



EMPLOYMENT TRIBUNALS

Claimant: Mr P Zaluski

Respondent: NSL Ltd

Heard by video

On: 12 & 13 January 2023

Before: Employment Judge Corrigan
Dr N Westwood
Mrs S Dengage

Representation

Claimant: In person

Respondent: Mr S Cuthbert, Counsel

REASONS

For the Tribunal's Judgment sent to the parties on 7 February 2023

Provided at both parties' request

Issues

1. The issues to be considered by the tribunal were set out in the Case Management Orders dated 12 August 2022 (Employment Judge Smith). There were also Case Management Orders dated 24 August 2022 (Employment Judge Tsamados).
2. The hearing conducted by Employment Judge Tsamados pre-dated that conducted by Employment Judge Smith but the Orders from that hearing were produced after the second hearing. The relevance of this is that although Employment Judge Smith recorded that the claimant could not demonstrate a protected act in respect of a victimisation claim, Employment Judge Tsamados recorded in his later order in respect of the earlier hearing that there was a victimisation claim with the protected act being an email the claimant sent to Mark Shaw dated 3 March 2021. It was agreed, and the respondent's representative did not object, to keep open the possibility of a victimisation claim to avoid a potential unfairness to the claimant, a litigant in person. However during the hearing the claimant did not really pursue the claim of victimisation and we considered he was using the word in a lay

sense. The remaining issues better represented his situation and the case before us.

3. Employment Judge Tsamados had also defined the race/nationality as being from an overseas home country (i.e. a foreign national working in the UK) with the appropriate comparator as those whose home country is the UK, which we agreed was the more appropriate comparison.
4. Once the tribunal had read the statements and some of the bundle it considered there may be more appropriate PCPs which the respondent's representative did not object to. These are therefore set out in the list of issues below.
5. The issues discussed and agreed between the parties were:

Direct race/nationality discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 impose a final written warning on the claimant on 14 May 2021?

5.1.2 Maintain the said decision as recorded in an appeal outcome on 11 June 2021?

5.2 Was that less favourable treatment?

5.3 If so, was it because of his race/nationality?

Indirect discrimination (Equality Act 2010 section 19)

5.4 Did the respondent have the following PCPs:

5.4.1 the requirement for staff to return promptly from annual/authorised/compassionate leave during the covid pandemic?

5.4.2 the requirement that quarantine be covered be part of authorised leave and/or any continuing absence due to quarantine would be unauthorised absence

5.5 Did the respondent apply the PCP to the claimant?

5.6 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic of race/nationality or would it have done so?

5.7 Did the PCP put persons who shared the protected characteristic of the claimant of race/nationality at a particular disadvantage compared with persons who did not (those who are of UK origin), because it was more likely that persons who shared the claimant's characteristic (being from an overseas home country) would have to travel abroad to deal with family bereavements which in turn would take greater time than those who had to address the same issue in the United Kingdom?

5.8 Did the PCP put the claimant at that disadvantage?

5.9 Was the PCP a proportionate means of achieving a legitimate aim?

Harassment related to race /nationality (Equality Act 2010 section 26)

5.10 Did the respondent do the following things:

5.10.1 write two emails on 19 February, one on 26 February and one on 4 March 2021 making threats of disciplinary action?

5.11 If so, was that unwanted conduct?

5.12 Did it relate to the claimant's nationality/race?

5.13 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.14 If not, did it have that effect?

Victimisation

5.15 Did the claimant do a protected act when he sent the email of 3 March 2021 to Mark Shaw?

5.16 Did the respondent do the following things:

5.16.1 send the claimant the emails referred to in the harassment claim;

5.16.2 Subject the claimant to the disciplinary sanction, which was upheld on appeal.

5.17 Was this because the claimant had done the protected act?

Hearing

6. The tribunal heard evidence from the claimant on his own behalf. He also had a witness, Mr Olufemi Lotun. We read his statement but he did not give oral evidence as the respondent had no questions for him.

7. On behalf of the respondent we heard evidence from Mr Mark Shaw (Client Account Manager), Mr Paul Boxall (Senior Account Manager) and Mr Paolo Orezzi (Service Director).

