



EMPLOYMENT TRIBUNALS

Claimant: Solomon Demba

Respondent: Care UK Clinical Services Ltd

Heard at: London South (by CVP) **On:** 15 & 16 March 2021

Before: **Employment Judge Housego**
Tribunal Member Julie Cook
Tribunal Member Grace Mitchell

Representation

Claimant: In person

Respondent: Sam Proffitt, of Counsel, instructed by Jonathan Shuster, Solicitor, DAC Beachcroft LLP

CORRECTED JUDGMENT

The claim is dismissed.

REASONS

Basis of claim

1. Mr Demba is a registered nurse. He applied for a senior post with the Respondent. He was offered and accepted a job with the Respondent. The processing of the acceptance took a while. Ultimately the Respondent withdrew the offer. They say that there were inconsistencies in his application and that his references did not meet their requirements. They say that they asked him to meetings on 3 occasions in August but he did not respond. They say they thought he had taken another post, but they had decided not to appoint him anyway. They accept that they did not tell him they had withdrawn the offer, and that they did not deal with the letter of complaint he raised in September, but that he had no right to bring a grievance as he had never been an employee. Mr Demba says that the way he was treated in relation to his DBS check and references were assessed and by his offer of employment being withdrawn was unlawful race discrimination. Mr Demba states that he is of black African heritage. He compares himself with a hypothetical white man.

Law

2. Race is a characteristic protected by the Equality Act 2010¹. Mr Demba asserts

¹ S11 Equality Act 2010

that his treatment was direct race discrimination².

3. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever³ was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination⁴, and if he does so then it is for the Respondent to show that it was not. The two steps are not hermetically sealed, and eliding them is not impermissible. The Tribunal has applied the relevant case law⁵, and has fully borne in mind, and applied, S136 of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice. The test for a claim for harassment⁶ differs from that for direct discrimination⁷.

Evidence

4. The Tribunal heard oral evidence from the Claimant and from Musa Sanyang (who provided a personal reference), and for the Respondent from the Regional Director, Anji Knight, and from Evelyn Ainsworth, Compliance and Post-offer Manager. All provided witness statements, were cross examined and answered questions from the Tribunal.
5. There was a bundle of documents of 215 pages and an index to it, and Mr Demba provided some extra documents.

Issues

6. The Case Management Order after a telephone hearing of 06 May 2020 contained the following list of issues:

5. Direct discrimination: The claimant says that he was subjected to less favourable treatment because of his race and/or age in that:

- a. The respondent unreasonably delayed the start of his employment;*
- b. They withdrew the offer of employment;*
- c. The termination of his employment; and*
- d. The manner in which it was terminated.*

6. He makes a further claim of direct race discrimination in respect of the respondent's alleged failure to investigate his grievance submitted on 27 August 2019.

7. Victimisation: the claim of victimisation is made pursuant to an alleged protected act (the grievance of 27 August 2019) and the detriment claimed is the withdrawal/termination of his employment.

² S13 Direct discrimination: (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.

³ *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142, para 14 applying *Barton v Investec Securities Ltd*, [2003] ICR 1205 para 25.

⁴ *Igen v Wong* (above), *Madarassy v Nomura International plc* [2007] EWCA Civ 33, *Laing v Manchester City Council* [2006] I.C.R. 159, and *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913

⁵ *Royal Mail Group Ltd v Efoji* [2019] EWCA Civ 18 paragraphs 6-15 and 57

⁶ S26 Equality Act 2010

⁷ Set out fully in *Bakkali v. Greater Manchester Buses (South) Ltd (t/a Stage Coach Manchester) (HARASSMENT - Religion Or Belief Discrimination)* [2018] UKEAT 0176_17_1005

8. Harassment: The claimant says that when he visited the home to do a risk assessment, he was told by the home manager that the respondent would be more likely to accept a younger person....

The claimant says this is evidence of the reason for the withdrawal and termination of his employment and also amounted to age related harassment."

The hearing

7. At the start of the hearing Mr Demba withdrew his claim of age discrimination. The Respondent accepted that the letter of complaint or grievance was a protected act. Mr Demba objected to the late introduction (the working day before the hearing) of the grievance procedure. The Tribunal allowed it in, as it was not said to have been sent to Mr Demba, or that he knew of it. It is plainly relevant to the Respondent's case that he did not qualify to bring a grievance under that policy.

Submissions

8. Mr Proffitt spoke to a 13 page written submission, which the Tribunal first took half an hour to read, affording Mr Demba that opportunity at the same time. After Mr Proffitt's submissions there was a further 15 break for Mr Demba to consider what was said. He then made his submissions. My typed record of proceedings records them.

