



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 22, 23 and 24 June 2022

Claimant: Mr A Clarke

Respondent: Mitie Ltd

Before: Employment Judge Mr J S Burns
Members Ms S Campbell and Dr V Weerasinghe

Representation

Claimant: Ms B Perry (Paralegal)

Respondent: Mr A Rozycki (Counsel)

JUDGMENT

The claim is dismissed

REASONS

1. This was a claim of direct race discrimination arising from the Respondent's handling of a grievance raised by the Claimant on 18/5/2020. As per the case management summary dated 24/3/22, the sole alleged act/omission relied on as less favourable treatment is the claimed failure by the Respondent to uphold the said grievance; with the Tribunal to consider that question by reference to a hypothetical comparator. At the PH on 24/3/22, an application to amend the claim/add other causes of action was abandoned; and it was confirmed on the Claimant's behalf, as recorded in the Tribunal's record, that the ambit of his claim was restricted to the "*grievance, which followed his redeployment to a new site after an incident at his original site.*"
2. We heard evidence from the Claimant (who describes himself as Black Afro-Caribbean and who remains in employment with the Respondent as a Security Officer), Mr G Amponsah (Respondent's Site Supervisor) and then from Mr A Rauza (Respondent's Security Manager). The Claimant identified no actual comparator. The documents were in a bundle of 246 pages. In addition, we admitted from the Claimant a copy letter to him from Mr A Carpenter dated 22/1/2020. We refused to admit diary entries which the Claimant had failed to disclose or refer to until half way through the second day of evidence, as allowing that material in at that stage may have interrupted the trial or caused forensic prejudice.

Findings of Facts

3. There were a series of altercations between the Claimant and a white male (whom we refer to as the "alleged perpetrator" and who was employed by the Respondent's client HMCTS) in the reception area of a court building occupied by HMCTS and in which the Claimant was working in January and March 2019. The Claimant felt he had suffered racial abuse and an assault and reported the matter to his managers and the police. The Claimant's then Regional Manager Mr A Carpenter who was in charge of the HMCTS contract attended a meeting in February 2020 where HMCTS carried out an initial investigation but it is unclear what if anything further

was done by HMCTS to determine this serious complaint against one of its own employees. The Claimant hoped that the alleged perpetrator would be prosecuted in the criminal courts but at the end of October 2019 the Claimant was told that this would not proceed.

