



EMPLOYMENT TRIBUNALS

Claimant: Mr A Findlay

Respondent: Rendall and Rittner Ltd

Heard via CVP (London Central)

On: 7 and 8 December 2021

Before: Employment Judge Davidson
Ms D Warman
Mr P Madelin

Representation

Claimant: in person

Respondent: Mr C Bennison, Counsel

RESERVED JUDGMENT

The claimant's complaints of race discrimination and breach of contract fail and are hereby dismissed.

REASONS

List of Issues

1. The issues for this hearing were set out in the case management order of EJ J Burns dated 9 June 2021 as follows:

Direct race discrimination

2. The Claimant describes himself as "Black African (origin)". The unfavourable treatment he says he suffered because of his race is:

- 2.1. on or about 8 May 2020 he did not attend an overtime shift and was "pounced on" by Steve Fryer and suspended from working overtime thereafter as a punishment. He compares his treatment in that regard to that of Caitlan Colman, a white woman employee, who had forgotten to give overtime shifts to the Concierge team, leading to a letter of complaint, but no sanction or punitive action was taken against her; and

2.2. he claims that his dismissal was because of his race. He relies on a hypothetical comparator in this regard. He says that, if he was white, Steve Fryer would not have made what he claims were untrue statements about him and dismissed him.

Wrongful dismissal/Breach of contract:

3. The Claimant contends that express terms of his employment contract were breached in that
 - 3.1. he was not asked to attend probation employment reviews;
 - 3.2. his probation was not extended; and
 - 3.3. he was not treated fairly under the Respondent's procedures, in particular he claims the dismissal was unfair because the Respondent relied on "untrue statements of Steve Fryer" who had falsely accused the Claimant for example of "not knowing how to operate fire alarm system, not knowing how to operate AOV system; not knowing who to call if car lift breakdown, of not attending work etc. and not doing lift alarm test."

Evidence

4. The claimant gave evidence on his own behalf. Neither the dismissing manager, Steve Fryer, or the appeal manager, Georgiana Rosoi, attended the hearing. We were told that they no longer work for the respondent. Nicola Milburn, Area Director, gave evidence on behalf of the respondent but she accepted she had no direct knowledge of the events in question.
5. The tribunal had a bundle of 197 pages before it.

Facts

6. The respondent is a property management company with residential developments including a development in Bermondsey called Bermondsey Works. The claimant was employed from 4 December 2019 as a Day Concierge under the terms of a contract of employment dated 26 November 2019. It is not disputed that his first day of work was 4 December 2019.
7. His manager was Steve Fryer. There were four other Concierges working at Bermondsey Works – another two Day Concierges and two Night Concierges, all of whom are Black African, as is the claimant.
8. The contract provided for a probationary period of six months as follows:

PROBATIONARY PERIOD

New employees join on a six-month probationary period.

During and/or at the end of your probationary period you may be asked to attend employment reviews to discuss your overall work performance. Absence, timekeeping and general attitude may also be taken into account.

If the Company is satisfied that you have reached the required standards your employment status will be confirmed.

If you have not reached the required standards, you will not pass your probation and your employment will be terminated with the required notice.

In borderline cases, the Company reserves the right to extend the probationary period. This is to allow for a further period of review to enable you to reach the required standard. A subsequent probationary review will be held and a decision made. Your employment will then either be confirmed or terminated with the required notice.

