



EMPLOYMENT TRIBUNALS

Claimant: Mr M Perrone

Respondent: Procomm Site Services Limited

Heard at: Liverpool (by CVP)

On: 5, 6, 7 and 8 July 2021

Before: Employment Judge Benson
Mr I Frame
Mr T Walker

REPRESENTATION:

Claimant: Mr K McNerney - counsel

Respondent: Miss P Hall - consultant

JUDGMENT having been sent to the parties on 15 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant has brought claims of direct discrimination, harassment and victimisation. He relies upon the protected characteristic of sexual orientation. The claimant is a homosexual man.
2. There have been two previous Case Management Orders, including one of Employment Judge Shotter dated 31 October 2019 in which the parties agreed a List of Issues, and they are contained at paragraph 9 of the Order. At the hearing, an updated List of Issues was agreed as set out below. On day three of the hearing Mr McNerney indicated that one of the allegations (which is listed 1(b) in the List of Issues) was withdrawn.
3. The hearing was conducted by CVP and we had some issues on the first day which delayed matters.

Direct Discrimination (section 13 EQA 2010)

- (1) Has the claimant been treated less favourably by the respondent in relation to the following alleged acts:
- (a) In or around November/December 2017, the claimant was pushed and shoved by Robert Campbell and the word “*stabbing*” was used in a threatening manner against him;
 - (b) On 17 November 2017, the tyres of the claimant's car were 'let down' by Robert Campbell or Wayne Pickstock;
 - (c) On 27 November 2017, the claimant walked in to the 'Brew Room' and Wayne Pickstock said to the claimant “*Back are you? I hope we didn't break your holiday mood*”;
 - (d) On 30 November 2017, Wayne Pickstock walked over to the “Zap” shelter and when the claimant looked at him, Wayne Pickstock said “*What the fuck are you looking at!*”
 - (e) On 5 December 2017 the claimant walked past Wayne Pickstock with two cans of paint. Wayne Pickstock was aggressive, shouting at the claimant “*You better fucking hurry up and get on with the fucking job*”;
 - (f) On 6 December 2017, whilst the claimant was in his painting shed, Wayne Pickstock walked in and shouted “*Oi, Dickhead, just letting you know you won't be painting in here much longer. I have decided to put you on collapsing CTX modules just to put you off*”. He then said: “*How do you feel about that, you dirty gay faggot bastard.*”
 - (g) On 14 December 2017, Wayne Pickstock said to the claimant the quality of the claimant's work was “*no good*” and the claimant pointed out to him that he thought that his work was of a good quality. Wayne Pickstock said to him “*I'm not happy with it and that's all that matters*”;
 - (h) On 15 December 2017, Wayne Pickstock walked over to where the claimant was standing by some metal steps and said to him “*Just to tell you, don't bother turning up at the work's party next Friday because your type isn't welcome. If you do go I will get Big Rob to have a pop at you*”;
 - (i) On 22 December 2017, a friend of Wayne Pickstock, Craig, drove down to the wood skip where the claimant was throwing in wood, and Wayne Pickstock's friend, together with Robert Campbell, started to 'rant and rave' when loading the paint;

- (j) On 3 January 2018, at approximately 1:15pm, Wayne said to the claimant *“we had a really good time at the Christmas Party without you, you poof”*;
 - (k) On 11 January 2018, Wayne Pickstock came over to the claimant and said, *“What do you think you are doing getting ready to leave?”* The claimant pointed to the Brew Room/Changing Room and said that the others over there were getting changed and getting ready to go Wayne Pickstock responded by saying *“I am not bothered about them, it’s you I am questioning”*;
 - (l) On 18 January 2018, Robert Campbell shouted at the claimant saying, *“You better watch how you are fucking talking to me because I will fucking twat you”*;
 - (m) On 22 January 2018 the claimant walked in to the 'Brew Room' and he saw that his table had been deliberately moved right over to the side corner away from everybody else;
 - (n) On 22 January 2018, the claimant went to the toilet and when he was washing his hands one of the other Employees, Ian Field, walked in and started to stare at the claimant;
 - (o) On 23 January 2018, Wayne Pickstock came over to the 'big zap' shelter where the claimant was working, and said *“You were supposed to finish this job 5 minutes ago, you better get a fucking move on and get it finished you fag.”*;
 - (p) During a works outing to Chester Racecourse, Wayne Pickstock deliberately threw a third of a pint of beer over the claimant to try and get a reaction;
 - (q) During a works outing to Chester Racecourse, the claimant was left out of a group photograph and Wayne Pickstock shouted *“We don’t want you in it”*.
- (2) If so, is that treatment because of the claimant’s sexual orientation?
 - (3) The claimant relies on a hypothetical comparator, that being a heterosexual male.

