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THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr S Kalkhoran

AND John Lewis Partnership

HELD AT: London Central

ON: 23 & 24 March 2017

EMPLOYMENT JUDGE: Miss A M Lewzey

MEMBERS: Mrs C Ihnatowicz
Mr J Ballard

Representation

For Claimant: In Person

For Respondent: Ms G Hicks, Counsel

JUDGMENT having been sent to the parties on 27 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant Mr S Kalkhoran was employed by the Respondent at Waitrose Kensington Gardens as a Petrol Station/Supermarket Assistant and latterly as a Duty Partner, from 2 April 2012. He continues to be employed.

The Issues

2. The issues for determination by the Tribunal are as follows:

Direct Race Discrimination (s.13 Equality Act 2010)

2.1 The Claimant identifies as being a British man of Iranian origin.

2.2 Was the Claimant treated less favourably on the grounds of race? It is the Claimant's case that:

2.2.1 The way in which the interview was handled was unlawful. In particular, Ms Tracy Hart:

2.2.1.1 Changed the date of the interview at the last minute;

2.2.1.2 Asked where the Claimant was born;

2.2.1.3 Asked what the Claimant knew about democracy;

2.2.1.4 Said that, although he spoke good English, the Claimant did not understand about democracy.

2.2.2 He was subjected to a disciplinary process in March 2016 following a period of absence from 16 December 2015 to 2 March 2016 because of his race.

2.3 Did the Respondent do the acts complained of at paragraph 2.2?

2.4 If so, in doing so, did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator who was not of the Claimant's racial origin but was in the same or materially similar circumstances as the Claimant?

2.5 If so, has the Claimant proved facts from which the Tribunal could conclude that the Respondent treated the Claimant in this way because of his race?

2.6 What was the reason for the treatment outlined at paragraph 2.2 above? Was it to any extent because of the Claimant's race?

Harassment (s. 26 Equality Act 2010)

2.7 If the Respondent did the acts complained of at paragraph 2.2, was the conduct complained of related to the Claimant's race?

2.8 Did these acts have the purpose or effect of:

2.8.1 Violating the Claimant's dignity;

2.8.2 Creating a hostile, degrading, humiliating or offensive environment for the Claimant?

Remedy

2.9 To what remedy, if any, is the Claimant entitled? The Claimant seeks an award for injury to feelings.

Evidence

3. We have heard evidence from Mr Kalkhoran by means of a written witness statement.

4. We have also heard evidence from the following witnesses called on behalf of the Respondent:

Ms Tracy Hart, Operational Assurance Manager Convenience.

Mr Oliver Trivedi-Gardner, Assistant Team Manager previously known as Assistant Petrol Station Manager.

Mr Simon Curtis, Operational Assurance Manager Convenience.

5. In addition, we have an agreed bundle of documents to which we refer by reference to the relevant page number.

The Facts

6. Mr Kalkhoran had worked in the Kensington Gardens branch of Waitrose since he started on 2 April 2012. He became a Duty Partner in 2015.

7. The Respondent operates on a partnership model giving all employees an interest as partners. This is heavily emphasised in the contract of employment (31-32). The letter of offer dated 20 March 2012 (31 – 33) states:

“Our democratic structure underpins our commitment to offer you excellence service as a partner and we trust that in accepting a job here you are making the same commitment to us and our customers.”

8. The relevant partnership policies include an equal opportunities policy, a short term and persistent absence policy and a grievance policy. The short term and persistent absence policy (49 - 51) includes the following:

“The Partnership expects Partners to:

- Comply with our procedures for reporting sick absence
- Keep their line manager informed of their progress
- Cooperate in attending informal Return to Work meetings following sick absence
- Supply self certificates and fit notes as required
- Participate in referrals to the partnership health service when necessary.

.....
“Whilst a partner is off sick, their manager may contact them from time to time to discuss their progress. Partners should also be aware of the following:

- it is the Partner’s responsibility to report their absence to us, and evidence it as appropriate with self certification form or Fit Note from their doctor in order to prove eligibility for sick pay.
- Partners who fail to notify us of their absence, attend a Return to Work Meeting or supply required documentation of sickness as required may unless there is a good reason, lose their eligibility to sick pay and/or face disciplinary action.
- Each partner’s sick absence is monitored. A capability process under the disciplinary performance and capability procedures may commence after a partner has reached the “Poor Attendance Trigger.”

