EMPLOYMENT TRIBUNALS

Claimant: Mr Bartosz Moscichowski

Respondent: Open House London Limited

Heard at: London Central Employment Tribunal (by CVP) **On:** 2-8 October 2024

Before: Employment Judge Anthony
Dr V Weerasinghe
Mr S Williams

REPRESENTATION:

Claimant: Litigant in person
Respondent: Mrs A Singh (Solicitor)

WRITTEN REASONS PROVIDED FOLLOWING A REQUEST MADE PURSUANT TO RULE 62(3)

The Tribunal gave oral judgment with reasons on 8 October 2024. On 9 and 30 October 2024, the claimant made a request for written reasons. The written reasons are set out below.

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct discrimination because of race under the Equality Act 2010 fails and is dismissed.

2. The complaint of victimisation under the Equality Act 2010 was brought before the end of the period of three months starting with the date of the act to which the complaint relates.

3. The complaint of victimisation under the Equality Act 2010 succeeds.

REASONS

Introduction

1. The claimant is Polish. He was employed by the respondent as a Bartender, but was informed shortly after starting that he would be demoted to Barback. The claimant states that this and his subsequent treatment amounted to race discrimination. He states a written complaint dated 2 September 2022 was a section 27 Equality Act 2010 'protected act', and that he was victimised by having his hours reduced. He states he resigned as a consequence of this treatment, his resignation being a response to discriminatory repudiatory acts and therefore an act of discrimination.

2. The claimant's effective date of termination was 6 October 2022. The claimant notified ACAS of his prospective claim on 9 September 2022. The Early Conciliation Certificate was issued on 28 September 2022. The claimant's ET1 claim form was presented on 10 October 2022.

The Hearing

3. The claimant gave evidence on his own behalf. The respondent relied on the evidence of two witnesses, Mr Walter Carta and Mr Karl Hogan. The claimant had provided a witness statement from Ms Dominika Zmuda but she did not attend to give evidence. The respondent had provided a witness statement from Mr Jack Hanson but he did not attend to give evidence.

4. The Tribunal was provided with:

   a) Joint Hearing bundle – 259 pages;
   b) Witness statement bundle – 20 pages;
   c) Claimant's index to bundle – 2 pages;
   d) Claimant's bundle – 30 pages;
   e) Claimant's medical letter – 2 pages;
   f) Claimant's grievance 1 – 11 pages;
   g) Claimant's grievance 2 – 3 pages;
   h) Claimant's written closing submissions – 2 pages;
   i) Respondent's written closing submissions – 15 pages.

The Issues

5. The issues before the Tribunal 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 29 June 2022 may not have been brought in time.

1.2 Were the discrimination and victimisation 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 Karl Hogan tell the claimant shortly after joining “All Polish people are so slow, is it just you?”

2.1.2 Karl Hogan demote the claimant from Bartender to Barback on 25 August 2021, wrongly saying this was a temporary arrangement.

2.1.3 From October 2021 refuse to pay his TRONC for 3 months.

2.1.4 Verbally assault him on 6 December 2021, telling him “the way you work is ridiculous” and “you’re stupid and a piece of twat”, and then ignore his subsequent email complaint about this treatment.

2.1.5 From January 2022, give him a reduced number of shifts, often only one shift a week.

2.1.6 On 12 June 2022 at a meeting with his manager, Jack, refuse to reinstate him to Bartender or address his complaint about the failure to reinstate him.

2.1.7 Fail to pay accurate sick pay for an absence between 18 June and early July 2022 until October 2022.

2.1.8 On 17 August 2022 Jack told him in a rude and aggressive manner that he must strip the room and make the walls, shelves and floor spotless, saying "If you don't want to do it you can go home, I don't need you here". Did the respondent ignore his written complaint about this incident?

2.1.9 On 30 August 2022 did manager Joao Palma bully him? Did the respondent ignore his written complaint about this incident?

