



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

MS O AUSTER

BANK OF AMERICA LIMITED

Heard at: London Central

On: 11 to 12 December, 2023

Before: Employment Judge: O Segal KC
Members: Ms S Aslett; Ms E Ali

Representations

For the Claimant: In person

For the Respondent: Ms Iris Ferber KC

JUDGMENT

The unanimous judgment of the Tribunal is that the claim of discrimination fails and is dismissed.

REASONS

Introduction – the issues

1. The Claimant (C) applied to work for the Respondent (R) as a Quantitative Financial Analyst (QFA) within R's Market Risk Analytics Quant group (the Role), but was unsuccessful in her application.
2. C claims the reason she was unsuccessful in that application was that she had significantly more professional experience than R was wanting the successful candidate to have, given that (internally) R had designated the Role as a Band 5 (B5) role.
3. R asserts that the reason C was unsuccessful was, in essence, because she did not have any or sufficient experience in/understanding of analytics in the specific area of Market Risk (MR).
4. At a PH on 23 February 2022, C's claims against R were identified as follows:-

Section 19 Equality Act 2010 (EqA): Indirect discrimination because of age

4.1. Did the Respondent have the following PCP: The designation of Band 5 for the role of Quantitative Financial Analyst with the requirement for less than 10 years relevant professional experience? The tribunal was prepared to amend the description of the PCP to include within the description of the material 'role' the refinement "**Quantitative Financial Analyst within R's Market Risk Analytics Quant group**" – on the basis that this reflected better C's case as presented at the hearing and did not prejudice R.

4.2. Did R apply this PCP?

4.3. Did the PCP put persons with whom C shares the characteristic i.e. applicants aged 40 or older at a particular disadvantage when compared with persons with whom C does not i.e. applicants under the age of 40? (The 'group disadvantage' issue)

4.4. Did the PCP put C to that disadvantage?

4.5.If so, has R shown that the treatment [was justified]?

5. In the event, this claim turned on the answer to the first two questions combined, as amended: **Did R apply the PCP that the designation of Band 5 for the role of Quantitative Financial Analyst within R's Market Risk Analytics Quant group required less than 10 years relevant professional experience?**
6. R argued in the alternative that its rejection of C's application was in any event for the reasons it stated and therefore any PCP applied did not in fact disadvantage her.
7. R sensibly accepted that, if it did not succeed as regards the PCP and whether C was disadvantaged by its application, it could not defend the claim by reference to the group disadvantage issue and also accepted that the PCP could not be justified.

Evidence

8. We had an agreed bundle of documents.
9. We had witness statements and heard live oral evidence from:

9.1.the Claimant;

For the Respondent:

9.2.Ms Gail Danvers (GD), EMEA Talent Acquisition Partner, Vice President – an internal recruitment specialist who handled C's application;

9.3.Ms Laura Muller (LM), Director in the Global Market Risk Analytics Team – the 'decision maker' in relation to C's application;

9.4.Mr Adrian Zuber (AZ), International Background Screening Regional Manager, Senior Vice President, and GD's manager.

10. The tribunal says immediately that it considered that all four witnesses were giving honest evidence and attempting to assist the tribunal.

Facts

11. The relevant facts are limited in scope and not materially in dispute – save as to the critical ‘fact’, whether Ms Muller made her decision not to hire C because of C’s more than 10 years’ professional experience.
12. R bands the roles of its employees into 9 ‘job bands’ *“based on various factors, including scope, organizational impact, knowledge and skills required, and how the jobs compare to other jobs within the same band”*. Various criteria are set out to describe the different bands - which do not include any reference to number(s) of years of professional experience.
13. C was at the material time 41 years of age with well over 10 years professional experience as a QFA. Her experience during that time was primarily in Counter-party Credit Risk – which, it was common ground, is rather different from MR.
14. C had made an application for a different position with R in about February 2022, which was considered by a different person, Mr Dongning Qu. In an email dated 25 February 2022, Mr Qu wrote to GD in explanation of not wanting to progress C’s application: *“For the PB role (vp5), she is too senior and her experience is not directly on PB models”* – “PB” stands for Prime Brokerage; “vp5” stands for Vice President, Band 5.
15. The second part of that brief reasoning echoes LM’s rationale for not hiring C to the Role (insufficient directly relevant experience).
16. As to the first part of Mr Qu’s reasoning, C relied on it as revealing a company-wide policy of not hiring those with significantly more than 10 years professional experience to any VP B5 role. When this was put to R’s witnesses, they said that they disagreed with Mr Qu’s perspective that a candidate might be ‘too senior’ for a VP B5 role by reason of such long professional experience.
17. The Role was advertised from a date prior to the start of May 2022. The Job Description included the following: *“The positions provide an excellent opportunity for a Market Risk Quants/Modeller to be at the heart of [R’s] model development ... the successful candidate will be responsible for critical regulatory deliverables*

