



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ahmed

Respondent: TC Facilities Management Ltd (TCFM)

Heard at: Southampton **On:** 30 January 2019

Before: Employment Judge Hargrove
Members: Mr J Shah
Mr D Stewart

Representation

Claimant:

Respondent:

JUDGMENT

1. The unanimous Judgment of the Employment Tribunal is that the claimant's claim of discrimination on racial grounds against the respondent is not well founded.

REASONS

1. The claimant was employed by the respondent TCFM to work as a Security Guard at a site owned by Arquiva Ltd which required 24 hours 7 days a week security, it being a site in the Winchester area responsible for the distribution of satellite and DBS broadcasting equipment.
2. His employment commenced on 13 April 2017 and he was dismissed by letter dated 25 October (page 69 of the bundle) following a disciplinary hearing on 4 October conducted by Hannah Kupny (HK) Operations Manager. The Notes of that hearing are at pages 46 – 68 of the bundle. The claimant appealed and his appeal was heard by Raphael Sugula, Account Manager responsible for the Arquiva account on 13 November 2017. The appeal notes are at pages 73 – 79.

3. The claimant is Black and is of Sudanese national origin. On 19 December he presented claims of unfair dismissal and race discrimination in respect of his dismissal. His claims were originally against TCFM as first respondent and Arquiva Ltd as second respondent. The claim against Arquiva was rejected by the Employment Tribunal because the claimant had not obtained an early conciliation certificate. That has had consequences, or possible consequences, for the outcome of this hearing. In addition, the unfair dismissal claim was struck out following a strike out warning on 13 March 2018 because the claimant did not have the necessary two years service to bring such a claim to the tribunal.
4. Thus the claimant's only remaining claim is that of race discrimination in respect of the dismissal against TCFM his former employer alone.
5. On 11 July 2018 there was a telephone case management hearing which identified a comparatively narrow issue for the attention of the tribunal.

"The claimant contends that the respondent discriminated against him because of his race by treating him less favourably than the respondent would have treated others when investigating an allegation that a person who named himself as Ali made an unauthorised phone call from the claimant's workplace at 5.00am on 27 September 2017. The claimant denied that he had made the phone call when questioned by the respondent. The claimant contends that a more thorough and fair investigation into the allegation would have been made if the person who had made the phone call had given the name of the other employee on duty at the workplace at the relevant time, namely Paul Chadd.

The outcome of the respondent's investigation of the allegation was a finding that the claimant had made the unauthorised phone call. That finding, together with other performance related issues, led to the dismissal of the claimant. The claimant makes no complaint of race discrimination in relation to the performance related issues that contributed to the respondent's decision to dismiss him. The claimant complains that there was race discrimination in the way that the respondent went about its investigation into the allegation relating to the unauthorised phone call and that the race discrimination therefore contributed to the decision to dismiss him".

6. The tribunal at that hearing ordered the parties to exchange witness statements by 26 October 2018. The claimant has not produced a witness statement or disclosed one in advance of this hearing or at this hearing. We have permitted him to give oral evidence to explain the basis of his claim notwithstanding that fact.
7. We now turn to the law. This is a complaint under Section 13(1) of the Equality Act 2010. That provides that a person discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat others. The protected characteristic in this case is race and that is defined by Section 9 as including (a) colour (b) nationality (c) ethnic or national origins.

8. Section 39(2)(a) of the Act defines discrimination in the employment field:

“An employer must not discriminate against an employee by dismissing him or by subjecting him to any other detriment”.

There are special provisions in the Equality Act dealing with the burden of proof. Section 136 of the Act provides:

“If there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned, the court must hold that the contravention occurred but that subsection does not apply if A shows that A did not contravene the provision.”

That requires that we apply a two stage test. The claimant at the first stage has to prove facts from which an Employment Tribunal could reasonably conclude that the reason for his treatment by his employer was a reason related to, or was materially influenced by, the protected characteristic; in this case race. If he does so, he will succeed unless the respondent proves that the reason for the treatment had nothing whatsoever to do with either race or national origin.

