Case No: EA-2019-000999-JOJ
(previously UKEAT/0259/20/JOJ))

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 September 2021

Before :

HIS HONOUR JUDGE SHANKS

MR D BLEIMAN

MS M V McARTHUR BA FCIPD

- -

Between :

MR G HYLTON **Appellant**

- and -

INSTITUTE OF DIRECTORS **Respondent**

- -
- -

Mr B Knight (lay representative) for the **Appellant**

Ms S Omeri (instructed by The Institute of Directors) for the **Respondent**

Hearing date: 22 July 2021

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JUDGMENT

SUMMARY

RACE DISCRIMINATION

The claimant was dismissed during a six month probation period.

Although some of the allegations relied on were not established to the satisfaction of the ET and the dismissing officer did not give evidence the ET were nevertheless correct to conclude that the burden of proof had not shifted to the respondents on the basis that the facts overall were not such that race discrimination could properly be inferred.

HIS HONOUR JUDGE SHANKS:

1. This was an appeal by the claimant, Mr Hylton, against a judgment of the employment tribunal sitting in Central London (EJ Henderson, Ms D Olulode and Ms L Jones) rejecting his claim for direct race discrimination against his former employers, the Institute of Directors (IOD). The appeal was allowed through only on three grounds identified by HH Judge Auerbach at a rule 3(10) hearing on 11 November 2020.

The facts

2. The claimant, who is black British, was employed in the IOD's Membership Department with the job of encouraging new members to join and renewals by existing members. He was employed from 3 March 2017 under terms of employment which provided for a six-month probation period during which he was entitled to two weeks' notice of termination. He had been interviewed for the job by Mr Moore who had overall responsibility for the team. Mr Ladwa was his immediate line manager; Mr Ladwa had difficulty managing the claimant and the ET found that he suffered a lack of management support, but they also found that this was not related to his race.

3. After about four months Mr Moore decided not to confirm the claimant in post. He told the claimant of this decision at a meeting on 6 July 2017 which was also attended by Mr Dale. At the meeting the claimant remained calm, did not dispute any of the reasons put forward and did not suggest that the respondent was discriminating against him.

4. The decision was confirmed in a letter dated 7 July 2017 which referred to the matters Mr Moore had relied on at the meeting to justify the decision, ie the claimant's failure to complete required sales processes (such as entering required data onto the "CRM" system), persistent lateness, absence from his desk, and sleeping at his desk. The evidence also disclosed that there were other

matters concerning Mr Moore which were not mentioned to the claimant, including a suggestion, which was related to the way he had entered data on the CRM system, that he had made false commission claims, a suggestion that his attitude and behaviour made him unmanageable, and "disruptive behaviour", including the use of his mobile phone during working hours and an incident at the end of June when he took the team away from their desks for 10 minutes for an unauthorised training session.

5. The claimant appealed against the decision but his appeal was dismissed by letter dated 4 August 2017. At the appeal meeting he stated that the reasons given for the dismissal were fabrications but he did not suggest that the dismissal was racially motivated or that he had suffered race discrimination. In the course of the meeting he admitted several of the points made against him, in particular three instances of lateness, "nodding off" and taking the team away from their desks for the unauthorised training session.

The claim and the grounds of appeal

6. In September 2017 the claimant brought his claim alleging race discrimination. For some reason the alleged discriminatory treatment was put forward not only as (a) the dismissal itself, but also, separately, (b) the respondent's reliance on lateness, (c) their reliance on absence from and sleeping at his desk, (d) their reliance on the fact he had entered incorrect data on the CRM and (e) the respondent's failure to raise any of the grounds relied on with him before the dismissal.

7. Following a five day hearing at which the parties were represented as on the appeal, the tribunal rejected all the allegations of race discrimination on the basis that on their findings of fact the burden of proof had not shifted to the respondents under section 136 of the Equality Act 2010 to show that they did not discriminate against the claimant. Mr Moore did not give evidence at the hearing but the tribunal had before it a note from him to Vicky Taylor (the respondent's head of HR)

headed "Recommendation not to confirm Giles Hylton in post" and Ms Taylor gave evidence about her dealings with the claimant's case and her conversations with Mr Moore in relation to it.

8. HH Judge Auerbach allowed the appeal to proceed on the following grounds only:

(a) that the ET failed to pay sufficient regard to a finding about Mr Ladwa at para [48] of the judgment when it stated that there were "no actual comparators" at para [55];

(b) that the ET failed to have sufficient regard to the fact that it heard no evidence from Mr Moore about his motivation; and/or hence

(c) it erred in concluding at para [56] that the burden of proof had not shifted under section 136 of the Equality Act 2010.

