EMPLOYMENT TRIBUNALS

Claimant: Mr R Meshram

Respondent: Entserv UK Limited

Heard at: Leicester (remotely via CVP) **On:** 23 July 2024

Before: Employment Judge Welch
Mr S Pearlman
Mr R Miller

REPRESENTATION:

Claimant: Mr L Davies, Solicitor
Respondent: Mr C Kelly, Counsel

RESERVED JUDGMENT ON REMISSION

On the matters remitted from the Employment Appeal Tribunal, the unanimous judgment of the Tribunal is as follows:

Victimisation

1. The complaint of victimisation is not well-founded and is dismissed.

2. The hearing listed for 11 October 2024 has been vacated.

RESERVED REASONS ON REMISSION

1. This case was remitted by the Employment Appeal Tribunal (EAT) following an appeal by the claimant in respect of the Judgment of this Tribunal dated 1 March 2021.

2. The claimant successfully appealed this panel's decision in respect of the dismissal of the victimisation complaint on the grounds that it was not *Meek*-compliant in relation solely to the failure by Mr Nagra to progress the claimant's appeal email dated 14 June 2019. There were other points of appeal before the EAT which failed.
3. The case was remitted to the same panel for further consideration on whether the burden of proof shifted in relation to Mr Nagra's failure to progress the appeal, and, if not, why not and/or as to the positive explanation for that conduct.
4. Further, the EAT identified that should the panel find that the claimant was victimised in relation to Mr Nagra's failure to progress the appeal email dated 14 June 2019, the Tribunal will also need to consider what, if any, impact that may have on the previous outcome of the dismissal victimisation complaint.
5. It was agreed at the start of the hearing that the parties would only give submissions on this latter point once the outcome of the victimisation complaint relating to the appeal email was known. We agreed a follow up hearing date before the parties left, should this prove necessary.
6. Where an appeal has, on a particular point, succeeded, and the matter has been remitted to the Tribunal for further consideration, the Tribunal must accordingly reconsider that point in accordance with the EAT's decision. However, such a remission hearing is not an opportunity to invite the Tribunal to consider other points of its original decision, be they points on which there was an unsuccessful appeal or points which were not the subject of prior appeal at all. We reminded ourselves that the further hearing must be confined to consideration only of those points which have

been the subject of successful appeal and remission. This is an established principle of jurisdiction and serves the interests of fairness and finality.

7. The hearing was a remote hearing held via CVP. As agreed with the EAT, no additional evidence was adduced, but the parties were able to make submissions to the panel on the matter before it.

8. The Tribunal was referred to the hearing bundle, supplemental bundle (with additional pages) and a bundle of documents entitled "…. Suki Nagra documents (with links)" and the witness statements which the panel had received at the original hearing. In addition, we were helpfully provided with skeleton arguments and an agreed bundle of authorities, although the claimant provided us with four additional cases upon which he relied.

9. We reminded ourselves of the salient parts of the Reserved Reasons in the original judgment, the EAT decision, the witness statements from the original hearing, parts of the oral evidence and documents within the various hearing bundles.

10. We relied upon the findings which we made in the original Judgment and make further factual findings only to the extent necessary from the evidence previously heard and/or seen.

11. We heard submissions from both parties on the point remitted by the EAT and reserved our decision.

Findings in respect of the point remitted

12. We made findings at paragraphs 64 and 65 of the original Judgment relating to the appeal email which was, in effect, ignored by Mr Nagra. In those paragraphs we stated:

Paragraph 64 "*The Claimant appealed on 14 June 2019 [page 436]. This was sent directly to Mr Nagra, who gave evidence that he did not recall receiving this or passing it on to anyone within the Second Respondent. We find this hard to accept but, in any event, accept that Mr Nagra did nothing with the appeal email. On 28 June 2019, Mr Basterfield emailed Mr Nagra asking why he had decided not to continue with the Claimant's employment, as he could not recall [page 479]. Mr Nagra replied to Mr Basterfield [also page 479], in which he confirmed that the Claimant had been questioned on the first day of his employment as, "a word in industry" was that he had been dismissed for fraudulent activities from TCS, the First Respondent. He went on to say, "also discovered that he had [lied] (sic) to me specifically about his employment status at TCS suggesting that he was employed by TCS when in reality he was unemployed. Continued the same lie for almost three months and four [rounds] (sic) of the interview and even suggested that he had to take gardening leave.*

On day one of his employment commencing at DXC questioned him AND HE CONFESSED, he then shared the fact that he had separate inflight Employment Tribunal Hearings.

