Case Number: 3321331/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Heeley	**v**	**Birk Holdings Ltd**
Heard at: Bury St Edmunds via CVP		**On**: 9, 10 and 11 March 2021

Before: Ms Costley, Mr Mizon and Employment Judge Bartlett

Appearances

For the Claimant: Mr David Jones
For the Respondent: Mr Alex Francis

JUDGMENT

1. The claimant's claim that he suffered harassment under s26 of the Equality Act 2010 succeeds.

2. The claimant's claim that he suffered direct discrimination contrary to s13 of the Equality Act 2010 succeeds only in relation to the comments in the work place.

3. The claimant's claim under s13 of the Equality Act 2010 fails in so far as the alleged less favourable treatment was dismissal.

4. The claimant was not provided with a written statement of particulars of employment contrary to s38 of the Employment Rights Act 2002.

Remedy

5. The respondent shall pay the claimant £2,500 as injury to feelings in respect of his claim of race discrimination and harassment.

6. The respondent shall pay the claimant £961.74 in respect of his claim not to have received a written statement of particulars of employment.

7. The tribunal makes a declaration that the claimant has suffered unlawful race discrimination and harassment in the course of his employment with the respondent in the form of discriminatory comments.

REASONS

The Hearing

1. The hearing was scheduled for four days commencing on 8 March 2021. The judge initially scheduled to hear the case was indisposed and the case was put back to 9 March 2021 when Judge Bartlett was able to hear the case. The hearing commenced on 9 March 2021.

2. Housekeeping matters were dealt with initially and then the claimant gave evidence. Mr Birk was due to commence his evidence on the afternoon of 9 March 2021. He had dialled into the call via audio only and was asked before the lunch break to ensure that he could participate in the hearing visually. After lunch over an hour were spent trying to make Mr Birk visible at the hearing. The issues were finally re-resolved around 3:15 PM when it was explained that Mr Burke's laptop was on a setting that did not have permission to use his camera and this was the reason for the difficulties.

3. Mr Jones requested that Mr Birk did not start evidence until the morning of the second day because it would be impossible to complete his evidence on 9 March 2021. There was no objection by the parties and the tribunal agreed to this. Mr Birk's evidence was completed on the morning of the second day. The parties made what turned out to be very lengthy submissions which were completed around 3:30 PM on the second day. The tribunal took the third day to deliberate and judgement was reserved.

4. Except for the issues with Mr Birk there were no other difficulties with connection or communication.

5. The list of issues were set out in the record of a preliminary hearing dated 23 April 2020. Further detail about the allegations of harassment were set out in further and better particulars.

Background

6. The claimant was employed by the respondent as a transport administrator from around October 2017 until dismissal with effect from 15 March 2019. The claimant presented a claim form on 13 August 2019 following a period of early conciliation from 13 June 2019 to 13 July 2019. His claim was that as a white British worker he was treated less favourably than non-white British workers in that he was dismissed and suffered adverse comments. He alleged that he suffered harassment related to race arising from work place comments. The respondent denied all the allegations.

The law

7. S13 of the Equality 2010 sets out the test for Direct Discrimination:

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

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim…

(5)If the protected characteristic is race, less favourable treatment includes segregating B from others…"

8. Burden of Proof

S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination cases:

"(1) This section applies to any proceedings relating to a contravention of this Act.

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

9. In **Igen Ltd v Wong** the Court of Appeal approved the guidance given in **Barton v Investec Securities Ltd [2003] IRLR 332** concerning the burden of proof in discrimination cases which is that:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail….

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

10. S26 of the Equality Act sets out the following:

"26 Harassment

(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—
(a)A engages in unwanted conduct of a sexual nature, and
(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—
(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b)the conduct has the purpose or effect referred to in subsection (1)(b), and
(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

age;
disability…
sex…"

11. The meaning of "violating" and "intimdating etc"

12. We have considered the guidance set out in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** *"(violating is a strong word which should not be used lightly). The case law emphasises the critical importance of context.*" and **Betsi Cadwaladr University Health Board v Hughes and others UKEAT/0179/13** which sets out:

> *"12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

General findings

13. We found that neither witness was wholly credible in all respects of their evidence. In addition there was very limited documentary evidence. The respondent's evidence was limited to that of Mr Birk and some limited documentary evidence. No satisfactory reason was given why the respondent did not produce more evidence namely witness evidence from individuals who were at the material times and at the date of the hearing employed by the respondent and would have been expected to give evidence on relevant issues including the claimant's performance, attendance and timekeeping and numerous employees who were alleged to have made discriminatory comments. In addition the respondent failed to provide basic HR records which were relevant to the issues of the claimant's attendance and potentially time keeping. Mr Birk's evidence was that he signed off on attendance records and we would have expected these sorts of basic records to be submitted as evidence.

