



EMPLOYMENT TRIBUNALS

Claimant

Mr Odhiambo

Respondents

Abt Britian Ltd

AND

Heard by: London Central (on the CVP platform)
February 2021

On: 23 & 24

Before: Employment Judge D A Pearl

Members: Ms C Ihnatowicz
Mr J Carroll

Representation

For the Claimant: In person

For the Respondent: Ms C Meenan, of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of (a) direct race discrimination and (b) breach of contract fail and are dismissed.

REASONS

1. By ET1 presented on 8 October 2019 the Claimant made claims of race discrimination, principally arising from the termination of his employment on 3 October 2019. He had been employed by the Respondent as a Finance Manager on 24 June 2019. He was, therefore, dismissed, purportedly on the ground of performance, a little over three months into his probationary period of six months.

2. At a preliminary hearing held on 20 January 2020 Employment Judge Khan defined the issues with the parties and the alleged acts of direct race discrimination were set out as follows:

(a) He was deliberately excluded from attending client meetings i.e. a GGF bid meeting with external clients in July 2019 and a funding meeting with external clients in August 2019.

(b) No probation review took place.

(c) He did not receive a review report of his performance.

(d) He was dismissed.

(e) The termination letter was written prior to the dismissal meeting.

3. The Claimant maintains that the points (b) and (c) above are separate acts. However, he accepts that the allegations at (d) and (e), in effect, amount to the same thing, namely that a decision was taken to dismiss him, and that he was dismissed. He regards these acts as being directly discriminatory because of race or ethnic origin. His race is described as Black and African.

4. In resolving these issues, we heard evidence from Mr Roantree and the Claimant. We studied a bundle running to 258 pages. The hearing was held on the CVP video platform. There were technical problems at the outset of the hearing which delayed the start, but during the presentation of evidence and submissions matters ran relatively smoothly. With the Claimant's agreement we heard first from Mr Roantree, because he is resident in Australia and the hour was getting late.

Facts

5. We note at the outset that it is not our function to resolve each and every disputed issue of fact. What follow are the relevant factual findings so far as the legal issues are concerned.

6. The Respondent bids for and implements international development programmes. The parent organisation is an American company based in the United States. At relevant times Mr Roantree, who is Australian, was the Managing Director of the Respondent's London office. He has now returned to Australia. The Claimant's Line Manager was Mr Jacobs, who was also based in Australia.

7. Having need of a full time Finance Manager, the Respondent conducted a thorough recruitment process before employing the Claimant. It is agreed that he emerged as the strongest of the five candidates and he is experienced in this field. His employment began on 24 June 2019 [check this date] and the contract provides (page 113) that there was an initial probationary period of six months during which the Respondent "may terminate your employment without notice ... during the first four weeks ... and thereafter for the remainder ... with one weeks written notice to you". If employment was not terminated by the expiry of the probationary period the Respondent was obliged to continue to employ the Claimant.

8. The Claimant was involved with the bidding and pricing of tenders. Dealing first with his allegation that he was excluded from meetings, this is dealt with relatively sparsely in his witness statement. In paragraph 10 he simply says that he was excluded from attending "meetings with partners" and concluded this was because of his race. He states, "all other staff members who were white were invited to the meetings". The examples he gives are two meetings. They were in July and August 2019 and he maintains in the statement that they were important meetings for him to attend and that he ought to have been invited. His white colleague, Mr Sparkes, was invited. These assertions became far less secure under cross examination.

9. The Respondent has identified three meetings that they say are relevant. The first was on 19 July 2019 in connection with the GGF bid and it can be seen from page 253 that seven people were invited to the meeting. Mr Sparkes was a Senior Manager in

Programme Delivery who was more involved with operational issues. It was put to the Claimant that at this meeting there was no need for a costings specialist; the Claimant disagreed. However, looking at the Claimant's evidence overall, he appears to have been saying throughout the hearing that he was entitled to attend all meetings. We find this a little improbable.

