Case Number: 1801533/2018

1804856/2018

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr E Idusogie	v	**Suez Recycling & Recovery Kirklees Limited**

Heard at: **Leeds** **On:** **15th, 16th and 17th July 2019**

Before: **Employment Judge Lancaster**

Members: **Ms H Brown**

Mr M Brewer

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr M Humphreys, counsel**

JUDGMENT having been sent to the parties on 18 July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, based upon the transcript of the oral judgement delivered immediately upon the conclusion of the case:

REASONS

1. These are claims by Eric Idusogie against Suez Recycling and Recovery Kirklees Limited. There are three claims. Two of them are for monies allegedly owed, the first of those is for outstanding holiday entitlement not taken at the time of termination, the second is for enhanced contractual paternity pay. The third claim is a complaint of harassment or discrimination because the claimant is of Black African heritage.

Holiday Pay

2. So far as the holiday pay claim is concerned it has already been decided at an earlier hearing that the effective date of termination in this case was 26 March 2018. Up to that date it is conceded that the claimant still had seven days' holiday owing to him that he has not been paid for.

3. The claimant had gone off sick in September 2017 and had not taken his full holiday entitlement for that year, he was also already carrying over some leave from the previous year which his employers allowed him to do. So at the end of the calendar year, the holiday year 2017, he still had 14 days leave outstanding. He remained off sick until the end of his employment on 26 March, that is

effectively one quarter of the year and the respondent is prepared to concede that that gave rise to an entitlement to a further 9 days holiday. So that is 23 days still outstanding at the date of termination. However, after the end of employment there is a payslip which clearly records the payment of holiday pay and that equates to 16 days, so there is 7 days outstanding.

4. The claimant has included in his schedule of loss a calculation for pay which takes account of regular overtime. The respondent does not contest that rate of pay. That therefore results in a gross sum owing to the claimant for untaken holidays of £697.48, and that figure is conceded. So that part of the claim succeeds.

Paternity Pay

5. The second part of the claim is in relation to contractual paternity pay. The claimant's wife gave birth at the end of January 2018, that was during his period of sickness absence. The respondent contractually will pay enhanced paternity leave. So where an employee is entitled to statutory paternity leave the respondent will pay more than that minimum statutory sum. It will in fact pay full wages and for a period not limited to the two weeks paternity leave provided for in statute but for up to three weeks, if the longer period is applied for.

6. That still requires the employee to go through the procedural hurdles that will ensure he is entitled to the statutory leave. He then of course can elect to take the more advantageous contractual company pay for the longer period.

7. That application for paternity leave ought ordinarily be made no later than 15 weeks before the expected date that the baby is to be born. That did not happen in this case and by that stage the claimant was already off sick. At no subsequent stage did he ever actually apply for paternity leave. So he never said when he wanted paternity leave to start - and it must be taken to end within a period no more than 56 days from the date of birth - and nor did he say how long he wanted to take paternity leave for: see Paternity & Adoption Leave Regulation 2002, regulations 4,5 and 6. We cannot, and do not imply in these circumstances as the claimant would apparently have us do, a term that he is automatically entitled to paternity pay by reason of the fact that the respondent knew that he was shortly to be or that he had become a father.

8. So on a simple contractual analysis the claimant was not entitled to company paternity pay; he had not met the pre-conditions. It is accepted that if he had made a delayed application the respondent would have been lenient and allowed him to take leave. That is so even though the claimant would not have been taking paternity leave in the ordinary sense. Obviously, these provisions are designed for somebody who is at work and then wishes to take time off work in order to be present and care for their partner and new baby. But of course in this case the claimant did not need to take time off work because he was already at home to do that. That leaves the undecided question as to whether paternity leave (whether statutory or contractual) is meant to cover the position where somebody is already absent from work, so that he should be entitled to avail himself of an advantageous rate of pay at a point where he is not actually fit to work in his contractual position. The short answer in this instance is that even if he might have been potentially able to claim it in these circumstances the claimant did not make the relevant application. He is

therefore not contractually entitled to paternity pay, which would in this case amount to no more than 3 times a half weeks' pay. That claim is dismissed.

Harassment/Discrimination

9. The final claim and by far the most significant in this case is one made under the Equality Ac 2010 t: that is either of harassment or direct discrimination because of race. It cannot be both. If it is harassment it cannot by definition of the Equality Act (section 212) also be a detriment amounting to direct discrimination, that is less favourable treatment because of race. So necessarily we look firstly whether or not this is harassment under section 26 of the Act. In reality, if the claimant were not to succeed on his harassment claim there could be no claim of direct discrimination either. There are nothing on the facts of this case which would indicate that if he did not meet the test of harassment he could somehow claim direct discrimination as an alternative, so that is what we are concentrating on.

