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# THE EMPLOYMENT TRIBUNALS

**Claimant:** **Ms Neamat Youseff**

**Respondent:** **Swissport GB Limited**

**Heard at:** **East London Hearing Centre** **On: 10, 11, 12 October 2018**

**Before:** **Employment Judge Burgher**

**Representation**

Claimant: In person

Respondent: Mr D Flood (Counsel)

**JUDGMENT having been sent to the parties on 22 October 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.**

# REASONS

Issues

1 At the outset of the hearing, the Tribunal identified the issues as those set out in the case management order of Employment Judge Russell dated 16 August 2017. The issues were expressed and, following clarification with the Claimant, the issues the Tribunal considered are as follows:

2 The Claimant claims that the Respondent has, contrary to section 13 of the Equality Act 2010, discriminated against her because of race and/or religion and belief by:

2.1 Not offering her a direct contract of employment.

2.2 Mr Wood issuing the Claimant 'yellow tickets' for poor performance.

2.3 During Ramadan in 2016, Mr Wood laughed at the Claimant in front of other staff because she was wearing a headscarf (relied on as religion or belief only).

2.4 On 1 January 2017 (not December 2016), Mr Wood said that the Claimant was "not determined enough" and he would "have to take it further" following a period of sickness absence caused by food poisoning.

2.5 On 1 January 2017, Mr Wood did not permit the Claimant to leave work early after she had requested this due to suffering from a sore throat. The allegation that the Claimant was not permitted to leave work early on 2 January 2017 due to her fiancé being involved in a motor accident was not pursued.

2.6 On 6 January 2017, the Respondent informed the Claimant's agency that the Respondent did not want her to return to work.

3 In respect of the comparators, the Claimant stated that she relied on hypothetical comparators, "DJ" and Ms Tanya Mombe, and not the Pakistani comparators that were outlined in the Preliminary Hearing before Employment Judge Russell.

4 In addition to the above, the Respondent maintains that the Tribunal does not have jurisdiction to consider claims of race and/or religion or belief as they are time-barred under section 123 of the Equality Act 2010, and that it is not just and equitable to extend time.

Evidence

5 The Claimant gave evidence on her own behalf and called Ms Layla Mansi to give evidence in support. The Respondent called Mr Jamie Paterson, Head of Business Support, and Mr Oliver Wood, Service Delivery Manager. All witnesses were subject to cross-examination and separate questions from the Tribunal.

6 The Tribunal was also referred to relevant documents in a bundle of over 285 pages. The Tribunal admitted additional documentation by way of payslips submitted by the Claimant which was labelled C1, and additional documentation from the Respondent labelled R2.

Procedural matters

7 During her evidence, the Claimant sought to adduce additional documentation relating to Facebook messages concerning the headscarf issue. The Tribunal did not review these documents, which had not previously been disclosed to the Respondent. Disclosure in this case should have taken place by 23 August 2017.

8 Following review of the documents and taking instructions, Mr Flood, on behalf of the Respondent, applied to adjourn the hearing so that he could call witnesses in rebuttal of the matters that the Claimant had specified in her evidence to the Tribunal. He submitted that the Respondent would be seriously prejudiced if the adjournment was not permitted and made the point that the Claimant had sought to rely on different comparators in her oral evidence to those that were recorded in the Preliminary Hearing

before Employment Judge Russell. The Claimant stated that the two previous postponements in this case were for genuine reasons and were permitted by the Tribunal. She also asserted that, if the Respondent would call further witnesses, they would not tell the truth.

9 When considering the Respondent's application, the Tribunal had regard to the overriding objective of dealing with the case fairly and justly, in particular, ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

10 We had specific regard to the fact that the headscarf issue concerned what Mr Oliver Wood was alleged to have done. Apart from a potential witness, 'Christiana', there were no other people alleged to have been present. At the time of the adjournment application, the Claimant had given her oral evidence and had been cross-examined on it. Further, Mr Wood was at the Tribunal and able to give his evidence in this regard. We concluded that an adjournment to allow ancillary witnesses to rebut the specifics of what the Claimant had said in cross-examination would not be fair or proportionate, especially as the Claimant had stated in her witness statement, exchanged on 30 October 2017, that she had complained to another manager (not a formal complaint) and was told by that person that Mr Wood did not mean any harm. Save for saying that the Respondent has many managers, Mr Flood did not state what enquiries had been taken to identify the manager mentioned or question any of its managers before the Tribunal hearing.

11 However, given that the Respondent's adjournment application was predicated on the non-disclosed Facebook documents, in order to balance fairness we refused to allow the Claimant to rely on the additional documents. We concluded that the important issue for consideration was what the Claimant says happened regarding the headscarf issue against Mr Wood's evidence. Whilst the Claimant may or may not have reported the matter to others at the time of the alleged headscarf incident, her failure to previously disclose the documents until such a late stage leads us to conclude that it is not proportionate to allow them to be submitted in evidence.

