Case Number: V 2300288/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Dr S Chacko
Mr R Singh

BETWEEN:

Mr C Clement-Fletcher **Claimant**

AND

Spy Alarms Limited **First Respondent**
Sussex Alarms Ltd **Second Respondent**

ON: **15-17 March 2021**

Appearances:

For the Claimant: **Ms A Davies-Fletcher, Lay Representative**

For the Respondent: **Mr R Cater, Advocate**

Written reasons produced following a request by the Claimant

Introduction

1. By a claim form presented on 25 January 2019 the Claimant brought claims of race harassment and victimisation. The relevant law is set out in sections 26 and 27 Equality Act 2010, which are reproduced below.

2. The hearing took place on 15-17 March 2021 At the end of the hearing the Tribunal gave a unanimous judgment that the Claimant's claims of racial harassment under s26 Equality Act 2010 ("Equality Act") and of victimisation under s27 Equality Act did not succeed. The Claimant made a request for written reasons.

3. The hearing was conducted over three days by CVP. Given the problems of the current pandemic this was a reasonable manner in which to conduct this hearing. The parties consented and the witnesses all gave evidence clearly and could be seen and heard by all parties. I was satisfied that each witness

was giving evidence on her own account and there is no question that their evidence was interfered with in any way in the course of giving evidence.

4. There was a bundle of documents consisting of 76 pages. References to page numbers in these reasons are references to page numbers in that bundle.

5. The Claimant gave evidence on his own behalf and the evidence of the Respondent was given by Hugo de Beer, the Respondent's Service Director, Darren Green, its Operations Manager and Thomas Howard, its Managing Director. The witnesses had all prepared written statements, which the Tribunal read before the hearing began.

The relevant law

6. S 26 Equality Act prohibits harassment related to a protected characteristic, including age or race.

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

7. Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

The issues

8. The issues in the case were as follows:
    a. Was the Claimant subjected to racial harassment by Mr de Beer?
    b. Did the Claimant do a protected act by complaining of racial harassment?
    c. If so was the Claimant's dismissal in any way influenced by his having done that protected act?

Findings of fact

9. On the basis of the written and oral witness evidence and the documents to which we were referred we made the following findings of fact.

10. The Claimant was employed by the Second Respondent from 1 November 2016 as a Security Alarm Engineer. He was dismissed by the Second Respondent by letter of 13 September 2018 which was emailed to him that day. He was given an offer letter and a contract of employment (pages 29-43).

11. The First Respondent acquired the shares in the Second Respondent on 31 August 2018. There was no immediate TUPE transfer of staff but the Respondent's witnesses became directors of the Second Respondent and the Second Respondent was therefore liable for their conduct under s109 Equality Act. The Claimant had no legal relationship with the First Respondent.

12. Following the acquisition, the new Directors agreed to meet with the Service Engineers at their premises in Orpington. There had been a brief introduction a week earlier and the format of the day was a plenary session at which all the engineers assembled for a briefing. There was an opportunity for individual engineers to raise specific points in one-to-one meetings.

13. The Claimant had had an arrangement with the previous owner of the business, Colin McPherson, in respect of his working hours. The exact nature of that arrangement was explained in an email sent to the Claimant by Mr McPherson on 17 September 2018, shortly after the Claimant's dismissal. The adjusted hours had been put in place to enable the Claimant to take his son, who is disabled, to school and to collect him from school when no-one else was available. That email was not included in the bundle of documents despite having been the subject of correspondence between the parties and Mr Cater said this was an oversight. The Tribunal was not entirely satisfied with that explanation.

14. The arrangement with Mr McPherson was oral not written. Consequently it was the Respondent's case that when the First Respondent undertook due diligence on the Second Respondent prior to the acquisition, the arrangement did not come to light.

15. The Claimant had two meetings with Mr de Beer on 13 September for the purposes of discussing certain aspects of his terms and conditions. Three issues came up at the first meeting including the question of the Claimant's working hours. The Claimant asked Mr de Beer if he was aware of his working hours arrangement. Mr de Beer said that he was not aware of the arrangement and that it was likely to be a problem. The Claimant then suggested that the problem could be mitigated by his stock being sent to the Burgess Hill branch, which was near his home. Mr de Beer said that this was not going to be possible as the person who used to assist with this arrangement would in future be working from home. The meeting adjourned and Mr de Beer went to check the terms of the Claimant's contract.

16. The two men met later in the day on a different floor of the building. There was a note of the meeting at page 61, the content of which Mr de Beer confirmed in cross examination. The Claimant disputed the content of that note. The Claimant described Mr de Beer closing the door and jamming it closed with a chair, which was placed in such a way that no-one would have been able to open the door. He found this intimidating and it made him feel uneasy. Mr de Beer said that the door was faulty and he had put the chair there simply to stop the door swinging open. He also said in cross examination that the room in question had glass panels and he did not think it was an intimidating environment. The Tribunal accepts however that the action put the Claimant on edge and that he said words to the effect "so this is serious then". He is also likely to have been feeling uneasy as a result of the conversation with Mr De Beer earlier in the day.