My trust has been lost on day one and I could not allow him to be in a position of authority, manging key accounts and client relationships based on the fact that he was dishonest and untrustworthy".

13. Paragraph 65: "*The Claimant's appeal was not initially dealt with by the Second Respondent. When the Claimant commenced proceedings at the end of August 2019, Mr Basterfield of the Second Respondent became aware that the Claimant*

had appealed the decision to dismiss him. Having carried out an investigation, it became clear that the Claimant's appeal had been received but that it was in a queue and had not yet been assigned to a manager."

14. Our comment in the original judgment that "*we find it hard to accept*" was not well phrased and we accept that we did not fully explain the basis for our factual findings. We found it hard to accept that Mr Nagra had not received the appeal email. It was clear to us that this had been properly addressed and had come to his attention. However, we are not saying that we disbelieve Mr Nagra when he gave evidence that he could not recall receiving it, just that he must have received it, noticed it at the time and then ignored it.
15. The reason we find that Mr Nagra ignored it, was because he was aggrieved at the claimant for misleading him throughout the recruitment process, which he referred to as being for almost 3 months and as evidenced by his email to Mr Basterfield of 28 June 2019 referred to above.
16. We accept that Mr Nagra was copied into a further email from the claimant to "Mano P" on 24 June 2019 [P472], which confirmed that he had not heard back on his appeal. This was also ignored by Mr Nagra, but we note that this was not specifically addressed to him. We find that the reason Mr Nagra ignored the original appeal email and the follow up email and/or failed to progress the claimant's appeal against dismissal was because he felt personally aggrieved and let down by the claimant. In recruiting the claimant, Mr Nagra had gone against senior colleagues in the recruitment process and the Gallup test results, which showed low potential for the claimant, and despite this, had recruited him and even negotiated an additional

signing on bonus. We consider that he felt let down and, as a result, either consciously or unconsciously, ignored the emails regarding the claimant's appeal.

17. We do not find that the reason for Mr Nagra's, and/or the respondent's, failure to progress the appeals was to try and avoid Tribunal claims due to the time for presenting claims ticking by whilst the appeals were not progressed. This was suggested by the claimant, but we do not accept that as being a plausible explanation.

Submissions

18. We had the benefit of written submissions from both parties, which were extremely helpful and for which we are grateful. As in our previous Judgment, we will not go into detail in relation to the submissions but provide brief details.

19. The claimant agreed with the respondent that unreasonable conduct of itself was insufficient to shift the burden of proof. There was a 2-stage approach to the burden of proof as approved by the Supreme Court in Royal Mail Group Limited v Efobi [2021] UKSC 33.

    Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.

    Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

20. Also, as propounded in Bahl, it is very unusual to find direct evidence of victimisation.

21. We were referred to the EHRC Employment Code as relevant to our decision.

22. Where there was an untruthful explanation given for a difference in treatment, this might lead to a prima facie case of discrimination being established. (Hussain v Vision Security Limited and Mitie Security Group Limited (2) UKEAT/0439/10).
23. Should a prima facie case be found on the facts, the Tribunal must consider whether there is sufficient explanation by the respondent to discharge the burden by proving that there has been no victimisation.
24. No cogent evidence had been offered by Mr Nagra for the victimisation and therefore the Tribunal was urged to find in favour of the claimant.
25. The respondent's submissions were that the claimant must establish the reason for differential treatment, not just the fact of differential treatment to show a prima facie case.
26. The issue for the Tribunal was therefore whether:
    a. the Claimant has established a prima facie case that the reason that Mr Nagra did not respond to the Claimant's appeal was because the Claimant brought the ET claim; and, if so;
    b. whether the Respondent has shown that Mr Nagra did not fail to respond to the appeal because the Claimant brought the ET claim.
27. The failure to progress the appeal was the type of unreasonable conduct identified in Bahl as not shifting the burden of proof.
28. Two reasons had been put forward by Mr Nagra, the first being that he was unaware of the appeal, and the second, as stated by him in cross examination, was that the email must have gone into his junk email. However, the Tribunal were free to find

an alternative reason for the treatment, such as that evidenced by Mr Nagra's email to Mr Basterfield.