9. We also have the document (94) that deals with sickness absence and states:

“You will be eligible for your contractual pay during periods of sickness absence. This is subject to qualifying for Partners Sick Pay and is conditional upon you complying with the procedure for reporting absence, attending a return to work meeting and supplying a self certification form or “fit note” that meets statutory sick pay requirements.

.....
If you fail to notify us of your absence as required then you may, unless there is a good reason, lose your eligibility to sick pay and/or face disciplinary action.”

There is also a passage on democracy (96) which states:

“As a business we operate on democratic principles and our constitution says partners share the responsibilities of ownership as well as its reward, profit, knowledge and power”.

It goes on to set out a structure of elected bodies which includes the Partnership and Divisional Councils and Forums.

10. On 26 September 2015, Mr Kalkhoran made his first application for promotion. That application (109 a and b) is for promotion to Assistant Section Manager in Headington. The application is brief. The job description for the position is at page 109. The application was referred to Ms Hart who spoke to Mr Kalkhoran and asked him to reapply with further details. At that time Mr Kalkhoran had no previous dealings with Ms Hart. On 11 November, Mr Kalkhoran submitted his second application form (128a and b), which is much fuller than the first one.

11. On 7 December 2015 Ms Hart emailed Mr Kalkhoran inviting him to an interview (129). The interview was fixed for 16 December in Burgh Heath.

12. On 15 December 2015 Ms Hart parked her car in the Kensington Gardens car park in order to attend a meeting at the nearby Notting Hill Branch. She spoke to Mr Kalkhoran, who was the Duty Officer at the Kensington Gardens Branch and realised that she was to interview him the following day. She offered to hold the interview later on 15 December at Kensington Gardens rather than at Burgh Heath the following day. Ms Hart’s evidence was that Mr Kalkhoran was pleased and agreed to this. Mr Kalkhoran’s evidence in cross-examination was that the interview location and time were not a problem. He accepted in cross-examination that he could have refused the rearranged date.

13. On 15 December 2015 later in the day, Ms Hart interviewed Mr Kalkhoran at Kensington Gardens. We have the notes (132-140). They contain a series of proforma questions. In particular, there is a question:

“How would you like to see your career developing over the next 5-10 years?”

The notes record the response:

“Want to be a store manager, going to prove myself for sure”

In the corner of the answer box it says “IRAN”.

Later (134) there is a further question referring to the job:

“What do you like least about it?
Why?”

The answer recorded is:

“Some ways other people work, lack of tidiness of others, deal with it - I go back and do the job myself. Keep complaining - no point.”

Mr Kalkhoran’s evidence was that the Kensington Gardens Branch was always short staffed, with two people rather than four members of staff. There is a further note (137) which records “Democracy” with some arrows and a note saying no understanding. Ms Hart decided to reject Mr Kalkhoran’s application and told him so at the interview.

14. On 16 December 2015 Mr Kalkhoran reported sick. He sent an email to his manager, Tom Harding (141) as follows:

15.

“Here I am to Report Sick and mentally Frustrated by being treated as a Second class in Waitrose and I see no Future in the company and being ignored all the time regardless of all the racist act towards me. I feel mentally Sick and I don’t feel able to cope with the situation, therefore I need time off until I recover from my present situation and I am checking to GP to see what’s wrong and why I have fallen ill and as my advice from my GP I will keep you updated and will send you a note from my Dr and I can’t understand of my three years of hard work being treated like this, very sad and I am calling sick until further notice and advise from my Dr”.

16. On 17 December 2015 the resourcing team confirmed in writing to Mr Kalkhoran that he was unsuccessful in his application for the post at Headington.

17. On 24 December 2015 Mr Kalkhoran sent an email to Ms Hart asking for feedback (165a) as follows:

“I would love to know what are my weakness on my progress in the partnership and I can get through this with my manager Tom Harding, so I will be able to apply for the same role in the future.”

