



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr AKINTUNDE TAYLOR

BIDVEST NOONAN

FULL HEARING JUDGMENT AND REASONS

HELD AT: London Central (CVP video audio call)

ON: 29 and 30 October 2020

BEFORE: Employment Judge Russell
Members Mr S Soskin and Mr L Tyler

REPRESENTATION:

Claimant: In person

Respondent: Mr De Lacey , Solicitor

Judgment

The unanimous judgment of the ET panel is as follows

1. The Claimant's claims of direct race discrimination under s 13 Equality Act 2020 , Harassment under s 26 Equality Act 2020 and Victimisation under s 27 Equality Act 2020 are dismissed .
2. The Claimant has been paid his accrued holiday pay .
3. The Respondent is awarded the deposit of £500 made by the Claimant pursuant to the Deposit Order of the Tribunal made on 3 July 2020 .
4. The Claimant resigned and his effective date of termination was 17 April 2020 .

Reasons

Background

1. The Claimant was employed as a security officer for the Respondent from 1 November 2017 . At the time of his ET1 claim he was still employed by on a zero-hours contract of employment . For much of his employment he was a bench security officer which meant he took on work opportunities as and when they arose but not on a full-time basis . He worked for several of the Respondent's clients in the

London area but has not worked for the Respondents in 2020 the reasons for which are disputed .

Claims

2. Employment Judge Burns in a Preliminary Hearing of 25 August 2020 identified his claims as these (and we accept these summarise the issues even though the Claimant sought to extend his claims at the hearing today and , effectively , for the first time which application was refused)
 - a) The Claimant who is black, says that his manager Lawrence Merry (LM) wrongly rebuked him for missing shifts and also caused problems with the Claimant's rota between 14/11/2017 and 10/9/2018.
 - b) The Claimant felt he was being discriminated against by LM so he sent emails complaining about this dated 27/9/2018 and 28/9/2018.
 - c) In mid-October 2018 he was removed from his work at 60 Ludgate Hill (building 1) and put to work at Mizuho House (Building 2) following a complaint about him by a director of a client who was based in 60 Ludgate Hill.
 - d) He says that from late 2018 other staff including whites were taken on and given full time jobs and training, whereas he was not, despite the fact that he has completed his probation.
 - e) He says that he asked to be assigned a permanent position in "the loading bay" but this was refused by LM
 - f) He says he was picked on and unfavourably treated in the allocation of work
 - g) On 19/5/19 he emailed LM complaining about this as discrimination.
 - h) He says that while working at Mizuho House he was then assigned a new unfavourable shift pattern by Paul [Gallagher] from about the end of December 2019.
 - i) He says that his complaints about these matters were not responded to by the Respondent properly or at all
 - j) The main persons he claims were involved in these matters were managers Lawrence Merry, Paul and Tracy Taylor.
 - k) He relies on a white Latvian woman Alla Kotovica [another security guard] as a comparator, claiming that she also on some date in the past was involved in some problem in her work at Mizuho House but that in contrast she was not removed from her workplace as a consequence.
 - l) He claims £288 for holiday pay he says had accrued but was not paid by the end of 2019.

He relies on the matters in (a) (c) (d) (e) (f) (h) and (i) above as direct race discrimination and harassment. He relies on the complaints dated 27/9/2018, 28/9/2018 and 19/5/2019 as protected acts and as (c) (d) (e) (f) (h) and (i) above as the detriments for a victimisation claim.

Findings of Fact

The Claimant's Contract of Employment

Key terms include these .

3. The Claimant's place of work was not fixed at 60 Ludgate Hill, Mizuho House or any other site. His Job Title was Bench security officer. He was on a zero- hours contract which required him to work at any one of the Respondent client's sites within London and the Home Counties.
4. If any of the Respondent's clients decided that they no longer permitted him to work at their site, then the Claimant accepted, in his contract of employment, that he would be removed from that site and Respondent would endeavour to place him in an alternative position.
5. The Claimant worked on a zero- hours contract and was not guaranteed any shift pattern or any hours of work or a minimum hours of work on a weekly, monthly or annual basis. His working hours are stated to include both day and night shift patterns. Which could be varied at any time.