12 As far as the change in comparators was concerned, the Respondent was permitted to adduce documentary evidence of the new alleged comparator in bundle R2.

Facts

13 The Tribunal has made the following findings of fact.

14 The Respondent company employs front of house operations staff and passenger service agents and covers services such as checking, ticketing, departures, and the baggage department in arrivals.

15 The Claimant is Egyptian and of Muslim faith and she was recruited as a passenger service agent by Premier Work Support Ltd, which provided agency workers to the Respondent.

16 The Claimant commenced her assignment with the Respondent on 9 February 2015. We heard evidence from the Respondent to the effect that the Respondent has a ratio of 50:50 permanent to agency workers during the busy summer months, and a ratio of approximately 70:30 permanent to agency workers during less busy times.

17 We find that there was a diverse workforce within the Respondent and that there was a very high turnover of agency workers, which at times approached 95%. From the evidence we have seen, at any one time there could be up to 46 agency workers on the roll.

18 The Respondent operated a 24-hour shift system. The Claimant reported to Lead Agents and to the Shift Manager in the Respondent. Lead Agents were line managed by the Shift Managers. From the evidence we have heard, there were approximately 15 Shift Managers and Lead Agents at any given time.

19 One of the Claimant's Shift Managers was Mr Oliver Wood. We find that the Claimant had a positive working relationship with Mr Wood until at least April 2016. The work-related Facebook messages between the Claimant and Mr Wood demonstrate this [282 – 294].

20 The Respondent has a stringent system for recording time keeping and attendance, called the Kronos system, which is activated by the Claimant's fingerprint. Failure to join (FTJ or no show), sickness absence and lateness are recorded on this system.

21 The Respondent has an employee recognition notice policy that results in managers or agents issuing either positive yellow tickets for good conduct and behaviour and positive work, or negative yellow tickets for negative and poor performance and actions.

22 It became clear that there was an element of discretion on the part of Lead Agents and Shift Managers relating to whether they would issue yellow tickets for an infringement of a rule or policy, this depending on the circumstances.

23 In June 2016, the Claimant experienced difficult personal circumstances resulting from the very poor state of health of her mother, who was in hospital. The Claimant stated that she made Mr Wood aware of this but ultimately no dispensation was made in this regard, Mr Wood issuing her with negative yellow tickets.

24 From time to time, the Respondent recruited permanent staff from the agency pool of workers. We were provided with a spreadsheet of workers who were given permanent employment that coincided with the Claimant's period of employment. During this period, there were approximately 40 agency workers who were offered a permanent contract by the Respondent. The Claimant was not offered a permanent contract, but the spreadsheet demonstrates that a significant proportion of the names on the schedule were apparently of Arabic and/or Islamic provenance.

25 The decision to offer agency workers permanent contracts was the exclusive preserve of Mr Paterson. We find that, given the number of reports that he was responsible for, and from the evidence that he gave to us, he was unaware of the Claimant's particular nationality or religion.

26 When determining who to recruit from agency workers, Mr Paterson instructed his Shift Managers and Lead Agents to provide feedback on the agency workers. He stated in a number of emails, one of which was the 2 July 2015 email, that the Respondent was looking to recruit contract staff in the hope of building a more consistent and dedicated workforce, and asked them to complete an assessment, selecting their 15 best contractors under a series of criteria. Lead Agents and Shift Managers were instructed to pay close attention to contractors who had been with the Respondent a long time. It is apparent to the Tribunal that Mr Paterson was at all material times concerned to ensure that the right members of agency staff were recruited and offered permanent roles.

27 There were 6 criteria referred to in the spreadsheet sent to Shift Managers and Lead Agents against which contractors were assessed. The criteria were general performance, customer service, interpersonal relationships with colleagues, decision-making, system procedural understanding competency and proactive behaviour. Each Lead Agent or Shift Manager was requested to use his or her knowledge of the individuals gained through his or her daily observations and feedback, to select his or her top, at various times, 15, 10, 8 or 6 agents.

28 We find that the way in which this process was undertaken was subjective, inconsistent, wide-ranging and involved unverified opinions of performance. There was no moderation or justified factual basis for any manager to be able to conclude or score against the criteria. We can easily find that there was an element of favouritism that could influence the outcome of the assessment in any criteria. We find that the periodic selection process was simply a random assessment based on a Lead Agent's or Shift Manager's personal opinion of the individuals.