4. From the evidence before us, HMCTS did not then make any transparent and fair determination of its own about what had happened between the Claimant and the alleged perpetrator earlier in the year. Instead, two days after the collapsed trial of the alleged perpetrator, HMCTS issued an instruction - which was evidently made informally in October but formally confirmed on 13/11/19 (which request the Respondent was contractually obliged to comply with), that the Claimant should be removed from the HMCTS contract. The Claimant naturally felt extremely aggrieved that he, in his view the victim of racial abuse, should be punished in this way.
5. The Respondent's policy on Third Party Removal states that the Respondent will try to discover the reasons for the instruction from the client and depending on the reasons may ask the client to reconsider. The policy itself recognises that in some cases the Respondent may not be given the client's reasons (page 103). If the instruction remains in force then the employee's manager will meet with the employee to discuss the reasons and if appropriate investigate further, and discuss redeployment opportunities. The policy does not say whether or not the client's letter requiring the removal should be disclosed to the employee.
6. Mr Carpenter met with the Claimant on 31/10/19 to explain the situation.
7. Mr Carpenter issued a letter of 13/11/19 stating that the Claimant's terms and conditions were to be maintained for 4 weeks while Mr Carpenter challenged the client's request. It is unclear to what extent he actually challenged the client.
8. On 10/12/19 the Claimant having just returned from an extended holiday texted Mr Carpenter stating that he had still not received reasons why he had been removed.
9. The Tribunal is concerned by the possible injustice which may have occurred consisting in the HMCTS having summarily removed the Claimant from his work at the court where he had been for 6 years, apparently without a fair process to determine whether or not he had been the victim of racial abuse. It is also unfortunate that he does not appear ever to have been told the reasons which motivated HMCTS to issue the instruction. We do not know whether these motives were ever explained to Mr Carpenter - they may not have been. If they were he did not tell the Claimant about them. The upshot was that the Claimant was not given reasons which increased his feeling of having suffered an injustice.
10. The Claimant had previously been paid for 5 x 13 hours (65 hours per week) as he did not take a lunch hour during his 12 hour shift, but after his transfer to the hospital he did take lunch breaks and was faced with being paid for a 12 hours a shift (60 per week) only. This would lead to a loss of 5 hours pay per week. He discussed this with Mr Rauza, who was the Operational Manager in charge of the health services contracts, and who had made the new position available to the Claimant after his removal from the court.
11. Mr Rauza was able to offer the Claimant a pay rate at the hospital of £8.77 per hour (which was the rate he had been paid at the court and slightly more than the then minimum wage £8.21 which the other Security Officers at the hospital were being paid), but he was unwilling to pay the Claimant for more hours than the 5 x 12 he would be working per shift (60 per week). This was because Mr Rauza was administering a fixed budget, there was a slim profit margin for the Respondent in the health service contracts, and his supervisor Mr Rugg would not permit extra money to be dispensed.
12. Mr Carpenter agreed to maintain the Claimant's terms and conditions initially for 4 weeks. The Claimant thought that the agreement was that on transfer to the hospital his pay would be

preserved (ie not be reduced), on an indefinite basis. Mr Amponsah told us he overheard a conversation about this between the managers and the Claimant; but if so we find that as he was not the person concerned and was listening to a third-party conversation he would not have been best placed to fully understand what was said. Mr Carpenter has since left the Respondent's employment so we did not hear evidence from him, but as appears from letters written by him dated 13/11/2019, 22/1/2020 and 21/2/2020, the agreement was that, as a temporary concession, the Claimant's pay would be preserved until the end of the consultation period (relating to his transfer) only, which period should have been for only 4 weeks under the Respondent's policies but which in the event was extended by Mr Carpenter to 16/1/2020, and that thereafter the Claimant would be paid for only his actual work at the hospital ie for 5 x 12 hour shifts only - that is 60 hours a week - at the rate of £8.77 per hour - and hence he would receive a 5 hour per week loss of pay in comparison with what he had received at the court. If the Claimant did not wish to accept that, he could re-enter the Respondent's redeployment consultation procedure with a view to trying to find a better paid job with longer paid hours, or failing that, be dismissed. This approach is consistent with the Respondent's policies

13. In January 2020 Mr Carpenter arranged to make a back-payment of extra money to the Claimant to cover the period to 17/1/20, but after that the Claimant received marginally lower pay than before. The extra money was probably found by Mr Carpenter from the budget he was administering (which applied to the courts-contract) as Mr Rauza was unable to find it from the hospital contract budget.
14. The Claimant did not re-enter the redeployment process but stayed in the hospital job while issuing a series of oral and informal complaints about the drop in his pay after 16/1/2020. These complaints were directed to HR and or Mr Rauza, his new manager, who however had over 100 Security Officers to manage and who therefore did not reply as often or as promptly as the Claimant wished.
15. On 18/5/2020 the Claimant raised a written grievance to the Respondent about (i) the fact that he was now earning less pay than he had at the HMCTS building (ii) lack of communication and response to previous messages and (iii) lack of PPE or testing for key workers (for Covid) at the Hospital Site where the Claimant was then working.
16. The agreed notes of the grievance meeting on 4/6/20 show that Mr Rauza conducted the meeting in an open and courteous manner designed to assist the Claimant to explain and expand on his concerns. Mr Rauza identified and discussed with the Claimant 9 subjects of complaint. None of these were about race discrimination.
17. After the meeting Mr Rauza sent the manuscript notes to Ms Nell in HR on 9/6/20, asking for help, and trying to expedite the matter. There was liaison between Mr Rauza and Ms Nell as a result of which Mr Rauza drafted a grievance outcome letter dated 3/7/20 as follows:

"Further to your recent grievance hearing held on 4th June 2020, I am writing to let you know the outcome Ms Nell with of your grievance and the actions I am taking as a result. At the meeting you chose to be unaccompanied, although you were aware of your right to accompaniment.