14. The bundle contains a transcript of a call which took place between the claimant and Mr Schofield a former employee of the respondent. This was a covert recording and we do not condone the actions of the claimant in this regard. It was not disputed that the transcript was accurate but issues were raised by Mr Francis that the claimant primed Mr Schofield to say some of the comments in the transcript. We find that Mr Schofield was not informed that the call would be recorded. We accept that the claimant was asking questions and said things in the call in a manner in which it was intended to draw certain comments out of Mr Schofield. We have assessed the weight to give this evidence in light of these factors.

Findings

15. We have taken the allegations of harassment in turn.

Harassment allegation 1 as set out in the further and better particulars:

a. The Claimant overheard Mr Birk say *"no more English drivers should be used as they are lazy and only interested in claiming benefits."* The Claimant avers he heard these comments in February 2018 when he was sat in the meeting room in the Peterborough Amazon offices.

c. The Claimant avers that Mr Birk asked Mr Gloria to not hire British workers because they *"can turn you down easily and claim benefits."* The Claimant confirms that this comment as

16. We find that the meeting took place on February 2018 and that Mr Birk and Mr Gloria were in attendance.

17. We prefer the claimant's evidence in this regard because Mr Birk's claim that he would not meet with employees of Mr Gloria's level is contrary to a comment by Mr Schofield in the transcript of the recording which sets out :

> 132 as well because he expected a lot. I can remember some mornings, you'd just be like, nine in
> 133 the morning, he'd go, "Right, I'm calling a meeting here. Expect you all to come from all
> 134 over the country and come to Peterborough." And [I was] like "Mate, you need to give them
> 135 notice, man."

18. We consider that in February 2018 some 3 years ago it is credible that Mr Birk would have had meetings with employees of Mr Gloria's level. The respondent is a relatively new company that has enjoyed considerable growth. We accept that Mr Birk would not meet employees of Mr Gloria's level at the present time but we find that the situation was different some years ago.

19. Further, content of the text messages between Mr Gloria and the claimant support the claimant's allegations.

20. Therefore we find that comments as the claimant alleges were made.

Harassment 2

> Mr Augustis and Mr Yovkov would say *"English drivers do drive slowly"* and when referenced what work he did said *"not a lot he's English."* These comments were made to each other and the Claimant in June 2018.

21. We find that on the respondent's evidence Mr Augustis is a reasonably senior employee and no satisfactory reason was given as to why he was not called as a witness. For the respondent we only have Mr Birk's evidence that he spoke to the Mr Augustis and Mr Yovkov about the allegations. They told him that they had not made the comments. We find that this is unsatisfactory. There is no record of Mr Birk asking these individuals except for his own evidence. They could have been asked to put their response in an email, there could have been meeting notes and they could have been called as witnesses but they were not. In these circumstances we prefer the claimant's evidence and conclude that the comments were made. Further, we draw an adverse inference from the lack of evidence from the respondent and conclude that these comments were made.

Harassment 3

> January 2019 and Wiktoria Kolenska & Sandra Liutkevciene would say comments such as *"can tell you're British as you don't have your coat on, are you still drunk from last night?"* The Claimant then avers that

22. As above, Mr Birk's evidence was that Ms Kolenska was a head of a team or department therefore she is reasonably senior. Again there is no evidence from Ms Kolenska or Ms Liutkevciene about these allegations. The evidence is that Mr Birk spoke to these individuals and they denied that they made the comments. We find that these two individuals could have been asked to provide evidence directly to the Tribunal. Again there is no evidence of what they said in response to the allegations except for the evidence of Mr Birk. In these circumstances we prefer the claimant's evidence and conclude that the comments were made. Further, we draw an adverse inference from the lack of evidence from the respondent and conclude that these comments were made.

