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EMPLOYMENT TRIBUNALS

Claimant: Mr A Olayemi

Respondent: Aspers (Stratford City) Ltd

Heard at: East London Hearing Centre

On: 11-12 January 2018 & 2 March 2018

Before: Employment Judge C Lewis

Members: Mrs P Alford
Ms M Long

Representation

Claimant: Mr A Mortuza (Non-practicing barrister)

Respondent: Mr E McFarlane (Consultant)

WRITTEN REASONS FOR JUDGMENT

Reasons having been given orally at the hearing on 2 March 2018 and written reasons having been requested by the parties

1. The unanimous judgment of the Employment Tribunal is that the Claimant's claim for race discrimination succeeds.
2. Remedy is to be dealt with at a separate hearing.

REASONS

1 Our reasons are as follows.

2 The Claimant brought complaints of direct race discrimination against the Respondent. The issues we had to decide were set out in an agreed list of issues; in essence there were three allegations of conduct that amount to direct discrimination

contrary to section 13 of the Equality Act 2010: those being that (1) the Claimant was subject to an extension to his probation which was unjustified and an act of direct discrimination; (2) that he was denied training in conflict management; and (3) that he was suspended and then dismissed in relation to an incident that took place on 9 April 2017 and that also amounted to direct discrimination.

Summary

3 We did not find for the Claimant in relation to the first and second allegation but we found for him in respect of the third allegation: the suspension and dismissal and we did so on the basis set out below.

Evidence

4 The Tribunal heard from the Claimant in person and from Michelle Long and Alexander Bucsa for the Respondent. We were also provided with a bundle of documents which contained documents produced as a result of the investigation into the incident on 9 April 2017 which led to the Claimant's dismissal, and other documents produced through the Claimant's employment together with some documents in relation to mitigation. We were also provided with a copy of the CCTV footage of the incident on 9 April which we viewed in the Tribunal.

5 Having heard the evidence the Tribunal makes the following findings of fact.

6 The Respondent is a casino operator located at Westfield Stratford City and its correct title is Aspers (Stratford City) Ltd.

7 The Respondent employed the Claimant from 27 September 2016 to 2 May 2017 when the Claimant was summarily dismissed for gross misconduct.

8 The Claimant is black, of Nigerian origin.

9 The Claimant was employed full-time as a security officer on a salary of £19,000 per annum. The first six months of his employment was a probationary period which lasted until March 2017 when his probation was then extended for a further three months due to some concerns raised about his performance. The Claimant complains that these concerns were unfounded and discriminatory.

10 The reasons given by the Respondent for extending his probation included the Claimant's failure to follow reasonable requests from management, poor attitude to senior management, receiving a negative file note on 1 March 2017 for chewing gum on the gaming floor, and poor knowledge of the licensing conditions.

11 We heard evidence from Mr Bucsa who conducted the Claimant's probation review. He is a security supervisor at Aspers and has worked there since May 2012. He told us that he is a Moldovan citizen and that English is not his first language. He was asked by Mr Mark McEwan, who was then security manager, to do a probation review on the Claimant on 8 March and that is documented at page 131 of the bundle. The record of that meeting is signed by Mr Bucsa and the Claimant and we accept that it is an accurate record.

12 We found Mr Bucsa to be an honest and credible witness and we also found that he was on the whole supportive of the Claimant. Despite some concerns raised by others, for instance Mr McEwan who had given the negative file note for chewing gum on 1 March (page 130 of the bundle), something which the Claimant did not dispute he had done but he explained that he had forgotten about the rule, Mr Bucsa concluded that the Claimant was capable of becoming a good security officer.

13 In his probation review meeting with Mr Bucsa the Claimant accepted that there were some areas where he could improve and we note that the Claimant did not allege that Mr Bucsa himself had discriminated against him because of his race but rather his allegations were again Mr McEwan and Mr Holden. We are satisfied that Mr Bucsa's overall assessment was more positive than negative. He concluded the Claimant could improve and he extended his probation for a further three months. It had been open to Mr Bucsa to terminate the Claimant's employment rather than extend his probation. We find no evidence to suggest that Mr Bucsa's assessment of the Claimant was affected by the Claimant's race, nor any evidence of less favourable treatment by Mr Bucsa.

14 The next matter that formed the Claimant's complaint of race discrimination was the failure to provide conflict management training.