8. There was a bundle of documents and the parties made oral submissions.

9. Based on the evidence before us the tribunal found the following facts.

Facts

10. The claimant was employed by the respondent as a Civil Enforcement Officer from 24 September 2013. He is of Polish origin and nationality. He remains in employment with the respondent.
11. The respondent is a multi-functional business providing parking and transport services, amongst others. It is a large employer employing in excess of 4000 staff across 250 locations nationally (page 27). The claimant works on the respondent's contract with Wandsworth Borough Council in respect of enforcement of parking regulations.
12. The claimant had a period of unauthorised leave in January 2020 when he travelled to Poland as his mother-in-law had died. At the subsequent return to work meeting it was recorded that no action was taken as his absence had been due to a family reason in respect of his mother-in-law's death. The return to work interview records that no support was required "because employee had very good excuse this time" (p97).
13. The claimant requested extended leave to go to Poland in August 2020 which was refused. He was allowed the first and third week of his request but had to return the second middle week. In the event he did not come back due to sickness absence which in fact then lasted until November 2020 and was followed on his return by a 14 day mandatory quarantine without any issue being raised by the respondent (in around November 2020). The claimant did face a disciplinary process as Mr Shaw suspected that he had effectively taken the refused leave anyway. However the disciplinary manager found insufficient evidence of this and indeed considered that the medical evidence cast doubt on the suggestion the claimant had pre-planned the situation and found that unplanned absence was not necessarily a disciplinary issue. It was found that breach of trust was not established.
14. Mr Shaw nevertheless held against the claimant that he had a history of not returning on the due date and this has been the overriding influence on the way he treated the claimant in the matter before us. There is a suggestion that it was these disciplinary proceedings that prevented the claimant travelling earlier to arrange his father's funeral.
15. The Claimant's father died on 26 December 2020. He is an only son and his mother was 80 so he needed to travel to Poland to arrange his father's

funeral and to put his affairs in order. He estimated this required 3 weeks and requested time off to do this. He was very clear that he needed 3 weeks actually in Poland in his request on page 105 (15 February 2021). He proposed a combination of compassionate leave, 4 days annual leave and unpaid leave along with rest days and Sundays from 21 February to 14 March 2021. This was initially refused by Mr Shaw. He cited operational circumstances and said the respondent also needed to consider there was a 2 week quarantine period once the claimant returned. He granted 3 days compassionate leave and 4 days annual leave from 22 February requiring the claimant back at work on 3 March 2021. He provided flights and suggested organising the funeral via videolink/email. He said any unauthorised absence would be dealt with through the disciplinary process. His letter is not clear on this as he proposed alternative flights knowing there was a 2 week quarantine but also stated he expected the claimant back at work on the 3rd March. This was clearly not practical if he intended the claimant to travel to Poland and incorporate the quarantine period (thereby using annual leave and compassionate leave to do so) and his letter is ambiguous (p106).

16. He said in evidence that he put in the warning about the consequences of unauthorised absence due to the Claimant's previous history set out above.
17. Following intervention from the claimant's union representative and another manager the claimant was eventually granted a further period of unpaid leave by two emails on 19 February 2021 (pp109-112). He was granted holiday leave (including the compassionate leave) until 2 March and then unpaid leave until a return to work on 15 March 2021. He was required to produce a return flight due to concerns about the previous late return to work when he had not had a return ticket. Both emails said a failure to return would be an unauthorised absence which could be considered misconduct and disciplinary action could be taken including dismissal. Again this still did not allow the claimant the full time in Poland he had requested.
18. By further letter Mr Shaw made clear that the claimant needed to allow for the 10 day UK quarantine in that period (111-112). The letter said this was the maximum the respondent could offer due to operational circumstances within the contract due to an increase in absences combined with the end of the holiday year. Again he required sight of the return ticket.
19. We accept the Claimant's account that he had done research to plan for his trip and to avoid quarantine in Poland. He believed based on widespread press articles at the time that testing had been introduced at Polish airports, including the airport he was using, in order to make travel to Poland easier and to assist passengers to avoid quarantine in Poland. He therefore did not test for covid before he left reliant upon this. Unfortunately, when his particular flight arrived in Poland there was no testing available and he was

