



EMPLOYMENT TRIBUNALS

Claimant: Mr R Meshram

First Respondent: Tata Consultancy Services Limited

Second Respondent: Entserv UK Limited

Heard at: London Central (Remote via CVP) **On:** 23 to 26 November 2020 and in Chambers on 8 February 2021

Before: Employment Judge K Welch
Mr R Miller
Mr S Pearlman

Representation

Claimant: Mr L Davies, Solicitor

First Respondent: Mr A Smith, Counsel

Second Respondent: Mr C Kelly, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claims against the First Respondent under case number 2203730/2019 are dismissed upon withdrawal;
2. The Claimant's complaints against the Second Respondent under case number 2203448/2019 of direct race discrimination and victimisation are not well founded and fail.

RESERVED REASONS

1. This is a claim brought by the Claimant against Tata Consultancy Services Limited ("TCS" or the First Respondent) and Entserv UK Limited ("Entserv" or the Second Respondent).

Claim Nos: 2203448/2019 and 2203730/2019

2. The Claimant had previously been employed by TCS until 31 August 2018. He brought successful proceedings of unfair dismissal and victimisation against TCS under case number 2205035/2018.
3. The Claimant's claims against TCS before this tribunal were brought under case number 2203730/2019 and related to direct race discrimination (on grounds of ethnicity and caste) in providing a "bad reference" about the Claimant and the alleged failure by TCS to share details of the investigations into the provision of the alleged bad reference. He also claimed harassment in respect of the alleged provision of the bad reference and victimisation relying upon his grievance, grievance appeal and previous tribunal proceedings.
4. Against the Second Respondent, Entserv, the Claimant brought claims under case number 2203448/2019. He claimed direct race discrimination (being of Indian national origin) in respect of his dismissal and failure to progress his appeal. He also claimed victimisation in respect of the same treatment relying upon his previous discrimination complaints against the First Respondent and others under case number 2205035/2018.
5. The hearing was a remote public hearing conducted using the Cloud Video Platform ("CVP") under Rule 46. The parties agreed to the hearing being conducted in this way.
6. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
7. From a technical perspective, there were some difficulties with the Claimant's representative's ability to log on and continue conducting the hearing via CVP. However, following some assistance from the Tribunal clerk, the parties were able to

complete the evidence and the submissions within the four day listing. The parties were told that it was an offence to record the proceedings.

8. The Tribunal had been provided with a number of documents electronically, which included a main bundle and page numbers referred to in this Judgment refer to page numbers within that main bundle. We were also provided with a supplemental bundle and opening skeleton arguments from TCS and the Claimant.
9. There was an outstanding application for a witness order in respect of one of Entserv's former employees, Mr Nagra and further documentation relating to that application. However, having considered the application during the panel's reading time, it was confirmed that Mr Nagra would be attending voluntarily to give evidence to the Tribunal and therefore it was unnecessary for us to finalise a witness order.
10. We heard from the following witnesses:
 - a. The Claimant himself;
 - b. Ms Dass, Chair of the Anti-Caste Discrimination Alliance;
 - c. Mr Parvata, former colleague of the Claimant at TCS;
 - d. Mr Chandrasekaran, HR director for the UK and Ireland for TCS;
 - e. Mr Venkatraman, Vice President and Global Head of the Alliance and Technology Unit at Tata America International Corporation;
 - f. Mr Krishnaswami, former line manager of the Claimant whilst employed at TCS;
 - g. Mr Thevarajan, former colleague of the Claimant whilst at TCS;
 - h. Mr Nagra, hiring and dismissing officer at Entserv;

- i. Mr Basterfield, HR business partner at Entserv;
- j. Mr Collyer, recruitment consultant involved in the Claimant's recruitment by Entserv; and
- k. Mr Ambler, appeal officer and general manager with Entserv.

11. A further bundle was provided by the Second Respondent relating to Mr Nagra's evidence. Whilst this was provided, the Tribunal did not have regard to it, since it was provided on the basis that should Mr Nagra amend his evidence in any way, reference may be made to documents within that additional bundle. However, there was no need for this to be considered, and therefore the Tribunal did not have regard to it.