9. The respondent also has various procedures under its Disciplinary, Capability and Grievance Policies. We find that these are not relevant to the issues in this case, which turns on the probationary period review, not the application of these processes.
10. On 8 April 2020, the claimant raised a concern about attending work due to the pandemic. He discussed this with Steve Fryer and agreed that he would attend work the following day. In the event, the next day, 9 April, he sent an email to Steve Fryer saying that he would not be attending but that he was still happy to do the overtime shift on Sunday 12 April 2020.
11. In response, Steve Fryer expressed his frustration at the claimant's non-attendance without prior notice on 9 April 2020 and told him that he would not allow him to do the overtime shift on 12 April 2020 as it would not be fair or send out the right message to the other Concierges. Steve Fryer's frustration was at the claimant failing to communicate his decision not to attend earlier, rather than being critical of his caution regarding Covid.
12. The claimant attended for work as normal after the day of non-attendance.
13. In early April he signed up for overtime shifts on 28 April and 8 May 2020. He worked the 28 April shift but failed to attend for the 8 May shift. His explanation, which was not challenged, is that he forgot. He apologised. He then spoke to Steve Fryer and apologised again. According to the claimant's dismissal appeal letter written in June 2020, Steve Fryer said to him at the time that 'that was the end of the matter'. Later, as part of this claim at a case management hearing in June 2021, the claimant categorised this conversation as Steve Fryer 'pouncing' on him.
14. The claimant went on to say that when he was asking for overtime shifts, Steve Fryer told him that he was suspended from receiving overtime shifts due to his unreliability. The claimant relies on a conversation he had with Steve Fryer at the time. We did not hear from Steve Fryer but we note that the claimant has not mentioned a telephone conversation before his oral evidence to the tribunal.
15. There was an ongoing issue between the Concierges and management regarding overtime shifts at Bermondsey Works. The Concierges wanted first refusal on any overtime shifts that became available, before these shifts were offered to outside

agency staff. It was evident that this was a source of concern to the Concierges who raised it with management but we did not have a lot of evidence of the history or development of the issue.

16. The respondent denies that there was a ban on the claimant doing overtime shifts and points to an email from Caitlin Colman dated 10 June 2020 in which she explained to Kofi (the claimant's colleague) that, due to an administrative error, she had made a mistake by offering shifts to an Agency and not to him and the claimant. The respondent's position is that this email shows that there was no overtime ban.
17. The claimant relies on the difference in treatment between him and Caitlin Colman after their respective errors. There was no evidence whether a sanction was applied to Caitlin Colman but, for the purposes of our findings, we will assume that no sanction was applied.
18. We did not hear from Steve Fryer or Caitlin Colman and we therefore accept the claimant's evidence that he believed he was not being permitted to carry out overtime shifts and this is borne out by the fact he does not appear to have worked any more shifts after 8 May 2020. However, we find that it is more likely that this is due to Steve Fryer's assessment of the claimant's reliability than due to his race.
19. The claimant's probationary period was due to end on 4 June 2020. On 1 June, he was invited to a probationary review meeting. This was his first formal review meeting since he started and, in that period, he had only met his manager a couple of times as site visits by management were being restricted due to the pandemic.
20. There is a dispute regarding the date the review meeting took place. The documentation, including the invite letter and notes of the meeting state that it took place on 4 June. The claimant alleges that it was 8 June and this is supported by the Probation Review Form and an email from Steve Fryer to HR dated 9 June referring to the review meeting 'yesterday'. We therefore find that the date of the review meeting was 8 June 2020.
21. The claimant was marked as 'average' in 5 of the 6 categories and 'below average' in the sixth category. At the meeting, Steve Fryer raised a number of issues of concern regarding his performance. These included:
 - 21.1. The claimant not carrying out fire alarm checks and AOV
 - 21.2. Use of computer and phone by the claimant during working hours
 - 21.3. Allowing a resident to access the computer (in order to help the claimant)
 - 21.4. Handing out keys to residents
 - 21.5. Reliability
 - 21.6. The claimant not knowing the identity of the lift contractor
 - 21.7. Late/no response to Caitlin Colman's request for measurements
 - 21.8. Leak issue