Extempore decision

9. An extempore decision was given after the Tribunal had deliberated. It is set out below.
10. Mr Demba claims race discrimination arising from his application to work for the Respondent. He started his application in late April, and was offered the job, and he accepted immediately, on 25th April. For reasons not relevant to this judgment there was an unavoidable delay until June.
11. There was much discussion about whether references had been accepted or not, because there would be no point in going through a panel if the references were not accepted.
12. There was a dispute of evidence about whether Mr Demba was ignored in August or whether he was not answering the Respondent's calls. At the end of August Mr Demba raised a grievance or complaint. On 17 September 2019 the offer was withdrawn.
13. The complaints arising from this that there was direct discrimination by delaying the start of his employment, withdrawing the offer, or indeed his employment, and about the manner in which this was done, and in failing to investigate his grievance. It was said to be victimisation to withdraw the offer after the grievance was raised.
14. The first issue was whether there was a contract of employment not. The offer was conditional on references and a DBS check. While Mr Demba thinks that the conditions were satisfied and perhaps was reasonable to think so, that is a

matter for the Respondent, only. The conditions were not satisfied and so there was no contract of employment.

15. Two references were supplied. The second was from Mr Sanyang who described himself as a professional colleague. It seems they worked together in Gambia and also as agency nurses for the same agency. The Respondent looked him up on LinkedIn, but could find no correlating work patterns. The references were shown on the internal system, known as Harbour. Ms Knight was clear that meant it was approved references. Ms Ainsworth, who runs the system, said it meant simply received, but it is clear that the Harbour system recorded Mr Demba as ready to start work, with only the start date to be confirmed – document 155.
16. Two individuals at the home where Mr Demba was to work had different expressions of concern in emails. Ms Kingsmill referred to only DBS, whereas Mr O'Leary referred to references.
17. The documentation supplied is scant, self-contradictory and difficult to follow. Whatever the situation about references, the matter was put to the DBS panel in June and approved within a week. The document sent with it, compiled by Ms Kingsmill ticked all the right boxes from Mr Demba's point of view. It could not have been more complimentary or supportive. This was an important consideration, for if there was race discrimination from either of them it would have been easy not to make the job offer, or to recommend refusal to the DBS panel. Later, Matthew O'Leary and Jane Kingsmill considered there were conflicting statements about the DBS, but only one statement was provided, and that predated the reference to the panel. Neither Ms Knight nor Ms Ainsworth were able to shed any light as to what the discrepancy might be.
18. Why Mr Demba was put forward for the panel at all is unclear since at document 139 there is an email predating it, indicating that they did not wish to employ Mr Demba by reason of his DBS matter. However, from 24 June appears that he was on the Harbour system as employable with only the start date to be arranged.
19. Delay during July is understandable for holidays.
20. The Respondents say that Mr O'Leary and Ms Kingsmill were trying to arrange meetings in August and tried to arrange three of them, all of which Mr Denba failed to attend. Mr Denba says there was no such contact at all.
21. We resolve this conflict of evidence by not accepting either account in full. There was some contact from the Respondent. First in a contemporaneous email Ms Kingsmill refers to a foreign dialling tone. Mr Demba in his oral evidence agreed that he was abroad at about this time. It would be extraordinary for this to be invented at the time. Secondly there was a diary entry to meet on Outlook, and thirdly a contemporaneous email (146) stating that Mr Demba cancelled a meeting on 15th August. There is no reason for this to be a fabrication.
22. However, it is also true that by the end of August Mr Demba was fed up with the lack of progress and on the 27th emailed Sophie Nixon in human resources complaining that he was not able to start work. She emailed Mr O'Leary, who

emailed back to say that he would telephone again and then let Jane Kingsmill and Sophie Nixon (a recruiter) know what transpired. There is no further email. Whether he did or not is unknowable. It is likely not, because the next day Mr Demba putting his grievance claiming that the delay was down to age and race discrimination.