15 The Claimant complained that he had not been provided with ejection training whereas other colleagues had, and the reason for this was because the Respondent had an intention to sack him.

16 We heard from Michelle Long who was the Respondent's security manager. She had worked for Aspers since April 2015, initially as a security supervisor in the security department, she moved to surveillance in December 2015 and then returned to Stratford as security supervisor in February 2017 and became a security manager in May 2017.

17 Ms Long told us that she had received a copy of the Claimant's training record for the purpose of preparing to give evidence at this hearing. Those documents were in the bundle (at pages 105 to 128) and she found those showed a normal learning and development record covering topics that all officers have to complete before they go on the floor, including knowledge of the licence conditions (pgs. 118 to 119), operational awareness (pgs.120 to 121) and how to deal with difficult situations.

18 The licence conditions set out that designated members of staff would have conflict management training and those were duty managers, security managers and supervisors.

19 Ms Long's expected officers would have had some conflict management training with their SIA badges but would be trained when the opportunity arose by the Respondent. The Respondent had run a course in November 2017 and the next one was due in spring 2018. Ms Long stated that whether the Claimant had been on the course would depend on a number of factors, including his start date, the numbers of candidates, and the timing and dates of the courses.

20 The Claimant had not been on the November course and she saw nothing unusual in this however she would expect him to go on the next course which was due in spring 2018. We accept her evidence on this and we do not find that there is any evidence from which we can conclude that there was deliberate exclusion of the Claimant from the training so no less favourable treatment on the grounds of his race.

21 The next incident we had to consider was the incident on 9 April 2017 which was the ejection of an intoxicated customer.

22 On the 9 April the Claimant was asked to assist three colleagues Kate Kucma, Mr Scorpan and Mr Munian in ejecting an intoxicating customer who did not want to leave and had become violent towards staff.

23 After the incident the customer complained to police who attended the scene shortly afterwards; the Claimant's duty manager Ms Kucma, his supervisor Mr Scorpan and colleague Mr Munian, gave statements to the police as did the Claimant. They all stated that at no time was excessive force used and the police took no further action as a result of the complaint.

24 The Claimant also told us that his manager and his supervisor thanked him for his assistance in ejecting the customer and we accept his evidence that he was thanked at the time for his actions.

25 Three days later the Claimant was suspended by Ms Long and investigated for his actions in ejecting the customer; the allegation being that he had used excessive force. Ms Long told us that she was asked to suspend and investigate the Claimant by Mr McEwan. She was not present at the time of the incident on 9 April, she was the supervisor on a subsequent shift.

26 As a result of the ejection and police involvement the Respondent's surveillance department raised an SIR (Surveillance Incident Report) which is at pages 137 to 148 of the bundle. This includes a surveillance officer's description of events from the CCTV footage and a report from the duty manager and reports from those involved.

27 It is standard practice for anyone involved in an ejection to write a statement. Ms Long's typed notes of her investigation are pages 149 to 151 of the bundle. The description of the security footage at pages 145 to 148 is of the Westfield security CCTV which was viewed as part of the investigation. It shows three security officers involved in ejecting the customer: the Claimant, Mr Scorpan and Mr Munian. The allegation of excessive force came after the footage was viewed and was made only against the Claimant. It is based on the Claimant's action in pushing the customer away once outside the casino, as a result of which the customer stumbles and falls into the path of a young woman and she takes three steps to her left and then carries on her way. The customer runs back towards the casino door and Mr Scorpan prevents him re-entering: he has his left arm raised onto the customer's upper chest and chin and pushes him back. The Westfield officers then arrive shortly afterwards and take over.

28 The footage viewed by the Tribunal showed that the customer clearly did not want to leave the casino. He was holding on to a post inside the casino door, trying to

brace himself and resisting being ejected. All three security officers have their hands on him at various points. It is not always easy to distinguish which officer's hands are on him at any particular point in time but at the point he is pushed away by the Claimant both of the Claimant's colleagues have their hands on the Claimant's back. It is clear the customer is using force to resist and it took all three security officers to eject him. All three officers gave statements that only reasonable force was used throughout.

29 Ms Long's evidence was that she would expect that anyone involved in the incident would be treated in the same way. She did not know why the other two officers Mr Scorpan and Mr Munian were not suspended or investigated; of the three it was only the Claimant who was suspended and investigated.

