Case Number: 3302874/2020
3305069/2020

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Christian Ononye **v** MAN Commercial Protection Limited

Heard at: Norwich **On**: 25, 26, 27, 28 and 29 April 2022

Before: Employment Judge Postle

Appearances
For the Claimant: In person
For the Respondent: Miss T McCallister, HR Director

JUDGMENT

1. The Claimant's claims under the Equality Act 2010 are not well founded.

2. The Claimant's claim that he was unfairly dismissed is not well founded.

REASONS

1. The Claimant brings claims under the Equality Act 2010 for the protected characteristic of race, particularly direct under Section 12 and harassment under Section 26. He also brings a further claim for ordinary unfair dismissal under the Employment Rights Act 1996. The Claimant's national origin is Nigerian. The Respondents defend the claims and in the case of the unfair dismissal claim, the potentially fair reason for dismissal advanced is conduct.

2. The specific issues for the claim under the Equality Act 2010 were agreed and set out at the Case Management Hearing before Employment Judge Kurrein on 18 March 2020 and they were that the Claimant relies on the following events:

    a. between October and December 2019, Richard Unitt unfairly singled the Claimant out for criticism of his time keeping;

b. on or about 5 November 2019, Mr K Mayo racially abused him;

c. in or about December 2019, Mr D Jones ridiculed the Claimant by pinning up a picture of a person of small stature;

d. in or about 2019, Mr Unitt replaced the Claimant's supervisor because he had declined to be complicit with Mr Unitt in discriminating against the Claimant;

e. on 19 December 2020, Mr Unitt harassed the Claimant by following him; and

f. on 20 February 2020, Mr Unitt singled the Claimant out for a search.

3. The Claimant relies on the hypothetical comparator whose circumstances are not materially different from the Claimant other than the comparator being white.

4. There was a second claim filed on 27 May 2020 following the Claimant's dismissal on 23 March 2020. That dealt with the Claimant's dismissal claim and in that particular claim there is no claim under the Equality Act 2010 for discrimination.

5. In this Hearing we have heard from the Respondents, through prepared Witness Statements from: Mr Unitt the Site Security Manager; a Miss McCallister an HR Director; Miss G Yardley an Account Director; Mr Bryce a Contracts Director; and Mr Keighley the Contracts Manager. There were Witness Statements from Miss Gloves from HR and Mr Smith a Quality Director, however, the Respondents elected not to call those witnesses. All of those witnesses gave their evidence through prepared Witness Statements.

6. The Claimant gave his evidence through 17 different Witness Statements and the Tribunal also had the benefit of a Bundle of documents consisting of 402 pages, including the two additional documents provided by the Respondents during this Hearing dealing with Amazon's Standard Operating Procedure for whom the Respondents provide Security Services at the Peterborough site, amongst others.

7. The Respondent is a large employer, employing 1,600 staff (or thereabouts) over a number of sites which they are responsible for the provision of Security Services and Protection. The Respondents were awarded the contract to cover security at Amazon's site known as EUK5 Peterborough. They were awarded it in April 2019 and that site went live on 1 August 2019. This apparently followed the previous contractors ICTS losing the contract seemingly because of their poor performance and the site at Peterborough was considered a 'problem site', in fact one of the worst performing sites in the UK at that stage. The Respondents were clearly brought in to tighten up security throughout the site.

8. The Claimant was previously employed by ICTS and was TUPE transferred over to the Respondents with 300 other staff (or thereabouts) on 1 August 2019. Apparently, some of the Guards / Officers, it was suspected, were letting Guards through security without following the correct procedure and hence the new contractors, the Respondents, were brought in to tighten up matters.

9. Mr Unitt was taken on as the Site Manager to oversee the Security Officers on the site and three other sites. He commenced his employment on 23 September 2019. It is clear that his remit was to improve the site's security and to reduce the amount of losses that Amazon were sustaining through theft.

