



EMPLOYMENT TRIBUNALS

Claimant

Abdelganio Kehinde Ayinde

v

Respondent

STM Group (UK) Limited

Heard at: Central London Employment Tribunal (by CVP)

On: 13-15 March 2024

Before: Employment Judge Talbot-Ponsonby
Mr Patrick Alleyne
Mr Robert Baber

Appearances

For the Claimant: Mr Eric Brown

For the Respondent: Mr Spencer Keen (Counsel)

JUDGMENT having been sent to the parties on 4 April 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These are two claims by the claimant Mr Ayinde, a security guard, against the respondent, STM Group (UK) Limited, a company that (among other things) provides private security services. The first claim is of racial discrimination; the second is of constructive dismissal.

Claims and issues

2. The first claim was summarised by Employment Judge Emery in a case management order following the preliminary hearing on 13 February 2023 as follows:
3. The claimant remains employed by the respondent. He is currently not working and is not being paid.

4. The claimant alleges that he was unreasonably removed from Paddington Station where he was working in Security by a Network Rail manager. This happened towards the end of his shift. He denies the allegation made against him by Network Rail, that he had failed to properly undertake security checks. He contends that the decision of Network Rail manager to remove him and the manner of his removal constitute direct race discrimination for which the respondent is liable.
5. He contends that the failure to provide him with work thereafter constitutes direct race discrimination.
6. The respondent contends that it has offered the claimant work since the events at Paddington Station, that it wants the claimant to return to work. It denies discriminating against the claimant.
7. We discussed the concept of direct discrimination and the requirement for an actual or hypothetical comparator. We also discussed the issue of whether the respondent can be liable for the acts of a 3rd party, and the respondent can amend its defence to address this issue.
8. The claimant describes himself as Black African of Nigerian descent, he is a naturalised Italian citizen.
9. In the second claim, the claimant stated in the ET1 that “The new claim is for constructive dismissal. The letter that was submitted to ACAS has the details.”
10. There was no document accompanying the ET1.
11. The claimant did send a letter to the respondent, undated, but postmarked 23 March 2023, and headed “Constructive dismissal”. At the hearing, Mr Brown, representing the claimant, said that this was the same as the letter that was sent to ACAS. The respondent’s grounds of resistance referred to this letter and the tribunal has treated it as constituting the second claim.
12. This letter raises the following issues:
13. First, that, when the claimant was removed from his post at Paddington Station (as described in the first claim), he did not accept that he had failed to observe an unattended bag and asked for CCTV to demonstrate this, together with a letter setting out the allegation against him. The respondent failed to obtain the CCTV evidence promptly and, after a long time, told the claimant that it was not available.
14. Meanwhile, the respondent failed to offer any work to the claimant or to pay him any money. The only money he received was when he was off sick and when he took accrued holiday.
15. The final straw was that, when he attended the employment tribunal for the preliminary hearing in the first claim on 13 February 2023, the claimant neither explained nor apologised for what the claimant perceived to be fundamental breaches to his contract and continued not to offer him work. He therefore

secured alternative employment starting on 3 March 2023 and claimed constructive dismissal.

16. The respondent denies all the allegations. It states that it made appropriate investigations into the allegations made by Network Rail, and the CCTV was not necessary because the single point of confusion was whether the unattended bag was in the area that the claimant was responsible for, and Network Rail had been able to confirm this. The letter of allegation was to be provided to the claimant as part of the disciplinary process.
17. The respondent claims that it was not able to offer work to the claimant at Paddington Station, as Network Rail refused to allow him to work there, but that it did offer work to the claimant at Charing Cross Station, but that he did not want to do this.
18. Finally, the respondent denies that its behaviour at the employment tribunal could have amounted to the “last straw”.
19. The issues that need to be determined in the first claim were identified in the preliminary hearing before Employment Judge Emery and are as follows:

1. Time limits

1.1 *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 23 June 2022 may not have been brought in time.*

1.2 *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

1.2.2 *If not, was there conduct extending over a period?*

1.2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

1.2.4.1 *Why were the complaints not made to the Tribunal in time?*

1.2.4.2 *In any event, is it just and equitable in all the circumstances to extend time?*

2. Direct race discrimination (Equality Act 2010 section 13)

2.1 *Did the respondent do the following things:*

2.1.1 *Remove the claimant from Paddington station during a shift and not allow him to work there again?*

2.1.2 *Not give the claimant shifts?*

2.2 *Was that less favourable treatment?*

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated (the "hypothetical comparator").

