



EMPLOYMENT TRIBUNALS

Claimant: Bacary Dieme
Respondent: Elevate Staffing Ltd
Heard at: East London Hearing Centre (by Cloud Video Platform)
On: 10 & 11 March 2022
Before: Employment Judge Housego
Members: Mr L O'Callaghan
Mr J Webb

Representation

Claimant: In person
Respondent: Joe Shepherd, managing director of the Respondent

JUDGMENT

The claim is dismissed.

REASONS

Basis of claim

1. The Claimant describes himself as black African. The Respondent is an events management company. It obtained a government contract called the Hauliers Outreach Programme. This was to engage with lorry drivers at motorway service stations about Brexit related matters affecting international deliveries. In November 2020 the Claimant started as a team leader at South Mimms motorway services. His team was based in a portacabin there. He resigned on 06 February 2021. He claims that his shifts were reduced by half and that this was racially motivated discrimination by his regional manager ("RM"). The Respondent says that the whole project nationally had a reduction in shifts because of a policy change by the government, and this was implemented fairly. They say that the Claimant was a poor team leader, and that any criticism of him was justified. The

Claimant says there was a hostile approach taken towards him, and that while he does not claim that was racial harassment he says it is the background to the reduction in hours which he says was because of his ethnicity. The Respondent says it has a highly diverse workforce, that the Claimant only raised race later, after his resignation, that race had nothing to do with anything, and that (by chance) most of the Claimant's shifts were allocated to another black person.

Law

2. Race is a characteristic protected by the Equality Act 2010¹. The Claimant asserted that the treatment he received was direct race discrimination². He does not claim harassment³.
3. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination, and if he does so then it is for the Respondent to show that it was not. The Tribunal has applied the relevant case law⁴, and has fully borne in mind, and applied, S136 of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice. The test for a claim for harassment differs from that for direct discrimination⁵.

Evidence

4. The Tribunal heard oral evidence from the Claimant.
5. For the Respondent the Tribunal heard oral evidence from:
 - 5.1. Lizzie Morrison, a director of the Respondent, and responsible for staffing, and from
 - 5.2. Layla Evans, a senior accounts director.
6. There was a bundle of documents of 131 pages.

Issues

7. The Case Management Order after a telephone hearing of 04 January 2022 summarised the case thus:

"34. The claimant was employed by the respondent, an events management company, as a temporary employee on the Hauliers Outreach programme (HOP) from 9 November 2020 until 11 February 2021. Early conciliation started on 26 February 2021 and ended on 12 March 2021. The claim form was presented on 10 April 2021.

¹ S11 Equality Act 2010

² S13 Direct discrimination: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

³ S26 Equality Act 2010

⁴ The law is comprehensively set out in *Royal Mail Group Ltd v Efofi* [2021] UKSC 33 (23 July 2021)

⁵ Set out fully in *Bakkali v. Greater Manchester Buses (South) Ltd (t/a Stage Coach Manchester) (HARASSMENT - Religion Or Belief Discrimination)* [2018] UKEAT 0176_17_1005

35. *The claim is about race discrimination. The respondent's defence is that the claimant resigned against a background of concerns about his performance, including his failure to comply with Covid-19 restrictions. The claimant and others had their working hours reduced for reasons set out in the response. The claimant did not allege race discrimination at the time of his resignation and the allegations of race discrimination are groundless.*

8. That Order also contained the following list of issues:

"The Complaints

36. *The claimant is black, African and claims that he was treated less favourably by the respondent, through the actions of Ms Tilly Favaraulo, Regional Manager, reducing his workings from 48 hours to 24 hours in February 2021.*

37. *The claimant explained that he refers in the claim form to Ms Favaraulo complaining that his cabin door was closed in breach of Covid regulations. The claimant made clear that the incidents concerning Covid restrictions do not form any part of his claim. The claimant alleges that he will refer to background evidence that Ms Favaraulo treated him unfairly. He claims this eventually led to the decision to cut his hours.*

38. *The claimant is making the following complaints:*

38.1 *Direct race discrimination about the following:*

38.1.1 *Reducing his working hours from 48 hours to 24 hours in February 2021."*

The hearing

9. There was a short witness statement from the Claimant, filed only the day before the hearing. He gave evidence orally and answered questions from Mr Shepherd and from the Tribunal. There were short witness statements from the Respondent's witnesses, and the Claimant asked questions of them, as did the Tribunal. I made a full typed record of proceedings which records the evidence fully.

