



EMPLOYMENT TRIBUNALS

Claimants: Mr T Roche and Others (see the attached schedule)

Respondent: Terence Kwok

Heard at: London Central by video (CVP)

On: 1 March 2022

Before: Employment Judge E Burns (sitting alone)

Appearances:

For the Claimants: Lawrence Davies, Solicitor

For the Respondent: Did not appear and had not presented a Response

RESERVED JUDGMENT

The Claimants' claims do not succeed and are dismissed.

REASONS

THE HEARING

1. The hearing was a remote video hearing.
2. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net
3. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.
4. Two claimant's gave evidence: Thomas Roche and Asmita Odedra.
5. There was a hearing bundle of 68 pages. I read the evidence in the bundle to which I was referred and I refer to the page numbers of key documents that I relied upon when reaching my decision below.

THE ISSUES

6. During the course of the hearing, after the evidence had been heard and the submissions made, but before judgment had been given, Mr Davies realised that there was a matter in respect of which he wished to take instructions. He asked that the hearing be adjourned to enable him to do that.
7. On 8 March 2022, by email, he confirmed that the only claims the Claimants wished to pursue were the claims of harassment related to race and direct discrimination because of race. I have issued a judgment dismissing the other claims on withdrawal. The issues to be determined were therefore as follows:

Harassment Related to Race

- 7.1 In accordance with section 26(1) of the Equality Act 2010, were the Claimant's subjected to unwanted conduct as follows:
 - (a) On 2 July 2019, being told out of the blue that their roles were to end on 31 July 2019 and the failure to consult
 - (b) Discovering that about £670k had been removed from Tink Labs Europe Limited's bank account
 - (c) Philip Yuen's sarcastic comment about finding the missing monies
 - (d) Being told that their employment was to transfer to GS Holdings but that proving to be untrue
- 7.2 Was that conduct related to the Claimants' race? The Claimants describe their race as either British or not Hong Kong Chinese.
- 7.3 Did this conduct have the purpose or effect of:
 - (a) Violating the Claimants' dignity; or
 - (b) Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimants.

Direct Race Discrimination

- 7.4 In the alternative, did the treatment set out at paragraph 1.1 (a) – (b) constitute "less favourable treatment", i.e. did the respondent treat the claimants as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimants rely on hypothetical comparators.
- 7.5 If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

FINDINGS OF FACT

8. Having considered all the evidence, I find the following facts on a balance of probabilities.
9. The Claimants in this multiple claim were all employees of a company called Tink Labs Europe Limited based in London. The company had been incorporated on 16 December 2014 was registered at Companies House. The Respondent, who is from Hong King, was its director and secretary.
10. The Claimants understood the company to be part of a group owned and controlled by the Respondent and managed by him by another person called Mr Philip Yuen, which was also from Hong Kong. The corporate group included a company based in Hong Kong.
11. On 2 July 2019, in a conference call with the London staff the Respondent informed them that he was restructuring the corporate group. He said that their employment with Tink Labs Europe Limited would end on 1 August 2019, but they would be paid notice payments. In addition, the assets of Tink Labs Europe Limited were to be split and transfer to two different entities.
12. This was the first time the possibility of any kind of corporate restructure had ever been raised with the Claimants, although some of them were aware that within the corporate group there was a significant operating debt.
13. The Claimants were given letters of termination on the same day. The letters sent to Mr Roche and Ms Odedra were contained in the bundle at pages 42-45. They were dated 2 July 2019 and confirmed their employment would end on the 1 August 2019, with salary being paid up to this date.
14. There were no other consultation meetings conducted with the staff of Tink Labs Europe Limited.
15. In around mid-July 2019, some of the Claimants received emails telling them that offers were being made to them to join a company called G.S. Holdings Limited, starting on 2 August 2019. Ms Odedra was one of these and a copy of the email she was sent was at page 68 of the bundle. In fact, it transpired that there were no jobs for any of the company's employees and their employment ended on 1 August 2019.
16. The Claimants were not paid for the month of July 2019 and did not receive any notice pay or redundancy payments.
17. Tink Labs Europe Limited was wound up in early 2020. The Claimants were able to claim arrears of wages, notice payments and redundancy payments from the Redundancy Payments Service.