put into a 10 day quarantine there, monitored by police. We accept his evidence that this impacted the majority of those on that flight as he was not alone in relying on the border testing. We therefore accept that this was unexpected. We also accept the claimant's evidence that he had enquired about funeral arrangements prior to travel but had been told that face to face appointments were necessary at both his father's funeral parlour and the Orthodox church where he eventually held the funeral. He needed the death certificate before he could do this which needed to be obtained in Poland. His trip was also to deal with his father's affairs generally, also involving multiple face to face visits with multiple institutions. There was limited work he could do in respect of his father's affairs from quarantine or from the UK.

20. The next day the claimant wrote from quarantine to the Account Director to explain his situation. Again he said he needed 3 weeks in Poland, meaning it was unfeasible for him to include the UK quarantine in that period. He also raised the fact that he was now subject to the Polish quarantine. He did not explain the issue with testing at this time. However we still accept his account. We note in particular that he was anxious to proceed with his plans and that his father remained at the funeral parlour at an increasing cost until he could make the necessary arrangements.
21. He said his return flight would be on 24 March 2021. The respondent was therefore on notice the claimant required 20 days quarantine and 3 weeks in Poland.
22. Mr Shaw initially responded on 26 February (p124) saying any absence from work from 15 March onwards would be treated as unauthorised and such an absence would be considered gross misconduct and could result in dismissal. He said in light of the fact the claimant was indicating he would not return until April he urged him to take steps to come back sooner. If not, the company would have no alternative but to consider disciplinary action. He said it was concerning the claimant had not booked his return flight prior to leaving.
23. The company therefore took the stance that they would not approve any further leave which by implication suggests they intended the claimant to return without attending the funeral or conducting any of the other affairs for which he had travelled and spent 10 days in very restrictive quarantine.
24. On 1 March 2021 Mr Shaw maintained this stance and provided earlier alternative flights to enable the claimant to still return to work by 15 March (by flying on 5 March) even though the claimant would not be out of his Polish quarantine until 4 March 2021. By implication this would require the claimant not to organise the funeral. He also provided flights on 12th and 14th March, which was to encourage the claimant to at least stay a shorter period.

25. Prior to travelling the Claimant had also taken an antibody test and this was the explanation he was giving to the Respondent about how he had intended to ensure entry to Poland (rather than the issue around border testing) but we confirm this does not affect the fact we accept his evidence that he believed prior to travelling after research that he would be able to get into Poland quickly without quarantine.
26. On 3 March 2021 the claimant wrote again (p129) explaining how strict the quarantine had been with police checking on him daily. He explained that he could not start his planning of the funeral until 4 March and all other necessary formalities. He explained about the need for original documents and face to face visits. He said he had had legal advice and that disciplinary action based on the imposed quarantine would be harassment and discrimination. He explained that to comply with the respondent's instructions he would have to simply do the two quarantines and return without actually planning the funeral. He reiterated that he had always said he needed 3 weeks in Poland. He expressed considerable distress.
27. We are satisfied from the claimant's evidence that once he was released from the Polish quarantine the first available date he could book for the funeral was 19 March 2021 and that he spent the entire trip very busy managing his late father's affairs. He did not tell the respondent that the date was 19 March 2021 but he was very clear he needed 3 weeks in Poland. The reason for the delay was the pandemic and the increased number of funerals generally.
28. Mr Shaw's reply was that he had been granted leave whereby he was expected to return on 15th March and any leave after that date would be classed as unauthorised. Inevitably the claimant continued to do what he needed to do and to return on the date he had indicated. No account was taken of the fact the claimant had lost his father and had kept the employer informed promptly of relevant information, he did not overstay his trip to Poland and returned as soon as he could after the UK quarantine.
29. On 22 March 2021 (p134) the respondent wrote to the claimant suggesting they did not know why he had not returned on 15 March and when he would be returning. This was not true as the claimant had made his position clear. The claimant replied in the early hours of 23 March 2021 to say that he had just buried his father. Here he did say the date of the funeral and that he was preparing to return after dealing with a huge and overwhelming amount of sad issues and formalities. He said he was returning on 24th March 2021 and would return to work after the UK quarantine. He was told there would be an investigation.
30. We note that 2nd -5th April 2021 was Easter. On the day of the claimant's return on 6 April 2021 the respondent produced the document at page 140

and required staff on the Wandsworth contract to sign though many refused. That said:

“Please note that all staff are required to be back at work at the end of their authorised holidays....Any absence beyond that will be deemed as unauthorised absence.

