EMPLOYMENT TRIBUNALS

Claimant: **Elizabeth Kolajo**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **17 & 18 June 2021**

Before: **Employment Judge Housego**
Members: **Ms J Henry**
Ms P Alford

Representation

Claimant: In person

Respondent: Daniel Moher, of OneSource Legal Services

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The claim is dismissed.

REASONS

Basis of claim

1. Ms Kolajo was placed, as an agency worker, to work at LB Newham as a business analyst. After about a month the manager who had interviewed her, and to whom she was responsible, terminated the arrangement. The Respondent says this was for performance reasons. Ms Kolajo says that it was because she was the only person in the team of black African heritage.

Law

2. Race is a characteristic protected by the Equality Act 2010[1]. Ms Kolajo asserts that her treatment was direct race discrimination[2].

3. The test for a claim that a claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever[3] was there less favourable treatment tainted by such discrimination. It is for the claimant to show reason why there might be discrimination[4], and if she does so then it is for the Respondent to show that it was not. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice.

Evidence

4. The Tribunal heard oral evidence from the Claimant, and for the Respondent from Nicolina Cooper (who engaged the Claimant, and who ended that engagement) and from Jackie Antoine (a colleague at the Respondent). A witness statement was tendered in the name of Lisa Perry (who was the Claimant's immediate line manager) but although still employed by the Respondent was not called to give evidence. The Tribunal accorded that witness statement little weight, particularly as it was generic and short.

Submissions

5. Mr Moher provided a written submission. In summary he emphasised that the issue was discrimination not unfairness. While unfairness was denied, there was contemporaneous evidence that Ms Cooper was unhappy with the work of Ms Kolajo, and no reason to think there was any other reason for Ms Cooper to end Ms Kolajo's time with the Respondent. It was also significant that it was Ms Cooper who had interviewed and chosen Ms Kolajo to work at the Respondent only the previous month, and who was shortly to leave the Respondent, and who sought urgently another business analyst on parting with Ms Kolajo. It was contrary to the Respondent's interests to get rid of someone doing a good job: Ms Cooper thought she was not doing a good job. The work force was very diverse, and included many other black people. The complaint of Ms Kolajo was that there was a very close team including family members, who, in effect, colluded in getting her dismissed. Her complaint on being dismissed was of *"internal politics"*, not race discrimination. In all there was every reason to think, based on contemporaneous emails, that Ms Cooper was not happy with Ms Kolajo's contribution and that was the only reason for the placement being ended, and no reason to think that had anything to do with Ms Kolajo being African.

6. Ms Kolajo said that she was a thoroughly competent business analyst. This involved far more than just process mapping, which was only the start of her

[1] S11 Equality Act 2010
[2] S13 Direct discrimination: (1) 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.
[3] Igen Ltd & Ors v Wong [2005] EWCA Civ 142, para 14 applying Barton v Investec Securities Ltd. [2003] ICR 1205 para 25.
[4] Igen v Wong (above), Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

role, which was business transformation. It took the 4 days of the first week to find her way around, and then she was reliant on others for documents and interviews, and sometimes people were not as quick as she would have liked. It was unfair to pick on one email to the legal department as unsatisfactory: there had been others before to inform the legal department what the information was needed for. It was simply untrue that she had been sleeping – the most that happened was that she rested before the start of a workshop. There had been no telephone conversations with Ms Cooper warning her about performance. The recruitment processes were suspect and involved bringing in friends and family members without going through open recruitment. That there were other non white people there, including black people did not mean that there was no discrimination against Africans. This was all so unfair and untrue that she was sure it was race discrimination. She had experienced hostility while at work from various people. Ms Cooper was overcritical of her.

Findings of Fact

7. Ms Kolajo is a business analyst, who obtained work through a recruitment agency. The Respondent had taken over the running of the vehicle pound, through a transfer of undertaking. There were a number of issues which required urgent attention, in particular the number of vehicles impounded, some of which had been there many years. Ms Kolajo's role was to transform that operation. It was multi faceted, involving cctv systems, the procedures needed, and the personnel required. The vehicles themselves were impounded for a variety of reasons. Some were abandoned, some had cloned plates, some were stolen. Some had hire purchase finance on them. All required different treatment. Ms Kolajo's first task was process mapping, to find out what was being done, finding that out from people actually working in the pound.

8. Ms Cooper was herself in post as an interim appointment, and was due to, and did, leave the Respondent in very early March 2020.

9. Ms Cooper did not give Ms Kolajo any fixed deadlines, other than that the work needed to be done as swiftly as possible.

10. Ms Cooper was keen that Ms Kolajo provide a plan for transforming the operation of the car pound. Ms Perry was expecting the highlight reports by 21 February 2020, for a board meeting on 26 February 2020 (54).

11. Ms Kolajo emailed Ms Cooper with her *"highlight reports"* on 12 February 2020 (56). Ms Cooper emailed back that there was quite a lot missing. Ms Kolajo replied that she was seeing the team the next week and would then update her highlights report. Both agree that there was a telephone discussion. Ms Kolajo says there was no reference to being dismissed. Ms Cooper says that she would need to consider *"letting you go"* if the pace and quality of work did not improve. The Tribunal accepts that Ms Cooper let it be known that the output of Ms Kolajo was such that if it did not improve her stay would end.