29 On the 26 June 2016, during Ramadan, the Claimant wore a headscarf to work to reflect the religious significance of the occasion to her. Mr Wood had not seen the Claimant in a headscarf before this time. The Claimant stated that Mr Wood laughed at her and that she was upset by his reaction to seeing her in a headscarf. Mr Wood stated that he could not recall the event but states that he would not have laughed at the Claimant. We find that the Claimant was upset by Mr Wood's interaction on this occasion and she reported this at the time to her friend Ms Leila Manzi, who gave evidence before us.

30 We observed from the documents that we were provided with that there were 16 negative yellow tickets issued to the Claimant during the relevant time. However, Mr Wood was alleged to have issued only two of them and was alleged to have influenced the issuing of two others. The relevant yellow tickets were 28 January 2016, 11 March 2016, 30 June 2016 and 9 November 2016. The Claimant did not make any allegations against other individuals responsible for issuing her the 12 other yellow tickets.

31 When considering the yellow tickets that were the subject of allegations, we find that the two that Mr Wood issued were properly issued. They were accepted and signed for by the Claimant without complaint. These two yellow tickets were unobjectionable, and they were issued at the time when there was a good working relationship between Mr Wood and the Claimant.

32 The 30 June 2016 yellow ticket related to the Claimant wearing a headscarf with red which was not an acceptable colour for uniform. Mr Wood said that he was not responsible for this and that another Shift Manager issued it. He stated that he would have issued all yellow tickets himself if necessary and would not have relied on another person to do this. We accept his evidence in this regard.

33 The 9 November 2016 yellow ticket was issued by a Lead Agent in respect of the Claimant providing written confirmation that she had read an operational memorandum when she had not in fact read it. In view of his evidence, we do not find that Mr Wood had any influence on the issuance of this yellow ticket and he would have issued any such ticket himself if necessary.

34 On 21 December 2016, Mr Paterson decided to terminate the continued attendance of the Claimant and two other agency workers at the Respondent. He wrote an email dated 21 December 2016, stating that he wished to terminate the Claimant's attendance, as of Monday 9 January 2017, due to her continued performance and attendance issues. However, he stated that the employment agency should not be informed until the start of January 2017. Mr Paterson stated that the Christmas period was busy and also that he did not want to notify the agency workers before Christmas that their potential future with the Respondent was coming to an end. The Tribunal accepted his evidence in this regard.

35 On 1 January 2017, the Claimant attended for work, but after a few hours of attendance she approached Mr Wood to ask whether she should go home because she had a sore throat. Mr Wood asked her whether she been taking any medication to alleviate the symptoms and the Claimant replied that she had not but that she just needed to go home. Mr Wood permitted the Claimant to leave work early on that day and in doing so he told her that she was not determined enough, as he believed that she should have just completed her shift despite her sore throat. He informed her that he would need to take it further, meaning that he would need to inform her agency that she left work early.

36 Mr Wood recorded his understanding of staff absence and sickness at the time in an email to Mr Paterson on 1 January 2017. In this email he expresses scepticism about the reasons for the Claimant wanting to go home early.

37 On 6 January 2017, in accordance with Mr Paterson's instruction of 21 December 2016, the Claimant was informed that she was no longer required to work at the Respondent.

**Law**

38 Section 13 of the Equality Act 2010 provides for direct discrimination and states:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treated B less favourably than A treats or would treat others.*

39 The protected characteristics in this matter are race (Section 9 Equality Act 2010) and religion or belief (section 10 Equality Act 2010).

40 In considering direct discrimination based on inferences, the Tribunal is required to address the following questions:

40.1 Can the Claimant establish facts from which the Tribunal could infer, in the absence of any explanation, that the Respondent discriminated against the Claimant on the grounds of religion or belief or race (a prima facie case of discrimination)?; if so,

40.2 Can the Respondent establish a non-discriminatory explanation for the treatment (Igen Ltd (formerly Leeds Careers Guidance) and others v Wong [2005] EWCA Civ. 142)?

41 The burden is on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination (The Court of Appeal, in Madarassy v Nomura International plc [2007] EWCA).

42 The Court of Appeal in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination. 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. As such, the Claimant must establish more than a difference in status (e.g. religion or belief or race) and a difference in treatment before a Tribunal will be in a position where it could conclude that an act of discrimination had been committed. There must be something more.

43 Even if the Tribunal concludes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the Claimant's religion or belief or race (B and C v A [2010] IRLR 400).

44 The Claimant's case is that she must have been unlawfully discriminated against because, she says, no reasonable grounds have been put forward for not offering her a permanent role, for the termination of her placement, and for the issuing of negative yellow tickets.

45 In respect of time limits, section 123 of the Equality Act 2010 states:

"*(1) Proceedings on a complaint within section 120 may not be brought after the end of –*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(2) Proceedings may not be brought in reliance on section 121(1) after the end of –*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section –*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*"

46 The Tribunal has had regard to the helpful summary of the law regarding time limits and extension of time provided by Jackson LJ at paragraphs 30 – 41 in the case of Aziz v FDA. The Tribunal also considered the guidance in Robertson v Bexley Community Centre (t/a Leisure Link) that the extension of time is the exception rather than the rule. We also considered the balance of prejudice between the parties when considering whether it is just and equitable to extend time.