Submissions

10. The submissions can be read in my record of proceedings by a higher Court if required. The main thrust of the submissions is below.
11. The Respondent's case is that there was a change imposed on it by their client, which they had unsuccessfully resisted. This meant a reduction in shifts for 51% of staff, all of whom were on zero hours contracts. This was implemented fairly, across the whole programme, and the halving of the hours of the Claimant was objectively justified and nothing to do with race. The criticisms of the Claimant by managers were the result of his poor performance, and were part of the reason his hours were reduced. Workers of all ethnicities were affected, and white British workers affected just as much as every other ethnicity.
12. The Claimant says that his hours were cut in half, and that his Regional Manager had used the programme hours reduction as an excuse to cut his hours in half, and that she was racially motivated. He says that the previous matters demonstrate hostility towards him, and that this supports his assertion that his hours were cut for reasons to do with his ethnicity. He pointed out that a white female team leader at the same place had hours

that were not reduced.

Facts found

13. The background is set out above.
14. The Claimant always worked 48 hours a week. By early February he had been rostered to work 48 hours a week for the next two months.
15. From the start, in November 2020, there was management dissatisfaction at the way the Claimant performed his role. The programme was a government programme, and the Respondent was keen that everyone stuck to Covid restrictions and guidance. The Claimant kept the door of the cabin closed, and, for the most part, did not wear a mask. Both were contrary to instruction. He claimed to be exempt from wearing a mask, but did not give a clear reason for that, or provide any evidence in support, even after being asked (as was company policy). He would, on occasion, wear a mask, so the Respondent did not think him genuine. He did so when a photograph was taken by his RM. The Claimant had a lanyard stating that he was exempt, but the Respondent was aware that these could be bought on eBay for very little, and without providing any evidence. The programme involved talking to lorry drivers, outside, and workers were expected to dress warmly, so it was not unreasonable for the cabin door to be open. The Respondent's managers found the Claimant disinterested when they visited the site. This was of concern to them, as South Mimms is easily accessible from Central London, and ministerial visits were thought to be likely.
16. The Claimant did not wear a mask. He bought himself a lanyard saying that he is disabled and exempt. He did not provide any evidence of this. He told the Tribunal he is prone to blood clots, and so has not been vaccinated. He said that wearing a mask has made him faint. While he said that was what his GP told him, there is no medical evidence of any of this, and the Tribunal finds that it was reasonable of the Respondent to seek clarification from the Claimant. Not only did he not provide any evidence, but he was not clear, to them at the time about the reason he said he was exempt from mask wearing.
17. His RM was not happy about this, as there was no evidence, and because when she went to take a photograph with him in it, the Claimant had put a mask on, which seemed to her (not unreasonably) odd. By late December 2020 she was seeking advice about what to do, from Lizzie Morrison. In turn she sought advice from an external provider. This took until 10 January 2021. Nothing was done about this before the Claimant's hours were reduced.
18. On 03 February 2021 the Claimant was visited by his regional manager. This did not go well. He was in the cabin with the door shut. The policy was that the cabin door must always be open. This was during a lockdown, so requirements were fairly stringent. The cabin is not large. The policy was that there was to be only one person at a time to be in the cabin. There were two in the cabin when the RM visited on 03 February 2021. After a forceful discussion, in which the Claimant refused to commit to leaving the door open, the RM left. She gave her feedback to Sonca Smolcic in head office.