The Catalyst Event 60 Ludgate Hill

6. After an incident and dispute (concerning a client senior employee without her security pass to hand) with one of the Respondent's clients on or around 27 September 2019 (following an earlier alleged Tailgating incident on 10 May 2018 involving the same protagonists) at 60 Ludgate Hill the Respondent was told by the client they did not want the Claimant on site. They had 2 adjacent buildings (the second was Mizuho house) and at the time he was working at the first building .
7. There is some evidence this dispute was the Claimant's fault, and he should have handled the dispute more effectively. We find the Respondent did view the CCTV evidence despite the Claimant suggesting otherwise but as no disciplinary action was taken against him there was no need to drill down into the detail of this unfortunate incident . Unfortunate for the Claimant as it led to him being excluded from the 60 Ludgate Hill site. But because of the client demands not of the Respondent's choosing.
8. The Respondent through Mr Merry his manager did try to support the Claimant making representations on behalf of the Claimant . This resulted in him being allowed to work in the client's second building Mizuho house and its (shared with the first building) Loading Bay.
9. Mr Merry as the Claimant's manager explained the Claimant was banned by the client not the Respondent and (as the Respondent's representative highlights) said on 28 November 2019 "Again don't know how many times I have to say this the client has banned you from building one. So, you can't stay in building one." He has admitted he accepted this, but we find the Claimant has never adequately understood this . That it was the client's decision not that of the Respondent that led to his being removed from the first building security detail . In part leading to his misplaced belief he was being prejudiced then and onwards. Because of a decision made , at least in part, by the Respondent.

Mizuho house

10. Although he subsequently worked in the Loading Bay area and at Mizuho House this position became untenable when the Respondent security officers working there and at Mizuho House were asked to cover 60 Ludgate Hill which the Claimant (through no material fault of his own) could not do . Whilst the Claimant considered

himself prejudiced by the Respondent in this regard, we find this is not so and was the result of client demands on the Respondent rather than the Respondent wishing to side-line the Claimant. The Respondent refers to the fact that the Respondent employee supervising security personnel working in the loading bay remained there in situ . But it is wholly reasonable that he should as the supervising manager .

11. As a result of the Claimant no longer working at 60 Ludgate Hill there were limited further full-time work opportunities available to the Claimant . But we find that those which did arise were made potentially available to the Claimant including a full-time position night shift job working at Mizuho house. However, the Claimant did not like the shift pattern proposed and refused this job. As he was perfectly entitled to do.
12. However, we also note that the Claimant took a full-time job with another security business on or about 20 April 2020 . He is not criticised for this and is to be commended for finding alternative work but this is a night worker role notwithstanding that he did not want the Mizuho job primarily because it , too , was a night time job. So, it remains unclear why the Mizuho house offer was so unacceptable to him .
13. One possible reason given by the Claimant was the fact the job offered had a review and probation period, but this would not have affected the Claimant's continuity of employment (already around 2 years by then) . It was simply a reflection of possible client demands in respect of what would be a new role for the Claimant if he had accepted the assignment .
14. His manager Mr Merry did try to accommodate the Claimant's requested shift pattern, but his hands were tied by the demands of the Respondent client following the Catalyst Event. We accept the Claimant was offered shifts at night in Mizuho house at least partly to avoid conflict through its client (the same client as at 60 Ludgate Hill) finding out the Claimant was the same person the client had banned from 60 Ludgate Hill.

Alternative Jobs generally

15. The Claimant was unable to be assigned a permanent position (working regular fixed shifts including day shifts on a permanent basis), because such positions had to be filled by security officers who could move around and work in both the Respondent's buildings (namely 60 Ludgate Hill and Mizuho House), and the only "contractual position" at Mizuho house was already filled.
16. In the first months or so of 2020 the Claimant was genuinely looking for work within the Respondent organisation. We make no finding on the extent of the effort the Respondent made to find roles for him but do find that job offers were made to him but refused and further that the Claimant was not unfairly denied appropriate roles. Having pressed him on this we find there was a logical explanation for every job that he applied for but did not then get usually because he was late in his application .
17. One source of confusion , then and even now, was the importance and relevance of the Respondent's "time gate "portal. The Claimant did not make himself available on this and seemed confused as to how this operated but he should not have been. There is no evidence of others with a similar difficulty. He had worked at the Respondent for some 2 years as a bench security officer and should have

known that he was expected to put his availability on the portal and could get work from doing so. But he expected the Respondent to approach him and or to resolve matters with emails.