- 21.9. Rudeness complaint from a resident and the mention of 'retaliation' by the claimant when told of the complaint
22. As a result of the issues raised at the meeting, Steve Fryer considered whether to fail the claimant's probation or extend it. The claimant disputed the points relating to fire alarm checks/AOV, reliability, lift contractor and the leak issue. He accepted that he used his phone and the computer (saying the shift was too long not to do so without falling asleep), allowed a resident to access the computer to help him, had not replied to Caitlin Colman's request within a reasonable period and that he had failed to attend on two occasions. The claimant was adamant that he should be able to phone his children and his mother at any time when on the front desk and that this should not be limited to his break time. Steve Fryer took the view that matters were unlikely to improve if he extended the claimant's probation and he therefore told the claimant on 15 June 2020 that he had not passed probation and this was confirmed by letter dated 18 June 2020. The claimant was paid one week's notice.
23. Shortly before the probationary review meeting, one of the residents sent a letter of appreciation of the work done by the Concierges. Steve Fryer had this at the meeting and says that he took it into account as a balancing factor in the claimant's favour but it was not sufficient in the light of the other concerns.
24. On 22 June 2020, the claimant appealed against the decision to terminate his employment, alleging factual inaccuracies and an absence of substantive reason for termination. Although he referred to an allegedly racist comment said by a Polish cleaner in Polish to a colleague, he did not accuse Steve Fryer of discriminating against him, either in relation to the decision not to offer him shifts, the way Caitlin Colman's mistake was dealt with or the termination itself.
25. The appeal hearing took place on 28 July 2020 and was conducted by Georgiana Rosoi (Property Team Manager). The claimant was given an opportunity to present his appeal. At the appeal, the claimant ascribed Steve Fryer's decision not to pass his probation as being connected to the claimant raising the fact that overtime shifts were offered to agency staff instead of the Concierges based at the site and that Steve Fryer turned 'malicious' when the Concierges raised this.
26. On 28 August 2020, Georgiana Rosoi wrote to the claimant with her outcome findings. She did not uphold any of the elements of his appeal.
27. The claimant sent in further objections to the appeal outcome but his right of appeal has been exhausted by that point. In that letter he referred to 'imbalances in the management' of the respondent in the context of Caitlin Colman not being penalised for her mistake but he makes no express reference to race. We do not agree with the claimant's suggestion that his reference to 'imbalance' was clearly an allegation of race discrimination and should have been understood as such by the respondent. In our view, imbalance can refer to a range of issues and the most

natural reading of the claimant's comment is that management were treated differently to staff.

Determination of the issues

28. We find that the claimant failed to attend for his overtime shift on 8 May 2020 due to an honest mistake in forgetting he had signed up. The crux of his discrimination case is Steve Fryer's reaction to this 'honest mistake' compared to the honest mistake made by Caitlin Colman in failing to offer overtime shifts to the Concierges. The claimant alleges that he was 'pounced on' for this mistake and suspended from working overtime as a punishment. This is not consistent with his contemporaneous account in his appeal letter in which he reports that Steve Fryer told him that he accepted the claimant's apology and told him it was the 'end of the matter'. We have seen no evidence in the documents, or in the claimant's witness statements to suggest that Steve Fryer 'pounced' on him. The allegation first appears in the List of Issues dated 9 June 2021 and was repeated by the claimant in his oral evidence.

29. In relation to the allegation that he was suspended from working overtime shifts, he raised this matter in his appeal in the context of him not having been told this by Steve Fryer until he had been turned down for a number of overtime shifts. In his evidence before the tribunal, the claimant referred to a telephone call in which Steve Fryer told him he was suspended from working overtime shifts but this has not been mentioned by the claimant previously. Even if we accept that there was such a conversation, in his appeal and in his evidence before us, the claimant links the overtime suspension to Steve Fryer regarding him as unreliable. He also refers to the fact that Steve Fryer turned 'malicious' in response to him and his colleagues requesting overtime shifts in preference to agency workers. He does not allege that the reason he was suspended from working overtime shifts is because of his race and he repeated this in his evidence before us.