10. Security screening with scanners will notably only pick up about 40% of objects as they will not pick up non-metallic items and possibly small metal items. All Security Guards, Officers and employees of Amazon were expected to be subject to searches when the scanner bleeped, or if it was noted an employee of Amazon, or the Respondent, exhibited visible signs of potentially concealed items, would be secondary searched. Security Officers / Guards were expected to arrive on shift promptly to commence their shift and be ready to commence their shift at their scheduled time. Therefore, if they were not dressed in their uniform upon arrival, they were expected to arrive in sufficient time to change into their uniform and thereby be ready to start their shift at the scheduled time.

11. It is clear, that certainly between October and December, there were occasions when the Claimant was late to start his shift. One of the problems the Claimant said was causing his lateness, was a battery problem to his car. The Claimant was spoken to about his lateness by Mr Unitt as he would speak to any other individual regardless of their national origin or colour. Furthermore, the Claimant would on occasions arrive for work not dressed correctly, necessitating the Claimant to go to his locker and change, which meant he was late in starting his job, which in turn had a knock on effect to staff wishing to leave their shifts. It was, therefore, not unreasonable for the Claimant to be spoken to about the need to arrive on shift either dressed in his uniform or arrive sufficiently early in order to start his shift on time.

12. The Tribunal accepts a failed battery on one occasion is an unforeseen event. Once it has failed, causing lateness, it is incumbent upon any employee to rectify that problem as soon as possible.

13. On or about 5 November 2019 a Mr Mayo, an Agency worker at the Respondent's site or Amazon site, apparently, according to the Claimant was speaking on a radio and said to the Claimant,

> *"Christian, speak to me in English"*

The Claimant raised this as a complaint with Mr Unitt. Mr Unitt spoke to all of those on shift at that time, no one was able to report hearing the said comment over the radio; the radio used at the sites would be played out to all staff who have the benefit of a radio set.

14. As a result of the fact there was no corroboration of what the Claimant was saying, the matter could not be investigated any further. In any event, Mr Mayo was removed from the site by the Respondents subsequently. Clearly there was no point in taking witness statements from those on duty at the time if no one was able to corroborate hearing the alleged comment that was made.

15. In or about 8 or 9 November 2019, the Claimant complains that whilst on shift another Agency worker, a Mr Jones, either printed and / or put up a picture showing what the Tribunal have seen is the head and shoulders of someone known as the late Gary Coleman; that is at page 101 in the Bundle. The Claimant took offence at this, believing he was being made the subject of ridicule because of the Claimant's height. Apparently Mr Coleman was of short stature. The picture does not in any way show that Mr Coleman is of diminished stature. When the Claimant raised this with Mr Unitt by email on 11 November 2019, the picture was removed, Mr Unitt carried out an investigation of those on shift but that did not reveal who in fact had printed the picture, or indeed put it up. In the area where the picture was placed there is, we are satisfied, no CCTV available. Mr Unitt sent an email following this to all Supervisors and Officers regarding respect to all colleagues and bullying and that harassment will not be tolerated regardless of its context.

16. The Claimant did not take the above matter any further. We also notice that in any event, Mr Coleman was of a black nature and assumed of American origin.

17. Mr Unitt did not replace Mr Rodriguez in December 2019 at all. In fact Mr Rodriguez had requested reduced hours as he wished to pursue other interests and in doing so wished to step down from his role as Supervisor. This was agreed by Mr Unitt and Mr Keighley, no more, no less.

18. In November and December 2019, it was clear Mr Unitt still had concerns about the Security Procedure being adhered to by the Security Officers on site. Therefore, on 28 November 2019 and 2 December 2019, as a follow up Mr Unitt sent out an email (pages 110 – 111) reminding Officers of the screening procedures and noting the Respondent was not holding their Officers to the same standard as Amazon employees.

19. The Claimant then refers to a particular incident of alleged harassment on 19 December 2019 as an issue. There is no reference in the Claimant's witness statements to an incident occurring on that date.

20. By 20 February 2020, the Claimant had been searched on no less than eight occasions without objection and had co-operated. On 20 February

2020, Mr Unitt was supporting his team at the screening area for Amazon 'kick out'. The Claimant was passing through the screening at this time and had visible evidence of potentially concealed items in his pocket. The Claimant was asked to empty his pockets onto, what we understand is the by-pass table, which the Claimant refused to do. The Claimant accepts he refused to do this. The Claimant maintains that Mr Unitt did not have the authority to search him as he was not wearing a high visibility jacket and clothing and was not displaying his SIA badge. Further, the Claimant maintains he did not believe it was part of a Manager's task. Mr Unitt was in a safe area and therefore did not require a high visibility jacket and as a Manager he clearly would be entitled to search and was wearing his SIA badge. It is clear from the picture, at page 325, that Mr Unitt has a lanyard around his neck.