12. A preliminary hearing for case management purposes took place on 11 March 2020 before Employment Judge Spencer. The cases against the First and Second Respondents were combined to be heard together. Evidence was heard from all of the witnesses relating to the totality of the claims brought.

13. However, on 5 February 2021, prior to the panel's Chambers' Day, the Claimant's representative wrote to the Tribunal withdrawing all of his claims against TCS, the First Respondent. They were therefore dismissed upon withdrawal. The Claimant continued to pursue his claims against the Second Respondent and, therefore, these were the only claims considered by the Panel.

14. Issues for consideration by the Tribunal which were limited to the Claimant's claims against the Second Respondent, Entserv, had previously been agreed as follows (subject to a minor amendment which was agreed in the hearing itself):

LIST OF ISSUES

Direct discrimination because of race (Indian national origin)

15. In dismissing the Claimant, did the Second Respondent treat the Claimant less favourably than it treated, or would have treated, a comparator? The Claimant relies on a hypothetical comparator who is a UK national.

16. Did the Second Respondent fail to progress the Claimant's right of appeal on his dismissal because of his Indian national origin? The Claimant relies on a hypothetical comparator who is a UK national.

17. Was such less favourable treatment because of the Claimant's race?

Victimisation

18. Did the Claimant carry out a protected act? The protected act relied upon is the Claimant having brought a discrimination claim against his former employer, TCS.

19. Did the Second Respondent treat the Claimant unfavourably by dismissing him because he had done the alleged protected act?

20. Did the Second Respondent fail to progress the Claimant's right of appeal on his dismissal because he had done the alleged protected act?

Statutory Defence

21. Can the Second Respondent avail itself with the defence under Section 109(4) EqA because it took all reasonable steps to prevent the alleged discriminator from doing that thing, or from doing anything of that description?

Remedy

22. If any of the Claimant's complaints are well founded what compensation is he entitled to receive in respect of compensation for unlawful discrimination, victimisation, including any award for injury to feelings, aggravated damages, uplift in compensation and interest?

Findings of fact

23. Following the Claimant's dismissal by TCS, which was found by the earlier Employment Tribunal to have been unfair, the Claimant applied for a role with the Second Respondent. His application was made through a recruitment agency used by the Second Respondent, Full Circle Recruitment.

24. The Claimant submitted his CV to Mr Collyer of Full Circle Recruitment on 29 November 2018. The CV he sent [168d-168f] provided "*Leadership role and accomplishments*" as "*Tata Consultancy Services Alliance Director - UK and Europe, since July 2015*".

25. His LinkedIn profile, which was also sent to the recruitment consultants, stated the Claimant's current employment as, "*Alliances Director - UK and Europe at Tata Consultancy Services*".

26. Neither of these referred to the Claimant's employment having terminated in August 2018.

27. The Claimant gave evidence that he informed Mr Collyer during a telephone conversation that his employment had been terminated by the First Respondent in August 2018. Mr Collyer, however, gave evidence that he had not been told this. In fact, Mr Collyer went further to say that, if he had been told this, he would have been obliged to inform the Second Respondent, but that it would not necessarily have

caused any problems in placing the Claimant for a role since often individuals are required immediately. We prefer the evidence of Mr Collyer and consider that, at the time of the Claimant's application to the Second Respondent, he had not informed the recruitment consultants and/or the Second Respondent that his employment with the First Respondent had terminated in August 2018.

28. The recruitment agency sent an email to Mr Nagra of the Second Respondent, who was the individual responsible for recruiting a number of positions in its organisation on 3 December 2018 [page 170]. The email stated as follows:

"Ravindra has been with TCS in the UK since 2004, demonstrating strong career progression throughout that time and a constant thread of new logo business development culminating in his current role as Alliance Director. ...currently on £135K plus £47K Bonus..."

29. Also attached to the email was the Claimant's CV showing his current role as being with the First Respondent.

30. The Claimant attended a first interview with Mr Nagra of the Second Respondent on 5 December 2018. Both parties accepted that, during this interview, the Claimant's employment status and/or his termination by the First Respondent was not discussed.

31. There was a second interview on 14 December 2018, again with Mr Nagra of the Second Respondent. During this interview, the Claimant was required to give a presentation but, again, there was no discussion regarding the fact that his employment had already been terminated by the First Respondent.

