



EMPLOYMENT TRIBUNALS

Claimant: Mr R R Cherian

Respondent: SOF-10 Starlight 12 Operations Limited

Heard via Cloud Video Platform

**On: 13,14 and 18 January 2021
(in chambers 19 January 2021)**

**Before: Employment Judge Davidson
Mr G Bishop
Mr J Carroll**

Representation

Claimant: in person

Respondent: Mr T Brown, Counsel

RESERVED JUDGMENT

The claimant's complaints of direct race discrimination, victimisation and unfair constructive dismissal fail and are hereby dismissed.

Employment Judge Davidson

Date 26 January 2021

JUDGMENT SENT TO THE PARTIES ON

.26/1/21.

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

REASONS

CVP Hearing

1. This was a CVP Hearing and the following applied:
 - 1.1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.
 - 1.2. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
 - 1.3. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
 - 1.4. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.
 - 1.5. The participants were told that was an offence to record the proceedings.
 - 1.6. Evidence was heard from the claimant, Nithin Jayalekha Das (formerly Food and Beverage Outlets Manager), Ruta Jasilionyte (formerly Reception Manager), Jake Seage (formerly Sales Manager), Daniela Schmidt (formerly Front Office Manager), Ali-Reza Esfandyary (formerly Food and Beverage Outlets Manager) and Sean Brennan (formerly Operations Manager) on behalf of the claimant. The tribunal heard from Wayne Androliakos (Chief Operating Officer, Cycas), Eduard Elias (Co-founder of Cycas) and Samuel Farmer (formerly Interim General Manager) on behalf of the Respondent.
 - 1.7. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

Issues

2. The issues in the case had previously been agreed between the parties and are set out below:

Direct Race Discrimination contrary to Section 13 Equality Act 2010

Failure to give the claimant the job title of General Manager

- 2.1. Did the respondent verbally agree to promote the claimant on 26 May 2017 to General Manager and subsequently fail to do so because of his race?
- 2.2. Did any of the following alleged act(s) amount to less favourable treatment because of the claimant's race namely:
 - 2.2.1. the respondent describing the claimant's new role as 'Hotel Manager' in the offer letter dated 27 May 2017, rather than using the term 'General Manager and why did the claimant sign it on that basis;
 - 2.2.2. the respondent describing the claimant's new role as 'Hotel Manager' in the second offer letter on 27 May 2018, rather than using the term 'General Manager', and why did the claimant accept it on that basis;
 - 2.2.3. the respondent describing the claimant's role as 'Hotel Manager' in the statement of terms of employment dated 19 June 2018 and why did the claimant agree to this;

- 2.2.4. the respondent failing to amend the claimant's terms of employment to reflect the fact that from 1 August 2017 the claimant was, at all material times, carrying out the duties of General Manager;
- 2.2.5. the respondent failing to acknowledge that the claimant was carrying out the duties of a General Manager;
- 2.2.6. the respondent repeatedly ignoring the claimant's requests to revise his job title, to General Manager;
- 2.2.7. the respondent's continual denial of the claimant's position as General Manager;
- 2.2.8. the respondent's denial that the claimant was offered the role of General Manager, as part of the outcome to the claimant's appeal dated 1 May 2019?

If the burden of proof shifts to the respondent, does the respondent have a non-discriminatory reason for the alleged treatment?

Recruitment and Selection Procedure

- 2.3. Was the respondent's recruitment and selection procedure for the General Manager position in or around January 2019 discriminatory because of the claimant's race? If so, does this shift the burden of proof to the respondent to provide a non-discriminatory reason for the alleged treatment?
 - 2.3.1. the respondent's refusal or deliberate omission to offer the claimant and/or consider him for the General Manager role;
 - 2.3.2. the respondent's failure to advertise and/or follow any formal procedure in relation to the vacant role of General Manager;
 - 2.3.3. the respondent's failure to inform the claimant of the vacant position;
 - 2.3.4. the respondent denying the claimant the opportunity for promotion to the position of General Manager;
 - 2.3.5. the respondent's use of subjective criteria and the decision to slot a worker of a different race into the position that the claimant was performing (without a competitive process)?

