Case Number 1302953/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Shingler		**(1) Angard Staffing Solutions Limited**
		(2) Royal Mail Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Stoke on Trent **ON** 10, 11 & 12 May 2017

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Mrs LA Evans
Mr P Tsouvallaris

Representation
For the Claimant: **In Person**
For Respondents: **Mr J Gregson (Solicitor)**

JUDGMENT
(Sent to the Parties on 8 June 2017)

The judgment of the tribunal is that:

The respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of race discrimination and victimisation, pursuant to Section 120 of that Act, are dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Jacob Shingler; who was employed by the 1st respondent Angard Staffing Solutions Limited from 6 May 2016. At all times material to this claim, the claimant remained in that employment. The 1st respondent is an employment agency providing staff to the 2nd respondent, Royal Mail Group Limited; and, from 6 May 2016 until 26 September 2016, the claimant was placed by the 1st respondent to work for the 2nd respondent as a Customer Services Adviser.

2 On 26 September 2016, the claimant's assignment to the 2nd respondent was terminated by the 2nd respondent for the second time. Although the claimant's employment with the 1st respondent continued, as he was working on

a zero-hours contract, the effect for him was that, if he was not working for the 2nd respondent, he would receive no pay.

3 By a claim form presented to the tribunal on 10 November 2016 the claimant initially brought claims against both respondents for unfair dismissal; race discrimination; and arrears of pay. There was a Preliminary Hearing before Employment Judge Harding on 12 January 2017 at which the claimant recognised firstly, that his employment with the 1st respondent was ongoing - he had not at that time been dismissed; and secondly, that because he lacked the requisite 2 years' time-service, the tribunal had no jurisdiction to consider an unfair dismissal claim. The claimant also confirmed that there were no arrears of pay owing - his claim for arrears of pay was effectively part of his compensation claim if his claim was successful. Accordingly, the claims for unfair dismissal; and arrears of pay were dismissed by Judge Harding upon being withdrawn by the claimant.

4 At the same hearing the claimant was permitted to amend his claim to include a claim for victimisation. The Protected Act relied upon was the presentation of his claim form. The detriment complained of was that very soon after the presentation of the claim form the 1st respondent instigated a disciplinary investigation against the claimant - acting on a complaint received from a former colleague Ms Wendy Dziesinski. (This disciplinary investigation eventually led to the claimant's dismissal by the 1st respondent on 6 March 2017.)

5 Accordingly, the claims to be decided by this tribunal are the claimant's claims for race discrimination and victimisation.

Evidence

6 We heard evidence from 3 witnesses: firstly, from the claimant on his own account; and then on behalf of the respondent from Mrs Samantha Barker - an employee of the 2nd respondent whose decision it was to terminate the claimant's assignment and from Ms Wendy Dziesinski - whose evidence primarily related to the victimisation claim. The essential facts of the case are not in dispute. It is sufficient that we record that we found both Mrs Barker and Miss Dziesinski to be truthful and credible witnesses; the claimant was also a truthful witness but the reliability of his evidence was to some extent undermined by his inability to properly focus on the issues which the tribunal had to decide - he was to an extent over concerned with the fairness and justice of Mrs Barker's decision rather than with her reasons for it.

7 We were also provided with an agreed trial bundle running to somewhere more than 237 pages. We have considered those pages from within the bundle to which we were referred by the parties during the hearing.

The Facts

8 On 6 May 2016, the claimant commenced his employment with the 1st respondent and was placed with the 2nd respondent to work as a Customer Services Adviser at the 2nd respondent's Stoke Contact Centre. The claimant's duties involved dealing with telephone enquiries from members of the public – a prompt start when the phone lines opened was therefore very important. The claimant was based in Team 32; a team of employees made up exclusively of Angard agency workers; under the team leader Claire Burton. From documents in the bundle we can infer that Ms Burton found the claimant to be a satisfactory employee including as to his timekeeping. Ms Burton reported to Mrs Barker and regarding agency workers direct to the head of centre Ms Tracy Jones.

