



EMPLOYMENT TRIBUNALS

Claimant: Mr O Akinsola

Respondent: Express Security Limited

Heard at: Ashford

On: 28 November 2017 and in chambers of 29 November 2017.

Before: Employment Judge Pritchard
Mrs S Dengate
Mr A Brown

Representation

Claimant: Miss E Godwins, consultant

Respondent: Mr S Oso, in-house legal consultant

JUDGMENT

It is the unanimous decision of the Tribunal that:

- 1 The Claimant's claim for holiday pay is dismissed upon withdrawal.
- 2 The Claimant's claim that he was victimised contrary to section 27 of the Equality Act 2010 is dismissed.

REASONS

1. The Claimant claimed that he had been victimised contrary to section 27 of the Equality Act 2010. At the outset of the hearing, the Claimant withdrew his claim for holiday pay.
2. The Tribunal heard evidence from the Claimant and from Nelson Okwong, the Respondent's Operations Manager. The Tribunal was provided with a consolidated bundle of documents to which the parties variously referred. The parties made oral submissions at the conclusion of the hearing. Evidence and submissions were concluded within the first day of the two day time allocation and the Tribunal used the second day to deliberate in chambers and reach its decision.

Issues

3. The issues were discussed at a Preliminary Hearing which took place on 17 August 2017 when, among other things, the Claimant was required to provide further details of his claim. The issues can now be described as follows:
 - 3.1. The Respondent accepted that the Claimant had complained about discrimination, and so there was a protected act. However, the Respondent's case is that they investigated the complaint, which they say was unfounded, and that it had no bearing on a subsequent decision to dismiss the Claimant, they say because there had been a reduction of work following the loss of a contract.
 - 3.2. Can the Claimant show that the Respondent subjected him to the following detriments?
 - 3.2.1. Failing to provide suitable alternative work for the Claimant at another site (the Respondent contends the Claimant was moved from Beckenham to Bellingham when they became aware of his complaint)
 - 3.2.2. Failing to follow a fair grievance procedure in that:
 - 3.2.2.1. The Claimant's concerns were not adequately investigated: the Claimant was not invited to provide detailed information about his concerns (the Claimant says he was invited to the office twice but nothing was done);
 - 3.2.2.2. There were no further meetings held to discuss the Claimant's concerns;
 - 3.2.2.3. The Respondent's response to Claimant's grievance was inadequate, the Respondent saying they could not complete the investigation because the Lidl duty manager had left the company. The Claimant contends that the Respondent could still have carried out an investigation as other staff members who witnessed the incident still worked for Lidl and there was CCTV available.
 - 3.2.3. The Claimant withdrew his allegations that the Respondent had failed to advise him of his statutory right to be accompanied at meetings held during the grievance process and when the Claimant's dismissal was being considered or that the Respondent had failed to follow a fair dismissal procedure.
 - 3.3. Dismissing the Claimant. This was un-contentious: the Respondent admitted that it had dismissed the Claimant.
4. If so, can the Claimant show facts from which the Tribunal could infer, in the absence of any other explanation, a causal link between the detriments or any of them and the protected act? If so, can the Respondent show that it did not contravene the provisions of section 27 of the Equality Act 2010?

Relevant findings of fact

5. The Claimant commenced employment with the Respondent on 18 April 2016 as a security officer. He was posted to work at the Beckenham store of one of the Respondent's clients, Lidl.
6. The Claimant was said to be employed on a zero hours contract. His contract of employment provided:

“You will be required to work whatever hours are required in each week to fulfil the duties of your post – the amount will vary from week to week but we hope to be able to advise you in advance wherever this is practical. Express will communicate to you in writing or by text or verbally for rosters and notices”.

In fact, the Claimant usually worked 39 hours each week while at the Beckenham store. Upon the commencement of his employment, the Claimant signed a written agreement in which he opted out from the 48 hour working week restriction under the Working Time Regulations 1998 although Mr Okwong gave unchallenged evidence that the Claimant did not wish to work more than 40 hours each week over no more than four days. The Claimant's written statement of employment particulars provided that his normal place work would be Lidl stores but that he may be required to work at any other Company or Customer site within reasonable travelling distance, either on a temporary or permanent basis. Although the Respondent's security officers are permitted to work while their vetting application is being processed, the Claimant's terms of employment provided, among other things “Your appointment may be terminated if you fail BS7858 Screening and Vetting”.

