Case Numbers: 2208394/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Mba	**v**	Cabinet Office

Heard at: London Central Employment Tribunal

On: 6, 7, 11 September and 23 November 2017

Before: Employment Judge JL Wade
Ms S Samek
Ms E Ali

Appearances:
For the Claimant: In person
For the Respondent: Mr M Sethi (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the respondent did not discriminate against the claimant, victimise him or subject him to detriment because he had made a protected disclosure.

REASONS

1. Mr Mba pursues claims against (1) Cabinet Office and (2) HMRC. This Hearing was to decide the claims against the Cabinet Office which failed to shortlist him for the post of Assistant Parliamentary Counsel in the Office of Parliamentary Counsel. The claimant alleges that the decision not to shortlist him was unlawful:

1.1 Direct race discrimination under the Equality Act sections 13 and 39: less favourable treatment as a job applicant because he is black African of Nigerian origin
1.2 Post-employment detriment, section 109 and
1.3 Detriment on ground of making a protected disclosure, Employment Rights Act section 47B.

2. It is common ground that discrimination may be unconscious as well as conscious and that any of the above need not be the only or principal reason for not shortlisting so long as they are important factors.

3. It is also common ground that the claimant can argue post-employment detriment because he was a crown employee when he worked for HMRC and was applying for another crown employment post with the Cabinet Office.

4. Whilst the claims are against Cabinet Office, for there to have been discrimination or detriment the motivation of the individuals who made to decisions on behalf of their employer must be examined. Discrimination or detriment does not hang in the ether, it is perpetrated by the human agents employed by the corporate body or organization which is the named respondent.

The procedural history

5. The procedural history is summarised as follows

5.1 Complaints against Sir Jeremy Heywood (Cabinet Secretary and Head of the Civil Service), Elizabeth Gardiner CB (First Parliamentary Counsel, Cabinet Office), Edward Troup (Executive Chair and Permanent Secretary, HMRC), Gill Aitken (General Counsel and Solicitor, HMRC) were rejected.

5.2 The claims of direct race discrimination and whistleblowing detriment against HMRC were struck out. The claimant's application to amend to add an indirect race discrimination claim against HMRC was permitted and this claim is being decided separately; the hearing took place between 13 and 17 November, chaired by Employment Judge Glennie.

5.3 The respondent's application for strike out/deposit in relation to direct race discrimination and whistleblowing detriment claim were refused.

5.4 The claimant's application to join TMP Worldwide as third respondent was refused

5.5 The claimant served a supplementary statement on the respondent the afternoon before the hearing. The respondent objected to its being admitted due to the lateness and the fact that it was longer than the original. The application to admit it was refused because (1) it had not been provided for in the directions orders, (2) due to the need to treat both sides equally in terms of admissible evidence (3) it was late in the day and would throw out the timetable contrary to the desirability of starting the hearing. However, the claimant was told that what he wanted to say could be raised in cross examination and in his closing submissions. The claimant is a lawyer and an experienced litigator and should know the rules.

5.6 The claimant said he was not ready to start the hearing due to the late exchange of witness statement on the Friday before (this was not the respondent's fault). In order to assist him we refused the respondent's application for their witnesses to go first and the claimant was told to be ready to cross-examine one of the

respondent's witnesses only. When his evidence concluded he said he was ready to cross-examine the respondent's last witness and despite objections from the respondent we permitted this.

5.7 On Thursday 7 September the claimant said he had been unwell overnight. We told him that he could take breaks whenever he needed and checked on his health during the day. He finished the day and did not take additional breaks. At the start on the next hearing day, 11 September the claimant did not attend and once medical evidence had been obtained we adjourned the hearing on 12th due to his ill health. The hearing resumed and concluded on 23 November.

Evidence and submissions

6.1 We heard evidence from the claimant.

6.2 For the respondent, we heard from Ms E Gardner, First Parliamentary Counsel, Mr D Sprackling and Mr N Rendell, both Parliamentary Counsel. All three were involved in the selection process.

6.3 We read the pages in the bundle to which we were referred together with the written submissions and a skeleton of the claimant.