18. His lack of understanding of this led to an earlier dispute as to the Claimant believing he was not working when the Respondent thought he was (so criticising him for not turning up to work) and a frustration for the Claimant that he was not being given work when he could have got some work by highlighting his availability.
19. And in addition, we agree with Ms Taylor who gave evidence for the Respondent that by doing the bench security stand in work he would have been more likely to get the permanent position he wanted. This is because when clients saw a guard in situ and then, perhaps, wanted to take on one or more full time security officers into their team they would appreciate that person's good qualities. So, the Claimant did not help himself, but the Respondent could and should have sat down with the Claimant and made the system clearer to him. They said they did so, and IT assistance was on hand if the Claimant wished to benefit from it, and perhaps the Claimant needed more explanation and help than he should. But this dispute has arisen at least partly because of the Claimant's ongoing uncertainty (which he still has) as to how the time gate portal worked.
20. As a result of this narrative the Respondents did not readily give him work opportunities in the latter part of 2019 and early 2020. But we find they did try to do so and exchanges around 20 January 2020 for instance make it clear that genuine efforts were being made to give the Claimant work opportunities. These efforts carried on during 2020. We accept the Claimant wanted to work but also find he did not do enough to pursue opportunities with the Respondent and when pushed on this, more than once, was unable to point to any emails or letters where the Respondents acted to his detriment. Putting it as its highest they might have done more given they had some 8000 employees and many client work opportunities but at no stage did they purposely ignore the Claimant or prefer the applications and or interest of others when considering his job search.

Complaints by the Claimant against Respondent employees

21. His complaints against his manager Lawrence Merry (14 November 2017), a Director of Ropes and Gray (27 September 2018) and his managers for preventing him from working (he says) at 60 Ludgate Hill and not allowing him to work at Mizuho House are all without substance. There is no evidence of these or any Respondent employees putting unreasonable barriers in his way.

End of the Claimant's employment

22. Whilst the Respondent states the Claimant is still employed by the Respondent this does not accord with the true situation. The Claimant mistakenly says his employment ended on 31 December 2019, but this is simply when he ceased to get any work from the Respondent. He started a new full-time job on 20 April 2020. The Respondent was still looking for jobs for him and offering him some, without substantive response, beyond that date. But we find that his employment with the Respondent can be said to have ended through his resignation to start his new FTE.

23. He might have preferred to stay as a Respondent employee and says now he could still work for them. But this is wholly unrealistic if he is working 36 hours a week for another business. Whilst he did other work whilst employed as a zero hours worker for the Respondent he had the time to do this when his hours were very part time. But he wanted full time employment with the Respondent and started a new full-time job on 20 April. And so, we find his effective date of termination was 17 April.

Holiday

24. The Claimant was due holiday pay beyond that paid to him in January 2020 and despite stating otherwise in its defence and in fact paid him more than his actual holiday pay claim. And did so very late in the day on or about 23 October 2020. So, whilst he is not owed any holiday pay now the Respondent was at fault for not crystallising the position and making these payments beforehand.

25. The Claimant should have requested his Holiday Pay through the online portal which he did not do. The outstanding figure was due for the times he has phoned in at the last-minute sick as he accrues holiday pay on days when he was sick. It was understood when he claimed he had made the request and was not due any holiday pay. If at any point up until now he had requested his holiday pay via the online portal it would have been paid to him.

Alla Kotivica

26. Alla Kotivica submitted a legitimate complaint about the Claimant. The Claimant admits to making a mistake which the Respondent categorised as him falsifying his hours of work. To the extent the Respondent had instigated disciplinary action it would have been legitimate to consider this against the Claimant. Especially as there is evidence that this was not an isolated case. But there is no evidence that Alla Kotivica was at fault or that there have been any complaints about her by the Respondent's clients or co-workers.