2.1.10 Reduce his shift hours between 18 September and 2 October 2022 from 40 to 16 hours per week.

2.1.11 Constructively dismiss the claimant?

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; in other words the comparator must be a non-Polish employee working for the same manager and have the same skills and capabilities as the claimant.

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 claimant has named Sofia as an employee who he says was treated better than he was. He is considering whether there are other employees who were treated better than he was. He will also rely on a hypothetical comparator.

2.3 If so, was it because of the claimant's race?

2.4 Did the respondent's treatment amount to a detriment?

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the claimant do a protected act as follows: in his written complaint of 2 September 2022 complain about how he and members of staff of Polish nationality were treated?

3.2 Did the respondent do the following things:

3.2.1 Reduce his hours?

3.3 By doing so, did it subject the claimant to detriment?

3.4 If so, was it because the claimant did a protected act?

3.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

Relevant Law

Time Limits

6. The law in respect of time limits for discrimination complaints is set out in section 123(1)(a) of the Equality Act 2010. A discrimination complaint must be brought before the end of the period of three months beginning with the date of the act to which the complaint relates. Alternatively, it should be brought within such other period as the Tribunal thinks 'just and equitable' (section 123(1)(b) of the Equality Act 2010).

Continuing Act of Discrimination

7. To establish whether a complaint of discrimination has been presented in time, it is necessary to determine the date of the act complained of, as this sets the time limit running. The question of when the time limit starts to run is naturally more difficult to determine where the complaint relates to a continuing act of discrimination. Section 123(3) of the Equality Act 2010 makes special provision relating to the date of the act complained of in these situations. It states that "conduct extending over a period is to be treated as done at the end of that period".

8. In Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, the Court of Appeal made it clear that it is not appropriate for Employment Tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'.

9. The Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in Hendricks, namely that Employment Tribunals should look at the substance of the complaints in question, as opposed to the existence of a policy or regime, and determine whether they can be said to be part of one continuing act by the employer.

'Just And Equitable'

10. The discretion for Tribunals to hear out-of-time claims within whatever period they consider to be 'just and equitable' is broader than the discretion to allow late claims to proceed where it was not 'reasonably practicable' to present the claim in time in non-discrimination related claims.

11. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal noted that, because of the wide breadth of the discretion given to Tribunals to proceed in accordance with what they think is just and equitable, there is very limited scope to challenge the exercise of that discretion on appeal. An appellate court or Tribunal should only disturb the Employment Tribunal's decision if it erred in principle, for example, by failing to have regard to a factor that is plainly relevant and significant or by giving significant weight to a factor that is plainly irrelevant, or if the Tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable. A Tribunal's decision to extend or not to extend a time limit can also be challenged where it fails to give adequate reasons (Madhavan v Great Western Hospitals NHS Foundation Trust EAT 0200/16).

Direct Discrimination

12. By section 13(1) of the Equality Act 2010, an employer directly discriminates against an employee if it treats him less favourably because of a protected characteristic than it treats or would treat others. By section 4 of the Equality Act 2010, the protected characteristics include race. There are therefore two elements that make up a finding of direct discrimination, a) less favourable treatment; and b) because of a protected characteristic.

13. The burden of proof is on the claimant to establish facts from which the Tribunal could conclude that, absent any other explanation, the respondent discriminated and/or victimised him (section 136(2) of the Equality Act 2010). This means that the claimant must show facts from which the Tribunal could conclude that he has been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant, and that an effective cause of the difference in treatment was the protected characteristic (O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1997] ICR 33 EAT).

14. The House of Lords in Nagarajan v London Regional Transport 1999 ICR 877, HL, took a similar view, holding that where a protected characteristic has had a 'significant influence on the outcome, discrimination is made out'. Therefore, the protected characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause. If the claimant is able to do so, the burden then shifts to the respondent to prove that they did not contravene the Equality Act 2010 (section 136(3)).