23. That went to Ms Nixon, who sent it to Ms Knight. Ms Knight says that she put in hand progress reports from Mr O'Leary and Ms Kingsmill, but no evidence of that was provided. Ms Nixon was supposed to log it on a complaints system but only sent it to Ms Knight, and did not do so. No one did anything with the grievance.
24. In an email of 29th August 2019 Anji Knight emailed colleagues to say she thought that Mr Demba was seeking to get money out of them and asking about age, but not race. Nothing then happened for a further two weeks. On 17th September 2019 Mr O'Leary emailed Ms Kingsmill and Ms Knight saying that there were queries about references and DBS statements in June, that they found difficulty talking to him, that they had eventually arranged a meeting for 9th August, rearranged for the 12th when he had left a message on that morning that he could not come, rescheduled for the 15th which he did not attend, and then saying that he had left a voicemail, but that Mr Demba had not returned the call. Why he sent the email was not clear from the documents supplied.
25. Ms Knight then responded enquiring whether Mr Demba had now been withdrawn from the system. A senior recruiter replied to say that she thought so, but that the system needed to be checked. Someone did check, and said that he was still on the system as ready to go apart from the start date.
26. Ms Kingsmill queried whether he could be withdrawn, having raised a grievance. The senior recruiter spoke with Ms Ainsworth to say that she had called Mr O'Leary a few times but had not heard back – presumably from Mr O'Leary rather than from Mr Demba. Just over an hour later Ms Knight emailed to say *"I think we just need to withdraw offer based on the fact that he has not been in contact"*. The senior recruiter did not know whether she should do so or if the home should do so. This appears to have been done in the human resources Department from the entry on 24th September added by Lynn Callistan.
27. It is accepted that the grievance is a protected act.
28. It is accepted that this was, in effect, ignored.
29. Turning to the heads of claim, there was plainly a delay in starting the Claimant's employment. That was understandable until early July, or perhaps the beginning of August by reason of holidays. From then on there was a combination of Mr O'Leary not doing perhaps what he should have done, and Mr Demba not keeping appointments. Mr O'Leary left in September 2019 but we were not told why. We were told that Ms Kingsmill was on long-term sick and then resigned, and so we heard from neither of them.
30. It is inexplicable that no one emailed Mr Denba, and equally inexplicable that he did not email them about this. It is clear that Mr O'Leary and Ms Kingsmill had concerns about both references and the DPS check. Nothing appears to

have happened after there was reference by Ms Kingsmill to the DBS panel in June, and so why there was reference to the panel in supportive manner is unclear.

31. However, there is no reason to doubt that the two people at the home, Ms Kingsmill the manager, and Matt O'Leary the business manager did have concerns they wanted to address, to the extent back as far as June they were having doubts about whether to employ him at all.
32. None of that relates to race.
33. The withdrawal of the offer of employment was a decision made by Ms Knight on the basis of the information provided to her, largely by or through Mr O'Leary, all of which was to the effect that he had tried and failed to have a meeting with Mr Demba to clarify these matters.
34. It was certainly unwise simply to terminate the arrangement given the grievance lodged by Mr Denver. Ms Knight's evidence in her witness statement was that she knew that he had filed it, but that it was not the reason for her decision. Her oral evidence was that she had forgotten about it. Clearly she knew that it was him. While she manages many homes, they cannot be very many letters in complaining about age and race discrimination, from potential employees. It was referred to in an email asking if the offer could be withdrawn given that he had now raised a grievance.
35. However, and after giving the matter much thought, from Ms Knight's point of view she was faced with having a post vacant for many months. Because an offer had been made to Mr Demba the post could not be filled permanently and had to be staffed with agency staff. The first item on her meeting with every home manager was the cost of agency staff. It was entirely understandable that she wished to resolve the situation. Plainly she did not give it very much thought because of the speed of the email exchange.
36. It is also relevant that there is a very large attrition rate between application and the start of employment, as given the shortage of nurses many people offered jobs take up other offers, often not letting the Respondent know.
37. However, there is nothing to suggest that this is anything to do with Mr Demba being black, save the fact that one follows the other. That could be enough, but given the information available to Ms Knight the panel concludes not, particularly given the workplace environment.
38. It is highly relevant to the panel's conclusion that nurses are in enormously short supply. The Respondent is seeking to recruit nurses from abroad. Any company that sought to discriminate against nurses from any particular ethnic background would be limiting its pool in a most ineffective way. That applies to individual home managers as well as the Respondent as a whole. Plainly there are a large number of black nurses working for the Respondent. Even if Mr Demba is right in saying that promotion is difficult (and we make no finding of fact that this is so) that would be no reason to discriminate against a hands on nurse manager.
39. The failure to investigate the grievance was utterly incompetent, as was much

of the rest of the history, but there is no reason to think that either Ms Nixon or Ms Knight did so by reason of Mr Demba's race.

40. One can entirely see why Mr Demba thinks this was race discrimination. The Tribunal has considered carefully whether such an utter shambles is sufficient explanation but ultimately concluded that was what it was.
41. It is most unfortunate that Mr Demba should be left with an entirely genuine feeling that he has suffered race discrimination.

Employment Judge Housego
Date: 16 March 2021
Corrected on: 1 November 2023

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.