29. The respondent therefore contended that the remaining aspects of the claimant's claim should be dismissed.

Law

30. We had regard to the Law as set out in our original Judgment, which will not be repeated here. We also had regard to the authorities provided by the parties.

31. In the case of Hussain v Vision Security Limited (1) and Mitie Security Group Limited (2) UKEAT/0439/10 both parties referred us to paragraph 16 which states: *"We do not believe that our conclusion that the facts relied on by the Appellant raised a prima facie case of age discrimination conflicts in any way with the passage from Mummery LJ's judgment in Madarassy on which Mr Salter relies. Mummery LJ was there rejecting Mr Allen's submission that the burden of proof is, automatically and in all cases, reversed merely by proof of difference in the relevant status and difference in treatment. That is not the basis on which we have reached our conclusion, which is situation-specific. In the particular situation in this case, with its specific features, which go beyond the mere fact that the Appellant is older than his comparators, we believe that a prima facie case of age discrimination was shown. We would not wish any generalised conclusions to be drawn from our decision. The process of drawing an inference of discrimination, including deciding whether "Igen stage one" is satisfied, is a matter for factual assessment and, as we have said, situation-specific. We deprecate the development of sophisticated quasi-rules of law governing that exercise, of the kind which are at least implicit in Mr Salter's*

submissions. The inference that the non-offer of a job to the Appellant was significantly influenced by his age is in the circumstances of this case a legitimate factual conclusion and not a "tick-box" presumption. It is, in the absence of anything else, the likely explanation."

32. Both parties also relied upon Law Society v Bahl [2004] EWCA Civ 1070.

Paragraph 94 provides:

"*All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination, it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory considerations. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made."*

Conclusion

33. We firstly have to find whether there were facts from which we could decide, in the absence of any other explanation, that discrimination had occurred. Whilst we accept that the respondent acted unreasonably when Mr Nagra failed to progress the claimant's appeal against dismissal, we do not consider that there is sufficient from this failure to shift the burden of proof onto the respondent. The case of Bahl warns against us making conclusions like this. There are a number of reasons why

individuals fail to forward on emails to others when they should. However, this failure in itself is insufficient to shift the burden of proof in this case.

34. We took into account Mr Nagra's credibility and note that despite seeking payment to give evidence, he consistently said that his evidence would remain the same in respect of the claimant's case, but that he would raise other issues concerning his own treatment.

35. Mr Nagra's evidence was that he did not recall seeing the email. Even if we had found Mr Nagra to have been dishonest on this point, this does not necessarily mean that we are obliged to find that the burden of proof has shifted.

36. For completeness, even if the burden of proof had shifted, we find that the reason Mr Nagra failed to progress the claimant's appeal was because he was aggrieved at the claimant's perceived misleading conduct, which he referred to as him lying for almost 3 months. The fact that Mr Nagra did not provide this as an explanation for his failure, does not prevent us from finding that to be the case.

37. We consider this to be a genuine reason for why Mr Nagra behaved the way he did with the claimant's appeal. There is evidence of this in his email to Mr Basterfield, from 28 June 2019, and we find that his resentment towards the claimant as a result of the claimant's failure to be truthful about the termination of his previous employment continued following the claimant's dismissal.

38. We do not find that there was any link in the mind of the discriminator between the doing of the protected act and the failure to progress the appeal. We carefully considered whether the protected act of bringing Employment Tribunal proceedings against his former employer, formed any part of the reasoning for ignoring the

appeal email. We find that it formed no part in Mr Nagra's decision to not progress the claimant's appeal and/or forward it on.

39. We do not accept the claimant's solicitor's submissions that the delay in dealing with Mr Nagra's appeal was to allow the time limit for bringing a claim to run down.

40. As we have found that the victimisation claim in respect of the failure to action the claimant's appeal email fails, there is no need to go on to consider whether there is any impact on the reasons for the claimant's dismissal. Therefore, the hearing on 11 October 2024 has been vacated.

41. The claim for victimisation relating to failure to progress the claimant's appeal against dismissal is therefore dismissed.

Employment Judge Welch
28 July 2024

Judgment sent to the parties on:

1 August 2024
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For the Tribunal:

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