



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent(s)

Mr A Conteh

v

First Security (Guards) Ltd

**Heard at:** London Central Employment Tribunal    **On:** 29, 30, 31 January 2018

**Before:** Employment Judge Davidson  
Mrs J Griffiths  
Ms L Moreton

## Representation

**For the Claimant:**            in person  
**For the Respondent:**        Ms D Grennan of Counsel

## JUDGMENT

**The unanimous judgment of the tribunal is that the claimant's complaints of unfair dismissal and race discrimination fail and are hereby dismissed.**

Employment Judge Davidson on 1 February 2018

## REASONS

### The Issues

1 The issues which had been agreed at a Case Management Discussion in front of Employment Judge Baty on 12 November were as follows:

**1. Section 26: Harassment related to race**

1.1. The claimant describes himself as black British.

1.2. Did the respondents engage in unwanted conduct as follows:

1.2.1. The production on 23 February 2015 by the first respondent to the claimant of computer stills containing information relating to the claimant and his family.

1.2.2. The second respondent's request to the first respondent on 25 February 2015 to remove the claimant from site.

1.2.3. The claimant's suspension by the first respondent on 25 February 2015.

1.2.4. The production on 10 March 2015 by the first respondent to the claimant of computer stills containing information relating to the claimant and his family.

1.2.5. The refusal of the second respondent on 12 March 2015 to allow the claimant back to work.

1.2.6. The first respondent by letter on three occasions threatening to dismiss the claimant if the first respondent could not find alternative employment for him.

1.2.7. The claimant's dismissal by the first respondent with effect from 17 June 2015.

1.3. Was the conduct related to the claimant's race?

1.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.5. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.6. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

**2. Section 13: Direct discrimination because of race**

- 2.1. Did either of the respondents, because of the claimant's race, treat the claimant less favourably than it treated or would treat others? The allegations of less favourable treatment are those set out at paragraph 1.2.1 – 1.2.7 above.
- 2.2. The claimant relies in all cases on a hypothetical character and, in relation to allegations 1.2.2, 1.2.3 and 1.2.7 only, on Jhalak Rai as an actual comparator.

**3. Unfair dismissal**

- 3.1. Did the first respondent dismiss the claimant for a potentially fair reason? The first respondent relies on some other substantial reason, following a client removal request and an inability to find suitable alternative employment for the claimant.
- 3.2. In dismissing the claimant, did the first respondent act otherwise reasonably?
- 3.3. If the dismissal was unfair, should any adjustments to compensation be made under the principles in Polkey v AE Dayton [1987] IRLR 503 HL?

2 At the start of the hearing, there was further discussion on the issues as follows:

- 2.1 The original case management order included draft issues relating to a potential whistleblowing complaint. After a subsequent application for an amendment to include a whistleblowing claim, permission to amend the claim was not granted and this claim is not an issue before this tribunal.
- 2.2 In the ET1, the claimant mentioned a claim under section 104 ERA 1996 (among other claims) but did not particularise it. In its ET3, the respondent asked for further and better particulars of this claim and reserved the right to amend its defence on receipt of such particulars. The claimant did not respond to that at the time. When the matter came before EJ Baty on 12 November 2015 for a case management discussion, the issues in the case were identified taking into account representations from both parties and agreed as set out above. EJ Baty struck out a number of complaints including some which were not within the jurisdiction of the tribunal. In relation to section 104, he recorded that the claimant was 'not bringing a section 104 blacklisting complaint, nor was there any TUPE complaint nor a complaint related to maternity. Therefore to the extent that there is anything pleaded in the claim form relating to such complaints I struck out those complaints.'. There was no discussion about any other section 104 complaint and none was included in the final list of issues.
- 2.3 In December 2017, claimant sent respondent a reply to its request for further and better particulars and sought to include a claim that he was automatically unfairly dismissed for asserting a statutory right namely infringement of data protection rights.

- 2.4 When asked by the tribunal if he was seeking to make an amendment to his claim, he confirmed he was not but was simply putting his claim as requested by the respondents request for further and better particulars. The respondent resisted this and argued that, in any event, section 104 would not assist the claimant as data protection is not one of the statutory rights included within the scope of that section.
- 2.5 We find that the claimant, if he wished to pursue this argument, should have raised it at the case management discussion. Alternatively, once his whistleblowing amendment had failed, he could have made an application to amend his claim to include this section 104 claim. However, we note that this application would have doomed to failure as the claim he seeking to bring simply does not exist.
- 2.6 The claimant then argued that the spirit of section 104 was to protect all rights contained within the 1996 Act. We find that data protection is not within the act and in any event, we cannot interpret the 'spirit' of legislation, only its meaning.

