



EMPLOYMENT TRIBUNALS

Claimant: Mr D Naique

Respondents: (1) Naheed Hussain
(2) Laura Sheard
(3) Reed Specialist Recruitment Limited

HELD AT: Leeds **ON:** 12 February 2018

BEFORE: Employment Judge JM Wade
Ms NH Downey
MS GM Fleming

REPRESENTATION:

Claimant: No attendance
Respondent: Mr K Ali (Counsel)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 12 February 2018, the written record of which was sent to the parties on 14 February 2018. A written request for written reasons was received from the claimant on 15 February 2018. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 12 February 2018 are repeated below:

JUDGMENT

The claimant's claims of harassment and direct discrimination related to his Indian origin, during a telephone call on 3 May 2017, do not succeed and are dismissed.

REASONS

Introduction

1. This Mr Naique's case, number 1800837/2017. It concerns complaints against Mrs Hussain, Ms Sheard and the third respondent Reed Specialist Recruitment Limited.
2. The claim initially included unfair dismissal, and a number of allegations of contraventions of the Equality Act 2010, but some of those were dismissed following deposit orders having been made in separate Judgments of the Employment Tribunal.
3. The complaints remaining to be determined by this Tribunal are complaints of harassment or direct discrimination, in the alternative, in relation to a telephone call on 3 May 2017 and conduct during that call by Mrs Hussain and Ms Sheard. That alleged conduct was said to amount to discrimination or harassment relating to, or because of, the claimant's Indian origin as revealed by his accent during the course of that telephone call.
4. (The claimant has not attended today, for reasons of lack of funds to travel, having moved away from Leeds, but also because he says the respondent has not provided disclosure or information sufficiently fully in the preparation for this hearing. The disclosure matters do not amount to a good reason for non attendance. In the circumstances, and in the interests of justice, and in the very specific circumstances of this case, the Tribunal will proceed in his absence, having considered rule 47 – this decision was given extempore after deliberations and before the hearing of evidence commenced).

Undisputed chain of events

5. The matters that were not really in dispute in this case were as follows. The claimant was an applicant for temporary work with Lloyds Banking Group through the respondent employment agency. On 11 April 2017 he completed pre-screening checks with Ms Sheard, a resourcing specialist: her role was to provide candidates for the filling of bulk assignments by the agency.
6. The claimant cleared, or passed, that telephone interview. He passed a further interview on 20 April 2017 in person with the Lloyds representative and a representative of the respondent. He was then subject to a process of verification and audit, which included the usual credit status checks, ordinary employment references and criminal references and so on.
7. After that initial process was underway Lloyds asked that candidates attend an induction day in Leeds on 4 May and Mrs Hussain had to telephone all the candidates for that assignment, to ask them if they could attend that induction day the next day. She had to report the outcome of those telephone calls to Lloyds by 3.30pm on 3 May. She called the claimant, he must have been one of the last people called, around or about 3.15pm on that day, which was very shortly before her deadline. That call became fractious. Mrs Sheard also took part in it. During the last part of the call Mrs Hussain decided to withdraw the claimant as a candidate for the Lloyds' assignment.

8. He then entered ACAS conciliation and subsequently presented a complaint to the Employment Tribunal on or around 19 May 2017. The issues for the Tribunal by the time we reached this hearing are all related to that short call on 3 May.

The Issues

9. Mrs Hussain and the third respondent accepted that Mrs Hussain asked the claimant during the call why he had applied for the role, or words to that effect. Mrs Hussain accepted that she transferred the claimant to Ms Sheard. The claimant said that transfer was without warning and that was not accepted by Mrs Hussain. Mrs Hussain also denied laughing during the call while the claimant was talking to Ms Sheard and Mrs Hussain denied hanging up on the claimant. They were the words that the claimant used to describe the ending of the call. Mrs Hussain accepted that she decided to withdraw him from the Lloyds assignment, during the second part of the call, and that she had told the claimant that.
10. In relation to the allegations against Mrs Hussain, in broad terms we had to ask ourselves whether her conduct on that call amounted to unwanted conduct, whether it could be said to relate to the claimant's Indian origin as revealed by his accent on the call, and amounted to harassment. We also ask ourselves in the alternative whether that conduct on the call was less favourable treatment than was accorded to other candidates who were not of Indian origin.
11. As regards the allegations against Mrs Sheard, the issues were more straightforward. Did she laugh during the call? She did accept that she transferred the claimant back to Mrs Hussain. Did those matters amount to either unwanted conduct related to the claimant's Indian origin, amounting to harassment, or less favourable treatment because of the claimant's Indian origin.
12. Reed, the third respondent, accepted in its evidence before the Tribunal that the way in which the call was handled was not necessarily satisfactory, and that lessons could be learned from it, and indeed had been, but did not accept that any of the conduct of Mrs Hussain or Ms Sheard amounted to discrimination or harassment in all the circumstances. Reed did not say it was not liable for any acts of Mrs Hussain or Ms Sheard.
13. Mrs Hussain fairly accepted that transferring the call in the circumstances was not ideal and also that she had allowed the claimant's approach to annoy her. Ms Sheard denied laughing at all during the call, albeit she accepted that she made some sort of a noise.