Ground (a): Mr Ladwa as a comparator

9. At para [48] of the judgment under the heading "CRM" the tribunal rejected the complaints made by the respondent about the claimant's CRM entries on the basis of his evidence that he had copied Mr Ladwa's approach exactly and that the entries made by Mr Ladwa which were shown to the tribunal "look[ed] very similar … to those of the claimant". However, at para [55] under the same heading (though it is not clear whether at this latter stage the tribunal was considering the wider case that the dismissal overall was an act of discrimination), the tribunal stated: "There were no actual comparators raised by the claimant …" Judge Auerbach considered that this arguably involved a contradiction in the ET's reasoning.

10. Ms Omeri answered this ground of appeal in two ways which we consider sufficient. First, it was technically correct to say that the claimant had *not raised any actual comparators* in the context of the CRM complaints (the only comparators he raised were in the context of lateness, which was dealt with at paras [37]-[42]) and the ET made quite clear in the next sentence in para [55] and para [56] that they were considering the right question regardless of actual comparators. Second, in any

event, although Mr Ladwa's CRM entries formed the basis for the ET's rejection of the complaint about the claimant's entries, that could not possibly make Mr Ladwa a suitable comparator for the simple reason that Mr Ladwa, unlike the claimant, was not subject to a six-month probation period.

Ground (b): lack of evidence from Mr Moore

11. Although he made the decision to dismiss, Mr Moore did not give evidence before the tribunal. Mr Knight submitted that in a case like this, where race discrimination may be unconscious, the claimant is put at an unfair disadvantage if he cannot subject the decision maker's thought processes to scrutiny before the tribunal and that the ET failed to take this into account.

12. The failure of a party to call an obvious witness is always something on which a tribunal or court in a civil case can base an adverse inference. But the correct inference in any case must be based on all the circumstances. It cannot be right that a failure to call a witness must inevitably lead to a result in favour of the other party.

13. In this case it is plain that the tribunal had well in mind the fact that Mr Moore did not give evidence. But they also had unchallenged evidence from the respondent as to the efforts that had been made to secure his attendance (see: [para 12]) and, although they did not have direct evidence from him, they had his contemporaneous note setting out reasons for the dismissal as well as evidence from Ms Taylor about his decision, evidence to which they gave considerable weight for reasons which were justifiable (see: para [52]). They also had material from which they could properly draw inferences about his character and motivation, including the fact that he had recruited the claimant and the recording of the meeting between them in late June 2017 made by the claimant.

14. In those circumstances we consider that the tribunal were perfectly entitled to come to the view that Mr Moore had not been influenced by race in reaching his decision to dismiss the claimant

notwithstanding that he did not give evidence and was not subject to cross-examination before the tribunal.

Ground (c): error in stating burden had not passed under section 136

15. It is not entirely clear whether ground (c) is wholly contingent on the claimant succeeding on ground (a) and/or (b) or whether it is a free-standing ground. We consider that the claimant should be given the benefit of the doubt on this point.

16. In addition to the points raised on grounds (a) and (b), at the hearing of the appeal Mr Knight submitted that there was evidence of racial stereotyping of the claimant by Mr Moore and Ms Taylor which he said reflected a wider culture within the IOD which could have given rise to unconscious bias against the claimant and which the tribunal ought to have taken into account in drawing the appropriate inference as to Mr Moore's motivation in dismissing the claimant. Although it is not entirely clear, there is a suggestion at para [5] of the judgment that the tribunal took the view that it was not open to the claimant to raise the issue of racial stereotyping because it was not part of the list of issues for the hearing. If the tribunal were taking that approach we doubt that it would have been justified but in any event the tribunal appear to have considered the point.

17. The racial stereotyping submission was based largely on Ms Taylor's evidence about a conversation she had with Mr Moore shortly before the meeting of 6 July 2017:

> **Stephen [Mr Moore] reiterated his concerns to me about Giles [the claimant], particularly in relation to Giles falsely claiming commission as well as Giles' attitude and behaviour, as Stephen felt Giles had become unmanageable. He also raised his concern about Giles taking the team away from their phones to tell them how to do their job, and that two of the individuals had been very upset about how Giles had spoken to them and felt patronised and undermined. Stephen explained to me that his awareness of Giles' bad temper and unpredictable nature, along with**

