



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT
MR MS KPAKIO

RESPONDENT
V VIRGIN ATLANTIC AIRWAYS LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF

ON: 15TH APRIL 2013
16TH APRIL 2013 (IN
CHAMBERS)

BEFORE: EMPLOYMENT JUDGE CK SHARP
MR G LLOYD
MR L MAPLEY

REPRESENTATION:

FOR THE CLAIMANT:

IN PERSON

FOR THE RESPONDENT:

MR A ROBSON (COUNSEL)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The Claimant's claim for direct race discrimination is dismissed.

REASONS

1. This is a claim brought by Mr Maxson Kpakio against Virgin Atlantic Airways Ltd. The claimant applied for a job as a Customer Service Advisor ("CSA") in the Swansea Contact Centre twice in October 2012. The first time he applied it was with his own name, completed application form and curriculum vitae ("CV"), and an equal opportunities monitoring form stating he was a Black African. The second time he applied with a false name (Craig Owen), with a differently completed application form, false CV and an equal opportunities form stating he was White British. The first application was rejected by the Respondent, while the second application was put forward to the next recruitment stage, a telephone interview. The second application was not progressed by the Claimant.

2. It is the case put forward by the Claimant that the above outline of events gives rise to a claim against the Respondent for direct race discrimination under s.13 of the Equality Act 2010, namely that the decision not to progress the application made under his real name was due to his ethnic origin or nationality, being originally from Liberia. He originally sought significant compensation in respect of this claim, but under cross-examination withdrew this claim. The Claimant wishes to receive a job offer from the Respondent and an apology, neither of which are in the power of this Tribunal to order if the claim is upheld, and this was explained to the Claimant during the hearing.
3. At the outset of the hearing, the procedure used by the Tribunal was explained to the parties and the following issues were agreed as requiring a determination from the Tribunal:
 - a. The claim is being brought under s.39 of the Equality Act 2010 (“the Act”) by an applicant who is complaining of the Respondent’s decision not to offer employment and about the arrangements the Respondent makes for deciding to whom to offer employment, the Claimant alleging the decision not to progress his application was due to a protected characteristic. The right to bring the claim is not disputed by the Respondent, though the claim itself is disputed;
 - b. The protected characteristic in this case is race as defined by s.9 of the Act, and in particular the national origin, nationality and/or ethnic background of the Claimant who was born in Liberia and is a Black African. The right to bring the claim is not disputed by the Respondent, though the claim itself is disputed;
 - c. The head of discrimination alleged by the Claimant is direct race discrimination under s.13(1) of the Act, namely that the Respondent discriminated against the Claimant if due to race the Respondent treated him less favourably than the Respondent treats or would treat others. The less favourable treatment complained of is not progressing the first application by the Claimant. A comparator is not strictly required by the Act as the “reason why” test from **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** is sufficient for the purposes of this claim (why was the Claimant’s first application rejected? Was it because of his race?), but in this case the Tribunal has been given the details of a comparator – Craig Owen. Mr Owen is not a real person, but an identity adopted by the Claimant to “test” the Respondent. The parties have agreed the above legal test must be determined by this Tribunal, but the Respondent does not challenge the description of failure to progress the application as being “less favourable treatment”. It does strongly deny the reason for the failure to progress was the Claimant’s race;
 - d. A mere difference in ethnic origin between applicants is not sufficient to successfully bring a claim for race discrimination. Under s.136 of the Act, there is a “shifting burden of proof”. The

Claimant must show facts on the balance of probabilities from which this tribunal could find in the absence of an explanation from the Respondent that it breached the Act. If the Claimant does so, the tribunal must uphold his claim unless the Respondent can then show on the balance of probabilities that it did not breach the Act;

- e. If the Claimant succeeds in this claim, the tribunal must go on to consider what compensation to award for financial loss and injury to feelings, though the Claimant has now waived this element of his claim as explained in paragraph 2 above. However, the hearing spilt the issues of liability and remedy, and this judgment as a result only deals with liability.
4. At the outset of the hearing, Counsel for the Respondent sought an informal confidentiality agreement in respect of Appendix 2 of Mrs Day's witness statement. This request was dropped after an adjournment. It may also be useful to note that Counsel was later concerned that a photograph of Mrs Day giving evidence may have been taken by a member of the press in attendance, Mr Martin Shipton of the Western Mail. Mr Shipton denied taking such a photo, and the Tribunal with the consent of the Respondent left the matter there on the basis that if such a photo had been taken and was published, it would be a contempt of court, a matter in which the Attorney-General could bring proceedings against both the journalist and publication involved.