The facts

7. On 5 February 2007, the claimant was first employed as a Grade 7 lawyer in HMRC's Solicitor's Office. Between March and October 2011, he made protected disclosures; the HMRC/ Goldman Sachs scandal about "sweetheart" tax deals were widely reported and he received some publicity as a whistle blower.

8. In June 2012, the claimant presented an ET claim against HMRC under case no 2202361/2012 complaining of s47B whistleblowing detriment and it is agreed that his allegations contained a protected act for the purposes of a victimisation claim under Equality Act section 27. The matter was resolved by way of a settlement agreement under which he left the employment of HMRC by mutual agreement. His last day of employment was 30 September 2013.

2016

9. Nearly three years later, the Cabinet Office identified a need to recruit Assistant Parliamentary Counsel. The Office of the Parliamentary Counsel (OPC) is based in the Cabinet Office as a team of specialist lawyers who draft legislation for the government.

10. Chaired by Elizabeth Gardner, the selection panel of four met to discuss the process. This included ensuring diversity in the recruitment and so they decided to advertise widely and asked the advice of a Diversity Mentor.

11. The application pack required a statement of suitability "explaining how you consider your personal skills, qualities and experience provide evidence of your

suitability for the role, with particular reference to the criteria in the person specification." It says that candidates must answer with reference to the person specification. This consisted of requirements for academic and professional qualifications and a list of eight skills and competencies relevant to this specialist job, for example:

- A skilled use of language, attention to detail and commitment to accuracy
- An ability to master new areas of law at speed, across the legal landscape.

12. It asked for a CV too, showing career history with "key responsibilities and achievements".

13. We find that since this was a competency-based process the applicants needed to show that they met the competencies in the person specification and were told to provide this in the statement of suitability. The process did not require the assessors to sift through the CV to see what they could pick up as its purpose was to show the career history, including any gaps, and highlight the headline achievements.

The claimant applies

14. On 6 July 2016, the claimant applied for post of Assistant Parliamentary Counsel.

15. From his CV, it is clear that he is probably black African and that he started life in Nigeria. Mr Rendell said he had not been told his ethnicity but agreed he could guess if relevant, which he said it was not.

16. The CV says that he was involved in two race discrimination test cases and his statement of suitability describes his involvement in whistle blowing issues; these are very prominent feature of the application.

17. On 8 July, the claimant was invited to complete an online test aimed at reducing the number of applicants from 250 to a more manageable number. By early August 150 candidates, including the claimant, had passed the test and so a further extensive sift was necessary.

18. The claimant was sent a letter informing him that his application would progress to the short list stage of the selection process.

Recruitment panel meet

19. On 11 August 2016, the recruitment panel met to discuss how it would sift the applications consistently against the Person Specification. They agreed that the identity of a particular university was not relevant if the candidate had the correct qualification. They of course agreed that ethnicity was not relevant and indeed that diversity was very welcome.

20. The 150 applications were divided up between the panel of four. Mr Rendell and Mr Sprackling were to sift a group of 42 including the claimant and Mr Rendell sifted another group with Ms Gardner. All four were to read two groups of applications, about 75 in all, with a different "partner" on each sift and then discuss them. The full panel would then discuss everyone. Given the numbers involved it was

a thorough process. This is an exercise to find the best, relative to the others, not to decide who was good and who bad and it inevitably required the markers to exercise their judgement at some speed given the number of applicants involved.

Stage 1: Mr Rendell's sift

21. This was Mr Rendell's first involvement in recruitment. He had been to unconscious bias training and had familiarised himself with the statutory protections under the Equality Act and the protected disclosure aspect of the Employment Rights Act (he doesn't know how the others prepared). He does not regard himself as a protected disclosure expert although he wrote the Act, his point being that drafting is a very different skill from being an expert in a particular field.

22. He read all the applications three times in all: by alphabetical order, then in reverse and then over again. He marked everyone a particular grade A, B1, B2 or C, and kept a set of running notes. There was much discussion about whether his notes were an aide memoir or his headline conclusions. Of course, they were not the final conclusions as there were two stages to go. Having looked at the comments about many of the candidates we conclude that whilst he was recording memorable points, they were not necessarily positive or negative. Also, his conclusions were not fully formed in his notes as he knew there was to be a discussion which would expand or alter his thinking. Both Ms Gardner and Mr Sprackling were more senior and more experienced than he.

