lj

EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mr Y Abiri-Osei **AND** Imperial College Healthcare NHS Trust

Heard at: London Central **On**: 17-18 July 2019

Before: Employment Judge Davidson
Mr M Baber
Ms C Young

Representation
For the Claimant: In person
For the Respondent: Mr S Sudra, of Counsel

JUDGMENT

It is the unanimous decision of the Employment Tribunal that the claimant's claims of discrimination and constructive dismissal fail and are hereby dismissed.

REASONS

Issues

1. The complaints and issues as set out in the case management discussion of 19 April before EJ Tayler are as follows:

1. Direct Discrimination

The Claimant describes his race as Black African.

Was the Claimant treated favourably because of his race contrary to Section 9.13 and 39 of the Equality Act 2010 as set out in the Claim Form as summarised as:

1.1 The Respondent making an allegation that the Claimant was sleeping on duty on 15 June 2018 (Allegation 1).

1.2 Mark Wicks encouraging the TI engineer to provide a statement as part of the investigation (Allegation 2).

1.3 Mark Wicks' statement provided as part of the investigation (Allegation 3).

1.4 The manner in which the Respondent conducted the investigation into the allegation that the Claimant was asleep on duty on 14 June 2018 (Allegation 4).

1.5 Mark Wicks discussing the allegation with friends and associates within the department before the investigative meeting (Allegation 5).

1.6 The Respondent failing to follow its procedure in that the allegation should have first been reported to the Senior Security Officer, Kwaku Damoah and the Site Service Operations Manager (Allegation 6).

1.7 Paul Groom's conduct towards the Claimant in coercing him to sign his statement as part of the investigation (Allegation 7).

1.8 The findings of the investigation (Allegation 8).

1.9 Inviting the Claimant to a disciplinary hearing on 14 September 2018 and sending the letter to the Claimant's home address (Allegation 9).

1.10 Mr Groom's response to the invite to the disciplinary hearing in that the Claimant was informed that any subsequent request for a reference would include detail that there was a disciplinary pending when the Claimant resigned (Allegation 10).

2 Harassment

In accordance with Section 26 Equality Act, was the Claimant subjected to unwanted conduct by the incidents/events set out in paragraph 1.1 to 1.10 above.

2.1 Was the conduct related to the Claimant's race?

2.2 Did the conduct have the purpose or effect of:

- Violating the Claimant's dignity; or
-
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3 Discriminatory Constructive Dismissal

3.1 Did such discriminatory conduct set out in the Claim Form as the Claimant may establish, breach the Claimant's contract of employment?

3.2 If so, did the Claimant resign in response without affirming his contract of employment?

3.3 Was the Claimant constructively dismissed for the purpose of a race discrimination claim under the Equality Act?

4 Unfair Constructive Dismissal

4.1 Did such of the conduct set out in the Claim Form as the Claimant may establish, breach the Claimant's contract of employment?

4.2 If so, did the Claimant resign in response without affirming his contract of employment?

4.3 Was the Claimant constructively dismissed?

4.4 Did the Respondent have a potentially fair reason for the dismissal?

4.5 If so, was the dismissal fair (if not, the dismissal is necessarily unfair)?

5 Jurisdiction

5.1 Did the alleged conduct take place more than three months before the claim was submitted with the Employment Tribunal?

Evidence

2. The Tribunal heard from the claimant on his own behalf and from Mark Wicks (Security Information Manager), Paul Groom (Band 8 Facilities Security manager) and Andrew Murray (Head of Facilities) on behalf of the respondent. The tribunal also had a bundle of some 140 pages before it.

Facts

3. The tribunal found the following facts on balance of probabilities:

3.1. The respondent operates a number of hospitals in the West London area including St Mary's Paddington. The claimant, who is black African, was employed in a security role from 18 May 2015. There was a dispute regarding the claimant's job title and job description but it was accepted that the element of the job description relied on by the respondent did apply to the claimant, namely the obligation to 'provide a security service with the aim of creating and maintaining a safe and crime-free environment' 24 hours a day, 7 days a week. Part of the respondent's disciplinary procedure includes a non-exhaustive list of gross misconduct offences which includes sleeping on duty.

