



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MARTIN

BETWEEN: Mr Cyril Nicol Claimant

AND

Blackfriars Settlement Respondent

ON: 14 July 2016

APPEARANCES:

For the Claimant: Mr Brown

For the Respondent: Mr Kohanzad - Counsel

JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claim do not succeed and are dismissed.

REASONS

1. Oral the reasons were given at the conclusion of the hearing. These reasons have been given by Tribunal in response to a request by the Claimant.
2. This is a claim for race discrimination and sex discrimination brought by the Claimant against the Respondent. At the start of the hearing, the Respondent asked the Tribunal if it would entertain an application to strike out the Claimant's claims on the basis that the claim had no reasonable prospect of success. In the discussions following this request, it became apparent that the claim hinged on one factual matter and Mr Brown who was representing

- the Claimant confirmed that if the Tribunal found against him on that one factual matter, then his whole claim would fail. Therefore, by agreement, the Tribunal heard evidence in relation to the one factual matter, which is set out below.
3. The single issue for the Tribunal had to determine was whether the Respondent was entitled to give Ms Underhill a permanent contract of employment in June 2015 without advertising the position either externally or internally. The Claimant's claim is that because it was not advertised he was precluded from applying which was direct discrimination and victimisation on the grounds of race and sex. This was the only matter the Tribunal considered.
 4. The basic background is not in dispute. The Respondent is a small charity working in the local community. The Claimant was employed as an accountant.
 5. Miss Underhill was first employed as a consultant and then under a succession of fixed term contracts from 2012. It is not disputed that the final extension to the fixed term contract expired. It is also not disputed that Miss Underhill continued to work for the Respondent in the same role that he had been doing for the previous three years and continued to be paid as she had been before.
 6. The Tribunal accepts that there was an auditing process which was about to be carried out and the Respondent needed to ensure their employment contracts are all up-to-date and accurate. About the same time Miss Underhill spoke to Mr Beach (who started working for the Respondent on 16 February 2015), explaining that she was currently not working and under any written contract as the fixed term contract in which she had previously been employed had expired without formally being renewed.
 7. Mr Beach took advice from the external HR consultants the Respondent uses. Given Miss Underhill's period of employment with the Respondent (three years), she had qualified for the right not to be unfairly dismissed and therefore to all intents and purposes, was on par with permanent employees who had also accrued this right.
 8. The Respondent says that Miss Underhill undertook her duties satisfactorily and that there was no potentially fair reason to terminate her employment. In any event, Ms Underhill was carrying on doing the same role she had done for the previous three years and therefore no vacancy arose to be advertised.
 9. The Tribunal's conclusion is that there no vacancy to advertise. Miss Underhill was the incumbent in that post. There is precedent for this in that Mr Leong, who the Claimant supervised, was also moved from a temporary contract to a permanent contract in the same role without the position being advertised.
 10. The Tribunal does not accept the evidence given by Mrs Islam in so far as the

evidence is not directly relevant to this situation in that first, the examples she gave of fixed term employees begin appointed as permanent employees by way of a competitive recruitment process were of a large public sector organisation (NHS) which has its own recruitment policies and practices, and second the examples she gave involved staff who were on fixed term contracts, but had worked for less than two years thereby not accruing the right not to be unfairly dismissed.

11. The Tribunal accepts that when a vacancy arises, then, that vacancy should be advertised either externally or internally or both and recruitment process undertaken in accordance with equal opportunities legislation and practice. Mr Brown, has submitted that if an employee can simply get permanent status by the continual renewal of fixed term contracts this could be used by the employer is a ruse to evade their obligations under the equality legislation. However, there is no evidence to suggest that when Miss Underhill was recruited in 2012 that was not part of an competitive process – indeed there is an application form in the bundle which indicates that it was.
12. The Tribunal also take account of its own industrial experience that, particularly in the charitable sector, staff are often taken on a fixed term basis, as there are often question marks about funding in the long time. This does not mean that the recruitment exercise for that fixed term position is not as open, and competitive as any other recruitment exercise for permanent position.
13. There is no evidence that the Respondent is trying to manipulate the situation to evade equal opportunities legislation. Mr Beach has given evidence about a particular set of circumstances (the audit, Ms Underhill's accrued rights and the need to formalise her working arrangements) and in those circumstances the Tribunal does not accept the Claimant arguments and find that the Respondent acted reasonably in not considering that there was a vacancy that needed to be advertised.
14. Given that the Claimant accepted start of the hearing should Tribunal find that there was no reason for the Respondent to advertise the post that his claim would fall away the Tribunal dismisses the Claimant's claim.

Employment Judge Martin
Date: 15 July 2016