



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Andrew Donald

v

Yusen Logistics (UK) Ltd

Heard at: Watford

On: 19/20/21 May 2021

Before: Employment Judge Alliot
Mr D Wharton (by CVP)
Mr I Middleton (by telephone and CVP day 1, in person days 2 & 3)

Appearances

For the Claimant: In person
For the Respondent: Mr Jason Braier, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims are dismissed

REASONS

Introduction

1. The claimant was employed by the respondent as a warehouse operative on 6 April 2015. By a claim form presented on 17 June 2020, following a period of early conciliation from 11-27 May 2020, the claimant brings complaints of victimisation. The respondent defends the claims.

The issues

2. At a preliminary hearing before Employment Judge Palmer on 5 January 2021 the issues were narrowed and defined as follows:

“List of issues

Victimisation – s.27 of the Equality Act 2010

1. The claimant relies on the following protected acts:
 - (a) Filing of a grievance on [19] August 2019 (in which he alleged that he was being treated less favourably because of his sex); and
 - (b) Bringing the first ET claim in these proceedings under case no. 3327807/2019, alleging various forms of discrimination.
2. For the avoidance of doubt, the respondents accept that these amounted to protected acts for the purposes of s.27.
3. The detriments relied upon by the claimant under s.27(1) are:
 - (i) The respondent's decision of [6] March 2020 (which was a decision in respect of an appeal against the decision in respect of the claimant's first grievance ([19] August 2019) and an initial decision in respect of his second grievance (31 October 2019)), amounts to a detriment because of the claimant's protected act; and
 - (ii) The respondent's decision dated 30 April 2020 in respect of the grievance appeal (for grievance no. 2) amounts to a detriment because of the claimant's protected acts."

The law

3. S.27 of the Equality Act 2010 provides as follows:-

"27. Victimisation

- (i) 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."

4. S.136 of the Equality Act 2010 provides as follows:-

"136. Burden of proof

...

- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But sub-section (2) does not apply if A shows that A did not contravene the provision."

5. In this case the respondent accepts that the two matters raised are protected acts and that the outcome of the two grievances are potential detriments if they were because of the protected acts.

6. As per the IDS Employment Law Handbook Discrimination at Work at 1946:-

“The essential question in determining the reason for the claimant’s treatment is always the same: what, consciously or sub-consciously, motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an enquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.”

7. The protected act need not be the sole reason but it is sufficient if it has a significant or material influence.

The evidence

8. We have been provided with a hearing bundle running to 576 pages. In addition we have a schedule of loss from the claimant and the respondent’s chronology. We had witness statements and heard evidence from the following:

- The claimant
- Mr Mike Coates (Regional General Manager of the respondent)
- Mr Greg Carter (Senior General Manager for Transport for the respondent)

The facts

9. The claimant was employed on 6 April 2015 as a warehouse operative. His job entailed some office-based administration processing orders and invoices and some picking of goods for dispatch.
10. The claimant worked alongside a female colleague referred to in this judgment as NR. NR is disabled and in order to protect her privacy we have anonymised her identity to NR. As part of the reasonable adjustments made by the respondent for NR, she was allowed to start earlier at 6am and undertook more office-based work.
11. On 4 July 2019 there was an incident in the warehouse. In short, a forklift truck was used in order to tilt a “Mezz” gate to a cardboard waste disposal unit. This resulted in the gate falling and making a loud noise. We were told that using a forklift truck for this manoeuvre was a breach of health and safety rules.
12. We do not need to go into the resultant disciplinary process in great detail. The claimant acknowledged that he witnessed the event. Management investigated the incident and the claimant was subjected to the disciplinary process for failing to report a health and safety breach. Throughout that disciplinary process the claimant maintained that he could not have reported the incident as a breach of health and safety rule as he had not been trained on this piece of equipment and consequently could not report it as a breach of health and safety. Be that as it may, the claimant was disciplined and on

8 August 2019 a verbal warning was issued to him. The claimant appealed against the disciplinary outcome on 15 August 2019. The appeal was unsuccessful, the outcome being communicated on 24 September 2019.