I chaired the hearing and also took notes.

You raised the following points in your grievance e-mail and at the hearing and below I have stipulated my findings and the outcome:

You were assaulted at your place of work by a client employee, who was not charged with the offence. The client subsequently unfairly requested your removal from site

The contract that we have with the client entitles them to request an employee's removal at any given time. The client formally placed the request in writing on 13.11.2019, to which we pushed back asking them to reconsider their request however, this was unsuccessful. The removal from site was not a decision which was taken by Mitie and we do not believe this is a reflection of your dedicated hard work on the contract.

You are being forced to lose 20 hours per month due to the redeployment following the removal request. This is equal to £175.40 per month and £2,280.20 per year which puts you at a detriment

The position put forward to you at Finchley memorial hospital is a 60 hours Monday to Friday, with a lower pay rate. At the time when this was offered to you, it was agreed that you will remain on your pay rate of £8.77. Unfortunately this position will not be able to have an increase to match your previous hours/earnings position at courts. This was explained to you by Kartik Arya in the letter dated 22.01.2020.

Mitie have failed to adhere to an ACAS agreement from 2016 whereby it was agreed that any changes regarding your shifts/pattern would be made in writing or emailed across to you, but on several occasions, this has not happened

From the Grievance hearing, you made me aware that between 2017-2018 you were asked to cover some shifts at short notice as there was no one else available to cover. You advised that you were made aware of these shifts via telephone and not email as the ACAS agreement states. However, you still agreed to covering these shifts and at no point requested this to be put in writing as per the agreement. I'm sure that had you asked the individual who made the request to put it in writing, this would've been arranged to ensure there was no confusion at any stage.

Lack of response from management and HR when emails or messages have been sent

Unfortunately, I am unable to comment on the reasons for the lack of responses from both management or HR in the last 5 years however, I can confirm that when emailing the People Support team with a query, their SLA for responding to emails is 3 working days. The team would advise that if you have not had a response within this timeframe, you call them on 0330 1234 005 to discuss. In regard to management responses, I will do my best and improve going forward. but it is reasonable for the operations manager to respond to none urgent queries within 3 working days. For all urgent matters you can always call control room on 0333 207 6605.

Failure to update your contract from September 2018 when you moved into a Supervisor Role

When changing Job Title or moving into a different role within the business, it is standard process that you are submitted with a letter changing the relevant parts of your T&C's rather than issuing you with a new contract. As the only details that would've been changing with the new role were your job title, who you report into and your rate of pay, it would not be deemed necessary to provide you with a new contract as the majority of your contract stays the same. For your information, I have enclosed a copy of the T&C's letter which was issued to you confirming the details amended.

Lack of care from the company by not providing suitable PPE during the current Covid-19 pandemic

I have enclosed an email from the site supervisor dated 18.05.2020 confirming that the client made PPE available as soon as they were able to. This was also provided to employees prior

to my visit on 30.05.2020 in which I delivered further items for all Mitie staff on site. If at any stage there is a lack of PPE, please let me know so I can ensure the team are fully equipped.

You have applied for annual leave on 3 separate occasions and all have been rejected. You believe that due to your hard work and loyalty with the business this should've been approved.