Ms Hart responded on 24 December:

“Please can you confirm if you are still off sick, if so then I would not want to send you any feedback until you are fit to return to work.”

18. On 4 January 2016 (154) Merseyside Employment Law wrote to the Human Resources Department of the Respondents making an allegation of race discrimination.

19. On 5 January, Ms Hart received a further job application for an APSM at Tubs Hill Sevenoaks from Mr Kalkhoran. Mr Kalkhoran was not shortlisted. Ms Hart’s evidence was that the PPA, which is the Human Resources function, asked her to provide written feedback. They had previously asked her not to because of Mr Kalkhoran’s absence. There is no evidence before us that Ms Hart knew of the reason for Mr Kalkhoran’s absence at that point.

20. On 15 January 2016 (165) Ms Hart sent a feedback email to Mr Kalkhoran as follows:

“Following my previous communication I had hoped to have had an opportunity to discuss this feedback with you when you return to the business, however, as I aware that you have applied for a further position it will be worth you having this feedback to enable you to address any shortfalls I noticed during your interview.

.....

On a positive note to your credit, you shared your strengths about the shop floor standards and high levels of customer service. Your understanding of procedures across the shop floor were strong and describing your commitment to getting the shop floor right was a priority for you.

I felt from our meeting that areas you could focus on for your development are:

- knowing your personal objectives...
- understanding what skills you have to be able to articulate them when asked
- to gain an understanding of the democratic side of our Business
- work on the Partner experience piece
- understanding tasks which need to be achieved of the shop floor.”

21. Mr Kalkhoran emailed Mr Curtis, Mr Harding and Mr Trivedi-Gardner on 16 January 2016 (167) as follows:

“.....you must understand that John Lewis and Waitrose Partnership Policy and Rules which comes through EXPERIENCE and NOT RACE HAVE BEEN EXPLAINED IN THE PARTNERSHIP DEMOCRACY. I believe so?????????”

I have been subjected as outcast and race regarding my Progress in the Partnership and even after so many attempts I have not seen a decent respond. Therefore, this is a very serious matter and until these issues are not solved, I am not coming into the branch where these attitudes are being practiced.

I believe I have been treated unfair and against Human Right however, I have been subjected to Unauthorised Unpaid Leave and proceeding in accordance with the Partnership’s Disciplinary Policy.”

22. From September 2015 Mr Trivedi-Gardner had been seconded to the Kensington Gardens Branch as a level 9 Assistant Petrol Store Manager. He subsequently went through an interview process and was appointed permanently to the position in March 2016.

23. On 21 January 2016 Mr Trivedi-Gardner responded to Mr Kalkhoran by his email (168). He said:

“Thank you for your email and I am disappointed to hear that you feel you have been treated unfairly and the allegations of racist behaviour by Partners in the branch. The Partnership does take all allegations of this nature seriously and we can proceed in two ways.

1 Investigate....

2 We treat your email as a formal grievance....

.....

Alternatively, if you are unwell and not fit for work you must follow the usual absence reporting procedures for reporting your sick absence. Where sick absence lasts for more than 7 days a fit note provided by your GP will be required. Failure to do this may affect your entitlement to Partnership sick pay and we may have no other option but to take disciplinary action in accordance with our disciplinary policy.”

24. On 22 January 2016 Mr Trivedi-Gardner sent a further email to Mr Kalkhoran referring to a letter from his legal representative which head office was dealing with. The letter goes on to repeat the need for a medical certificate from Mr Kalkhoran's GP and warning that failure to do this will unfortunately leave me with no option but to pursue your absence in accordance with the partnership disciplinary policy.

25. On 5 February, Mr Trivedi-Gardner issued an invitation to a Disciplinary Hearing about unauthorised absence (173).

26. On 9 February 2016 Mr Kalkhoran emailed Mr Harding saying that Mr Trivedi-Gardner could not conduct such a process. As a result, Mr Curtis took the matter over. He decided that Mr Trivedi-Gardner should not conduct the disciplinary investigation.