Victimisation

15. The question of whether the claimant has been subjected to a 'detriment' has both subjective and objective elements. It is a question to be considered from the claimant's point of view, but his perception must be reasonable (Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925 at [50]-[51]).

16. The House of Lords held in Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 at [31]:

> "Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings."

17. Where an employer fails to investigate a complaint or grievance relating to discrimination or harassment, that will not, in itself amount to victimisation unless there is a material link between the fact/substance of the complaint (as a protected act) and the failure to investigate (A v Chief Constable of West Midlands Police (UKEAT/0313/14/JOJ, 21 April 2015); Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust [2019] IRLR 1022 at [95]-[96]).

18. In that regard, when the Tribunal is considering the reasons why a claimant was subjected to a detriment, it must do so specifically by reference to the doing of the relevant protected act[s] (JJ Food Service Ltd v Mohamud (UKEAT/0310/15/JOJ) at [19]).

Findings of Fact

Direct Race Discrimination

2.1.1. Karl Hogan tell the claimant shortly after joining "All Polish people are so slow, is it just you?"

19. The initial burden is on the claimant to demonstrate that Karl Hogan did say to him "All Polish people are so slow, is it just you?".

20. The Tribunal has considered all of the documentary evidence provided. We find there is no contemporaneous complaint made by the claimant at the time that Karl Hogan did make this remark to the claimant.

21. We have considered the first grievance letter dated 18 August 2022. We find that this document is long and that the claimant details many incidents. However, we find from the document and the claimant's own oral evidence that there is no mention of race discrimination or this remark being made to him by Karl Hogan. We observe that the claimant makes in general terms the claim that he was subjected to discrimination by Jack Hanson. We also note the claimant makes the allegation that "Jack is nurturing a climate of injustice discrimination unforgivable treatment planted by his predecessor Karl Hogan."

22. We take into consideration the "cappuccino" remark which the claimant alleges happened on the same day as the allegation about Polish people. However, we find the claimant did not mention the allegation about Polish people in his grievance letter when describing the "cappuccino" incident. Furthermore, we find the claimant did not mention this allegation in his second grievance letter dated 2 September 2022.

23. We accept the claimant did mention this allegation in the ET1 claim form and in his witness statement prepared for this hearing. Given the seriousness of the allegation, we find that it would be reasonable to expect the claimant to have raised this in a timely manner or alternatively in his first grievance letter. Given this was not raised at the time the incident was said to have taken place, and not raised subsequently in the two grievance letters, we find the claimant has not met the evidential burden of proving that Karl Hogan said to the claimant the words "All Polish people are so slow, is it just you?".

24. In respect of this allegation, we conclude there is nothing to indicate that the claimant was treated worse than someone else was treated and that it was because of his Polish nationality.

<u>2.1.2 Karl Hogan demote the claimant from Bartender to Barback on 25 August 2021, wrongly saying this was a temporary arrangement.</u>

25. There is no dispute that the claimant was demoted to Barback on 25 August 2021. The claimant's understanding was that this was meant to be a temporary arrangement as evidenced by his email of 25 August 2021 in response to Karl Hogan's email of the same date (page 144). We understand the claimant's case to be that the temporary demotion should have had an end date and that his performance should have been reviewed periodically.

26. We have carefully considered the email from Karl Hogan dated 25 August 2021 to the claimant. Karl Hogan stated "The duration of this period depends on you and your willingness to learn, adapt and take on board everything that is being taught to you." We find there was no promise of an end date to the demotion. We find that any promotion back to Bartender was conditional on the claimant's performance.

Job Description and Claimant's Experience

27. The claimant complains that the original advert for the job did not specify that candidates needed to have experience of making cocktails. We have considered the job description and we accept that it does not specify the need for cocktail making skills. However, we find that the advert does specify that candidates would need to have at least one year experience as a Bartender in a fast paced, busy venue. We find that it is implicit within the advert that one would need to have some cocktail making skills.