Background

5. The Claimant was born in Liberia and moved to the UK in 2002. He attended a "job talk" in the premises of the Respondent in its contact centre in Swansea at some point in October 2012, where he toured the premises as part of a group of 12-15 job seekers. The Respondent is a well-known airline. As a result, the Claimant decided to apply online for a role with the Respondent as a CSA in the contact centre on 6 October 2012. The role was advertised and the Respondent was filling a considerable number of CSA roles. In October 2012, the Respondent was attempting to fill 2 or 3 courses to train new staff to be a CSA, a course consisting of 15 people each. It was an on-going recruitment campaign.
6. The application was considered by Mrs Charlotte Day, a HR co-ordinator based in Crawley, Sussex, and rejected. This meant the application did not progress to the next stage, which was a telephone interview. The Claimant was notified of this on 12th October 2012.
7. The Claimant submitted a new application for the CSA online in the name of "Craig Owen" in order to "test" the Respondent in his own words. Mr Owen does not exist and is an alter ego of the Claimant. Mr Owen's application stated in the equal opportunities form that he was White British. His application was not identical to the Claimant's and was made on or around 16th October 2012.

8. Mr Owen's application was considered by Mrs Sally Williams, a HR assessor based in Crawley, and was passed through to the next stage, the telephone interview. The Claimant was notified of this on 19th October 2012.
9. The Respondent's automated recruitment system, known as "i-recruit" generated emails to Mr Owen between 19th October and 8 November 2012, noting his lack of response and asking him to book a telephone interview. There were 7 emails in total. The Claimant did not respond and after the 7th email, the system stopped emailing Mr Owen.
10. The Claimant was aggrieved that his real application had not been successful while "Mr Owen's" had moved to the next stage. He accordingly issued this claim in the Cardiff Employment Tribunal on 19th November 2012, to which the Respondent responded on 13th December 2012. The Claimant originally sought compensation in the region of £82,146, which he later reduced following a case management discussion to £55,888.

The law

11. The list of issues agreed between the parties comprehensively summarises the tests set out by sections 9, 13, 39, & 136 of the Act. There is no dispute regarding the interpretation of those sections and therefore it would be otiose to repeat the provisions again. Counsel for the Respondent drew the Tribunal's attention to s.23 of the Act which states that when comparing a Claimant to a comparator, there must be no material difference between the two, other than not sharing the protected characteristic.
12. The Tribunal heard from the Claimant in person, and Mrs Adele King, Mrs Charlotte Day and Mrs Sally Williams on behalf of the Respondent. It also read every document in the hearing bundle (though not all were referred to during the hearing). Both the Claimant and Counsel for the Respondent made oral submissions. The Tribunal do not propose to set out in detail those submissions, but adopt them in their entirety and refer to them only where they appear most relevant.

Findings of fact

13. It is accepted by all the parties that the Claimant has the right to bring this claim due to s.39 of the Act, and that failure to progress his application could constitute less favourable treatment. It is also accepted that the Claimant is a black African from Liberia and is protected by s.9.
14. This case turns on whether the Claimant's application was not progressed by Mrs Day because of his race. A comparison of the Claimant's application to Mr Owen's is required, but it is not determinative of this matter as the critical question is why Mrs Day did not progress the Claimant's application, not why Mrs Williams progressed Mr Owen's.

15. The Claimant says that his application and CV clearly shows that he is from Liberia. The Claimant says his name shows he is African, and that his application and CV refers to his education and experience in Liberia. The Claimant points out he completed the Equal Opportunities monitoring form to say he was a black African.
16. It is a finding of this Tribunal that this is not entirely accurate. Nowhere in the application form or CV of the Claimant is there a reference specifically to Liberia or Africa. The education and experience all post-date the Claimant's arrival in the UK in 2002. The only reference to Africa is potentially the Claimant's name, which the Tribunal finds is not a traditional British name, and the monitoring form.
17. Mrs Day's evidence was that she did not have access to the monitoring form. The Tribunal found Mrs Day to be an honest and credible witness and accepts her evidence in this regard. Mrs Day's evidence was that she did not recognise the name of the Claimant as African and that she did not recall reading it. Mrs Day explained she had 5 minutes per application to consider the application form and CV and decide whether the essential criteria of the role were met. Mrs Day, and her colleagues Mrs Williams and Mrs King, all confirmed there were approximately 1200 applications and that the team had little time to reflect on applications. Their evidence was that they looked at the answers to the questions and the CV, and that was all. The Tribunal accepts this evidence.
18. The Claimant went on to argue that he clearly was an excellent candidate for this role. The Claimant pointed to his degree in International Relations from Swansea University, and his extensive volunteering work, including counselling victims at Victim Support and his experience with the Red Cross. His application form referred to being able to use the internet. Under cross-examination, the Claimant went on to explain his work as a student representative on the Faculty Board at university. He also stated that the reason given by the Respondent for preferring Mr Owen was unconvincing as Mr Owen alleged he worked at the check-out of a supermarket, which in the Claimant's view was not customer service, but merely stacking shelves. He stated that people on check-outs do not speak to customers, while as a counsellor he had extensive experience of customer service. The Claimant also stated in his submissions that he noticed on his tour of the Respondent's premises there was no-one who looked like him, and thus he had a good chance of getting the role as there were quotas for ethnic minorities.
19. The Claimant's CV and application form set out his volunteering work, but did not disclose his work as a student representative. There was no reference to formal customer service work in a retail environment, and only made a passing reference to the Internet. It did refer to a three-month stint in a call centre in the form, but not the CV. Mrs Day's evidence was that if the experience was not in the CV, it would be ignored as she did not have time to "play detective". She also gave evidence that once a candidate showed they had an education of

GCSE standard, no additional points were given for a university education.