7. Security officers commencing their duties clock on by using the clients' store telephones. This shows up on Respondent's electronic system to demonstrate that the security officer is at work. On occasions when the clients' telephones are not accessible, security officers can use their own mobile telephones to contact the Respondent's head office following which enquiries are made of the client to ensure the security officer is indeed at work.
8. On 7 July 2016 the Claimant sent a fax letter dated 5 July 2016 to the Respondent's management complaining that he had been racially discriminated against by a duty manager employed by Lidl at their Beckenham branch on 8 June 2016. The Claimant alleged that the duty manager had withheld his office key from the Claimant which meant he would not have access to the store telephone to clock on. The Claimant complained that when, thereafter, two white men asked for the office key, the duty manager was able to produce it. The Claimant is black. The Claimant complained that by not providing the office key, the duty manager had thus subjected him to less favourable discriminatory treatment.
9. Mr Okwong made telephone enquiries of the duty manager as to what took place and, by letter dated 11 August 2016, the Respondent informed the Claimant of the outcome of Mr Okwong's enquiries. The explanation was that the store manager had been busy when the Claimant had asked for the key which the duty manager did not have with him; when the two white men, who

were contractors, had asked for the key he was less busy and had in the meantime collected the key from the deputy manager. The Claimant was informed by the Respondent: "Please do not hesitate to contact us or write to us about attending a meeting if necessary".

10. In the meantime, and as a direct result of the Claimant's complaint, the Respondent decided to remove the Claimant from the Beckenham store and transfer him to Bellingham, where there was a vacancy. The Claimant worked at Bellingham on reduced hours, usually 26 hours each week. Bellingham was chosen because it was a reasonable travelling distance from the Claimant's home and on the same route for him when travelling to Beckenham. The Claimant agreed to move to Bellingham and made no complaint about the reduced hours.
11. Having sought advice from the Citizens Advice Bureau, the Claimant sent a further letter to the Respondent on 18 August 2016 re-iterating his complaint. In response, the Respondent invited the Claimant to a meeting and told him "If the store manager was busy at any point in time and unable to go and open the office for you to use the store phone, should not mean that he is discriminating against you".
12. Mr Okwong held a meeting with the Claimant on 22 September 2016. The Claimant re-iterated his complaint. Mr Okwong commented that the Claimant should have informed his employer before going to the Citizens Advice Bureau. Although Mr Okwong reached no firm conclusion, he told the Claimant that there was a possibility that the deputy duty manager had handed the office key to the store manager. The Respondent had not at this stage contacted Lidl's Head Office about the Claimant's complaint.
13. By letter 12 October 2016, the Claimant informed the Respondent that he wished to go further with his case and asked if the Respondent would contact Lidl or whether he should do so through a solicitor. The Respondent informed the Claimant that they would notify Lidl but also advised the Claimant to do so.
14. By email dated 25 October 2016, Lidl informed the Respondent that its contract for the provision of security officers at a number of stores would be terminated with effect from 26 November 2016. Neither the Beckenham nor the Bellingham stores were directly affected. The Tribunal accepts the Respondent's unchallenged evidence that hours were consequently reduced for all its security officers.
15. By email dated 1 November 2016, Lidl informed the Respondent that it had not been possible to investigate the Claimant's complaint because the duty manager was no longer employed by the company.
16. By letter to the Respondent dated 4 November 2016, the Claimant's solicitors demanded a response to their enquiries relating to the Claimant's complaint within 7 days failing which legal proceedings would be commenced against the Respondent. The Respondent promptly replied that Lidl had been unable to investigate the matter because the duty manager was no longer employed by them. By letter dated 17 November 2016, the Claimant's solicitors complained to the Respondent that they had taken insufficient steps to investigate the matter and demanded compensation for injury to feelings, 52

weeks' of future loss of wages (despite the fact that the Claimant was still working) and aggravated damages.