10. The next point to note was that the meeting had been organised by Mr James, an employee against whom the Claimant makes no allegations of race discrimination. Those allegations are confined to Mr Roantree. The Claimant told us in evidence that Mr Roantree "must have told Joseph James to exclude me". It was very clear that this was a matter of surmise on the part of the Claimant and that he has no reason to think that this is what occurred. There is nothing anywhere in the evidence in the case to corroborate the allegation.

11. The second meeting was on 20 August 2019 and that was organised by Mr Roantree. It was in connection with the ACR bid and it was entitled "Next Steps". Here, there were only two attendees. The Claimant agreed that this was one of the meetings that he had referred to in his ET1 as being an example of race discrimination, however, given that Mr Sparkes was not in attendance, this called for some further explanation from him. What he said in evidence, and is absent from his witness statement, is that he passed through the lobby area where the meeting was taking place and saw Mr Sparkes there. Quite how many people he alleges were present at this meeting is difficult to determine. The pleaded case that all other white members of the team were invited but that he was excluded seems, as a matter of fact, not to be made out.

12. The third meeting was on 30 August 2019 and was in connection with a work shop for the DFID African Cities Research Bid. This was organised by Matilda Nash. Again, the Claimant maintained that she "would have" been told by Mr Roantree not to invite the Claimant for a reason solely based on race. He added in evidence, "this is how I take it". Although this meeting appears to be at a relatively early stage in the bid process, the Claimant insisted that his involvement would not have been premature. He needed to be there. We find some difficulty in accepting this evidence and the implication that he was entitled to be invited to every meeting and should have been invited. Again, the comparator Mr Sparkes was not invited to this meeting. When pressed a little further about the list of invitees disclosed in the documents, the Claimant said that these were "selective invites".

13. When looking at these meetings, we conclude that, while the Claimant certainly has a feeling that he was excluded, and was being targeted, this is not borne out by the documents. In oral evidence he widened the claim in that: (a) Mr Roantree became someone who "must have" instructed others to exclude him; and (b) he appeared to suggest that the invitation emails were themselves suspect.

14. It is perfectly possible that these additional suggestions from the Claimant came about because he was confronted with documents that appear to contradict what he had claimed. In any event, there is no good basis for finding that he was targeted for exclusion. Nor is there any reason to make a finding that all other white employees within the team were invited to these meetings. It may be that the factual basis for the claims were never clear to the Claimant. In any event, it is not possible for the Tribunal to make any findings in this area of the case along the lines of his allegations. The documentary and other evidence suggest that there was no practice whereby all members of the team would normally be invited to meetings as a matter of course. The Claimant accepts that he went to some meetings and it appears that in compiling his ET1 he could only recall two that he had not attended. In the light of what we have summarised above, we do not find it surprising that there were some meetings to which the Claimant was not invited. The

reason is that he had a specialised role in relation to finance and budgeting and that it is likely, on the balance of probabilities, that some of these meetings were more concerned with operational matters and that those who organised the meeting did not deem it necessary that the Claimant should attend.

Performance Issues

15. There is a stark conflict of evidence. The Claimant does not accept that there were any performance issues and he maintains that he had the background and expertise to fulfil all tasks to a high standard. The Respondent's case is that there were problems with his performance from the outset and that after three months' employment it was decided that the Claimant should be dismissed as he was not up to the job.

16. As the Claimant maintains that he was dismissed because of his race and ethnicity, it necessarily follows that he seeks to persuade us that the purported rationale for his dismissal is a fabrication and a fiction.

17. Mr Roantree begins by dealing with the GGF bid in which he was involved, together with the Claimant's Line Manager Mr Jacobs, who was based in Australia. The bid had to be submitted at the end of August. The narrative account is set out in Mr Roantree's statement, starting at paragraph 3.5. On 23 August 2019, on reviewing the documentation, Mr Roantree states that he could see that the Claimant had made more mistakes or omissions than he would have expected. At paragraph 3.7 he states that it was clear to him that Mr James, Project Coordinator, was becoming frustrated with some aspects of the Claimant's work. Further exchanges on 27 August led Mr Roantree to be concerned about "the sheer volume of errors in the Claimant's work". Problems were still not being ironed out by the Claimant and Mr Roantree goes as far as to say that this "was putting stress on me ..." as well as others. He noted further mistakes on 28 August and comments: "I could not believe what I was reading". The narrative continues in similar vein up until the submission of the Model GGF on 30 August 2019.