30. The claimant relies on a comparator, Caitlin Colman who made a mistake in not realising she could offer overtime shifts to on-site Concierges and using agency staff instead. He says that she was not punished for this mistake and therefore, as a white female, has been treated more favourably than him. In applying the provisions of the Equality Act 2010, we find that there are material differences between the claimant and the comparator, in particular the nature of and the implications of the mistakes in question. Caitlin Colman's mistake was an administrative oversight whereas the claimant signed up for a shift and failed to attend. In terms of the implications of the mistakes, the claimant, in failing to attend for a shift, caused a colleague to work after the end of his 12 hour shift while the respondent tried to find agency cover and put the respondent to the trouble and expense of finding a last-minute replacement. Without the co-operation of the Concierge coming to the end of his shift, the property would have been left without Concierge cover. Caitlin Colman's mistake meant that the Concierges lost the opportunity to request an overtime shift (where there is no guarantee or right to

overtime) but she did not threaten the safety and security of the building. We therefore conclude that Caitlin Colman is not a valid comparator.

31. We do not find that the claimant's dismissal was related to his race. We have not been shown facts from which we could determine that discrimination had taken place. The claimant has not made a prima facie case in relation to his dismissal and, in evidence, did not appear himself to regard the dismissal as racially motivated. He questioned the accuracy of the information relied on by Steve Fryer and, at his appeal, attributed it to Steve Fryer not liking the Concierges making representations about overtime and agency workers.
32. All the other Concierges at the property were of the same racial group as the claimant and Steve Fryer did not fail their probationary periods. This supports the view that Steve Fryer's issue was with the claimant's behaviour rather than his racial origin.
33. If we are wrong about this, we find that Steve Fryer had valid non-discriminatory reasons for terminating the claimant's employment. This is not an unfair dismissal claim so we are not concerned with the fairness of the process or the robustness of the conclusions as long as we are satisfied that race was not a factor in the decision. Even though the claimant takes issue with the factual grounds on which the dismissal was based, many of those grounds are, in fact, conceded by the claimant. These include missing two shifts, using his phone during shifts, use of the computer to access job websites, allowing a resident to use the computer to help him, failing to respond to Caitlin Colman's email regarding measurements for a Covid screen. It is not for us to determine whether Steve Fryer investigated fully, just whether we accept that these were the reasons for the claimant failing his probation, which we do. We also accept that the threshold of acceptable performance/conduct is lower when considering whether to confirm probation or not.
34. Based on the claimant's attitude to the matters raised at the probation review meeting, we understand why Steve Fryer would not have thought there was any point extending his probation period.

Breach of contract

35. We find that there was no express term of the employment contract requiring the respondent to hold probation reviews during the probation period. The contract allows for this but does not require it.
36. We find that there was no express term of the employment contract requiring the respondent to extend the probation period. The contract allows for this but does not require it.
37. The claimant relies on the timing of his probation review, which took place after the six month anniversary of his start date. We take the view that 'at the end of' the

probationary period extends to a few days after the anniversary. In any event, the strict wording of the provision '*you may be asked to attend a review*' could reasonably mean that the invitation to the review meeting will be made '*during or at the end of*' the probationary period. In this case, the invitation to the meeting was made on 1 June for a meeting on 4 June. We have no information to explain why the meeting did not take place until 8 June 2020 but we find no basis on which we can conclude that the respondent lost the right to fail the claimant's probationary period a few days after the six month anniversary of the start date.

38. We remind ourselves that this is not an unfair dismissal claim and we must not treat it as such under the guise of a breach of the contract due to the 'Johnson exclusion area' laid out by the House of Lords in *Johnson v Unisys Ltd [2001] UKHL 13*. The respondent is entitled to terminate the claimant's employment for any reason in the first two years of his employment other than reasons proscribed by statute, which would include race. We have found that race was not the reason for dismissal and therefore the respondent is entitled to reach the decision to terminate even if the information relied on by the respondent is disputed by the claimant. The claimant does not have a stand-alone right to be treated 'fairly'. In any event, the respondent had a cogent reason, went through a probation review meeting and an appeal and reached a decision which it considered fair, even the claimant disagrees.

Conclusion

39. The claimant's complaints of race discrimination and breach of contract therefore fail and are dismissed.

Employment Judge Davidson

Date 15 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15/12/2021.

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.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.