21. It is also in accordance with Standard Operating Procedure, pages 399 – 402, which was put in place by Amazon. This is the procedure to be adopted at paragraph 9 for Amazon employees who are refusing to be screened and therefore investigated by Amazon's Loss Prevention Officer. Clearly, if it is a Respondent's employee, the Respondent will be responsible for investigating it, not Amazon.

22. The Claimant was asked twice by Mr Unitt to succumb to a search, he refused and so Mr Unitt offered the Claimant the chance to be searched by another colleague. As a result of the failure to adhere to a Reasonable Management Instruction, the Claimant was suspended. That letter is at page 252 and confirms that suspension is a neutral act and sets out the reason for his suspension. It also advises the matter was to be investigated. The Claimant was quite properly asked to provide a statement of his version of events on 20 February 2020 and the Claimant duly provides that and his version of events are at page 323.

23. On 12 March 2020 by email, the Respondent invites the Claimant to a Disciplinary Hearing and enclosing various statements from other Security Officers regarding the search procedure. The Disciplinary Hearing takes place on 16 March 2020, the minutes of which are at pages 345 – 352, it was Chaired by a Miss Gill Yardley an Account Director. The Claimant was clearly given an opportunity from those minutes to respond to the allegations and set out his reasoning for his failure to follow a reasonable Management Instruction.

24. Miss Yardley took the decision to dismiss. Her reasoning for this was her focus during the Disciplinary Hearing being the Claimant's refusal to follow a reasonable Management Instruction. It was a duty to uphold security on the site and if an Officer refuses to be searched, who has a visible bulge about their person, that to her mind represented an act of gross misconduct. Miss Yardley concluded the view that Managers do have the right to search, despite the Claimant suggesting the alternative. She also concluded that at no point does the Standard Operating Procedure state that a Security Manager cannot carry out a search and furthermore, can only search if the scanner has been activated or beeped.

25. Miss Yardley made the point that the Claimant was not the first person to be dismissed after a full investigation for failing to accept a search, or failing to follow search procedure. She further concluded,

> *"You simply cannot have Security Officers refusing to be searched given the nature of the site and the nature of the Respondent's remit at the Amazon site".*

26. The Claimant appealed against the decision to dismiss by letter of 23 March 2020, page 358, on the grounds that it was in some way in breach of his contract, lacked jurisdiction and that the Respondent's in some way did not apply discrimination policies.

27. On 3 April 2020, the Claimant was invited to an Appeal Hearing which was going to take place over the telephone, no doubt because of the pandemic at the time, to be conducted by Mr Bryce the Contracts Director. The minutes we see at page 366. Mr Bryce reviewed the decision and once again concluding on the facts that the Claimant had failed to comply with a reasonable Management Instruction, after he had reviewed and clarified the search procedure.

28. The outcome of that Appeal was confirmed to the Claimant on 8 April 2020, page 379.

The Law

29. Dealing with ordinary unfair dismissal, a potentially fair reason to dismiss is conduct, under Section 98(2) of the Employment Rights Act 1996 ("ERA"). That is not the end of the matter, we then have to have regard to Section 98(4) which says,

> 98(4) Where the employer has fulfilled the requirements of subsection (1), namely the potentially fair reason to dismiss, the determination of the question of whether the dismissal is fair or unfair having regard to the reasons shown by the employer, depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

30. There is well trodden law in relation to conduct dismissals which is the well known case of British Home Stores Limited v Burchell [1980] ICR303 and the EAT set out a threefold test which the employer must show that they follow. That is, did it believe that the employee was guilty of misconduct, that it had in mind reasonable grounds upon which to sustain that belief, and at the stage which that belief was formed, on those grounds, it had

carried out as much investigation into the matter as was reasonable in the circumstances? It does not have to be a counsel of perfection.