13. The first protected act relied upon was the filing of a grievance on 19 August 2019. Obviously enough, the disciplinary process and the award of the verbal warning took place prior to the first protected act. Consequently none of the disciplinary process prior to the appeal can have been motivated by any protected act. We express no view as to the outcome of the disciplinary process save to record what happened.
14. It was against the background of the claimant's disciplinary process that he lodged the first grievance on 19 August 2019. The relevance of the disciplinary process is that part of the grievance lodged on 19 August 2019 relates to the disciplinary process.
15. In evidence the claimant told us that the reason why he considered that the dismissal of his grievance was on the ground that he had done a protected act was based on a number of factors. The evidence he relied upon was because his grievances had been dismissed, because not all the issues raised in his grievance had been dealt with, because they had not considered his health, because he had not been allowed to work and because of the failure of their investigations. Accordingly, we have examined carefully how the grievance was dealt with by the respondent to see if there are any primary facts from which we can draw the inference that the claimant invites us to do.
16. We have the grievance lodged by the claimant on 19 August. As he himself accepted in later interviews, the first four paragraphs do not do anything other than recite generalisms relating to the law and the acts that he is complaining about are contained in paragraph 10. The claimant was alleging that he had been treated less favourably than NR on the basis of his sex. We have looked in detail at the matters raised by the claimant.
 - 16.1 Two of them relate to a complaint about his reporting line.
 - 16.2 There is an allegation that NR was able to contact Rebecca Griffin directly. Rebecca Griffin was a layer of management above the claimant and NR's line managers, who at the relevant time were Stewart Wise or Steve Wood.
 - 16.3 A complaint was made that a client (Zippo) contacted the site manager, Rebecca Griffin, directly.
 - 16.4 Two of the complaints relate to having to work for Mitsubishi on two different days.
 - 16.5 One complaint relates to being given a point on the claimant's file for failing to invoice at the end of a working day as against an allegation that NR had not been given a point for failing to invoice off on 24 December 2018.
 - 16.6 Five of the complaints relate to the disciplinary process. We observe that the disciplinary process was still live in the sense that the claimant had an appeal against the disciplinary outcome.

17. The balance of the grievance filed on 19 August 2019 deals with the effects that the alleged treatment was having on the claimant, in particular in relation to his health.
18. Due to the claimant's assertion that the investigation of his grievance was incomplete we have looked at it in some detail.
19. We have a document in our bundle dated 26 August 2019. This is an email from someone called Jason Tipple who it would appear was initially tasked with investigating and dealing with the claimant's grievance. The content of that email is self-explanatory but in short Mr Tipple was declining to deal with the grievance on the basis that he might not be seen to be impartial as he reported to Rebecca Griffin and worked in the same management team. We take from that that the respondent's systems were very alive to providing a fair system to the claimant and do not reflect some sort of intention to penalise him for raising a grievance relating to NR and an allegation of sex discrimination.
20. HR responded on 29 August 2019 and arranged a formal grievance meeting. Mr Steve Morris was appointed to deal with the grievance and conduct the relevant meetings.
21. There was an investigation meeting with the claimant on 13 September 2019. We do not quote extracts from that meeting which can be referred to if necessary. The meeting lasted one hour and the notes of the meeting run to six pages. Having considered the meeting notes we find that the investigation was thorough and that the claimant was given every opportunity to air his grievances.
22. Following the investigation meeting with the claimant, Mr Morris then undertook interviews with five relevant individuals. These took place on 20 September 2019. Again we do not quote extracts from these interviews but cite examples of the thoroughness with which the respondent investigated the claimant's grievances.
23. Mr Stewart Wise, the claimant's line manager, was interviewed. The following extracts are cited by way of example:

“SM What is your knowledge of the H&S incident with the gate?

