Case Number: 3323555/2021
3323710/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Joseph Johnson	**v**	1. Place of Progress Limited 2. Ms Bianca Andrew 3. Ms Cassandra Kalunga

Heard at: Watford (claimant by CVP)
On: 6, 7 and 9 November 2023

Before: Employment Judge Alliott
Members: Ms L Thompson
Ms A Telfer

Appearances
For the Claimant: In person
For the Respondents: Mr Oliver Lawrence (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims against all respondents are dismissed.

REASONS

Introduction

1. The claimant was employed by the First respondent as a Service Manager – Semi-independent Accommodation on 29 November 2021. He was summarily dismissed on 14 December 2021 and paid two weeks pay in lieu of notice plus any annual leave accrued and not taken.

2. By two claim forms presented on 14 December 2021 (First and Second respondents) and 20 December 2021 (Third respondent) the claimant presents claims of direct discrimination and harassment relating to the protected characteristic of sex and victimisation. The respondents defend the claims.

The issues

3. The issues have been drafted by the First respondent following the preliminary hearing before Employment Judge Coen held on 28 February and 3 March 2023. The claimant indicated to us that he agreed them.

4. They are as follows:-

" A Direct sex discrimination.

1. Did the following events occur?

(a) Did the Second respondent push back the claimant's start date to 29 November 2021?

(b) On 1 December 2021, did the Second respondent:

(i) Practically yell at the claimant, stating he should not leave her and Hibo Ali to take items out of her car by themselves.

(ii) On the claimant asking questions, give responses such as "that's not important now" and "What you're asking doesn't make sense", or just ignore the claimant altogether.

(iii) Falsely allege that the claimant was not helping the Second respondent to unload her vehicle.

(c) On 6 December 2021, did the Second respondent begin to attack the claimant after he informed her he had got the rooms ready (except for the locked one) by utilising a shade and bulb from the corridor.

(d) On 7 December 2021, did the Second respondent reject the claimant's request for annual leave in January 2022?

(e) On 8 December 2021, did the Second respondent :

(i) Question the claimant about what he would do if during a room inspection he found drugs in a young person's room;

(ii) Challenge the claimant's decision to take two young people to Tesco and to tell them to pick food for a few days, spending £80 in the course of doing so.

(f) On 9 December 2021 did the Second respondent:

(i) Bring up the subject of the Tesco spend again, and during the discussion say "I answer to no one" and "ok I'm inconsiderate, so what?"

(ii) Tell the claimant that he would have a probation review because she felt he was underperforming as a Service manager.

2. If so, by any of the above conduct, did the First or Second respondent treat the claimant less favourably than they treated or would treat a female comparator in materially similar circumstances? The claimant relies on the following actual comparators:

(a) In relation to 1(a), Samantha Wozniak

(b) In relation to 1(b), Hibo Ali

(c) In relation to 1(c), No comparator specified.

(d) In relation to 1(d) Samantha Wozniak

(e) In relation to 1(e), No comparator specified.

(f) In relation to 1(f), no comparator specified.

3. If so, was any such less favourable treatment because of sex?

B Victimisation

1. Did any part of the claimant's written grievance of 13 December 2021 constitute a protected act?

2. If so, is the evidence, information or allegations set out therein false?

3. If false, was it given, or made, in bad faith?

4. Did the respondents subject the claimant to the following detriments:

   (a) Dismissing the claimant?

   (b) Ignoring his appeal?

5. If so, was the claimant subjected to those detriments because of that protected act (the grievance of 13 December 2021)?

C Harassment

1. Did the events set out at A1(a) –(f) occur?

2. If so, in each case did the conduct relate to the protected characteristic of sex?

3. If so, did this conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating and offensive environment for the claimant? In determining whether the conduct had the necessary purpose or effect, the tribunal must take into account the factors listed in section 26(4) of the Equality Act 2010 namely:

   (i) The claimant's perception;

   (ii) The other circumstances of the case; and

   (iii) Whether it is objectively reasonable for the conduct to have had that effect."

The law

5. Section 13 Equality Act 2010 provides as follows:-

> "13 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."

6. By virtue of section 23(1) there should be no material difference between the circumstances relating to each case as regards the comparator.

7. As per paragraph 15.74 of the IDS Employment Law Handbook Discrimination at Work:

> "Determining reason for treatment: The "Reason why" enquiry.
>
> A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. In Gould v St John's Downshire Hill [2021] ICR 1, EAT, Mr Justice Linden, after summarising the established case law discussed in detail below, helpfully explained: "The question whether an alleged discriminator acted "because of " a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined that the "reason why" question and the test is subjective… for the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" in the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious."

