



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 22/9/2021

Claimant: Ms M Keswani

Respondent: BBC

Before: Employment Judge Mr J S Burns

Representation

Claimant: Ms E Banton (Counsel)

Respondent: Mr B Randle (Counsel)

JUDGMENT

The claims in the Schedule are struck out

Reasons

I accept and adopt the Respondent's submissions about this in Mr Randle's skeleton argument dated 16/9/2021 the gist of which are reproduced here (in italics) : .

Direct discrimination and harassment: Failure to adhere to policies

1. *Whilst the GoC do not set out how R is alleged to have failed to adhere to its policies, C provided some further and better particulars, dated 5 May 2021 (FBPs) and confirmed that she was referring to the Diversity & Inclusion policy (D&I policy) and the Recruitment policy. C also indicated that she sought to rely on the BBC Workforce report titled 'A Report on Career Progression and Culture for BAME staff at the BBC' (the Report); this is not a policy: [48 – 51].*
2. *In her FBPs C asserts that the failures in implementation or adherence to the above policies was set out in her grievance, dated 27 April 2020. However, her grievance does not reference any specific part of the Recruitment policy or the D&I policy.*
3. *C's grievance does refer to various sections of the Report. However, whether one considers C's actual claim or her grievance, for the purpose of this claim C does not:*
 - (1) *rely on any specific discriminatory or harassing act;*
 - (2) *describe circumstances where C has been treated less favourably than any other person because of her race;*
 - (3) *describe any unwanted conduct that could reasonably constitute harassment.*

4. *For the above reasons this claim has no reasonable prospect of success.*

Direct discrimination and harassment: Racial diversity on panels

5. *In order to demonstrate that a failure to ensure racial diversity on her interview panels constituted direct discrimination or harassment C would have to demonstrate that this constituted less favourable treatment (direct discrimination) or unwanted conduct related to race which had a harassing purpose or effect (harassment).*
6. *Therefore for her direct discrimination claim C would need to show that her interview panels (two and three white women respectively) were less racially diverse than that of a suitable comparator (i.e. other candidates in the same recruitment drive). However, all candidates were interviewed by the same persons.*
7. *As to the harassment claim, in circumstances where all candidates were interviewed by the same interviewers there is no basis for any assertion that the lack of racial diversity on an interview panel was “related to” any persons race. Furthermore, it is clearly unreasonable for the lack of racial diversity on a panel per se to have a harassing effect.*
8. *For the avoidance of any doubt, the question of whether an absence of racial diversity on an interview panel might “lead to” direct discrimination or harassment is an entirely separate point. Whilst it is not clear that C acknowledges this (see paragraph 4(b) of Cs 18 June 2021 letter [89]), for this claim to succeed C would need to demonstrate that the lack of racial diversity on interview panels itself constituted direct discrimination or harassment; she has no reasonable prospect of demonstrating this.*

Victimisation: Engagement with ACAS and resolutions

9. *The parties are agreed that the ACAS conciliation process (through which C sent a set of ‘resolutions’) is entirely without prejudice to employment tribunal proceedings: see paragraph 5 of Cs 18 June 2021 letter: [89]. Therefore, there is no reasonable basis for Cs reliance on a failure to engage with ACAS as an act of victimisation.*

Victimisation: Pre-employment checks

10. *C has provided no reasonable basis for any assertion that her grievance was disclosed during any pre-employment checks. C has simply inferred (without any evidence) that*

because she has been unsuccessful in her job search that her grievance has been disclosed.

For these reasons, none of the above claims have any reasonable prospects of success and are struck out under Rule 37.

Schedule

References are to the PH bundle)

- (1) Cs direct race discrimination and harassment claim relating to an alleged failure “to implement or adhere to internal policies designed not to place BAME candidates at an unfair disadvantage during the recruitment process”: See Grounds of Claim (GoC) at paragraph 27 (i) and paragraph 5 (i) of the agreed list of issues (LOI): [33] and [42];
- (2) Cs direct race discrimination and harassment claim of failure to ensure racial diversity on the interview panels: See GoC at paragraph 27 (ii) and paragraph 5 (ii) of the LOI: [33] and [[42];
- (3) Cs race victimisation claim alleging as a detriment “continued failure to engage with ACAS and the resolution proposed by the Claimant: See GoC at paragraph 36 (c) and paragraph 21 (xi) of the LOI: [35] and [44];
- (4) C’s race victimisation claim alleging that R following the termination of her employment C’s future career opportunities were impeded by “disclosing the Claimant’s grievance to prospective employers through informal pre-employment checks”: See GoC at paragraph 36 (j) and paragraph 21 (xvii) of the LOI: [36] and [45].

J S Burns Employment Judge
London Central
22/9/2021
For Secretary of the Tribunals
Date sent to parties : 22/09/2021
