



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ullah
Respondent: B & Q plc
Heard at: Leicester
On: 7, 8 and 9 January 2019
Before: Employment Judge Brewer
Members: Mr J Akhtar
Mr C Tansley

Representation

Claimant: In person
Respondent: Mr D Piddington of Counsel

JUDGMENT

1. The claims for race discrimination and religious discrimination fail and are dismissed.
2. The claims for harassment on the grounds of religion and race fail and are dismissed.
3. The claim for unlawful deductions fails and is dismissed.

REASONS

Background

1. By a Claim Form dated 27 February 2018, Mr Ullah brings claims for unlawful deduction from wages, direct race discrimination, direct religious discrimination and harassment related to religion and race.
2. The tribunal spent the first day reading in this case. We heard evidence over the second day and the morning of day 3. We heard evidence from the Claimant (Mr Ullah) along with the following witnesses for the Respondent:

- Angela Peel
- Richard Taylor
- Dave Drewett
- Matt Knibbs
- Tom Dallison

Each witness adopted their witness statement as their evidence-in-chief and were cross-examined. We had an agreed bundle which we have taken account of.

3. At a preliminary hearing on 17 August 2018, Mr Ullah was ordered to pay a deposit as a condition of continuing a number of other claims for discrimination. Claims relating to discrimination in relation to the events of 27 November 2017 were exempted from the deposit order. In the event, Mr Ullah indicated that he would not be paying the deposit and therefore the claims we are left with relate to the unlawful deductions and the incident which took place at a meeting on 27 November 2017 between Mr Ullah and Ms Peel and the fact that Mr Ullah was not given a particular job. Finally, Mr Ullah says that what Ms Peel said at the meeting on 27 November 2017 amounts to harassment related to his religion and/or his race.

Issues

Unlawful deductions

4. In relation to unlawful deductions, the issues in this case are as follows:
 - 4.1 Were any deductions made from Mr Ullah's wages?
 - 4.2 If there were deductions, were they unauthorised?
 - 4.3 Is the claim for unlawful deductions in time?
 - 4.4 If it is not in time, should the tribunal extend time on the basis that it was not reasonably practicable for Mr Ullah to bring the claim in time and the extra time taken was reasonable.

Direct discrimination

5. In relation to the claim for direct discrimination on both grounds of race and religion, the issues are:
 - 5.1 Was Mr Ullah treated less favourably than the Respondent did or would treat a comparator who is not in materially different circumstances than Mr Ullah?
 - 5.2 If so, was that treatment because of his race or religion?
6. The particular acts of less favourable treatment complained of under this heading are:
 - (a) Ms Peel describing Mr Ullah as either a terrorist or a B & Q terrorist, and
 - (b) not giving him the internal promotion he was applying for.

Harassment

7. In relation to harassment, the issues are whether Ms Peel using the term 'terrorist' or 'B & Q terrorist' in relation to Mr Ullah amounted to unwanted conduct, relating to in this case religion or race which had the purpose or effect set out in section 26(1)(b) of the Equality Act 2010.

Time limits

8. In relation both to the direct discrimination claim and the harassment claim, there is an issue as to whether the claim was brought in time and if not, whether the tribunal should exercise its discretion to allow the claim to be heard out of time on the basis that it is just and equitable to do so.

The law

9. In relation to the claim for unlawful deductions, we have considered sections 13 and 23 of the Employment Rights Act 1996.
10. In brief, section 13 says that an employer shall not make a deduction from the wages of a worker unless the deduction is authorised, either by law, by contract or by prior written agreement or consent by, in this case, Mr Ullah.
11. By virtue of section 23, a worker may present a complaint to an employment tribunal that his employer has breached section 13 of the 1996 Act and must do so within 3 months of the alleged unlawful deduction or, where it was not reasonably practicable for him to bring the claim within the normal time limit, within such further time as the tribunal considers reasonable. I should add of course that the 3 month time limit may be varied by reason of early conciliation but that is not a matter which this case is concerned with given the timings.
12. In relation to direct discrimination, we have considered section 13 of the Equality Act 2010, which is essentially that it is unlawful to discriminate against an employee because of a protected characteristic. In this case, the protected characteristics relied on are religion and race.
13. In relation to harassment, we have considered section 26 of the Act, which for the purposes of this case says that harassment occurs where the employer engaged in unwanted conduct towards Mr Ullah related to religion or race where the conduct has the purpose or effect of violating Mr Ullah's dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment for him.
14. For reasons which follow, we have not found it necessary to deal with any specific case law.