8. In addition, in so far as the claimant makes out a prima facie case requiring an explanation, the burden of proof may be reversed.

<u>Harassment</u>

9. Section 26 of the Equality Act 2010 provides as follows:-

> "26 Harassment
>
> (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."

10. Unwanted has been interpreted as synonymous with unwelcome/uninvited. We have to assess the position from the perspective of the employee.

Victimisation

11. Section 27 of he Equality Act 2010 provides as follows:-

> "27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.

12. We do not go into the definition of a protected act as it is accepted by the respondent that the claimant did do a protected act.

13. As per 19.60 of the IDS Employment Law handbook Discrimination at Work:-

> "The essential question in determining the reason for the claimant's treatment is always the same: What, consciously or subconsciously, motivated the employer to subject the claimant to the detriment?"

The evidence

14. We were provided with a hearing bundle of 408 pages.

15. We had witness statements and heard evidence form the following:

- The claimant: A one page statement lifted from a previous multi-page "claimant's list of issues" document with text and supporting evidence.
- Ms Bianca Andrew, Second respondent and Managing Director of the First respondent.
- Ms Cassandra Kalunga, Third respondent and an HR professional.

The claimant's non-attendance and participation by CVP

16. At 10am on 6 November 2023, the claimant was not in attendance for the start of this hearing.

17. This hearing for 6-10 November 2023 was listed by Employment Judge Lewis at a preliminary hearing on 5 September 2022 as an in person hearing. That was confirmed by Employment Judge Coen at the preliminary hearing held on 28 February and 3 March 2023.

18. On 3 April and 1 May 2023, the claimant emailed the tribunal requesting that the final hearing be done by video conference:

> "Due to family and mental health issues".

19. On 15 June 2023, Regional Employment Judge Foxwell refused the request as it was not supported by medical evidence or an explanation of the family issues and that consideration was given to whether the hearing should be in person at the CMPH before Employment Judge Coen.

20. On 4 October 2023, the respondents' solicitor emailed the claimant asking him to confirm that he would be attending the hearing in person.

21. On 5 October 2023, the claimant emailed the tribunal to state:-

> "This email is to inform you that I, the claimant, are medically unfit to attend the 9th October [sic] hearing scheduled for the above case…"

22. Attached was a fit note. The claimant was assessed on 2 October 2023 as not fit for work due to "work related stress" for the period 2/10/23 – 15/01/24.

23. On 10 October 2023, the respondents' solicitor emailed to seek clarification as to whether the hearing was to go ahead and opposing any postponement.

24. Also on 10 October 2023, the claimant responded by stating:-

> "Postponement of the hearing isn't necessary, as I am able to attend a video hearing but not one in person".

25. On 11 October 2023, the respondents responded by observing that the claimant was fit to attend the hearing but only via video and objecting on five grounds.

26. Unfortunately, the files were lodged in duty work and not reached.

27. On 3 November 2023, the claimant emailed again that he was medically unfit to attend in person and only able to do so remotely.

28. Also on 3 November 2023, the respondents repeated their opposition to the application.

29. The matter was clearly referred to Regional Employment Judge Foxwell who directed that the matter be dealt with at the start of this hearing.

30. The claimant emailed the tribunal at 11.32 on Sunday 5 November stating:

> "I have once again sent evidence of my medical unfitness to attend in person, along with a summary of my case, as the respondents haven't sent me a viable bundle."

31. At the outset of this hearing the respondents submitted that the claim should be struck out under Rule 47 for non-attendance. In summary, it was submitted that:

- The application had been refused in June due to a lack of medical evidence and the claimant had done nothing until prompted by the respondent's solicitors in October 2023.

- The medical evidence was insufficient to explain an inability to attend in person and did not comply with the Presidential Guidance. The claimant had had ample opportunity to comply.

- An in-person hearing would be preferable as the claimant was "In person" and the documents voluminous.

- There was potential for prejudice to the respondent.

- There was evidence of the claimant manipulating the tribunal to get his way and that he had, in other cases, demonstrated an unwillingness to attend in person and had disconnected from other remote hearings wilfully and without good reason.

32. We adjourned at 10.30 to see if the clerk could make contact with the claimant to ascertain his intentions. The claimant replied to an email to him at 11.01 repeating that he was medically unfit to attend and that he was ready and able to participate.

33. We directed that a video link be created and the claimant was able to join at 12.10. We asked for an explanation as to why he had not attended and he told us that the strain on his mental health due to the discrimination caused him panic attacks.

