlined in an email of 25 November 2021 at page 245. Whilst we note that these examples are to messages in standard email "footers" particularly, it is some indication that some messages included emphasis by altering font.
c. We have considered the submission made by the claimant, that SP would have been engaged in more time in changing the font colour to red and upper case. But we find that would only have added a second or 2 to the time taken to send the message.
d. The response was to a "chaser" message. The claimant had not received a reply to his first message and therefore sent a second email. The reply, with the changed font to provide emphasis, was to this second email.

<u>SP's actions – March 2019.</u>

42. It is relevant to make findings of fact about SP's subsequent involvement with the claimant.

43. On 21 March 2018 (page 192) SP emailed the claimant in the following terms

"Sims Your line manager/Business Unit will inform you as to the security level required for your post. This is not done by centrally"

44. We also note the email is one that has a footer in red font and italics, informing the receiver that SP's department was receiving a high number of queries and to bear with them.

45. The claimant confirmed in his evidence that this email was acceptable.

<u>SPs evidence about the claimant's name.</u>

46. Because she had no recollection of handling the email in question, SP was unable to give evidence that she did not notice the claimant's name on the email or, if she did, did not assume that the claimant was African. In her evidence SP explained her own minority ethnic background, that she knows people of many different cultures and national origins and her view that it is unreliable to assume a particular national or cultural background from a name. She summarised her evidence on this theme at paragraph 27 of her statement. *" I give these examples because in my experience you simply cannot know or assume a person's race, nationality, ethnicity or background from their name alone and I would not have made assumptions about Mr Mutangadura or any other applicant"*

47. The claimant's name appears on the Email – Simbirai Mutangadura. If a recipient of an email from the claimant containing his name, were to reflect on that name, they would conclude that the claimant is almost certainly not of white British origin and possibly also that the claimant is black African or of black African origin.

48. However we find:-

a. That SP's focus on 14 November 2017, was to deal with the email query as quickly as reasonably possible, given the backlog. As such, we find on balance that she did not pause to consider the origins of the claimant's name.
b. Had SP considered the claimant's name and concluded that he was or may have been of black African origin, she would not have treated the claimant less favourably as a result. We make this finding having considered the evidence provided by SP in her statement, in answers to questions from the claimant and in the bundle (particularly page 192 of the bundle – being the only other email from SP to the claimant which is dated 21 March 2018 (comments above).

49. We accept SP's evidence that, when dealing with the query from the claimant she would not have accessed any information on the respondent's systems about the claimant's nationality or national origins.

<u>Respondent's retention of emails.</u>

50. Part of SP's evidence is that she has in the past sent emails to other recipients that included highlighted words in red font and capitals. Understandably, the claimant asked where other examples were.

51. SP did not provide any other examples. Her evidence was that she had stopped emphasising parts of messages in red font and capitals when she learned that it had caused offence to the claimant. We accept that evidence.

52. The respondent's evidence was that it was not possible to search a "back catalogue" of emails sent by SP because such emails were not retained. Mr Cook gave evidence that he tried to conduct a search for SP's old emails but was told that was not possible. He gave evidence of a discussion he had with another employee of the

respondent called Stuart Crook (SC) who is the Head of Personnel Security at the respondent's security unit. Mr Cook's evidence is (1) that he was told by SC that at the time, emails were being handled via Outlook and were deleted every 2 weeks or so (2) a more recent system has a retention time set at 90 days. Any emails that need to be retained for longer are transferred to a case management system.

53. SP's evidence is consistent with the information provided by Mr Cook. This is what she says:

> *"I have been referred to emails he* [the claimant] *sent to HOsecurityenquiries@homeoffice.gsi.gov.uk. This is the inbox which was receiving all HO security enquiries at the time and, as referred to above, was being manned by just me and one other colleague in October and November 2017. This had a huge backlog of enquiries and we were trying to get through as many of these in a day as we could.*
>
> *Before clustering we were using Outlook and at the time this inbox received thousands, sometimes 10s of thousands of emails in a week. Our server did not have the space to store the volumes of emails we sent and received so our practise was to delete emails once we had dealt with them."*

54. "HOsecurityenquiries" was an email equivalent of a helpline. We accept that the email traffic was considered to be the type of information that could and should be deleted after a short retention period and soon after a query had been answered. Any email traffic generated that became more significant was purposefully moved to different system/folder.