The claimant has not named anyone in particular who he says was treated better than he was.

2.3 *If so, was it because of race?*

3. Remedy for discrimination

3.1 *Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*

3.2 *What financial losses has the discrimination caused the claimant?*

3.3 *Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

3.4 *If not, for what period of loss should the claimant be compensated?*

3.5 *What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?*

3.6 *Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?*

3.7 *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*

3.8 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

- 3.9 *Did the respondent or the claimant unreasonably fail to comply with it?*
 - 3.10 *If so is it just and equitable to increase or decrease any award payable to the claimant?*
 - 3.11 *By what proportion, up to 25%?*
 - 3.12 *Should interest be awarded? How much?*
20. There was no preliminary hearing in the second claim, so the issues in this claim were agreed at the start of the hearing. They are:

4. Unfair dismissal

4.1 *Was the claimant dismissed?*

4.1.1 *Did the respondent do the following things:*

Fail promptly to investigate the alleged evidence that C had left an unattended bag on the platform

Fail to provide any letter from Network Rail stating what the C was alleged to have done

Fail to offer work to C?

Fail to pay the C during this period?

Fail to apologise or explain when attending the employment tribunal hearing or offer any further work

4.1.2 *Did that breach the implied term of trust and confidence? The Tribunal will need to decide:*

4.1.2.1 *whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and*

4.1.2.2 *whether it had reasonable and proper cause for doing so.*

4.1.5 *Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.*

4.1.6 *Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.*

5. Remedy for unfair dismissal

- 5.1 *Does the claimant wish to be reinstated to their previous employment?*
- 5.2 *Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*
- 5.3 *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*
- 5.4 *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*
- 5.5 *What should the terms of the re-engagement order be?*
- 5.6 *If there is a compensatory award, how much should it be? The Tribunal will decide:*
 - 5.6.1 *What financial losses has the dismissal caused the claimant?*
 - 5.6.2 *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
 - 5.6.3 *If not, for what period of loss should the claimant be compensated?*
 - 5.6.4 *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
 - 5.6.5 *If so, should the claimant's compensation be reduced? By how much?*
 - 5.6.6 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
 - 5.6.7 *Did the respondent or the claimant unreasonably fail to comply with it?*
 - 5.6.8 *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*
 - 5.6.9 *If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?*

5.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

5.6.11 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

5.7 What basic award is payable to the claimant, if any?

5.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

21. Although the second ET1 alleged a failure to make a redundancy payment, Mr Brown conceded that this did not form part of the claimant's claim and was not being pursued.

Procedure, documents and evidence

22. The claim was heard in Central London Employment Tribunal on 13-15 March 2024 by CVP. The claimant was present in the Tribunal building and everyone else, including the panel, attended by CVP. The claim was heard by Employment Judge Talbot-Ponsonby with Mr Baber and Mr Alleyne as lay members.
23. The claimant represented by Mr Brown and the respondent by Mr Keen. We were grateful to them both for their assistance.
24. The tribunal had a bundle of 241 pages, including claims, grounds of resistance, employment contracts, correspondence and minutes of meetings.
25. Witness statements were provided from the claimant and, on behalf of the respondent, from Saeed Ahmed, Kuldeep Chumber, and Joshua Rout. The tribunal heard oral evidence from the claimant, Mr Ahmed, and Mr Chumber.
26. The tribunal was satisfied that everyone was doing their best to assist the tribunal.
27. The tribunal also noted that memories fade and can be unreliable, so contemporaneous documentary evidence is usually preferable as being more accurate.
28. The tribunal notes also that the claimant was unwilling to accept anything he did not agree with, even when there was clear evidence to the contrary. Examples of this were when the claimant asserted that he never refused any shifts (despite repeated offers from the respondent), that he always responded to all communication (despite repeated requests from the respondent to contact them to arrange work) and that he always went into the office on request (despite several requests by Mr Ahmed During December 2022 to February 2023). Accordingly, the tribunal is cautious about the claimant's evidence in the absence of corroboration.