18. According to Mr Roche and Ms Odedra, the reason the Claimants were not paid was because at some point during July, Mr Kwok (via Mr Yuen) had asked accounts staff employed at Tink Labs Europe Limited to transfer the cash held by the company in the bank to him. They told me that Mr Yuen told their accounts colleague that this was said to be an intra-company loan that would be repaid, but later turned out to be a fraud. Mr Roche and Ms Odedra told me that they believed the amount involved was £671,000 based on being told about the transfer by a colleague in accounts.
19. In addition, that same colleague also told Mr Roche and Ms Odedra that Mr Yuen had later told him that the Respondent had taken the money and that Mr Yuen had sarcastically wished the UK staff “good luck” in finding and retrieving it.
20. Mr Roche and Ms Odedra told me that they believed that the Respondent had used the £671,000 from Tink Labs Europe Limited to pay the staff employed in the Hong Kong company he owned
21. Although the Claimants invited me to make findings in fact about what happened to the monies and what Mr Yeun said at the time, I decline to do so in full. Although the facts are not disputed by the Respondent (because he failed to present a Response and did not seek permission to attend the hearing), this does not mean I can simply adopt the version of events I have been told.
22. Neither of Mr Roche nor Ms Odera had first-hand knowledge of the company’s bank accounts or any transfers out of it. They were not party to the conversation between the colleague and Mr Yuen. Although the tribunal rules do not prevent me from making findings based on hearsay evidence, the reliability of such evidence is called into question.
23. In this case, I have no difficulty finding that the Claimants were not paid because by the time they were due to be paid, there was insufficient cash in the company’s bank to pay them. I do not, however, consider I have been presented with sufficient evidence that the reason for that was because of a fraudulent transfer that was then used to pay group employees in Hong Kong. I was not provided with any documentary evidence to support this assertion at all and critically, the accounts colleague who was said to be responsible for the transfer did not attend the hearing and give evidence himself.

THE LAW

24. Race is one of the protected characteristics identified in section 4 of the Equality Act 2010. Section 9(1) of the Equality Act 2010 says race as includes colour, nationality and ethnic or national origins.
25. Section 39(2) of the Equality Act 2010 prohibits an employer from discriminating against one of its employees by subjecting the employee to a detriment. In subsection 212(1) of the Equality Act, a detriment does not include conduct that amounts to harassment.

26. Section 40(1)(a) of the Act provides that an employer must not, in relation to employment by it, harass a person who is one of its employees.
27. An employee or agent of an employer can be held to be personally liable for discrimination or harassment through the operation of sections 109 and 110 of the Equality Act 2010.
28. Section 26(1) of the Equality Act 2010 provides:

“A person (A) harasses another (B) if

 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”
29. A similar causation test applies to claims under section 26 as described below in relation to claims under section 13. The unwanted conduct must be shown “to be related” to the relevant protected characteristic.
30. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show he has been subjected to unwanted conduct related to the relevant characteristic. If he succeeds, the burden transfers to the respondent to show prove otherwise.
31. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.
32. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that affect.
33. The shifting burden of proof rules can also be helpful in considering the question as to whether unwanted conduct was deliberate.

34. Section 13 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'.
35. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.
36. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.
37. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.
38. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.
39. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.
40. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.
41. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

42. The Court of Appeal in *Madarassy*, states:

'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' (56)

43. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).
44. The tribunal's focus "*must at all times be the question whether or not they can properly and fairly infer... discrimination.*": *Laing v Manchester City Council*, EAT at paragraph 75.
45. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.
46. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. We must "*see both the wood and the trees*": *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79.

ANALYSIS AND CONCLUSIONS

47. This is a case where there are four allegations which are argued to be harassment related to race and direct discrimination related to race. They cannot, however, be both, because of the operation of section 212 of the Equality Act 2010.
48. In conducting my analysis, I have first considered whether the allegations occurred as alleged. Where I was satisfied in relation to the facts, I have then applied the legal tests for harassment related to race and direct discrimination because of race.