17. The Respondent invited the Claimant to attend a further meeting to take place on 12 December 2016.
18. In the meantime, on 9 December 2016, the Respondent was informed by its vetting agency, Check Your Staff Limited, that the Claimant had not provided the necessary documentation and had accordingly failed to pass the vetting process.
19. At the meeting on 12 December 2016, chaired by the Respondent's HR Director, the Claimant was informed that the duty manager in question no longer worked for Lidl and hence Lidl was unable to investigate the Claimant's complaint. Mr Okwong was also present at this meeting.
20. By letter dated 5 January 2017, marked "BS 7858 VETTING (VERY URGENT)" the Respondent urged the Claimant to contact Check Your Staff Limited as a matter of urgency and set out the documentation to be provided. The Claimant was informed that unless he provided the documentation within four weeks and passed his vetting his employment would be terminated. There was no evidence to suggest that the Claimant replied to the Respondent's letter.
21. The Tribunal heard conflicting evidence as to whether the Claimant had been informed that his request for two weeks' holiday had been refused because he had only 5.7 days accrued entitlement. Regardless, it is clear that the Claimant did not attend work, and had no intention in doing so, from 19 December 2016 to 1 February 2017. By letter dated 9 January 2017, the Respondent asked the Claimant for an explanation. The Claimant replied that he had made a holiday request. In the event, the Claimant chose not to return to work at all in the period 19 December 2016 to the date of termination of his employment as described below. During this period, other security officers were posted to the Bellingham store to fulfil the duties the Claimant would have otherwise undertaken.
22. By letter dated 8 February 2017, the Respondent invited the Claimant to attend a meeting to discuss the termination of his contract because of reduced hours consequent upon the termination of the Lidl contract for certain stores. The meeting took place on 23 February 2017 and was chaired by the Respondent's HR Director. Mr Okwong was also present. The Claimant was informed that the purpose of the meeting was "regarding his contract where Lidl has reduced stores/hrs to Express Securities and also OA [the Claimant] failed vetting as per BS 7858 standard for security industry". The Claimant maintained that he had posted the necessary documentation to Check Your Staff Limited by recorded delivery and heard nothing from them. The Tribunal notes that at the meeting of 22 September 2016, the Claimant informed the Respondent that he had been called by Check Your Staff Limited to say that there were gaps in his vetting history. The Tribunal Mr Okwong's evidence that he contacted Check Your Staff Limited following the meeting and was informed that they had not received the necessary documents from the Claimant. The Tribunal is satisfied that at the time the Respondent took the decision to terminate the Claimant's contract, there was nothing to suggest that the Claimant had provided his documents to Check Your Staff Limited

save for his assertion that he had done so. Nor was there any documentary evidence before the Tribunal, perhaps in the form of a recorded delivery postal receipt, to show that the Claimant had done so.

23. By letter dated 2 March 2017 from the Respondent's HR Director, the Claimant was informed that his employment was to terminate with two week's notice with effect from 13 March 2017. The Claimant's employment ended on that date. The decision to dismiss the Claimant was taken by the Respondent's HR Director and the Respondent's Managing Director. The Tribunal is satisfied that Mr Okwong had discussed with the Respondent's HR Director the reason for the Claimant's dismissal as recorded in the letter of 2 March 2017.
24. The Claimant subsequently appealed and an appeal hearing took place on 10 April 2017 chaired by the Respondent's HR Director. The Claimant's appeal was unsuccessful.
25. Other security officers were also dismissed as result of the loss of the Lidl contract for certain stores.

26. Brief summary of applicable law

Victimisation

27. Section 27 of the Equality Act 2010 provides that 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.

What is a detriment?

28. The Code of Practice on Employment (2011) states:

9.8 'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage...

9.9 ... There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish a detriment.

Determining whether a person is subjected to a detriment 'because' he has done a protected act

29. Although motive will be irrelevant, consideration of what consciously or subconsciously motivated the alleged discriminator to subject an employee to a detriment requires an enquiry into the mental process of the alleged discriminator. What was the real reason? This is the crucial question. See: Nagarajan v London Regional Transport 1999 ICR 877 HL.

30. Discrimination cannot be inferred from unreasonable conduct alone; see for example Commissioner of Police of the Metropolis v Osinaike EAT 0373/09.

The burden of proof

31. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in cases brought under the Act. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.
32. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted. Evidence from the Respondent can, if accepted by the Tribunal, be relevant as showing that, contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the Tribunal could properly infer a prima facie case of discrimination on the proscribed ground; see Igen Ltd v Wong and Others CA [2005] IRLR 258.
33. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption. If the Claimant does not prove such facts, his claim will fail.
34. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."
35. These general legal principles were recently approved by the Court of Appeal in Ayodele v Citylink Limited [2017] EWCA Civ 1913.

36. Conclusion

37. As stated above, the Respondent conceded at the Preliminary Hearing that the Claimant's written complaint about the store manager was a protected act for the purposes of section 27 of the Equality Act 2010.

38. The Tribunal first considers whether the Claimant has proved that he was subjected to the detriments alleged.

38.1. The Tribunal concludes that the Claimant was not subjected to a detriment by reason of a failure on the Respondent's part to provide him with suitable alternative work following the communication to the Respondent of his complaint about the duty manager at Beckenham. The Claimant agreed to move to Bellingham which was in reasonable travelling distance as required under his contract of employment. It was on the same route as Beckenham. The Tribunal accepts Mr Okwong's evidence that the Claimant was moved to Bellingham in order to remove him from the working environment about which he complained. Although the Claimant worked fewer hours at Bellingham, since he worked under a zero hours contract there could have been no reasonable expectation on his part that he would actually continue to work 39 hours each week.