3.2. In June 2018, there was a power outage at St Marys Hospital which affected parts of the building. The claimant, who was on patrol at the time, was alerted by alarms being triggered and he phoned in the issue and on-call engineers were called. The power outage resulted in the disabling of intruder alarms in the part of the building occupied by the CEO and executive team (the Bays) and that part of the building was left unsecured with doors unlocked and no CCTV in operation.

3.3. Immediately after the event, this building was manned by security although it appears that later in the evening there was no security presence. There was a dispute of evidence as to whether engineers were on site but we do not need to resolve this.

3.4. Mark Wicks received a call from the security engineer contractor, Gary Bridgen, who informed him of the power situation and the lack of security of the Bays and that the security team on duty had said they were busy to provide a security presence at the Bays.

3.5. Mark Wicks then decided to come himself to the site as he lived nearby. He and Gary Bridgen checked the Bays and then went to the security control office where they found the claimant and his two colleagues, Ade and Ovie (both black African). Mark Wicks saw that the claimant and Ade were asleep and Ovie was watching a programme on his PC.

3.6. The next morning, Mark Wicks informed his manager, Paul Groom, of the events of the previous evening and his observations regarding the security team. Paul Groom asked him to write a statement and to ask Gary Bridgen to provide a written account. These statements were sent to Paul Groom in the days following the incident.

3.7. Paul Groom took the view that the allegation of sleeping on duty against the claimant and Ade needed to be investigated. Paul Groom asked HR for advice on how to conduct the investigation and they provided him with template letters.

3.8. Paul Groom's investigation comprised interviewing the claimant, Ade and Ovie and asking all relevant witnesses to mark the positions of those present in the control room on a sketch diagram.

3.9. By email dated 20 June 2018, Paul Groom invited the claimant to a meeting on 25 June but the claimant could not attend due to sickness. On 27 June, the claimant emailed asking for further information regarding the meeting and asking for 'legal representation'. Paul Groom replied at 12:39on that day stating that the claimant was not entitled to representation as it was an investigatory meeting. He sent a further email at 17:26 on the same day informing the claimant that he could bring a representative if he wished.

3.10. The investigatory interview took place on 10 July 2018 with Steve Harwood (Security Policy Manager) as notetaker. The claimant was not accompanied.

3.11. After the meeting, Paul Groom asked the claimant to sign the summary notes taken by Steve Harwood, but he declined, saying it was a 'witch-hunt'. Paul Groom repeated the request by email on 11 July giving the claimant the option to inform him that he didn't want to sign. The claimant didn't reply. Later that day, Paul Groom sent another email to the claimant giving him a deadline to sign or the option to provide his own notes. The claimant did not sign and did not provide his own notes.

3.12. Following the investigation, Paul Groom wrote a summary report and a full report setting out his findings. He concluded that there were sufficient concerns for the case to go forward to a disciplinary hearing.

3.13. Under the respondent's policy, there is a post-investigation checklist stage which is conducted by the investigating manager, a divisional senior manager who has not been involved and a representative from HR. This panel agreed that the matter should proceed to a disciplinary hearing on an allegation of gross misconduct, namely sleeping on duty.

3.14. On 7 September 2018, Andrew Murray sent an invitation to a disciplinary hearing by post to the claimant 's home address. He replied on 11 September saying he would not be able to attend due to sickness. He also asked that correspondence should be sent to him by email, not by post.

3.15. Andrew Murray then sent a further invitation by email to attend a disciplinary hearing on 4 October 2018.

3.16. The claimant had been absent due to sickness (diarrhoea and back pain) from 10 to 24 September and was signed off for work-related stress from 24 September to 1 October. On 1 October, the claimant resigned with immediate effect citing 'stressful work situations, hostile/unfavourable working conditions and broken work relationships'.

3.17. His resignation was accepted but he was informed that any reference would state that he resigned pending a disciplinary hearing.