Harassment (section 26 EQA 2010)

- (4) Has the respondent engaged in unwanted conduct, namely the acts listed at paragraphs 1(a) to 1(q) above?
- (5) If so, are those acts related to the claimant’s sexual orientation?

- (6) If so, does that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive for the claimant?
- (7) Taking into account the perception of the claimant and the circumstances of the case, is it reasonable for the conduct to have that effect?

Victimisation (section 27 EQA 2010)

- (8) Has the claimant done a protected act?
 - (a) It is accepted that the claimant raised a grievance in July 2018 relating to sexual orientation discrimination.
- (9) Did the respondent subject the claimant to a detriment, namely by not upholding the claimant's grievance and failing to properly consider his concerns as set out at paragraphs 10 and 11 of the claimant's ET1?

Evidence and Submissions

4. We heard evidence from the claimant and on behalf on the respondent, Ms Hopkins, who was no longer its employee but who was, at the time, its Hire Controller, Mr Upton, who is the Depot Manager, Mr Pickstock, who is the Yard Foreman and Mr Saxon who is an CTX Supervisor.

5. Mr McNerney gave oral and written submissions, and Ms Hall provided oral submissions for which we were grateful.

6. Essentially, this case turned upon the credibility of the claimant and the respondent's witnesses.

7. The claimant alleged that he was subjected to a number of serious acts of harassment and direct discrimination which he says occurred following him telling Mr Pickstock, in the presence of a number of other colleagues, that he was gay.

8. The respondent denies that the claimant told Mr Pickstock, or indeed that they were aware, that the claimant was gay until over a year later, and it denies any of the acts of discrimination or harassment occurred. The credibility of the witnesses is therefore a key issue in this case.

9. The respondent accepts that the claimant did tell it that he was homosexual by way of a letter dated 2 July 2018 and that he raised allegations of harassment. The claimant further contends that the process which was undertaken as a result was not properly considered and he was dismissed because he had raised issues in respect of his sexuality. This is the basis of his victimisation claim.

The Bundle

10. We were provided with a bundle of documents which consisted of 115 pages which was agreed.

11. There were very few documents to which we were referred which related to the events of that time other than the notes which the claimant made, which we deal with below.

Findings of Fact

12. The claimant is a homosexual man. He commenced his employment with the respondent on 20 February 2017. He resigned from his employment on 2 October 2018. He was employed as a yard operative within the respondent's premises.

13. The respondent supplies and repairs containers which are used for office purposes. They employ approximately 15 or 16 staff of whom four work in the office and the remainder in the yard area.

14. The management structure is very flat. Essentially all yard operatives report to Mr Pickstock, the Yard Foreman, and he reports to Mr Upton, the Depot Manager. There are supervisors and team leaders, but the workforce in the yard is small.

15. The office staff are based on the first floor of the office building and they have their own kitchen and eat lunch at their desks. The yard staff have a canteen or 'brew room' which is on the ground floor. All yard staff have their lunch at the same time.

16. The workplace was a friendly environment and generally people got along. The claimant's work was good. There was banter and swearing in the yard.

17. The claimant alleges that on a date in April 2017, a couple of months after he started working at the respondent, whilst in the work canteen he overheard Mr Pickstock making offensive remarks about homosexuals. He said that he explained to him that he was homosexual and that he found the comments offensive. He says Mr Pickstock appeared taken aback and from a couple of days after that his and others' attitudes towards the claimant changed and thereafter, he was subjected to abuse and harassment. He says that there were between six and nine people in the canteen who would have witnessed the exchange.

18. Mr Pickstock and Mr Saxon, who the claimant says was also present, deny that this event occurred, as did two other witnesses who were interviewed as part of a later investigation. All deny that they knew the claimant was homosexual until a year later, including Mr Upton and Ms Hopkins.