Harassment 4

> days' of illness in February 2019 where Vilius Augustis made comments such as the above and specifically said *"oh the lazy English worker has decided to come back to work"* and *"lazy English workers are always off sick."*
> The Claimant would hear comments such as *"lazy English workers" and "lazy English workers off sick."* The Claimant confirms that this relates to his return from work following 3

23. We have considered that Mr Augustis gave the claimant a glowing reference around the time of his termination which could contradict the claim that he made disparaging comments about him. However we recognize that there may be a number of reasons why Mr Augustis gave such a reference. As set out above we consider it most unsatisfactory that there is no evidence from Mr Augustis himself and that the only evidence we have is via Mr Birk. In these circumstances we prefer the claimant's evidence and conclude that the comments were made. Further, we draw an adverse inference from the lack of evidence from the respondent and conclude that these comments were made.

General conclusions relating to harassment

24. We accept the claimant's evidence that all of these comments combined over a period of time by various different individuals created an adverse environment for him related to his race. We have also had regard to the circumstances of the case which even taking the respondent's case at its highest is that in the office in which the claimant worked approximately five of

the 16 employees were white British and therefore the claimant was in a minority.

25. We consider that the comments are serious such that they create a hostile and/or intimidating environment because they are by a number of reasonably senior individuals, over a period of time, repeated and in a workplace in which the claimant was a minority.

26. We find that the conduct was unwanted unwarranted. Mr Francis put forward arguments that the comments were mere jokes by individuals that the claimant perceived as friends and at times the claimant joined in with the jokes. Much was also made of the fact that the claimant did not raise any concerns about discrimination during the course of his employment. The allegations were only made after his employment ended and he did not set out the detail of these harassment allegations until his further and better particulars which was a very considerable time after the end of his employment. The claimant's evidence was that he did not raise any concerns because of fears that he would suffer adverse consequences. The claimant's particulars of claim set out that comments were made generally in the environment and also specifically to him. He identified being disturbed by the comments. We do not accept that the fact that he called some of the comments jokes undermines their effect on him. Many extremely unpleasant behaviours can be dressed up as jokes but it is no excuse. Further, we except that many employees do not wish to raise matters of concern when they are employed due to the fear of suffering adverse consequences.

27. We find that the claimant did perceive himself to have suffered the prescribed effects of harassment and overall in all the circumstances we consider it reasonable to regard the conduct as having that effect. The comments were made over a period of time and by a number of individuals.

Direct discrimination

Comments

28. In relation to the comments which it was alleged were harassment and direct discrimination, for the reasons set out above we find that the comments amount to less favourable (by comparison to a hypothetical comparator) by reason of the protected characteristic and are therefore direct discrimination.

Dismissal

29. We found the evidence surrounding the claimant's dismissal confusing, internally inconsistent and unclear. This has made our task difficult but it is also relevant to our findings on the burden of proof. As set out above we found that both witnesses were not wholly credible. The account the claimant gave in his witness statement did not correspond with the emails around the time of his dismissal. In particular his emails to Mr Birk set out that Mr Birk was present at times when he was in India. As a result the tribunal gave limited weight to those emails and to the claimant's recollection of events around the time of his dismissal.

30. The respondent's evidence was that the claimant was dismissed for a number of reasons which included performance, sickness absence and time keeping. The letter of termination dated 4 March 2019 refers to "[the claimant] did not perform well". Mr Birk's evidence was that these 3 issues had been raised with the claimant at numerous meetings over some time by him and Mr Robertson who was the claimant's line manager. However the evidence from the respondent was vague, Mr Birk was unable to produce any records of any conversations or instructions on these matters to the claimant. We have not been provided with any sickness absence records except for some text messages but these are not the respondent's own HR records. Mr Robertson was not called as a witness. We note there was a dispute about when the letters were received by the claimant.

31. The claimant claimed that he was told that he would be dismissed because of restructuring and redundancy. This was denied by the respondent. The claimant's emails around the time of dismissal refer repeatedly to redundancy. We recognize that small employers mistakenly refer to redundancy when it is not a redundancy in law.