3.18. Before the tribunal, the claimant relied on a white comparator as evidence of less favourable treatment in that the comparator (XY) was not disciplined despite two incidents of altercations in the security areas at Charing Cross Hospital and Hammersmith Hospital. The respondent's explanation for the lack of disciplinary action against XY is that XY is under medical investigation and on referral to OH with ongoing medical issues.

Determination of the Issues

4. We determine the issues as follows:

4.1. Allegation 1: there is no evidence to support a contention that the claimant 's race was a factor in Mark Wicks's decision. We find that Mark Wicks was not upset at being called out but was irritated to find all three security officers in the control room while there was an ongoing incident, two of them apparently asleep and one watching his PC. This is the most likely reason for Mark Wicks escalating his observation. We therefore find that this is not an act of discrimination.

4.2. Allegation 2: we find that Mark Wicks asked Gary Bridgen to provide a statement at the request of Paul Groom. This was a reasonable step for Paul Groom to take and we find no evidence that Mark Wicks encouraged Gary Bridgen to do this over and a simple request. This is a reasonable step to take as part of the investigation – if anything, it would be unreasonable not to have taken this step. The claimant suggested that Gary Bridgen was motivated to provide the statement as he as a contractor and wanted to keep his client (the respondent) happy. Even if this is correct, this would not be related to the claimant 's race. We find that this is not an act of discrimination.

4.3. Allegation 3: we take this to mean the content of Mark Wicks's statement rather than the fact of providing it. We are satisfied that the statement reflects Mark Wicks's observations of the control room. It is largely consistent with Gary Bridgen's statement and we find that this statement does not constitute an act of discrimination.

4.4. Allegation 4: the claimant relies on the fact that he was not told in advance of the investigation meeting what the allegation against him was, that he was initially told he could not have representation and that Steve Harwood was present to take notes. He also claims to have been interrupted while giving his account and he alleges that Steve Harwood's notes were not an accurate record of the meeting. We find that there is a difference between a fact-finding investigatory meeting and a disciplinary hearing and that it is not necessary to give an employee full details of the allegation prior to a fact-finding meeting. Although the respondent's policy allows trade union representation and Paul Groom's initial comment was a response to the request for 'legal' representation, which is not provided for in the policy. This may have been a misunderstanding but, in any event, Paul Groom changed his position the same day and offered the claimant the right to be represented. We note that the claimant did not avail himself of this opportunity. We find that it was reasonable for Paul Groom to ask someone to take notes. This is common practice and there is no suggestion that the decision to have a note taker was related to the claimant 's race. Although it is accepted that the claimant was not given advance notice of Steve Harwood's presence, we do not find this unusual. The claimant asked Paul Groom in cross examination why he interrupted him and Paul Groom said it was because that the claimant's account was not clear and he was bringing up irrelevant matters. As regards Steve Harwood's notes, the claimant has not identified any specific inaccuracies and he did not take the opportunity provided to him to submit his own account of the meeting. We find that, in relation to the issues identified, the respondent has conducted the investigation in a reasonable manner and in accordance its policy and normal practice. We find no reason to conclude that the claimant 's race played any part in the conduct of the investigation.

4.5. Allegation 5: the claimant alleges that Mark Wicks discussed the allegation against him with family and associates prior to the investigation meeting. The claimant was told that Mark Wicks had commented that the security team had not done enough during the power outage and that he would punish them as a warning shot for others. Mark Wicks has three relatives working in the security team and two in the emergency department. He denied discussing it with any of them or with anyone else. We are unable to conclude whether or not Mark Wicks himself discussed it but we note that the comments attributed to him reflect an irritation with the security's team's performance, not their race. We therefore find that this does not constitute an act of discrimination.

