EMPLOYMENT TRIBUNALS

Claimant: Mr A Nazarczyk

Respondents: 1. T J Morris Limited
2. John Cowley

HELD AT: Liverpool **ON:** 5 and 6 July 2017
19 July 2017
(in Chambers)

BEFORE: Employment Judge Robinson
Mrs J L Pennie
Mr P Gates

REPRESENTATION:

Claimant: in person with interpreter.
Respondent: Mr Lewinski of Counsel.

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claim for direct race discrimination succeeds against both respondents with regard to one comment made by Mr Cowley, the second respondent, as detailed in the reasons below.

The matter will now proceed to the remedy hearing already arranged for the 9 October 2017

REASONS

1. The issues between the parties relate to historical issues in the first respondent's warehouse include ridicule over the death of the Polish President in April 2010, Mr Cowley allegedly dumping the claimant's clean clothes on a dirty floor in front of other employees, not approving holidays without the claimant giving Mr Cowley a bottle of vodka, family members of the first respondent's staff working on the same shift but not allowing the claimant to work with his daughter and treating British workers more favourably than Polish workers by, for example, a nephew of the Night Shift Manager, Matt Wright, working on the same night shift as his uncle,

and a neighbour of Mr Findlay working on the night shift and travelling with Mr Findlay.

2. There were other general observations made during the hearing about the way in which British and Non British staff are treated differently, for example British workers working together and talking during the working hours but the management not allowing Polish workers to do the same. When the claimant put in a fit note it was suggested that he should not perform heavy duties and because he could not do those heavy jobs he was sent home whereas British workers were found lighter jobs and would not be sent home. British workers' cars are not searched whereas the non British workers' cars are, and where British workers are involved in an incident, there are no consequences for them but non British workers are suspended.

3. We can deal with some of the general allegations fairly simply. No or little evidence was brought by the claimant in relation to the alleged general difference in treatment between Polish workers, non British workers and British workers.

4. We were given no specific incidents of where the treatment of the claimant, or more generally Polish workers, were dealt with in any way different from other workers.

5. We therefore turned to the specific allegations and concluded as follows.

6. With regard to the air crash, no complaint was made by the claimant or any of the workforce. The incident alleged is that Mr Cowley pretended to be in an aeroplane after the death of the Polish President in April 2010. 92 other people died in those tragic circumstances. Not only did the claimant not make a complaint but no other Polish workers made a complaint. Mr Cowley said he did nothing to mock the Poles at that time of national upset and we accepted his denial. If he had acted in the way suggested there is little doubt that a member of the Polish workforce would have complained. Mr Cowley was supposed to have done this action in front of the many employees.

7. In any event , if it occurred at all , this was a one off incident. The claim is out of time and it would not be just and equitable to extend time in these circumstances. Witnesses could not be expected to remember the details of incident after seven years or more had elapsed.

8. With regard to the holiday issue, Mr Cowley does not generally have the authority to give holidays. That is done by managers above Mr Cowley's grade. On occasion Mr Cowley will authorise holiday if it is an urgent request.

9. The claimant's evidence changed with regard to this allegation. Firstly, he said that in order for him to get permission to go on holiday he had to buy Mr Cowley a bottle of vodka and then Mr Cowley allowed him to have his leave. He then, before us, changed the allegation to say that he was forced to bring back a bottle of vodka from holiday after he had been to Poland.

10. Mr Cowley denied the allegation and again we accepted his denial on the balance of probabilities. He told us that he did not drink, but even if he did drink we could not believe the claimant's evidence in this respect because it changed and we

do not think that Mr Cowley was wanting a bribe in order to give holidays to Mr Nazarczyk. The allegation did not make any sense.

11. There was little cogent evidence with regard to the allegation that Mr Cowley had dumped the claimant's clean clothes on a dirty floor in front of other employees. No other employee suggested that that had happened. We found that there were some clothes on a piece of machinery and Mr Cowley put them to one side without knowing whose they were. He did not act with any malicious intent towards the claimant or any other employee. In other words his actions were not aimed at Mr Nazarczyk. There does not seem to be any racial discriminatory undertone with regard to this, and it is not clear from the claimant's evidence when this alleged incident took place or the exact circumstances of it.

12. With regard to the allegation that British workers were allowed to work together on the same shift if they were in the same family, we came to the following conclusions.