32. The Claimant attended two further interviews: one on 10 January 2019 with the Second Respondent's Chief Operating Officer and the other on 22 January 2019 with the Second Respondent's Global Head of Technology - Analytics. The interviewer at

the final interview did not consider the Claimant to be an appropriate candidate, as his email at page 208 highlights; he did not consider him to be an analytics expert and confirmed that his view was to, "Say *NO...*".

33. We accept that no-one asked the Claimant whether his employment was continuing or had ended or anything about his employment status at any of his interviews.

34. Mr Nagra decided to move forward with the Claimant's application despite his colleague's reservations. Therefore, a conditional offer was made to the Claimant on 20 February 2019 [pages 233-254]. The conditions were that the Claimant had to provide three years' worth of employment references, a document confirming his right to work in the UK and a successful completion of a criminal background screening as part of the Second Respondent's global employment screening process.

35. A reference was received from the First Respondent dated 30 April 2019 [page 364]. This was a factual reference confirming only that the Claimant had been employed by the First Respondent in the role of Principal Consultant from 4 December 1995 to 31 August 2018. It did not provide any further information.

36. The Second Respondent carries out pre-employment screening, which includes checking references, although this is not carried out by the Second Respondent itself. Instead, a third party, namely First Advantage, undertakes this for the Second Respondent. The Claimant completed the form and provided this information to First Advantage [pages 348-351]. On the basis of the information provided, First Advantage provided a background report to the Second Respondent. Mr Basterfield, HR business partner at the Second Respondent, provided evidence that no one at the Second Respondent would see the documents provided by the candidates to First Advantage. The Second Respondent's Global Employment Screening Team

would see the background report only and this would not be shared with HR or, in this case, Mr Nagra, the hiring manager, unless there was an issue.

37. The information provided on the form to First Advantage was correct in that it stated at page 351, and for the first time, that the Claimant was not employed from "09/2018" and that his former employer was Tata Consultancy Services. It went on to provide that his employment was not current and continued until "08/2018".
38. On 4 March 2019, the Claimant emailed Mr Nagra of the Second Respondent asking for a meeting as he had queries on the offer that had been made to him [page 260]. Mr Nagra of the Second Respondent met with the Claimant on 12 March 2019. At the meeting on 12 March 2019, the Claimant requested an increased financial package. Mr Nagra's evidence was that the Claimant explained that, as he was leaving the First Respondent after over 20 years, he would be leaving a "steady role" and moving into a role with a probationary period with no job security. The Claimant fails to mention this in his witness statement. In cross examination, his evidence was that he referred to his previous package in telephone conversations, but we do not accept this.
39. Following the meeting, the Claimant sent an email to Mr Nagra of the Second Respondent on 13 March 2019 attaching a letter from the First Respondent confirming his base salary. The email stated, "*...I am sharing the salary letter showing my base salary as £135,640.00. My DXC offer had a base of £130,000. I am expecting an increase in my base salary since I am making a career change after over 20 years...*" [page 273].
40. The salary confirmation letter attached to it [page 274] was dated 13 July 2017 and confirmed the Claimant's salary with effect from 1 April 2017.

41. Whilst the Claimant denied that he implied his employment with TCS was continuing, we accept the evidence of Mr Nagra that he believed the Claimant was still employed and was using this as a negotiation tactic in order to increase his package with the Second Respondent.
42. Mr Nagra sought approval to obtain a sign-on bonus in the Claimant's package to try and ensure that he joined the Second Respondent's employment.
43. A revised offer of employment, including a sign-on bonus of £10,800, was therefore sent out to the Claimant on 4 April 2019 [pages 277-298].
44. Mr Nagra subsequently interviewed an alternative candidate who he considered might prove much stronger than the Claimant in the role for which he was recruiting. Mr Nagra therefore emailed the person responsible for sending out the revised offer to the Claimant on 10 April 2019 asking her to not send the revised offer for 48 hours, if it had not been sent out already. The response to this email was that it had already been sent out.
45. At the beginning of May 2019, the Second Respondent had updated its method for recruiting all internal and external candidates. The amendment was that all candidates were to be online tested using Gallup. Only those showing potential or high potential via the Gallup test would be considered for an interview. Any other candidates scoring lower than this were not to be sent to Mr Nagra for consideration.
46. The Claimant had applied for the role prior to this requirement being introduced. However, Mr Collyer was tasked on 2 May 2019 with asking all candidates that were still going through the recruitment process to undertake the test as soon as possible [page 376].
47. The Claimant undertook the Gallup test and the results of his test [page 382] was that he was of low potential. This would have meant that he would not have been

interviewed should his application have been submitted after the introduction of the test.