Change of job description

- 2.4. In or about 12 June 2019 was the claimant required to carry out the duties of an Operations Manager (as part of his duties or instead of his duties as Hotel Manager). If so, was this less favourable treatment because of the claimant's race?

Comparators

- 2.5. Is Mr Sam Farmer an appropriate comparator? In any event, the claimant relies on a hypothetical white / non-Asian comparator whose circumstances are not materially different to his.

Victimisation contrary to Section 27 Equality Act 2010

- 2.6. Does either of the following amount to a protected act pursuant to s.27 of the EqA:
 - 2.6.1. the claimant raising a complaint of race discrimination during the meeting of 25 January 2019;

2.6.2. the claimant's submission of his grievance letter dated 18 February 2019 in which he set out his complaints of race discrimination?

2.7. The claimant relies on the following detriments:

2.7.1. denying the Claimant's role is that of General Manager despite the internal Marriot Epic system confirming the Claimant's job title as General Manager, the Claimant being given use of the gm@rilondonkensington.com email address, and the Claimant being sent on the General Manager's Induction programme with Marriott International (hypothetical white / non-Asian comparator);

2.7.2. denying that the Claimant was ever offered the role of General Manager, as part of the outcome to his appeal dated 1 May 2019 (hypothetical white / non-Asian comparator);

2.7.3. changing the Claimant's job description on 12 June 2019, requiring him to also carry out the duties of Operations Manager (hypothetical white / non-Asian comparator).

2.7.4. being called to a meeting on 13 February 2019 at short notice, during which the Respondent attempted to pick fault with the Claimant and blame him for, amongst other things, an unauthorised stay at the hotel (which was authorised by Mr Gillings);

2.7.5. the outcome to the Claimant's appeal dated 1 May 2019 raises a number of completely unrelated matters regarding an allegation that was made against the Claimant and also questions his performance. These matters would not have been raised had the Claimant not raised a complaint about discrimination;

2.7.6. the removal of managerial responsibilities from the claimant;

2.7.7. the setting of unrealistic deadlines and increased workload.

Constructive Unfair Dismissal

2.8. Did the respondent's failure to promote the claimant and/or its treatment of the claimant amount to a repudiatory breach of contract thereby entitling the claimant to resign?

2.9. If so, did the respondent resign in response to that repudiatory breach or did the claimant affirm his contract?

Facts

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

Background

3.1. The respondent is a company which employs staff in the hotel business. It does not, typically, manage or operate the hotels itself but enters into management agreements with third parties. The claimant was employed by the respondent as a Hotel Manager, most recently at the Residence Inn London Kensington ("the Hotel"), a hotel managed by Cycas Hospitality BV (Cycas). The owner of the property was Starwood Capital and the hotel was branded as part of the Marriott group. The Hotel was an 'extended stay' hotel, rather than a full-service hotel.

3.2. At the time, the respondent was looking for a Hotel Manager for the Hotel who would report to the Cluster General Manager. The Cluster General Manager has responsibility for the leadership and management of the hotel operations of a number of hotels, working in close partnership with the Hotel Managers to provide leadership, resources and influence for the benefit of the hotels. The Cluster General Manager also has responsibility for brand strategy and has a direct

relationship with the owner. The Hotel Manager's role is to support the General Manager with particular responsibility for Front Office, Housekeeping, Security/Loss Prevention, Engineering/Maintenance and Food & Beverage, but not Finance and Sales.