Fact finding

29. The claimant was employed by the respondent from 10 September 2019 until he resigned. His resignation email is dated 13 March 2023 and the respondent accepted this as having effect from 27 March 2023. The claimant states that his employment ended on 3 March 2023. This discrepancy is addressed in these reasons when we get to it chronologically.
30. In one email and in cross examination, the claimant has mentioned concerns about a lack of uniform, but these have not been pleaded and are not in his witness statement; they were not explored in the cross examination of Mr Ahmed either. There was no real evidence before the tribunal on which any findings could be made about what may or may not have happened.
31. The complaint brought was that the claimant did not get work after he was dismissed from Paddington, not before.
32. We turn to the events of 30 June and 1 July 2022.
33. The claimant was rota'd to work at in area Alpha 4 (A4) and was then asked to work in area Alpha 5 (A5), which, for the avoidance of doubt, includes platform 12: an email dated 19 July 2022, at page 94 of the bundle, records that this was confirmed to the respondent by Network Rail.
34. There was evidence from Mr Ahmed that the claimant did not always like changes; in particular, he was not always happy to change at the last minute; an example of this is shown in the email at page 82 of the bundle where he mentions clarifying which area he was responsible for. This email confirms that, on 30 June, the claimant was responsible for area A5.
35. Likewise, in the minutes of the meeting on 4 July (page 83 of the bundle), the claimant confirmed that on 30 June he was responsible for A5.
36. The claimant in his witness and in cross examination said he was on taxi marshalling duties, but this is not consistent with the contemporaneous documents nor with the times of the shifts he worked as explained by Mr Ahmed.
37. The tribunal does not know why he now says he was taxi marshall, and whether he has forgotten in which area he was working on 30 June, but we do not accept it.
38. Network Rail say a bag was planted by test staff and the claimant missed it. The tribunal has no reason to doubt this.
39. We understand that this is an automatic reason for Network Rail to request that member of staff not to work on that station, and this is what they did.
40. On 1 July 2022, the claimant was asked to leave at 12.15. He says in his witness statement that the manager was aggressive and humiliating towards him but, in emails at the time, he simply says he was approached on the concourse and asked to leave immediately. In contemporaneous emails, he does not allege any discrimination.

41. Also on 1 July, Network Rail emailed the respondent and informed them of this incident, relating both to the claimant and another employee, and asked that they no longer work at Paddington.
42. The claimant was invited to meeting on 4 July to investigate. The minutes of this meeting are at page 83 of the bundle. The meeting note records 1 July, but the claimant and Mr Ahmed agreed it took place on 4 July. The claimant says these are inaccurate but acknowledges that there was a note taker at the meeting. There is no reason for the respondent to manipulate the minutes and we find they are accurate.
43. Mr Ahmed states that, in the meeting, he read the salient parts of the email from Network Rail. The claimant denies this but does accept that he was told of the complaint against him.
44. It is clear that, in the meeting, the claimant did challenge whether there was a bag that he had missed; the claimant appears to accept that he was working at A5. Mr Ahmed said that he would clarify with Network Rail where the bag was.
45. In the meeting, Mr Ahmed explained to the claimant that Network Rail did not want him at Paddington; the claimant confirmed that he did not wish to work at Liverpool Street; Mr Ahmed stated that this left only one station left that the claimant can work at, and this is Charing Cross. The claimant said he wanted to remain at Paddington.
46. The claimant says he was not offered the work at Charing Cross at this stage, but the tribunal accepts the minutes of the meeting as being accurate.
47. Mr Ahmed confirmed in his evidence that, when an allegation such as was made against the claimant (missing a bag, which was known as failing a “tag test”), the respondent’s policy is that a disciplinary investigation must follow, and a hearing to identify the reason must be held if, prima facie, the claimant did fail the tag test. The respondent needs to know the reason for the failure and whether further training will be required.
48. The claimant then sent several emails to the respondent on 5, 11, 18, and 22 July 2022 ,in which he claimed that Mr Ahmed had promised to obtain the CCTV from Network Rail and to send him the letter of accusation. Neither Mr Ahmed not anyone else at the respondent specifically replied to these emails but, on 18 July, Mr Ahmed asked the claimant to come in for a meeting on 21 July. In his evidence, Mr Ahmed explained that this was to follow up his initial investigation meeting, and he was ready to explain to the claimant that he had received confirmation that the bag was on platform 12 and was within the claimant’s areas of responsibility on 30 June. The claimant replied on 20 July to say, “I can’t I’m on sick bed”.
49. The claimant is recorded on the respondent’s absence records as being on sick leave from 14 July until 21 August 2022, but there are no records of the claimant informing the respondent that he was recovered until 14 September, when the claimant sent an email to the respondent in which he stated that,