28. The claimant's evidence was that prior to working for the respondent, he last worked at a hotel bar near Heathrow. We find there is no reason to dispute the claimant's evidence of his previous experience in the industry. We find this was not challenged by the respondent. However, we find there may be a difference in terms of the claimant's bartending experience and the respondent's expectations. We find that working in a hotel bar near Heathrow is substantially different to working in a central London bar.

Training

29. We heard evidence from Walter Carta about the training that all bar staff receive upon commencement of employment. We have considered the emails and rotas provided for this period (page 195 – 197 and page 3 of Grievance letter dated 18 August 2022). We find on 9 August 2021, five bar staff employees were given the beverage academy training. We find from the rotas and the documentary and oral evidence we heard that the claimant received comparable training to the other bar staff. In respect of this allegation, we conclude there is nothing to indicate that the claimant was treated worse than someone else was treated and that it was because of his Polish nationality.

Test on 21 August 2021

30. We accept there was a test carried out on 21 August 2021 which considered the claimant's speed and ability to make four different types of drinks (page 131-132 and 135). The test compared the claimant's ability against another bar staff, Arkadia. The claimant stated he was unaware that the test was being carried out. He also referred to the fact that he was working from a bar where three other bartenders were working from and that he was prevented from executing the task in a timely manner. The claimant stated that he was on a busier floor. The claimant also stated that Arkadia was more experienced than him, having worked with the respondent in excess of two years.

31. Having considered the email dated 21 August 2021 from Chris Bevitt and the claimant's oral evidence, we accept the claimant's evidence that this was a test which he was unaware of. We are reinforced in our conclusion by the email from Chris Bevitt which refers to a "random ticket sent by the Floor Manager to a random table so the bartender has no idea it's a test". We also accept the claimant's

evidence that he may have been working on a busier bar that day compared to Arkadia. Although we have no direct evidence, we are prepared to accept the claimant's evidence that Arkadia had worked at this establishment for over two years. We find this was not contested by the respondent.

32. We have considered the email dated 22 August 2021 (page 135) from Chris Bevitt to Walter Carta and Karl Hogan. We find from this email that the respondent's concerns about the claimant's performance was based not just on the test of 21 August 2021 but based on their observations of the claimant's performance over the two weeks after his first training week.

33. We find from the email dated 21 August 2021 from Chris Bevitt, the HR note of the meeting that took place between Chris Bevitt, Karl Hogan and the claimant on 22 August 2021 (page 137), that the claimant did agree to accept the change of role to Barback. We find the claimant was sent an email by HR on 23 August 2021 (page 140) confirming that the demotion was due to his performance. We are reinforced in our conclusion that the claimant did accept the demotion because the claimant responded to confirm receipt of the amended contract in an email dated 25 August 2021 (page 139 and 147). We find the claimant did not raise a complaint at this point. We accept and find he agreed to it on a temporary basis. We conclude there is nothing to indicate the demotion was due to the claimant's nationality. We find the demotion was entirely due to the feedback on the claimant's ability to perform in the role.

Meeting With Walter Carta And Joao Palma

34. The claimant stated in his second grievance letter dated 2 September 2022 that he was coerced into signing the new contract by Walter Carta and Joao Palma. In oral evidence, the claimant was unable to recall the date of this meeting. We find the account given in this grievance letter to be inconsistent with the contemporaneous emails and HR record of the conversations that took place around 21-25 August 2021. We prefer the contemporaneous record of what took place at the time. We find the claimant was not coerced into accepting the demotion and that he agreed to it. Having considered the contemporaneous correspondence, we conclude there is nothing to indicate the demotion was due to the claimant's nationality.