23. The comments were not consistent, for example he does not record the claimant's masters from Oxford nor does he say "good academics" in his note. However, he does say this for "F", another BAME, though not African, candidate, which demonstrates that his comments were quite random and unlikely to be racist.

24. Mr Rendell's notes about the claimant say:
- Whistleblower
- Expression not good
- Too political

25. The claimant says this is evidence that he intended to exclude a known "leaker" from returning to the civil service, particularly because protected disclosures such as his in 2011 were internally considered to be a breach of the Civil Service Code. Mr Rendell does not accept that whistle blowing should be characterised this way, he wrote the original legislation and says he is sure that whistle blowers are protected. Also, he told us that whilst he knew about the "sweetheart deal" issue he did not know the claimant's name or that there had been protected disclosures involved. When he noted that the claimant was a whistle-blower he did not mean that he had a reputation as a rule breaker.

26. The claimant says that this comment was negative, derogatory and signified an absolute prohibition on his being recruited. Mr Rendell disagreed and pointed out that Mr Mba described *himself* as a whistle blower. He is not a line manager and has no views on or responsibility for leaks and has no interest in what he called "the theology or the history of whistle blowing".

Expression not good

27. Mr Rendell says this was the main problem. We agree that the application was not well expressed and this is crucial to the job of parliamentary counsel and a competency appearing in the person specification.

Too political

28. Mr Rendell admitted that his concerns might not have been well founded but explained that he was aware that a 2014 recruit was leaving because he wanted some policy content in the job; parliamentary counsel have no policy input and this could be frustrating for someone passionate and political. The claimant's application led him to believe that the claimant had similar passions. Also, the claimant had expressed personal views as a whistle blower in his application and Mr Rendell was concerned that this was out of place. Another "too political" candidate was also given a C, it is not known whether they had self-identified as whistle blowers.

The claimant's CV

29. The claimant argues that Mr Rendell ignored the many skills and accolades listed in his CV. The reply was that the CV was not irrelevant and it contained evidence that there could be skills matching the competencies but these were not borne out in the statement of suitability. For example, the claimant published a number of legal articles and gave evidence to parliamentary committees but Mr Rendell replied that the articles do not demonstrate that the claimant is interested in or has an aptitude to be a legislative drafter as they are all about whistle blowing. He commented that taken with the statement of suitability the claimant would need to demonstrate a skilled use of language, which he did not. He also said that you could read the claimant's statement of suitability and up until the very end you would not know what the job applied for was. This is true.

30. The claimant was very clear that his CV was enough to demonstrate that he was suitable and that his academic and professional qualifications were not acknowledged. However, competency recruitment is the norm and as a job applicant in a group of 150 a candidate must work hard to *prove* their suitability in the manner prescribed rather than, as we did laboriously at the hearing, trawl through the application for clues that competencies existed.

31. Another example was around the competency "ability to master new areas of law at speed across the legal landscape". The claimant quoted praise from Mr Justice Bean about his ability to represent himself in an appeal in a race discrimination Employment Tribunal claim brought by the claimant against another former employer. Mr Rendell said this comment was made in about 2006 and was less valuable than a recent example from his work with HMRC.

32. Finally, the claimant argues that he brought considerable expertise in tax law which was unique and very helpful as much drafting involved tax, but this was ignored. Mr Rendell said that everyone brought a unique qualification but this was not what the office was looking for. Their skills were transferrable; he himself had done tax drafting with no tax training or specialism.

33. We looked at the way Mr Rendell had marked other candidates. Candidate F also did not have an obviously English name and Mr Rendell could tell that she was probably connected to India. She WAS shortlisted after he changed her mark from B2

to B1. The claimant says Mr Rendell did this to avoid the charge of race discrimination which seems unlikely and we think it more readily demonstrates an open mind and lack of discrimination. In the end F did very well at interview so his judgment was good.