The Issues

10. Harassment occurs when somebody engages unwanted conduct related to a relevant protected characteristic, in this case race, and that conduct has the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating offensive environment for them.

11. In assessing whether it does have that effect we look at the perception of the claimant and objectively at all the circumstances to determine whether it would be reasonable to conclude that it did indeed have that effect in this case. That however, is not an issue here. The claimant said that offensive comments were made to him, if they were made and if they were indeed related to his race, his colour, then necessarily they are offensive: they cannot be anything else. So the crucial issue we have to determine is firstly what was or was not actually done that may amount to unwanted conduct, and more particularly is that related to the claimant's race.

12. In this context, as in every alleged breach of the Equality Act the burden of proof provisions in section 136 take effect. The claimant who brings this claim must prove the alleged harassment. That means that initially he must prove facts from which we, the Tribunal, could conclude in the absence of any other explanation that there has been a breach of the relevant provision of the Act. That is in answer to the question: is this conduct, if it took place, related to race? He must establish facts from which we could conclude that it is. If he does so then the respondent has the burden of proving it had nothing to do with his race, or is not related to it, and if it fails to do that the claim must succeed.

The Facts

13. There are three elements of the harassment claim. The first two, which we have already referred to, are comments made to the claimant. The third is an allegation that his protective safety equipment, his hat and goggles which he put down because he did not need them whilst working on the conveyor belt, have been removed or knocked onto the conveyor.

14. We can shortly dispose of that third allegation, there is no evidence that this happened. The person who is said to have done that is Nathan Hirst, the same person who is alleged to have made the offensive comments. The claimant

relies on closed circuit television footage that shows the two men working together on the conveyor belt on the morning of 21 September 2017. Whilst that footage shows Mr Hirst near to where the claimant had left his safety equipment we have viewed it and it does not show him actually doing anything to the claimant's helmet and goggles. That was the same conclusion reached by the managers who viewed that footage and indeed by the claimant's union representative in the course of the grievance meeting. It is only the claimant who purports to be able to see from that footage evidence supporting his categoric assertion that Mr Hirst deliberately removed his safety equipment - which the claimant says with the view to getting him into trouble as he would then be caught not following the necessary safety measures and be subject to disciplinary action. There is simply no evidence on the CCTV footage that would enable us to draw that conclusion. So, what we are concentrating on are two comments.

15. These are on consecutive days. It has not always been easy in the course of this hearing to establish precisely what the claimant says happened because he has had difficulty in distinguishing between what was actually said by Mr Hirst and what he thinks is the reason why it was said. The claimant of course asserts categorically that he believes that both these comments were made because of his race.

16. Firstly, on Wednesday 20 September the claimant says that shortly after the lunch break, after midday, there was a passing comment from Mr Hirst. He alleges that Mr Hirst said "you smell and you stink", or as he put it in an earlier report in the grievance stage, "you smell and you smell in my face". That has been corrupted somewhat in the retelling to his being called "smelly and stinky", but that is not in fact what the claimant is alleging. The words are "you smell, you stink".

17. Mr Hirst in his evidence, in cross examination, denied that. His witness statement to the Tribunal is not quite as categoric as that. He says in his statement that he would not have used words like 'smelly and stinky'. Once we have taken that specific and inaccurate allegation out of the equation we simply need to consider that he also says that he does not remember the incident.

18. On balance in relation to what happened on 20 September we accept the claimant's evidence that something was said to him by Mr Hirst to the effect that "you smell". Contextually that is plausible because the claimant in his own mind linked that to what happened the following day, and in our view, it does take that combination to give any logical explanation as to why the claimant reacted as vehemently as he did on the next day. There is no categoric denial from Mr Hirst in his statement and of course the claimant did make a complaint, almost contemporaneously. He raised a grievance on 24 September just four days later and makes this accusation and he has been consistent in the gist of what he claims ever since, even if there has been some difference in the actual wording. So, on balance we hold that those words were said. There is, howeevr, nothing on the face of that that is ostensibly related to race or colour. The only way it could be related to race is in context.

19. The following day, 21 September, a Thursday, the claimant who did not ordinarily work in cabin 1 alongside Mr Hirst was relocated there along with a number of other employees. When he arrived at the conveyor belt it is common ground that Mr Hirst said something to the effect "you can't work here move

further away from me". The claimant reacted to that, he confronted Mr Hirst claiming that this was offensive. That is because he thought it was related to the earlier comments that he smelt. He thought Mr Hirst was in effect saying "you smell I don't want a smelly person working alongside me".