9 In September 2016 both Claire Burton and Tracey Jones were absent on leave. Mrs Barker was covering for Ms Jones; and on 12 September 2016, she had occasion to consider the claimant's continued employment. This arose principally I because of an incident which occurred between the claimant and a co-worker Kirsty Allcock on Saturday 10 September 2016. Details of that incident are now unimportant but because of having the matter referred to her Mrs Barker looked at the claimant's record since the commencement of his employment in May. She was concerned that his attendance record fell below acceptable standards. To that date the claimant had been late on a total of 16 occasions cumulatively totalling 132 minutes this included a late start on Saturday 10 September 2016 when the claimant was 56 minutes late. The claimant's attendance record also appeared to be deteriorating: he had been late twice in May; twice in June; 3 times in July; 6 times in August; and a further 3 times in the first 10 days of September. Mrs Barker was aware that on each of the occasions that the claimant was late he should have had a one-to-one meeting with Ms Burton; and been warned as to future lateness. Assuming this to have happened; and in view of the claimant's record, Mrs Barker informed the 1st respondent that the claimant's performance was unsatisfactory and they no longer wished him to continue his assignment to them.

10 This meant that there was no further work available for the claimant unless the 1st respondent could find an alternative assignment for him. In fact, a potential alternative was identified but it was not acceptable to the claimant because it involved a lower rate of pay. The claimant asked if he could appeal against Mrs Barker's decision; Mrs Barker was asked to review her decision; and upon enquiry with Ms Burton she discovered to her surprise that Ms Burton had operated a very lax regime so far as timekeeping was concerned. There had not been the one-to-one meetings and informal warnings that she would have expected in the case of an agency worker with such a poor attendance record. We were told, and we accept, that Mrs Barker had a stern conversation with Ms Burton about this; and in view of this, Mrs Barker agreed to review her decision

and allow the claimant to recommence the assignment. This was to be strictly on the understanding that there were no further incidents of lateness. The claimant was due to recommence his assignment on Monday 26 September 2016; he was to attend in time for a meeting with Mrs Barker before the start of his shift; and to be ready to start his shift at 9am. Mrs Barker therefore expected the claimant to be present by no later than 8.45am. The claimant was late; arriving on site at 9:03am; bearing in mind the circumstances, and the fact that she regarded this as the claimant's last chance, Mrs Barker once again informed the 1st respondent that the claimant's assignment was terminated.

11 It is most important to note however that at this stage the claimant's employment with the 1st respondent had not been terminated. It was not terminated until March 2017 following what appears to have been a thorough investigation and disciplinary process into the claimant's abuse of social media; and his harassment through social media and mobile communications of his co-worker Ms Dziesinski.

12 Ms Dziesinski was also Angard employee working for the 2nd respondent. She and the claimant had a good relationship; she acted as an informal mentor to the claimant when he commenced his employment; she was broadly supportive to the claimant when his assignment was terminated; she believed that he had been treated unfairly. It has emerged during the hearing that Ms Dziesinski in part misunderstood what had happened to the claimant; she believed that his assignment had been terminated because of the incident with Kirsty Allcock; she felt this was unfair and that the claimant had been blamed for an incident where both were equally culpable.

13 Over a period of approximately 3 weeks following the termination of the claimant's assignment his level of contact with Ms Dziesinski steadily increased; he was telephoning her; sending text messages; leaving messages on social media. Ms Dziesinski began to find this both intrusive and oppressive – she described one day where the claimant's relentless attempts to contact her extended over a period of 9 hours; she eventually spoke to him just to make it stop. Ms Dziesinski was particularly offended by a message which the claimant posted on his Facebook page. The result was that, on 11 October 2016, Ms Dziesinski made a complaint to her manager Alison Norcup. At this time, although not assigned anywhere, the claimant remained an employee of the 1st respondent. And, following Ms Dziesinski's report, a disciplinary investigation was commenced which eventually led to the claimant's dismissal. During his many communications with her, the claimant had informed Ms Dziesinski of his intention to bring a claim to the tribunal; and he told her when his claim had been presented; he also mentioned the possibility of a discrimination claim. Ms Dziesinski understood this to be a reference to inequality of treatment between the claimant who was an agency worker and Ms Allsop who was employed by Royal Mail there was no mention of a claim for race discrimination.

The Law

14 **The Equality Act 2010**

Section 4: The protected characteristics

The following characteristics are protected characteristics—
age;
disability;
gender reassignment;
marriage and civil partnership;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

Section 9: Race

(1) Race includes—

(a) colour;
(b) nationality;
(c) ethnic or national origins.

Section 13: 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.