SW I conducted the investigation into it, so I know the details of it. RR was asked to drop the palette of cardboard & AD (the claimant) was a witness to the gate being dropped by the forks.”

And

“SM He wants to know why the work is not distributed equally between him & NR, do you feel the workload is equal?

SW I am not really able to comment on the equality. There are differences in what they are required to do, this is down to their capabilities, they have different roles & cover holidays.”

And

“SW I don’t think there is a difference in how they are treated. They are different people, with different strengths & weaknesses but no inequality is applied.”

24. From the interview with NR, when she was asked about reporting to Rebecca Griffin, she stated:

“NR I only report to RG in relation to the Titan system errors, other than that I email S Wood & I report to Steve/Stewart not RG.

SM Before DS left Zippo, would the customer contact DS & now RG & not Steve/Stewart?

NR Yes, as they have the relationship with RG. Steve & Stewart do not know the Zippo contract, even DS did not know much about Zippo.”

And

“SM What is your relationship on a day to day basis with AD?

NR We use to get on & have some banter & a laugh. In the last two years he has changed & is nasty & bitchy, so I don’t really talk to him now. It makes me worse & the doctor has been trying to sign me off work, but it is my safe place & the only time I leave the house. He is taking that away & I don’t trust him, I don’t even go to the toilet as he creeps about & I don’t trust him, as I feel he is on a mission.”

And

“SM His grievance in summary is – why is the work not equally distributed, why do you think he thinks that?

NR He doesn’t do anything, I don’t get it, he won’t touch the system side of things. I like being organised & he is not like that, I will even come in early if I need to keep on top of it. He makes excuses why it is not done.”

25. The respondent managed to interview David Stacey who we have seen reference to being made redundant. David Stacey had been the claimant’s line manager prior to Stewart Wise and Steve Wood. It is noticeable that in his grievance the claimant refers to David Stacey as treating him and NR equally with work distribution.

26. In his interview David Stacey said as follows:-

“SM AD states that before September 2018 both NR and AD reported to you & work was distributed equally. After you left RG requested that they report to Steve

Wood and Stewart Wise. Can you summarise how the work was split or whether there were any problems whilst you were here?

DS They have worked together for several years & both did equal duties. NR preferred to do the admin & AD more the manual labour.

SM Did AD ever complain about this?

DS No, he didn't, I think it was mutually agreed. When NR was off, he did most of the admin & Shannon helped. There was no favouritism, it was an equal split. NR was always in early, so she would do the keying in of orders, before AD arrived so that he would do the picking & packing. NR would do the picking & packing to help if she had finished the admin.

SM Have you ever seen any incidences where NR was more favourably treated?

DS No, some staff may have felt that, due to the phones and her condition. HR had to explain to them what the problems were in relation to NR's issues & the adjustment made regards DDA."

27. Rebecca Griffin was interviewed and said:-

"SM AD says he was asked by Steve W to make a statement & he refused due to not having the H&S training.

RG AD is not aware that we have his sign off of his Talk Box training of the gate. This was found after his disciplinary & we did not have it at that time."

28. The last reference by Rebecca Griffin is to the fact that the claimant had had training on the mezzanine gates. We have seen the training document and it is fair to say that it does not expressly say a forklift truck is not meant to be used to operate it but from what we hear it would appear that that was a fairly obvious conclusion from a commonsense point of view.

29. We have set out examples of what we have concluded was an extremely thorough investigation by Mr Morris into the claimant's grievances raised on 19 August 2019. Five witnesses were interviewed at length, each interview taking approximately one hour. All the matters (and more) raised by the claimant in his grievance were investigated with those witnesses and material was provided to Mr Morris upon which he could later base and justify the conclusions he reached in deciding on that grievance.