19. Mr Pickstock denies that all of the specific allegations of harassment occurred as alleged, and the respondent's other witnesses confirmed that they had no knowledge or suggestion that the claimant was being treated as he alleges.

20. There were then a series of events including an allegation and incident between the claimant and Mr Campbell, which was documented and to which we were referred. That issue was resolved. There was a further incident in January 2018 involving Ian Field who made a complaint about the claimant, again in respect of which there were documents and an investigation commenced, and then from 23 January 2018 the claimant was absent through sickness.

21. There are clear factual disputes upon which we must make findings. In respect of these the claimant has the burden of proof. We must consider whether, on the balance of probabilities, or essentially was it more likely than not, that the claimant has shown that his version of events happened. In coming to a view on this we listen to the evidence of witnesses and we consider any documents that are available and to which we are referred. We are also permitted, as indicated by Mr McNerney, to take judicial notice of certain things. In this case he asks us to do so in respect of the fact that the claimant did not bring his claims of discrimination to the respondent until over a year after he says it started, and he reminds us that we may take judicial notice of the fact that this can often be the position in complaints of discrimination. Further, he also reminds us that there is rarely direct evidence of discrimination.

22. This is a case where in our view there is only one set of documents which might have assisted us. These are the notes which the claimant has disclosed as part of these Tribunal proceedings, and which he says he made as the incidents he complained of were occurring. They start on 27 November 2017 and reference events through to 23 January 2018. The only other documents that may have any relevance are pages 113 and 115 of the bundle, which are the job sheets saying where the claimant was working during particular hours on 23 November 2017, and which the respondent says show that the notes are inaccurate. We do not believe that they provide any real assistance.

23. In assessing whether the notes made by the claimant are contemporaneous as the claimant says, we have had regard to the total of the evidence but also the content of the notes themselves and when they were disclosed. We have further noted, as raised by Mr McNerney, that they reference innocuous events and not just those which would amount to discrimination related to the claimant's sexuality. In that respect we were referred to a couple of instances, being the claimant leaving site early on 11 January 2017 (allegation (k)) and the quality of the claimant's work on 14 December 2017 (allegation (g)).

24. We have found this case very difficult. The allegations are serious ones, and we are acutely aware of the implications of our findings on both parties, but it is our job to make findings of facts, and we only do so on the basis of what is more likely.

25. We have found the oral evidence of all witnesses believable, but on balance we have preferred the evidence of the respondent as to the events which were in dispute.

26. The claimant when giving evidence was unclear and vague about the details of some of the incidents that he relied upon. It is some three or four years since these incidents occurred, but we considered that even when taking that into account he would have been able to recall what he says were intimidating or significant events. For instance, in recalling when he says he told Mr Pickstock and others that he was gay in April 2017 he was vague about what the comment was that Mr Pickstock was making which he objected to. He referred to it relating to someone in a pub but was unable to provide any detail. He further could not recall the date or rough date when he says Mr Campbell harassed him and there was confusion as to whether it was June or November, which are big differences in the short timeline of

his complaints, and also what Mr Campbell was saying to him when he was “ranting and raving”. Generally, we noted a vagueness in the claimant's evidence.

27. The claimant says that he told Mr Pickstock in the presence of 6-9 of his colleagues that he was gay. This was a small company. Although Mr Pickstock, and possibly Mr Saxon, may have a reason to deny that occurred, we find that neither Mr Upton or Ms Hopkins, who has since left the company, had any knowledge of the claimant's sexuality until July 2018.

28. This is a small company. The yard staff visited Ms Hopkins in her office, and she passed the time of day with them. It seems to us that the claimant challenging Mr Pickstock and telling him that he was gay in April 2017 is an event which would have come to Ms Hopkins' and Mr Upton's knowledge soon afterwards.

29. We also consider that had Mr Upton known of the claimant's sexuality when issues were raised with him in June 2017 and January 2018 concerning incidents involving the claimant, he would have made enquiries or at least explored whether the claimant's sexuality was behind the incidents.