55. We accept SP's evidence that she was unable to recover other emails from that period which included her placing an emphasis (by changing font) on part of a message.

56. We are not impressed by some of the respondent's response to a questionnaire submitted by the claimant on 22 November 2021 (a copy of which is at 280 to 282). One of the questions asked by the claimant was:-

> *"Please advise of the number of emails in which Ms Pillai used at least one capitalised and in bold word in red that was underlined from 2017 and onwards that were sent from Ms Pillai to other people in relation to a security check that they were undergoing or underwent."*

57. Other questions indicated that the claimant wanted disclosure of similarly styled emails.

58. The response provided in January 2022 was *"Emails from 2017 are no longer available."* At the date this questionnaire was received the respondent knew that it faced a remaining complaint from the claimant about the Email. The response provided is accurate as far as emails sent in 2017 are concerned. However it must

have been possible to have searched emails for the 90 days at the end of 2021. We accept that SP had by then stopped any underlining or red font colour and she may have done more than 90 days before the date of the questionnaire/ We note that by the Case management Hearing on 10 September 2021 SP had been told about the complaint and her involvement(see para 15 at page 122). There may have been no such emails in this last period of 2021. But the respondent should have considered this and provided a more accurate response.

59. We also find that SP had no involvement in the responses to this questionnaire. Through the actions of others within the respondent, SP might have been denied an opportunity to provide documentary proof that sometimes she emphasised part of a message by using a contrasting font.

Submissions

60. We heard submissions late in the afternoon of the second day (26 October 2022).

61. For the respondent, Mr Tinkler relied on the written submissions document that had already been provided by Mr Jones and supplemented these with oral submissions. By way of brief summary, in Mr Tinkler's oral submissions:-

a. We were reminded of the findings of fact already made at the first Final hearing and not challenged.
b. That allegations of discrimination against the respondent through the actions of their employees Holding and Russell, had been dismissed and the only remining issue was in relation to the Email;
c. That the claimant takes no issue with SP's email of March 2019.
d. That a large part of SP's evidence is unchallenged – including the heavy workload, the significant recruitment taking place.
c. That although SP is unable to specifically recall her dealing with the claimant, she gave clear and candid evidence about the process she would have followed.
d. That the respondent has provided a coherent explanation about the destruction/non-retention of emails.
e. That the claimant did not raise any concerns at the time or in the ET1 about the Email.
f. That the claimant has not discharged the initial burden of proof but if the Tribunal is against the respondent on that, through the evidence provided, it has done mor than enough to adequately discharge the burden of proof.

62. A brief summary of the claimant's submissions:-

a. This is a case whether there has been subconscious bias by SP.
b. That if SP was unable to consider properly the claimant's query, she simply needed to refer him to the relevant business manager or business unit but instead she replied as she did and did so because she decided

the claimant was trying to lower the security levels and therefore cheat the system.

c. That the difference in circumstances of November 2017 (when SP sent the Email) and March 2018 (when SP was much more friendly and helpful) was that in March 2018, the claimant had informed SP's department (by email of 11 March 2018) that the correct security check level was CTC (low) level.
d. In November 2017, SP could and should have just advised the claimant to raise his query with the right department.
e. That there are people who consciously or subconsciously believe that black people are more likely to be involved in misconduct (para 3m of the Written submissions).
f. That SP subconsciously distrusted the claimant and that was based on her stereo typical assumptions about black Africans. He supplements this considerably in his written submissions. At paragraph 5:

> *"Miss Pillai realised in my 13 November 2017 to Home Office Security Enquiries that I was trying to get the Home Office to change the level of security cheque from SC to CTC. She subconsciously thought that because of my black African background that was suggested by my distinctive name, I was doing so fraudulently."*

g. That SP will have sent 1000s of emails (in his written submissions the claimant estimates some 50,000 over a 4-year period) yet when the claimant asked for disclosure of emails from SP which contained red capitals, not one other example was provided.
h. That the respondent dd not produce Mr Crook (or other IT expert) as a witness about IT retention policies. Adverse inferences should be drawn from this.
i. A hypothetical comparator in substantially the same circumstances (but called John Smith) would not have received a direct, curt response as the claimant received. That comparator would have had their query about security clearance properly investigated and resolved. (paras 11-13 of the written submissions)
j. The evidence provided by SP does not discharge the burden of proof that must shift over to the respondent.