38.2. With regard to the way in which the Respondent dealt with the Claimant's grievance, the Tribunal concludes that the Claimant was subjected to detrimental treatment. Although the Respondent initially did what it reasonably could to investigate the Claimant's complaints of discrimination by speaking to the store duty manager, the Respondent did not provide the Claimant with a response until some weeks later. The Respondent did not seek Lidl's permission to speak to other staff members. Nor, when in receipt of Lidl's response, did the Respondent ask for further enquiries to be made. The Tribunal also notes that the Claimant was not initially invited to attend a meeting to discuss his grievance as envisaged by paragraph 33 of the ACAS Code of Practice: Disciplinary and Grievance Procedures (2015). Although the Claimant's complaint that he had been treated by the duty manager in the way alleged would not necessarily lead to the conclusion that he had been discriminated against, his complaint was serious and deserving of more thorough consideration by the Respondent.

39. Finally, the Tribunal considers whether the Claimant was subjected to this detrimental treatment and dismissed because he had complained about race discrimination in his fax letter of 5 July 2016. The Tribunal is satisfied that Mr Okwong was able to give credible evidence as to the circumstances surrounding events in question and the reasons for the Claimant's dismissal as communicated to him by the Respondent's HR Director. The Tribunal concludes that the Claimant has failed to show, on the balance of probabilities, that the reasons for either the detrimental treatment or the dismissal were in any sense whatsoever because he had done the protected act. There is nothing in the evidence from which the Tribunal could properly draw such an inference.

39.1. Although it might be said that the Respondent dealt with the Claimant's grievance in an unreasonable way such that the Respondent's failings amounted to a detriment, it was not so unreasonable such that the Tribunal could conclude that the reason for the way in which the Respondent dealt with matters as it did was because of the Claimant had done the protected act. Enquiries were made of the duty manager and his version of events communicated to the Claimant. The Claimant

was, perhaps belatedly, invited to a meeting to discuss his grievance. The Tribunal is mindful of the legal principle that discrimination (victimisation in this case) cannot be inferred from unreasonable treatment alone.

- 39.2. The Claimant raised his complaint about discrimination on 7 July 2016. He was given notice of dismissal on 2 March 2017. The time lapse between these dates do not, without more, suggest that the reason for the Claimant's dismissal was because he had raised his complaint.
- 39.3. The Respondent clearly had a reduction in the requirement for security officers consequent upon the loss of contract with Lidl for the provision of security staff at certain stores. When the Claimant chose not to work, the Respondent reasonably covered the requirement for security staff at both Bellingham and Beckenham.
- 39.4. The Claimant's contract was clearly subject to him having passed the vetting procedure. He had not done so. The Tribunal is satisfied that the Respondent, as well as Check Your Staff Limited, prompted the Claimant to provide the necessary documents; the Tribunal is not persuaded that the Claimant actually did so. The Claimant was well aware that failure to pass the vetting process would result in termination. The fact that the Respondent wrote to the Claimant encouraging him as a matter of urgency to provide the relevant documents is inconsistent with the notion that he was dismissed because he had raised his discrimination complaint. Although the letter inviting the Claimant to a meeting to discuss the termination of his employment did not refer to the vetting procedure, the Claimant was informed at the meeting that it would include consideration of the Claimant's failure to provide the necessary documents.
- 39.5. The Tribunal is satisfied, on the balance of probabilities, that the Claimant was dismissed both because of the reduced need for security officers and the fact that he had not satisfied the relevant vetting requirements.
40. There was no credible evidence to suggest that the Respondent sought to discourage the Claimant from pursuing his complaint or that the Respondent dismissed the Claimant in order to protect its client as submitted by Ms Godwins.
41. Even if the Claimant's move to Bellingham had amounted to a detriment for the purposes of section 27 of the Equality Act 2010, the Tribunal would in any event conclude that the Claimant was moved in order to remove him from the work environment in Beckenham about which he complained. The Claimant's protected act was simply the occasion which led to the move and not the reason for it.
42. Even if the Claimant had persuaded the Tribunal of a prima facie case that he had been victimised when he was dismissed, the Tribunal would in any event be satisfied that the Respondent has shown an adequate and non-discriminatory reason for his dismissal as set out in paragraph 39 above.
43. For the reasons set out above the Claimant's claim fails.

Employment Judge Pritchard

Date 29 November 2017