30. We also note that the claimant says that the reason he did not mention that he was suffering harassment and abuse because he was gay to Mr Upton until 2 July 2018, was because he was embarrassed and ashamed. He was given the opportunity to tell Mr Upton from the private setting of his home when they spoke during his absence in the summer of 2018, but he did not take that opportunity. We find this is difficult to reconcile with the claimant's evidence that he had previously told Mr Pickstock in a canteen full of colleagues that he was gay. Had he indeed done that, as we have said, it is a small company and surely the claimant would have considered that Mr Upton already knew.

31. The claimant says he was suffering regular abuse from shortly after April 2017. In May 2017 he went to the races to an event organised by Mr Pickstock. There he says Mr Pickstock poured a third of a pint of beer over him and that he was not allowed to join with others in a photograph. Mr Upton was present, and the claimant walked with him to the railway station at the end of the evening. It seems to us that a third of a pint of beer spilt or poured over the claimant's clothes would have been noticed by Mr Upton. He did not see anything. Further, if that had happened, there was an opportunity for the claimant to have raised any issues as he walked back to the station, but he did not.

32. Turning then specifically to the notes produced by the claimant. We are concerned as to why these notes, and indeed the detail contained within them, were not produced until these proceedings had commenced. On 25 May 2018 Mr Upton spoke to the claimant. His concerns were noted in a note that we have been referred to, that he thought Mr Pickstock was corrupt and intimidated him and called him a liar. He did not mention homophobic abuse or harassment, even though he says he had been recently making notes about it. At that stage he was not in work.

33. Further, when Mr Upton recommended the claimant go down the route of a grievance in his letters of 7 June and 27 June, Mr Upton asks for the claimant to produce evidence or paperwork which he wanted Mr Upton to consider, but again the claimant did not provide the notes nor did he provide any detail. This was still

the position on 2 July when the claimant told Mr Upton that he has been suffering homophobic abuse – again he did not provide the notes. That was the opportunity to provide Mr Upton with the detail within the notes or the notes themselves.

34. The claimant's explanation as to why he did not provide the notes was vague. He referenced not knowing that he should have done and not being an expert in these matters, but he also says that he was stressed at that time and on prescription medication to assist him sleeping. This may have been the case, but we find it odd that if the claimant was keeping a notebook of the issues he was having, why when specifically asked for evidence he would not produce it.

35. We also note more generally that the claimant says he was suffering daily abuse from the respondent but there is a gap between April and November where there are no specific allegations, or indeed no evidence before us as to what happened during that period.

36. Mr McNerney put it to us that the notes are accurate in respect of the meeting at which Ms Hopkins was present, and also, because they mention matters which are clearly not homophobic, they are more likely to be contemporaneous. We understand that argument. We note, however, that the non-homophobic matters are still matters which the claimant considers amounted to Mr Pickstock and others harassing him, even though the nature of the particular comment referred to by Mr McNerney is on the face of it innocuous. We do not accept Mr McNerney's arguments support the view that the notes are more likely to be contemporaneous.

37. Although Ms Hopkins' evidence of the meeting was generally aligned with the claimant's notes, it was not in every respect. Ms Hopkins mentioned that the time did not seem right, and we also consider that the notes made by the claimant were very much the bones of the meeting without detail. We also note in cross examination that she said that in the meeting, the respondent said it did not want the claimant to leave his employment, and that accords with what Mr Upton told Mr Pickstock but that is not reflected in the claimant's notes.

38. We have also considered the claimant's notes of the incident of 18 January and where he indicates that he reacted 'calmly' to Mr Field. We cannot see why if that was the case, Mr Field would make a complaint about the claimant's behaviour, which is not disputed. The claimant's notes are not in our view an accurate reflection of what must have happened.

39. As we have said, we have to make findings of fact and we therefore conclude that the claimant did not advise Mr Pickstock or his other colleagues in April 2017 that he was gay as he describes, and further we find that neither Mr Pickstock, Ms Hopkins, Mr Saxon or Mr Upton knew that the claimant was gay until 2 July 2018 at the earliest.

40. In respect of the specific allegations contained within the List of Issues at paragraphs 1(a) and (c)-(q), we prefer the respondent's evidence and find that the claimant has not shown that the matters occurred as he alleges. There were some allegations where something may have occurred, but it was not as described by the claimant. These are allegations at (g) where Mr Pickstock accepts he may have raised the speed of the claimant's work, (m) where the furniture may have been

moved but there was no evidence that the table where the claimant sat had been moved deliberately and (n) where Mr Field may have looked at the claimant.