34. Mr Lawrence repeated his opposition and applied to strike out the claim.

35. We decided to go ahead with the hearing and allow the claimant to participate by CVP.

    - We accept that the claimant has failed to provide adequate medical evidence.

    - We accept that an in person hearing would be better than a CVP link but that, nevertheless, CVP links have become common and are extensively used.

    - We accept that the claimant may be manipulating the tribunal.

36. However:

    - We are prepared to give the claimant the benefit of the doubt.

    - The parties are ready to hear the claim, there is time to do so, and we are here to do so.

    - The claimant has a right to a fair hearing and this can be achieved via CVP.

- The prejudice to the respondents will not be great.

- It is proportionate to proceed and hear the case on the merits. It would be disproportionate to strike out when the claimant is engaging.

The facts

37. The First respondent is a company that provides accommodation for care leavers aged 16 plus. By May 2021 the First respondent had 4 residences in London with the capacity to support 15 young people. The First respondent had 1 permanent employee and 10 casuals.

38. In about September/October 2021 the First respondent was in the process of acquiring a further property, namely 69 Greatfields Drive, Uxbridge. To that end, the Second respondent recruited the claimant to be a manger at 69 Greatfields. The claimant said he was recruited for the existing premises in Slough but we prefer the evidence of the Second respondent on this issue. The claimant was interviewed and appointed by the Second respondent.

39. The Slough premises were managed by Ms Samantha Wozniak.

40. The claimant was made a conditional offer of employment on 19 October 2021. At that time his start date was uncertain as the First respondent did not know when vacant possession of 69 Greatfields would be obtained. It was hoped to be about 15 November 2021.

41. After the claimant had been offered the role Ms Samantha Wozniak resigned. The Second respondent asked the claimant if he would be interested in managing the Slough premises pending 69 Greatfields opening and operating and he said he would.

42. However, Ms Samantha Wozniak retracted her resignation and decided to stay. Consequently, the offer of the temporary management role to the claimant was withdrawn.

43. On 29 October 2021, the Second respondent was emailed by the owner of 69 Greatfields (presumed to be a council) that there would be a two week delay in the properly becoming available.

44. On 29 October 2021, the Second respondent emailed the claimant to say:-

> "Thank you for your patience. I have had confirmation that the outgoing tenants are not able to vacate the accommodation by the original date agreed. They have asked for a two week extension which therefore impacts on our plans. Unfortunately I cannot offer you a guaranteed start date at this time. I will touch base with you in a week or so."

45. On 15 November 2021, the claimant was emailed a conditional contract of employment (subject to background checks) and given a start date of 29 November 2021.

46. Consequently, we find that the claimant's start date was pushed back to November 2021 albeit that there was never a firm start date and that it was always uncertain at this time.

47. We do not find that Ms Samantha Wozniak is a proper comparator as she was an existing in-post manager. We find that a hypothetical female applicant in the claimant's position would have been treated in exactly the same manner. His start date was deferred due to uncertainty around when vacant possession would be obtained of 69 Greatfields and the fact that the temporary manager role in Slough was no longer available.

48. We find that Samantha Wozniak was allowed to retract her resignation because it was expedient to retain an existing manager in Slough and the First respondent needed two managers. We do not find that the decision was anything to do with the claimant's sex.

49. We find on a general basis that it is inherently unlikely that the Second respondent would discriminate against the claimant before he had even begun work in circumstances where the Second respondent had interviewed him and appointed him only weeks before and needed a manager for 69 Greatfields.

50. The claimant began work on 29 November 2021. On 29 and 30 November he visited another Uxbridge property and the Bexley property, met staff and service users and underwent training.

51. On 1 December 2021, the Second respondent was preparing 69 Greatfields for a service user due to arrive with his/her social worker to view the accommodation at about 3pm. The Second respondent received the keys to the property at about 12 noon and so there was some urgency to get the property into good order.

52. The claimant, as instructed, attended at 12.30pm. The Second respondent and Ms Hibo Ali were already there unloading the Second respondent's car.

53. There is a considerable conflict of evidence between the claimant and the Second respondent as to what happened on that day. The claimant says that he arrived, joined in and helped move items into the property. He states that he stopped for literally five seconds to look at the office computer and that this caused the Second respondent to yell at him saying "You shouldn't leave her and Hibo to take items out of the car by themselves."

54. The Second respondent's evidence was that the claimant let her down almost immediately, did not voluntarily join in moving items and that she had to ask him to help. She said the first item he moved was the computer and that, having taken it in, he stopped and was just looking at it. She said she had to ask him to come on. She denied yelling at the claimant.

