



EMPLOYMENT TRIBUNALS

Claimant: Ms I Murnikaite-Afolabi

Respondent: Atalian Servest Limited

Heard via CVP (London Central)

On: 25 July 2023

**Before: Employment Judge Davidson
Ms D Warman
Mr J Ballard**

Representation

Claimant: Mr S Ellis, Lay representative

Respondent: Mr A Sendall, Counsel

JUDGMENT

The claimant's complaint of race discrimination fails and is hereby dismissed.

REASONS

Issues

1. The issues in the case were set out by Tribunal Judge McGrade at a case management preliminary hearing on 16 May 2023 as follows:
 - 1.1. The Claimant seeks to rely on the protected characteristic of her nationality, which is Lithuanian.
 - 1.2. Did the Respondent directly discriminate against the Claimant because of her nationality when it issued a job advert for a security officer that stated that the 'applicant must be from the UK only'?
 - 1.3. Did the Claimant have a genuine interest in applying for the role?
 - 1.4. Was the Claimant genuinely deterred from applying for the role?
 - 1.5. What were the Claimant's chances of actually being recruited for the role?

- 1.6. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 1.7. What financial losses has the discrimination caused the claimant?
- 1.8. What injury to feelings has any discrimination caused the claimant and how much compensation should be awarded for that?
- 1.9. Should interest be awarded? How much?

Evidence

2. The tribunal heard from the claimant and Mr Stacey-Martin Ellis (former employee of the respondent) on behalf of the claimant and from Mr Tom Copsey (Head of Recruitment) on behalf of the respondent. Mr Ellis was also a witness in the proceedings but the respondent confirmed it had no objection to him both representing the claimant and giving evidence on her behalf.
3. The claimant submitted witness statements from Hillary Ndoke (former employee of the respondent) and Saheed Shittu (current employee of the respondent), neither of whom attended and both of whom have claims in the employment tribunal against the respondent. Their evidence was not relevant to the particular issue before the tribunal and little weight was given to their statements.
4. The claimant submitted an 'victim impact statement' but no witness statement. We accepted the impact statement as her witness statement and also relied on her claim form and her oral testimony under cross examination.
5. The tribunal had a bundle of documents running to 59 pages.

Facts

6. The tribunal found the following facts on the balance of probabilities.
7. The respondent operates a services company including the provision of security services in the United Kingdom and Ireland. The respondent posts approximately 11,000 job adverts a year and employs up to 30,000 people.
8. The claimant is a Lithuanian national who has lived in the United Kingdom for over ten years. She has the right to work in the United Kingdom.
9. She has various security qualifications and has significant experience as a Door Supervisor. At the relevant time, she was living in Stevenage and working full time (40 hours per week, Monday to Friday) on a contractor basis in Central London. She had been in that role for the last six years.
10. In 2019, the claimant was offered work by the respondent but she never took up the offer.

11. The claimant was looking to find work nearer her home in order to save the travel costs of going into London each day. In about February 2023, she saw a job advert for a security role which stated “*Location: St Albans – applicant must be from the UK only*”. The advert also included a Diversity statement stating that the respondent is an equal opportunities employer.
12. The role was based in St Albans and was for 15 hours per week (3 hours per day).
13. The claimant did not apply for the job. She did not query the meaning of the advert with the respondent or put in a speculative application.
14. The claimant presented her claim to the tribunal on 17 February 2023. On 9 March, Mr Copsey became aware of the wording in the advert and expressed his concern to his team that this was discriminatory. One of his team (based outside the UK) accepted that this had been a mistake due to their human error. The advert should have stated that the applicant must have the right to work in the UK. The advert was corrected and all other adverts were checked to ensure their wording was correct.
15. As there were no suitable applicants for the original vacancy, a new position was created offering more hours but at a lower hourly rate. This was advertised in April 2023. The claimant did not apply for this role, or any other roles with the respondent. There was no evidence before the tribunal of her applying for any other roles with other employers.

Law

16. The law relating to job applicants and prospective job applicants is set out in sections 39 and 40 of the Equality Act 2010. The relevant wording provides that an employer must not discriminate against or victimise a person ... in the arrangements the employer makes for deciding to whom to offer employment.
17. We must consider what is meant by ‘arrangements’. In *Cardiff Women’s Aid v Hartup* [1994] IRLR 390, the EAT took the view that a discriminatory advert was a mere intention to discriminate rather than an act of discrimination in itself. This decision has been called into question by the ruling of the ECJ in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn* [2008] IRLR 732, which found that a public statement in the media that Moroccans would not be employed was discriminatory because it had the effect of deterring Moroccan individuals from applying.
18. A subsequent EAT decision (*Berry v Recruitment Revolution and others* UKEAT/0190/10) questioned the decision in *Hartup*, suggesting (but not deciding) that a discriminatory advert could be an ‘arrangement’ for recruitment. However, this authority together with the decision in *Keane v Investigo and others* UKEAT/0389/09 make it clear that a person will not succeed in a discrimination claim relating to a discriminatory job advert if they have no intention of applying for or taking the job being advertised.

Determination of the Issues

19. We find that the respondent posted an advert with wording stating that the applicant must be from the UK only. We accept that there could be some ambiguity in that this could mean that the applicant must be in the UK at the time of the application, or be UK-based, but find that the more likely meaning is that the role was restricted to UK nationals.
20. We accept Tom Copsey's evidence that this was an error from one of his team and that there was no intention to restrict the role to applicants from the UK only.
21. As this was an error, we find that there were no arrangements which actually discriminated against applicants who were not from the UK and no such discriminatory decision would have been taken.
22. As the claimant did not apply for the role, there was no discriminatory decision taken against her.
23. We must then consider whether the wording of the advert put off the claimant from applying for this role.
24. We find that the claimant did not have a genuine interest in applying for the role. We find it unlikely that she would give up a position offering her 40 hours work, which she has done for six years, in order to take up a position offering 15 hours of work, even if that position was nearer her home. We also note that she made no effort to follow up, such as contacting the respondent to query the wording or making an application in any event. She had previously been offered a position with the respondent so she was aware that there was no bar to non-UK applicants being offered work by the respondent. She was also friends with Mr Ellis, who worked for the respondent and who would have been aware that there were numerous employees of the respondent who were not UK nationals.
25. She did not apply for the position when it was readvertised in April 2023, even though that would have been a more attractive role as it was for 40 hours per week, nearer to her home.
26. If the claimant had been genuinely interested in applying for the role, we find that she would have sought clarification from the respondent, particularly as the wording is ambiguous and could mean that the applicant must be physically in the UK rather than a UK national. The advert also included the Diversity Statement, which the claimant confirmed that she read.
27. Much of the evidence submitted on behalf of the claimant related to a general culture within the respondent of preferential treatment of white staff in relation to promotion and benefits. The issues in the case do not relate to the claimant's colour (she is white) or her treatment by the respondent, as she was never employed there. She also complained that she might have been discriminated against as she has an African surname (from her ex-husband). As she never made an application to the respondent, they would not have been aware of her name and this suggestion has no basis in this case. We have therefore

disregarded any evidence which did not assist us in reaching our conclusion on the issues before us.

28. In conclusion we find that the claimant was not genuinely interested in applying for the position and her complaint of race discrimination fails and is hereby dismissed.

Employment Judge Davidson
Date 21 September 2023

JUDGMENT SENT TO THE PARTIES ON

21/09/2023

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.