19. On 04 February 2021 (page 98 is dated 05 February and refers to the visit “*yesterday*”) Layla Evans, Senior Accounts Director, also looked in. The Claimant is mistaken in saying that it was the same day. Ms Evans says this was a coincidence that she visited. The Tribunal decided it was a coincidence, but it is immaterial whether it was or not. She also gave feedback to Sonca Smolcic (it is quoted in the email at 98). The Claimant did not speak to Ms Evans much. A colleague spoke to her. The Claimant says that his colleague was trying to score points over him. Ms Evans took the lack of discussion as the Claimant being disengaged. She was not impressed by him, and that was her feedback about him. She is quite high up in the Respondent. There is a layer of management between her and the RM, and it would not be expected that she would liaise with the RM. This was not the RM and Ms Evans acting in concert.
20. Later that day (04 February 2021) someone from the office telephoned the Claimant to tell him that his hours were reduced from 48 a week to 24.
21. On 05 February 2021 Sonca Smolcic from head office emailed Lizzie Morrison about the Claimant setting out extensive negative feedback about the Claimant. This states that the hours were reduced due to overstaffing.
22. This was not entirely the case. It was a decision made, on 04 February 2021, by Lizzie Morrison and Sonca Smolcic, and possibly others. Lizzie Morrison had worked with the RM before and that was how the RM had got the job. She acted on the report she had from the RM, and also had from Layla Evans.
23. Accordingly, the Tribunal finds that this reduction in hours was the direct result of the RM reporting back to Sonca Smolcic via Lizzie Morrison, and Layla Evans report. It was Lizzie Morrison who decided to cut the Claimant’s hours, after discussion with the RM, Sonca Smolcic and Victoria Kowalski, also in the human resources office. It was nothing to do with the reduction in hours overall, although there was (at South Mimms) a small reduction in hours worked at this time. Lizzie Morrison’s evidence was that performance issues were relevant to the number of hours worked. They were not happy with the Claimant’s performance, and that was why they reduced his hours. The reduction was of half his 192 hours in a 4 week period. That is a reduction of 96 hours. In the four weeks after the Claimant resigned there were 127.2 fewer hours worked by staff based solely at South Mimms. There was, accordingly, a reduction in the number of hours worked at South Mimms greater than the reduction in the Claimant’s hours. What the Respondent did was to make most of that reduction to the Claimant’s hours.
24. The Claimant points out that in his team no-one else’s hours were reduced. He says that his hours were given to someone else, so that there was no reduction in the number of hours worked. This is not correct, as set out above. It is correct that no one else was told on 04 February 2020 that their hours would be reduced, and that the hours of the other, white, team leader were not reduced.
25. The history is therefore:

- 25.1. 03 February 2020: RM visit.
 - 25.2. 04 February 2020: Layla Evans visit.
 - 25.3. Later on 04 February 2020: Claimant told by Victoria Kowalski that his hours reduced by half
 - 25.4. 05 February 2020: collation of dissatisfaction with Claimant's work (page 98).
 - 25.5. On 06 February 2021 the Claimant resigned, with immediate effect,
26. There was, at this time, a change in the way hours were allocated, and about half of the 750 or so people engaged in the programme had their hours reduced.
 27. The other regular team leader at South Mimms was a white woman who worked a similar number of shifts. Her shifts were unaffected at the time the Claimant's hours were halved (88). The Claimant points out that if the reason for the reduction was an overall reduction in hours it would be logical to reduce his hours and those of the other team leader by the same amount (25%) and not cut his in half. He is also a fluent speaker of French, and the other team leader is monolingual, and while there was no particular need for French language ability, it was still an asset to his work and this is another contraindicator to the reduction in his hours being for the stated reason.
 28. The Claimant says that the reduction in hours was immediately after Layla Evans visited, without notice. He thinks this was arranged after he had been criticised by his Regional Manager for keeping the cabin door shut, and that after he had refused to leave it open he says she "*stormed off*". Whatever the cause of the visit of Layla Evans, the feedback from both led to the reduction in the Claimant's hours the day Ms Evans visited.
 29. This dissatisfaction was all about the Claimant not complying with management instructions about Covid precautions, and his perceived lack of engagement with his work. The ethnicity of the Claimant had nothing to do with his reluctance to follow management instructions about Covid precautions, or about his presentation to his RM and to Ms Evans. Ms Evans did not know the Claimant. She had to ask who the team leader was. There are many RMs in the company, and no evidence that Ms Evans was complicit in any action of the RM. There is every reason to think that the feedback of Ms Evans was simply what she observed, and no more.
 30. The Claimant had in the past (16 December 2020) complained about another team leader, who he said was "*spreading lies*" about him. He got on well with the other RM who visited the site. He had not complained about his RM before the reduction in his hours. There is no evidence that his RM was harassing him before the reduction in hours. The Claimant had complained about another member of staff. If he was harassed by his RM he would have complained about it.
 31. His RM did, as the Claimant said, get her role by reason of past connection with Lizzie Morrison. That is not a fact relevant to consideration of the possibility of race discrimination.
 32. There is some evidence that could lead to a shifting of the burden of proof