Signatures

35. On the second day of the claimant's oral evidence, the respondent provided 4 additional documents which were the a) Claimant's barback contract; b) Barback Job description; c) Handbook and d) Tronc letter. The respondent accepts the disclosure in this claim has been less than satisfactory. We agree. We find the respondent's failure to carry out the disclosure in a timely manner did impact on the hearing timetable and also caused significant inconvenience and frustration for the claimant. We find the respondent could and should have dealt with disclosure

better. We also find the bundle was prepared poorly with pages placed in the wrong order which led to confusion during the claimant's evidence.

36. We have already accepted during the hearing that the respondent had an ongoing duty of disclosure. Due to additional disclosure on the second day of the claimant's evidence, we permitted the claimant more time to consider the documents and to provide further oral and/or documentary evidence on those documents. The claimant's evidence is that the documents were manipulated and that the signature was not his electronic signature.

37. We note from the properties of the documents that most of the documents were signed on the same date and time or nearly the same time. Having heard evidence from Walter Carta, we accept and find that it is possible to sign all three documents with one click. The claimant does not dispute this aspect of Walter Carta's evidence. We find from the contemporaneous emails and Walter Carta's evidence that the claimant did sign the contract, the handbook and the job description. We do not accept the claimant's evidence that the documents were manipulated and that the signature was not his electronic signature. If that was the case, we find there is likely to be other documentary evidence or correspondence between the claimant and HR addressing his reluctance to sign the new contract or his unhappiness with being coerced into signing the new contract.

2.1.3 From October 2021 refuse to pay his TRONC for 3 months

38. We find from the claimant's evidence that the TRONC payments were eventually paid but only after his complaint and after some delay. The respondent accepts that the payments were delayed i.e. TRONC for September was paid in October and the TRONC for August paid in November (page 151 and page 244). The respondent states that the delay was due to an administrative error because of the claimant's change of role from Bartender to Barback (page 151). We are persuaded that the respondent's explanation is more likely than not to be the reason for the error and subsequent delay in payment. We find the claimant has not demonstrated that any delay or refusal to pay was due to his nationality.

2.1.4 Verbally assault him on 6 December 2021, telling him "the way you work is ridiculous" and "you're stupid and a piece of twat", and then ignore his subsequent email complaint about this treatment.

39. The claimant alleges that this incident occurred on the same day as the incident involving Ria. We have considered the email dated 7 December 2021 which the claimant sent to Chris Bevitt. The claimant complains to Chris Bevitt about Ria's behaviour. However, the claimant did not complain about the alleged incident involving Karl Hogan. The claimant stated in oral evidence that he did not complain about the incident involving Karl Hogan because he did not receive a reply to the complaint involving Ria.

40. We find the claimant could have raised a complaint regarding both incidents in his email of 7 December 2021. We place weight on the fact that he did not. We find the lack of contemporaneous complaint of this remark strongly indicates it did not happen. Furthermore, we find the claimant did raise the incident involving Ria in the first grievance letter but again, makes no reference to the Karl Hogan incident. The burden of proof is on the claimant to demonstrate that the incident with Karl Hogan did occur and that it happened because of his nationality. We find the claimant has not discharged the burden of proof. Given our finding that the claimant did not raise the incident with Karl Hogan in the email of 7 December 2021, we find that there is no indication the respondent ignored any complaint about this matter.

2.1.5 From January 2022, give him a reduced number of shifts, often only one shift a week.

41. The respondent accepts that the claimant had reduced shifts in January 2022. We find from the rotas provided for February to June 2022 that the claimant had a comparable number of shifts to other Barbacks (page 210 – 216). We find the claimant then had a period of sick leave. We find the respondent also accepts the claimant had a reduced number of shifts in September 2022. We find the burden of proof is on the claimant to demonstrate he had reduced shifts from January 2022. We find there is nothing to indicate the claimant had a reduced number of shifts for the months of February to August, or often only one shift a week. We find the claimant has not discharged the burden of proof in demonstrating that from January 2022, the respondent gave him a reduced number of shifts, often only one shift a week. As a consequence, we conclude there is nothing to indicate that the claimant was treated worse than someone else was treated and that it was because of his Polish nationality.

2.1.6 On 12 June 2022 at a meeting with his manager, Jack, refuse to reinstate him to Bartender or address his complaint about the failure to reinstate him.

42. The respondent accepts they did not reinstate the claimant to the position of Bartender as requested. The respondent states this was because of the claimant's performance. We find the burden of proof is on the claimant to demonstrate the refusal to reinstate him to the role of bartender was because of his nationality. We find the claimant has not discharged the burden of proof. In light of the contemporaneous documentary evidence, we prefer the respondent's explanation that this was because of the claimant's performance.

2.1.7 Fail to pay accurate sick pay for an absence between 18 June and early July 2022 until October 2022.

43. We find from the claimant's oral evidence that he was entitled to one day statutory sick pay between 22 June 2022 to 26 June 2022. We find from the claimant's oral evidence that he agreed with Mrs Singh that he was paid for all the periods of sick

leave that he was entitled to pursuant to the table at page 153 and in line with his contract and the handbook. The claimant conceded under cross examination that for his absence on 27 June which ended on 12 July 2022, he received the full sixteen days of sick pay. We find this corresponds with the claimant's pay slips for July to September 2022 which confirm payment of the relevant statutory sick pay (page 252). We find the claimant has not discharged the burden of proof to demonstrate that the respondent failed to pay accurate sick pay for an absence between 18 June and early July 2022 until October 2022.

2.1.8 On 17 August 2022 Jack told him in a rude and aggressive manner that he must strip the room and make the walls, shelves and floor spotless, saying "If you don't want to do it you can go home, I don't need you here". Did the respondent ignore his written complaint about this incident?

44. The claimant states that he refused to carry out Jack Hanson's instructions because cleaning was not part of his job description. The claimant states that he had never been provided with a Barback job description. We have already found that the claimant did sign the Barback contract and job description. We find he would have been aware that cleaning was part of his job description.

45. Jack Hanson did not attend to give evidence. There was no opportunity to cross examine Jack Hanson regarding this allegation. We are prepared to accept the claimant's version of events that he was told to clean in an aggressive and rude manner. We find that when the claimant refused to carry out the instruction as directed, the claimant was told to go home, which he duly did. Although we accept that this incident did happen, we find there is nothing to indicate that the way Jack Hanson spoke to the claimant was because of the claimant's nationality. We find it was because the claimant had refused to carry out the instruction as directed even though this was part of his job description (page 169).

46. The claimant states that the respondent ignored his written complaint about this incident. We find the claimant raised the complaint regarding his treatment by Jack Hanson in his first grievance letter dated 18 August 2022. We find the respondent concedes they did not respond to the claimant's first grievance letter. The Grounds of Resistance at paragraph 16 state the respondent responded to the claimant on 21 August 2022 but we have not been taken to any correspondence pertaining to this (page 56). We conclude the respondent did not respond to the claimant. However, we find there is nothing to indicate the failure to respond was due to the claimant's nationality.

47. We note the respondent did respond to the claimant's second grievance letter the next day on 3 September 2022. We find the respondent did ask the claimant to reconsider his resignation.

2.1.9 On 30 August 2022 did manager Joao Palma bully him? Did the respondent ignore his written complaint about this incident?

48. The respondent concedes there was an incident between the claimant and Joao Palma on 30 August 2022 but disputes the claimant's version of events. Having heard oral evidence, we find we can accept the claimant's version of events that the manner in which the claimant was asked to remove his personal food from the fridge was perceived by the claimant to be aggressive. We find the burden of proof is on the claimant to demonstrate that the manner in which he was spoken to by Joao Palma was because of his nationality. We find the claimant has not discharged the burden of proof. We place weight on the claimant's email of 31 August 2022. We find the claimant did not mention the abuse of power and bullying by Joao Palma was because of his nationality (page 230).

