Neutral Citation Number: [2024] EAT 190

Case No: EA-2021-000078-VP; EA-2021-000619-VP

EA-2021-001105-VP; EA-2022-000479-VP; EA-2022-000714-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 November 2022

Before :

HIS HONOUR JUDGE SHANKS

- -

Between :

MR D IRELAND	**Appellant**
- and -	
UNIVERSITY COLLEGE LONDON	**Respondent**

- -
- -

The **Appellant** in person

Rule 3(10) Application- Appellant only
Hearing date: 30 November 2022

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JUDGMENT

HIS HONOUR JUDGE MURRAY SHANKS:

Introduction

1. I have heard a series of rule 3(10) applications in appeals which have been brought by Mr Ireland against decisions of the London Central Employment Tribunal (EJ Brown, Mr Kendall and Mr Baber).

Background

2. The background to the claims that Mr Ireland brought against UCL is as follows. In May 2019 UCL started a recruitment exercise for three research operations administrators. The posts were advertised on a six month fixed term basis. Mr Ireland, who is white, applied for one of these posts. He named three referees from universities that he had worked at in the period 2016 to 2018. Anonymised applications, which did not disclose ethnicity, were prepared. A Ms Loleta Fahad, the relevant manager, considered the application that had been put in by the claimant to be a strong one and he was invited to interview.

3. Ms Fahad assembled an interview panel. It consisted of herself, another woman and one man, all of whom were BAME. The employment tribunal carefully considered her evidence about the composition of the panel and why all three members had been BAME and accepted that there were good operational reasons for that.

4. Three interviews were carried out on 7 June 2019 and the interview panel scored the candidates. Mr Ireland performed best and he and one other candidate, who was also white, were sent conditional job offers subject to receipt of satisfactory references. The weakest candidate, who was BAME, was not selected to be given an offer.

5. The claimant was sent a formal offer letter on 12 June 2019 and apparently another one was sent on 18 June 2019 at an increased salary. On 19 June 2019 emails were sent by HR to the three referees that the claimant had named. Two of those referees responded promptly. The third did not respond within five days, three working days. The ET found that there was no out of office response from that third referee either, in other words, the request for a reference simply was not responded to, albeit the time period that we were considering was short.

6. Referee number 2 replied in an email briefly on 19 June 2019 saying, "**I decline to provide a reference for this candidate. Please accept my apologies for any inconvenience**." No reason was given for her declining to give the reference. That is paragraph 66 in the judgment.

7. Referee number 1 replied on 24 June 2019 at 14.46. He or she said at paragraph 67 in the judgment:

> **"(…) Apologies delay [sic], I am actually relocating … at the end of this week so it's been pretty manic. [The Claimant] was only with this team for a short while, he didn't finish his probation period and it would have been unlikely that he would have successfully completed this probation. …. [The Claimant] was not in post long enough for me to be able to give a full assessment of suitability, there were a number of areas of weakness."**

8. In the light of those two responses, Ms Fahad very quickly decided to withdraw the offer that had been made to Mr Ireland. The second reference had come in at 14.46 and Ms Fahad emailed her colleague, Ms Jackson-Cole at 15.10 on the same day saying:

> **"In light of the emails received so far, I am not prepared to proceed with the appointment and would like to withdraw the offer. Referee 3 is the last place of employment, but even if they came back with a very strong reference, Referee 2 and Referee 1 employed [the Claimant] prior to this and we have one refusal and the other is not favourable."**

9. The other white candidate who had been given an offer was an internal candidate and only required one reference from his line manager. That reference was positive, and (I think I am right in

saying) he was in fact given a post.

10. Ms Fahad did not consult the other members of the interview panel before deciding to withdraw the claimant's offer and she was cross-examined about her decision and the speed with which it was made and the employment tribunal accepted her explanations.