48. On 22 May 2019, the Claimant was informed by the Second Respondent that the background check process had been completed and that everything was settled for his commencement on 3 June 2019.

49. At some point following the revised offer being sent to the Claimant and his agreed start date of 3 June 2019, Mr Nagra became aware that the Claimant's employment with the First Respondent had ended in August 2018. Mr Nagra's evidence was that he had received this information from Mr Parvata, a former colleague of the Claimant's, who had worked with him at the First Respondent's and who had informed him that the Claimant had been involved in some wrongdoing and had been dismissed for fraudulent activities in exceeding his authority in respect of corporate hospitality. Mr Parvata gave evidence to the Tribunal and stated that he had not provided this information to Mr Nagra, but that Mr Nagra had asked about it following the Claimant's commencement on 4 June 2019. It is unnecessary for the Tribunal to decide how and where Mr Nagra obtained information relating to the Claimant's employment with his former employer, the First Respondent. However, it is necessary for the Tribunal to consider what information Mr Nagra was given.

50. The Panel was satisfied that Mr Nagra had been informed, not only of the Claimant's termination of his employment, but also that he had brought Employment Tribunal proceedings. Whilst Mr Nagra disputes this in his evidence, we are satisfied that this is the case from the email which the Claimant subsequently sent to Mr Nagra following his discussions with him on the day of his commencement (referred to below).

51. The Claimant therefore commenced employment with the Second Respondent on 3 June 2019. He was initially 'buddied' by Mr Singh, who helped with his induction due to Mr Nagra being unavailable due to meetings.
52. Mr Nagra gave evidence that he initially spoke to the Claimant and said to him to think about whether there was anything that he needed to share about his employment at TCS, as some things he had been told did not stack up. Mr Nagra's evidence was that they were going to talk after his meeting.
53. Mr Singh had taken the Claimant to a café for lunch. Following his meetings, Mr Nagra attended the café. The Claimant gave evidence that Mr Singh was in attendance at this meeting, although Mr Nagra gave evidence that he was not. The documentation provided as part of the appeal process supported Mr Nagra's version in that Mr Singh confirmed that he was not in attendance during this meeting [p566]. We accept that evidence.
54. There was a difference in evidence between what was stated in this meeting. Although it is accepted by both parties that there was a discussion of the fact that the Claimant had left the First Respondent's employment in August 2018 due to redundancy, and the fact that he was bringing Employment Tribunal claims against TCS, the difference in evidence related to who brought this information up first. The Claimant asserted that Mr Nagra had brought this up by mentioning a bad reference that he had received from the First Respondent earlier that day [paragraphs 108-110 of his Witness Statement]. Whereas, Mr Nagra's evidence was that the Claimant told him all about what he said had happened with TCS. Mr Nagra's evidence was that the Claimant informed him that he had been made redundant in August 2018 and that he was bringing Employment Tribunal claims against the company. Mr Nagra went on to further state that he told the Claimant how he had clearly lied to him and had lost all trust in him.

55. The Panel accepts Mr Nagra's evidence and finds that Mr Nagra knew of the Employment Tribunal claims and that the Claimant had been terminated months prior to his commencement before the conversation with the Claimant on 3 June 2019.
56. The Claimant sent an email to Mr Nagra on 3 June 2019 [page 400]. The email referred to the discussion earlier that afternoon, "*where [Mr Nagra] mentioned receiving bad references from [the Claimant's] previous employer, TCS. [Mr Nagra] stated matters related to Employment Tribunal claim and [the Claimant's] business expenses*". The email went on to refer to the Tribunal claim and the fact that the Claimant had been told by the Judge to maintain strict confidentiality on information relating to that litigation, but it confirmed that the Claimant had raised a grievance for victimisation that occurred when the Claimant had defended the unfair treatment that female colleagues were subjected to. It also provided confirmation that the Claimant had never been subject to disciplinary actions during his employment.
57. Mr Nagra, on receiving this email, forwarded it to Mr Collyer, at the recruitment consultants [page 401]. In this email, Mr Nagra requested that Mr Collyer obtain the case number and the name of the Employment Tribunal where the Hearing was listed.
58. Following on from receiving the email from Mr Nagra, Mr Collyer at the recruitment consultants contacted the Claimant by email and suggested that he be open and transparent to show that he had nothing to hide. The Claimant subsequently provided that the case was listed at London Central Employment Tribunal and provided the case numbers for the claims. Mr Nagra gave evidence that he did not do anything with that information and his only interest in the Tribunal claims was to see whether there were allegations of financial impropriety on the part of the Claimant.