Appointment of the claimant

- 3.3. In early 2017, the hotel was being refurbished with a view to opening in 2018. The hotel required a hotel manager to run the hotel, reporting to the Cluster General Manager, who looked after three separate hotels. Wayne Androliakos had been impressed by the claimant's performance in other hotels, including a role as Interim General Manager in a smaller property, and considered that the Hotel Manager role in Kensington would be a step up in his development. He was interviewed by the Cluster General Manager, Mark Gillings and was offered the position.
- 3.4. There is a conflict of evidence between the parties regarding the offer made to the claimant. It is accepted that the claimant's salary would be £50k, rising to £55k and this pay increase was implemented. The claimant claims he was offered the job title of General Manager after the hotel opened but the respondent disputes this. We did not hear from Mark Gillings, who has since left the respondent's employment. We therefore looked at the documentary evidence. We were unable to see any promise of the General Manager job title by the respondent although there was much evidence of the claimant raising the issue of his job title. We accept the respondent's evidence that their view was that the claimant was not ready for a General Manager role and we therefore find it unlikely that such a role would have been offered to him. We find that it is more likely that he would be promised a development path which would ultimately lead to a General Manager role.
- 3.5. The claimant entered into a contract of employment with effect from 1 August 2017 specifying his job title as Hotel Manager. The contract contained a flexibility clause allowing the respondent to require him to perform other duties and work in other departments from time to time.
- 3.6. As the Hotel Manager, everyone in the hotel reported to him other than the Finance Manager and the Sales Manager, who reported to the Cluster Financial Controller and Area Director of Sales respectively, with a 'dotted line' to the claimant.
- 3.7. The claimant performed well in his role, particularly in the areas of guest satisfaction and had particular skills in dealing with guests who had negative experiences due to problems with the fabric of the building. The hotel was a challenging property, being a relatively old building that had been modified over time, rather than built to an original plan. This led to ongoing maintenance issues such as broken lifts and air conditioning failures and the claimant performed well in dealing with client complaints arising from these issues. His performance was reflected in the bonus payments he received. However, the respondent felt that the claimant concentrated too much on firefighting situations with unhappy guests rather than trying to resolve the underlying problems which were causing the dissatisfaction.
- 3.8. The claimant's case is that he should have been the General Manager and that he was, in effect, carrying out the role of General Manager as evidenced by various communications from the respondent itself, such as being introduced to third parties as the Hotel General Manager, having the 'gm@' email address and being included on Marriott's General Manager training course. We find that the respondent's explanation for these uses of the General Manager title are consistent with its position that the claimant was a Hotel Manager but was the most senior person in the hotel when Mark Gillings was Cluster General Manager and therefore it was appropriate to use the term 'general manager' in those contexts.

Appointment of Sam Farmer

- 3.9. We find that the respondent should have been clearer with the claimant when he repeatedly raised the issue of his job title. Matters came to a head on the resignation of Mark Gillings. Instead of Mark Gillings being replaced with another Cluster General Manager, the respondent appointed Sam Farmer as General Manager with sole responsibility for the Hotel. This was to be on an interim basis so that Sam Farmer could troubleshoot the various issues with the Hotel, but it was not announced as such when the staff were told of his appointment on 25 January 2019. The claimant had been told in advance, but he was also not made aware of the short-term nature of the appointment.
- 3.10. The claimant was aggrieved that he was not given the role, or even given the opportunity to apply for the role. The respondent did not follow a formal recruitment process (as they had not done with the claimant's own appointment) and gave Sam Farmer the role as he had previously successfully performed such as role at another hotel.
- 3.11. On being told of Sam Farmer's appointment, the claimant complained that he had been discriminated against although he accepted in cross examination that he may not have said 'race' although he suggested that this was implicit. There can be a number of reasons why a person may believe to have been discriminated against other than their race, for example being an employee of the respondent and not Cycas. We do not consider that the respondent was bound to understand the claimant's comment as an allegation specifically of race discrimination. We find, therefore, that this was not a protected act.
- 3.12. Sam Farmer came into post and it was apparent that the claimant was disappointed with his appointment, but they agreed that they would together and there was no personal animosity. However, the claimant was upset about the matter and it remained a live issue and a source of grievance.

Investigation Meeting

- 3.13. On 13 February 2019, Ingrid Van Veen (Vice President, Operations Cycas) sent the claimant an email asking him to come into a meeting a few minutes later. The claimant attended the meeting and was asked about the issue of staff occupying hotel rooms overnight, which is not normal practice. The claimant gave the explanation that this had been authorised by Mark Gillings and that the rooms were not fit for guest occupation. The respondent accepted the explanation and that was the end of the matter.