13. In relation to Mr David Mason's daughter, Mr Findlay denied that the circumstances were anything like the claimant's circumstances relating to his daughter which we will deal with below.

14. The daughter of Mr Mason was a worker supplied by the "Heads" Agency. When workers are needed on the night shift the managers ask that Agency to supply workers. Ms Mason was on a final written warning for poor attendance and eventually she was not allowed to work in the warehouse. Apparently not so long ago she asked if she could come back. The agency requested her return but management refused the request because of her attendance issues.

15. In any event Mr Findlay has little control over which agency workers are offered to fill gaps in the first respondent's workforce. It is Heads who allocate their workers to a specific shift.

16. With regard to the nephew of the Night Shift Manager, Matt Wright, Mr Wright's nephew is not working for the company. He has returned to South Africa, but the nephew did work on the night shift and was not a good worker. His probationary period was extended and it was Mr Findlay's decision to extend the probationary period for three months because of his levels of underperformance. The nephew left before the end of the extended probationary period. Again, it would not be Mr Findlay who arranged for Mr Wright's nephew to work on the night shift.

17. With regard to Mr Findlay's neighbours working on the night shift and travelling in with Mr Findlay, we accepted Mr Findlay's evidence that none of his neighbours (indeed no one in the village where he lives) worked for the first respondent. Mr Findlay said that no neighbour of his travelled in to work with him. We accepted his evidence.

18. Mr Findlay also said that the majority of the time in 2016 he cycled into work and if he could not cycle in then his wife would drop him off when the weather was bad. We accepted his evidence that he had not given anybody a lift and neither had his wife.

19. It was Mr Findlay who also told us that on the night shift there were 13 British workers compared to 262 other European workers. That ratio of course fluctuates. Supervision is given by both British and Polish managers.

20. Consequently these vague allegations set out above were all dismissed and we moved onto the real issue between the parties.

21. That was an incident which took place on the evening of 18 and 19 October 2016 over the night shift. Because of that incident Mr Nazarczyk put in a grievance. The grievance was rejected by Mr Findlay and then on appeal was also rejected by Mr Dixon. However, at the end of the process an apology was given by Mr Findlay to the claimant which reads as follows:

> "Adam, this is a meeting to just follow up on your grievance that you placed against Mr J Cowley. It is my understanding that you appealed against my conclusion when I heard your grievance and that the appeal was heard by Mr K Dixon. Now that the process has been concluded and you are back at work I would like to take this opportunity to apologise to you for any misunderstanding as a result of miscommunication from either party involved. I hope going forward we can continue to work as before without any further issues."

22. Mr Nazarczyk has signed that document confirming his receipt of it.

23. None of the other incidents that are set out above have been complained about and the formal grievance only deals with the incident on 18/19 October.

24. There are various versions of the incident but in short Mr Nazarczyk asked Mr Cowley if his daughter could work on the same shift as him. Mr Nazarczyk's concern was that his daughter worked until 11.00 pm when it was dark and when going home had to walk through an area of Liverpool (Bootle) which he deemed unsafe. The claimant felt that if they worked on the same shift the claimant could bring his daughter into work.

25. Mr Cowley said that it was not his decision. He told the claimant it would be for Mr Findlay, the night shift supervisor, to deal with the issue and decide whether the shift pattern should changed. Ultimately, the first respondent's reason that the claimant's daughter could not move onto the night shift was because the company felt that, on previous occasions, when the claimant had worked with his daughter both their work suffered because Mr Nazarczyk tended to spend time with his daughter looking after her in the workplace.

26. The claimant refused to accept that Mr Cowley could not make the decision and so a further discussion took place where it was suggested that the reason he wanted to make sure his daughter was safe was because it was not her country, she did not speak the language and it was not her city. It was Mr Nazarczyk who therefore introduced the issue of his daughter being unsafe on a British city's street.

27. Mr Cowley took umbrage over the criticism of his city and became angry and frustrated and said words to the following effect (and there are various versions of what was said). We set out below each allegation.

28. The ET1 suggests that Mr Cowley said:

> "I you do not like it pack yourself and your family up and go back to Poland."

29. Mr Lewinski has interpreted the allegation as:

> "If you feel uncomfortable here then take the family and go back to your country."

30. There is a further allegation that the words used were:

> "You should go back to your own country."

