



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MRS G CLARK

AND

Respondent
SOUTH WALES INDUSTRIAL
EQUIPMENT LTD T/A SWIE-LIFT

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 11TH / 12TH / 13TH / 14TH SEPTEMBER 2018

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS: MRS M WALTERS
MS C WILLIAMS

APPEARANCES:-

FOR THE CLAIMANT:- CATHERINE CLARK (CLAIMANT'S
WIFE)

FOR THE RESPONDENT:- MR DANIEL SMITH

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims of:-

- a) Direct discrimination contrary to s 13 Equality Act 2010;
- b) Harassment contrary to s26 Equality Act 2010;
- c) Victimisation contrary to s27 Equality Act 2010

Are dismissed

Reasons

1. This is the decision of the employment tribunal in the case of Mr G Clark (claimant) v South Wales Industrial Equipment Ltd (respondent). By this claim that the claimant has brought claims of direct discrimination and victimisation and harassment contrary to sections 13, 27 and 26 of the Equality Act 2010. The claims are based on the protected characteristics of race/nationality (the claimant is of South African origin) and disability. The claimant has Type 1 diabetes and it is not in dispute that by reason of this he is a disabled person within the meaning of s6 Equality Act 2010.

Direct Discrimination/ Victimisation

2. Both the claimant's claims of direct discrimination and victimisation relate to his dismissal. The events which led to his dismissal can be stated shortly. On 13th July 2017 there was an incident between Karl Williams and the claimant in which Karl Williams alleges that the claimant touched his groin. On the morning of 14th July 2017 Karl Williams attended work having decided to complain about this. He spoke to other members of staff and seven of them signed a grievance relating to the claimants conduct (although 1 later withdrew).
3. Mr Simon Lewis conducted a number of investigatory interviews on 14th July 2017. The claimant was off work that day but on Monday 17th July he was suspended and on Wednesday 19th July he attended a disciplinary hearing at which Mr Lewis was the notetaker and Mr Mark O'Connor the decision maker. The claimant faced three allegations of misconduct which he denied and continues to deny. Mr O'Connor upheld them and decided the claimant should be dismissed, which was orally conveyed to the claimant on 20th July and confirmed in writing on 21st July. The claimant subsequently appealed. His appeal was heard by an external HR Consultant and was dismissed. As the claimant does not have two years' service there is no claim for unfair dismissal and accordingly we are not concerned either with the fairness of the process nor the outcome, but only whether the decision was discriminatory.
4. The claim of direct discrimination is based upon the proposition that the claimant's dismissal was an act of direct discrimination on the grounds of either or both of the protected characteristics of nationality and disability. As set out above the claimant was dismissed in July 2017 following the investigation of a grievance lodged by a number of his workmates on 14 July. The person who made the decision to dismiss him following that investigation was Mr Mark O'Connor. In the course of the hearing the claimant has accepted that whilst he believes that Mr O'Connor's decision to accept that he had committed the misconduct alleged against him was a wrong conclusion, he is not alleging that Mr O'Connor acted in bad faith and accepts that the decision that he made was based upon a genuine belief that the misconduct had been committed; and was not based in whole or in part upon the fact of his nationality

or his disability. It follows automatically that the claim of direct discrimination must fail.

5. Similarly we can deal with the claim of victimisation swiftly. The claimant's pleaded case is that he informed his line manager Mr Christopher Hurlow that he had been the subject of harassment in relation to his protected characteristics; and in particular he subsequently, following what has been come to be called the forklift incident in the course of the hearing, explained that he had had an altercation with Mr Thomas, but told Mr Hurlow that he did not wish the allegation to be taken any further. His pleaded claim is that either or both of these alleged conversations were a protected act and that he was subsequently victimised in that he was dismissed for having made them. Mr Hurlow disputes that the first conversation took place but accepts that the second did. However it is accepted by the claimant that Mr Hurlow did not breach the request for confidentiality made by him and did not pass on these comments or investigate himself. Accordingly it is accepted that no one other than Mr Hurlow was aware of this conversation, and secondly it is accepted that Mr Hurlow did not himself perform any act to the claimant's detriment in consequence of any disclosure, and nor was he involved in any way in the process which led to the claimant's dismissal. It follows equally therefore that there is no causal link between any disclosure and the dismissal, and the victimisation claim is also bound to fail. Whilst these claims have not formally been withdrawn in the course of discussion the claimant did not dispute that this analysis is correct in respect of both claims.

