EMPLOYMENT TRIBUNALS

Claimant: **Mr J Pereira**

Respondent: **Saipem Ltd**

Heard at: **Via CVP** **On: 23/11/2020 to 26/11/2020**

Before: **Employment Judge Wright**
Ms C Beckett
Mr G Henderson

Representation:
Claimant: **In person**

Respondent: **Mr P Gorasia**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal is that the claimant's claims fail and are dismissed.

REASONS

Introduction

1. The claim was presented on 14/2/2019 and the claimant claims direct discrimination per s. 13 Equality Act 2010 (EQA) and harassment per s. 26 EQA. His protected characteristic is race (s. 9 EQA) as he is of Indian ethnicity. The complaint is of a detriment or dismissal (s. 39 (2)(c) and (d) EQA).

2. The claimant was a contract Geotechnical Engineer and worked for the respondent between 6/9/2018 and 7/11/2018. His contract was terminated due to poor performance.

3. The hearing was conducted via Cloud Video Platform (CVP) and the Tribunal heard evidence from the claimant; and for the respondent from: Emma Cansfield (grievance officer), Richard Harrison (grievance appeal officer), Armen Der Hakobian (claimant's line manager) and Angelos Hadjinicolaou (Mr Der Hakobian's line manager).

4. The Tribunal had before it a bundle of approximately 250-pages[1]. The respondent provided written closing submissions and both parties gave oral submissions.

5. Not all the matters which the claimant advanced were germane to his case and the Tribunal has only determined the issues which are relevant to his pleaded claims.

6. The issues were identified at a case management hearing on 12/9/2019 which recorded the allegations of unlawful discrimination were made against Mr Der Hakobian and Mr Hadjinicolaou. At that hearing, a time limit jurisdiction point was taken, however, that was not pursued at the final hearing.

7. The claimant described Mr Der Hakobian as his 'mentor' (page 115). Mr Der Hakobian had approached the claimant regarding the vacancy for a contractor in his department, although he had described the claimant as 'pestering' him regarding a job with the respondent (page 121). The claimant had worked for the respondent on two previous occasions and was not happy in the role he had at the time. His previous employer was subsequently insolvent. It is of note that the remuneration paid to the claimant doubled from £70,000 pa to £149,520 paid by the respondent.

8. The respondent has approximately 350 employees in the UK, 200 of which form the Engineering Department performing: design; analytical support;

[1] The electronic bundle was not compliant with the Presidential Guidance.

project management; and construction operations. The claimant is a Chartered Engineer with the Institute of Civil Engineers with over 23 years' experience. The respondent was multi-cultural and diverse in terms of the ethnicity and nationality of its staff.

9. Following in interview on 27/7/2018, the claimant started working for the respondent on 6/9/2018. The claimant was informed on 7/11/2018 that his contract was being terminated and his last day was 8/11/2018. The claimant raised a grievance on 8/11/2018 and made allegations of unlawful discrimination (pages 89-96) and provided a 'log' of events on 14/11/2018 (pages 102-114).

10. Mr Der Hakobian was dissatisfied with the claimant's performance. He knew the claimant's experience was onshore engineering, rather than offshore and he knew the claimant was 'quite rusty'. Indeed, at the interview, it was discussed that the claimant was 80% compatible with the role. It was however understood, that the claimant would engage in some reading prior to starting with the respondent, in order to breach the 20% lack of knowledge.

11. It is not accepted, as was the claimant's case, that at the interview it was considered he was a 20% match for the role. The Tribunal finds that the respondent would not engage a contractor, pay him remuneration equivalent to £575 per day, if the skill match was only 20%.

12. This is one example of the claimant completely misunderstanding what was said to him. Another example which arose when the claimant was questioning the respondent's witness. Mr Der Hakobian said he did not call a former employee Ram Babu 'weak'. The claimant said that Mr Der Hakobian had said Ram Babu was weak and took him to the minutes of the investigation meeting where Mr Der Hakobian referred to Ram Babu as 'a nice chap however very shy, young and needed a lot of support' (page 122). The claimant equated 'weak' to needing support. They are clearly completely different descriptions.

13. The allegation is that from 6/9/2018 until 13/11/2018 Mr Der Hakobian and Mr Hadjinicolaou were responsible for acts of direct discrimination and harassment. The first allegation is that on 26/10/2018 Mr Der Hakobian told the claimant to 'go fuck off' and said, 'have you lost your mind'.

