Case Number: 2500166/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr D Ediale	**AND**	**Greggs Plc**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **7 & 8 June 2017**
Deliberations: 19 June 2017

Before: **Employment Judge Hargrove** **Members:** **Mr D Embleton**
Mr L Brown

Appearances

For the Claimant: **In person**
For the Respondent: **Mr Ryan of Counsel**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The unanimous judgment of the Tribunal is as follows:-

1 Pursuant to rule 72 the Employment Tribunal reconsiders and revokes the following parts of the judgment sent out to the parties on 30 November 2016 as follows:-

1.1 The finding that the respondent directly discriminated against the claimant on grounds of race in respect of the following acts –

- Failing to rotate him in the full range of duties, in particular in utensil wash from autumn 2013;

- On the part of AW in reprimanding the claimant in or about July 2015 for approaching Rob Grieve, Senior Hygiene Assistant, to ask him if he must sign in only at Balliol 1, when AW had already given that instruction to the claimant.

1.2 Paragraph 2 of the judgment whereby the Tribunal found that the respondent victimised the claimant contrary to section 27 of the Equality Act –

- On the part of AW, in monitoring the claimant's work, and in criticising it to his supervisor in January or February 2016, notwithstanding that AW had been removed from responsibility for managing the hygiene team in November 2015

1.3 The finding that the respondent directly discriminated against the claimant on grounds of race in respect of the following act is confirmed –

- On the part of AW in delaying the approval of the claimant's application made on 3 July for extended leave which he took from 9 September to 12 October 2015; and in paragraph 4 the claimant was unfairly constructively dismissed and the single act of race discrimination which we have affirmed played a material part in the claimant's decision to resign.

REASONS

1 This was an application by the respondent for reconsideration of a part of a judgment sent out by the Employment Tribunal on 30 November 2016. The respondent sought to challenge the Tribunal's findings of direct race discrimination in respect of three matters; and the single finding of victimisation. The reconsideration hearing took place on 7 June 2017, when the Tribunal gave its unanimous decision revoking two of the three findings of race discrimination and the single finding of victimisation on the morning of 8 June 2017 having deliberated. There then followed a remedies hearing in which the Employment Tribunal heard evidence from the claimant and from Mr Michael Grayson, Managing Director of Solutions Recruitment, for the respondent.

2 These are the reasons for the revocations described above. The Tribunal had the original written application from the respondent for reconsideration made by e-mail of 19 December 2016. The Employment Judge did not refuse that application on the sift. The Tribunal also had the claimant's response to the application submitted to the Tribunal on his behalf by his new solicitor, Ms Colquhoun, by e-mail of 28 January 2017. Mr Ryan for the respondent provided additional submissions in writing. We heard oral submissions from Mr Ryan and from the claimant in person. The general tenor of the respondent's submission was that there had been no sufficient evidential base, or sufficient findings of fact made in the original judgment, to support a shift in the burden of proof, applying the provisions relating to the burden of proof in section 136 of the Equality Act as set out in particular in paragraphs 7.1 and 7.2 of the original judgment. In

particular the respondent contended that the Employment Tribunal had fallen into the **Zaffar** trap (**Glasgow CC v Zaffar [1998] IRLR page 360**) of "relying on unexplained unreasonable conduct to support some of the inferences it drew". Mr Ryan relied upon a particular passage at paragraph 97 of the judgment of Mrs Justice Similar, President in **The Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16 22 March 2017**. In addition, in relation to the single claim of victimisation, it was submitted that no evidence had been presented to the Tribunal as to the alleged victimiser's (AW) knowledge that the claimant had done a protected act. In that respect Mr Ryan relied upon passages at paragraphs 91, 93 and 95 of the judgment in **Bowler**.

3 We can state our reasons for reviewing our decision on the utensil wash issue; and the reprimand issue quite shortly. Although we have a suspicion that there might have been some difference in treatment on racial grounds of the allocation of cleaning tasks particularly in the allocation of tasks at weekend shifts, we in fact have no evidence put before us of any material difference in the proportion of employees from racial minority backgrounds on the weekend shifts including Fridays and Mondays, and that on the normal week day three shift system. In any event, we did not and we do not now reject the respondent's explanation for the lack of training, which was said to be due to staff shortages at weekends. In addition, we do not now consider that the differences in treatment of James Kemp, who was given utensil wash training and was white, had anything to do with the fact that he was white and the claimant was black. He worked on the three shift system which required the work force to be more flexible in the tasks they could do.

4 As to the reprimand issue there has been some confusion as to the exact nature of the claim being made by the claimant. During the reconsideration hearing the claimant reverted to an earlier contention that he had originally made at the first hearing namely that the discriminatory treatment by AW lay in the fact that he, the claimant, had been reprimanded by AW for signing in at the wrong venue, whereas a white comparator who had done the same thing, Tony Jones, was not reprimanded. At paragraph 10.5 of the original judgment we had made a specific finding of fact that Tony Jones had also been reprimanded. We do not review that finding of fact. There was in this respect no difference in treatment based on racial grounds. The later reprimand given by AW was because AW perceived that the claimant had gone behind his back in seeking to gain support for his view – which was as it turned out correct – that it was open to employees to clock in at either venue. There is no evidence that Tony Jones, or any other white person, did the same act as the claimant and was not reprimanded. In these circumstances there is no evidence of any difference in treatment. We think that AW's conduct was indicative of an attitude that he does not like being contradicted or shown up. This is not however a reason which is related to race.

5 We affirm however our conclusion that AW's later delay in approving the claimant's application was materially influenced by the claimant's race. Here there is evidence of a difference in treatment based on racial grounds. We set out in paragraph 10.7 that others not of the same racial origin or colour as the claimant always had their applications for extended leave granted promptly. In addition, we have rejected AW's suggestion that he placed the approved

application (which has never been produced) in a letter tray and that it simply went missing; and there was evidence of yet further delay by him from 3 August to 21 August for which no real explanation has been given. We see no reason to alter our conclusion on this issue. Furthermore we accept that it was a matter which played a significant part in the claimant's decision to resign. The repudiatory conduct was tainted by race discrimination to that extent.

6 In relation to the victimisation issue we remain satisfied that the claimant was criticised by AW to Mr Edwards (to whom the claimant then reported) in January 2016. This was after the claimant had done a protected act. He had raised in his grievance letter of 16 November 2015 and in his grievance interview which followed it on 1 December, with Ms Tunn, that he had been discriminated against on grounds of race or colour in particular by AW. It is however a necessary ingredient of a victimisation claim that it is established that the victimiser knew or believed that the claimant had done a protected act. It was never put to AW during cross-examination by the claimant that AW knew that the claimant had accused him of race discrimination. There is no direct evidence that AW was aware of that fact. It might be inferred that he was aware from the fact that there was an investigation into the grievance by Ms McKeever from whom we have not heard, but there is no evidence that he was approached about any of the issues in particular the extended the leave issue by her. Still less that she informed him that he had been accused of race discrimination. Ms Tunn did not investigate the matter herself. It is a fundamental principle that a person accused of race discrimination or victimisation and who attends as a witness at a Tribunal is given the opportunity to answer the accusations which should be put to him. That did not happen in this case. For these reasons, the necessary causal link between the detriment and the protected act has not passed the initial burden of proof stage.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
12 July 2017
JUDGMENT SENT TO THE PARTIES ON

14 July 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL