



EMPLOYMENT TRIBUNALS

Claimant: Miss N Jones
Respondent: Whitbread Group Limited

Heard at: Teesside Justice Centre, Victoria Square, Middlesbrough, TS1 2AS

On: 1st, 2nd 3rd May 2024

Before: Employment Judge AEPitt
Mr S Carter
Mrs D Winter

Representation

Claimant: In Person
Respondent: Mrs Barchet

JUDGMENT having been sent to the parties on 2nd July 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant makes claims under the Equality Act 2010 for Direct Sex Discrimination pursuant to section 13 of the Act and Harassment related to sex pursuant to Section. The claimant has been employed by the respondent since 3rd March 1997 and is currently the General Manger for it's premises at The Talpore Beefeater in Stockton-on-Tees.
2. The Tribunal read witness statements and heard evidence from the claimant; Ms B Richardson, who was a Deputy General Manager at the Turnpike Brewers and latterly as a Hotel Manager at a Premier Inn a colleague of the claimant; Ms S Sweet, a colleague of the claimant; Mr D Griffiths, Deputy General Manger of the Talpore colleague of the claimant; Mr S Beach-Broadbent a colleague of the claimant who was the restaurant manager. On behalf of the respondent the following witnesses were relied upon; Ms A McCaig-white, Reward Manager; Matt Avery who at the time of these events was the Regional Operations Manager, ROM, for the area which included the Talpore and is the alleged perpetrator of some of the discriminatory acts.

3. The Tribunal also had before it an agreed bundle of documents which included the pleadings, parts of the respondents' policies, notes of meetings and emails

The Issues

Jurisdiction

- 4.1 Were the Claimant's claims for discrimination presented within the primary time limit of 3 months from the act or last act of discrimination plus any period of early conciliation? The claim form was presented to the Tribunal on 12 January 2023; therefore, any unlawful acts, taking into account the ACAS early conciliation extension, should have occurred on or after 24 August 2022.
- 4.2 Can the Claimant demonstrate that earlier allegations form part of 'an act extending over a period' including some later unlawful act?
- 4.3 Was there a clear break in the chain of events separating any of the unlawful acts ?
- 4.4 If not, is it just and equitable to extend time for the presentation of any earlier claims?

Direct sex discrimination (Equality Act 2010 section 13)

- 5.1 Did the Respondent do the following things:
- 5.2 In early May 2022, Matt Avery (the Claimant's line manager) failed to award the Claimant a bonus. The Claimant's case is that Mr Avery could have awarded her a bonus (notwithstanding that she was facing disciplinary allegations) but he decided not to do so because she is female.
- 5.3 Was that less favourable treatment?
- 5.4 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 she was treated worse than someone else would have been treated.
- 5.5 The Claimant has not named anyone in particular who she says was treated better than she was.
- 5.6 If so, was it because of sex?
- 5.7 Did the Respondent's treatment amount to a detriment?

Sexual harassment (Equality Act 2010 section 26)

6. Did the Respondent do what the Claimant alleges below:

In early March 2022, Mr Avery delivered the news that the Claimant was not getting a bonus to her in front of colleagues in a humiliating manner. The Claimant's case is that Mr Avery did this deliberately to humiliate her because she is female.

6.1 If so, was that unwanted conduct?

6.2 Did it relate to sex?

6.3 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?

6.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect

Remedy

7. What remedy does the Claimant seek? Understood to be the bonus payment of 2022.

7.1 What financial compensation would be appropriate?

Facts

8. The Tribunal were impressed by all the witnesses, they were all straight forward answering questions honestly, to the best of their ability bearing in mind some were recalling events from some time ago.

9. The respondent is a national company operating in the hospitality sector including Public Houses, restaurants and hotels

10. The claimant is clearly a hard working member of the Whitbread team. She manages a successful site in the region. Her focus is on her customers and staff. Prior to the arrival of Mr Avery as her ROM, the claimant was free to manage her site with little interference from any regional manager. Mr Avery was also a diligent member of the team. The difference between the two was their styles of working, Mr Avery was very much a detail man ensuring i's were dotted and t's crossed, an example of this is repeatedly referring rotas back to the claimant. This meant Mr Avery was more interventionist than the claimant had previously experienced, and she considered he was micromanaging her and she resented this. She formed the view that this interference was not required because of her experience, and she considered it unhelpful from her perspective.

11. The Tribunal concluded that it was this difference that led to increasing tensions in the relationship which ultimately led to a breakdown in their relationship. There was evidence that Mr Avery had been supportive of the

claimant, for example in obtaining an increase in her salary above threshold of 7.89% in May 2021.

12. The respondent has a discretionary incentive scheme for its salaried staff. That is to say, whether a bonus will be offered at all in any one year is a matter for the respondent and within its complete discretion. If a bonus scheme is offered there is no discretion as to who is eligible for an award subject to fulfilling the relevant criteria and not being excluded. In Public Houses, the persons eligible are; the General Manager, the Restaurant Manager and the Kitchen Manager. This Incentive Scheme offers a bonus to eligible staff subject to certain criteria. A bonus will not be awarded to eligible staff in three circumstances; first, if an employee is undergoing investigation or disciplinary action up to and including the month that the incentive is paid. In such circumstances the bonus is withheld until the investigation is concluded unless disciplinary action incurred. Secondly, if an eligible staff member has an unspent written or final warning effective up to and including the month that the incentive is paid, the staff member ceases to be eligible for a bonus. Finally, there is an exclusion relating to performance which is not relevant here.
13. The respondent also has a Salaried Pay Review policy. This applies to all salaried staff. Again, this is a discretionary award, i.e. the fact of whether all eligible staff will receive an increase is at the discretion of the respondent. It has similar provisions as the Bonus policy in relation to disciplinary investigations and sanctions.
14. In August 2021, following an incident inside the Public house the claimant posted unauthorised images on Facebook. Mr Avery met with the claimant to discuss the matter and concluded it did not merit disciplinary action. Mr Avery sent the claimant a 'Letter of concern' to ensure that neither the claimant nor her staff repeated the behaviour. The letter included, amongst other matters, a requirement that the claimant familiarised herself with company policies and procedures, 'so you are clear on Company expectations going forward'.
15. Against the background of Covid and issues arising in her personal life, the claimant concedes she dealt with a staff member inappropriately. The staff member lodged a grievance on 7th February 2022 and an investigation was commenced. The investigation was prolonged, the claimant was interviewed by Mr Brennan on 18th March 2022 as part of the investigation. Following the meeting the claimant resigned citing the relentless pressure of the job and being investigated about the complaint was the last straw.
16. Mr Avery immediately responded to the claimant's resignation by trying to call the claimant to discuss the letter and responded in writing the next day. Mr Avery did not accept the resignation, whilst it may be considered good industrial practice to confirm an employee's intentions, the Tribunal having considered Mr Avery's letter in response concluded that this is a personalised letter to reflect the claimant's particular situation. He shows understanding towards her situation and extends an invitation to meet to discuss her reasons and offer alternative solutions.

17. The claimant and Mr Avery did meet up and it was agreed that the claimant would return to work following a period of sickness absence. She returned on 5th April 2022 and was subsequently on annual leave between 18th April and 5th May.
18. During this period the bonuses were being processed and finalised. The Rewards team calculate the bonus for each eligible employee. The Rewards team liaises with HR to collate information in relation to any employee who is excluded under the terms and conditions of the scheme. The Rewards Team was notified that the claimant was pending a disciplinary investigation by Tracey Phillips.
19. Mr Avery was aware that the claimant's bonus would be withheld pending the outcome of the disciplinary procedure. He did not discuss it with her before he was officially notified for two reasons; first, he believed she would be aware of her exclusion under the scheme as an experienced manager; secondly, he assumed that the claimant familiarised herself with company policy as directed by the letter of concern in August 2021; finally he did not discuss because the claimant was on holiday whilst this process was on going.
20. As of May 2022, the claimant was still under disciplinary investigation. Mr Avery understood this to mean that she was not eligible to receive a bonus. He made enquiries of and was informed his understanding was correct.
21. On 6th May 2022 there was a prearranged Regional meeting. This coincided with the claimant's return to work. Two regions joined together for this event held in York. It was to discuss operational matters going forward. As the respondent had bounced back from the Covid Pandemic and achieved excellent results. Mr Avery and Miss Robinson, the second ROM decided to reward their teams with a social event to celebrate the success. This was to follow on immediately after the business meeting.
22. The ROMs were expected to inform their teams of their bonuses before 12th May 2022. The two ROMs decided to inform each individual General Manager of the bonuses to be awarded to themselves and their team at the conclusion of the business meeting and before the social event. A separate room was to be used for the social event; at the conclusion of the business meeting the teams were invited to retire to the other room and the ROMs commenced speaking individually to the each employee individually and the General Managers to disseminate the information. Ms Robinson was carrying out the same exercise in the same room but at some distance away.
23. The claimant was the final person to be informed. She was aware that the respondent had performed well in bouncing back from Covid and therefore she was anticipating a bonus of around £15,000. She was surprised to discover her bonus was withheld. Having been informed that she was not to receive a bonus the claimant was clearly upset and distressed, and she felt unable to remain at the event because she would have to field

questions about her bonus and did not wish to spoil her colleagues celebrations.

24. On 9th May 2022 the claimant lodged a grievance about the way in which she was informed about her bonus. The fact she was awarded a 0% pay review. In addition, she stated that she felt she was being, 'targeted and pushed to a point where it is untenable for me to work under these conditions'.
25. Mr Avery had secured a new position and formally resigned from the respondent on 9th May 2022. On 12th May 2022 he was invited to go on garden leave until the end of May 2022, in addition he was informed he did have to complete his three month notice period. Mr Avery told the Tribunal he had applied for the position in February 2022, and he knew he had succeeded in obtaining his new position two weeks before he resigned. The Tribunal have no reason to doubt this evidence.
26. On 27th May 2022, Mr Brennan informed the claimant, by email she would face disciplinary proceedings. A disciplinary hearing was held on 13th June 2022, at the conclusion the claimant was issued with a Final Written Warning.
27. The claimant grievance was heard on 13th June 2022. The grievance was upheld in relation to the manner in which she was informed about her bonuses but not upheld in relation to Mr Avery's general treatment of her or her 0% pay review.
28. The claimant appealed both the disciplinary and grievance hearing and was unsuccessful. The claimant was still dissatisfied so raised with the matter with management and subsequently met with Carla Jones, Head of HR Operations. Although the claimant's grievances remained unresolved, she has continued and still does work for the respondent.
29. We heard evidence from the claimant, Ms Richardson, Ms Sweet that Mr Avery treated female staff differently. Much of this was generalisation and hearsay. Specific examples were
 - 29.1 Ms Sweet, who was a General Manager in the region as the claimant asked to take a holiday which would encompass the period of the first Mother's Day following the Covid Lock Down. It was anticipated that this would be an extremely busy day for the respondent. Although she was able to take most of her leave but her leave for Mother's Day was refused which meant she had to break her leave. In contrast William Clough, another General Manager was authorised to have Mother's Day by Mr Avery.
 - 29.1.1 Mr Avery concluded that he could not grant Ms Sweet leave because the person who would undertake the General Manager duties during her absence was unreliable. Mr Avery had grave concerns about their ability to cope on

what was anticipated to be the busiest day of the year.

29.1.2 Further and perhaps of more significance Mr Clough was on paternity and not annual leave on the day in question. Mr Avery had put in place plans based on two scenarios to provide cover for Mr Clough depending upon the date of baby's birth. Clearly the two situations are very different.

29.2 Further the claimant alleges she was treated differently to Mr Clough because she was not allowed to take leave over a Christmas and New Year holiday. The Tribunal accepts that the position was that General Managers were not permitted to have an authorised rest day on any Bank Holiday. They had to apply for annual leave for such days, and these were granted on a case by case basis and often would depend on the strength of the team working on the premises.

29.3 The claimant complains Mr Avery spent more time with Mr Clough than other General Managers. This is in sharp contrast to her suggestion she was micromanaged. Mr Avery accepts this is to an extent correct, however Mr Clough was participating in the Area Managers Development Programme and Mr Avery was assisting him. This had nothing to do with the sex of either manager.