> **the fact that Giles was a physically fit, large man, led Stephen to feel concerned that if he (Stephen) raised these two issues (Giles falsely claiming commission and the issues with Giles' attitude and behaviour) with Giles, Giles could become violent. In light of this Stephen sought my advice for dealing with the dismissal meeting and whether he absolutely had to raise these two additional issues given all of the other issues that he had.**
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> **I advised Stephen that, whilst best HR practice would be to inform Giles of all of the reasons for not confirming him in post, given the circumstances (as he feared Giles could become violent), together with the fact that there were a number of reasons for the dismissal, it was not necessary for him specifically to communicate these two issues to Giles. I did not want any of my employees to be put in a position where they felt in fear of physical violence and certainly not in a case such as this one where I did not believe that it was absolutely necessary given the wide range of reasons for the dismissal. We discussed the option of Stephen having someone with him at that meeting if he was concerned.**
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> **I felt particularly certain of my advice to Stephen as this was not the first time a member of staff had expressed concerns of this nature to me about Giles. Two of my [female] team members … had complained to me previously that Giles had made inappropriate comments to them, which had made them feel very uncomfortable and intimidated …**

In the event, as we have said, Mr Dale attended the meeting with Mr Moore, Mr Moore did not raise the issues he was concerned about raising and the claimant remained calm. In this connection, the claimant had also presented to the tribunal a recording of a meeting he had with Mr Moore in late June 2017 in which Mr Moore appeared irritable and agitated with the claimant but not fearful or intimidated.

18. The claimant's position was that the perception shared by Mr Moore and Ms Taylor in their discussion that he was likely to become violent indicated that they were guilty of racially stereotyping the claimant as a violent black man. The tribunal dealt with this issue and the evidence relating to it in the course of the judgment at paras [28], [32]-[36], [80]-[83] and [90]: they rejected the suggestion

that the claimant was treated any differently because of any racial stereotype and implicitly found that Mr Moore's concerns about the claimant's possible reaction if all the points he had in mind were raised at the meeting were genuine and reasonable; in considering the issue they were fully aware, as shown by the comments in the final sentence of para [90], that a failure by an employer to be open and honest about all the reasons for a dismissal may indeed raise an inference of discrimination in an appropriate case.

19. Mr Knight also relied on a suggestion that there was evidence of a general culture of race discrimination and stereotyping at the IOD which should have been taken into account in this connection. This was based on the fact that a former chair of the organisation, Lady Barbara Judge, had left because of allegations about her behaviour, which included serious allegations of race discrimination. There is no doubt the tribunal had this history in mind; they expressly refer to it in the context of considering Ms Taylor's evidence when they refer to her long HR experience and the fact that she herself had been responsible for starting the investigation which led to Lady Judge's departure. However, given that context, it does not seem to us that it would have been fair for the tribunal to reach the conclusion that there was a general culture of race discrimination and stereotyping in existence based on Lady Judge's earlier behaviour.

20. We therefore reject Mr Knight's submissions based on the allegation of racial stereotyping by Mr Moore and a general culture of race discrimination. Leaving those matters aside, the claimant's case that his dismissal was because of his race was therefore essentially dependent on the following facts: (i) due to lack of management support most of the issues that were relied on by the respondents were not raised with the claimant before dismissal (para [88]); (ii) the complaint about the claimant's CRM entries were not justified by the evidence presented to the tribunal; (iii) the suggestions of false commission claims and unmanageability were not raised with him at all. On the other side were the following considerations: (i) the claimant was on probation and had no right not to be unfairly

dismissed; (ii) he had been recruited by Mr Moore, the dismissing officer, a few months previously; (iii) there were some criticisms which were admitted by the claimant and/or established to the satisfaction of the tribunal and other genuine suspicions of wrongdoing; (iv) three black contemporaries were confirmed in post (para [77]); (v) the claimant did not raise any issue of race discrimination until after his appeal; (vi) Ms Taylor (whose evidence impressed the tribunal) did not have any suspicion that Mr Moore's decision was connected to the claimant's race. We consider that the tribunal were entitled to reach the view in these circumstances that the burden had not shifted in that the facts were not such that an inference of race discrimination could properly be drawn.

Conclusion

21. We acknowledge that the tribunal's judgment is not structured or expressed as well as it might have been (although in fairness that may be in part because of the way the issues were identified). Nevertheless, we are of the clear view that their decision, essentially one of fact, that the claimant's treatment was not because of his race, was one that was open to them on the evidence, even taking into account the provisions of section 136, which they clearly had well in mind. We therefore unanimously dismiss the appeal.

22. We would, however, echo the point made by the ET at para [90] of the judgment about the possible consequences for employers of a lack of openness in dealing with a dismissal in a case where an employee has less than two years' service. In all the circumstances we do not think Mr Hylton can be criticised for bringing his claim and, indeed, pursuing it to an appeal.