34. We also looked at candidate D and could see a much more concerted attempt by him than by the claimant to make the application relevant and readable. The claimant kept trying to point out examples of infelicitous use of language by other candidates, but none were a striking as his.

35. Mr Rendell was careful to emphasise that the claimant's application was not a bad one, it just lacked some features which other applicants demonstrated. He scored the claimant C, a grade meaning he should not to be considered for final interview.

Mr Sprackling's sift

36. Mr Sprackling also read and marked the claimant's application. He has also had unconscious bias training. Like Mr Rendell, he marked the claimant a C and so neither thought that the claimant was borderline appointable in this exercise. This is not to say that the claimant was not a good applicant; he was just not as good as others.

37. In his initial notes Mr Sprackling commented: "No good examples on legal judgment. Can't spell "counsel"". It was true that the claimant had spelt "Counsel" "council", an elementary mistake and not a good one for a lawyer to make. The claimant says this shows bias against people who do not have English as first language but this is not the basis of his race discrimination claim. In any event, the standard for parliamentary draftsmen must be high because legislation must be clear and correct.

38. On the subject of legal judgment, the claimant gave an example of his whistle blowing activity. Mr Sprackling commented that this was just showing he had applied the law correctly in making a protected disclosure when what was needed was an example of weighing up the arguments, balancing risk and reaching a decision.

39. Mr Srackling says that his comments were notes to remind him of the candidate and not a record of a full decision, not least because the candidates were all going to be discussed with Mr Rendell.

40. The claimant challenged that he had ignored his excellent CV from which, incidentally it could be told that he was Nigerian/ British. Mr Sprackling explained that the CV had little impact as the statement of suitability was so poor meaning that the link between Mr Mba's skills and the person specification was not made.

41. As an example, whilst drafting tax legislation is an important part of what his office does and probably the largest percentage, and whilst the claimant is a highly qualified tax lawyer, the recruitment was for generic skills. It was not relevant to the competencies required to give tax experience additional weight. Mr Sprackling went on to comment that the claimant had worked in the Government legal department but gave remarkably few examples drawing from that experience, which would have made it a better application.

42. Mr Sprackling said that the fact that the claimant was a "whistle blower" was irrelevant to him. Given that whistle blowers are protected by the law, that he had a strong commitment to the rule of law and that he was fully focused on identifying only the relevant competencies, we believed him.

Stage 2: the sifters discuss the candidates they have assessed

43. Nigel Rendell and David Sprackling had independently scored the claimant a "C" meaning "not appointable" so there was already little room for doubt. This meant that during the next stage of this voluminous exercise the claimant was unlikely to get much air time in the discussion.

44. On 16 August, the two met and discussed each candidate for whom they were jointly responsible. At that stage, their marks were finalised, subject to the final meeting of all four recruiters and they recoded short conclusions.

45. Their joint conclusions about the claimant were:
- Experience quite varied
- Infelicities in language in statement of suitability
- Statement not focused on competencies
- Application over-confident?

46. At this stage, the joint note is a summary of the claimant's suitability, or rather lack of it. These were the four headline points if not the full reasons. The claimant's protected characteristic of race and that he was a whistle blower is not in that list.

47. In terms of the comment "Experience quite varied" Mr Rendell says this was a good thing but Mr Sprackling thought it not so good as he had moved about a lot in his career and the office needed people who would stay and learn. If anything, this shows the independence of both men and no relevant inference can be drawn given that the remaining three comments were agreed as negative.

48. "Infelicities in language in statement of suitability" was, as we have said, a comment with which we agree. Although the claimant has tried to point out typos in Mr Rendell's statement and other documents, the obvious response is that his statement was a job application for a job requiring high levels of accuracy so his infelicities deserved to be highlighted. Infelicities in these Reasons also do not fall into the same category.

49. As discussed above, the statement did not sufficiently highlight the competencies and the markers felt that the claimant was stating his achievements rather uncritically.

50. In a parallel process Mr Rendell and Ms Gardner met to discuss the candidates they had both marked, including candidate F.

Stage 3: final Shortlisting meeting

51. A final meeting of all four assessors took place on 23 August 2016. It was a short-listing meeting to consider which of the candidates who had been successful in the sift should be invited for interview, based on their CVs and statements of suitability. The claimant was not discussed because he had failed the sift without question.