In line with our Absence Management Procedure, any member of staff who is absent from work for 3 or more days will be subject to a disciplinary and this may be classed as gross misconduct.

Staff who choose to travel at this time and this [results] in having to serve a quarantine period which exceeds their authorised holiday, will be subject to the absent management procedure. When going on holidays any potential quarantine should be considered and it is the responsibility of the staff member to ensure this is factored within the authorised period of absence.”

31. Two other colleagues from Goa had also travelled to visit family around the same time. On arrival they had to isolate and then received notification that their return flight was delayed and they were unable to book another flight for a period of time following which they had to isolate in the UK. The respondent treated the additional time off that had not been pre-approved as unauthorised absence and they were given a final written warning, one on 6 April 2021 and the other 12 April 2021.
32. Mr Boxall dealt with the claimant’s disciplinary. He decided the claimant should also receive a final written warning. He considered the claimant’s situation was akin to that of a Kenyan colleague who had been delayed during a trip back to Kenya for 6 months due to the pandemic restrictions and who was then dismissed when he did not return at the earliest opportunity. He considered the claimant’s efforts to return akin to that case albeit did not dismiss because of the mitigation of the funeral.
33. He held against the claimant that he did not inform Mr Shaw of the date of the funeral (which was incorrect as the claimant did inform the respondent on 23 March) and, again incorrectly, that the claimant had not informed the respondent that he had booked a return flight on 24th March 2021 and still required to quarantine.
34. He did accept that it was impossible for the claimant to return by 15th March and that he made arrangements as soon as he could but considered that he did not tell the respondent. He considered the claimant had not shared the risk of a Polish quarantine with the respondent.
35. With the help of another Polish colleague he phoned a couple of Polish funeral parlours and concluded the claimant could have done more to

arrange the funeral before he left and that although documentation needed to be made available in person he took the view he could have also sent copies by post.

36. He also took the view the claimant could have delegated the work of arranging the funeral but this is not true as the claimant is an only child. In any event it is entirely reasonable of the claimant to want to undertake these matters in person for such a close relative and we agree that it is overstepping its power for an employer to decide otherwise.
37. Mr Boxall found that the claimant was going to do what he had to regardless of the company, as a negative finding. Whereas in fact our view is that, as the claimant had to arrange the funeral and other affairs anyway, it was the respondent that had put him in that position. The suggestion that the claimant should have done anything else is unreasonable.
38. Mr Boxall found the claimant's conduct unacceptable.
39. As the claimant has said there are a number of unaccounted for errors in the decision letter as the claimant did inform the respondent of his requirements from the outset and again once he was detained in quarantine in Poland – he did ask for an extended period of leave and it was Mr Shaw's insistence that he return on 15 March 2021 even once that became unfeasible.
40. The claimant appealed and it was dealt with by Mr Orezzi who upheld the decision due to the need to treat everyone the same and said he had three concerns. These were that the claimant had not booked his return flight; had failed to research entry requirements; and the claimant's belief that the UK quarantine should not have been included in the leave request. He decided had the claimant raised issues earlier other plans could have been made, but it is abundantly clear that the claimant did communicate the issue by 22 February 2021 and no plans were made. Mr Shaw never had the intention of extending leave to cover what the claimant needed.
41. We explored whether the respondent could have granted the extended leave and whether there were alternative ways of managing the situation. We accept that there was no possibility of home working during the quarantine. Normally the respondent uses overtime to cover absences. However the situation had developed where a lot of staff were using untaken leave in March. Nevertheless they were able to cover a lot of the claimant's leave. They were concerned about the impact on their contract with Wandsworth and did receive a fine in the region of £900 in March 2021. We heard that it is possible to organise agency staff and the respondent does do so, though usually for longer absences of 2 months or more as it can take up to a week or so for registration and uniform and training and there can be a delay in recruiting. However the respondent did know that

the claimant would be returning in April from 22 February 2021. If it was truly the case that the contract was in jeopardy then it is inexplicable why they did not at least try that avenue, especially as they had a higher proportion of absences due to the pandemic, of which this was one. We also note that the respondent knew from 15 Feb 2021 that the claimant needed 3 weeks plus the quarantine at a time when in any event they must have known for some time that their staffing levels were impacted by the pandemic.

