



EMPLOYMENT TRIBUNALS

Claimant: Mr I Edun

Respondent: NHS Property Services Limited

Heard at: London Central

On: 20,21 & 22 November 2018

Before Judge: Employment Judge Henderson
Mr R Pell
Ms M Jaffe

Representation

Claimant: In Person

Respondent: Mr J Heard (Counsel)

JUDGMENT

The unanimous decision of the Tribunal is as follows:

The claimant's claim for direct race discrimination (under section 13 of the Equality Act 2010 (EA)) fails and is dismissed.

REASONS

1. These reasons were delivered to the parties at the conclusion of the Hearing on 22 November 2018. It was agreed with the parties that in the written version of these Reasons, the names of individuals referred to at the hearing (who were not parties or witnesses) would be anonymised.

The claim

2. This was a complaint for direct race discrimination contrary to section 13 EA brought in an ET1 lodged on 11 April 2018. There was a preliminary hearing on 2 August 2018 which considered various applications/cross-applications of the parties. The claimant's application to amend his claim

was refused and the respondent's application to strike out the claimant's complaints was refused.

3. Although not expressly set out in the Tribunal Order, it was agreed by both parties that at the preliminary hearing the Employment Judge had granted an extension of time (under section 123 EA - on just and equitable grounds) to allow the claimant to bring the race discrimination claim. The Tribunal therefore had jurisdiction to consider the claim.

The Issues

4. At the commencement of the hearing the issues were agreed with both parties. Whilst he had not specifically agreed the List of Issues prepared by the respondent's solicitors dated 24 September 2018, the claimant confirmed that the issue for determination in this case was as follows:

-was the claimant treated less favourably than an actual or hypothetical comparator was or would have been in respect of the respondent's act of excluding the claimant from the opportunity to be considered for a permanent position (namely that of Fixed Asset Financial Controller) the creation of which caused his temporary position as a contractor to be brought to an end? (section 13 EA);

-if so, was the less favourable treatment because of the claimant's race; which the claimant described as being of black African descent?

-The claimant relied on the following actual comparators, whose circumstances he said were materially the same as his own (section 23 EA), namely:

<u>Name</u>	<u>Race/Ethnicity</u>
SMY	Chinese/Singaporean
RM;	Asian British-Indian
RR;	Asian British-Indian
HB;	Asian British-Bangladeshi
KS;	Indian-New Zealand
DMcD	White-New Zealand
SDS	Asian-Australian
JPR	White –British

-the claimant also relied on a hypothetical comparator;

-the respondent accepted that the claimant was a contract worker within the meaning of section 41 EA.

Conduct of the Hearing

5. The Tribunal heard evidence over the course of the first two days from the claimant and on behalf of the respondent from Elliot Cheung (Head of Financial Control since March 2017) and Gillian Sheeran (Senior Transaction Manager in the Investment Management Team). The witnesses had prepared written statements which were taken as their evidence in chief. The parties had agreed a bundle of documents and page references in this Judgement and Reasons are to that bundle. The Tribunal also received written submissions from the respondent and heard oral submissions from both parties.

Findings of Fact

6. The Tribunal heard detailed evidence, but will only make such findings of fact as are necessary to determine the issues referred to above.

Background

7. It was agreed that the claimant had commenced working with the respondent at the end of December 2015 as an interim Fixed Asset Accountant, based at the respondent's Kings Cross office. He had been recruited through an agency, Morgan Law, initially on a three-month contract to 31 March 2016. The claimant's contract was continually extended by the respondent until 17 November 2017.
8. In April 2017 the claimant moved his payroll administration from Morgan Law to Michael Page Recruitment under an umbrella company payroll arrangement and Michael Page sent invoices for the claimant services to the respondent from May 2017. However, the claimant was not available as a candidate to Michael Page Recruitment for job placement or introduction to the respondent as any commission payable on such an appointment would have reverted to Morgan Law. Michael Page, therefore, had no incentive to put the claimant forward for any job vacancies at the respondent.
9. The claimant had been reporting to SR (Head of Financial Accounting) since March 2016: SR was also a long-term contractor. At that stage DMcD was Group Financial Controller, responsible for contractors working within her team. The claimant had indicated to SR that he was interested in becoming a permanent employee if an opportunity arose.
10. In October 2016 SR had informed the Financial Accounting team that the respondent was commencing a staff restructuring and the outcome would be known in or around February 2017. He said that following staff consultation, vacant posts including those currently covered by contractors and agency staff would be filled. Mr Cheung was appointed in March 2017 to implement that restructuring. Mr Cheung said that when he joined the respondent around 70% of the finance function comprised expensive day-rate contractors with short notice periods, which he immediately identified as being high risk to the respondent.