Claims out of time

27. Many of the Claimant's complaints were over 12 months out of time at the date of the ACAS submission on 4 December 2019 some 9 months after the 3-month primary time limit for any discrimination claim under s 123 Equality Act 2010. We make no finding as to whether there was a continuing act however as no evidence was presented to us on this.

Legal Findings

28. The issues as agreed with findings particularised.

a) The Claimant who is black, says that his manager Lawrence Merry (LM) wrongly rebuked him for missing shifts and also caused problems with the Claimant's rota between 14/11/2017 and 10/9/2018

b) The Claimant felt he was being discriminated against by LM so he sent emails complaining about this dated 27/9/2018 and 28/9/2018.

These rebukes were not unjustified and did not lead to any disciplinary action and there is no evidence of Mr Merry charging his rota unfairly or in breach of contract or

acting towards the Claimant other than in a sensitive manner. Our view of Mr Merry was that he was , in general, a very lenient and understanding manager.

c) In mid-October 2018 he was removed from his work at 60 Ludgate Hill (building 1) and put to work at Mizuho House (Building 2) following a complaint about him by a director of a client who was based in 60 Ludgate Hill.

This was client led and not the Respondent's decision or preference and indeed they attempted to prevent this happening.

The Claimant was unable to be assigned a permanent position (working regular fixed shifts on a permanent basis), because such positions had to be filled by security officers who could move around and work in both the Respondent's buildings (namely 60 Ludgate Hill and Mizuho House), and the only "contractual position" at Mizuho house was already filled.

The Claimant continued to be offered shifts at Mizuho House, which however he refused to take up because they did not suit him or for some other unexplained reason.

d) He says that from late 2018 other staff including whites were taken on and given full time jobs and training, whereas he was not, despite the fact that he has completed his probation.

No evidence of this has been adduced . Nor have the Respondent's denials been challenged.

e) He says that he asked to be assigned a permanent position in "the loading bay" but this was refused by LM

The explanation for him not continuing in this role is legitimate and justified and unconnected with his race.

f. He says he was picked on and unfavourable treated in the allocation of work
No evidence of this has been adduced . Nor have the Respondent's denials been challenged.

g. On 19/5/19 he emailed LM complaining about this as discrimination.

This email does mention discrimination but not in a substantive way . It is simply a complaint about not getting the assignment and shift hours he wanted There is no evidence of discriminatory treatment and nothing said to justify one being made.

h. He says that while working at Mizuho House he was then assigned a new unfavourable shift pattern by Paul [Gallagher] from about the end of December 2019.

i)He says that his complaints about these matters were not responded to by the Respondent properly or at all

The explanation for him not continuing in his role is legitimate and justified and unconnected with his race. There is no substantive evidence of the discrimination complaint so none for the Respondent to investigate and certainly no apparent link between the shifts pattern the Claimant found unfavourable and his race.

j. The main persons he claims were involved in these matters were managers Lawrence Merry, Paul and Tracy Taylor.

None of these individuals has been found to have treated the Claimant less favourably than any other staff and the efforts Ms Taylor and Mr Merry made to assist the Claimant were evident .

k. He relies on a white Latvian woman Alla Kotovica [another security guard] as a comparator, claiming that she also on some date in the past was involved in some problem in her work at Mizuho House but that in contrast she was not removed from her workplace as a consequence.

No evidence of this or any misconduct by Alla Kotovica has been adduced . Nor have the Respondent's denials been challenged. Alla Kotovica raised a legitimate complaint against the Claimant. She is not a proper comparator in any event because she has not been the subject of a ban from working in any Respondent client building.

l. He claims £288 for holiday pay he says had accrued but was not paid by the end of 2019.

He was paid holiday due to him in January 2020 and further holiday pay in October 2020 in excess of his claim.