12. Ms Cooper wanted input from the legal team at the Respondent as to the legal parameters of what needed to be done (for example what interaction

with the police about stolen vehicles, or with hire purchase companies for vehicles with finance on them).

13. On 18 February 2020 Ms Kolajo emailed Ms Cooper a draft email to the legal department (75) asking some questions about the legal requirements in various circumstances. It is four bullet pointed questions. Ms Cooper said it was insufficient. Ms Kolajo rewrote it (76), and copied it to Ms Cooper for comments or amendments. On 19 February 2020 Ms Cooper said that she needed to rewrite the email to the legal department (79), for which Ms Kolajo then apologised (81). Ms Kolajo says there were earlier emails, but none were made available to the Tribunal, and the Tribunal finds there were none of significance. In any event the email to the legal team should have been complete, or at least referred to prior communication.

14. On 24 February 2020 Ms Kolajo sent Ms Cooper her process maps for all vehicle categories (83). On 25 February 2020 Ms Perry asked to speak to Ms Kolajo about them (86). They are simple flow charts, one for each type of vehicle. Ms Cooper thought they were too simple. Ms Kolajo described the detailed flow charts as *"user stories"*, a phrase unknown to Ms Cooper before this hearing. Ms Cooper's view, genuinely held, was that they were little to show for about 4 weeks' work, the last two weeks being at home.

15. On 27 February 2020 Ms Kolajo sent (97) an agenda to Katie Brunger and to Ms Cooper about a workshop she was to attend. Ms Brunger was not happy about this. Cooper was not happy about this: Ms Brunger's remit was the reorganisation of the collection of money across the Respondent. As the car pound collected revenue, it made sense for Ms Kolajo to be involved, to shadow Ms Brunger and then implement the solutions and processes to be designed by Ms Brunger. Ms Cooper said that Ms Kolajo was *"interfering"* with the workshop, for she should not have been supplying her own agenda for the workshop, but learning from it and incorporating Ms Brunger's revenue collection processes into the car pound process mapping and procedures.

16. At some point Ms Cooper had been told that Ms Kolajo had been asleep at work, and mentioned this on 27 February 2020 when talking to Ms Antoine, who told her that she and Ms Kolajo had been over 45 minutes early for a workshop which was to start at 11am, and that Ms Kolajo had put her coat over her head and appeared to go to sleep. This report was the point at which Ms Cooper decided that Ms Kolajo should cease her role, and on 27 February 2020 she emailed the agency to say that it was not working out, and that her placement should cease (111). She wrote:

    "Further to out discussion just now, the business analyst role with Elizabeth is not working out. She unfortunately does not have the required skills or experience to do what we are asking and she is unable to meet deadlines. Therefore, can you advise her tomorrow that that will be her last day with us, but we will honour her weeks' notice and pay her next week. We do need to replace her urgently so can you send CVs to Lisa to review via Beeline?"

17. The Tribunal finds these reasons to be the full extent of Ms Cooper's reasons. No one else was responsible for either the engagement of Ms

Kolaja, or the ending of her placement. Ms Cooper had reason to think that the performance of Ms Kolajo (who was being paid £250 a day) was inconsistent with the urgency of the reorganisation that was required.

Reasons for findings of fact and conclusions

18. The Tribunal takes full account of the test for the assessment of cases of race discrimination. The Tribunal could not identify primary facts that could lead to the inference that race discrimination was a factor, however small, in the ending of the engagement of Ms Kolajo with the Respondent. Accordingly, the burden of proof does not shift to the Respondent. If it did shift, it would be met.

19. It is not enough to suffer a detriment (as plainly Ms Kolajo did) and to have a protected characteristic (as Ms Kolajo has). The one must be causally connected with the other.

20. Bahl v The Law Society & Anor [2004] EWCA Civ 1070 sets out the relevant analysis. The Court of Appeal described the analysis in the EAT below, of Elias LJ (as he then was), as *"impressive"*. It was, in part:

"97. However, demonstrating the similar treatment of others of a different race or sex is clearly not the only way in which an employer who has acted unreasonably can rebut the finding of discrimination. Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case. The inference may also be rebutted - and indeed this will, we suspect, be far more common - by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."

21. This is plainly the case here. There were genuine reasons, and the Tribunal does not need to make findings of fact about whether they were such as to make ending the placement unfair: that is not the issue in this case. Ms Kolajo was an agency worker without the rights of a permanent employee with 2 years' service. Ms Cooper was an interim director, about to end her involvement with the Respondent within a week. The task for the Respondent was urgent. Ms Cooper had reason to think (and the Tribunal finds did think) that Ms Kolajo's performance was inadequate. Whether it was or not is irrelevant to the issue of race discrimination. For all the reasons summarised in Mr Moher's written submission, briefly summarised above, there is no reason to think that race had anything to do with the decision of Ms Cooper. There is every reason to think that it did not have anything to do with race. There was nothing false about what Ms Cooper wrote to the agency.

22. Ms Kolajo added at the hearing that she felt hostility at work. This was not part of her pleaded case. If so, that hostility was from colleagues of a great variety of racial backgrounds, and if she did so suffer, then it is

overwhelmingly likely to have been for the same reasons that led Ms Cooper to end her engagement with the Respondent.

Employment Judge Housego
Date 18 June 2021