52. Ms Gardner did tell us that she had read the claimant's application and was interested in the fact that he was a whistle blower as she liked his independence but because Messrs Rendell and Sprackling had given him a C she did not raise his application at the meeting.

53. On 26 August, a letter was sent to the claimant saying "The panel has now concluded its short list meeting and I am sorry to inform you that you have not been selected for interview on this occasion."

54. Between September and October 2016 25 candidates were interviewed by the whole interview panel over 4.5 days. In respect of these 25 more formal notes were made using a grid to record answers to questions and assessments. Candidate F came top.

55. On 12 December, the claimant filed his ET1.

Conclusions

Race discrimination

56. We have identified no evidence whatsoever to indicate that the claimant's race might or could have been a factor in the decision. The reason why the claimant was not shortlisted was that he did not do as well in the sift as others; there were no other reasons.

57. Given that the panel had 150 applications to sift their processes were acceptable and there is no scope for the claimant to argue that their failure to make more records or use a selection grid opens up the possibility that an inference of discrimination (or indeed protected disclosure detriment) can be drawn.

58. F, although not the same race as the claimant, was the top candidate and given the commitment to and need for diversity in the office, the recruiters would have considered it an achievement to recruit another black person, this time of African ethnic origin and Nigerian national origin. H, who succeeded following a sift by another team of markers, is also black African though not of Nigerian origin. The evidence relating to whistle blower is discussed below; of course, race discrimination and whistle blowing are two very different things which cannot be conflated.

Protected disclosure

59. In his personal notes at the first stage of sifting Mr Rendell recorded a few factors which were irrelevant to the process and the competencies, for example the name of the university an applicant had attended and that the claimant was a whistle

blower. Our conclusion is that if anything this indicates that his notes were more aide memoir than a record of settled conclusions; this was not least because Mr Rendell was not a sole decision-maker and the application had to go through two more sifts before the shortlist was final.

60. In the claimant's case, his application was so full of his whistle blower activity that it would be as odd not to have recorded the fact as to have noted it down. The claimant assumed that they would be against a whistle blower but at the same time made his activity very prominent in his application which seems odd and made us wonder if he had written the application expecting to be rejected.

61. This one piece of evidence at stage one does not lead us to conclude that the reason the claimant was not shortlisted at stage three was that he had made protected disclosures and indeed we are satisfied that the markers viewed independence of mind as a good thing, had great respect for lawful activity and did not see the claimant's actions as having been in breach of the civil service code.

Victimisation

62. The claimant also assumed that he was notorious and that his role in the Goldman Sachs scandal was well known, which it was not. Whilst technically the Tribunal has post-employment jurisdiction as the claimant was in Crown employment and was applying to return, the fact that there were two separate departments involved and that he was not known by the Cabinet Office the makes post-termination victimisation less likely. As recorded above, we find that that employer's reasons for not shortlisting the claimant were cogent and we have no hesitation in concluding that his protected act at HMRC was not a factor.

Other considerations leading to these conclusions

63. To summarise other key elements of our decision:

63.1 The panel had received unconscious bias training and diversity in recruitment was a key objective.

63.2 Much of the claimant's case is based on his belief that his excellent CV speaks for itself but he failed to demonstrate how he met the competencies required. Whilst the CV was important, the key document was the statement of suitability, in a competency based process it is crucial and we agree with the respondent that there were deficiencies. It is striking that Messrs Rendell and Sprackling, who marked independently, found themselves almost fully in agreement, and for very similar reasons.

63.3 The claimant has substantial tax skills which he says were ignored. He failed to recognize that they were not a required competency in the person specification and that the generic skills required by draftsmen were what was important.

63.4 Also he argued that by forming an opinion of the applications the assessors were not objective but the process required them to exercise judgment as to who the best candidates were; all had passed the first test so all had a reasonable standard of

capability. Particularly at this stage of the process, forensic objectivity was not required or possible.

63.5 We agree that the application did not clearly demonstrate that the claimant met the competencies for the role.

Employment Judge Wade on 6 December 2017