55. Later the claimant complains that the Second respondent gave responses such as "that's not important now" or "what you are asking doesn't make sense" or ignored his questions. The Second respondent says that the

claimant was asking a load of questions about, for example, reimbursement of expenses and broadband provision, when she and Hibo were still unloading the car. She accepts that she may well not have answered his questions given the situation and that she was concentrating on getting the property ready. She said she wanted to discuss the issues at a more appropriate time.

56. The Second respondent and the claimant returned to the property on 2 Decemebr 2021 to continue preparing it. The claimant gives evidence that he took a lampshade and bulb from a corridor to a bedroom, probably after the Second respondent had left.

57. It is quite clear to us that, following the interaction between the claimant and the Second respondent on 1 and 2 December 2021, the Second respondent decided that she already knew she wanted to dismiss him. At 06.51am on 3 December 2021, the Second respondent sent a WhatsApp text message to the Third respondent saying:

> "I have brought in manager No 2 and I already know I need to manage him out so your support with this process will be needed. 1week in and I can see that he doesn't have what I need in a manager. Sloppy is putting it politely."

58. We prefer the evidence of the Second respondent on the events of 1 and 2 December 2021. We find that it is unlikely that the Second respondent would yell at the claimant if he had only lingered for five seconds by the computer and was willingly helping unload the car. We find that the claimant was probably reticent in helping and had to be asked to. We find that the claimant was asking questions at an inappropriate time. We find that the conduct of the claimant may have resulted in sharp comments from the Second respondent but such a response was, in our judgment, justified by the claimant's demeanour and attitude at the time which we find was not helpful or collaborative. We do not find that the Second respondent yelled at any time.

59. Consequently, we find that the Second respondent did not yell at the claimant but may well have said words to the effect that he should not leave her and Hibo to take items from the car themselves. We find that the Second respondent may have said words to the effect that the claimant's questions were not important at that time etc. We find that the suggestion that the claimant was not helping unload the vehicle was not false but justified. We find that Hibo Ali is not an appropriate comparator as she was readily helping unload the car. We find that a hypothetical female comparator would have been treated in exactly the same way. The treatment was nothing to do with the claimant's sex but all to do with his attitude and non-action at the time.

60. On 6 December 2021 there was a further incident between the claimant and the Second respondent. The claimant states he was attacked by the Second respondent when he told her that he had got a room ready by taking a bulb and shade from a corridor. He goes on to state:-

> "I also highlighted the fact that she was all over the place which created an environment which was incoherent and resistant to a solution focussed approach."

61. He claims that the Second respondent admitted she was disorganised. The Second respondent denies this saying she prides herself on being organised. She says that the claimant was rude, arrogant, shouty in his tone and accused her of being disorganised.

62. We prefer the evidence of the Second respondent on this issue. We find that the claimant was presenting as an individual who did not react well to management instruction or feedback. In addition, we have taken account of the notes the Second respondent made on WhatsApp as follows on 7 December 2021:

> "Notes so I don't forget when we speak.
>
> Rude and arrogant in his tone.
>
> - Comes across as demanding.
>
> Sloppy/lazy
>
> - Not wanting to do what I have asked/expecting others to do it.
>
> Lack of attention to detail.
>
> - Ordered wrong bedding items.
>
> - Didn't read referral.
>
> - Said he didn't have keys when he did.
>
> Demanding A/L that is not convenient to the business.
>
> - I have agreed 1/4 dates and he's telling me he has a personal matter to deal with.
>
> He told me to be more organised."

63. In addition, on 7 December 2021, the Second respondent left a voicemail message for the Third respondent as follows:-

> "I've hired Manager no. 2, I need to sack Manager no. 2, I don't like him, I don't like his energy, he is lazy, he is arrogant, I've got to get rid of him. He's been in for – this is his second week – and obviously I don't want to do it in a way that's going to cause me a problem so I need you on board, I need to get rid of him as quickly as possible but as legal as possible, so if you're able to speak this evening I would be available…"

64. It is clear to us that the interaction between the claimant and the Second respondent on 6 December 2021 was, in effect, the final straw in the Second respondent's decision to dismiss him as it is specifically referenced in the probationary review meeting invitation letter dated 9 December 2021.

65. We find that the Second respondent did question the claimant about using a bulb and shade from the corridor on 6 December 2021 but that this was not an attack and was a reasonable management response. We find it was nothing to do with the claimant's sex. Further, we find that any hypothetical female comparator would have been treated exactly the same in the circumstances.