31. This means that the employer may not have conclusive direct proof of the employee's misconduct, only a genuine and reasonable belief reasonably tested. In this case we have the Claimant's acceptance that he refused to succumb to a search.

32. That said, then the question of whether the decision is fair or unfair is a matter that falls under what we call the 'band of reasonable responses' test. That is, employers often have at their disposal a range of reasonable responses to matters such as the misconduct or incapability of an employee, which may span summary dismissal down to an informal warning. It is inevitable that different employers will choose different options. In recognition of this fact and in order to provide a standard of reasonableness that Tribunals can apply, the band of reasonable responses approach was formulated.

33. This requires Tribunals to ask, did the employer's action fall within the band or range of a reasonable response open to an employer? This approach was approved by the Court of Appeal in British Leyland UK Limited v Swift [1981] IRLR91 CA, where Lord Denning MR stated,

> *"The correct test is this, was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness within which one employer might reasonably take one view and another quite reasonably take a different view. And in assessing that it is not for the Tribunal to substitute its own view as to what they would have done. It is quite simply, does the decision of the Respondents fall within that band after they have followed the threefold test in the Burchell?"*

34. Moving on to the Law in relation to the Equality Act 2010.

35. Firstly, direct discrimination under s.13,

> 13(1) A person (A) discriminates against another (B) if, because of protected characteristic, A treats B less favourably than A treats or would treat others.

36. In simple terms, what that means is, has the Claimant shown prima facie evidence of less favourable treatment? If he has, have the Respondents explained why that treatment has occurred? If they have, do the Tribunal believe the Respondent's explanation and what inferences, if any, can they draw from it?

37. Of course, if the Claimant is unable to show a prima facie case of less favourable treatment, he fails at that hurdle and what we call the shifting burden of proof does not go over to the Respondents to explain.

38. We then have s.26 EqA 2010, harassment. That again, says,

> 26(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.

39. Therefore, the Claimant firstly has got to show there is some form of conduct and then he has to show that it has some sort of effect against him because of that conduct.

Conclusions

40. Dealing firstly with the claims under the Equality Act 2010 and in particular each individual allegation:-

41. Claim 4.1 – the allegation that between October and December 2019, Richard Unitt unfairly singled the Claimant out for criticism of his time keeping.

42. The fact of the matter was, even on the Claimant's own admission he had been late on a number of occasions as a result of his faulty car battery not starting and then arriving late for work, the Claimant's view was that as his lateness was caused by a faulty car battery, and that in some way was mitigation or not his fault. Despite this having occurred on a number of occasions before purchasing a new battery which would have avoided being late, if once the battery had failed on the first occasion he had acted promptly.

43. It is simply not an excuse for lateness to say on the second, third, fourth and fifth occasion 'oh no it's my battery, I knew I had a faulty battery'. The Tribunal were therefore entirely satisfied this was not an acceptable excuse for arriving at work late. Maybe on one occasion, but then resolve the problem. In addition, the Claimant arrives at work without his uniform which led to insufficient time to go to his locker and put his uniform on, thereby being late to start his shift. The Claimant does not seem to distinguish between the difference of arriving at work and being ready to start his shift. Mr Unitt, or indeed any other Manager or Supervisor, is clearly justified in: (a) bringing this to the attention of any employee and (b) where it occurs on a regular basis, warning the employee about their future conduct, or being late for work.

44. The Tribunal therefore found no evidence that the Claimant was being singled out for being late, or that he was being treated any differently or less favourably than any other employee who arrived late on a regular basis. That claim therefore fails.

45. Claim 4.2 – the allegation that on or about 5 November 2019, Mr Mayo racially abused him.

46. This is the allegation and the incident when the Claimant allegedly was asked by Mr Mayo over the radio to *"speak to me in English"*. The first point the Tribunal notes is that when Mr Unitt questioned staff on shift that evening who had access to a radio, no one was able to corroborate the Claimant's allegation. That being so, there is no prima facie evidence of less favourable treatment or harassment and in those circumstances that claim fails.

47. Claim 4.3 – the allegation that in or about December 2019, Mr Jones ridiculed the Claimant by pinning up a picture of a person of small stature.