14. Mr Der Hakobian admitted swearing at the claimant and expressed his regret. In fact the respondent subsequently took disciplinary action against Mr Der Hakobian. The non-discriminatory explanation was that swearing at the claimant was not because of or related to the claimant's race. It was as a result of the claimant's under-performance in his role,

when he had been recruited to 'hit the ground running' as a contractor in a busy department. The claimant had not done the pre-reading which was required of him and he was unable to use the software correctly. Mr Der Hakobian had a heavy workload and found the claimant was unable to produce basic work and was incompetent; which he found stressful and frustrating. Such that Mr Der Hakobian gave the claimant a month to improve his performance after approximately 3 weeks of his engagement starting. In due course Mr Der Hakobian found there was no improvement and terminated the claimant's contract.

15. Mr Der Hakobian's conduct was as a result of the claimant's failure to perform and was not because of or related to the claimant's race.

16. The next allegation was that on 29/10/2018 Mr Der Hakobian told the claimant to 'shoo shoo shoo', questioned the claimant's technical skills and compared him to a graduate engineer (Sarunas Bartkus). Mr Der Hakobian denied telling the claimant to 'shoo'. The claimant's witness statement refers to Mr Der Hakobian saying 'sssshhhhoooo, sssshhhhoooo, sssshhhhoooo'. Even if Mr Der Hakobian did say something to that effect, the claimant has not established how this amounted to less favourable treatment because of his race or how it was related to his race.

17. Mr Der Hakobian did question the claimant's technical skills as he found the claimant to be lacking and to be incompetent. That had nothing to do with the claimant's race. Furthermore, Mr Der Hakobian did compare the claimant to a graduate engineer. He did so because he compared the claimant's grasp of the role, with that of Mr Bartkus. Mr Bartkus had read the technical papers that the claimant had been asked to read and mastered the software. Mr Der Hakobian expected someone of the claimant's experience to be ahead of, not behind a colleague who had recently graduated.

18. Also on 29/10/2018 Mr Hadjinicolaou asked the claimant to eat his breakfast in the kitchen, not at his desk. The claimant was eating porridge. Mr Hadjinicolaou had a rule that 'sloppy' food (such as porridge and soup) was to be eaten in the kitchen, not at a desk, where potentially a mess could be made. He allowed sandwiches to be eaten at a desk. Mr Hadjinicolaou had also told two other colleagues not to eat 'sloppy' food at their desks.

19. The claimant has not particularised how Mr Hadjinicolaou requiring him to eat porridge in the kitchen was less favourable treatment because of his race or related to his race. The Tribunal finds it was nothing whatsoever

to do with his race. The non-discriminatory explanation was that Mr Hadjinicolaou did not permit messy food to be eaten at a desk.

20. The claimant attempted in his questioning of Mr Hadjinicolaou to bring a racial element into the allegation as he put it to Mr Hadjinicolaou that in Indian culture, asking someone to move while they are eating is very rude. The claimant suggested that Mr Hadjinicolaou should have waited until he had finished. Mr Hadjinicolaou denied he had been rude and he had politely asked the claimant to eat porridge in the kitchen.

21. The problem for the claimant is that this was not his pleaded case. He had not previously made any reference to Indian culture whilst he was eating.

22. The fourth allegation was that on 2/11/2018 Mr Der Hakobian referred to the claimant as the weakest in the department, compared his performance to his colleague Evgenia Chrysouli and referred to the claimant as Ram Babu (a former employee of Indian ethnicity). The claimant contends that referring to him as Ram Babu implied that he (the claimant) was lazy and not good at his job, as that was the view Mr Der Hakobian had of Ram Babu.

23. As with other allegations the claimant makes, there is a lack of particulars and specifics. In his witness statement the claimant refers to 'multiple' occasions when he was referred to as Ram Babu, yet he does not set out the basic facts such as when the multiple occasions were – bearing in mind that the claimant only worked for the respondent for eight weeks. The claimant produced a log, which on his case he started around the 23/10/2018. The claimant does not say where the alleged statement was made or suggest who else was present. The claimant worked in an open plan office and the Tribunal was told that his department was 'loud'.

24. Mr Der Hakobian's opinion was that the claimant's was incompetent, such that around six weeks into the engagement, he had told the claimant that he had two weeks to improve or otherwise, the contract would be terminated. The claimant's race was not the reason Mr Der Hakobian considered him to be weak. The reason was the claimant's incompetence.

25. Mr Der Hakobian did compare the claimant unfavourably with Ms Chrysouli, as her performance exceeded the claimant's.

26. The claimant alleges on 6/11/2018 Mr Der Hakobian called him a 'wanker' and told him to 'fuck off' and made a further reference to him being as weak as Ram Babu. He also claimed Mr Der Hakobian asked him if it was 'Indian culture to be lazy?'

27. Mr Der Hakobian had admitted to swearing at the claimant and he was disciplined as a result. The Tribunal finds Mr Der Hakobian's profanities were as a result of his frustration with the claimant's performance. He did not swear at the claimant because of or related to his race.