Conduct of the hearing, further findings and the claimant's submissions

14. The claimant has during the course of this case coming on for a hearing and during its preparation made various requests for information or documents from the respondent, some of which were provided and some of which were not.
15. In his written submissions he asked that we clarify a number of matters with the respondent. He asked that we clarify the ethnic origin of Mrs Hussain which we did. She is of Pakistani origin. Mrs Hussain also said that her name might reveal that origin, but it might also be a name commonly in use in Iran, India, the Middle East or other countries where the Muslim faith is practised.

16. We also clarified that the claimant's verification/due diligence record was clean and untainted: there was no known reason for him not to be a candidate for the Lloyds posts other than the call on 3 May 2017.
17. It was also not in dispute that the claimant had undertaken previous calls with Ms Sheard, and his previous interviews had all passed without any difficulty at all, and there was no evidence of any previous difficult calls.
18. As to the other candidates that were put forward to fulfil the assignment, the respondent's oral evidence during the Tribunal's questioning of the witnesses was that there was a mix of diverse ethnic backgrounds in those candidates, albeit there had been no documentary disclosure in relation to that issue.
19. In her evidence before the Tribunal Mrs Hussain said that the reason that she had given to Lloyds for the claimant's withdrawal, when she made the call to confirm the candidates who were attending induction the next day, (which did not include the claimant) was the nature of the telephone conversation they had just had. We accept that is what she said to Lloyds. We also accept that there was no written confirmation of that explanation, time being somewhat limited. There was therefore no disclosure to give of such an email: it did not exist.
20. There were a number of other matters which the claimant, in his written submissions, asked us to consider.
21. Bearing in mind that the claimant is a litigant in person without the benefit of a lawyer, he has nonetheless drawn to our attention matters in the respondents' response to these complaints which might suggest that there was some sort of discriminatory element or contravention of the Equality Act, or from which we might infer such facts which would suggest that.
22. He drew our attention to two such matters: firstly that the respondent's solicitor, Mr Hawkins, had said in correspondence that he had not received a recording of the 3 May call, which the claimant had been ordered to forward to the respondent, when in fact it had been sent. There is a good deal of correspondence about that on the matter, and albeit we have not heard from Mr Hawkins, nevertheless we accept the written explanation that because of the format in which the recording was sent, and, in effect the various quarantines and safety nets that are present in the third respondent's IT systems, it did not reach him on the day on which it was sent (which was 7 September) and it came to his attention some time later.
23. We also know that by the time the sending of the recording had been clarified by the claimant, the recording had been listened to by Mrs Hussain and Ms Sheard and indeed by Mr Overfield (by 26 September). It was certainly no later than that because the witness statements produced today in Ms Sheard's case was dated 28 September and in Mr Overfield's case, 3 October. The witnesses describe having heard that recording prior to finalising their witness statements: there was therefore a very short delay while that recording was tracked down within the respondent's IT system. The Tribunal draws no adverse inference at all from the respondent's initial comment to the Tribunal and to the claimant that it had not received the recording. That is simply explained by the IT security that was in place and the delays that were caused, and the state of Mr Hawkins' knowledge at the time.

24. The second matter that the claimant has drawn to the Tribunal's attention and from which he would ask us to draw inferences, were he advised, is that the respondent's response contained a number of inaccuracies and variances with the recording. We note that the response was presented to the Tribunal on 28 June (amounting to consolidated responses on behalf of all the then respondents). Those responses were written before the respondent had heard the recording which the claimant had made of the 3 May call.
25. We say something a little bit more about those inaccuracies in our conclusions, but they included that the claimant was said to have been aggressive on that call, that he had called both Mrs Hussain and Ms Sheard stupid during the course of that call, which proved, once the recording had been heard, to be inaccurate. He asks, or at least that is the gist of his submissions, to bear that in mind in determining the complaints.

Evidence

26. The evidence that we have heard as a whole before this Tribunal been limited to the respondent witnesses: Mrs Hussain, Ms Sheard and Mr Overfield, their manager. They were all straightforward in giving their evidence. They acknowledged the difference between the responses filed in June, and their evidence, and indeed the recording. Mr Overfield was very frank about the disappointing nature of that call, and we found his evidence compelling.
27. We did not hear from Mr Hawkins about the issue of disclosure in the case, as indicted above, but there was a wealth of correspondence about that and explanation as to why various matters were dealt with and others were not, which we regard as entirely straightforward and probable.
28. Finally we did not hear from the claimant today because he had indicated that for a number of reasons he would not attend, but that he nonetheless wanted his complaints to be determined.
29. He says that he was not in funds to travel to Leeds and was no longer living in Leeds. We accept that as the main explanation for him not attending. The Tribunal has to weigh in the mix that what he says are his beliefs and feelings about this call are matters that are untested: Mr Ali has not had the chance to cross-examine him about his case, and neither has the Tribunal had the opportunity to ask him any questions about that call. Similarly the claimant has not seen his case heard or directly asked questions of the witnesses, and that is far from satisfactory. We have been limited to the claimant's previous statement or timeline, as he describes it, and the written submissions that he made.
30. In this case his absence is perhaps less problematic than in many cases because the only matter from which allegations of discrimination arise is a short recorded telephone call. The Tribunal has had the benefit of hearing that full recording of some 10 minutes or so, which comprises three parts: first Mrs Hussain talking to the claimant, then Ms Sheard and then Mrs Hussain resuming the call and ultimately telling the claimant that she would not be proceeding with his candidacy for the Lloyds role.