59. The Claimant emailed Mr Nagra again on 4 June 2019 confirming that he had raised the issue of the bad reference with TCS through their solicitors.
60. It was agreed that the Claimant would attend the Second Respondent's offices on 5 June 2019. Prior to this meeting, Mr Nagra confirmed that he had made the decision to terminate the Claimant's employment. He discussed the matter with Mr Basterfield and gave evidence that he decided to terminate the Claimant due to the fact that, in his view, the Claimant had lied to him for some months concerning the termination of the Claimant's employment by the First Respondent.
61. Mr Nagra emailed Mr Basterfield at 10.06 am on 5 June 2019 confirming the email as confirmation of the termination of the Claimant's employment, which was stated to be effective immediately.
62. Mr Nagra met briefly with the Claimant on 5 June 2019, during which he confirmed the decision to dismiss him. Mr Nagra's evidence was that this was because the Claimant had been dishonest during the recruitment process, whereas the Claimant's evidence was that this was because he had been dishonest in lying to him about the Employment Tribunal claims against the First Respondent. We accept the evidence of Mr Nagra.
63. A letter was sent to the Claimant dated 5 June 2019 [page 422]. This stated that, *"...it appears you have misled the company within the hire stage process leading [the] us to consider and conclude this as a serious breach of trust and confidence"*. The letter went on to confirm that the Claimant would be paid in lieu of his one-week notice period and that he had the right to appeal against the decision to dismiss him.
64. The Claimant appealed on 14 June 2019 [page 436]. This was sent directly to Mr Nagra, who gave evidence that he did not recall receiving this or passing it on to anyone within the Second Respondent. We find this hard to accept but, in any event,

accept that Mr Nagra did nothing with the appeal email. On 28 June 2019, Mr Basterfield emailed Mr Nagra asking why he had decided not to continue with the Claimant's employment, as he could not recall [page 479]. Mr Nagra replied to Mr Basterfield [also page 479], in which he confirmed that the Claimant had been questioned on the first day of his employment as,

"a word in industry" was that he had been dismissed for fraudulent activities from TCS, the First Respondent. He went on to say, "also discovered that he had [lied] (sic) to me specifically about his employment status at TCS suggesting that he was employed by TCS when in reality he was unemployed. Continued the same lie for almost three months and four [rounds] (sic) of the interview and even suggested that he had to take gardening leave.

On day one of his employment commencing at DXC questioned him AND HE CONFESSED, he then shared the fact that he had separate inflight Employment Tribunal Hearings.

My trust has been lost on day one and I could not allow him to be in a position of authority, manging key accounts and client relationships based on the fact that he was dishonest and untrustworthy".

65. The Claimant's appeal was not initially dealt with by the Second Respondent. When the Claimant commenced proceedings at the end of August 2019, Mr Basterfield of the Second Respondent became aware that the Claimant had appealed the decision to dismiss him. Having carried out an investigation, it became clear that the Claimant's appeal had been received but that it was in a queue and had not yet been assigned to a manager.

66. The Claimant was finally sent an invitation to an appeal hearing on 31 January 2020 [pages 505a-505b]. Mr Ambler was asked to hear the Claimant's appeal. The initial

hearing was scheduled to take place on 5 February 2020 but the Claimant was unable to attend this due to being out of the Country. The appeal hearing was postponed following various requests made by the Claimant.