11. Mr Cheung also assessed and reviewed the roles and outputs of the team and concluded that nearly all of them needed to improve their performance. When he was interviewed for his role by the CFO, JP, Mr Cheung said that they had discussed the fact that the Finance team was of a poor standard overall and that there was a need to reduce the number of external contractors.
12. The Tribunal was referred to a Handwritten note of Mr Cheung's (of an unknown date at page 66) recording his initial discussions with SR. This note refers briefly to the claimant and acknowledges his interest in a permanent role but also notes that DMcD "did not rate" him and that Mr Cheung should check with MM (Interim Property and Capital Finance Manager) who had dealt extensively with the claimant.
13. Mr Cheung said at paras 18-19 of his witness statement that MM also had issues with the claimant's competence. However, the Tribunal was not taken to any documented exchanges on this topic and Mr Cheung did not specify exactly what his concerns about the claimant were. He said that the claimant's perception of his role was too narrow and transaction-specific and that he did not see the overall context of the situation.
14. SR left at the end of June 2017 when his contract was not renewed and was replaced in August 2017 by TM, who was a permanent employee. DMcD's employment terminated in September 2017.

The claimant's performance

15. There was a dispute in the evidence about the claimant's performance in his role. Mr Cheung maintained that from an early stage he (and other managers) had concerns about the claimant's performance; the claimant maintained that he had never been told there were any problems with his performance and that, in fact, there were no such problems.
16. The claimant asked Mr Cheung in cross-examination about specific evidence of his poor performance. Mr Cheung referred to page 122 which contained SP's (Department of Health Financial Controller) assessment of the claimant's performance in an email dated 27 October 2017. However, the Tribunal notes that this was a retrospective assessment and had been written after JPR (the successful candidate for the Fixed Asset Financial Controller role) had started work and after the claimant had raised his complaint against the recruitment process on 12 October 2017.
17. Mr Cheung also referred to HS's emails at page 130/131 which referred to a delay by the claimant in providing specific information; TM's views of the claimant's performance as expressed in Ms Sheeran's investigation (page 163) and SP's interview as part of Ms Sheeran's investigation (page 171). Again, other than HS's emails all of these assessments were made after the recruitment process had concluded and the claimant had raised his complaint.

18. The Tribunal finds that the claimant never received any feedback (documentary or otherwise) which was critical of his performance. This was confirmed by Mr Cheung in his oral evidence. Furthermore, the claimant's contract had been consistently renewed over a period of 23 months, which meant it was reasonable for him to conclude that there were no problems with his performance. Both of these facts were confirmed by Ms Sheeran in her investigation. There were some examples in the documentary evidence (including the accounting following the fire at the Weybridge site) which showed that the claimant may not have responded immediately to requests for information; but there was no evidence presented to suggest that such delays had led to any material accounting errors. Further, the claimant was not made aware at the time that these delays had reflected adversely on his performance.
19. Mr Cheung said that SR was a poor manager in that he had not raised any performance issues with the claimant and that he avoided confrontation. Mr Cheung accepted that as from June to August 2017 he had been (by default) the claimant's line manager until the appointment of TM. However, despite his adverse assessment of SR, Mr Cheung had not raised any performance issues directly with the claimant during this period nor had he mentioned any such problems to Michael Page, who were technically supplying the claimant's services to the respondent. Mr Cheung said that he had been extremely busy during that time. The Tribunal finds that (like SR) Mr Cheung failed to manage the performance of those in his team, and, of the claimant. This was especially significant as he knew that the claimant had expressed interest in the permanent role and that he (Mr Cheung) was about to commence the recruitment process.
20. The Tribunal does not make any finding of fact with regards to the claimant's competence or performance, nor does it need to do so. Mr Cheung formed his view of the claimant's performance through his own relatively limited contact with the claimant and also through the hearsay reports of other managers, but not through any objective (or properly documented) performance assessment. Furthermore, Mr Cheung was very clear in his evidence about the type of person he wished to recruit into the team: namely "hungry, proactive communicators with audit experience from ideally the Big Four accountancy practices". The claimant did not fit this profile and accordingly Mr Cheung did not include him in the recruitment process. To that extent Mr Cheung's recruitment process was pre-judged and unfair.

The recruitment process for the Fixed Asset Financial Controller

21. The process commenced on 11 July 2017, when, having obtained the appropriate internal authority, Mr Cheung instructed Michael Page to look for a suitable candidate. Mr Cheung said that Michael Page had sent somewhere between three to six CVs and that he had interviewed two candidates for the Fixed Asset Financial Controller role: namely, JPR and another female candidate. There were no internal candidates considered and the roles were not advertised internally or externally. As noted above, Michael Page did not put the claimant forward for the role. Mr Cheung said that he had been unaware of the respondent's recruitment policies;

however, given his position as a senior manager in the respondent's organisation this explanation is not acceptable. Mr Cheung should have made himself aware of such policies.