4.6. Allegation 6: the claimant alleges that the respondent's procedure requires the allegation against him to have been reported first to the Senior Security Officer, Kwaku Damoah (who is Black African) and the Site Service Operations Manager (Pamela Workman). We find that the relevant procedure for dealing with the allegation was the respondent's disciplinary procedure, not the security escalation procedure. We find that the management structure of the respondent is complicated and all of the witnesses denied having line management responsibility for the claimant. Mark Wicks explained that he reported the issue to his manager, Paul Groom, and he would not have reported it to the relevant employee's manager who may have been a lower grade to him. The respondent's policy provides that a disciplinary hearing which could result in dismissal must be conducted by a manager at Band 8 or above. Paul Groom's evidence to the tribunal was the investigation had to be carried out by a Band 8 manager and therefore it had to be him rather than Kwaku Damoah (or another manager below Band 8). On reviewing the respondent's procedure provided to us, this does not seem be the case. However, we find that Paul Groom carried out the investigation after Mark Wicks reported it to him and he took advice from HR who seemed to be content for him to carry out the investigation. Under the respondent's policy, although not crystal clear, it seems that Pamela Workman should have conducted the investigation and Paul Groom the disciplinary. However, we do not find that any departure from the policy was on the grounds of the claimant's race and we do not consider that this amounts to a breach of contract. We note that the other members of staff were treated in the same way and there was no evidence before us that a white employee would have been treated differently.

4.7. Allegation 7: We find that Paul Groom asked the claimant on three occasions to sign the notes of the investigatory meeting but the claimant refused to do so. He did not respond to the email but spoke to Paul Groom on the phone and told him he would not sign. The claimant was also given an opportunity to submit his own notes, which he did not take. We reject the claimant's assertion that Paul Groom was reluctant to allow him to submit his own notes as this is in direct conflict with Paul Groom's email. We do not find

that this was harassment and we do not find that Paul Groom chased the notes due to the claimant's race but because he wanted to ensure the investigation was complete.

4.8. Allegation 8: the investigation concluded that there was a case to answer. It made no findings of fact, only a finding that there was sufficient evidence for the allegation to be considered at a disciplinary hearing. In addition, the investigation was check-listed by other managers. We find that Paul Groom's conclusions were reasonable on the basis of the evidence before him. We find that he would have reached the same conclusion whatever the race of the individual and that the investigation outcome would have been the same.

4.9. Allegation 9: in the light of our finding under Allegation 8, we find it was entirely reasonable for the respondent to invite the claimant to a disciplinary hearing and this is not an act of discrimination. In relation to the allegation that the invite letter should not have been sent to his home address, we find that the respondent followed its normal practice and did not take this action because of the claimant's race. During the course of the hearing, it became apparent that the claimant was complaining that the revised date for a disciplinary hearing, which was sent to him while he was off sick, should not have been fixed until he had returned to work, undergone a Return to Work interview and that he should have been consulted about the date. We find that an employer is entitled to fix a date for a disciplinary hearing with prior consultation with the employee as long as the employer is open to postponing the date if the employee provides compelling reasons. We note that the first date was postponed on request from the claimant. The respondent's policy provides that hearings should take place within a short period of any postponed hearing and we find no grounds to criticise the respondent in this regard. The issue of a return to work interview is separate from fixing the date but since the claimant did not return to work, there was no return to work interview.

4.10. Allegation 10: the respondent's evidence was that there is a pro-forma reference form which includes as a standard query whether the employee is under investigation for any matter under any employment policy. We accept that this is a standard document and the claimant was not treated differently from any other employee in his situation.

Harassment

4.11. On the basis of our findings above, we find that the claimant was not subject to unwanted conduct related to his race. His harassment claim therefore fails and is dismissed.

Constructive dismissal

4.12. On the basis of our findings above, we find that the claimant was not subject to race discrimination and there is no fundamental breach of contract on that ground.

4.13. We find that the respondent did not commit any fundamental breach of contract which would have entitled the claimant to resign. The respondent followed a disciplinary procedure and reached a conclusion that a disciplinary hearing was appropriate. We have found that the investigation outcome was reasonable and we find that it did not amount to a breach of contract.

4.14. In the light of our findings, we do not need to address the time issue.

Employment Judge Davidson

Dated: 13th August 2019

Judgment and Reasons sent to the parties on:

20/08/2019

For the Tribunal Office