49. Based on my factual findings, I am satisfied that the Claimants were told, out of the blue, on 2 July 2019, that their roles were to end on 31 July 2019. Also, there was a failure to consult them about the termination of their employment prior to them being issued with termination letter letters. I am also satisfied that at least some of them were told that their employment was to transfer to GS Holdings, but this proved to be untrue.
50. I have not however, found that £670k was removed from Tink Labs Europe Limited's bank account or that Mr Yuen made a sarcastic comment about these monies being missing.
51. The basis for the Claimant's allegations as harassment related to race and direct race discrimination is the suggestion that when faced with economic difficulties, the Respondent prioritised the Chinese subsidiary within his group of companies and therefore employees who were Chinese compared to the UK subsidiary and its employees.
52. I do not consider I can infer that that there was a connection between the events that occurred and the claimants' races, such that the allegation that the conduct was related to race or because of race is proven on the balance of probabilities.
53. The three potentially relevant facts are that the Respondent was from Hong Kong, that he was assisted by a senior employee called Mr Yuen who was also from Hong Kong and that the group of companies he owned included a subsidiary based in Hong Kong. In my judgment, these facts alone are insufficient to infer a connection between the events that occurred and the race, even in the circumstances where the Respondent has failed to defend the proceedings.
54. The claims therefore fail.

Employment Judge E Burns
27 September 2022

Sent to the parties on:

27/09/2022

For the Tribunals Office

Schedule of Claimants and Claim Numbers

Thomas Roche	2204624/2019
Ricky Aggarwal	2204626/2019
Reem Alkhateeb	2204627/2019
Dhilan Amin	2204628/2019
Connor Baker	2204630/2019
Ivan Ballan	2204631/2019
Slawomir Bartczak	2204632/2019
Jessica Faye Basi	2204633/2019
Gurneesh Kaur Bath	2204634/2019
Toby James Bennett	2204635/2019
Papa Amandou Biteye	2204636/2019
Mark Brooks-Belcher	2204637/2019
David Carter	2204638/2019
Yi Chang	2204639/2019
Oladipo Cole	2204641/2019
Celine Corneau	2204642/2019
Casper John Dean	2204644/2019
Melina Druga	2204645/2019
Nicolas Demetrios Emmanuel	2204646/2019
Luisa Ferrers Meyer	2204647/2019
Samuel Ford	2204648/2019
Paul Frampton-Calero	2204649/2019
Paula Salado Garcia	2204650/2019
Geetha Guntupali	2204653/2019
Clara Gutierrez Vizуетe	2204654/2019
Will Hawskworth	2204655/2019
Andrea Halstead	2204657/2019
James Hill	2204658/2019
Mark Hurst	2204659/2019
Jordan James	2204660/2019
Andrew Derek Fletcher Jones	2204662/2019
Siva Katragadda	2204663/2019
Maria Mirabella Kulibaba	2204664/2019
Victor Olasunkami Lawoyin	2204665/2019
Ioannis Leventis	2204666/2019
Jasanjeet Singh Mann	2204667/2019
Ahmed Mohammad	2204668/2019
Andrea Molina	2204669/2019
Angeliki Naisiopoulou	2204671/2019
Karolin Nguyen	2204672/2019
Vendula Novobliska	2204673/2019
Asmita Mandan Odedra	2204674/2019
Ammad Rifi	2204678/2019
Abigail Riley	2204679/2019
Richard Roberts	2204681/2019
Thomas Roche	2204682/2019
Madeline Hale Rosenthal	2204683/2019
Serena Sciarretta	2204684/2019

Case Number: 2204682/2019 & Others

Nicolo Seguso	2204685/2019
Anshita Shedha	2204687/2019
Yuese Shi	2204688/2019
Christopher Stokes	2204690/2019
Cameron Taylor	2204691/2019
Megan Thomas	2204693/2019
Vasileios Tsiakoumis	2204694/2019
Cecilia Venettoni	2204695/2019
Andrew Mark Warner	2204696/2019
Zac Alexander Wheatley	2204697/2019
Wai Tsan Wong	2204699/2019