22. The CV of JPR is at pages 100-103. Mr Cheung and SP conducted the interview with JPR; there was no agreed list of questions and there was no record kept of the interview. Mr Cheung and SP jointly made the decision to offer the role to JPR and it was accepted by him in August 2017, with a proposed start date of 9 October 2017.
23. The claimant's contract was renewed at the end of July 2017 to 31 October 2017. Mr Cheung was asked why he had done this: he said that given the high level of contractors in the team he could not remove them all at the same time and he needed people to cover the functions required to run the organisation. On 6 October 2017 the claimant was informed by TM (who was then his line-manager) that his contract would not be renewed and was told that JPR had been appointed and he then started in his new role on 9 October.
24. Mr Cheung was asked in Tribunal questions why the claimant had not been told of JPR's recruitment in August. He said that given the contractor's short notice period, he did not want the claimant to leave before he had been able to hand over to JPR and to give him basic training in the respondent's financial systems. He said that the claimant had first-hand knowledge of those systems. Mr Cheung accepted that this was an apparent contradiction of his views of the claimant's performance but he said that essentially it was a judgement call and on balance he wanted to ensure that he "picked the claimant's brains" before he left. The Tribunal accepted Mr Cheung's evidence as honest, if somewhat cynical and callous.

The investigation

25. On 12 October 2017 the claimant emailed Mr Cheung complaining that he been excluded from the recruitment process but refused to discuss the matter in a meeting with Mr Cheung.
26. The respondent decided to treat the claimant's complaint as if it had been a grievance (although the grievance process did not strictly apply to contractors). This was dealt with by Ms Sheeran who interviewed the claimant, Mr Cheung; TM; and SP. She then produced an investigation report dated 27 November 2017. The report concluded that Mr Cheung had not followed the respondent's recruitment processes and policies. However, the report also concluded that Mr Cheung's motivation had been to reduce the number of external contractors within the finance team and had not been on grounds of the claimant's race. The Tribunal finds that Ms Sheeran's assessment was a reasonable one in all the circumstances and did contain clear criticism of the recruitment process followed by Mr Cheung and his treatment of the claimant, with which criticism the Tribunal agrees.

27. The report was not shown to the claimant but he was invited to attend a meeting to discuss the outcome which he declined, and on 14 December 2017 Ms Sheeran emailed a summary of her findings to the claimant. The respondent did not allow the claimant a right of appeal as the grievance procedures did not technically apply to him.

The comparators

28. The Tribunal was taken through the details of the eight actual comparators cited by the claimant, but find that the first seven of those are not appropriate comparators as they do not fall within the test that there must be “no material difference” between their circumstances and those of the claimant. The claimant accepted in his oral evidence that the first seven comparators cited had not been contractors, although he had not been fully aware of their status at the time.
29. As regards JPR, the Tribunal finds that he would be an appropriate potential comparator, bearing in mind that the essence of the claimant’s complaint is his exclusion from the recruitment process.
30. The claimant also referred to a hypothetical comparator which the Tribunal finds would be: a contractor within the respondent’s organisation, with the appropriate level of qualification and experience for the relevant role and about whom the respondent had genuine concerns regarding performance, but not of the claimant’s race.

Mr Cheung’s attitude to the claimant and persons of the claimant’s race

31. The Tribunal was referred to examples of Mr Cheung’s behaviour cited in the claimant’s witness statement at paragraphs 18, 24, 27 and 28.
32. At paragraph 18, the claimant said that at their first meeting in March 2017 with many attendees, Mr Cheung was not interested in interacting with the claimant and did not respond to his saying “hello”. The claimant accepted that he had not been offended by this conduct at the time. The claimant also accepted in his oral evidence that he could understand that Mr Cheung may have been overwhelmed on his first day and did not know many of the people at the meeting. The Tribunal finds that the claimant has not shown that this behaviour by Mr Cheung was racially motivated.
33. As regards paragraph 24, the claimant said that around July 2017 he began to observe that Mr Cheung spoke to everyone (including those on student placements) other than the claimant. He said that Mr Cheung would frown at him; was unwelcoming, abrasive and hostile such that the claimant began to avoid him. The claimant said that he had also observed that Mr Cheung behaved in a similar way to OA and MM, both of whom were black women in the Department. The claimant had not kept a diary or any contemporaneous notes of such behaviour. Mr Cheung denied that he had treated the claimant, OA and MM any differently to other members of the team.