30. On 9 October 2019 there was a follow up meeting with the claimant where Mr Morris went through the evidence he had been given by the five witnesses and gave the claimant a further opportunity to comment on them. Again we do not go through that in great detail. There is one minor error that Mr Morris has made in that he asserts that the statement provided by NR following the mezz gate door incident does not name the claimant. We have seen the statement and it does. However, it does not assert that the claimant witnessed the incident. In any event, it is irrelevant because the claimant now accepts that he did witness the incident. The impression given of him saying that he did not witness it was in the context of the

claimant saying he did not witness an incident that required him to make an H&S report.

31. The claimant covertly recorded some of these meetings and has produced transcripts. The transcript of the meeting on 9 October is somewhat selective and some parts of it have been taken out of context.
32. On 18 October 2019 Mr Morris sent the claimant the grievance outcome letter. We have read through that letter and we find that Mr Morris has addressed all the matters raised by the claimant in his grievance and has given a reasoned response as to why, mostly, his grievances are not accepted. The reason we say that the grievance was mostly not accepted is that the outcome letter reads to us as being positive in a number of respects. The reporting line is clarified, training was recommended, the claimant was referred to OH and it was indicated that working on the Cassio account would be explored. These suggestions were made in order to try and solve some of the issues raised.
33. We find that Mr Morris dealt with the grievance thoroughly and properly and he was motivated by clearly investigating and dealing with the grievance. We find that he did not reach the conclusions he did on the basis that the claimant had made an allegation of sex discrimination and had raised the grievance in the first place.
34. On 18 October 2019 the claimant raised a second grievance. This was as follows:-

“I would like to make an official complaint regarding a member of staff’s dignity at work.

Every morning I say good morning to NR and I find it disrespectful and offensive that she ignores me and does not acknowledge or reply.

While I appreciate she does not wish to be friends (mutually respected), I believe that she should be more respectful and acknowledge me and not be so rude. I don’t believe this is too much to ask for.

Yusen Logistics has a dignity at work policy which NR is not complying with, perhaps this is a lack of training.

To this end, I wish to know how this will be addressed and resolved, as it further causes upset to my disabilities.”
35. In response to that second grievance the claimant’s line manager, Steve Wood, suggested to the claimant that he go on temporary garden leave on full pay until the respondent had heard and looked into the grievance in order to remove him from any situation that could cause detriment to his health. We find that that was a reasonable management instruction given that the second grievance specifically linked the alleged behaviour of NR to causing him upset to his disabilities.

36. Mr Coates was tasked with dealing with the appeal against the outcome of the first grievance and to deal with the second grievance. Due to the fact that the claimant was off work there was some delay in arranging the investigation meeting and appeal meeting. Several appointments were deferred at the claimant's request. The meeting eventually took place on 12 February 2020.
37. The claimant's first Employment Tribunal claim was presented on 19 December 2019. From the file it can be seen that notice of it was served on the respondents on 7 January 2020. The respondents filed their ET3 response form on 29 January 2020. Consequently we find that the respondent was aware of the Employment Tribunal proceedings (the second protected act) as from approximately 7 January 2020.
38. We note that on 27 November 2019 the respondent received an occupational health report into the claimant.
39. On 12 February 2020 Mr Coates held a combined first grievance appeal meeting and second grievance investigation meeting. It is clear that Mr Coates was aware of the Employment Tribunal proceedings as reference is made in the notes to the Employment Tribunal on a few occasions. Nevertheless, Mr Coates is recorded as saying that despite the Employment Tribunal case he wanted to carry on with due process. We have read the notes of the hearing and it is clear that the claimant was given an opportunity orally to air all the matters that he wanted to in relation to the appeal against the rejection of his first grievance made on 19 August 2019. In addition the second grievance was investigated. We quote the following from the respondent's notes:-
- “AD I am complaining regarding NR's behaviour towards me regarding the dignity at work policy. I feel her treatment towards me is not as per the policy.
- MC How did this manifest itself?
- AD I don't know, I imagine since July 2019 & the statement she made and things gone downhill. For some time, she made it clear that unless it was work related, she was not talking to me & I found this made the work environment not good. I continued to be polite saying good morning & goodbye to her & she did not respond.
- MC So, NR stated that unless it was work related she did not want to talk to you?
- AD Not talking to me is not a problem but not being courteous is not acceptable.”
40. Once again we have a transcript prepared by the claimant following his covert recording of that meeting. There does not appear to us to be any material difference.
41. In evidence the claimant accepted that there was tension between him and NR.