on 2 September 2022, he sent a text message to Mr Ahmed saying that his sick leave was over and he was available for work. In his evidence, Mr Ahmed stated that he had not received the text message. We accept that Mr Ahmed did not receive this; all other communications from the claimant have been by email so it would be out of character for this sole message to have been sent by text. Neither the original text nor a screenshot of it was provided in evidence. In his grievance hearing, discussed below, the claimant said that he was sick until 29 August 2022.

50. On 1 September 2022, the claimant raised a grievance in which he alleged:
- (i) He had not received a copy of the formal allegation letter from Network Rail stating the offence and how and when the alleged incident occurred, nor the CCTV which he had asked for
 - (ii) He had not received any response from Mr Ahmed
 - (iii) He had not been offered any work
 - (iv) He assumes that this is because he has taken the respondent to the Employment Tribunal in respect of a dispute over holiday.
51. By letter dated 8 September 2022, the claimant was invited to a grievance meeting on 13 September, and told that he could bring a colleague, a Trade Union official, or a representative. The letter stated that Shafqat Mehmood was to chair the meeting but, in fact, it was Mr Kuldeep Chumber who did so. Nothing turns on this.
52. During this period, the claimant continued to correspond with the respondent about his entitlement to annual leave, in respect of which he appears to have had a separate ongoing claim in the Employment Tribunal. Although some of the correspondence was in the bundle, this is not addressed in the parties' witness statements and no evidence was given to the tribunal about the substance of this.
53. The meeting was held on 13 September 2022. Minutes was taken and the claimant did not identify anything in the minutes that he said was not accurate. The claimant was given an opportunity to raise all his concerns at the grievance hearing and did not mention the other Employment Tribunal proceedings; his only mention of holiday was that he was trying to arrange some for October.
54. The response letter was dated 29 September 2022 and did not uphold grievance. It includes the following:

"The reason for my decision is as follows;

- *All relevant information will be provided to you upon arrangement of your disciplinary hearing.*

- *You have been unable to schedule or attend a disciplinary hearing due to illness.*
- *The CCTV is unavailable.*

Given the findings above, the company will undertake the following actions to address your concerns;

- *We appreciate your concerns are valid and upon speaking to Saeed Ahmed and Emma Bonici, the client complaint was to be sent to you upon confirmation of your disciplinary hearing. We have therefore arranged for your disciplinary hearing to be heard within 5 working days, whereby you will receive any relevant documentation available.”*

55. The claimant was given the opportunity to appeal this, and did not.
56. The disciplinary hearing was then arranged for 17 October 2022. This appears to be when the claimant was on annual leave, but neither party has raised any concerns about this.
57. The tribunal did have the pack that was provided or minutes of the meeting. The outcome letter dated 2 November 2022 recognises that although the claimant did miss the bag, this was a genuine mistake, and the claimant was usually diligent. Accordingly, no further action was required. The claimant could not longer work at Paddington due to the request of Network Rail, but Charing Cross Station was still an available alternative
58. The claimant responded to say he was pleased by the outcome although, in the absence of having seen the CCTV, he did not accept that he had missed a bag.
59. The claimant then took more holiday in November and, with effect from late November, the respondent was trying to contact the claimant to arrange shifts for him at Charing Cross.
60. The claimant stated that he did not receive any telephone calls and had no records of any missed calls, and nor did he receive the emails from Mr Ahmed asking him to call back or come to the office.
61. Bearing in mind the extensive communication between the claimant and the respondent in respect of holiday allowance and pay at this time, the tribunal does not think that these emails did not get to him and indeed it is apparent from some of his emails that he had received Mr Ahmed's emails.
62. We will not recite in these reasons all the emails or attempts by the respondent to get in touch with the claimant but it is clear that, by November 2022, the claimant was ignoring the respondent's offers of work.
63. The reason for this became apparent in cross examination.