Relevant law

42. A person directly discriminates against another if because of race he/she treated that person less favourably than they would treat others (s13 Equality Act 2010).
43. A person (A) indirectly discriminates against another (B) in relation to race if A applies to B a provision, criterion or practice which A also applies to others not of the claimant's race and it puts those of B's race at a particular disadvantage when compared with those who do not share it; actually puts B at that disadvantage; and A cannot show that it is a proportionate means of achieving a legitimate aim (s19 Equality Act 2010).
44. A person harasses another if he/she engages in unwanted conduct related to race which has the purpose or effect of violating that other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
45. In deciding whether the conduct as the above effect the tribunal must take account of the claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect (s26 Equality Act 2010).
46. A person victimises another if he/she subjects that person to a detriment because they have made an allegation that there has been a contravention of the Equality Act 2010 (s27 Equality Act 2010).

Conclusions

Indirect race discrimination

Did the respondent have the following PCPs:

the requirement for staff to return promptly from annual/authorised/compassionate leave during the covid pandemic?

the requirement that quarantine be covered be part of authorised leave and/or any continuing absence due to quarantine would be unauthorised absence?

47. By the relevant time there was a requirement that staff return at the end of whatever period of leave was initially authorised, irrespective of changing events due to Covid. This was applied in the claimant's case, and in the case of the other two Goan colleagues. This conclusion is supported by the document on page 140.
48. The respondent also by the relevant time required that quarantine be factored into authorised leave. That is also clear from page 140 and the stance taken by Mr Shaw in this case and the stance adopted in respect of the Goan colleagues.
49. It is also the case that ongoing leave due to quarantine beyond three days was treated as unauthorised absence and potentially gross misconduct, again this is evidenced by this case, p140 and the other two Goan cases.

Did the respondent apply the PCP to the claimant?

50. They did apply all the PCPs to the claimant. There was no dispute about this.

Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic of race/nationality or would it have done so?

51. The respondent admitted that the requirements were applied to everyone including UK citizens.

Did the PCP put persons who shared the protected characteristic of the claimant of race/nationality at a particular disadvantage compared with persons who did not (those who are of UK origin), because it was more likely that persons who shared the claimant's characteristic (being from an overseas home country) would have to travel abroad to deal with family bereavements which in turn would take greater time than those who had to address the same issue in the United Kingdom?

52. We do consider the requirements put persons who were not UK nationals at a particular disadvantage. We have seen that the three colleagues who were put at a disadvantage by the policy were from Poland and India (Goa) respectively. We take notice that someone who has come to work in the UK from another country is far more likely to have to travel overseas to deal with family emergencies or visit relatives on a regular basis than someone of UK origin. There will of course be British people with family overseas but if you are working in the UK from another country you are far more likely to have, or to have more, close family ties back in your home country and travel is

much more likely to be necessary to deal with family bereavement and emergencies. Quarantine was obligatory in respect of overseas travel and in some situations, as in these three examples, added between 20-28 days onto such a trip.

Did the PCP put the claimant at that disadvantage?

53. The requirements did put the claimant at a substantial disadvantage particularly as the respondent did not approve sufficient leave in the first place. The respondent never approved the leave the claimant needed for 3 weeks to arrange affairs in Poland and the 10 day quarantine in the UK and refused to reconsider once the claimant promptly made them aware that he was also subject to the quarantine in Poland. We accept the claimant was in a position where on a human basis he had to continue with his plans and the respondent's policy put him in the position that he really had no choice but to take unauthorised leave and the respondent still maintained the policy by disciplining the claimant.