34. As there is a dispute in the evidence, the Tribunal must decide whose evidence it prefers. The Tribunal notes that as part of Ms Sheeran's investigation, the claimant had asked her to interview OA (but this could not be done as she was on long-term sick leave). However, the claimant had never mentioned MM at that stage. The Tribunal heard no evidence from either OA or MM. Nor were there any contemporaneous notes of the claimant regarding such conduct by Mr Cheung. Bearing this in mind, the Tribunal prefers (on a balance of probabilities) Mr Cheung's evidence.
35. As regards paragraph 27, the claimant said that Mr Cheung was dismissive and undermined him at meetings. Mr Cheung said that he did not believe that he had done so. However, he did accept that in early August following the Weybridge incident he had been exasperated with the claimant's apparent lack of urgency in dealing with the accounting situation, but he said that this was his management style and that he would have treated any member of the team in the same way. The Tribunal accepted Mr Cheung's evidence on this point as credible.
36. The Tribunal had not been presented with any evidence from which it could infer that Mr Cheung's attitude towards the claimant was motivated by the claimant's race.

Conclusions

37. Ms Sheeran's investigation report accepted that the claimant had been treated less favourably by being excluded from the recruitment process in breach of the respondent's policy set out at pages 44-56 and the Tribunal agrees with that conclusion. The key question in this case is whether that less favourable treatment was because of the claimant's race?
38. The Tribunal considered section 136 EA as regards the burden of proof in discrimination cases and was also referred to the cases of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] EWCA Civ 33** (citing **Laing v Manchester City Council**). Bearing in mind the factual matrix in this case, the Tribunal prefers to adopt the approach in **Madarassy** and to consider the evidence presented as a whole when determining the burden of proof required to be met, rather than applying the strict two stage process.
39. The evidence presented by the claimant to establish that Mr Cheung had excluded him from the recruitment process on grounds of race was not sufficient to discharge the burden of proof (applying the balance of probabilities as the standard of proof). The claimant accepted that as regards the allegations contained in paragraph 18 of his witness statement, this could be explained by Mr Cheung's distraction on his first day. The Tribunal accepted Mr Cheung's evidence to explain why he may have appeared impatient or dismissive in meetings, which behaviour was not related to the claimant's race. The claimant had not established that Mr Cheung treated OA and MM differently from other members of the team. The Tribunal also notes that MM remains a member of the current team headed by Mr Cheung.

40. The claimant's direct race discrimination claim does not, therefore, succeed.
41. Despite this finding, the Tribunal recognises (as did Ms Sheeran) Mr Cheung's total failure to follow, not only the respondent's own recruitment policies, but indeed to follow any open or transparent approach to the recruitment of JPR.
42. Given, this conduct by Mr Cheung, it was unsurprising that the claimant should seek some explanation for his exclusion from that recruitment process especially when he had so clearly expressed an interest in a permanent role. The claimant's indignation was further compounded by the fact that the claimant had carried out the substance of the relevant role for 23 months as a contractor and had never been told directly that there was any problem with his performance but, on the contrary, had had his contract consistently renewed, including by Mr Cheung himself in July 2017.
43. The claimant had been checking the internal vacancies list on a regular basis but had only been told of JPR's appointment on the Friday before JPR was due to start the role on the following Monday. The actual decision to appoint JPR had been taken jointly by Mr Cheung and SP in mid - August 2017. The Tribunal finds that this conduct by Mr Cheung as a senior manager, is clearly unacceptable. The Tribunal notes that Ms Sheeran made various recommendations in her reports and that these have now been adopted by the respondent going forward.
44. However, despite the Tribunal's criticisms of Mr Cheung's conduct of the recruitment process, it finds that his reasons for doing so were based on:
- his ignorance/carelessness of/with regard to the respondent's recruitment process;
 - his strategy to reduce the risk within the team of relying too heavily on external contractors;
 - his assessment (albeit on an informal and hearsay basis) of the claimant's performance and abilities; and
 - the fact that the claimant did not fit the profile of Mr Cheung's vision for the team he was seeking to recruit.
45. Along with Ms Sheeran, the Tribunal does not make any finding as to the correctness of Mr Cheung's view of the claimant's abilities and performance; nor does it make any finding as to the correctness of his recruitment or business strategy; however, it is accepted that Mr Cheung's views were genuinely held and that his decision to exclude the claimant from the recruitment process was not motivated by the claimant's race.

46. The claimant's claim for direct race discrimination fails and is dismissed.

Employment Judge Henderson

Date 30 November 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

3 December 2018

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FOR THE TRIBUNAL OFFICE