Case Number: 3327596/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Zajac	**v**	**Bestway Wholesale Ltd**

Heard at: Watford **On**: 4 August 2021

Before: Employment Judge R Lewis

Appearances

For the Claimant: In person, with interpreter assistance
For the Respondent: Mr D Brown, Counsel

JUDGMENT

1. In the agreed list of matters complained of, five points are struck out, although they may be relied upon as background if found to be relevant.

2. The respondent's application for Deposit Orders is allowed. Orders and reasons have been sent separately.

REASONS

Introduction

1. This was the hearing directed by Employment Judge Manley on 19 January 2020 and again by Judge Tynan on 9 March 2021. A Case Management Order, and Deposit Orders, have been issued separately.

2. The claimant represented himself, with the assistance of an interpreter, Ms Dzulik. I record my appreciation to Ms Dzulik for her professionalism and her assistance.

3. I had a bundle of 113 pages. A very helpful document was set out at page 46, which identified the claimant's claims in eight points. Although drafted by Mr Brown on behalf of the respondent, the claimant agreed it as accurate and near-complete.

4. Within the bundle some 40 pages consisted of transcripts prepared by the claimant of covert recordings of telephone conversations which he had had with his manager, Mr A. The claimant said that Mr A did not know that he was being recorded. I have made the assumptions that Mr A's words have been transcribed accurately and in full, and that what Mr A said to the claimant was truthful. Mr Brown said that the respondent had asked for copies of the full original audio recordings. As they have not been provided, the respondent could not formally agree the transcripts. I agree that the claimant's disclosure obligations will extend to the audio recordings.

5. I have interpreted Mr A's words as forming part of the material placed before the tribunal by the claimant. Within them, I attach particular weight to a conversation at 104-105, in which there was discussion of the claimant's 'promotion'.

6. I proceeded informally, clarifying my understanding of the complaints and claims; then hearing Mr Brown's submissions, and then the claimant's replies. After an adjournment, I gave judgment on the strike out. I went on to deal separately with deposit orders and case management.

7. I did not hear evidence. The claimant was not sworn. I did not permit counsel to cross-examine. I asked the claimant such questions as seemed to me necessary for clarification.

General

8. I preface my findings with the observation that the Tribunal is familiar with the difficulties faced by litigants in person, particularly those working in a second or third language, and those with strong emotions about the events in their case. Those factors seemed to me present at this hearing. The claimant also mentioned that he had worked overnight before this hearing.

9. I was nevertheless concerned that although the claimant has had a great deal of paperwork for a long time, and had had the benefit of professional advice, he was not well prepared to do justice to himself. I repeat that I was in particular concerned that he has failed to think through two of the major problems in his case.

10. The task of the tribunal will be to decide legal claims of racial discrimination. Its task is not to assess whether Bestway managed the claimant, his colleagues, or his workplace, competently or incompetently. It will not necessarily help the claimant if the tribunal considers that there was poor management, because the tribunal might then decide that workers of races were managed equally poorly, without discrimination between them.

11. The claimant's first problem is that there is a distinction between the claimant's sense of workplace grievances (which the tribunal will not decide); and, on the other hand, the claims of race discrimination which the Tribunal will have to decide. I am not sure that the claimant has understood

the distinction, or how important it is. Secondly the claimant has not thought about the difficulties which he will face in proving racial discrimination by Mr A.

Factual setting

12. The background relevant chronology was that the claimant worked for the respondent for about 25 months. He resigned with immediate effect on 16 August 2019. Day A was 10 September 2019 and Day B was 10 October. He presented his claim form, represented by KL Law Ltd, on 13 December 2019. Mr Kozik of KL Law represented him at the first preliminary hearing, but before the second preliminary hearing, the claimant terminated his retainer. The claimant had had several months at least to prepare for today's hearing. As his covert recordings were made while he was still employed, he had had nearly two years to listen to them, and understand their effect on the case.

13. It was common ground that the claimant was a warehouse operative. I understand from the recordings that his workplace had general problems of an overload of work; not enough staff to do the work; and not enough budget to pay staff, including paying overtime for staff. The claimant said that there were about 10-15 workers per shift when he worked, and that the proportion of Polish workers might be between 33% and 70%. He confirmed that there were Polish supervisors.

14. In March 2018 the claimant applied for promotion to supervisor. It appears that Mr A supported his application. In one of the covert recordings, and confirmed in the respondent's pleading, Mr A, and then the respondent, said that the promotion had not been approved by more senior management. That was no doubt disappointing and frustrating for the claimant. It left Mr A, as a manager, with the problem that he had identified a need for more supervisor hours, but had been told by more senior managers that the company would not fund the hours which Mr A saw needed to be done.