2.1.10 Reduce his shift hours between 18 September and 2 October 2022 from 40 to 16 hours per week

49. We have considered the rotas and the payslips for this period. The rota for the week commencing 19 September 2022 show the claimant did two shifts (page 233). The payslip for 30 September 2022 show the claimant completed 13.5 hours for the week commencing 19 September 2022. We accept the claimant's hours were reduced in the week commencing 19 September 2022 to 16 hours or below.

50. We have considered the rota for the week commencing 26 September 2022 in the claimant's supplementary bundle (page 9). We accept the claimant's payslip for October 2022 demonstrates the claimant worked 16.47 hours for the week commencing 26 September 2022. Although there is plainly a reduction in the claimant's hours, we find the reduction in hours is not below 16 hours for this week. In any event, the respondent has accepted there was a reduction in hours during this period.

51. We find the claimant has not carried out a direct comparison with other employees who are non-Polish. We find the claimant has not established that the reduction in hours was due to his nationality. We find the claimant has not discharged the burden of proof.

2.1.11 Constructively dismiss the claimant?

52. It is accepted the claimant resigned. We have considered the claimant's resignation letter (page 190). We find the claimant did say he was discriminated against but we find the claimant does not refer to any protected characteristic.

2.2 Was that less favourable treatment? and 2.3 If so, was it because of the claimant's race?

53. Based on the above findings of fact, we conclude that there is nothing to indicate that the claimant was treated worse than someone else was treated i.e. worse than a non-Polish employee working for the same manager and with the same skills

and capabilities as the claimant. Although the claimant compares himself to Sofia, we have nothing to indicate that Sofia was treated better than the claimant and that it was because of Sofia's non-Polish nationality.

2.4 Did the respondent's treatment amount to a detriment?

54. As a consequence of our findings of fact above, we find the respondent's treatment did not amount to a detriment.

Victimisation

3.1 Did the claimant do a protected act as follows: in his written complaint of 2 September 2022 complain about how he and members of staff of Polish nationality were treated?

55. Having considered the claimant's grievance letter dated 2 September 2022, we find the claimant did make several explicit references to how he and members of staff of Polish nationality were treated. We find the respondent would have been aware these amounted to protected acts because in the claimant's first grievance letter, the claimant provides background information regarding discrimination, albeit without reference to the claimant's Polish nationality. We find the second grievance letter is not a general discrimination complaint. Rather, we find the claimant has sufficiently specified his complaint about his treatment on grounds of his Polish nationality as to amount to a protected act.

Bad Faith

56. The respondent makes the submission that the claimant's allegations were made in bad faith. However, the respondent does not point to any evidence to indicate that the claimant's grievance was made in bad faith. Having heard oral evidence, we find the claimant genuinely, subjectively believed that his treatment by the respondent was because of his nationality. We find the claimant did raise matters in his grievance in good faith.

3.2 Did the respondent do the following things: 3.2.1 Reduce his hours?

57. We accept and find the claimant was on annual leave from 5 September to 18 September 2022 (page 232 – 233). We have already found that in the week commencing 19 September 2022, the claimant worked 13.5 hours. We find this was a reduction in the claimant's hours. We find the respondent's written closing submissions is incorrect to suggest that the claimant was on holiday from 19 to 25 September 2022.

58. We have considered the rota for the week commencing 26 September 2022 in the claimant's supplementary bundle (page 9). We find the claimant's payslip for October 2022 demonstrates the claimant worked 16.47 hours for the week

commencing 26 September 2022. We find this is also a reduction in the claimant's hours as compared to his hours in the previous months.

Respondent's Reasoning

59. Walter Carta states in his witness statement at [11] (page 14) that the reason for the reduction in the claimant's hours was because the respondent was concerned about the claimant's wellbeing. This assertion was repeated in Walter Carta's oral evidence. In questions from the Tribunal, Walter Carta accepted that the respondent did not communicate to the claimant that this was the reason for the reduction in the claimant's hours. We find there is simply nothing to substantiate the respondent's assertion. We find the claimant was not told this was the reason for the reduction in his hours. Furthermore, we were not shown any HR communications at this time to suggest there was a concern regarding the claimant's wellbeing. We find it inconceivable that the claimant would not have been informed of the reason if the respondent was genuinely concerned about his wellbeing.