28. The claimant disclosed partial WhatsApp messages which on his case, would establish that he had been subjected to discrimination as the messages were almost contemporaneously sent when Mr Der Hakobian made the comments to him. The claimant was directed to disclose the messages in full. The messages did not demonstrate what the claimant suggested.

29. There was no message saying, for example, *something horrible has just happened at work*, or, *I am upset at the way my boss has just spoken to me*.

30. The messages do not refer to Ram Babu. The claimant's friend referred to 'Mamba bu II[2]' on 27/10/2018. This is all the claimant's friend said. The next message from the claimant's friend read 'how are you' and there was nothing to put the 'Mamba bu II' message into context. The claimant does not claim Mr Der Hakobian called him Ram Babu on or around the 27/10/2018. The respondent was prepared to accept 'Manba bu II' was a typographical error for Ram Babu II.

31. On 6/11/2018 the claimant told his wife Mr Der Hakobian had terminated the contract giving one week's notice in a message. She told the claimant to speak to the citizens advice bureau and to contact a lawyer. She referred to the EQA applying to the claimant, as a contract worker. She sent the claimant the names of some law firms. On the 7/11/2018 she sent the claimant some links to citizens advice bureau links. She referred to:

> 'This link clarifies types of discrimination and examples. Go through each so you can write your examples in a similar way.
>
> …
>
> Read this and written your example how the girl is treated more favourably than you.'

The claimant replied:

[2] The claimant had said that he was referred to as 'Ram Babu II' meaning that he was lazy like Ram Babu.

> ‘He is main in the harassment category.’

His wife replied:

> ‘And discrimination- based on race – because he said Indians lazy and called youbram baby.’

32. Again, the respondent was prepared to accept ‘bram baby’ should have read Ram Babu.

33. The claimant has not himself made any reference in the text messages to Ram Babu or commented that Mr Der Hakobian had said words to the effect that Indians are lazy.

34. In the claimant’s log, he did not reference a date or time when Mr Der Hakobian had referred to Indians being lazy.

35. In the claimant’s witness statement, he said Mr Der Hakobian had, on one occasion between 6/9/2018 and 25/10/2018, said ‘is it Indian culture to be lazy?’ When he gave evidence the claimant repeatedly referred to stress, his distress and injured feelings, as a result of the comments he alleges Mr Der Hakobian made to him. The Tribunal finds that had Mr Der Hakobian made these comments, the claimant would have been able to provide specific particulars of the same. He did not say where the comments were made and who else was there. This was a busy open plan office, the seating plan showed 19 people in the claimant’s team and desks for 90 people on the floor. Mr Harrison additionally interviewed two members of the claimant’s team. The claimant disagreed that the two members of staff Mr Harrison interviewed would have been able to overhear any comments which were made. The claimant however suggested that other colleagues whom Mr Harrison did not interview would have overheard. Mr Cotter said he did not overhear any shouting or swearing aimed at the claimant and did not hear any reference to Ram Babu, comments about laziness or bad behaviour or racist comments being made to the claimant. Mr Bartkus said Mr Der Hakobian would speak directly to the claimant, but he did not hear the name Ram Babu or reference to Indians being lazy. If, on the claimant’s case he was referred to as Ram Babu on ‘multiple occasions’ then it would be expected that the comments would be overheard in an open plan office.

36. The Tribunal was taken to Ram Babu’s resignation letter and he parted on good terms with the respondent. The Tribunal finds that Mr Der Hakobian did not have a negative view of Ram Babu and that he did not refer to him

in derogatory terms in respect of the claimant or indeed any other member of staff.

37. In his witness statement, the claimant said that he had spoken to Ram Babu on 27/12/2019 at 16:34 and Ram Babu had confirmed he had been harassed by Mr Der Hakobian during his time at the respondent. Ram Babu left the respondent's employ after five years on 21/6/2013 after his work permit had expired. The claimant did not provide any corroboration of this from Ram Babu, such as an email confirming that hearsay evidence. In the alternative, the claimant did not set out why Ram Babu did not provide confirmation. For example, if Ram Babu was still working in the same industry and he did not wish to become personally involved in the claimant's claim.

38. The final allegation was that the termination of his contract was both an act of direct discrimination and harassment. The Tribunal finds the reason the contract was terminated was due to the claimant's performance.

The Law

39. The EQA provides:

> 13 Direct Discrimination
>
> 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.
>
> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

40. The burden of proof in s. 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.

41. The authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258. That case makes clear that at the first stage the tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

42. In Shamoon v Chief Constable of the RUC 2003 IRLR 285 it was said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. It is suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as she was and postpone the less favourable treatment question until after they have decided why the treatment was afforded.