that there was a racial motivation to the reduction in the Claimant's hours. This is that the hours of the other team leader, who is white, were not reduced.

33. The Tribunal therefore looked to the Respondent for an explanation.
34. It has to be said that the Respondent did not present its case with any clarity. It was insistent that this was only the implementation of the need to reduce hours across the board, and there was much information about the reduction in hours across the 750 people engaged in the programme. The only relevant issue is the why the hours were reduced for the Claimant at South Mimms. The rest is irrelevant. It is clear that the Claimant was targeted for the loss of almost all the hours to be lost. That would have left them short of team leader hours, and another person was made up to team leader for some of those hours.
35. The issue is why he was so targeted. He says it was tainted by race discrimination. The Tribunal finds not. The fact is that there was dissatisfaction by his RM and by someone completely unconnected (Layla Evans) and that was the reason why the Claimant's hours were reduced.
36. The Claimant may feel that it was unfair of the Respondent to do this without giving him the opportunity to improve (and the Tribunal has some sympathy with this), but whether fair or not, that was the reason, and it is unconnected with race. The issues with the need to comply with Covid restrictions had been set out by the RM before, and yet the Claimant had failed to adhere to them: and defied his RM when she visited on 03 February 2021. He had been asked, politely, for information about his claimed exemption from wearing a mask, but had not supplied it (or even a reason why he claimed to be exempt). It was not unreasonable for the Respondent to think that his performance was less than satisfactory, not only for these reasons but also by reason of his disengagement from the managers who came to visit.
37. Internal emails clearly set out what the Covid related issues were, and discuss how they could be handled, sensitively.
38. After the Claimant resigned another person picked up many of the shifts he would have worked, and that person is black also.

Conclusions

39. There are the facts narrated above from which the Tribunal might think an inference could be drawn that the race of the Claimant was of relevance to the reduction in hours (that his co team leader was white and her hours were not reduced). The Claimant is right in saying that he was targeted for a reduction in hours, and that the overall issue of the company wide reduction in hours was a pretext. However, there is every reason to attribute this decision to his lack of engagement and attitude to Covid precautions, and nothing at all to suggest race was a factor in the decision to reduce his hours. There is no evidence that the co team leader was not complying with Covid restrictions, or was not performing well.
40. Accordingly, although the Claimant has proved facts which could lead the

Tribunal to find that there was race discrimination, the presumption that it was so is rebutted. There is a clear explanation.

41. It would have assisted the Tribunal had the Respondent been candid about its reasons, rather than suggest to the Tribunal that it was external matters that were the sole reason for the reduction in hours, which plainly was not a sustainable case. However, from the evidence, both contemporaneous documentary, and from the oral evidence, it is abundantly clear that the decision to reduce the Claimant's hours was because hours needed to be reduced, and his performance meant that they chose to reduce his by half. That would have been the case whatever his race. While not a reason for so concluding, the Tribunal noted that many of his hours were picked up by another black person: the issue was with the Claimant not his race.

**Employment Judge Housego
Dated: 11 March 2022**