27. On 24 February 2016 a rejection was sent to Mr Kalkhoran of the Tubs Hill Sevenoaks application.

28. On 25 February 2016 Mr Curtis invited Mr Kalkhoran to a disciplinary meeting to discuss his unauthorised absence (104). The meeting with Mr Curtis took place on 2 March. Mr Kalkhoran did not want to be accompanied. In that meeting Mr Kalkhoran said that Ms Hart had asked where he was born, said he spoke good English, but said nothing about democracy. The minutes also record (196)

"SC If Tom knew you were of why did he message you.

SK Ask him.

SC If you thought you were off, why did you send an email to Tom say you won't be in due to sick.

Reads email.

Tom asked for Doctor's certificates. We still haven't not got them.

SK Doc advised us to take to Court.

SC So he did not sign you off sick.

SK No."

29. In questioning by the Tribunal Mr Kalkhoran said:

"I did not go to my GP I never obtained any sick notes, I was not sick I was being treated badly and I said I was not mentally fit."

On the evidence before us Mr Kalkhoran did not go to his GP and did not obtain any fit notes.

30. On 2 March 2016 Mr Kalkhoran went back to work. Following an offer made by Mr Curtis at the end of the investigatory meeting, Mr Kalkhoran was transferred to the Battersea Branch on a temporary basis on 5 March and he was given a permanent transfer to Waitrose Ealing on 1 May 2016.

31. In the payslips for February, March and April (217 – 219) deductions were made for unauthorised absence.

Submissions

32. We have a skeleton argument from Ms Hicks which she supplemented orally. Mr Kalkhoran has read out to us a prepared submission. We take these matters fully into account in reaching our conclusions.

The Law

33. The claim of direct discrimination is a claim under Section 13(1) of the Equality Act 2010 which provides:

“A person (A) discriminates against another (B) if because of a protected character A treats B less favourably than A treats or would treat others.”

34. The harassment provision is at Section 26(1) Equality Act 2010 which provides:

“(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.”

35. Section 136 Equality Act 2010 provides for the burden of proof as follows:

“(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.”

36. In relation to claims of direct discrimination, we must take into account the guidance in **Igen v Wong [2005] ICR 931** and in **Madarassy v Nomura International plc [2007] IRLR 246**. There must be a finding of detriment and a difference in race in order for the Tribunal to consider whether there is anything from which the Tribunal can infer discrimination in order for the burden to pass to the Respondent.

37. In relation to harassment, we take into account the guidance of Underhill J, as he then was, in **Richmond Pharmacology v Dhaliwal [2009] ICR 724**.

Conclusions

38. We consider our conclusions by reference to the issues in this case. The first set of detriments, which Mr Kalkhoran relies on in both his direct discrimination claim and his harassment claim, are the way in which the interview was handled, in particular by Tracy Hart, in relation to four specific matters. We have considered those four matters in turn.

39. The first is changing the date of the interview at the last minute. This was done for Mr Kalkhoran's convenience. In cross-examination Mr Kalkhoran said that the time

and location of the interview was of no concern to him. He has not demonstrated that he suffered less favourable treatment.

40. The second point is being asked where the Claimant was born. The evidence of Ms Hart is that she was trying to engage with Mr Kalkhoran. We have no evidence that she asked him where he was born. The discussion was of his background. It is clear from his CV that Mr Kalkhoran speaks many languages and has worked for the American Embassy in India as an interpreter. The evidence is that Ms Hart noted on Mr Quiles' form the words "Spain". We have no evidence from which we can find that Ms Hart asked where Mr Kalkhoran was born.

41. The third matter is being asked what the Claimant knew about democracy. Mr Kalkhoran's evidence at paragraph 2 of his witness statement was that he was asked what he understood by democracy and answered as defined within the Partnership. His evidence was somewhat confused on what he was asked, but on the balance of the evidence before us, the question was about democracy within the Partnership.

42. The fourth matter is that Ms Hart said that although he spoke good English, Mr Kalkhoran did not understand about democracy. This is a reference to the feedback given by Ms Hart. What that said was that Mr Kalkhoran should gain an understanding of the democratic side of the business.