43. In Madarassy v Nomura International plc 2007 IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase 'could conclude' means that 'a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination'.

44. In Hewage v Grampian Health Board 2012 IRLR 870 the Supreme Court endorsed the approach of the Court of Appeal in Igen Ltd v Wong and Madarassy v Nomura International plc. It is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

45. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in Igen v Wong approved the principles set out by the EAT in Barton v Investec Securities Ltd 2003 IRLR 332 and that approach was further endorsed by the Supreme Court in Hewage. The guidance includes the principle that it is important to bear

in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

46. The Court of Appeal in Ayodele v Citylink Ltd 2017 EWCA Civ 1913 confirmed that the line of authorities including Igen and Hewage remain good law and that the interpretation of the burden of proof by the EAT in Efobi v Royal Mail Group Ltd EAT/0203/16 was wrong and should not be followed.

47. In Dresdner Kleinwort Wasserstein Ltd v Adebayo 2005 IRLR 514 the EAT said that the shifting of the burden to employers meant that tribunals are entitled to expect employers to call evidence which is sufficient to discharge the burden of proof. The EAT said that one of the factors to be taken into account, in an appropriate case, could be the respondent's failure to call witnesses who were involved in the events and decisions about which the complaint is made, in cases where the burden is found to have passed to the employer.

48. A detriment has been held to be 'putting under a disadvantage' and 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment' (MoD v Jeremiah 1980 ICR 13), 'disadvantaged in the circumstances and conditions of work' (De Souza v AA 1986 ICR 513 CA, or simply a 'disadvantage' (Porcelli v Strathclyde Regional Council 1986 ICR 564).

49. In respect of harassment under s. 26 EQA, in Richmond Pharmacology v Dhaliwal 2009 IRLR 336 the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic?

50. At paragraph 22 of Richmond Pharmacology, the EAT said:

> 'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

51. The civil burden of proof applies of the balance of probabilities. Or, to put it another way – is it more likely than not?

Conclusions

52. The claimant unfortunately did not meet the burden which was placed upon him. His claims were weak and were not presented in the most effective format. His assertions did not come up to proof; for example, when he said the WhatsApp messages would 'prove' his claims and they simply did not do so.

53. Mr Der Hakobian admitted that he swore at the claimant. He did so as he was frustrated, stressed and had a heavy workload. It was the claimant's own case that he was only 20% capable of doing the role and he did not take the opportunity to read the technical papers. In contrast to the graduate engineer who did do the reading and whose performance exceeded the claimant's. The reason for Mr Der Hakobian using profanities was not because of or related to the claimant's race. The non-discriminatory explanation of frustration about the claimant's under-performance is accepted as the reason for vulgar language used.

54. Mr Der Hakobian did not tell the claimant to 'shoo'. This is not less favourable treatment because of the claimant's race or related to his race. The fact is the claimant's technical skills were lacking and he was overtaken in terms of ability by a recent graduate.

55. On the balance of probabilities, the claimant has not discharged the burden of proof that he was referred to as Ram Babu or there was a reference to lazy Indians. As pointed out by the respondent, the claimant was insistent that the WhatsApp messages would definitively establish his case. When it was clear that was not the case, he changed his evidence and said that he had told his wife what was happening during lunchtime telephone calls. The claimant had made no reference to this in his witness statement.

56. There was no corroboration from Ram Babu, or indeed from anyone else working in a large open-plan office. The claimant produced hearsay witness statements for his wife, sister and friend; yet he did not produce such a statement for Ram Babu.

57. Calling the claimant Ram Babu or making a reference to lazy Indians are severe allegations of racial slurs. The Tribunal concludes that had these events taken place, that the claimant would have been able to provide more certain particulars, particularly as on his case, he had started to keep a log by 23/10/2018.

58. The claimant's case was simply lacking relevant evidence and it did appear that he had reverse engineered his claim. He was told he had two weeks to improve and then he was told his contract had been terminated and he then made his allegations.

59. Mr Hadjinicolaou's instruction to the claimant to eat his breakfast in the kitchen had nothing whatsoever to do with his race. It was Mr Hadjinicolaou's rule that messy food was to be eaten in the kitchen.

60. The reason for the termination of the contract was the claimant's incompetence and poor performance, which he had previously been warned about.

61. In essence, it is accepted the issue which the claimant had was the termination of his contract. He was really seeking to bring a claim akin to that of unfair dismissal. He was unable to do so and so he presented complaints of discrimination.

62. For the reasons set out above, none of the allegations are upheld and the claimant's claim is dismissed.

Employment Judge Wright
3rd December 2020