42. Mr Coates sent the claimant the grievance appeal and grievance number two outcome letter on 6 March 2020. We have been through that letter and in our judgment it deals with the matters that the claimant raised in his appeal against the findings of Mr Morris. The reasoning is clear. We find that Mr Coates was not motivated by a desire to penalise the claimant for making the grievance in the first place and/or bringing the Employment Tribunal proceedings.
43. Dealing with the second grievance, Mr Coates concluded as follows:-
- “You claim that NR’s behaviour towards you, is offensive and breaches the dignity at work policy.
- You stated in your meeting that N not saying good morning or goodbye to you. By your own admission, N has made it clear to you that she would like to keep conversation between you both to work related issues only. As long as colleagues are courteous, and work together in a professional way to ensure that the job is conducted, we cannot enforce someone to engage in conversation outside of this.”
44. Once again we find that the reasoning of Mr Coates is compelling and that he was not motivated in rejecting grievance number two by wanting to penalise the claimant for making the first grievance and/or bringing the Employment Tribunal proceedings.
45. On 13 March 2020 the claimant appealed the outcome of his second grievance. Having read that document we do not consider that it is actually appealing the outcome of the grievance as it does not appear to refer to the lack of response to his good morning greetings to NR. It appears to range over many other issues.
46. Mr Greg Carter was tasked with dealing with the appeal against the rejection of the second grievance. The hearing was conducted by Skype but with audio only. Again we have the claimant’s covert recording transcript and the notes from the respondent. What is clear from both is that the claimant was raising a range of issues outside the ambit of an appeal against the rejection of the second grievance. Nevertheless, Mr Carter heard what the claimant had to say and took it upon himself to look into the matters of complaint. It is noticeable that when asked what outcome the claimant was looking for he stated that he wanted NR to be removed from working with him.
47. On 30 April 2020 Mr Carter sent the grievance appeal outcome letter to the claimant. He identifies the issues raised by the claimant that fell outside his remit to deal with the appeal. Nevertheless, he did deal with those matters. As regards the grievance appeal, the letter states as follows:-
- “Finally, in reference to point 5 above, I have reviewed the circumstances of your grievance for a breach of dignity at work against your colleague. I note that your colleague has advised that she will communicate with you on all work related matters, however has expressed her desire not to engage with you on any social matters. Clearly when looking at our procedures, we need to consider the rights and entitlements of all

employees, and providing she acts in a professional and co-operative manner, I do not consider that this behaviour is indicative of harassment or bullying and whilst I accept that you may feel upset by her decision, this would not constitute a breach of the dignity at work policy.”

48. We find that Mr Carter’s reasoning was sound and that in rejecting the claimant’s grievance appeal he was not motivated by a desire to punish the claimant for making his original grievance on 19 August 2019 and/or bringing the Employment Tribunal proceedings.
49. We find that, contrary to the claimant’s assertions, the respondent did deal with all the issues raised by the claimant (and more), conducted thorough investigations, took into account his health and rejected the grievances (mostly but not wholly) on genuine and proper grounds. As such, there are no primary facts upon which we can infer that the treatment was because the claimant had done a protected act.
50. For the above reasons we find that the grievance outcome decisions were wholly unconnected with the bringing of the grievance on 19 August and the bringing of the Employment Tribunal proceedings in December 2019. Accordingly the claimant’s claims are dismissed.

Employment Judge Alliott
1 July 2021
Date:
12/07/2021
Sent to the parties on:
J Moossavi
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For the Tribunal Office