31. Mr Cowley's own statement states that he said:

> "If you felt your daughter was not safe in Liverpool then perhaps you should go back to Poland."

32. The essence of the comment, however, is that the claimant's daughter should go back to Poland or the claimant's family should go back to Poland.

33. Mr Cowley never apologised to Mr Nazarczyk for that comment and it was left to Mr Findlay in the document referred to above to apologise.

34. Mr Cowley clearly accepted both in his statement, in his evidence in chief but also before us that he should have been more mindful of his words. He feels that he could have had a similar conversation with a British employee and he could have, for example, said that if his daughter did not feel safe in Liverpool and she was from Bath she should move back to Bath in Somerset. In other words in Mr Cowley's eyes he would not be treating Polish workers differently from British workers.

35. Shortly after this incident the claimant commenced a period of sick leave. He lodged a grievance and the grievance was dealt with as above.

36. The claimant felt, on lodging his appeal to the grievance, that the five days to lodge his appeal was not long enough, especially as English is not his first language, and that Mr Findlay had not provided a solution to the claimant. The claimant continued to maintain that Mr Cowley had discriminated against him by telling him to go back to Poland.

37. Mr Dixon dealt with each of the allegations of the claimant and decided that he could not uphold any of the appeal allegations but did say to the claimant that if he felt there were other problems in the future then he should come and speak to one of the managers. Mr Dixon thought that Mr Cowley had apologised but in fact that never happened.

38. When asked by Ms Pennie, one of the members of the Tribunal, Mr Findlay said that the company did not have any diversity training available to its managers.

The Law

39. In terms of an allegation for direct discrimination the following legal principles apply.

40. An employer must not discriminate against an employee.

41. It is for the claimant to establish the detrimental action relied upon.

42. 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.

43. In such a comparison of cases there must be no material difference between the circumstances relating to the claimant and the comparator.

44. If the Tribunal finds that the less favourable treatment is because of a protected characteristic then the Tribunal must find that there has been direct discrimination.

45. In order to conclude in relation to the facts that there has been discrimination, the burden of proof initially lies on the claimant, but if there are facts from which the Tribunal could decide in the absence of any other explanation that the respondent has contravened the provisions set out in section 13 of the Equality Act 2010 the Tribunal must hold that the contravention occurred unless the respondent can show that they did not contravene the provision (section 136 Equality Act 2010 – burden of proof).

46. Applying that law to the facts of this case we concluded as follows.

47. The general allegations set out in paragraphs 1 to 20 above made by the claimant were all made out of time and, in any event, have no substance to them. The claimant produced no evidence to show a prima facie case so that we could conclude that there were facts from which we could decide that the respondent has discriminated against the claimant. In particular the issues relating to the aircraft, the clothes, the holidays and other staff being able to work together on the same shift if British. None of those claims get over the burden of proof threshold.

48. Those claims are therefore all dismissed as not getting past the burden of proof test in **Igen v Wong** and the test in section 136 of the Equality Act 2010 as set out above.

49. On the other hand we do find that Mr Cowley's comment was not only inappropriate it was discriminatory. He would not have said something like "if you do not like it here go back to Poland" to a hypothetical British worker. That is the correct comparator here. The comparison with saying to someone who perhaps lived in Bath that they could go back to Bath is not the same because it does not have the same racial connotation.

50. Mr Cowley, out of frustration and annoyance that his city was being impugned, let himself down by saying something that he should not have said and which was directly discriminatory.

51. We accept that it was said in the heat of the moment and that it was in response to the claimant's request for his daughter to work on the same shift. Mr Cowley did not have the power to make that decision for the claimant's daughter and we accept that Mr Cowley was annoyed that the claimant was suggesting that his (Mr Cowley's city) was unsafe.

52. Consequently the only part of the claim that succeeds is in relation to that comment. Both respondents are responsible to the claimant for that breach of the claimant's employment rights.

53. The first respondent should now put in place diversity training if they have not already done so. It was incumbent upon the more senior management to ask Mr Cowley to apologise to the claimant rather than the apology coming from Mr Findlay after the grievance process had been completed.

54. We find that there was no discrimination in the way that the grievance and the appeal to the grievance was dealt with. A proper process was gone through but we disagree with the outcome with regard to this one narrow issue for the reasons enunciated above.

Employment Judge Robinson

Date 10-08-17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 August 2017

FOR THE TRIBUNAL OFFICE