The Law

31. Section 26 of the Equality Act 2010, and sections 13, 39 and 40 are the relevant provisions. They describe what is involved in a contravention amounting to

harassment on grounds of race and a contravention amounting to direct discrimination on grounds of race (Section 9 describes what is meant by "Race").

Discussion and Conclusion

32. As far as the small matters in dispute are concerned: it is clear in our judgment that the transferring of the call by Mrs Hussain to Ms Sheard was preceded by the words "bear with me" or words to that effect, that it was a natural pause in the conversation, because the call had become somewhat fractious, and Mrs Hussain was looking for a means of resolving that and having some assistance.
33. It was not a transfer of the call without warning, albeit the claimant could have been told that he was to speak to a colleague and that was what was likely to happen. However, when Mrs Hussain put the phone on hold to seek assistance and said "bear me with me", she did not know necessarily that Ms Sheard would offer to resume the call.
34. It is also clear in our judgment having listened to the recording that Mrs Hussain was not laughing, whilst Ms Sheard was talking to the claimant. There was no sense of amusement or anything of the kind, but rather strain in the voice of Mrs Hussain during the entirety of the recording.
35. As far as her ending of that call with the claimant, it is also clear that Mrs Hussain ended the call with a "goodbye" and a clear signal that she was ending the call. That was preceded by her giving the claimant a complaint email address which he had been seeking from her in order to make a complaint about the call. It is not a fair characterisation of the ending of that call to say that Mrs Hussain simply hung up.
36. As far as the material allegation against Ms Sheard, it is clear that there was a pause and an exasperated sigh or "fuff" type noise, or something of that nature, which was prompted, again by frustration and exasperation in the progress of the call. It was not ideal and clearly bears the possibility of being perceived by the claimant as belittling of him, given the seriousness of the events from his perspective.
37. Against those further findings of fact then, the Tribunal has to analyse the complaint by reference to the components of harassment. The first question for us is whether the conduct described was unwanted conduct. Well, clearly from the matters on which the claimant relies we must discount the hanging up. There was no hanging up. We discount the laughing by Mrs Hussain. There was no laughing by her. Apart from those two matters, the conduct that is alleged happened, to a greater or lesser extent.
38. We accept the conduct was unwanted by the claimant. In particular the ending of his candidacy was unwanted by him. The question we ask ourselves is whether he relied on conduct related to the claimant's Indian origin, as relayed or revealed by his Indian accent. We repeat our earlier comments: the best evidence of the extent to which the conduct on that call related to ethnic origin is the recording itself. Having listened to it, we are clear that there is nothing in any of this chain of events as revealed by the recording that could be said to be either directly or indirectly relating to the claimant's accent or his Indian origin. There is simply no evidential basis for that whatsoever, other than the claimant's untested belief that that was the case. We also note that in his original claim form, he

asserted his Portuguese nationality as the protected characteristic, in respect of which complaints have been dismissed.

39. The harassment complaints fail and are dismissed. They do not pass the first threshold of “unwanted conduct related to”, in this case, race.
40. As far as the allegation of direct discrimination is concerned, again, we have to ask ourselves whether there are facts from which the Tribunal could conclude that there was less favourable treatment of the claimant than other comparable candidates who did not have his characteristic of either an Indian accent or Indian ethnic origins.
41. Other facts from which we could conclude less favourable treatment by Mrs Hussain or Ms Sheard, would involve constructing a comparator who had engaged in substantially the same conversation, much as Mr Ali submitted, in the same manner, but who perhaps had another accent or a different ethnic origin revealed by accent, but had engaged in the same kind of comments, and in the same kind of challenging and diversionary questioning, including asking whether Mrs Hussain had seen his “CV”, (in a “do you know who I am tone”) and referring to her as “dear” and so on. We note that the claimant’s question then led to Mrs Hussain asking why he had applied for this post (the inference being from his question that he was over qualified for it).
42. In all these circumstances, there is simply no evidential basis at all, no facts from which we could conclude, that a candidate who had engaged in the same verbal communication in which the claimant engaged, would have been treated any differently and there would have been any difference in outcome.
43. Against these primary findings, the inaccuracies in the initial responses characterising the claimant’s telephone communication as aggressive, and including that he called Mrs Hussain and Ms Sheard stupid, does not take his case any further. That inaccuracy, explained by the witnesses as their genuine recollection, which they accepted was mistaken in detail but not in general sense, gives rise to no inferences at all.
44. For all these reasons the complaint of direct discrimination also fails and is dismissed.

Employment Judge JM Wade

Date 2 March 2018