### **Evidence**

The tribunal took into account the following evidence:

- 2.1 The tribunal heard from Jacques Cader (Security Supervisor) and the claimant on behalf of the claimant and from Steve Curlewis (Account Manager) and Jackie Bainbridge (HR Manager) on behalf of the respondent.
- 2.2 In addition, the respondent submitted written witness statements from Aimee Regan (former Regional Director) and Sonal Sidpara (former Recruitment Deputy Manager) who had been ready to give live evidence on the original date set for this hearing but who had since left the respondent and did not want to give evidence now that they were working for new employers.
- 2.3 The tribunal had before it a bundle of documents running to some 600 pages.

### **The Facts**

- 5 The tribunal found the following facts on the balance of probabilities:
- 5.1 The respondent is a provider of outsourced security services to its various clients throughout London and the UK. The claimant was employed by the respondent as a night security officer at Regent's University London (RUL), a client of the respondent. His employment transferred to the respondent from Reliant Security Services Limited under TUPE in October 2009.
- 5.2 The terms and conditions between the respondent and RUL included the right for RUL to request the removal of a security officer for any reason. The respondent

has a policy to deal with such occurrences and this includes an obligation to ask the client to reconsider and guidance as to how to offer alternative employment to the affected employee.

- 5.3 Security officers are subject to certain requirements contained in detailed Assignment Instructions, which they are required to be aware of and they must confirm that they have read them.
- 5.4 Following a routine CCTV review of the night shift 17/18 February 2015, it came to the attention of the Security Manager, John Angel, that while the claimant was on duty there were students in prohibited areas. Another security officer, Jhalak Rai also appeared on the images.
- 5.5 On 18 February, John Angel raised this with Jacques Cader, the Security Supervisor and attached two CCTV images to his email. Later that day, John Angel met with Jhalak Rai who explained what had happened on that night shift and apologised for the incident. The matter was recorded by Stephen Curlewis in a Letter of Concern addressed to Jhalak Rai dated 23 February. There is no evidence that John Angel also met with the claimant on that day.
- 5.6 On 19 February, Jacques Cader spoke to the claimant and Jhalak Rai, the other security officer shown on the CCTV. On 23 February, he sent by email to the security officers a copy of the CCTV stills that had been forwarded to him by John Angel, warning them that the CCTV was being monitored and reminding them to be on their guard.
- 5.7 Later that day, the claimant sent an email to Jacques Cader and John Angel, copying in senior management of the respondent including Aimee Regan (Regional Director) and Allanah Shannon (HR), complaining about the processing of data (in particular, his image) without his consent.
- 5.8 Steve Curlewis responded the next morning asking him to refrain from copying in senior management and setting out the appropriate channels for him to raise issues, namely to the line manager and then the local account manager. The claimant replied, copying in senior management contrary to John Angel's instructions, alleging breaches of data protection laws and querying whether John Angel had authority to process data. Steve Curlewis replied, restating his instruction to take this to his line manager. Shortly afterwards, John Angel responded to the claimant offering to meet with him to discuss the issue.
- 5.9 Three hours later, the claimant sent an email to the client (Gary Sabini, RUL Senior Facilities Manager) setting his concerns about date protection violation of students and guards and visitors in which he named the students in the images and informing him that he was intending to take legal action against the respondent. He later sent the CCTV images to Gary Sabini.