Grievance

- 3.14. The claimant remained aggrieved at the appointment of Sam Farmer and raised a grievance on 18 February complaining of breach of trust and confidence and race discrimination. We find that this was a protected act.
- 3.15. There was a grievance hearing on 26 February, conducted by John Wagner (owner) with Janet Roberts (HR) and Ali Sohaib (Assistant Group Controller) in attendance. Mr Wagner wrote to the claimant on 11 March 2019 with the grievance outcome in which he concluded that Sam Farmer had been appointed to the role on the basis of being more suitably qualified than the claimant and he did not uphold the allegation of discrimination. He gave the claimant the opportunity to appeal which the claimant took up by appeal letter dated 21 March addressed to Eduard Elias.
- 3.16. Janet Roberts carried out an investigation into the claimant's allegations by contacting Mark Gillings by email and asking Wayne Androliakos and Ingrid Van Veen to write statements. The appeal meeting took place on 3 April and was conducted by Eduard Elias supported by Rebecca Towill (HR) and the claimant

was accompanied by Sean Brennan. At the appeal hearing the claimant raised an additional complaint that he had been victimised following his race discrimination grievance. In particular, he alleged that he had been given unrealistic deadlines and a greater workload by Sam Farmer.

- 3.17. Rebecca Towill investigated the claimant's allegations against Sam Farmer regarding unrealistic deadlines. She asked Sam Farmer for his comments and he confirmed that he had high expectations of the claimant but did not feel his deadlines were unrealistic and he felt that the claimant should manage his time better and delegate more. We find that this was the first Sam Farmer knew of the claimant's complaints and he did not know that the claimant had made an allegation of race discrimination until the this time, at the earliest.
- 3.18. As part of the investigation, various other issues came up. These are as follows;
- 3.18.1. Unrealistic deadlines;
 - 3.18.2. 1-2-1 meetings being called 'private and confidential';
 - 3.18.3. The working relationship generally between Sam Farmer and the claimant;
 - 3.18.4. Removal of the claimant's access to the safe;
 - 3.18.5. Removal of reporting lines.
- 3.19. The respondent looked into these matters and responded to the claimant as follows:
- 3.19.1. 1-2-1 being termed 'private and confidential' – the respondent explained this as being a protection for the claimant in the situation where the conversation included a third party. This was done to ensure that third party did not breach confidence. We do not find this to be a detriment.
 - 3.19.2. Removal of access to the safe was a decision of the Cluster Finance Controller, Raheel Hanif, to tighten up control of finances following two instances of fraud. This decision affected Sam Farmer, Sean Brennan and the claimant equally. The decision was not communicated in advance by Raheel Hanif nor did he consult with those affected.
 - 3.19.3. Following a series of resignations among the management team, Sam Farmer decided to reorganise the management structure, removing the Operations Manager and creating a new role of Rooms Division Manager which would cover 80% of the Operations Manager role, with the other 20% being absorbed by other managers. The Sales Manager was taken out of the structure at the request of the owners.
- 3.20. On 1 May Eduard Elias wrote to the claimant rejecting his appeal and informing him that this was the last stage in the internal grievance process. Eduard Elias accepted that there had been a lack of communication and confirmed his view that the claimant had the potential and ambition to progress his career. He suggested that the claimant worked closer with Sam Farmer so that he could learn from him and he offered Ingrid Van Veen to mentor him. On 21 May Rebecca Towill followed up with claimant, who replied on 1 June rejecting the idea as he had lost trust in the company and could not see Ingrid Van Veen as his mentor.