20. The job advertisement stated clearly that previous experience in customer service was essential. The Tribunal cannot substitute its view of the value of volunteering for that of an employer. The evidence from the Respondent's witnesses was that volunteering was not the same as formal customer service expertise, and the Respondent wanted individuals who had experience in a retail environment. Counselling was not the same as there were no sales targets to meet. Mrs Williams expressed the view nicely as "delivering great customer service" while selling the product. It is a finding of the Tribunal that the Claimant did not have such experience. It is also a finding of the Tribunal that saying you can use the Internet does not mean you can use "live chat", an issue the Tribunal will deal with later in this judgment.
21. It is a finding of the Tribunal that the Claimant's application and CV did not meet the published criteria for the job. However, the Tribunal went on to compare the differences between the Claimant's application and Mr Owen. Mr Owen's application and CV was very different to the Claimant's; it was not a case of simply changing the name and ethnicity. Mr Owen's degree and dates in university were different to the Claimant's. Much more critically, Mr Owen specifically mentioned he had experience of live chat, and 5 years of working in customer service in a retail environment. In the judgment of the Tribunal, the Claimant tailored this application and CV specifically to attract the Respondent's attention. The Claimant never adequately explained why he changed the application and CV so radically, or why Mr Owen's application mentioned "live chat".
22. The evidence of Mrs Williams was that it was unusual for candidates to mention "live chat". "Live chat" is a system of instant messaging between customers and retailers to enable customers to ask a question and receive a near-instantaneous response. Examples of "live chat" were in the bundle, and it was not disputed that "live chat" formed a key part of the CSA role.
23. The Claimant's "test" was certainly not one that would meet the requirements of scientific rigour. His application was not the same as Mr Owen. The evidence of the Respondent's witnesses was that due to the mention of "live chat" and the significant customer service experience, Mr Owen's application was worth progressing to the next stage, and the Tribunal accepts that evidence. The requirements of s.23 is that there must be no material difference between the comparators, and the Tribunal finds that there were significant differences between the two applications for the reasons set out by the Respondent. There was a clear business reason why Mr Owen was progressed and the Claimant was not.
24. The Claimant alleges the automated emails from the Respondent show it preferred white British candidates. The Tribunal is not persuaded by the contention. The Tribunal finds that the emails would have been

sent to any candidate who was progressed to the telephone interview stage. They were automatically sent to non-responding candidates.

25. The Tribunal considered carefully whether or not the Claimant had satisfied the first stage of the shifting burden of proof, namely that he had shown facts (on the balance of probabilities) from which, in the absence of an explanation from the Respondent, the Tribunal could find he had suffered direct race discrimination. In the judgment of the Tribunal, the Claimant has failed to do so. His witness statement contained untruths, such as he had set out his Liberian education and experience in his application to the Respondent, and he gave evasive answers under cross-examination. The Claimant's statement claimed he had been told he did not need experience at the job talk, but the Tribunal prefers the evidence of the advertisement which clearly stated customer service experience is required. More critically, the two applications were not the same or even similar. Mr Owen said he had experience of "live chat" and significant customer service experience in a retail environment. The Claimant did not. The Tribunal wishes to be absolutely clear given the press coverage in the hearing bundle that the Claimant did not merely change the names and ethnicity in the two applications; they were different applications and the false application was clearly designed to meet the Respondent's criteria for the role.

26. If the Tribunal is incorrect in saying that the Claimant fails to satisfy the first stage of the shifting burden of proof, given it is an artificial construct, it went on to consider the explanations given by the Respondent. Given the findings of fact in this case, the Tribunal finds that Mrs Day did not reject the Claimant's application because of his race, but because of the reasons set out in her witness statement. The Claimant's application failed to meet the criteria stated in the advertisement of the role, namely customer service experience and PC literate. Simply stating you use the internet is not enough information. Mrs Day did not behave in a racially discriminatory matter towards the Claimant. The Tribunal is satisfied that the Respondent has given a fully adequate explanation for its decision, and it was nothing to do with the Claimant's protected characteristic (**Laing v Manchester City Council 2006 ICR 1519**).

27. The Tribunal dismisses the Claimant's claim for race discrimination. The Claimant's race played no part in the decision not to progress his application in the judgment of this Tribunal.

Judgment posted to the parties on

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EMPLOYMENT JUDGE CK SHARP

For Secretary of the Tribunals

Dated: April 2013