17. Mr De Beer than produced the Claimant's written contract (page 29-43) and pointed out that the Claimant's contracted hours required him to be onsite at 8.30 finishing at 5.00 with a half hour lunch break. In the note at page 61 and in his evidence to the Tribunal he said that the Claimant had indicated that there was an email in existence that confirmed the revised arrangement. We prefer the Claimant's account however, according to which he said that he would be able to get email confirmation of the revised working hours from Mr McPherson, which he did in fact do after his dismissal.

18. The Claimant than asked about how much flexibility was possible as he also had College two days per week starting at 5.30pm. He confirmed that he was not able to drop his son at school early in the morning. It was not clear from the evidence whether 8.30 or 8.45 was the relevant time, but in any event the Claimant's agreed start time was not in line with the Second Respondent's expectations under its new management. Mr de Beer said that all employees would be expected to be on site at 8.30 am and asked how the Claimant would manage. The Claimant explained how he had managed the situation hitherto, with the assistance of the colleague who used to pick up parts for him from the office the night before and take them home. As that colleague lived near the Claimant this made matters easier. Mr de Beer reiterated that the arrangement would have to cease as the employee would be working from home in future. It seemed to the Tribunal that Mr de Beer was coming across to the Claimant as taking an inflexible stance about the issue and that the Claimant would have been upset at this point. It is therefore not surprising that

he said to Mr De Beer that he did not see how he could continue to work for the Company on that basis.

19. Mr de Beer also told the Claimant during the meeting that he should remove his baseball cap as this was not part of the company uniform. As the Claimant was evidently concerned about his position and future in the Company at that moment, the Tribunal considers that it was tactless and ill-advised to have mentioned the cap during the meeting and is likely to have upset the Claimant further, causing the atmosphere in the meeting to deteriorate.

20. At that point the Claimant's phone rang. The Claimant took the call and spent a few seconds on the phone telling the caller that he would call back later. The Claimant's evidence about whether he had asked if he could take the call was not entirely consistent in his witness statement and his evidence in cross examination. We find that he did not ask specific permission to take the call. When he ended the call Mr de Beer said that he should not take calls during meetings. The Claimant's evidence was that he said "Don't ever do that to me again" but Mr de Beer denied saying that. Mr de Beer's evidence was that he found it rude and disrespectful that the Claimant had taken a phone call in the middle of a conversation and had pointed that out, but politely and without aggression. However, the Claimant said that Mr de Beer had spoken in an aggressive tone and that the Claimant had responded by looking at him in disbelief. This, the Claimant said, caused Mr de Beer to ask him not to look at him like that and the Claimant said he retorted by asking Mr de Beer not to speak to him in that way. He said that at that point in the exchange Mr de Beer said "I can talk to you as I like kaffir. I am not your friend."

21. Mr de Beer's account was very different. He said the Claimant reacted angrily to the reprimand about the phone call and told him not to "treat him like a fucking child" and said that he was much older than Mr De Beer. Mr De Beer denied in the strongest possible terms having called the Claimant a "kaffir", giving a detailed account of why he would not use the word, and pointing out that in South Africa, where he grew up, it is an abhorred word and use of it has been criminalised. He said that at that point in the meeting the Claimant stormed out.

22. Having considered all of the oral and contemporaneous evidence the Tribunal was unanimous in accepting Mr De Beer's evidence that he did not use the word "kaffir" in the meeting or indeed any other term of racial abuse. We did however consider his handling of the meeting to have been insensitive and to have caused the Claimant to have become upset. As we have observed, it was not necessary, or wise in the circumstances to make the point about the baseball cap and it might also have been wiser not to comment on the phone call in the particular context of the meeting. The Claimant would justifiably have been worried about the content of the conversation – Mr De Beer himself acknowledged that in cross examination. The Claimant would have been particularly worried because Mr de Beer had taken a seemingly sceptical attitude about his working arrangements and was then indicating that the company was going to have difficulty showing any flexibility about hours in the future. It is not surprising that the Claimant left the meeting in an upset state.

However, we find that he did not do so as a result of any form of racial abuse or racist language.

23. That being our finding the Claimant's claim of racial harassment fails.

24. As regards what followed, the Claimant was seen to be upset by Mr Green who directed him to wait in a room while he went to find out what had happened. We find as a fact that the Claimant did not complain of racial harassment to Mr Green. The encounter with Mr Green led to the meeting with Mr Howard, the minutes of which were at page 62. We find as a fact that at no point during that meeting did the Claimant make an allegation of racial harassment by Mr de Beer. It was clear to the Tribunal that at the end of that meeting the Claimant had made it clear to Mr Howard that he intended to resign and that he left the building having conveyed that impression. In the context – namely that the First Respondent had only recently taken over the Second Respondent and there was no established relationship between the Claimant and the new managers, it is not surprising that the Second Respondent took him at his word and did not attempt to entice him back. Instead Mr Howard decided to make the situation absolutely clear by issuing the dismissal letter at page 65. As we have found as a fact that the Claimant made no complaint of racial harassment to Mr Howard or any other person, there is no basis for his claim that his dismissal was an act of victimisation.

25. Had the Claimant had two years' service the dismissal would certainly have been unfair if effected in the manner adopted by Mr Howard, but that was not an issue before the Tribunal in this case.

26. The Claimant's claims are not made out on the facts and are dismissed.

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Employment Judge Morton
Date: 27 May 2021