15. In a specific recorded transcript (104-5) Mr A explained to the claimant how he had solved that problem. His solution was that he had found a way of arranging for the claimant to be paid a supervisor's pay, without informing senior management, and that Mr A understood that this might place him (Mr A) at some risk.

16. In answer to my questions today, the claimant readily explained the solution. As I understood it, the claimant undertook the duties of a supervisor. He prepared a timesheet of his hours per week, and Mr A authorised the payment of additional sums which were described as overtime. The additional sums did not in fact represent overtime which the claimant had worked: their purpose and effect was to increase the claimant's hourly pay from £8.21 to £9.24 per hour. That gave the claimant, in effect, an unauthorised pay rise of about £50.00 per week.

17. In fairness to Mr A, I note that the language of the transcript suggested very powerfully that Mr A's only reason for making this arrangement was to make sure that the required supervisory work got done, and no other.

18. The effect of this arrangement was that the claimant did the duties of a supervisor, at (in effect) the pay of a supervisor, without ever being promoted formally to the post of supervisor. The claimant appeared at this hearing to show no understanding that this arrangement indicated positivity and support on Mr A's part, and might render it very difficult for the claimant successfully to argue that Mr A had discriminated against him on grounds of race.

19. At this hearing, the claimant showed a visible, live sense of grievance about the failure to promote him formally. That is understandable, but it illustrates the problem identified at #10-11 above. The question for the tribunal is only whether he was not promoted because he is Polish. The material available showed two potential strands of reasons why he was not promoted, which were not related to race. They were (1) his line manager supported his promotion; and (2) senior management refused to authorise any promotion on cost-saving grounds.

20. The claimant said that he first had a sense of being discriminated against in about April 2018. He said that he had consulted the CAB and Mr Kozik by the late summer of 2018. He said two other points which I find difficult to accept: one, that he had been advised (manifestly incorrectly) that he had no employment law rights or access to the Tribunal until he had completed two years' service; and the other that he had not undertaken any research online. I understand that there is voluminous advice online in Polish about employment rights in the UK.

21. The claimant also said that he understood that if he complained to an Employment Tribunal, he would inevitably lose his job, which he could not afford to do. That explanation is not necessarily compatible with understanding that he did not have access to the tribunal until he had completed two years service.

Strike out applications

22. Mr Brown's application for strike out moved from no reasonable prospect of success to the limitation point in that order. I understood that to be in the hope that strike out on the former ground would prevent the claimant from relying on the same point as a matter of relevant background.

23. Mr Brown's overarching point was that all the material available to the tribunal showed that Mr A had been a supportive, generous manager of Polish workers, including the claimant, and that that made it impossible to prove that Mr A had discriminated against Poles on grounds of race.

24. Mr Brown submitted that Mr A had promoted three Polish workers. It emerged at this hearing that there were in fact five Polish workers whom Mr A had promoted, or whose working development he had supported. They

were named as: the claimant, Stan, Lukacs, Michael and Bartos. When the claimant's promotion had been refused, Mr A had gone on to manipulate the claimant's pay, possibly at risk to his own employment.

25. Mr Brown submitted that this history ran wholly counter to the an allegation that Mr A might discriminate against a Pole on grounds of race, and said that there was no evidence that Mr A had been hostile or discriminatory towards Polish workers. On the contrary, the claimant's own experience showed that the opposite was the case. He submitted that any claim of racial discrimination based on Mr A's decision making was bound to fail. Mr A's covert recorded words showed that the workplace had problems which affected everyone, and that there was no evidence that the claimant had been treated differently on grounds of race.

26. Mr Brown also submitted that a number of the individual events of which the claimant complained were single instances, which were not part of a continuing act, and that as the claimant agreed that he had had access to professional advice at the time, it was not just and equitable to extend time.

The list of complaints

Failure to promote

27. When I asked the claimant if the list of eight matters complained of (drawn up by Mr Brown for today's purposes) was complete, he said that it was, subject to one omission, which was a complaint about the failure to promote him. This had appeared in his original particulars of claim, but had been expressly withdrawn in writing by Mr Kozik in a revised draft. I regarded the withdrawal as conclusive under Rule 52, and did not allow the claimant to re-introduce the point.