involving complex market risk models. The role will require ... high technical/analytical competencies to develop the next generation of Market Risk Models prescribed as part of the Fundamental Review of the Trading Book [FRTB]. ... This includes all components of FRTB IMA ... the resource [the successful candidate] will be required to define also the necessary requirements about market data modelling that would enable the implementation of the market data standards prescribed in BCBS FTRTB guidelines as well as the official FRTB requirements included in CRR for EU. ... Masters degree or PhD required ... and previous relevant experience.”

18. LM had previously considered and rejected other candidates for the Role.
19. On 13 May 2022, LM having looked at C’s CV (which of course included details of her professional experience since securing her academic qualifications), asked GD to arrange an interview between herself (LM) and C.
20. That interview took place on 20 May 2022. (All interviews in this case took place remotely.) LM’s evidence, which the tribunal accepts, is that she was looking ideally for a candidate who had specific experience working in MR, but such applicants were hard to attract, so she was hoping that C could demonstrate that (in addition to the experience set out in her CV) she had some indirect experience and/or understanding of MR. It is common ground that C was not in a position to demonstrate that.
21. LM was inclined to reject C’s application, but – as was normal practice at R where a candidate was still being considered for a role – arranged for other relevant members of the team to interview C (each interview being one-to-one). C was therefore interviewed by three other employees of R, as follows:-
22. On 6 June 2022, C had an interview with Pierre Szentmihalyi (PS), a Senior Quantitative Analyst, Director. PS provided written comments to LM following the interview. Some of those comments are very positive, but they included: *“However, it also became quickly apparent that she did not have an in-depth grasp of the pros and cons of FRTB and the practical challenges firms face in implementing it. This could be problematic given the role’s focus. I recommend her to be interviewed by Adolfo Montoro to see if she can be progressed further.”* He ticked the ‘Maybe’ box out of ‘Hire’, ‘Reject’ and ‘Maybe’.

23. C was not interviewed by Mr Montoro for reasons of availability, but was interviewed by a similar subject matter expert, Manuela Benigno (MB) – see below.
24. On 15 June 2022, C was interviewed by Benjamin Armet (BA), Senior Quantitative Analyst, Vice President. He too provided written comments to PS and LM, including: *“I asked simple questions related VaR modelling – she struggled a little bit to explain simply what the VaR number means. We talked about ... how she would compute VaR on an option and justify her choices. I was actually (very) surprised when she said she would remove the ‘stresses’ scenarios from the current VaR window to avoid having a VaR ‘too high’”*.
25. The final interview with MB was on 17 June 2022. MB recommended that R hire C. Her comments were mainly positive, but twice commented on C’s lack of experience in MR and FRTB regulation.
26. We record that C considered that some of the less positive comments made by those who interviewed her did not properly represent what she had said in interview (in particular the comments of BA recorded above). The tribunal is not in a position to determine what C said at interview, or how accurate any of the interviewers’ comments were – however, those issues are not relevant to the present claim, which concerns only why LM reached the decision not to hire C, and not whether the information she was given was accurate.
27. In the same vein, C argued in closing that LM attached too much significance to BA’s comments in relation to VaR. Again, we cannot say if that is right, but it is not relevant: if LM attached weight to those comments and that was part of the reason for her not hiring C, that undermines rather than supports C’s case.
28. By 20 June, LM had received the comments of the other three interviewers and on 27 June 2022 LM told GD that C had not been successful in her application for the Role.
29. C was unhappy at that result and with the initial feedback she was given by GD. On 4 July 2022, therefore, AZ provided C with further feedback, which also did not satisfy C, though she described her conversation with AZ in an email to GD as a ‘very constructive discussion’.

30. Before that conversation had happened, GD wrote on 27 June 2022 to Christoph Burgard, EMEA Head of Global Markets Risk Analytics, Managing Director (whom C had approached about possible job opportunities at R) as follows:

Olivia recently completed three interviews for a Band 5 VP role in Laura Muller's team.