Organisational changes

- 3.21. Various organisational changes took place following resignations of some management level employees. In addition, the owners had expressed their preference for a change of emphasis away from sales management to business development. In particular the Sales Manager role was deleted and, following Sean Brennan's resignation, the Operations Manager role was removed and replaced by a Rooms Division Manager. Most of the Operations Manager duties were taken over by the Rooms Division Manager but some of the Operations Manager duties were assigned to the Hotel Manager role.
- 3.22. On 12 June Sam Farmer asked the claimant to sign his job description because the claimant had been complaining about his duties. According to Sam Farmer the document he asked the claimant to sign was substantially the same as the job description the claimant had signed when he started the role although with different branded letterhead. The claimant argues that his role was diminished as fewer people reported to him and that he was doing the job of the Operations Manager. Sam Farmer states that the reports that the claimant says he lost were not his in the first place and the dotted line reports were unchanged. He did take on some, but not a significant proportion, of the Operations Manager role but his contract allows the respondent to change his duties in this way.

First tribunal claim

- 3.23. On 13 June, the claimant lodged his ET1 at the tribunal against the respondent alleging direct race discrimination and victimisation. He did not bring a claim against Cycas.

Departure of Cycas, Sam Farmer from the Hotel

- 3.24. In about August 2019, Cycas lost the contract to manage the hotel and Kew Green took over. At about this time, Sam Farmer left the Hotel as he wanted to remain with Cycas rather than TUPE to Kew Green and, in any event, he had achieved what his role required and was assigned to another Cycas project.

Claimant's sick leave and resignation

- 3.25. On 1 August 2019 the claimant went off sick. He resigned on 12 September 2019 by email addressed to Kew Green Hotels giving five weeks' notice with the last date of employment being 20 October. Some of this period was sick leave and the remainder was holiday. He did not return to work. His resignation did not give any reason for his decision other than his health.
- 3.26. On 14 November 2019, the claimant amended his tribunal claim to include a claim for constructive unfair dismissal.

Law

4. For the purpose of these proceedings, the relevant law is as follows:

4.1. Direct discrimination

Direct race discrimination occurs if, because of race, the respondent treats the claimant less favourably than it treats or would treat others. The claimant must show facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated against the claimant. In these circumstances, if the respondent is unable to show that it did not discriminate, the claimant will succeed.

4.2. Victimisation

Victimisation occurs where the respondent subjects the claimant to a detriment because the claimant has done, intends to do, or is suspected of going or intending to do, a protected act. A protected act includes alleging that the Equality Act 2010 has been contravened.

4.3. Constructive dismissal

Constructive dismissal occurs where the claimant resigns in response to conduct by the respondent that amounts to a repudiatory breach of contract.

Determination of the Issues

5. We unanimously determine the issues as follows:

Race discrimination

General Manager Role

- 5.1. We find that the respondent did not make a promise to give the claimant the job title of General Manager on 26 May 2017. Mark Gillings told the respondent during its investigation that he had not done so and, despite numerous reminders by the claimant, there is no evidence confirming a promise was made.
- 5.2. In the event, a new General Manager was appointed who was not the claimant. We find that the reason for this appointment was not related to the claimant's race. It related to the particular skills and experience of Sam Farmer, which the claimant did not have.
- 5.3. We find that the respondent described claimant's role as Hotel Manager because that is what the role was. There was a Cluster General Manager in place and he took the responsibilities for this property which were those of a General Manager, rather than those of a Hotel Manager. The claimant performed the role of Hotel Manager.
- 5.4. We do not find facts from which we could infer that the claimant had been treated less favourably because of his race. The claimant was unable to identify any reason why race was a factor other than that was how he felt. He made the representation that there were no South Asian General Manager in Cycas although he accepted that there were other senior positions occupied by South Asians within Cycas. We note that Cycas is not a respondent to this claim.

Recruitment and selection

- 5.5. We find that the recruitment and selection of Sam Farmer was due to his particular skills and experience and that it was not the normal practice of Cycas to follow an open recruitment procedure, particularly for a specific and short-term role such as this (as demonstrated by the recruitment of the claimant).
- 5.6. We find the respondent should have been more open with the claimant regarding his prospects when he was pushing for the General Manager title but do not find that this failure was on account of his race.
- 5.7. We do not find that, of itself, a failure to follow an open application process to fill a job vacancy is evidence of discrimination.