43. On the evidence before us, at the interview Mr Kalkhoran did not answer fully, but there is nothing from which we can infer that the feedback given was because of Mr Kalkhoran's race. Accordingly, the burden of proof does not pass on these four matters.

44. The issue at point B which is he was subjected to a disciplinary process in March 2016 following a period of absence from 16 December 2015 to 2 March 2016 because of his race. This relates to the disciplinary process. Mr Kalkhoran was subjected to the disciplinary meeting that took place on 2 March 2016, but on the evidence before us there had been many attempts to get him to comply with the sickness reporting requirements of the policy. Mr Kalkhoran has told us that he never went to his GP and that he took sick leave. Because he took sick leave, he had to comply with the policy. He may have thought that he would go to his GP at the beginning of the period, but, in the event he never did so. Accordingly, he did not comply with the sickness absence policy and that was the reason for the disciplinary process. In any event, there is nothing from which we can infer that the reason for the disciplinary process was because of Mr Kalkhoran's race. Accordingly, the burden does not shift.

45. In relation to harassment, clearly the disciplinary interview was unwanted conduct, but there is nothing to link it to Mr Kalkhoran's race, nor is there any evidence that it violated his dignity or created an adverse environment. We do note that Mr Curtis accepted that the disciplinary meeting could have taken place earlier, indeed it would have been better had it done so, but that does not go to Mr Kalkhoran's race. We have the letter from the Merseyside Law Centre, we have no adequate explanation as to what happened which might have been helpful background. This is not a complaint about the deduction of wages for sickness absence. Mr Kalkhoran says that he could have had the disciplinary meeting earlier and we therefore not have suffered

the deductions to the same extent that is not what was pleaded, it is not what was in the agreed List of Issues.

46. For all these reasons, it is our unanimous judgment that the claims of direct race discrimination and harassment fail.

Costs

47. This is an application for costs made by Ms Hicks on behalf of the Respondent. The grounds for the application are that Mr Kalkhoran makes serious allegations against Ms Hart which were not put to her in cross-examination and that he was unreasonable in the settlement negotiations making assertions against the Respondent of tampering with documents and planning to dismiss them.

48. Costs may be ordered by the Tribunal in accordance with Rule 76 of the Employment Tribunal Rules of Procedure 2013 when a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way in which the proceedings have been conducted. Rule 84 provides in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

49. Mr Kalkhoran should have put the allegations of race discrimination to Ms Hart in cross-examination. This was something that the Employment Judge explained to him at various points during the course of the hearing. Not to do so when they were such serious allegations does amount to unreasonable conduct. Mr Kalkhoran asked for a settlement by way of being given a job at Kings Cross and if that occurred he said that he would drop his claims. The Respondent would not have been able to simply give him a job at Kings Cross without going through a proper recruitment process. Whilst it might have been possible for him to put him forward for such a job interview, he could not have been preferred over any other candidate and the Tribunal could not make any such order in any event.

50. The Respondent gave good advice to Mr Kalkhoran at page 2 of their letter of 14 March in which they give him full details of the Ealing Law Centre including contact details and opening times. In addition, at the Preliminary Hearing before Judge Snelson, Judge Snelson encouraged Mr Kalkhoran to obtain professional advice and told him that such assistance should be available free of charge at a Law Centre local to him. Judge Snelson also urged the parties to resolve the matter saying both sides should make it a priority to settle the matter on sensible terms as soon as possible and make a fresh start. That was because of the ongoing employment relationship.

51. It appears that Mr Kalkhoran did not act on the Respondent's letter of 14 March and the correspondence and assertions made by him in that correspondence are plainly unreasonable. Accordingly, the threshold for an award of costs is met so the next issue is whether we should exercise our discretion to award costs and if so how much. We take into account that Mr Kalkhoran's net income is £1,150 per month and he says he uses all of this income. This is a case in which we could make an order for costs.

52. In deciding whether to do so we bear in mind that Mr Kalkhoran has no excess income over his outgoings and that he is still an employee. That last point weighs heavily. There is an ongoing relationship which should be given an opportunity to continue. An order for costs would not enhance that possibility and, in those circumstances, we make no order as to costs.

Employment Judge Lewzey
11 May 2017