Was the PCP a proportionate means of achieving a legitimate aim?

54. The respondent had the legitimate aim of ensuring the contract with Wandsworth was fulfilled and sufficient staff present at work to do so.

55. However we do not consider the requirements were a proportionate means of achieving that aim. We did not consider them appropriate and reasonably necessary to achieve the aims. It was not appropriate to impose restriction on employees compelled to obey legally enforceable restrictions such as quarantine to include it into agreed leave where the amount of leave agreed made it impracticable for the employee to accomplish what the compassionate leave was requested for.

56. If the concern was to ensure enforcement officers on the streets we do not accept this is a means for achieving that aim as in fact there was a good chance such a stance would push the claimant and/or his colleagues to leave and the respondent could have been risking unfair dismissal claims.

57. There were other more proportionate means to deal with the situation including recruiting agency staff and/or addressing the way the respondent managed leave entitlement so that it did not have too many staff off at the end of the leave year.

58. We do not accept that the needs of the business warranted restriction on overseas' staff's need to travel during the pandemic in this way.

Harassment

Did the respondent do the following things:

write two emails on 19 February, one on 26 February and one on 4 March 2021 making threats of disciplinary action?

If so, was that unwanted conduct?

59. The respondent did send the above emails making repeated threats of disciplinary action as set out in the facts above. Sending those emails was unwanted conduct and put a lot of unnecessary pressure on the claimant at a very vulnerable time.

Did it relate to the claimant's nationality/race?

60. We find it did. The respondent would not have behaved in this way if the claimant had not been an overseas national. The whole context was an overseas national needing to travel home for a bereavement. We also find that Mr Shaw had a prejudicial view of the claimant having a tendency to take unauthorised leave based on the previous two examples, despite the findings in favour of the claimant in both cases. And this is based in part on the fact the claimant is Polish and has to travel back and forth to Poland regularly for family reasons. This prejudicial view caused Mr Shaw to really "dig in his heels" (i.e. become intransigent) in respect of how much leave the claimant could take, despite evidence from both Mr Boshall and Mr Orezzi stating that further extensions could have been granted if the claimant had asked. Mr Shaw's stance was irrational and we find it likely that the claimant being from overseas contributed to that.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? If not, did it have that effect?

61. To put that kind of pressure to curtail a bereavement trip is inappropriate abuse of the employer's power and did create an intimidating environment. We consider it was intended to as the respondent wanted to force the claimant i.e. intimidate him into coming back early without fulfilling the intention of arranging the funeral and all other necessary affairs. It did create a hostile environment as the claimant was begging for compassion and received the opposite. We also find it caused a high degree of offence given his circumstances, and reasonably so.

Direct race discrimination

Did the respondent do the following things:

impose a final written warning on the claimant on 14 May 2021?

Maintain the said decision as recorded in an appeal outcome on 11 June 2021?

62. The respondent did impose and maintain the final written warning during the disciplinary process.

Was that less favourable treatment? If so, was it because of his race/nationality?

63. We do not find primary facts from which we could conclude that the reason for the final written warning and its being upheld on appeal was race/nationality. We find it likely that a UK national in the same position dealing with the death of a close relative overseas would have been treated the same (in respect of the disciplinary penalty) in the same material circumstances as the claimant.

64. We do consider the penalty was unfair and that it relied on incorrect conclusions, for example, that the claimant had not been forthcoming when he had and that had he just been more forthcoming that Mr Shaw would have granted an extension. It's clear that Mr Shaw would not have (and did not despite being aware of the claimant's situation). The decisions maintained the indirect discrimination but they were not done because of the claimant's race.

65. It was also unfair to consider the claimant akin to the Goan examples and the Kenyan example as his situation was completely different and no proper account was taken of his circumstances given the Goan colleagues also got final written warnings – but this is not a fact from which we can conclude a UK national would have been better treated.

Victimisation

66. The claimant did not really pursue victimisation and we did not consider that claim for the reasons set out above in the list of issues section, but in any event we were satisfied that the actions were not done because of the claimant's reference to advice about discrimination in the emails.

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Employment Judge Corrigan

24 February 2023