Laura has decided not to offer the role to Olivia because she only has the 1 open head count and would prefer to hire a candidate with previous experience in Market Risk. Laura's view is that volume of work requires someone who can quickly start contributing.

Olivia was frustrated with this feedback, she has been out of work for some time ...

31. LM's evidence to the tribunal was entirely consistent with what she had told GD at the time. We accept that evidence.

32. In the event, no successful candidate was identified for the Role prior to a subsequent recruitment freeze.

33. Finally, we refer to some statistical evidence produced by AZ. We do not pay too much attention to the data in relation to R as a whole, or even to its Global Risk teams as whole; however, we consider it material that within the Global Risk Analytics team, 66.7% of external hires (8 of 12) to B5 VP (the descriptor of the Role) were aged at least 40.

34. By way of further clarification, GD told the tribunal that about 90% of the Global Risk Analytics team were QFAs, of whom about a third were involved in modelling like C.

The Law

35. S. 19 EqA 2010 (the Act) provides that

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*

(b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

(3) *The relevant protected characteristics are—*

age;

...

36. Section 136 of the Act provides, as to the burden of proof, that

(1) *This section applies to any proceedings relating to a contravention of this Act.*

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

37. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: “*did the claimant, on the proscribed ground, receive less favourable treatment than others?*”

38. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that “*a reasonable tribunal could properly conclude*” from all the evidence, that discrimination occurred.

39. In the context of indirect discrimination, R additionally relied on the approach of Langstaff (P) in *Dziedziak v Future Electronics Ltd* EAT 0271/11, at [42] – confirmed by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 W.L.R. 1343 – that before the burden of proof was reversed, a claimant needs to establish the PCP, group disadvantage and particular disadvantage.

Discussion

70. Ms Ferber provided an Opening Note and both she and C made helpful oral closing submissions. We do not set out those submissions in detail here, but will refer to them if and as appropriate.

71. Our conclusion, in summary, is that we accept LM's written and oral evidence that the reason she did not hire C was because C did not have the narrowly relevant experience and understanding that she was looking for in the successful candidate.

72. That evidence was entirely supported by the contemporaneous documents we have cited above. We note in particular that those documents not only corroborate the explanation given by R for not hiring C, they do not evidence any suggestion that C's long professional experience was taken into account by LM or by any of the interviewers (and there would have been no reason why, if C's 'seniority' had been a concern, that would not have been mentioned in those internal emails – just as Mr Qu had mentioned it in respect of another role).

73. C's case is founded on her understandable frustration that she was rejected for the Role essentially for a reason – her lack of MR experience – which was evident from her CV. C therefore suspects that reason not to be genuine. However, there are two problems with that perspective:-

73.1. First, it ignores the more nuanced approach which LM described of choosing to interview C, despite her apparently lack of direct MR experience, in the hope that C would demonstrate that she had some indirect experience and/or understanding of MR – which is not so surprising given the difficulty R had had in finding a candidate who had direct MR experience.

73.2. More fundamentally, it ignores the fact that if R did have the PCP as alleged, there could be no reasonable explanation for LM interviewing C in the first place (let alone putting her forward for the other three interviews) – particularly given her lack of MR experience – given that all of C's professional experience was detailed in her CV, such that even a cursory examination would reveal that C had rather more than 10 years professional experience.

74. The statistical evidence referred to above significantly undermines the existence of the alleged PCP.
75. It is also inherently implausible that LM, who really wanted to fill the Role and knew it was going to be difficult to do so with an ideal candidate, would reject any suitable candidate, including C, on the basis that they had too many years of professional experience.
76. As C herself answered to the tribunal asking her why she thought LM had chosen to interview her, “*Having good experience at a lower price, that’s good for the Bank*”.
77. In short, we conclude that C has not demonstrated the existence of the PCP alleged; nor that it was applied in her case. On the contrary, the evidence strongly undermines the existence of such a PCP or its application to C.
78. The claim must therefore fail.

Final observations

79. The tribunal makes the following final observations:-

- 79.1. A clearer person spec., identifying essential and desirable experience would be better practice and might have avoided the present issue.
- 79.2. A more structured and objective ‘marking’ system for candidates, against a few defined criteria appropriate to any given role, would also be good practice.

Oliver Segal KC

Employment Judge

21 December, 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/12/2023