11. At an earlier stage in the process, Ms Fahad had refused to reimburse the claimant's expenses of travelling from Yeovil to London for the interview. At that stage she would have had no idea of the identity or ethnicity of the relevant candidate and there were reasons in her own mind for that decision, which the employment tribunal accepted, although it is right to say that the expenses were later paid in any event when the matter went, at Mr Ireland's behest, up to HR. Mr Ireland has mentioned today that in making her decision about the expenses, Ms Fahad should not have asked, as she did, to know where the relevant candidate was coming from and that that was a breach of the anonymity provisions. But as I have said, there was no linkage between him and the request for expenses.

12. The employment tribunal decided that the reason for the withdrawal of the offer to the claimant was the unsatisfactory references and that it was not because of the claimant's race. The reasoning for that decision was set out at paragraph 116 to 130 in a clear and concise way. The employment tribunal therefore dismissed the claimant's claim and indeed they sent out the written judgment on the same day as the final day of the scheduled hearing, which was 25 March 2021. Mr Ireland has told me today that the evidence and submissions in fact only lasted through the first two days, so it is plain that the tribunal had pretty quickly prepared their judgment and had it ready to send to the parties on 25 March which had been assigned as a day for the hearing.

13. On 25 March, they then proceeded to hear an application for costs by the respondent and they

ordered Mr Ireland to pay costs of £14,000 in a judgment that was sent out some months later on 27 June 2021. That costs award was on the basis that he had conducted the proceedings unreasonably in the light, in particular, of the deposit order made some time before and the figure of £14,000 was said to cover a period of some months from 24 November 2020 to 22 February 2021.

14. At that stage there was already in existence a costs application on paper which the claimant himself was making, and it appears that that was entirely overlooked by the tribunal and it was not until 28 January 2022 that that application was considered on paper by EJ Brown and rejected. The decision on that is at pages 49 to 61 in the bundle. In the course of that decision, the employment judge also declined to recuse herself.

15. Mr Ireland has appealed against all three decisions. He has represented himself today on the Rule 3(10) hearings and has made cogent and well put together oral submissions. He has also provided me with a helpful skeleton argument and a helpful document which sets out some amended grounds of appeal which have really focused in on the points that he seeks to make today.

16. His basic theme in relation to the main decision that he had not been discriminated against is that his case was really against Ms Fahad. She took the decision alone, he says, and she took the decision to withdraw the offer on the basis of the references, but in breach of a policy, he says, required the University College London to obtain a reference from the most recent employer. She took it hastily and she took it unfairly because she did not consult with him about what was said by the other two, and he says the employment tribunal really failed to ask themselves why she did that. And, he says, combined with her behaviour and breach of the policy in relation to the composition of the panel, and the expenses issue that I have mentioned, there was material from which an inference could have been drawn that Ms Fahad had a propensity to discriminate on the grounds of race, and that this was the conclusion that the employment tribunal should have reached as being the reason for

her withdrawing the offer.

17. As I say, he has put his position cogently but the problem with it is that the employment tribunal heard the evidence, no doubt heard his submissions, considered the evidence Ms Fahad gave about the travel expenses incident, and about the composition of the panel and reached a really very clear and stark conclusion on the facts at paragraph 130, namely that:

> **"On all the evidence, the Tribunal accepted Ms Fahad's evidence that she decided to withdraw the Claimant's offer because of the lack of satisfactory references. This was nothing to do with race."**

18. In reaching that conclusion, the employment tribunal must have been aware of the speed with which the decision was made and had that in mind. It is right there in the judgment. They knew that the missing reference was still pending but had not yet been received and they nevertheless made that clear decision on the facts. I am afraid that decisions of fact are for the employment tribunal and cannot be disturbed by the Employment Appeal Tribunal unless they are perverse.

19. Mr Ireland's complaint about the finding that Ms Fahad had consulted others before making her decision is really of no relevance, even if they were wrong to say that, because it is clear that the employment tribunal proceeded on the basis that she was the decision-maker and they considered her explanations and her evidence about what was in her mind and reached, as I say, that very clear conclusion.