29.4 In so far as the more general treatment, these rely on hearsay, for e.g., a comment about a female General Manager being a Silly Bitch, and there is no supporting evidence. In so far as there were complaints by Ms Richardson, Ms Sweet and the claimant Tribunal is satisfied that Mr Avery was a fair Manager, although his management style was perhaps not typical of the management the witnesses had previously experienced.

29.5 As far as the bonus being paid whilst staff were subject to disciplinary proceedings. The respondent cannot account for this and it appears to have been in error. However the Tribunal concluded that the arrival of Ms McCaig White into the role of Reward Manager around 2020 heralded a new strict adherence to the process and policy. On the evidence we have seen and heard The bonus is discretionary as to whether one is to be awarded to staff, once that decision has been taken there are strict rules about the employees who are actually eligible for a bonus. This is not discretionary.

29.6 In relation Amelia Reid the Tribunal concluded that the payment of a bonus in 2022 was an error probably because her disciplinary investigation fell during the period that the bonuses were being calculated. However, having been given a disciplinary sanction her bonus was withheld.

The Law

Section 13 Equality Act 2010 states that

person A discriminates against another B, if because of a protected characteristic A treats B less favourably than it treats or would treat others.

Section 23(1) Equality Act 2010 sets out comparison by reference to a comparator as follows:

'On a comparison of cases for the purpose of sections 13, 14, and 19 there must be no material difference between the circumstances relating to each case'

This was clarified in Shamoon v Chief Constable of Royal Ulster Constabulary 2003 ICR 337 HL. The comparator must be in the same position in all material aspects as the victim save only that he, or she is not a member of the protected class.

The relevant circumstances need not be identical 'what matters is that the circumstances relevant to the treatment are the same or nearly the same for the claimant and the comparator.

Guidance is also found in EHRC Employment Code para 3.23. Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School 2003 ICR 937 HL 'all the characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator.'

Because of a Protected Characteristic

This requires the Tribunal to consider the reason why. In Nagarajan v London Regional Transport 1999 ICR 877, HL. If sex... had a *significant influence* on the outcome, discrimination is made out' (our stress). The crucial question, in every case, was 'why the complainant received less favourable treatment... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'

Specific provisions apply in relation to the Burden of proof. Under s139 of the Act,

If there are facts from which the Tribunal could decide in the absence of any other explanations that a Person contravened the provisions the court must hold the contravention occurred.

The section does not apply if A shows that it did not contravene the sections.

Harassment

Section 26 Equality Act 2010 sets out what amounts to harassment as follows:

- 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 Bs dignity, or
 - (ii) creates an intimidating, hostile, degrading humiliating or offensive environment for B

Chapter 7 EHCR Code of Practice on Employment sets out guidance on harassment including what unwanted conduct may be. Unwanted conduct may extend to graffiti as well as verbal comments, gestures jokes and pranks. The phrase 'related to the protected characteristic' has a broad definition.

Submissions

30. Both parties submitted written submissions they are not rehearsed here.

Discussion and Conclusion

The bonus

31. Having reviewed the evidence in particular that of Ms McCaig White it is clear that if the respondent decides to award a bonus, i.e. by using its discretion. The question of who is eligible is not discretionary. The claimant was pending to disciplinary proceedings at the time the bonus was awarded. Under the rules of the scheme, any bonus would be suspended until the determination of the disciplinary. The claimant was then given a Final Written Warning which meant she was ineligible for a bonus The Award Team informed Mr Avery who was ineligible and the amount of their bonus. It was not a question of whether Mr Avery decided to award it, it is not his decision. The claimant fell outside the scheme and was not entitled to the bonus offered in 2022. In any event, the claimant was actually disciplined and that would have made ineligible for any further award.

31.1 Mr Griffiths was awarded a bonus in 2015 whilst subject to a disciplinary sanction. As noted above the tribunal is satisfied that with the appointment of Ms McCaig-White, the payment of bonus was strictly enforced.

31.2 As far as Ms Reid being awarded a bonus the Tribunal accepted that this was an oversight but in any event her bonus

the following year was withheld because of the disciplinary sanction.