The Law

Burden of proof

41. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

“(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 subsection (2) does not apply if A shows that A did not contravene the provision.”

42. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

Direct Discrimination

43. Section 13 of the EQA provides that:

” a person (a) discriminated against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

44. Section 23 (1) provides that:

“ on a comparison of cases for the purposes of section 13....there must be no material differences between the circumstances relating to each case.”

Harassment

45. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which sexual orientation is a relevant protected characteristic, and so far as material reads as follows:

“(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 sub-section (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.

46. Chapter 7 of the EHRC Code deals with harassment.

Victimisation

47. Section 27 EQA provides protection against 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.

48. It is clear from the case law that the tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so what that because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

Conclusions

Direct Discrimination and Harassment

49. Turning to our application of the law to the facts. In a claim of discrimination, the burden is on the claimant to show facts from which we could reasonably conclude that the respondent has discriminated against or harassed the claimant because of or related to his sexual orientation. As we have indicated these complaints primarily turn upon our factual findings.

50. In respect of the specific allegations contained within the List of Issues at paragraphs 1(a) and (c)-(q), and the equivalent references in the claim of harassment, we prefer the respondent's evidence and find that the claimant has not shown that the matters occurred as he alleges. As such the claimant has not discharged the burden upon him and those claims must fail. In respect of those matters where something might have occurred but not as the claimant describes it ((g), (m) and (n)), we find that the claimant has not shown facts from which we could conclude that his sexual orientation played a part. These matters all occurred prior to any of the respondent's witnesses being aware of the claimant's sexual orientation and the claimant has been unable to show that they occurred because of or were related to his sexual orientation, even assuming they were less favourable treatment or unwanted conduct. As such he has not discharged his burden of proof under section 136.

51. The claims of direct discrimination and harassment fail and are dismissed.

Victimisation

52. It is accepted by the respondent that the grievance which was lodged by the claimant on 2 July 2018 was a protected act. The claimant says that the dismissal of the grievance and the failure to give it proper consideration was a detriment, and it was because he had raised allegations of discrimination. We do not accept that is the position.

53. It was Mr Upton who pushed the claimant to raise a formal grievance when he first complained about his treatment. His correspondence in June and July 2018 to which we were referred, demonstrates this. The claimant, it is noted in one of those letters, missed the first meeting which had been arranged because he forgot to attend, and then upon being asked to provide written representations or provide someone to attend on his behalf he sent the letter of 2 July 2018. Mr Upton asked for further information and the claimant provided a list of names. Mr Upton interviewed those who were still employed by the company but made only minimal effort to contact those who had left, by attempting to phone one of them. His reasons for doing that were that all four of those he did interview, whom the claimant said were present when he told Mr Pickstock in the canteen that he was gay, denied that it had taken place. Mr Upton saw little point in tracking others down and he came to the view that the incident in the canteen had not happened. This was against a background where the claimant had made little effort to engage in the grievance process and had not provided any real detail of the complaints which Mr Upton could put to witnesses other than the alleged disclosure in the canteen. The claimant is correct to say that this was Mr Upton's focus in the investigation

meetings, but that was essentially all he had to go on other than vague allegations of homophobic comments. Although Mr McNerney suggests that the other staff interviewed reported to Mr Pickstock and may have been potentially in fear of him, this was a small company and we consider that Mr Upton was close enough to the Yard Operatives to form a view on this.

54. Having considered the claimant's criticism of the process, we find that the claimant has not shown that Mr Upton had failed to give proper consideration to his grievance.

55. The grievance was not upheld and that is a detriment to the claimant. We consider that Mr Upton could have made more enquiries of those who had left, but we accept his explanation for not doing so, being that he had already interviewed the four people who all agreed with each other, and as such in his mind he had sufficient evidence to come to a conclusion. There was nothing put forward by the claimant from which we could conclude that Mr Upton's consideration of this grievance or its outcome were in any way because he had raised a grievance complaining that he had been subjected to discrimination on the grounds of his sexual orientation.

56. As such the claimant has not discharged his burden under section 136 and this claim also fails.

Employment Judge Benson

Date: 21 October 2021

REASONS SENT TO THE PARTIES ON

22 October 2021

FOR THE TRIBUNAL OFFICE

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