18. It is not necessary to set out all of the documentary evidence, but our view is that the documents in the bundle corroborate the general narrative set out by Mr Roantree. For example, on 28 August 2019 (page 163) Mr Jacobs was telling the Claimant that he could still see issues with the file. From 23 August, page 155, through to 28 August, there are indications that there were perceived shortcomings in the Claimant's work. The emails deal with the details of the bid that had to be finalised and some of the criticism is fairly muted. For example, at page 149 Mr Roantree told Mr Jacobs that migrating data across to a new spreadsheet was something that the Claimant "seems to think it will take a LOT of work". This is clearly a criticism of him and Mr Roantree says in the next sentence "I am relying on your to be our backstop, as we are not getting the quality control we need out of Dennis". He said he wanted the version that Mr Jacobs returned to be the one that was submitted "with no more input required from Dennis".

19. The email of 28 August that Mr Jacobs sent to the Claimant at page 157 also indicates that the Claimant's Line Manager was continuing to find some problems with his work. "Can you please call me as soon as you wake up? I am seeing some inconsistencies in the file that were not there in the file I sent last night ...". This was the email that Mr Roantree says in his statement he could barely believe.

20. On the same day Mr Jacobs told the Claimant that he had reworked the file that he had sent last night and "tried to roll in your changes given the issues I was seeing with your file". He also, perhaps pointedly, noted that populating the new spreadsheet only took twenty minutes as opposed to the "lot of work" that we have referred to earlier. Mr

Roantree also explained to us that criticisms of the Claimant's work were received from Mr Sparkes.

21. Therefore, putting all these matters together in relation to this bid, we find that the description of events set out in Mr Roantree's witness statement is borne out by the various technical emails that are in the bundle, some of which we have referred to above. These documents also lead us to find that it was not merely Mr Roantree who was critical of the work that the Claimant had been performing. Mr Jacobs, Mr James and Mr Sparkes, as we find, shared some or many of his misgivings.

22. The next bid was the ACR. The technical matter set out in the emails at page 174-176 are explained in paragraph 4.2 of Mr Roantree's witness statement. In short, he asked some questions and states that the response from the Claimant misunderstood those very questions. This bid does not make a very great deal of difference, we find, to the opinion that Mr Roantree had formed by the end of August.

23. By about mid-September Mr Roantree wanted to dismiss the Claimant. The Claimant was granted compassionate leave on 18 September and Mr Roantree used the time to check on the process of dismissal. Importantly, his evidence is that he discussed it with Mr Jacobs, the Line Manager, as well as with Ms Woolsey, Vice President People and Culture. There was agreement, probably quite reluctant on the part of Mr Jacobs, that termination of employment was appropriate.

24. In reviewing the evidence, we have to decide whether or not we accept Mr Roantree's evidence as truthful and genuine. We have concluded that it is accurate and reliable evidence and that the implied suggestion that it has all been made up in order to mask his true motive, has no basis in the evidence. It would have to have been an elaborate exercise on his part in order to construct a case based on performance. Moreover, the contemporaneous documents support that case. As will be seen, the Claimant was dismissed summarily and without any warning. He was naturally shocked by this and he has come to believe, itself a genuine belief, that he was the victim of race discrimination. This has led him to overlook aspects of his performance that the Respondent, operating in a pressurised environment, with a need to submit bids and tenders to strict deadlines, found unacceptable. It is not our function to rule on the factual accuracy of the technical evidence and this is beyond our competence. We can, however, find that the concerns expressed by Mr Roantree (and through his evidence, the criticisms of others) were genuinely held perceptions. Whether or not they were harsh or fair is beside the point. They were perceived shortcomings in the Claimant's work and in his detailed preparations for these bids, and they led to a joint decision to terminate his employment.