30 The Respondent's explanation for the difference in treatment was that it was because of what was demonstrated by the CCTV footage i.e. that the Claimant shoved the customer which resulted in a collusion with a young woman and that he had therefore used excessive force whereas the others involved had not. The Claimant maintained he only used reasonable force, this is what he told Ms Long and he also raised that he had not had any training in conflict management.

31 During Ms Long's investigation the Claimant was asked if on reflection he would handle things differently, he accepted that he could but that he had not been in that situation before and would now know to handle it differently in future.

32 We accept from the evidence before us that none of the security officers involved had seen the young woman prior to the push on the customer taking place and were only aware of her presence afterwards. We also accept that the Claimant's focus had been on the customer who was resisting the ejection and had already been violent towards one of his colleagues and following the push continued to come back at him and his colleagues afterwards.

33 Following Ms Long's investigation the case went forward to Mr McEwan to consider the next steps and he referred it on to HR with a recommendation or 'request' that the outcome be dismissal (page 152 of the bundle) on the basis that the Claimant had used excessive force. The matter then on to Sarika Parmar an HR advisor to hold a disciplinary hearing.

34 In the meantime the Claimant wrote to Mr Smith the Group Operational Director, complaining that he had been targeted and was being treated unfairly.

35 We did not hear any evidence from either Mr McEwan or Sarika Parmar, nor did we hear any evidence, other than from Ms Long, as to why the Claimant was suspended and investigated and the two other officers were not. However Ms Long confirmed that no other action was taken against those two officers.

36 The decision to dismiss was made by Sarika Parmar on 3 May and the reason given was gross misconduct in the use of excessive force on 9 April.

Law

37 The relevant sections of the Equality Act are section 13, direct discrimination, section 23 comparison by reference to circumstances, which provides that on a comparison of cases there must be no material difference between the circumstances relating to each case; section 39 prohibiting less favourable treatment by an employer in dismissing the Claimant or subjecting him to any other detriment; and section 136 the burden of proof.

38 We remind ourselves that direct discrimination assumes a comparison between the treatment of different individuals and to make that comparison the cases of the complainant and the comparator must be such there is no material difference. We have some guidance in respect of what is a material difference and the comparison to be made in other cases including *Ladele v London Borough of Islington* [2009] EWCA Civ 1357. In deciding how a hypothetical comparator would be treated the evidence from how individuals were actually treated is likely to be relevant and the closer the circumstances of those individuals are to those of the complainant the weightier will be the significance of their treatment. Comparing those in non-identical but not wholly dissimilar cases is a helpful way to construct a hypothetical comparator. We also had in mind the guidance in the case of *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11 when it comes to the use of comparators and instances from treatment of people in similar but not identical circumstances.

39 In respect of the burden of proof we had in mind the guidance from *Igen v Wong* [2005] EWCA Civ 142 and the revised *Barton* guidance as to how the application of the burden of proof is to be considered.

Conclusions

40 As indicated above we found that on the first allegation in respect of the extension of the probation period there was no less favourable treatment of the Claimant because of his race and we also made the same finding in respect of the lack of specific training on ejection.

41 However, on the question of the suspension and dismissal we are satisfied that there was evidence before us of less favourable treatment. There was a difference in treatment between that of the Claimant and Mr Scorpan and Mr Munian both of whom were white. We are satisfied having carefully considered the circumstances of each that there was no material difference between their circumstances. Mr Scorpan and Mr Munian were more experienced than the Claimant and one was his supervisor. If anything one would expect them to be held to a higher standard. We do not find that the Respondent's explanation for the difference in treatment, namely that the Claimant alone was responsible for the shove or push on the customer, was sufficient to explain the disparity in treatment in the circumstances, particularly where no investigation whatsoever was carried out into the roles of the other two security officers involved in the ejection, and they had given statements that no excessive force had been used at any time in the incident.

42 We have looked to the Respondent for an explanation for that treatment, other than the Claimant's race and we found that they have failed to provide one. We have concluded that the less favourable treatment in respect of the suspension and the subsequent decision to dismiss was on the grounds of the Claimant's race.

43 The Claimant's claim for direct race discrimination succeeds in respect of his suspension and dismissal and there will be a separate Remedy Hearing to decide any compensation.

Employment Judge Lewis

18 June 2018