20. It then resulted in an altercation between the two. It is clear the claimant was upset, there was talk about the possibility of him losing his temper and , Mr Hirst responded saying "you'll regret it if you do". Mr Hirst further alleges that there was an indication that they should go out in the car park, with the implication that would be a physical confrontation. The claimant denies that, but as we say it is quite clear that he was angry or upset, Mr Hirst reacted inappropriately, we can see from the CCTV footage that he was waving his finger, he had to be told to calm down by somebody else. However the matter then did resolve itself and nothing further happened. The two men continued working alongside each other, the claimant did not move any further away from Mr Hirst, and that continued until the next break which was the best part of an hour or more later.

21. Once again the comment "move away from me" has no obvious connection with the claimant's race and whatever happened subsequently in the altercation it is common ground that the tone of that first comment was light. The claimant responded by saying "don't joke with me". Mr Hirst said it was always intended as a joke, there is no suggestion and never has been that Mr Hirst said that in an aggressive way, even if he did wag his finger afterwards. It may not have been a particularly funny joke, if that was what it was, but as we say there is common ground that the tone in which the comment was made was not of itself threatening or offensive. The claimant took exception to it on other grounds.

The Burden of Proof Provisions

22. Those are the essential facts as to what was said but because neither of those comments is, on its face, anything to do with colour we have to look at the context to establish whether there is something which means it could be related to race. So, we look at what are the facts the claimant has proved in this context.

23. There was an allegation made by the claimant against Mr Hirst in the summer of 2014, resulting in a grievance being upheld against Mr Hirst but that had nothing whatsoever to do with race. The circumstances were that the previous year employees had been as a treat bought fish and chips in recognition of accident free work. In this year they did not receive that benefit and Mr Hirst made a comment to the effect that that was down to the claimant, who had had an accident at work in the preceding period. That was upheld to be a potentially offensive comment that could be construed as "bullying". It was unnecessary to make that observation to the claimant but it was not because of his race, it was because of these circumstances that led to the loss of the fish and chips.

24. Between that incident in the summer of 2014 and these alleged incidents in September of 2017, apart from one matter to which we shall turn in a moment, the claimant makes no substantive allegations of anything whatsoever that Mr Hirst did towards him. He has made general allegations that Mr Hirst was continuously racially abusing him but he gives no examples at all. Indeed when we come to the internal grievance investigation following the September incidents the claimant was repeatedly asked whether anything had happened previously between him and Mr Hirst that might explain the context and he

repeatedly said “no”. He certainly at this stage, when he first raised his grievance, was not making any connection with his race, that only came out subsequently at the grievance hearin,g not the initial investigation meeting but the later grievance hearing in November when he was saying that it was racially motivated. But at no stage does he point to anything that Mr Hirst did let alone to anything that he did that might be connected to the claimant’s race or colour.

25. Within that nearly three and a half year period the claimant and Mr Hirst had worked alongside each other. They did not ordinarily work on the same conveyor belt, they had not actually worked together up to 2014 but they had been in employment together since Mr Hirst started in 2009. So for 5 years up to 2014 they had known each other and had passing contact. More particularly from May 2016, not every Friday, but regularly under a scheme to allocate workers different and more rewarding work than picking waste off the conveyor belts he had worked alongside Mr Hirst on a project that was painting the shadow boards (that is the tool boards, painting the shadows of implements so as to readily identify if anything had gone missing). The claimant and Mr Hirst worked together on that project and at no stage during that time of their interaction was there any allegation that Mr Hirst had done anything inappropriate or suggested he did not wish to work alongside the claimant. So the comment about the claimant smelling on 20 September came without any background and came out of the blue.

26. As to whether there is any other fact the claimant has put before us from which we could conclude this is related to race he relies primarily on an alleged comment, also made by Mr Hirst, to his colleague Mr Abraha Zenawi, who also gave evidence before us.

27. The first time this was mentioned was again in the course of the grievance investigation meeting in November 2017. That was where the claimant said that Mr Hirst had told Mr Zenawi, who is also a Black African, that he smelt. The claimant said he had witnessed and heard that comment in 2015. There is no contemporaneous record of that matter ever having been raised by Mr Zenawi at the time. The dates are a little unclear. In his witness statement Mr Zenawi says that this incident happened in November 2014, though he now says that is a typing error and he means November 2015, but in his evidence he said it was in fact later than that and it coincided with a grievance that had been raised against him by three fellow employees. That was was in fact in February 2016, a few months later. The most recent account given by Mr Zenawi is that all these events happened at the same time which whould have been February 2016.