- 5.10 Gary Sabini then forwarded the claimant's email to Steve Curlewis, not copying in John Angel, asking for the matter to be dealt with by the respondent and expressing a preference for the claimant to be suspended while the matter is investigated and asking that the claimant does not return to work at RUL. He asked for a report from the respondent about the matter and told Steve Curlewis that the claimant's email account and network access had been disabled with immediate effect.
- 5.11 Steve Curlewis then went to the RUL site and met with Gary Sabini to discuss the removal request. He asked if it was necessary to remove the claimant but Gary Sabini was insistent on the basis of the claimant's conduct as seen on CCTV images and the fact that he raised the matter with RUL instead of the respondent.
- 5.12 On 25 February John Angel sent Steve Curlewis more CCTV images and copies of correspondence. Steve Curlewis suspended the claimant later that morning pending an investigation and informed Aimee Regan that he had done so.
- 5.13 As part of the investigation, John Angel obtained an asset information report from IT because the CCTV images showed that the claimant had been spending a lot of time during his shift on his computer. This user activity IT report showed he had been using an unauthorised media device (USB stick) and working on private material during working hours. The additional CCTV images also show that he allowed a student to access an unauthorised area when he left his post.
- 5.14 HR then assisted Steve Curlewis to formulate the allegations which formed part of the internal investigation into dereliction of duty and these were sent to the claimant on 6 March with an invitation to attend an investigatory meeting. These were:
- a Use of client's equipment for personal non-work related purposes
  - b Allowing students in an unauthorised area
  - c Failing to follow a reasonable management instruction.
- 5.15 In the same letter the respondent informed the claimant that the reasons for removal from the site would also be discussed at the meeting.
- 5.16 At this time claimant was on paid suspension. Although the respondent had the contractual right to put him on any shifts and could have included him in the 'pool' of employees to cover absences, Steve Curlewis took the commercial decision not to do so as his clients would not be happy to know that they had been given an officer who had been removed from another site. We accept this explanation. In any event, pool staff only receive pay for shifts worked and the claimant had made it clear he would not accept any changes to his terms and conditions because he thought they were protected by TUPE.

- 5.17 The claimant responded to the investigation invitation meeting asking for some further information and for reassurances about the conduct of the hearing and making a counter-allegation about John Angel's failure to wear uniform.
- 5.18 The day before the investigatory meeting, the claimant sent a long email setting out his allegations of 'procedural irregularities' including an allegation that he had been subjected to the detriment of suspension for raising the issue of data protection violations. He also commented on John Angel's failure to wear uniform, his working hours and his sleeping arrangements on site. Steve Curlewis investigated the allegations about John Angel and found no breach of the respondent's policies or procedures.
- 5.19 The investigation hearing was conducted by Steve Curlewis and was divided into two parts. The first part dealt with the claimant's removal from RUL's site. Steve Curlewis was told the reasons and what would happen next, namely that he would have to apply for jobs. He was also told that if he was unsuccessful within 30 days, his job was at risk of termination for 'some other substantial reason' (sosr). He was then sent the current vacancy list and told he had to be proactive. He was told that other jobs might be at a different rate of pay but he said he would not accept this.
- 5.20 The second part of the meeting dealt with the disciplinary allegations. These were put to him and he initially denied some allegations but then admitted these when shown the evidence. Others he admitted but had had explanations. Following the meeting, Steve Curlewis decided that the matter should proceed to a disciplinary hearing.
- 5.21 At about this time Steve Curlewis went back to RUL explaining that the investigation had concluded and asking if they would reconsider the removal request. Gary Sabini made it clear that he did not want the claimant to return because 'he was not fulfilling the duty and expectations of a security officer working on our site, he has been observed acting unprofessionally and without due diligence in his role'. Steve Curlewis went back to the claimant and informed him of RUL's position.
- 5.22 From 18 March the respondent regularly sent the claimant the current vacancy list so that he could apply for alternative positions.
- 5.23 The claimant was invited to a disciplinary hearing which eventually took place on 1 April. The letter inviting him set out the allegations, included documentary evidence and explained that the possible outcome was a formal warning. Prior to

the hearing the claimant sent a request for information and the respondent provided what it was able to.

- 5.24 The hearing on 1 April was conducted by Darren Walker, a manager who had not been involved previously with the claimant. The allegations were put to the claimant who had an opportunity to respond. Following the hearing, Darren Walker decided to issue him with a verbal warning. He was offered the opportunity to appeal against this, which he did.
- 5.25 On 8 April, Steve Curlewis met with the claimant to discuss the issue of his continued employment following the removal from site. The claimant disputed that there was a 'sosr' situation. The claimant was told he needed to apply for alternative roles. As a result of that meeting, the respondent extended the period for finding alternative employment by two weeks to 22 April.
- 5.26 On 10 April, the claimant lodged his appeal against the verbal warning. The appeal was heard on 20 April by Aimee Regan, Regional Director and the claimant was given the opportunity to present his grounds of appeal. These included a reference to race and he stated that the reason for the verbal warning 'could be' his race. Following the meeting, Aimee Regan considered his representations but decided to uphold the verbal warning. The claimant was informed of this by letter dated 7 May.
- 5.27 At the date when the sosr decision was due to be reconsidered, HR informed Steve Curlewis that the claimant had an outstanding interview for a position at 10 Old Bailey. He therefore decided to wait for the outcome of this application before progressing the issue.
- 5.28 In the event, the claimant attended the interview but his interest in the post came to an end both due to the lower pay rate and the impending TUPE transfer of the site to another company.
- 5.29 Once the claimant withdrew his application for 10 Old Bailey, Steve Curlewis reactivated the sosr process. He wrote to the claimant on 7 May informing him that his employment was being terminated on notice due to sosr, namely the client's request to remove him from site and his failure to obtain alternative employment within the extended time period allowed by the respondent. The dismissal was due to take effect on 17 June and he was given the opportunity to continue to apply for roles until the termination date. He was offered the right of appeal, which he took up.