On the first instance there was a comment left by your previous line manager asking you to discuss the request with myself as I was your new line manager and they did not want to approve on my behalf. Since discussing with me, this leave has not been re booked and I had no opportunity to approve this. You also requested holiday for August which was initially rejected due to the fact another officer had booked the same time off prior to yourself therefore, I was unable to approve as had it been granted there would've been a lack of staffing. However, this has been rectified as the officer no longer requires this holiday so yours can now be approved.

You received letters relating to a TUPE to OCS

You were incorrectly issued these letters as the MOJ contract was to be TUPE'd across to OCS in April 2020. As you had previously worked for the MOJ contract, you were not removed from the contact list and therefore these letters were incorrectly issued to yourself. I wish to apologise for any confusion this may have caused.

You want Mitie to refer you for a Covid-19 test as you believe this is your employer's responsibility

The Government have issued guidance on Covid-19 testing in which if an individual believes they have Covid-19 symptoms, they can apply to have a test sent to them via post or they can attend a testing centre to do so. At present, the company are unable to provide the tests ourselves however, I have detailed below the links where you can obtain a test if you wish to do so.

<https://www.gov.uk/government/news/coronavirus-testing-extended-to-all-essential-workers-in-england-who-have-symptoms>

<https://self-referral.test-for-coronavirus.service.gov.uk/>

As a business we want to ensure that all employees are treated according to our values and appropriate action has been taken in order to resolve your grievance.

If you wish to appeal, you must send your appeal in writing to Andy Ross, Senior Operation manager, Andy.Ross@mitie.com within seven calendar days of receiving this letter.

I've attached a copy of the notes of the meeting. If you think these notes don't accurately reflect the contents of the meeting, please amend them and e-mail them to me at Anatolijs.Rauza@mitie.com by 10th July 2020."

18. The above was a draft letter which was never finalised or sent out to the Claimant.

19. On 10/7/20 Mr Rauza sent the draft to Ms Nell in HR with a request for a review and advice about it.

20. On 13/7/20 Ms Nell emailed Mr Rauza stating *"I think the part regarding his loss of hours and thus pay needs more detail regarding what we're going to do. We've had emails from him which clearly state that he has queried the pay and hours since he received the letter, but we've to date done nothing about these emails and it looks as though we've chosen to ignore them. ...I think you need to decide on a way forward which will be beneficial for both parties such as, paying him what he's owed to date – but stating that going forward, we'll be unable to accommodate his request. We may then need to pick the consultation process back up as he has raised on several occasions that he is not happy with the outcome. ...Please can you review how you are going to proceed and amend the letter accordingly. If you send back to me, I can review before we issue."*
21. On 19/7/2020 the Claimant sent an email to Mr Rauza complaining that he had not received a grievance outcome and threatening to take legal advice. Mr Rauza did not respond to this.
22. On 5/8/2020 Ms Nell sent a query to Mr Rauza asking for an update on the grievance outcome and asking whether it had been sent out to the Claimant. In response the same day Mr Rauza replied *"I am not sure what to do, there is no outcome I need further advise how to address the pay issues."*
23. Ms Nell replied to that *"Unfortunately this isn't something I can advise on – this will be a business decision as to whether you back pay the monies or not. My email on the 13th July details the stance and what we need to do."*
24. Mr Rauza was therefore being told by HR that he should pay the Claimant extra money for his lost 5 hours per week up to date but on the basis that after that his pay would not be supplemented.
25. Mr Rauza did not act on this advice. While he would have liked to have been able to accommodate the Claimant, he did not know where the extra money would come from. The hospital would not pay for hours of work which it did not receive, and he knew from past experience that his Regional Manager Mr Rugg would not permit extra money to be paid.
26. Furthermore, he knew that the Claimant would not be satisfied with an accommodation only up to mid-2020, because he knew that the Claimant wanted, and believed, that he had been promised by Mr Carpenter, that his pay would be preserved at the 65 hr per week level on an indefinite basis. Furthermore, the letters from Mr Carpenter which were available to Mr Rauza did not suggest that this was the agreement which had been entered into.
27. As a consequence of these difficulties, Mr Rauza and HR did not finalise or send out any grievance outcome letter. The Claimant issued these ET proceedings on 20/8/2020 and the matter appears to have been shelved from then on. The draft outcome letter did not progress beyond the version dated 3/7/20 which was only disclosed to and received by the Claimant during Tribunal disclosure in April 2022.