48. This is the allegation where Mr Jones has allegedly pinned a picture of Mr Gary Coleman, a black actor to ridicule the Claimant because of the Claimant's height.

49. The first point the Tribunal notes is that the picture displayed at page 101, this picture only depicts Gary Coleman's head and shoulders and is not annotated in any way and he is black in colour. The Tribunal struggles to understand what less favourable treatment is being advanced here. Likewise, how does the Claimant say this amounts to harassment?

50. Furthermore, in any event, when it was investigated by Mr Unitt no one was able to say who had printed it, who posted it on the wall and we are also satisfied that in this particular area it is not covered by CCTV so it would not help to try and find the CCTV that clearly does not exist. This claim therefore fails.

51. Claim 4.4 – the allegation that in or about December 2019, Mr Unitt replaced the Claimant's Supervisor because he had declined to be complicit with Mr Unitt in discriminating against the Claimant.

52. Mr Unitt, we are entirely satisfied, did not remove Mr Rodriguez from the position of Supervisor as the Claimant believes he was not supporting Mr Unitt in some sort of campaign against the Claimant. There is simply no evidence advanced to support this allegation and in any event, we are entirely satisfied that Mr Rodriguez wished to reduce his hours to pursue other interests and wanted to step down in his role as a Supervisor. He subsequently left the Respondent's employ of his own volition. The Tribunal is therefore satisfied this claim is not made out and fails.

53. Claim 4.5 – the allegation that on 19 December 2019, the Claimant states that Mr Unitt harassed the Claimant by following him.

54. The Tribunal were not advanced or shown any evidence of a specific allegation which centres on the 19 December 2019. This claim is simply not made out and therefore fails.

55. Claim 4.6 – the allegation that on 20 February 2020, Mr Unitt singling out the Claimant for a search. Mr Unitt was the Site Security Manager. He was brought in to shake up the Security Officers and make sure that the site in terms of security and protecting Amazon, ran smoothly and reduced their losses. It is clear that a Site Security Manager would be entitled to carry out a search. He was in possession around his neck of an SIA badge. He was following the SOP for an employee of the Respondents and had proper cause to search the Claimant who was exhibiting on 20 February 2020 visible evidence of concealed items in his pockets.

56. It is clearly a reasonable Management Instruction to request the Claimant be searched by a Security Officer given the problems at the site and the Respondent's remit from Amazon when they took over the site. In those circumstances the Tribunal are not satisfied this claim is in any way made out, in other words that Mr Unitt had somehow singled out the Claimant for a search.

57. Dealing with ordinary unfair dismissal under the Employment Rights Act 1996:-

58. Conduct is a potentially fair reason to dismiss.

59. We then have the threefold Burchell test: was there reasonable grounds to believe in the Claimant's misconduct. Clearly there was no dispute that the Claimant had failed to follow a Reasonable Management Instruction to succumb to a search. On that basis the Respondents clearly did have reasonable grounds to sustain that belief. Such investigation as was required had been carried out.

60. Dealing with the decision to dismiss, the Tribunal again reminds itself it is not for us to substitute our view as to what we would have done. Does the decision to dismiss fall within the band of a reasonable response of a reasonable employer?

61. Clearly an employee on a site such as the Respondent's site, who is a Security Guard who refuses to be subjected to a search upon being seen with visible items in his pocket which had not been removed, clearly in those circumstances it is a reasonable response of a reasonable employer to dismiss. Therefore the claim for ordinary unfair dismissal does not succeed.

62. The Tribunal would also like to comment on witnesses' creditability. The Tribunal would say without hesitation, we found all the Respondent's

witnesses, particularly Miss Yardley and Mr Unitt, to be very credible, reliable and consistent in their evidence. That is not to say the other Respondent's witnesses were not, but Miss Yardley and Mr Unitt have had a major part to play in these proceedings, therefore it is worth noting that.

63. For the avoidance of doubt, all of the Claimants claims whether under the Equality Act 2010 or the claim for ordinary unfair dismissal under the Employment Rights Act 1996, are therefore dismissed.

64. That concludes the unanimous Judgment of the Tribunal.

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Employment Judge Postle

Date: 7 June 2022

Sent to the parties on:

10 June 2022

For the Tribunal Office