64. The claimant had applied for a job with CIS; on 5 December 2022, he attended their office for a “workshop” which appears to have been in the nature of an interview; thereafter, he was providing paperwork to them so that they could offer him employment; he had induction sessions with them in January and/or February 2023, and started work on site on 3 March 2023. In response to cross examination, he repeatedly said that, from December 2022, he felt engaged by and committed to CIS and the tribunal finds that this is why he did not respond to the respondent or take up any offer of work after this date.
65. There was a tribunal hearing on 13 February 2023; this was a preliminary hearing for case management at which Employment Judge Emery clarified the claim, the issues, and the parties’ positions.
66. In the second claim, the claimant states that the failure of the respondent to apologise or explain at this hearing, and their continued refusal to offer him work, was the “last straw” that caused his resignation. The tribunal finds that not only had the respondent been seeking actively to offer shifts to the claimant, but the record of the hearing indicates that, at the hearing, they again made it clear that they wished the claimant to return to work.
67. Both before and after the hearing, the respondent continued to offer shifts to the claimant: see pages 216-217, 220 and 222 of the bundle. The claimant was responding to those emails so it is clear that he received them.
68. On 13 March 2023, the claimant sent an email to the respondent stating that he resigned with effect from 3 March. The respondent replied, saying the claimant could not resign retrospectively, but they accepted his resignation and his last day of employment would be 27 March 2023.
69. On 23 March 2023, the claimant sent a letter to ACAS and to the respondent alleging constructive dismissal in the terms already set out.

Law

Time limits: discrimination

70. Under the Equality Act 2010, section 123, there is a primary time limit of 3 months from the date of the relevant act, or if there is a continuing act, the end of the period of discrimination.
71. It is important to note that one must look at the act, not the consequences; this was made clear by the decision of the House of Lords in Barclays Bank plc v Kapur and ors 1991 ICR 208, which drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. Thus in Sougrin v Haringey Health Authority 1992 ICR 650, CA, the Court of

Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion that the employer operated a policy whereby black nurses would not be employed on a certain grade; it was simply a question whether a particular grading decision had been taken on racial grounds.

72. The tribunal has jurisdiction to extend time under section 123(1)(b) if it is just and equitable to do so.
73. This is a broad discretion. In Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) of the Equality Act 2010, “there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.” However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable, as per the decision in Pathan v South London Islamic Centre EAT 0312/13.
74. The fact that a claimant has awaited the outcome of his or her employer’s internal grievance procedures before making a claim is just one matter to be taken into account by an employment tribunal in considering whether to extend the time limit for making a claim: Apelogun-Gabriels v London Borough of Lambeth and anor 2002 ICR 713, CA.
75. The principles set out in section 33(3) Limitation Act 1980 can also be useful for a tribunal to consider, by analogy, although they are not binding and should not be used as a prescriptive list. Section 33(3) provides:
 - (3) *In acting under this section the court shall have regard to all the circumstances of the case and in particular to—*
 - (a) *the length of, and the reasons for, the delay on the part of the [claimant];*
 - (b) *the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the [claimant] or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A, by section 11B or (as the case may be) by section 12;*
 - (c) *the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the [claimant] for information or inspection for the purpose of ascertaining facts which were or might be relevant to the [claimant]’s cause of action against the defendant;*

- (d) *the duration of any disability of the [claimant] arising after the date of the accrual of the cause of action;*
- (e) *the extent to which the [claimant] acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;*
- (f) *the steps, if any, taken by the [claimant] to obtain medical, legal or other expert advice and the nature of any such advice he may have received.*

Discrimination

- 76. Section 13(1) Equality Act 2010 provides that (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.
- 77. Under section 9, race is a protected characteristic and includes colour, nationality and ethnic or national origins.
- 78. In order to claim direct discrimination under section 13, the claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant.
- 79. In the pivotal case of Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, (a sex discrimination case), Lord Scott explained that this means that “the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”.
- 80. In Watt (formerly Carter) and ors v Ahsan 2008 ICR 82, HL, (a race discrimination case), Lord Hoffmann opined that it is “probably uncommon” to find an individual who qualifies as a statutory comparator. Furthermore, where such an individual is identified, there is likely to be disagreement over whether his or her circumstances are materially different. However, Lord Hoffmann thought that in most cases “it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator.”
- 81. The definition of direct discrimination in the Equality Act 2010 requires the complainant to show that he or she received less favourable treatment “because of a protected characteristic”. The protected characteristic must be an “effective cause” of the treatment.