Harassment

6. That leaves the claims of harassment. The claimant's case is that he joined the respondent on 12 October 2016 as a workshop engineer. He was initially based in the workshop and then after a period of time worked mostly on the road as a mobile mechanic. In January 2017 he returned to the workshop effectively full-time. The claimant alleges that throughout his period of employment there was "banter" between him and Mr Ian Thomas and Mr Paul Johns both of whom worked in the workshop. His case is that the "banter" for the first few months was similar to that of which he later complains, but that at some point after approximately January 2017, the tone changed and became less friendly and more pointed. As is set out in the agreed list of issues it is alleged that the following allegations are said to have occurred "on a daily basis" by either or both of Mr Thomas or Mr Johns: a) "all South Africans are arrogant and aggressive", b) that they "had met another South African who was just as offensive and aggressive as the claimant", c) called him "a South African twat", d) called him "a South African bastard", e) called him "bi-polar", f) called him "schizo", and g) told him that he "should be in a psychiatric hospital". The first four type of comments are alleged to be harassment related to the protected characteristic of nationality, the latter three comments are alleged to be acts of harassment related to the protected characteristic of disability in that the claimant alleges that they are based on mood swings which are a consequence of his diabetes.

7. The legal analysis is straightforward. All of the remarks alleged are self-evidently on the face of it “related” to one or other of the protected characteristics. If they were made that would be sufficient at least to satisfy stage 1 of the Igen v Wong test and transfer the burden to the respondent. Equally if they were not said the claims will fall at the first hurdle.
8. Therefore the first question is whether those comments were made. There is a fundamental dispute between the parties as to whether they were or were not. There is an absolute conflict between the main protagonists, the claimant on the one hand, and Mr Thomas and Mr Johns, who both deny ever making any such comments. There is no middle ground between the poles of the evidence.
9. The respondent points to the fact that a number of other witnesses have been called all of whom deny ever hearing any comments of that type and all of whom worked in the workshop to a greater or lesser extent. In particular the respondent relies on the evidence of Christopher Hurlow the claimant’s line manager. His evidence was that he had a good relationship with the claimant, which is not in dispute, and that he spent some 90% of his time in the workshop where his desk was located and heard no such remarks. They point to the fact that there is no contemporaneous support for the claimant’s allegations and that the first reference to them was made in his appeal letter of 26th July 2017.
10. The claimant submits that we should accept that his evidence is honest and truthful. He points to the fact that the allegation was made relatively contemporaneously in the appeal letter, and that there is evidence in the later grievance investigation from Mr Martin O’Brien and Keiron Maskell which to an extent support his version of the various events in question. In respect of those two neither has been called to give evidence before us and accordingly we have no means of judging the reliability of their accounts. In addition there are parts of both of their accounts in the investigatory interviews which support the claimant’s contentions but other parts which support the respondent’s. Having not heard from them there is no basis upon which we can disentangle those parts of their evidence which support one party and those which support the other. It is therefore very difficult to place any weight on the contents of their interviews.
11. Fundamentally we have to decide on the balance of probabilities which account we accept, and we have not found this an easy issue to resolve. The claimant gave evidence in an apparently honest fashion. He did not give the impression of deliberately lying or embellishing his evidence and we have no specific reason to disbelieve him. In addition he has acted transparently reasonably in the course of this hearing particularly in relation to the direct discrimination and victimisation complaints set out above, which tends to disprove any allegation that this is a deliberately fraudulent claim.
12. On the other hand that is equally true of the evidence of Mr Thomas and Mr Johns. Neither gave the impression that they were lying or embellishing their evidence. Each has been reasonably consistent throughout the process, from the initial investigation

to this hearing. Where there are inconsistencies they are relatively minor and in truth it would be more suspicious if there were none.

- 13. It follows that there is very little to choose between the main protagonists and the accounts that they give, but equally they cannot all be correct. How therefore do we make a decision on a rational rather than impressionistic basis? In our judgment the nearest thing we have to an independent witness is Mr Hurlow. Whilst he is obviously not wholly independent as he is employed by the respondent, and is giving evidence for them, in broad terms it was accepted that he was on good terms with the claimant, has given honest and truthful evidence in relation to the victimisation claim and played no part in the dismissal. If Mr Hurlow's evidence is correct it must follow that the comments were at very least not made on a daily basis as alleged by the claimant.

- 14. We have concluded that we do accept Mr Hurlow's evidence from which it follows that there is no support for the claimant's account but there is for the respondents. We do accept his evidence and therefore whilst as between themselves it is very difficult to judge between the evidence of the claimant and Mr Thomas and Mr Johns, on the evidence before us we are not satisfied that the claimant has satisfied the us on the balance of probabilities that his account of the factual allegations underlying the claims of harassment is correct. It follows that the claims of harassment must also be dismissed.

**Judgment entered into Register
And copies sent to the parties on**

.....15 October 2018.....

**.....
for Secretary of the Tribunals**

**EMPLOYMENT JUDGE Cadney
Dated: 10 October 18**