67. The appeal hearing finally went ahead on 29 April 2020 [minutes pages 550 - 552].

On considering the Claimant's appeal, Mr Ambler did not uphold his appeal. He had been unable to speak with Mr Nagra as he had already left the Second Respondent's employment. He concluded that the Claimant had not been honest with Mr Nagra or the Second Respondent during the recruitment process about his employment status at TCS and that his deception "*went beyond lying by omission*" [Mr Ambler's evidence].

68. Mr Ambler's evidence was that, in seeking a higher financial package on the basis of a salary from a job from which he had been made redundant over six months before, he concluded that the Claimant had actively misled Mr Nagra and the Second Respondent. An outcome letter was therefore sent to the Claimant on 17 July 2020 [pages 579-583] dismissing his appeal.

Submissions

69. All parties provided either written closing submissions and/or opening arguments and were given the opportunity to address the panel further. This judgment will therefore not go into detail on the submissions, and will only refer to submissions relating to the claims the panel is to now decide.

70. The Second Respondent's submissions in brief were that on the facts there was no prima facie case of discrimination to uphold. Mr Nagra's evidence had been consistent despite having his own issues with his former employer, the Second Respondent. The Second Respondent put forward a number of submissions on the facts, which, with the benefit of written submissions, will not be recited here.

71. The Second Respondent accepted that the earlier Tribunal Proceedings brought by the Claimant against the First respondent were protected acts in accordance with section 27 Equality Act 2010 ('EqA'), but that the Claimant had failed to establish that his dismissal or the alleged failure to progress his appeal were because of him doing a protected act or because of his race. For direct discrimination, the Second Respondent submitted that this was an even weaker claim as the Claimant had not established any ostensible difference in treatment or any other evidence which might form the beginning of a prima facie case of race discrimination.

72. The Claimant's submissions were that it was accepted that the Claimant had done a protected act, and that there was a link between that protected act and the detriment to which he had been subjected. Looking at the contemporaneous evidence, it was clear, in the Claimant's view, that the Tribunal proceedings were playing on Mr Nagra's mind. Mr Nagra was not a credible witness. In the Claimant's view the reason for the Claimant's treatment (dismissal and the failure to progress the appeal) was because the Claimant had confessed to bringing Tribunal claims, and/or his race.

Law

73. Section 13 EqA provides:

"13. Direct Discrimination:

(1) A Person who:

(a) discriminates against another;

(b) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"

74. Very little direct discrimination today is overt, or even deliberate. Tribunals have been given guidance from case law to identify indicators which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias. Anya -v- University of Oxford [2001] IRLR377 (Court of Appeal). It is necessary for there to be a consideration of comparators under direct discrimination.
75. Under Section 23 EqA “there must be no material difference between the circumstances relating to each case”.
76. Section 27 EqA provides:
- “27. Victimisation
- (1) A person A victimises another person B if A subjects B to a detriment because:
- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act:
- (a) bringing proceedings under this Act;...”
77. There is no requirement for a comparator in a victimisation complaint. Also, as with direct discrimination, victimisation need not be consciously motivated.
78. When the protected act and detriment have been established, the tribunal must examine the reason for that treatment. These are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple ‘but for’ test is not appropriate.
79. There must be a link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. However, it is not necessary for a person claiming victimisation to show that the unfavourable treatment was meted out solely by reason of his having done a protected act.

80. Section 136 of the EqA governs the burden of proof and discrimination claims which provides:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person A contravenes the provision concerned, the court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision.”

81. In Ijun -v - Wong [2005] IRLR 258 and Madarassy - v- Nomura [2007] IRLR 246, the Court of Appeal identified a two stage approach to the burden of proof. Whilst both were decided under earlier discrimination legislation, they are still relevant. The Tribunal would first consider whether, in the absence of an explanation from the Respondent, the facts were such that it could properly conclude that discrimination had occurred. The Court of Appeal emphasised in Madarassy that this could be a conclusion that the Tribunal could properly reach: there would have to be something (although that might not in itself be very significant) beyond the difference in protected characteristic and a difference in treatment for this to be the case. If the facts were of that nature, the burden would be on the Respondent to prove it had not discriminated against the Claimant.

82. Section 136 of the EqA has not removed the power of the Tribunal in an appropriate case to draw a common law inference of discrimination. Where, however, a Claimant does rely on Section 136, there need to be sufficient facts, such that the Tribunal could make a finding of discrimination absent an exonerating explanation given by the Respondent.