Findings of fact

15. We make the following findings of fact relevant to the claims before us.
16. Mr Ullah commenced employment with the Respondent on 15 November 2010.
17. On 27 November 2017, Mr Ullah was interviewed by Ms Peel for the role of Trading (Replenishment) Manager.
18. The Claimant was informed that he had been unsuccessful in his application on 13 November 2017.

19. On 6 December 2017, Mr Ullah was signed off sick with work related stress.
20. On 12 December 2017, Mr Ullah raised his grievance.
21. Following the raising of his grievance, there followed an investigation. A number of witnesses were spoken to. The outcome of Mr Ullah's grievance was sent to him in writing on 26 January 2018. Mr Ullah appealed against that on 31 January 2018 and his grievance appeal meeting took place on 26 February 2018. The outcome of that appeal was sent to him in writing on 28 February 2018.
22. As we have said above, Mr Ullah brought his claim before the employment tribunal on 27 February 2018 having sought early conciliation on the same date.
23. In relation to overtime, the Respondent's policy is that anyone who works fewer than 39 hours per week and who then works overtime hours so that their total working hours in a week is up to a maximum of 39, receives overtime pay at their basic hourly rate. Anyone who works overtime for any hours over 39 per week, receives overtime pay at time and a half for those hours.
24. The Claimant worked overtime from 2 February 2015 until 29 May 2017 at various times during that period.
25. In order to receive his overtime pay, Mr Ullah completed on each occasion he worked overtime, an overtime authorisation form. All of these can be found at pages 514 – 542 of the bundle. Each form shows Mr Ullah agreeing to receive basic pay for the overtime hours he worked, save for one where he was in receipt of time off in lieu.
26. At his interview for the manager role with Ms Peel, which took place on 27 November 2017, there is an exchange which appears in the transcript at pages 262 and 263 of the bundle and which is the subject, and indeed the central issue, in this hearing. The exchange is as follows:

Ms Peel says: *"Yeah I said there would be times when you seemed very engaged and very up for it and there's other times you have almost been verging on being, I hate to say it because it's such an inappropriate word, but being a terrorist. And do you know that is an old B&Q word don't you"*

Mr Ullah says: *"Yeah"* and is heard on the recording which he made of this interview laughing.

27. Ms Peels goes on:

"That is not me saying another kind of terrorist, I am not saying that".

Mr Ullah responds: *"You're calling a Muslim guy a terrorist"*. Again, he is heard on the recording laughing.

Ms Peel then says: *"No, no, no, no, I know that's why it sounds so ridiculous I'm not saying anything"*.

Mr Ullah responds: "OK".

Ms Peels then says: *"You understand what I mean by a B & Q terrorist"*.

Mr Ullah responds: *"Yep, yeah"*.

28. As we have set out above, Mr Ullah says that that exchange amounted to Ms Peel calling him a terrorist and he says that that amounts to discrimination because of race and because of religion.

Discussion

Unlawful deductions

29. In relation to the unlawful deductions claimed, we have considered the evidence presented. The first finding we make is that the claim was considerably out of time, by at least 6 months. We have therefore considered whether we should extend time. In order to do that we would have to be satisfied that it was not reasonably practicable for Mr Ullah to bring the claim in time. We do not accept Mr Ullah's evidence that he was unable to bring the claim in time and indeed at best his strongest argument was that he was unwilling to do so. That, it seems to us is neither a physical nor a mental impediment to him being able to bring a claim in time. On balance considering his evidence, he gave no cogent or credible reason why he waited so long to bring this claim.
30. It follows from that that we do not need to consider whether the extra time taken to bring the claim was reasonable. We simply find that given that it was practicable, or to put it in the words of the statute, it was not "not reasonably practicable" to bring the claim in time, the claim is out of time and we decline to extend time in the circumstances in which case we have no jurisdiction to hear it.
31. However, we should add for the sake of completeness that even if this claim was one we could hear, we would find in the Respondent's favour. It was suggested during the hearing that Ms Peel may not have authority to vary the contract – that is to pay basic rate for overtime rather than time and a half - but the evidence was not as clear as that and our analysis is simply as follows: first, either Ms Peel did have the authority to agree with Mr Ullah that he would receive basic pay for the overtime hours worked or even, if she did not, in fact Mr Ullah agreed to receive basic pay. So, either there were no deductions or there were deductions but they were authorised in writing by Mr Ullah prior to payment. On that basis, he could not possibly succeed in this claim.
32. That leaves the discrimination claims. The time limit for bringing a claim for either direct discrimination or harassment is 3 months from the date of the act complained of. If a claim is not brought within the normal time limit, the tribunal has what is termed a just and equitable jurisdiction, that is to say we can entertain the claim if we consider that it is just and equitable to do so. We

have given very careful consideration to whether it is just and equitable to extend time in this case but on balance, we find that it is not.