Too many hours

28. In the list, point 1 is a complaint of repeatedly being forced to work in excess of 48 hours per week, including up to the end of the claimant's employment. In reply to my question, the claimant said that that happened 90% of the time. I noted that Mr A was recorded as sharing the claimant's sense of grievance that poor senior management left both of them having to work late long hours. I take Mr A's words as evidence that the claimant had grounds to be aggrieved about hours, and also that that sense of grievance was shared by other, non-Polish workers.

29. That claim is plainly within time. It relates to system failure, and it is difficult therefore to see how it can be formulated as a claim of direct race discrimination. Certainly the claimant has said nothing to show a causal link between his factual complaint and the protected characteristic of race. Judgment based on experience leads me to the view that this claim is unlikely to succeed on its merits, but I am reluctantly unable to say that it meets the test of no reasonable prospect of success.

No break time on three specific shifts

30. Points 2, 3 and 4 relate to working arrangements on shifts on 7 August 2018, 25 March 2019 and 29 May 2019. They are specific, dated, single instances. They describe system failure: the complaint is that those on shifts, Polish and non-Polish workers alike were denied breaks due to workload.

31. These three points are all out of time as complaints of race discrimination. I do not consider it just and equitable to extend time. I note that the claimant had professional advice well within time. Further, I can see little prospect of a fair trial in August 2022 of how arrangements were made to cover one shift in any of August 2018 or March or May 2019.

32. I do not regard any of these events as part of a series continuing to 29 May 2019 or beyond. I do not accept that three shifts in a working life of 25 months constitute a series.

33. Points 2, 3 and 4 are struck out on the basis that they are out of time, and that it is not just and equitable to extend time.

34. A party remains at liberty in principle (ie subject to the direction of the tribunal which hears the case) to give evidence about points 2, 3 or 4 to set relevant background.

35. I add that if I had to consider each of these points on its merits, I repeat what is said at #29 above.

Racist language

36. Point 5 is a specific allegation about the use of extreme racist language. It identifies a perpetrator and an event. The parties agree that the claimant complained at the time, that the matter was investigated at the time, and that there are therefore written records of it. I can see the potential background relevance of how the respondent reacted to a claim of racist language.

37. In those circumstances, it seems to me just and equitable to extend time to allow that allegation to be heard.

Supervisor pay and status

38. Points 6 and 7 arise out of the claimant's grievance, which I have summarised above, that he was not formally promoted to, or designated as, supervisor.

39. Point 6 was a complaint that on grounds of race Mr A failed to increase the claimant's pay in April 2019 by the 18p per hour awarded to supervisors. It will be recalled that at that time the claimant was in effect being paid £1.03 per hour more than the rate he was entitled to. The claimant's claim is that he should have received the same increase as the supervisors, ie that

having found a mechanism to pay the claimant more than the company allowed, Mr A should then have given him the same pay rise given to those who were actually supervisors.

40. Point 7 is the allegation that Mr A stated in a meeting in April 2019 that the claimant was not a supervisor. (As I understood it, the claimant was excluded from a meeting of supervisors).

41. These claims are both out of time. I accept Mr Brown's submission that the decision not to increase the claimant's pay in April 2019 was a single event with continuing consequences. In finding that it is not just and equitable to extend time, I find also that each point has no reasonable prospect of success, and is struck out in accordance with rule 37.

42. As to point 6: Mr A's transcript shows that he had worked the respondent's systems, at risk to himself, to work around management's refusal to authorise the claimant's promotion. As a result, the claimant had enjoyed significant financial benefit (which I estimate at around at least £50 per week). Mr A was under no obligation to re-work the systems so as to bring the claimant's pay up to supervisor rate. It is, on this point, difficult to understand the claimant's sense of grievance. It is impossible to demonstrate or suggest that Mr A would have worked the systems to find the extra 18p per hour in the case of a non Polish worker in the claimant's circumstances. The argument is fanciful.

43. As to point 7: Mr A's remark, that the claimant was not a supervisor, was the truthful position. The remark was relevant to the work context. It is, on this point, difficult to understand the claimant's sense of grievance. It is impossible to demonstrate or suggest that Mr A would not have made the same remark in the case of a non Polish worker in the claimant's circumstances. It is fanciful to suggest that stating the factual truth to work colleagues constitutes race discrimination in those circumstances.

Dismissal

44. Point 8 is in time. It continues as a claim of constructive dismissal under the Employment Rights Act 1996, and as a claim of race discrimination by constructive dismissal under the Equality Act 2010.

Employment Judge R Lewis

Date: 13/8/2021

Sent to the parties on: 25/8/2021

N Gotecha
For the Tribunal Office