25. Ms Griffith is Office and Administration Manager in London. Mr Roantree states that she had some HR functions, a proposition denied by the Claimant. Nevertheless, it seems likely that she did have some responsibilities in this field, because on 25 September she answered an enquiry from Mr Roantree and she dealt with two matters. The first was a probation review form to be used for Mr Sparkes at the conclusion of his six months probationary period. The second was in relation to the dismissal of the Claimant and she said that "given the circumstances you do not have to use this template, but rather have a letter ready when you meet with him so that his termination within probationary period is in writing".

26. Mr Roantree asked Ms Griffith to draft the termination letter and she did so. It was to be sent out in Ms Woolsey's name and she duly checked it for this purpose. The second paragraph of the dismissal letter dated 3 October 2019, at page 189, states that three

specified key requirements of the Claimant's role "have not been satisfied to the level required of the position".

27. We would note the probation performance review form that begins at page 193 and which was used for Mr Sparkes. The form states that the review should be undertaken "prior to the end of the first six months of the employee commencing in a position with the company, or just before the end of their probationary period ..."

Submissions

28. We are grateful to Counsel for her detailed written submissions and to the Claimant for the oral submissions he made on the second day of this hearing. Where relevant, we refer to them below.

The Law

29. Section 13(1) of the Equality Act 2010 provides that 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. Race is a protected characteristic.

30. Section 23(1) provides that: "On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case."

31. Section 136(2) provides that: if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

32. As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows:

"(1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will

not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the

Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.”

33. There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. “‘Could conclude’ ... must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it.” All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

34. We would also note guidance about the burden of proof contained in well known passages in **Amnesty International v Ahmed** (EAT) [2009] UKEAT/0447 at paragraph 24 and, to the same effect in **Hewage v Grampian** [2012] UKSC 37. In the latter Lord Hope stated at paragraph 32: “... as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”

Conclusions

35. We first deal with the issue at (a) in the pre hearing review, namely the claim that the Claimant was deliberately excluded from attending client meetings. He maintains that this was direct race discrimination. In the light of our findings above, which we do not repeat, we conclude that the Claimant has failed to establish facts from which a Tribunal could properly either find or infer less favourable treatment because of his race.

36. The principal argument that all white employees in the team were invited to all meetings necessarily fails. That has not been established and it is clear from all of the evidence that it did not happen.

37. We have accepted the Respondent’s evidence that Mr Sparkes had different responsibilities that were principally not involved with financial and budgetary concerns. His role was more operational. He is not therefore a comparator who satisfies s23(1) because there is a material difference between the circumstances of their respective cases.

38. In any event, it is inherently improbable that on these facts a Tribunal could find or infer that any decision not to invite the Claimant to a meeting was because of race. The improbability arises because of the way in which the Claimant, when faced with documentation, was constrained to speculate that Mr Roantree must (a) have sought to persuade others to exclude the Claimant and (b) that those others were acting on his orders. This was not how the Claimant had framed the case up

to the point at which he was questioned in the hearing; and it is plain to the Tribunal that he was speculating in order to explain the discrimination which he has always believed took place. The difficulty is that there is no evidential support anywhere for such speculation and it is improbable that such an elaborate scheme was being operated, when the much more straightforward explanation is that at certain stages of these projects, it was not necessary to require the Claimant to attend meetings because his specialist expertise was not at that point required.

39. It follows that there is no prima facie case established by the Claimant. We are obliged to look at all of the evidence before us and when we do so the facts that we have found do not surmount the first stage of Igen.

40. Turning next to the dismissal, we have come to the same conclusion and do not find that the Claimant has overcome the first stage of Igen. In order to do so he would have, at the very least, to establish a reasonable doubt about the veracity of Mr Roantree's explanation about the dismissal. If this was a racially motivated dismissal, whether consciously or unconsciously, it would be necessary for the Tribunal to find that Mr Roantree had built a misleading case, to say the least. Our findings are to the contrary. Based on what we have set out above, it is clear to the Tribunal that he had a strong view that the Claimant was not performing at an acceptable level. Those with whom he discussed it did not dissent, although there was certainly some reluctance on the part of the Claimant's Line Manager, Mr Jacobs. Nevertheless, even he agreed with the course that Mr Roantree proposed. As the concerns were genuine, and arose out of the Claimant's detailed work on the first bid in particular, this claim of race discrimination does not get beyond the first stage of Igen.