20. I am afraid that although, if I had been the first instance judge, I may have reached a different view, it is not for this tribunal to disturb the very clear decision of the employment tribunal. That, as far as I am concerned, deals with the points that were made in relation to the main decision.

21. There are slightly different considerations in relation to the costs decisions. First Mr Ireland

said that the Tribunal had somehow misconstrued the deposit order the relevant paragraph of which is set out at paragraph 10 of the costs judgement, page 34 in the bundle, quoting EJ Quill, who made the deposit order, at paragraph 52 of that order. The particular point he takes objection to is that Judge Quill suggested that one of the references had been a non-reply and that he might prove otherwise, and that is a reference to the one that had not arrived, if it was ever going to arrive, at the time that Ms Fahad made her decision. I simply find the point far too subtle. The fact was that EJ Quill, looking at the evidence available to him or her, made clear that there were very plausible reasons a tribunal might be satisfied that race played no part in the decision and considered it appropriate to make a deposit order. The employment tribunal that decided the case came, as I say, to a very clear view as to the facts and were entitled to conclude that Mr Ireland had behaved unreasonably in proceeding with the case in the face of that deposit order. So, the point he makes about that, I am afraid, is not a viable ground of appeal.

22. The tribunal also referred, perhaps by way of a make-weight, to other conduct of his that they considered unreasonable, but they certainly, even if it was a make-weight, took it into account. Mr Ireland says that when they did that (paragraphs 42 and 43 of the costs judgment at page 39) they did not take into account written submissions that he had made by way of seeking costs himself against the respondents, which arose out of what he said was their unreasonable conduct in the way they had dealt with disclosure in particular.

23. It seems pretty clear that the tribunal on 25 March or later in deciding the costs application, did not address their minds to Mr Ireland's cross-claim for costs which, as I have indicated, he says dealt with how reasonable or otherwise it was for him to make his disclosure applications. It is plain that they do not refer to those written submissions; although they do record at paragraph 3 that the claimant had said that he had made his own application for wasted costs, they do not refer to the submissions made and it took them until January 2022 to deal with his application and then it was

because, as I understood it, he had to send a reminder and indeed a complaint of judicial misconduct for not dealing with an application within three months. So, it seems that they overlooked material that he had put before the tribunal.

24. It is also slightly concerning that they proceeded on 25 March to hear the costs application. I can fully see that it made good sense to use the time, but the claimant said he was not prepared to deal with the costs hearing and that the case had been listed only as a liability hearing and the full written judgment, which came out very quickly, was only produced that day and it may have been a good idea to allow time for that judgment to be digested and thought through before proceeding to consider a wasted costs.

25. At the moment as I understand it in his grounds Mr Ireland has not complained about the failure to adjourn the costs application, although he has complained in ground of appeal 1, in appeal 1105, that the tribunal failed to take into account assertions within his counterclaim which were relevant. He has also in ground of appeal 5 complained that the employment tribunal failed to set out any reasoning as to why the quantity of his case management applications were deemed disproportionate, because they had not taken into account why he was making those applications, and he has also raised a ground of appeal 1 in appeal 479 that they erred by delaying judgment on his wasted costs application until January 2022 and that it should have been determined at the same time. In ground 3 he complains that they found that travel expenses were not an issue, although apparently Judge Quill had put off a decision about that and so they were proceeding on a wrong basis. He also raises ground of appeal 4 in appeal 479, which is that they did not take into account that he was an unrepresented litigant and that it was important that the respondent, who was of course represented by Clyde & Co, met their disclosure obligations.

26. So, it seems to me that the appeals 1105 and 479 which relate to costs should proceed to a full

hearing. I do not know if Mr Ireland is going to seek to amend to say that there should have been an adjournment in any event on 25 March 2021. If he does, I will give him leave to do so. I think it would be a good idea after this hearing, now we know where we are, if he were to put in a new document setting out the current grounds of appeal on costs, which might include a failure to adjourn, but cannot include reliance on a fatally flawed liability judgment for obvious reasons given my main decision.