Section 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;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 39: Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

Section 136: Burden of proof

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

15 **Decided Cases**

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage is to consider whether it finds that there are facts from which the tribunal could infer that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if such facts are found to exist, requires the respondent to prove that he did commit the unlawful act. If the respondent fails, then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more,

sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

The Claimant's Case

16 The claimant's case is that the termination of his assignment was grossly unfair. He invites us to conclude that he was treated as he was because of his race. He relies on 12 co-workers who he says are of a different race to him and all of whom have comparable records of lateness but whose assignments were not terminated. He also points to documentation relating to a co-worker Mike Mosedale who he claims was given several informal warnings about lateness, whereas the claimant received none. The claimant also invites us to draw an inference from the fact that there was no recognisable disciplinary process carried out prior to the termination of his assignments on either 12 or 26 September 2016. So far as the victimisation claim is concerned, the claimant's case is that the disciplinary investigation against him commenced within days of his claim form being presented. And Ms Dziesinski's complaints of harassment (as opposed to misuse of social media) were made two days after he informed her that his claim form had been accepted. He invites us to infer that she escalated the seriousness of her complaint because he had presented his claim form and that the 1st respondent commenced the disciplinary investigation for the same reason.

Discussion & Conclusions

17 We start by reminding ourselves that we are dealing with claims for direct race discrimination and victimisation - we are not dealing with a claim for unfair dismissal. Whether Mrs Barker's decision to terminate the claimant's assignment was fair is not a material consideration. What we must consider is her reason for acting as she did. Of course, it is possible for us to draw inferences from Mrs Barker's actions: would a white worker have been subject to a more sophisticated procedure before termination? Would a white worker have received a series of informal warnings? Would the respondent have overlooked similar lateness on the part of a white worker?

18 Firstly we conclude that there is no inference to be drawn from the fact that once Mrs Barker had concluded that the claimant's attendance record was unsatisfactory she followed no sophisticated disciplinary procedure. She was not obliged to do so; the claimant was not employed by the 2nd respondent; the 2nd respondent's contractual relationship was with the 1st respondent; Mrs Barker gave notice to the 1st respondent in accordance with the terms of that contract

that the claimant services were no longer required. Of course, the 1st respondent had an obligation to follow a disciplinary procedure before dismissing the claimant; and it appears that when the time came it did so.

19 So far as the comparators are concerned, we have considered the evidence; and frankly, none of them are proper comparators. We reach this conclusion for the following reasons: -

(a) In truth, none of them have a lateness record anywhere near as bad as that of the claimant - (we are aware that the claimant disputes some of the items on the record; but this is not relevant. What we are concerned with was what was in Mrs Barker's mind when she terminated the assignment.)
(b) The other employees were not subject to scrutiny from Mrs Barker. It is now common knowledge that Ms Burton took a more relaxed approach than Mrs Barker; it is quite possible that other managers did as well. In a claim for unfair dismissal consistency of approach between managers would be highly important; but this is not a claim for unfair dismissal; we are only concerned with the reasons for Mrs Barker's actions it is therefore irrelevant that other managers may have taken a different course.
(c) The direct comparison with Mike Mosedale is not appropriate because the series of informal warnings which are evidenced in the bundle all occurred several months after the termination of the claimant's assignment. We are aware that Mrs Barker had had a stern conversation with Ms Burton about such matters; and it is hardly surprising therefore that in the months following the termination of the claimant's assignment, Mrs Burton was careful to ensure that her paperwork was in order.

20 There is nothing about the evidence we have heard which suggests to us that Mrs Barker was in any way motivated by the claimant's race. She terminated his assignment because of his unacceptable lateness record including being late on the 1st day of what was to be his 2nd and final chance. It is arguable that Mrs Barker's approach was extremely harsh; but that is not a material consideration; we are quite satisfied that it was nothing to do with race. We find there are no facts from which we could properly conclude that race discrimination had occurred. Accordingly, applying Section 136 ERA, the burden of proof does not shift to the respondent in this case. The claim for direct discrimination is not made out and is dismissed.

21 So far as the victimisation claim is concerned, we have heard the evidence of Ms Dziesinski which we accept. There is no doubt in our minds that she was concerned about the claimant's intrusive; oppressive; and offensive communications. This is what prompted her to complain; she was not prompted in any way by the fact that the claimant had presented a tribunal claim. In broad terms, she was supportive of his right to do so.

22 Likewise, the disciplinary investigation was a proper response to Ms Dziesinski's complaint; it was not in any way linked to the presentation of the claim.

23 Accordingly, the claim for victimisation is not made out and it too is dismissed.

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Employment Judge Gaskell
7 September 2017
Judgment sent to Parties on

_____07/09/17_____

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