31.3 In determining this issue the Tribunal concluded that the burden of proof had not shifted from the claimant to the respondent. It did not engage with the reason why enquiry.

Harassment

32. Mr Avery acknowledges that the manner he delivered the information about the bonus may have been insensitive, however the Tribunal concluded that as an experienced General Manager the claimant should have been alert to the fact that her bonus would be withheld because she was the subject of a disciplinary investigation and would not be paid following her Final Written Warning.

32.1 The way in which the claimant has set out her case, i.e. that she was informed in front of colleagues in a humiliating manner, Whilst it was not in a private room, the claimant's close colleagues were not present in the room when she was informed. The colleagues to whom she refers were in a bar area on a separate floor, it wasn't until the claimant returned to them they may have become aware of an issue. In addition the Tribunal is satisfied that anyone else in the room would be unable to hear the conversation between the claimant and Mr Avery although it is possible there were persons present who saw her distress.

32.2 The Tribunal accept Mr Avery's evidence that he was not looking forward to the conversation with the claimant. It was clearly a difficult conversation to have but Mr Avery delivered it in an appropriate manner.

32.3 As to the fact he may have delivered in other circumstances, i.e. prior to the meeting, the Tribunal accept Mr Avery's explanation that it was inappropriate to speak to the claimant whilst she was on annual leave. He could not delay beyond 12th May 2022; Ms Robinson was informing her team that day it was inappropriate for the two regions to be told separately. It was unreasonable for Mr Avery to delay telling all his other General Managers beyond that date.

32.4 A further consideration was the fact that Mr Avery knew he would be leaving the respondent's employment. The Tribunal did not consider there was anything sinister in this. Upon handing in his resignation Mr Avery reasonably believed he would be placed on garden leave and lose the opportunity to inform the claimant himself. As it was he worked until the end of May 2022 and then went on garden leave.

32.5 In any event we can find no link between the place, time and delivery of the information and the claimant's sex. There is no

overt reference to sex. Having considered the claimants complaints about Mr Avery's previous behaviour outline above the Tribunal is unable to draw an inference that at the time Mr Avery was acting because of the claimant's sex. The Tribunal ultimately concluded that the tension in the relationship and the breakdown of the relationship may have led her to this conclusion but other than the fact the claimant is female there is no evidence upon which to base such a conclusion.

32.6 The Tribunal concluded that the burden of proof did not shift from the claimant to the respondent.

THE ISSUES

33. Mr Avery did not fail to award the claimant a bonus. The claimant was not entitled to a bonus, under the rules of the scheme, a bonus is withheld pending the outcome of disciplinary proceedings. If a sanction is imposed the bonus is not awarded.

34. Mr Avery did not deliver the news of the withholding of the bonus in a humiliating manner or in front of the claimant's colleagues.

35. The claimants claims for Direct Sex discrimination and Harassment are dismissed.

The Deposit Order

36. Following a hearing on 2nd June 2023, Employment Judge Legard ordered the claimant to pay a deposit of £1000 in relation to each claim as a condition of pursuing her claims. The claimant duly paid the relevant sum.

37. Under Rule 39(5) where a Tribunal decides a specific allegation....against a paying party for substantially the same reasons given in the deposit order

(a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of Rule 76, [costs] unless the contrary is shown

(b) The deposit shall be paid to the other party
Otherwise the deposit shall be refunded.

38. There was no application from the respondent for costs.

39. In looking at this matter the Tribunal had regard to Employment Judge Legard's judgment at paragraphs 6.6 -6.9. In particular paragraph 6.9 ' However the both the weight of case law in this area and the existence of some facts (which could be open to potential dispute) has persuaded me, albeit by the narrowest of margins, not to strike out the complaint of sex discrimination and harassment... '.

40. The burden of proof did not shift in either case and although there was a dispute on the facts about the conversation between Mr Avery and the claimant, this Tribunal preferred the evidence of Mr Avery. The case therefore fails for the same reason as those given by Employment Judge Legard.
41. As there was no application for costs the sum of £2000 deposited by the claimant must be paid out to the respondent.

Employment Judge AEPitt

Date 7th August 2024