41. Where we to be wrong about that, we would in the alternative conclude that the Respondent has, by reliable evidence, established that the reason for the Claimant's dismissal was not his race and was in no sense influenced by or tainted by racial or ethnic considerations. Dismissal was on the basis of performance which the Respondent believed to be lacking.

42. The writing of the letter of dismissal in advance is part and parcel of the allegation in relation to the dismissal. In so far as it can be separated out, it was a matter of procedure that was notified to Mr Roantree by an employee with HR responsibilities. That has nothing whatsoever to do with race. We do not consider that this claim at sub-paragraph (e) in the preliminary hearing adds anything to the dismissal claim but, were we looking at it in its own right, it would be a claim that fails.

43. The next matter is the failure by the Respondent to carry out a probation review. We deal below with the Claimant's contention that the Respondent was contractually obliged to do so. Here, the claim is specifically based upon the comparator, Mr Sparkes, who was subject to such a review at the end of his successful six months probationary period. Again, the circumstances are

materially very different as between the two employees. This is because the Claimant was being terminated for unsatisfactory performance approximately half way through the probationary period. In our view, this destroys the basis of comparison. Certainly, there was a difference in treatment and a difference in race as between the two employees, but that in itself does not assist the Claimant in his claim.

44. Our conclusion is that, both in relation to the dismissal and also the failure to carry out a formal probation review with a written report, a white employee or an employee of any other race or ethnic background in the same circumstances as the Claimant would have been treated in the same way. Such hypothetical comparator would, we conclude, not have been given a formal performance review. Again, there is considerable support for that conclusion in the advice that Mr Roantree was given by Ms Griffith. It is evident that the decision not to proceed with a documented, formal performance review had nothing at all to do with the Claimant's race.

45. We next turn to the contention that there was a breach of contract by the Respondent in not carrying out such a review. It is accepted that there is no express contractual term to this effect. Indeed, clause 2 that we have referred to envisages that a dismissal may take place within the six month probationary period and there is no need to imply anything about a formal review. Continuing as a permanent employee depends upon reaching the six month period, according to that clause.

46. The probation performance review form itself could not be regarded as a contractual document. Moreover, the paragraph relied upon by the Claimant itself states that it should be undertaken at the end of six months or just before the end of the probationary period. This wording is a very weak basis to imply any obligation on the part of the Respondent to undertake such a review at the three month stage. Read against clause 2 of the contract, we cannot see that it imposes any obligation on the Respondent to that effect. The argument that there is some implied term of the contract has no substance to it. If the Claimant were relying upon custom and practice, the short evidence from Mr Roantree on the point goes the other way and indicates that the customary practice, in these circumstances, was not to carry out such a review. Again, Ms Griffith's advice is corroborative.

47. In any event, the contractual claim, even if it were soundly based, has no value in our view. The Respondent would have been entitled to determine the contract at the next available moment after such a review had taken place. The review, involving the completion of the form, would simply have been conducted on the same day, 3 October. That is the plain implication of the correspondence between Mr Roantree and Ms Griffith, had the latter thought that the procedure should be undertaken. Accordingly, there would be no room for any argument as to financial loss. This is unlike a case where there is a contractual obligation to enter into consultation which would take, for example, a week or a month.

Arguably, such period of time would give rise to a claim for compensation by way of damages. In these circumstances no such claim could arise.

48. For all the reasons we have given we consider that the claims of race discrimination and the one contractual claim fail and must be dismissed.

Employment Judge Pearl

Dated: 03/03/2021.

Reserved Judgment and Reasons sent to the parties on:

03/03/2021.

For the Tribunal Office