Jack Hanson

60. Jack Hanson gives a different reason for why the claimant's hours were reduced, namely to do with train strikes and reduced business levels. We find this reason inconsistent with the reason provided by Walter Carta. In any event, we find the respondent has produced no evidence that they did have reduced business levels at this time.

Zero Hours

61. The respondent also makes a general submission that the claimant was on a zero hours contract and there is no obligation on the respondent to provide guaranteed hours. We accept there is no obligation on the respondent to provide guaranteed hours. However, the question we have to consider is whether the reduction in the claimant's hours was due to the claimant doing a protected act.

Inequality in shift distribution

62. Having carried out a comparison of the claimant's shifts against other barbacks in the week commencing 19 September and 26 September 2022, and even allowing for the non-availability of the claimant, we find there is a noticeable reduction in the claimant's shifts in comparison to other barbacks.

63. Having heard oral evidence, we find the respondent has not provided a cogent explanation for the inequality in shift distribution. Firstly, we find the various explanations provided to us were inconsistent. Secondly, if train strikes and reduced business levels was a legitimate reason to reduce the claimant's hours, it is unclear why the other barbacks did not also suffer proportionally less hours.

Thirdly, we reject Walter Carta's explanation that the respondent was concerned about the claimant's wellbeing and that is why the respondent gave the claimant reduced shifts. We have already found there are no HR documentary evidence to corroborate Walter Carta's evidence.

3.3 By doing so, did it subject the claimant to detriment?

64. Taking into account the respondent's explanations which we have already found inconsistent, and having found there was an unequal distribution of shifts between barbacks, we find the respondent did subject the claimant to a detriment.

3.4 If so, was it because the claimant did a protected act?

65. Given the proximity of the claimant's grievance to the reduction in hours, we have considered whether there is a link between doing a protected act and the reduction in hours. Having rejected two of the respondent's reasons for the reduction in hours, we have considered whether there may be an explanation for the reduction in hours, namely that the claimant was on a zero hours contract. However, we observe the claimant was previously provided hours in excess of the number of hours he was allocated in these two weeks. We find that when considered from the claimant's point of view, it is reasonable that he would perceive there was a link between him doing a protected act and the reduction in his hours.

66. At this stage in the analysis, we find the burden passes or 'shifts' to the respondent to prove that discrimination did not occur. We have carefully considered the mental processes of the respondent namely what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? We remind ourselves that if the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

67. We have considered the reasons why the claimant was subjected to a detriment and we have considered this by reference to the doing of the relevant protected act. We find the reasons advanced by the respondent does not explain the sudden change in hours or the unequal distribution in shifts between barbacks. We find the respondent has failed to explain the reasons why the claimant was given reduced shifts. We conclude in the absence of any other cogent explanation by the respondent, that the reduction in hours is more likely than not because the claimant did do a protected act. We find the claimant succeeds in demonstrating that he was victimised for doing a protected act.

Time limits

68. We have already substantively considered the claimant's claim for direct race discrimination and we have found this not proven.

69. In relation to the victimisation claim, we find that this was brought within three months. We find the protected act was done on 2 September 2022. We have already found the detriment suffered by the claimant happened in the week commencing 19 and 26 September 2022. The claimant notified ACAS of his prospective claim on 9 September 2022. The Early Conciliation Certificate was issued on 28 September 2022. The claimant's ET1 claim form was presented on 10 October 2022. We find there is no time limit issue in respect of the claimant's victimisation claim.

Employment Judge Anthony
11 December 2024

Reasons sent to the parties on:

19 December 2024
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For the Tribunal:

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