- 5.30 On 14 May, he emailed Aimee Regan with his appeal grounds which complained about the procedure for applying for alternative employment in not finding him a role that was suitable and acceptable to him.
- 5.31 He was invited to an appeal hearing on 1 June. He presented his appeal and contended that the respondent should have found a position for him without him having to go through the application and interview process. He also maintained that he was entitled to protection of terms and conditions because he had TUPEd to the respondent, that he had not been aware that the 10 Old Bailey position was subject to a TUPE transfer. Aimee Regan agreed to look into the matters he raised and to revert back. She wrote to him on 15 June addressing the points he raised in his appeal and taking the decision not to uphold the appeal.

### **The law**

6 The relevant law is as follows:

#### *Direct race discrimination*

6.1 A person discriminates against another if they subject that person to less favourable treatment because of their race.

#### *Racial harassment*

6.2 A person will be subjected to harassment if another person engages in unwanted conduct related to race which has the purpose or effect of either violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

#### *Burden of proof*

6.3 If there are facts from which the tribunal could decide in the absence of any other explanation that a person contravened the discrimination provisions, the tribunal must hold that there has been a contravention unless that person can show that they have not contravened the provision.

#### *Unfair dismissal*

6.4 The employer must show the reason for dismissal and the potential valid reasons include where there is some other substantial reason justifying dismissal.

6.5 Where the employer has shown the reason for dismissal, the tribunal must consider whether the respondent has acted reasonably in treating that as grounds for dismissal.

### **Determination of the Issues**

7 We determine the issues as follows:

*Race discrimination*

- 7.1 We find that the unwanted conduct set out in paragraph 1.2 of the issues took place.
- 7.2 We find that this conduct was not related to the claimant's race. The claimant has produced no evidence to support his allegation that the treatment was based on his race. We are satisfied that the respondent had good reason for all the treatment described based on the facts set out above.
- 7.3 We find that the claimant has not shown facts from which the tribunal could determine that race (or any other protected characteristic) was the reason for the respondent's treatment of the claimant. It is not sufficient simply to point out a difference in race. We therefore find he has not shifted the burden of proof in relation to his claim where he relies on a hypothetical comparator.
- 7.4 The claimant also relies on an actual comparator, Jhalak Rai, who is Nepalese. He contends that the difference in pigmentation explains the difference in their treatment in relation to the suspension and the dismissal. The respondent maintains that the difference in treatment can be explained by the difference in their circumstances, in particular that Jhalak Rai had not sent information to the client in contravention of a management instruction and that the client had not requested his removal. We accept that the difference in treatment of Jhalak Rai was due to their different circumstances, not the difference in race.

*Unfair dismissal*

- 7.5 We find that the reason for dismissal was 'sossr' which is a potentially fair reason under ERA. The reason for dismissal was the inability to find suitable alternative employment for the claimant following a client removal request.
- 7.6 We find the respondent acted reasonably by dismissing the claimant. We find that the respondent had in place a policy to deal with employees where the client has requested their removal. We find nothing to criticise in this policy. We find that the respondent followed the policy and was more generous than the policy provided for in the amount of time allowed for finding alternative employment. We do not find that this amounted to an overlong period of suspension as maintained by the claimant as this was intended to be in his interest.
- 7.7 The claimant has contended that he should have been slotted into an existing role without having to go through the normal recruitment procedure. We accept the respondent's explanation that this would be contrary to all its HR practices

which require all employees to go through the same application process in order to ensure its diversity requirements are complied with. In addition, Steve Curlewis stated that he would not put an employee who had been removed by one client into another client's premises without going through the proper recruitment process. We accept that there is no reason why the respondent should depart from its usual practice to accommodate an employee who has been removed from another site particularly where such removal was as a result of his conduct.

- 7.8 The claimant's complaints of unfair dismissal and race discrimination fail and are hereby dismissed.

Employment Judge Davidson on 1 February 2018