



EMPLOYMENT TRIBUNALS

Claimant: Mr A Leader

Respondent: Andrew Hossack

Heard at: Leeds

On: 25 June 2019

Before: Employment Judge Maidment

Representation

Claimant: Mr R Lees, Counsel

Respondent: Did not attend and no appearance entered

JUDGMENT having been sent to the parties on 3 July 2019 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues and evidence

1. The Claimant's sole complaint in these proceedings was of race discrimination and more particularly that he had suffered racial harassment from a colleague, the Respondent. Initially the Claimant's employer, Leeds City Council, had been named as a Respondent in this claim. However, the Claimant had, at a prior preliminary hearing, accepted that it had made out the statutory defence pursuant to section 109(4) of the Equality Act 2010 and shown that it had taken all reasonable steps to prevent the Respondent from making any racist comments to fellow employees. The complaint therefore against Leeds City Council was dismissed.
2. The Respondent has never submitted a response to these proceedings. The Claimant's complaint was separately served upon him and he was subsequently sent a copy of the response submitted by Leeds City Council. That recounted that Leeds City Council had investigated the Claimant's allegations against the Respondent relating to comments he was said to have made, that the matter was been referred to a disciplinary hearing to consider a charge of gross misconduct, but that the Respondent resigned from his employment prior to a disciplinary hearing.

3. The matter was listed for a final hearing which took place on 25 June 2019.
4. The Respondent did not attend the hearing and made no written representations.
5. The Tribunal heard evidence from the Claimant, who confirmed the contents of his written witness statement.

Facts

6. The Claimant's account was coherent, credible and convincing. The Tribunal accepted it as a true statement of fact. The Tribunal had before it no evidence or representations challenging his evidence.
7. The Claimant is employed by Leeds City Council as an Environmental Action Operative. He describes himself as black Afro-Caribbean in terms of his colour/ethnicity.
8. The Claimant was working with the Respondent, an assistant chargehand and his superior, on 9 February 2018. He was a passenger that day in a works vehicle driven by the Respondent.
9. As the vehicle was pulling into Kirkstall Tip at 9am, the Claimant and Respondent were listening to the news on the radio when the broadcaster announced that at the 2018 Winter Olympic Games the temperature was -11° C. The Respondent said to the Claimant: "*If you think it's cold here you should take your black arse over there.*" The Claimant looked at the Respondent with astonishment. The Respondent then said to him: "*Your arse is black isn't it?*" The Claimant answered saying: "*The last time I looked it was*".
10. The vehicle then pulled up behind a lorry with a Polish registration plate. The lorry was taking a bit of time and the Respondent said: "*These fucking foreigners*" to which the Claimant responded: "*You sound like a racist*".
11. The Claimant then informed the Respondent that he was not feeling well and asked to be dropped off at the nearest point to his home. As he was leaving the vehicle, the Respondent asked what he should tell their line manager about the Claimant going home, to which the Claimant replied: "*You can tell her what you fucking like*".
12. The Claimant said that he subsequently received a call from the Respondent's own line manager asking him to return to work. The Claimant described himself as being unable to do so because he felt angry and distressed and was not in the right frame of mind. He told the line manager what had happened in terms of the Respondent's comments to him.
13. The Claimant described himself as vexed and upset and said that what had happened had hurt him. Whilst he returned to work as normal on his next shift, he was very upset about what had happened and was not happy to work with the Respondent again, considering him to be a racist.

14. The Claimant was spoken to about the incident on 12 February and on 22 February Leeds City Council confirmed that the incident was being dealt with under its disciplinary policy and that the Claimant would not be required to work with the Respondent. However, the Respondent was not suspended or relocated. The Claimant did not receive any further communication from the Council and subsequently submitted a grievance on 12 April about the discrimination he alleged he had suffered. Since the incident, whilst he had responded to basic greetings from the Respondent in a like manner, he had otherwise not spoken to him. He had been concerned that the Respondent might be successful in applying for a vacant chargehand position as that would mean that the Claimant would have to ring him every morning for instructions. The prospect of talking to him made the Claimant feel anxious. He did not want to work with the Respondent in the future.
15. The Claimant described himself as angry, worried and feeling isolated from his colleagues. His anger was reactivated every time we saw the Respondent which was he described as “*all the time*” when at work.

Applicable law and conclusion as to liability

16. Whilst the claims had proceeded on an undefended basis, the Tribunal considered the necessary components in a complaint of harassment pursuant to section 26 of the Equality Act 2010 which provides (where race is one of the relevant protected characteristics):

“(1) *A person (A) harasses another (B) if -*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- a. the perception of B;*
- b. the other circumstances of the case;*
- c. whether it is reasonable for the conduct to have that effect.”*

17. The Respondent’s comments were clearly unwanted by the Claimant and related to race, his own colour and the nationality of others in respect of the comment about those in the Polish registered lorry. They certainly, at the very least, had the effect of creating a hostile, degrading humiliating and/or offensive environment for the Claimant and in all the circumstances it was not unreasonable for the Respondent’s comments to have that effect on the Claimant. The Claimant suffered from unlawful harassment.

Remedy

18. In terms of remedy, the Tribunal was referred to the Vento guidelines (derived from the case of **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the Claimant.
19. The bands originally set out in **Vento** have increased in their value due to inflation and a further uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. This had given rise to Presidential Guidance which, in respect of claims brought after 6 April 2018 but before 6 April 2019, prescribes a lower band from £900 to £8,600 and middle band of £8,600 to £25,700.
20. The Claimant had produced a schedule of loss in which he sought the sum of £5000 as compensation for injured feelings. Mr Lees volunteered that this perhaps overstated the appropriate level of compensation. It was accepted that what was complained of was effectively a one-off incident of racist comments, an isolated incident with no previous comments of a similar nature made by the Respondent to or in the Claimant's presence and none since the incident in question. The comments had not been made in a public place and were not overheard by anyone. He accepted that the Claimant had produced no medical evidence and had been able to go to work on the day following the incident.
21. However, there had been no apology received from the Respondent after the incident or any attempt at an explanation for his comments. The Respondent was the Claimant's assistant chargehand such that the Claimant worked in a directly subordinate position to him and the Claimant had been quite stoic in circumstances where other employees might have reacted more the face of such comments.
22. All of these factors suggest the appropriateness of an award for injury to feelings at the lower end of the lower bracket described in the Vento case. However, whilst the Claimant had not been directly abused (in the sense of being called by a particular term), comments had been made which angered and upset the Claimant and reasonably so. He had felt unable to carry on working on the day of the incident. Furthermore, the effect of the comments were not momentary and affected the Claimant on a continuing basis whilst he attended work in circumstances where the Respondent remained within the workplace, in his position as assistant chargehand and where the Claimant regularly came across him. The comments resulted in a disciplinary process in which the Claimant was involved by his employer

and in the need, in the Claimant's mind, to then raise his own grievance about the Respondent's treatment of him.

23. In all the circumstances the Tribunal considers an award in the sum of £2500 to be commensurate with the treatment to which the Claimant was subjected and as representing, in so far as possible in money terms, the hurt and upset caused to him.
24. Interest at the rate of 8% accrues on that sum over a period of 70 weeks from the date of the incident to the date of this hearing. That amounts to a further sum the Respondent is ordered to pay to the Claimant of £269.23.

Employment Judge Maidment

Dated: 15 July 2019