32. Mr Birk's evidence was that a new employee was a like for like replacement for the claimant and therefore we find that this was not a legal redundancy. We find that some issues had been raised with the claimant prior to dismissal. We do not accept the claimant's evidence that nothing had been raised with him. Our finding is supported by the claimant's statement in the conversation with Mr Schofield that he had been looking for a new job. There was a text message from August 2018 when the claimant had allegedly been caught in the pub after taking a sickness absence and this indicates that there were some problems in the relationship. The claimant denied any memory of these events which the tribunal found incredible. The timing of the dismissal was shortly after a sickness absence of the claimant spanning a weekend and we accept that this was a concern for the respondent.

33. Both parties agreed meetings took place on 27 February 2019 and 1 March 2019. We did not find the Claimant's evidence that he could not recall what was said in the 27 February 2019 meeting credible. His evidence was that he recalled that it did not cover timekeeping or sickness but he could not remember what it covered. We find that if the meeting raised the possibility that he would be dismissed, the claimant would have remembered it.

34. We find that further evidence that issues about his performance were raised with the claimant is that some of the claimant's tasks were re-allocated to another employee.

35. It is important to remember that this is not an unfair dismissal claim it is a direct race discrimination claim.

36. We have given careful consideration to the burden of proof. We find that the claimant has not discharged the initial burden which lies on him. All he has established is that there was a dismissal. He has made allegations that it was connected to race and the only thing more is our findings that he has suffered harassment and direct discrimination through the atmosphere of the

respondent through comments made by employees. We do not consider that these factors are sufficient to discharge the burden of proof. As set out above we did not find the claimant's evidence as regards his dismissal compelling or entirely reliable and this is a significant factor in our findings that he has not discharged the burden of proof. Further, Mr Birk was the controlling mind of the company and it was his decision to dismiss the claimant. We have found that Mr Birk made some comments about British drivers in February 2018 but these were not directed at the claimant. The other allegations of harassment did not concern Mr Birk directly. We consider that it is a step too far to use these as a basis to conclude that there was a taint of discrimination to the claimant's dismissal in circumstances where we have accepted that there were some issues about his performance, attendance and time keeping. We recognize we have found other comments amounted to harassment and discrimination but these were not by Mr Birk and not of the most serious level of offence.

37. The claimant's claim that he suffered direct discrimination by means of his dismissal fails.

Is it just and equitable to extend time?

38. As the claimant's claim for discrimination relating to his dismissal fails we must consider whether it is just and equitable to extend time in relation to the claimant claims for harassment and direct discrimination concerning comments that were made between February 2018 and February 2019. It is not disputed that these claims are prima facie out of time if the claim relating to dismissal failed.

39. We consider that it is just and equitable to extend time in the circumstances for the following reasons:

    39.1 The claims were presented as part of a claim which included dismissal. The dismissal claim was in time and if that had been found to be an incident of discrimination the claimant's harassment claims would have been in time;

    39.2 it was sensible and reasonable for the claimant to present all of his claims in one ET1;

    39.3 we find that the claims of harassment amount to a course of conduct between February 2018 and February 2019. The last act in this course of conduct was out of time by approximately one month. This is a short period of time;

    39.4 we accept that the termination of the claimant's employment was the catalyst for him bringing complaints against the respondent and in his mind they were all part of the same series of events;

    39.5 the respondent is not disadvantaged. All the claims were pleaded together and therefore the respondent was able to prepare its defence for the claims at the same time;

39.6 the disadvantage to the claimant is that he would not be able to bring any successful claims for discrimination.

Section 38 of the Employment Act 2002

We find that the claimant was not given written particulars of his employment.

Remedy

Amount of award of injury to feelings

40. The comments were not the most offensive course of harassment that the tribunal has encountered. The tribunal considers that an award at the lower end of the low Vento band is appropriate and has decided to make an award of £2500 for injury to feelings.

Written particulars of employment

41. We award the claimant two weeks gross pay in respect of the failure to provide written particulars of employment. This is £961.74.

Declaration

42. The tribunal declares that the claimant has suffered unlawful race discrimination in the course of his employment with the respondent in the form of discriminatory comments.

_____
Employment Judge Bartlett

Date: 12 March 2021

22/03/2021
Sent to the parties on: .....
J Moossavi
.....
For the Tribunal Office