63. We have read and re read the written submissions documents handed up by the parties, including the additional written submissions that the claimant provided after the hearing, by email dated 24 November 2022. We note specifically one part of the respondent's written submissions. Paragraphs 19 and 20 of Mr Jones'/Mr Tinkler's submissions draw our attention to another Employment Tribunal case that the claimant brought and some of the conclusions of the Tribunal in that case. We have not considered the judgment in the other case, focusing instead on the merits of the case before us.

The Law

Direct Discrimination – section 13 Equality Act 2010 ("EqA")

64. Section 13 states:

> *"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably7 than A treats or would treat others."*

65. An important question for us is whether the claimant's race was an effective cause of the respondent's treatment of the claimant. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question.

66. We also note the following:-

a. the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877, HL**, held *"discrimination may be on racial grounds even if it is not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."* (judgment of Lord Nicholls)

b. Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'*

67. Section 13 provides that direct discrimination occurs where an individual is treated *"less favourably"* than another. It is generally necessary therefore to identify a comparator who does not share the claimant's protected characteristic, although claimants can rely on a hypothetical comparator (the term "or would treat others" within the wording of section 13 makes this clear).

68. Section 23(1) EqA requires that there is *"no material difference"* between the claimant's position and his/her comparators position. Case law makes clear that the comparator's circumstances do not have to be the same in all respects; rather they have to be the same (or nearly the same) in those circumstances which are relevant to the claimant's claim. (see for example the decisions of the House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** and **MacDonald v. MOD; Peace v. Mayfield School 2003 ICR 937**).

Burden of Proof

69. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

70. Section 136 states:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has 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."

71. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. It is the annex to the judgment particularly that provides guidance. (the amended Barton guidance). We note the following particularly from the guidance (recognising that the guidance is now relevant to the application of s136 EqA)

a. That it is guidance only and not a substitute for the statutory language
b. It is for the claimant to prove on the balance of probabilities, facts from which the tribunal could conclude, in the absence of adequate explanation, that the respondent has committed an unlawful act of discrimination. If the claimant does not prove such facts then the claim will fail.
c. It is unusual to find direct evidence of discrimination.
d. It is important to note the use of the word "*could*" at s136(2) – that, at this stage of analysis, a definitive determination does not have to be made.
e. The Tribunal needs to decide what inferences of secondary facts can be made from the primary facts at this stage, on the assumption there is no adequate explanation for those facts?
f. Where the claimant has proven facts from which the Tribunal could conclude that the respondent has treated claimant less favourably on the grounds of (in this case) the claimant's race then the respondent must prove that it did not do so. It must pro9ve that the treatment of the claimant was in no sense whatsoever on the grounds of the claimant's race.
g. The tribunal will need to assess (1) whether the respondent has provided an explanation for the relevant facts and (2) that the explanation is adequate to discharge the burden of proof on a balance of probabilities.
h. The facts necessary to discharge the burden of proof would normally be in the possession of the respondent and a tribunal would therefore normally expect cogent evidence to discharge that burden of proof.

72. We also note that there can be occasions, particularly where a claimant is relying on a hypothetical comparator (as here) where it is appropriate to dispense with the first stage of the burden of proof test and to focus on the second stage, the reason why the Respondent treated the claimant in the way that it did. See for example the EAT Judgment in **Laing v. Manchester City Council [2006] IRLR 748 (**paragraphs 73 to 77**)**. However we also note the EAT's caution against Tribunals adopting this approach too readily - in the recent case of **Field v. Steve Pye and Co (KL) Limited [2022] EAT 68** and particularly paragraphs 43-46.

73. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867,** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Conclusions

74. Before we set out our conclusions against the relevant issues we wish to make clear that the claimant should not have been put through the turmoil of the recruitment process that he was. We have no doubt that it upset him greatly. The Tribunal has already recorded (in the 2019 judgment) the sometime chaotic nature of some of the respondent's relevant operation, some lack of care and mistakes. The evidence heard in this second hearing confirms how busy relevant departments or teams within the respondent department were at the relevant time, when a huge recruitment exercise was underway (see para 6 of the 2019 Judgment).