83. Section 109(4) of the EqA provides a statutory defence for an employer in the following circumstances:

“Section 109 - Liability of Employers and Principals

(4) In proceedings against A's employer B in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A:

- (a) from doing that thing, or
- (b) from doing anything of that description."

Conclusions

84. Turning firstly to the complaints of direct race discrimination, we do not find that the Claimant has proved facts so as to reverse the burden of proof in this case, and his complaints of direct race discrimination must therefore fail.

85. Whilst it is accepted that the Claimant was dismissed and that his appeal was subject to significant delays, there was no evidence before the Tribunal that this was in any way because of his race.

86. Even if we are wrong about the burden of proof not shifting to the Second Respondent, we, in any event find that the Second Respondent had not directly discriminated against the Claimant because of his race.

87. The Claimant had only very recently been recruited by Mr Nagra, who agreed his appointment to a very senior role within the Second Respondent, and who had arranged for a signing on bonus to be made to him. The same Mr Nagra made the decision to dismiss the Claimant. It is therefore not plausible, in our view, for the reason for that dismissal to have been tainted in any way by the Claimant's race.

88. We accept that there were significant delays in dealing with the Claimant's appeal against his dismissal. However, we consider that the reason for the delay was not because of the Claimant's Indian national origin. For the reasons outlined above, we do not consider Mr Nagra to have ignored the Claimant's appeal due to his race. We believe that Mr Nagra would have treated anyone else, in exactly the same way in

similar circumstances to the Claimant. There is no fact from which we could conclude that the treatment occurred because of race. In any event, the explanation has been established on the balance of probability.

89. We find that the failure to deal with the Claimant's appeal was Mr Nagra's failure to forward it on to the relevant department, and the Second Respondent's procedures and nothing else. There was no suggestion at all that there was any other conscious or subconscious motive.

90. We considered carefully whether the claims of victimisation had been made out, particularly as it was clear to the panel that the Second Respondent was aware of the Claimant's discrimination claims before it made the decision to terminate his employment.

91. However, we were not satisfied that the reason (or even one of the reasons) for the Claimant's dismissal was because of his protected act, in bringing those claims. We consider that the real reasons for the Claimant's dismissal was the misleading way in which he had approached his application for employment with the Second Respondent. He had sent a CV and LinkedIn profile which both suggested that the Claimant remained employed by the First Respondent. We consider that the Claimant maintained this stance throughout the application process, although acknowledge, that during interviews he was not asked about his employment status. We accepted the evidence of Mr Nagra that he felt that he had been effectively lied to by the Claimant, particularly in trying to obtain a higher financial package; we also considered that the fact that he had shown low potential in the Gallup test and was not considered appropriate by one of the Senior people within the organisation, may have had some effect on Mr Nagra's decision. However, we find that the reason for the decision to terminate the Claimant was that Mr Nagra considered that the Claimant had been dishonest throughout the recruitment process.

92. We carefully considered the evidence relating to Mr Nagra’s knowledge of the earlier Tribunal Proceedings, and whether they had any influence on the decision to dismiss the Claimant. We did not believe it had. We acknowledge that Mr Nagra asked Mr Collyer to obtain details of the earlier Tribunal proceedings, but accept Mr Nagra’s explanation that this was to see whether there was any financial impropriety on the part of the Claimant. We also took into account the email of Mr Nagra to Mr Basterfield [page 479] which talks about the fraudulent activities and the Claimant’s continued lie for over 3 months and 4 rounds of interview and that he had spoken to him and on day one “*HE CONFESSED*”. It is only after that, that mention is made of the Tribunal proceedings. Therefore, we do not accept that the protected act formed any part of the decision to dismiss the Claimant.
93. Turning to whether the failure to progress the appeal was an act of victimisation, we do not accept that it was. We find that there was no causal link between the failure to progress the appeal and the protected acts.
94. There was therefore no requirement for us to consider the statutory defence relied upon by the Second Respondent.
95. All of the Claimant’s claims against the Second Respondent are dismissed.

Employment Judge Welch

Date: 01/03/2021

JUDGMENT SENT TO THE PARTIES ON

02/03/2021

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FOR THE TRIBUNAL OFFICE