Burden of proof

82. Section 136 of the Equality Act 2010 provides that, once a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate.
83. Further guidance was given by Lord Justice Mummery in Madarassy v Nomura International plc 2007 ICR 867, CA, where he stated: “The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

Identity of employer / discriminator

84. The Equality Act 2010 provides that an employer must not discriminate against their employees on basis of a protected characteristic. Section 109 of the Equality Act 2010 provides that anything done by an employee (A) in the course of his employment is treated as being done by the employer and anything done by an agent for a principal with the authority of that principal is treated as being done by that principal.

Constructive dismissal

85. Under section 95(1)(c) of the Employment Rights Act 1996, an employee is dismissed if he terminates contract under circumstances in which he is entitled to do so by reason of his employer’s conduct.
86. This is referred to as constructive dismissal: it is based on a repudiatory breach by employer. There needs to be:
- (i) a repudiatory or fundamental breach of the contract of employment by the employer;
 - (ii) a termination of the contract by the employee because of that breach; and
 - (iii) the employee must not have lost the right to resign by affirming the contract after the breach, typically by delay.
87. The tribunal needs to identify the term breached. It was confirmed in Malik and Mahmud v BCCI [1997] ICR 606 that there is Implied into all employment contracts a term that the employer shall not

“Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

88. The tribunal the needs to consider all the circumstances of the case.

89. In the case of Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493 (a “last straw” case), Dyson LJ (with whom Wall and May LJJ agreed) held that:

“where an alleged breach of the implied obligation of trust and confidence consisted of a series of acts on the part of the employer, the last act, or final straw, which led the employee to resign, when viewed in isolation, might not always be unreasonable, still less blameworthy, but its essential quality was that it was an act in a series whose cumulative effect was to amount to a breach of the implied term; that, while it did not have to be of the same character as the earlier acts, it had to contribute something to that breach, even if what it added might be relatively insignificant; that, if the final straw was not capable of contributing to the series of earlier acts, there was no need to examine the earlier history to see whether it did in fact have such effect”

Conclusions

90. I will turn to detailed consideration of the issues in the discrimination claim shortly. But, prima facie, this claim is bound to fail for 2 reasons. Insofar as it relates the events at Paddington Station, it has been brought against the wrong person. Network Rail was not the claimant’s employer, nor an agent of it, and the respondent is not responsible or liable for Network Rail’s actions. Insofar as it relates to any subsequent actions of the respondent, the claimant was asked in cross examination, “Who is it you say, employed by STM [the respondent], discriminated against you?”, the claimant responded, “I am telling you - Kevin discriminated against me. I did not accuse anyone at STM. Kevin, at Network Rail. I did not accuse anyone at STM.”. This indicates that there is in fact no claim that any of the respondent’s employees discriminated against the claimant, and hence the respondent did not.
91. Notwithstanding this, it is appropriate to consider the detail of the issues in the discrimination claim.
92. The principal act of discrimination alleged is the claimant’s removal from Paddington Station by Network Rail. This took place on 1 July 2022 and so, in accordance with issue 1.1, this claim has been brought in time.
93. Looking then at the issues regarding discrimination:
- 2. Direct race discrimination (Equality Act 2010 section 13)*
- 2.1 Did the respondent do the following things:*
- 2.1.1 Remove the claimant from Paddington station during a shift and not allow him to work there again?*
94. The tribunal finds that this is not made out. Network Rail removed the claimant and forbade him to work at Paddington again; employees of Network Rail are neither employees nor agents of the respondent, and the respondent

is not responsible for their actions. This does not fall into the vicarious liability principles set out in the discussion of the law.