75. The principal wrong that the claimant was subjected to was the application of the incorrect security clearance and that was not initially picked up within the recruitment process even though the claimant queried it. The action of SP in writing and sending the Email was in part a continuation of that wrong and in part a consequence of it. The Tribunal has already reached the decision that the principal wrong was caused by an administrative error and not unlawful discrimination.

76. Issue One

> *Are there facts from which the Tribunal could conclude that in sending her email to the claimant on 14 November 2017 Shyla Pillai treated the claimant less favourably because of his race than a hypothetical comparator of a difference race would have been treated?*

77. We have decided that it is appropriate to look at the email in 2 parts:-

> 1. Whether SP treated the claimant less favourably in communicating to the claimant the error that the security clearance level was SC not CTC (rather than for example signposting the claimant elsewhere or looking in to the claimant's query further).
>
> 2. Whether SP treated the claimant less favourably in the style of that communication – the curt, "shouting" terms that she used.

78. These are the facts that indicate that discrimination may have occurred:-

(1)The claimant's name that appeared on his email to which the Email was a response, being a name that a reader might conclude was of black African origin.

(2) The terms of the Email itself, being curt, brusque and shouting (as already decided in the 2019 Judgment).

(3) The absence of any similarly styled emails sent by SP to any other recipient.

79. These are also facts that we have taken in to account in considering and deciding on Issue One:-

(1) That SP sent a second email to the claimant in March 2018 that the claimant refers to as being in friendly terms

(2) That the November 2017 and March 2018 email exchanges were the only 2 contacts between SP and the claimant

(3) That the respondent system showed the incorrect security clearance level – but this error was not a result of a discriminatory act.

(4) That SP accessed the system and told the claimant the security clearance level that was on the system.

80. There are no facts which we could conclude that, in telling the claimant that the security level was SC (i.e. the incorrect level) SP treated the claimant less favourably because of his race than she would have treated a hypothetical comparator in the same circumstances, called John Smith. SP saw the security requirement on the system and that is what she reported. There is no evidence to indicate that SP knew that the information was inaccurate.

81. However, the style of the communication is something that requires explanation particularly in the absence of documented examples of similarly styled emails sent by SP to other recipients. Therefore we look to the respondent to prove, on the balance of probabilities that, the claimant's race was not a reason for the treatment.

Issue 2

If so, can the respondent prove on the balance of probabilities that there was no contravention of Section 13 Equality Act 2010 because the claimant's race was not a reason for the treatment?

82. Notwithstanding our finding above, when reaching our decisions on issue 2 we considered and reached our conclusions on the respondent's explanation about the email as a whole.

83. Our conclusion is effectively recorded in our findings of fact, that we are satisfied that when writing the email in the terms and style that she did, SP was not influenced by the claimant's name (see particularly para 40 and 41 above).

84. We considered whether the respondent could discharge the burden of proof at all given (1) that it was unable to provide a witness who now recalled dealing with the Email and (2) SP had been unable to provide copy emails in the same style, due to the short data retention periods applicable and possibly also due to the failings of others within the respondent, to review emails from the 90 days preceding consideration of the claimant's questionnaire dated 22 November 2021 (see paragraphs 56-58 above).

85. Had that answer been a straight "no" then our only possible conclusion would have been that SP directly discriminated against the claimant even though, having heard and considered the evidence provided by SP we are all firmly of the view that she did not.

86. These difficulties with the evidence were not fatal to the respondent's defence, but they did place the respondent at something of a disadvantage when discharging its burden of proof.

87. In reaching our conclusion, we took into account the reasons why the evidence could not be provided and particularly the fact that it was through no fault on the part of SP. We also took in to account the evidence that the respondent did provide, particularly the evidence from SP. This evidence satisfied us that race was not a reason for SP writing the Email in the terms and style that she did.

88. For these reasons, we find that the claimant was not subject to direct discrimination as alleged.

Employment Judge Leach
Date: 13 March 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON:
14 March 2023

FOR THE TRIBUNAL OFFICE