**Conclusions**

47 In view of the law and our findings of fact outlined above we conclude the following:

48 In respect of not renewing the Claimant's contract and not offering her a permanent role, we conclude that Mr Paterson did not know of the Claimant's race or religion or belief and as such Mr Paterson did not discriminate against the Claimant on grounds of race or religion. Mr Paterson relied on the information that was provided to him by his Shift Managers and Lead Agents and we therefore considered whether the information that he used to make his decision was an evidential basis for the Claimant's unlawful discrimination claim.

49 We have found that the spreadsheet assessments that were undertaken from time to time by the several different Shift Mangers and Lead Agents consisted of unreasonable, subjective and wholly unfair parameters that were never communicated to the Claimant (or any other agent). The assessors had no objective parameters from which to score against the criteria. We can therefore readily accept how and why the Claimant felt aggrieved by this and can see how allegations of favouritism can easily be levelled against the Respondent in this regard. It was unreasonable for the Claimant, and other agency workers, to not be informed of the parameters that were being used to assess appointment for a permanent role. However, there was no evidence before the

Tribunal that race or religion or belief, whether of the Claimant or her comparators, played any part in the selection process. There were a number of different assessors scoring inconsistently from one another and this points against a conclusion of a systemic discriminatory culture of picking those likely to 'fit in' and perpetuate such a culture. Further, the list of agency workers that were appointed shows that there were a range of ethnic backgrounds, and by implication religious beliefs, and this points against unlawful discrimination playing a part in not selecting the Claimant for a permanent role. We conclude that the unreasonable selection process was applied in the same way to all members of staff, irrespective of their respective race or religious belief.

50 We therefore do not conclude that the Claimant has established that the decision to terminate her placement and not offer her a permanent role amounted to unlawful discrimination. As such, her claims in this regard fail and are dismissed.

51 In respect of the yellow tickets, we found that the two negative yellow tickets referred to in the bundle issued by Mr Wood to the Claimant were justified and she accepted them. They were sent at the time of a positive relationship between the Claimant and Mr Wood. We have found that that the two other yellow tickets that the Claimant alleges Mr Wood influenced were in fact made by the individuals concerned. The Claimant has not established that any of the negative yellow tickets issued to her were issued on the basis of her race or religious belief. As such, her claim in this regard fails and is dismissed.

52 In relation to the headscarf incident, we conclude that the reaction of Mr Wood to the Claimant when he saw her in a headscarf did make her feel upset and this was on the grounds of her religious belief. Had she not worn the headscarf as an expression of her religion, Mr Wood would not have reacted in the way he did and the Claimant would not have been made to feel upset.

53 This incident occurred on the 26 June 2016. We have not found that there is any other act of unlawful discrimination for there to be a continuing act for time limit purposes. The Claimant presented her claim to the Employment Tribunal on 2 May 2017. This claim, on the face of it, is presented outside the specified 3-month time limit.

54 We therefore considered whether it was just and equitable to extend time. The Claimant's evidence before us was that she informally complained to several managers at the time and that she complained to her agency but that she did not follow this up at all. She left matters unaddressed. There was no evidence presented by the Claimant as to why she delayed in pursuing this aspect of her claim. The Respondent had no grievance documentation in this regard and we find that the Respondent has been prejudiced by not being able to call relevant witnesses who may have been relevant to determination of this issue, and the recollection of Mr Wood regarding this incident had faded. Whilst this was significant event for the Claimant at the time, she did not pursue it within the relevant time limit and the Tribunal does not conclude that it is just and equitable to extend time. Therefore, the Tribunal does not have jurisdiction, pursuant to section 123 of the Equality Act 2010, to consider this aspect of the Claimants claim. As such, it fails and is dismissed.

55 In respect of the 1 January 2017 interaction between the Claimant and Mr Wood, the Claimant was permitted to leave work. Mr Wood expressed concerns about her not being able to see out her shift as it was a busy. Mr Wood needed staff to work during

this busy period and made the comments that form the basis of the Claimant's complaints in this context and not due to the Claimant's race or religious belief. As such, the Claimant's claims in this regard fail and are dismissed.

56 Given our conclusions set out above in relation to all of the issues, whilst we can accept the strength of feeling in respect of unfairness that the Claimant was subjected to in not being offered a permanent role, we cannot conclude that there was any basis for her assertion of discrimination on the grounds of race or religion and belief.

57 The Claimant's claims are therefore dismissed.

Employment Judge Burgher

22 November 2018