Change of job description

- 5.8. We find that the claimant was appointed as Hotel Manager and remained as Hotel Manager throughout his employment at the Hotel. He was asked to take on some of the responsibilities of the Operations Manager after the incumbent resigned and the position was deleted as part of the reorganisation of management roles. We find that this was permitted within the claimant's contract and any Hotel Manager would have had those

duties assigned to them irrespective of race. We do not, therefore, find that this was an act of direct race discrimination.

Victimisation

- 5.9. The respondent accepts that the grievance dated 18 February 2019 and subsequent correspondence from the claimant's solicitors, together with other elements of the grievance process are protected acts within the meaning of the legislation. We have found that the complaint of unspecified discrimination on 25 January 2019 was not a protected act.
- 5.10. A person can only victimise another if they are aware of the protected act. We accept Sam Farmer's evidence that he only became aware of the claimant's grievance when he was asked for information as part of the grievance appeal investigation. He was not sure when he became aware that the allegation was one of race discrimination, but we will assume that he first became aware of the protected act when Rebecca Towill was investigating the claimant's allegations of unrealistic deadlines and increased workload.
- 5.11. Looking at each of the claims of detriment, we find as follows:
- 5.11.1. We do not find that the reason that the claimant was not given the job title of General Manager was due to the protected act. The issue of his job title predates the protected act, as a matter of logic, cannot be an act of victimisation.
- 5.11.2. We do not find that the respondent's failure to uphold the claimant's grievance regarding his claim to have been offered the role of General Manager is an act of victimisation. We find that the reasons for the grievance appeal outcome are cogently set out in the appeal outcome letter.
- 5.11.3. We find that any changes to the claimant's job description to include the duties of an Operations Manager were part of a wider reorganisation, which had been suggested by the
- 5.11.4. Being called to a meeting on short notice on 13 February 2019 cannot be an act of victimisation since the first protected act was on 18 February 2019.
- 5.11.5. The matters raised in the grievance appeal outcome arise from the investigation into the allegation of victimisation raised by the claimant at the appeal hearing regarding his workloads and unrealistic deadlines. These matters would not have been investigated if the claimant had not made an allegation of victimisation during his grievance appeal hearing. We do not find that investigating the allegations and reporting on the outcome of the investigation is an act of victimisation.
- 5.11.6. We find that the claimant is mistaken in concluding that managerial responsibilities were removed from him. There was a reorganisation of management roles within the hotel at the request of the owner. There were changes to the reporting lines of the Sales and Finance roles within the Hotel but they did not report directly to the claimant and only had a dotted line responsibility to him. This was not removed. We do not find that this was an act of victimisation.
- 5.11.7. We find that Sam Farmer's management of the claimant, which included setting him deadlines and changing his workload, was within the normal expected interactions between a General Manager and a Hotel Manager. We do not find that Sam Farmer's requests were unreasonable or unrealistic. We also find that Sam Farmer was not aware of the race discrimination allegation at this time. We therefore do not find that the claimant was victimised.

Constructive dismissal

- 5.12. We find there is no express breach of contract.
- 5.13. Turning to whether there has been a breach of an implied term, in particular the implied duty of trust and confidence, we find that there were some communications failings but we do not find that these go to the heart of the contract. We therefore find that was no repudiatory breach and no constructive dismissal.
- 5.14. If we are wrong about this, we find that the claimant affirmed the contract. He mentioned on 1 June 2019 that he had lost trust in the company but took no action until 12 September 2019. Even allowing for his sickness absence from 1 August 2019, that is a period of two months when he continued to work as normal.
- 5.15. The individuals within the hotel with whom he had issues (in particular Cycas managers and Sam Farmer) had by then left.
- 5.16. Further, his resignation letter is very positive about his experience in the role and makes no mention of any breach of contract or complaint about the way he had been treated. However, we find that the claimant was still aggrieved and we accept his explanation that the people to whom he addressed his resignation were not involved in the matters which had led to his grievances.

Conclusion

6. In conclusion, the claimant's complaints fail and are hereby dismissed.

Employment Judge Davidson
Date 26 January 2021