2.1.2 Not give the claimant shifts?

95. The evidence that the tribunal has found is that the respondent did offer the claimant the opportunity to work elsewhere, but the claimant was initially insistent that he wished to work at Paddington. After his sickness, and once the disciplinary proceedings were resolved, the respondent made repeated offers of work to him and he ignored them all.

2.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated (the "hypothetical comparator").

The claimant has not named anyone in particular who he says was treated better than he was.

96. Since the respondent did not do the things complained of, there was no less favourable treatment.
97. In any event, as noted above, the claimant accepted in cross examination that he could not identify any employee of the respondent who had discriminated against him.

2.3 If so, was it because of race?

98. In the circumstances, this does not arise.
99. The tribunal found that, in any event, the claimant had not passed the first test in section 136 of the Equality Act 2010. In relation to the events at Paddington. Station, his claim was, effectively, "I know this is race discrimination because I recognise it when I see it". There was, to use the words of Lord Justice Mummery, nothing more than this: there was no alleged pattern of racist behaviour, nothing else that could point towards discrimination: there was a single incident at Paddington Station that the claimant stated constituted discrimination. This is not enough.

100. I turn to the claim of constructive unfair dismissal.

4.1.1 Did the respondent do the following things:

Fail promptly to investigate the alleged evidence that the claimant had left an unattended bag on the platform

101. The respondent started its investigation the next day. Mr Ahmed went back to Network Rail to seek clarification of whether the bag was in the area for which the claimant was responsible; he sought to arrange follow-up meeting, but by then the claimant was off sick. The process was resumed reasonably promptly once the claimant had recovered. Therefore this allegation is not made out.

Fail to provide any letter from Network Rail stating what the claimant was alleged to have done

102. It is not clear whether the respondent provided the actual email as part of the disciplinary pack, but it is clear that the claimant was informed of exactly what the allegations were and this is sufficient.

Fail to offer work to the claimant?

103. The tribunal has found that the respondent did offer work to the claimant, and also notes that the claimant was in fact employed on a zero hours contract, and therefore there was no obligation on the respondent to offer work to the claimant.

Fail to pay the claimant during this period?

104. It is not disputed that the claimant was not paid except for his sick pay and holiday pay. However, he was employed on a zero hours contract, so had no entitlement to be paid if he was not working.

Fail to apologise or explain when attending the employment tribunal hearing

105. It is agreed that the respondent did not apologise at the preliminary hearing. Its representative did explain the respondent's position, i.e. that it was not liable for Network Rail's acts and had continued to offer work to the claimant.

4.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

4.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

106. The tribunal does not consider that the respondent's actions, taken as a whole, were calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. In accordance with its procedures, the respondent was properly investigating what appeared to a serious security breach, and needed to ascertain whether the claimant required further training. The claimant brought a claim against the respondent in the Employment Tribunal that the respondent was, reasonably, defending, and it did so in a reasonable manner.

4.1.2.2 whether it had reasonable and proper cause for doing so.

107. The tribunal considers that everything the respondent did was reasonable. In particular, its behaviour at the Employment Tribunal preliminary hearing was reasonable and proper.

4.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

108. According to the claimant, the alleged "last straw" was the respondent's behaviour at the Employment Tribunal preliminary hearing on 13 February 2023. It was clear from the evidence given by the claimant in cross examination that he had decided to resign, and felt committed to his new work at CIS, long before then. In any event, he did not tender his resignation for a further month, on 13 March 2023.

4.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

109. To the extent that the claimant seeks to rely on any failure to offer work immediately after the incident in July, the resignation in March 2023 is far too long afterwards, and the claimant took sick pay and arranged to take annual leave in October and November 2022. This was relying on his rights under the contract and therefore affirming its continued existence. Thereafter, the respondent continued to offer work to the claimant in any event.

110. Accordingly, the tribunal finds that the claimant resigned because he had found employment with CIS, rather than because of any actions of the respondent. It follows that the claim in constructive dismissal fails.

111. In the circumstances, it is not necessary to consider the question of remedy for the constructive dismissal claim.

Employment Judge Talbot-Ponsonby

Date: 28 April 2024

Sent to the parties on: 14 May 2024

.....
For the Tribunal Office