28. Mr Zenawi had an issue with a number of his colleagues because he thought they were lazy. He complained about them to management. That was a cause of tension and when he had raised those complaints at a management meeting Mr Zenawi now says that he was confronted and Mr Hirst accused him of smelling. Also Mr Zenawi now says Mr Hirst made a comment that he should go back to his own country, which would clearly be offensive and relating to race.

29. That same day, however, three colleagues, including Mr Hirst and one other employee who although not Black African, is clearly Asian and a Muslim, made a complaint against Mr Zenawi. There were two elements to that. One is that, in support of his allegation that they were lazy, he had been taking photographs supposedly showing them being inactive at work. Th second part of the

complaint was that Mr Zenawi, who is a fervent Christian, had made comments that Muslims, in particular his Muslim colleague, were the devil. That complaint was investigated, it was not upheld and indeed no action was taken against Mr Zenawi on the basis that the matter could not be proved. However, in the course of defending those allegations against him, which were potentially serious, where we would certainly have expected Mr Zenawi to make reference to the offensive comments made to him, and in particular the comment that he should go back to his own country, we see nothing.

30. Subsequently, and for the first time, in cross examination before this Tribunal the claimant said that not only was the comment about going back to his own country made to Mr Zenawi but it was also made to him. He had never made that accusation before, either at the time - be it the end of 2015 or early 2016 or whenever - and nor when given the opportunity in the course of this grievance to give any background as to why there might be tension between him and Mr Hirst. At no time did he ever refer to that clearly racist comment and indeed said in terms that nothing had happened since the fish and chip incident between him and Mr Hirst.

31. The first time that any reference was anything said about going back to your country was in his witness statement of 4 April 2019 when Mr Zenawi claimed that comment had been made to him. He did not at that stage allege that it had also been made to his friend, the claimant, although that is now also his evidence.

Conclusion

32. It is for the claimant to prove the facts from which we could conclude harassment has taken place. On this evidence the claimant and his witness have not reached the requisite standard of proof. They have not proved, on balance, that these comments were indeed made. The lack of any contemporaneous report and, in relation to the “return to your country” comments the fact that they have only surfaced for the first time in April 2018, that is over three years since they were alleged to have been made, casts real doubt on the accuracy of these assertions.

33. The claimant, we accept, fervently believes these connections are to be made between the substance of the comment sand his race, but unfortunately he is not necessarily a credible witness in this context. We note the claimant has made a number of connections in his own mind that are not objectively borne out. So, for instance, he alleges on the basis of no real evidence from the CCTV footage deliberately disadvantageous conduct on the part of Mr Hirst. He also, simply on the basis of that CCTV footage is not the most clear, has alleged that it has been “tampered with”. The claimant makes leaps of logic that suggest he may have persuaded himself that something happened but without being able to persuade us that it is necessarily factually correct.

34. So, the claimant has not established the preceding history of any alleged comment made to Mr Zenawi. Even if he had we note that there is nothing ostensibly to relate any comment about Mr Zenawi smelling to his being black. Indeed, even if such childish comment had been made they were made in the context of an ongoing dispute between Mr Zenawi and other colleagues which was not in any way obviously related to race and where it may be (though he, of

course, denies it) that he had also engaged in inappropriate conduct towards his Muslim colleague..

35. We are left with the fact of what was said on the 20th, "you smell" and on the 21st, "move away and work further up the line" and the fact that Mr Hirst apparently did not recall the first of those comments, which we have found was said. Absent any overt connection to race we are not satisfied the claimant has proved this was harassment because of his race or ethnicity. It is a childish comment to say somebody smells, it is a playground comment, but there is of course no evidence from the claimant this was not the sort of childish comment that Mr Hirst might have made to other people as well, he simply would not know. We do make the observation that necessarily this is not going to be a sweet-smelling work environment: it is a waste recycling facility, it is an occupational hazard that those who have to work there will, on occasions smell. We are not satisfied that there is the connection between what happened on the 20th and 21st the claimant seems to make. The comments are not necessarily linked to each other at all. The claimant believes that he was told to move away on 21st because he smelt, because that was said to him the day before. That is not a necessary link, it appears to be simply something that was said when he came on to the line and we do accept Mr Hirst's evidence in this context that he did say it to other people as well. It is common ground it was said in a light-hearted tone, even if not particularly funny.

36. So, for those reasons we are not able to uphold the claimant's case. He has not established facts from which we could conclude of what was said to him on 20th and 21st September was indeed related to his race. There is certainly no evidence of anything untoward done by Mr Hirst in relation to the protective equipment. So the only part of the claim that succeeds is in relation to the holiday pay and the respondent will pay that sum of £697.48. The other claims are dismissed.

Employment Judge Lancaster

9th August 2019