66. On 7 December the claimant sent the Second respondent an email which states:-

> "Please book the following dates as annual leave:
>
> 4 January 2021
> 5 January 2021
> 18 January 2021
> 19 January 2021
>
> Best regards".

The years should in fact be 2022.

67. We find the tone of this email illustrates the claimant's demeanour. It reads to us as a demand rather than a request.

68. The Second respondent granted the leave request for 4 January but refused for 5, 18 and 19 January 2022. We find that this was nothing to do with the claimant's sex. We find that it was due to operational requirements. We find a hypothetical female comparator would have been treated exactly the same in the circumstances. We have had no evidence as to how Ms Samantha Wozniak was dealt with concerning her request for annual leave and so she is not an appropriate comparator.

69. On 8 December 2021, the Second respondent did question the claimant about what he would do during a room inspection if he found drugs in a young person's room and did challenge the claimant's decision to take two young people to Tesco and to tell them to pick food for a few days, spending £80 in the course of doing so. The claimant accepted that the Second respondent was justified in raising these issues with him as the Managing Director. He complains as to the way she did so.

70. In actual fact, the claimant's complaint is not so much as to the issues being raised with him but that he considers that his answers to the drugs issue was exemplary and that he was justified in his trip to Tesco. What the claimant did not like was the Second respondent challenging him and his judgment. We find that, in effect, he did not respect the Second respondent's right as a manager to manage him. We find that this had nothing to do with his sex. We find that a hypothetical female comparator would have been treated exactly the same in the circumstances.

71. On 8 December 2021, the Second respondent accepts that she raised the Tesco trip issue again with the claimant and told him that he would have a probationary review as she did not feel that he was performing to the

standard she needed from a Service manager. In actual fact, the Second respondent candidly told us that she had decided to dismiss him. As before, we find that the Second respondent was within her rights to raise the Tesco Issue. We find she did not say "I answer to no one" or "I am inconsiderate". The Second respondent struck us as a responsible individual managing a caring service in a potentially challenging environment. We find it unlikely she would have made such comments. The reference to a probation meeting was to dismiss the claimant. We find it was nothing to do with the claimant's sex. We find that a hypothetical female comparator would have been treated in exactly the same way in the circumstances.

72. On 13 December 2021, the claimant raised a grievance. It is accepted by the respondents that this was a protected act as it does reference, once, gender discrimination.

73. The claimant accepted that he knew he was going to be dismissed as his keys had been taken form him on 10 December 2021.

74. We find that the claimant was subjected to detriments, namely dismissal and his appeal against dismissal being ignored. Whilst these procedural defects could render the dismissal unfair, we are not dealing with such a claim as the claimant does not have the requite two years qualifying service.

75. We find no causal connection at all between the protected act and the detriments as the decision to dismiss the claimant had been made long before the protected act. The appeal was ignored as the First and Second respondents did not need to deal with it, wanted the claimant to remain dismissed and was not due to the grievance lodged.

Conclusions

76. The direct discrimination claims are dismissed.

77. By a parity of reasoning, the harassment claims are dismissed as, in so far as we have found the events occurred, we find that they were not related to the claimant's sex.

78. The victimisation claim is dismissed.

Costs

79. At the conclusion of this hearing, Mr Lawrence, on behalf of all three respondents, made an application for costs. The grounds of his application are based on Rules 76(1)(a) and (b).

80. Pursuant to Rule 76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, we may make a costs order in the following circumstances:-

> "When a costs order … may or shall be made

> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success."

81. In his submission, Mr Lawrence has suggested that the claimant's case was hopeless and that he failed to even discharge the primary burden of proof in establishing a prima facie case. Further, he submitted that no real or hypothetical comparator could or was engaged.

82. In this case the claimant has alleged discriminatory conduct/harassment and victimisation as against the First respondent and the two named respondents. Fundamentally, any such case stands to be considered on the evidence and that is what we have heard and determined. In our judgment, we cannot decide that the bringing of the claim was unreasonable or that the claimant had no reasonable prospect of success.

83. In our judgment, the claimant has not conducted the proceedings unreasonably. As regards the issue concerning CVP and the interruptions of my judgment, whilst they are to be regretted, in our judgment, they have no knock on consequences in causing the respondents extra expense and cost.

84. Consequently, we do not conclude that the claimant has acted unreasonably in the bringing of these proceedings, or in the way that they have been conducted and we do not conclude that he had no reasonable prospect of success. Consequently, we decline to make a costs order.

_____

Employment Judge Alliott

Date: 9/1/2024

Sent to the parties on: 10/1/2024

N Gotecha
For the Tribunal Office