Discrimination Claims

29. The Claimant's claim for race discrimination is unparticularised by the Claimant and remains so after this hearing. At no time does he raise any examples of how his claimed unfavourable treatment was or might be connected to his race . During the case management discussion with EJ Burns the Claimant alleges the race discrimination consisted of Harassment on 14 November 2017 and or 10 September 2018 and victimisation on 14 November 2017 and or 10 September 2018. But at no stage has he given any substantive evidence on any of these alleged incidents.
30. We do not find any detriment suffered by the Claimant because of actions by the Respondent still less any as a result of his race or any other protected characteristic. Nor has the Claimant has adduced any facts in his examination in chief or through cross -examination to suggest that his race was reasonably in the minds of Lawrence Merry, Martyn Pharo, Alla Koltavica or Tracy Taylor. He has not discharged his burden of proof to do so. *Nagarajan v London Regional Transport & Ors [1999] IRLR .*
31. We accept the Respondent's submission that a) there is simply no evidential basis to make a finding of direct discrimination under s13 Equality Act 2010 and b) the Claimant has adduced no evidence to meet any factor in the test for harassment under s26 Equality Act 2010. *Pemberton v Inwood [2018] ICR 1291.*
32. The Respondent referred us to the case of *Grant v Land Registry [2011] IRLR 748* and the importance of distinguishing between the Claimant being upset (which clearly he was and is) and actions which do or may have the effect of a violating his dignity and or creating an intimidating, hostile, degrading, humiliating or offensive environment. The Respondent has done none of these things.
33. There is no attempt by the Claimant to identify, or bring any evidence the Tribunal can infer was, a protected act pursuant to s27(2) Equality Act 2010 and there is no victimisation claim presented to us .
34. The Claimant's holiday pay has been paid and the Claimant's other claims all fail.

Jurisdiction

35. In view of these findings we have not make further findings as to the extent to which the Claimant's claims are out of time and or amount to a course of dealing which allows them or may allow them to be considered. We have taken into evidence all his discrimination claims and determined they are without substance and so have not, as many of the matters which the Claimant is complaining about occurred long before the commencement of the period of three months before the presentation of his ET1, considered which complaints might be considered as being in time and or if it would be just and equitable to extend time. As a result, our findings do not include a determination on jurisdiction.

Deposit Order and Costs

36. The Claimant's claims are dismissed as they are without substance and because this Tribunal has decided the case against the Claimant on substantively the same reasons as given by EJ Burns when making his deposit order for £500. And as the Claimant has failed to show he has acted reasonably in continuing with this claim the deposit he made will go towards the Respondent's costs. They may apply to HMCTS to have this sum released to them and as confirmed in this Judgment and the reasons for it.

37. However, the Respondent's application for a costs order of £20,000 is refused. In part because the Claimant has no means to pay any costs award (and we have considered his ability to pay under Rule 84 of the ET Rules having heard in detail from him on this) and we observe, in practice, the Respondents would be unlikely to get any costs back from him even if an order for costs was made noting e.g. he has another court judgement to comply with as well as other debts and limited income.

38. But these are the main reasons we refuse the Respondent's costs application.

1 The Claimant was genuinely keen to get work with and for the Respondent.

2 He genuinely did not fully understand why he was removed from working for the Respondent's client at 60 Ludgate Hill even if he should have done.

3 He has acted in good faith and genuinely did not understand why he was at fault for not using the "time gate" portal to ensure work opportunities came his way.

4 The Respondent could have perhaps done more to help him through the process of getting alternative work (even though they did attempt to assist him and at no stages broke his contract of employment).

5 The Respondent delayed payment of his legitimate holiday pay until 23 October 2020 albeit the Claimant failed to help himself here by not seeking payment and not communicating with the respondent about e.g. his new full-time job.

6 The Claimant was and remains unrepresented, does not speak English as his first English, is used to a different culture.

7 He has at no point acted maliciously or vexatiously even if his claims was misconceived.

39. Costs are awarded only as an exceptional basis and not as a rule. Whilst the Claimant has acted unreasonably in pursuing his claim to this full hearing for the reasons given above the Respondent puts his level of fault at too high a level. We do have sympathy for the Respondent and the significant costs they have incurred

and their application for costs was a valid one to make and well argued with supporting invoices and argument . But the Claimant has lost his claim. The Respondents' witnesses' evidence has been preferred . And applying the discretion we have under Rule 76 of the ET rules the loss of his deposit is a sufficient additional adverse consequence for the Claimant in this case . A costs order beyond this is refused.

EMPLOYMENT JUDGE
30 October 2020
Order sent to the parties on

02/11/2020

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for Office of the Tribunals