Background

9. The following is the Background to this case:

- (1) On 27 September 2017 the claimant was working a night shift at the Arquiva site. He usually worked weekends but he also worked as cover for shifts during the week if other workers were not available.
- (2) We heard evidence from the sole witness called for the respondent, Mr Christopher Andrews, Security and National Access Systems Supervisor for the security contract at Arquiva. He received a phone call from Mr Ian Whitefood, Regional Facilities Manager employed by Arquiva and based at the Arquiva site, at around 7.00am to go to his office. IW reported that he had a report from the out of hours contractor MML (who charged Arquiva £200 per call) that a call had been made by someone called Ali at 5.00am that day concerning a defective door lock. Normally defects were dealt with in the daytime by the helpdesk on site but a more expensive MML service could be used if there was something urgent at night which could not wait until the morning. IW's complaint was to the effect that the call at 5.00am had been unnecessary and had caused unnecessary expense to Arquiva. Two emails were sent out including one by Mr Andrews to the 8 security staff who worked for TCFM on the site at 7.50am. In the first email sent by IW at page 57 at 7.38am that day he stated:

“Despite numerous emails sent by Chris regarding the process for calling the MML out of hours helpdesk it still appears this isn't being followed as a job that could have waited and passed on to the day shift to log via the corporate facilities helpdesk which still logged through out of hours”.

The email received via the MML helpdesk states:

“Site advised that the rear fire doors automatic closer is broken. Site can still be secured and attendance before 5.00pm today is required.

The concerns that I now have if simple processes cannot be followed what other processes are not being adhered to”.

- (3) That was sent by Mr Whitefood to Mr Andrews and Hannah Kupny.
- (4) During the same meeting, according to Mr Andrews, IW stated that it was not the first issue which they had with Ali during his work group and they wanted him removed from the site. HK told Mr Andrews to investigate. Mr Andrews collated a number of other matters which he had raised with the claimant during his employment and probationary period but no detail is necessary because they do not seem to have played any significant part in the claimant’s subsequent dismissal which was principally because of the third party request to remove him from the site.
- (5) Mr Andrews checked the records. The only other person working as a security guard with the claimant on site that night had been Mr Paul Chadd who is white English. There was another Shakir Ali who was employed by Arquiva but he was established as not being on the shift for that night. There was no-one else called Ali who worked there at the time. Apparently, the CCTV record was not good enough to identify a person making a call from the reception area and it was not possible to locate the phone from which the call could have been made because there was a ghost number which did not identify the specific extension.
- (6) During the disciplinary hearing on 4 October 2017 the claimant repeatedly denied that he had made the call and asked for further investigation. We accept that Mr Andrews did return to speak to IW on at least one occasion before the decision to dismiss was announced. IW confirmed the account but declined to discuss it any further. He said again that he had lost confidence in Mr Ahmed.
- (7) In addition, on 29 September 2017 before the decision to dismiss was announced a further enquiry was made to Sarah Sparks by HK. Sarah Sparks was superior to IW and was also employed by Arquiva. She stated in an email “I fully agree that Ali should no longer be on site”.
- (8) At the appeal stage a further enquiry was made of Arquiva according to the appeal outcome letter and again it was confirmed that they wanted him removed from the site.

10. The conclusions that we have unanimously reached are as follows:

- (1) The claimant has to prove facts from which we could reasonably conclude that he was treated differently from an actual or hypothetical comparator who was not of his race or national origin or was of different race or national origin such that an inference of race discrimination could be made in respect of the treatment of the

claimant. In this respect the complaint is only of less favourable treatment in relation to the investigation of who had been responsible for the telephone call. That person was identified by Arquiva as being someone who used the name Ali.

- (2) There is no longer any separate claim of discrimination against Arquiva. We are not in fact concerned with whether the claimant did in fact make the call. It is a possibility that he did not. It may have been by someone who used the claimant's name. It is again not beyond the bounds of possibility that it was someone in Arquiva who might have been responsible for it. The case is not put upon the basis that TCFM or an employee of TCFM was responsible for it, or that TCFM knowingly endorsed an act of discrimination by Arquiva or one of its employees.
 - (3) The claimant thus has to show a prima facie case that TCFM's investigation of the allegation was itself an act of less favourable treatment because of his race or, to put it another way, that a white person whose name had been given as the maker of the call would have been investigated differently.
11. We are satisfied that no different or further investigation would or should have taken place in the circumstances of a white suspect. We are not concerned here with any issue of the fairness of the dismissal and in any event, unfairness of itself does not equate with discrimination. In these circumstances the treatment of the claimant was, in respect of TCFM, not because of his racial or national origin; and the claim has to be dismissed as not well founded.

Employment Judge Hargrove

Date: 22 February 2019.