33. Mr Ullah felt that he had been discriminated against on the ground of his race and/or his religion either during or immediately after the meeting on 27 November 2017. He gave no clear reason why he did not bring his claim in time. He again seemed to rely on lack of knowledge and also incorrect advice given by a non-professional adviser. We find it difficult to believe that somebody as intelligent as Mr Ullah with access to a computer and the internet, and the belief that he had suffered discrimination of the grossest kind at the hands of Ms Peel, did not have the wherewithal to go on the internet and find out what the normal time limit was for bringing a claim and meeting that time limit. He was clearly able to do that on 27 February so it somewhat beggars belief that he could not do it on 26 February or anytime between 27 November 2017 and 26 February 2018.
34. We are mindful, however, that notwithstanding the jurisdiction difficulty, Mr Ullah remains an employee of the Respondent and it will leave both Mr Ullah and indeed Ms Peel, who has been the subject of some discussion during this tribunal, in a very invidious position if we do not set out our views on the merits of the claims Mr Ullah brings.
35. The first issue is in relation to Mr Varnam getting the replenishment manager role rather than Mr Ullah.
36. In relation to that, in essence we accept entirely the case put forward by Mr Piddington on behalf of the Respondent. In evidence, Mr Ullah accepted that Mr Varnam had the better CV and more relevant experience than he, and it seems to the tribunal that Ms Peel took that into account when reaching her decision. Ms Peel's reasoning for preferring Mr Varnam related entirely to his skill set and experience and following her interviews with both candidates. In essence, there is no evidence that she did not choose the best candidate for the job and therefore no evidence from which we could possibly conclude that there was discrimination in relation to her choice of Mr Varnam.
37. That leaves the issue of the words used during the interview, which we have set out above.
38. We have asked ourselves the basic question whether Ms Peel would have treated a comparator in the same way she treated Mr Ullah. A comparator must be somebody whose circumstances are not materially different from Mr Ullah's and therefore in this case the comparator would be somebody not of his race or religion but of the same seniority, the same experience and with the same relationship with Ms Peel that Mr Ullah enjoyed, if that is the right word.
39. We have concluded from all of the evidence that Ms Peel is what we would describe as a plain speaking manager and it is clear from the evidence that her relationship with Mr Ullah is not an easy one. Having said that, it is also clear from the evidence that she spends as much time praising him as she does criticising him and our view of the evidence is that she can be very

praising and criticising. We also note that there are a number of examples where she has sought to push Mr Ullah forward in his career, including for example trying to persuade him to remain on the manager's WhatsApp group, which he left, whether that be right or wrong because she felt it was in his best interests.

40. We have also considered the context in which the comment was made. The terrorist comment was made almost halfway through a lengthy interview. At no point during the interview does the Claimant say he was upset or indeed even indicated that he was upset by the comment. It does not seem to us to be an answer to the question for Mr Ullah why he did not criticise Ms Peel for her comment, to say that in effect she is senior to him and he would not do so, because it is quite clear from the rest of the interview that he can be and has been critical of her to her face, and therefore we question why he was not critical of the terrorist comment if he was upset by it. We are also mindful that reading the transcript, the way Mr Ullah conducted himself before the comment and after the comment did not seem to change and we conclude that if he was as upset as he said, or indeed upset at all, he would have behaved rather differently after Ms Peel made the comment which she did.
41. In fact, Mr Ullah only complained about this comment after he failed to be appointed to the manager role.
42. We take on board Mr Ullah's evidence that his laughter was a way of him dealing with an uncomfortable situation but being uncomfortable is not the same as being the subject of race and religious discrimination or harassment. It also does not explain why, when Ms Peel asks him "*You understand what I mean by B&Q terrorist*", he says that he does.
43. We find that the reason Mr Ullah raised his grievance was his disappointment in the literal sense, which is that he did not get the Trading (Replenishment) Manager job. We find that Ms Peel would have said the same words to a comparator not of Mr Ullah's race or religion and we find that the use of that word did not amount to race or religious discrimination and is a very long way from amounting to harassment within the meaning of the Equality Act 2010.
44. So, had the claim made by Mr Ullah been in time or had we extended time, we would not have found in his favour in any event and would have dismissed the claim.
45. Finally, in relation to harassment, as we have said it must follow from our findings that nothing Ms Peel did amounted to conduct which had the purpose or effect set out in section 26 of the Equality Act 2010 even if it was unwanted by Mr Ullah, and we can well imagine that it might be, but given our findings we do not need to make a decision about that.

46. For all of those reasons, all of the claims fail and are dismissed.

Employment Judge Brewer

Date: 26 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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