28. Mr Rauza told us that he had previous experience of trying to get extra money for low-paid black employees - for example he referred to three such employees who had higher commuting costs into Zone 1 for their work than did others who had to commute into less central zones of London, for the same pay. He had approached Mr Rugg for extra money for these employees, but Mr Rugg had refused the request. It was this experience which had informed Mr Rauza's view in 2020 that the extra money could not be found to pay the Claimant at an enhanced rate.

29. Mr Rauza also told us that he had over the last ten years dealt with between 10 and 20 formal grievances, including grievances from white employees which grievances he had on occasion dismissed or not upheld.

30. In his ET1 issued in August 2020 the main focus of the POC is the alleged racial abuse of the Claimant by the alleged perpetrator at the court and the failure to suspend the alleged perpetrator, matters for which the Respondent had no responsibility and in which Mr Rauza was not involved at all. In his witness statement for the Tribunal FMH, the Claimant again enlarged on what had happened to him at the court building and said little about the manner his grievance dated 18/5/2020 had been dealt with, in paragraphs 33 and 34 simply making a bare assertion that because he was a black person his grievance had already been pre-decided and would not have been looked at objectively.

Law

31. Section 4 Equality Act 2010 (EA) provides that race is a protected characteristic and section 9 provides that race includes a persons colour, nationality or ethnic or national origins.

Direct Racial Discrimination

32. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.

33. The requirement is on the Claimant to show less favourable treatment by comparison with an actual or hypothetical comparator whose relevant circumstances must be the same or not materially different.

34. Section 136 provides that if there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

Conclusions

35. We are not satisfied that Mr Carpenter or any other manager entered into an agreement with the Claimant that his level of pay would be preserved and protected indefinitely after his transfer to the hospital. It is unlikely that any such agreement would be entered into. Such an agreement would have had to be funded with the support of Mr Rauza and/or Mr Rugg who were in charge of the hospital contract budget, and it is plain that they did not support it. Mr Carpenter would have been more likely to have offered the Claimant a temporary concession while the redeployment process was completed. That this was the basis of the agreement is supported by the letters dated 13/11/2019, 22/1/2020 and 21/2/2020 from Mr Carpenter to the Claimant, and by the fact that the Claimant's enhanced pay ended with the end of the extended consultation period.

36. We accept however that the Claimant probably did not understand the pay situation as clearly as he might have done.

37. Even if there had been an agreement that the Claimant's level of pay would be preserved and protected indefinitely after his transfer to the hospital, any breach of such an agreement is not alleged as a cause of action in the case before us.

38. The issue for our decision, is whether the Respondent failed to uphold the Claimant's grievance dated 18/5/20 and if so whether this was less favourable treatment because of the Claimant's race.

39. Mr Rauza held a reasonable grievance hearing with the Claimant on 4/6/2020 in response to the grievance. He took the matter seriously and dealt fully and courteously with all the various issues raised. The real problem and sticking point was the pay issue. Mr Rauza did not feel able to follow the advice of HR about this for the reasons mentioned above. These included primarily Mr Rauza not knowing where the extra money would come from, a detail which HR had failed to explain. Mr Rauza also believed that the Claimant's agreement with Mr Carpenter for extra pay did not extend beyond 16/1/2020. While Mr Rauza and HR were still stuck over this issue, the ET proceedings intervened and this appears to have caused the grievance outcome to have been shelved.

40. It was wrong and unreasonable for Mr Rauza and HR not to finalise the outcome letter and send it out to the Claimant. Even if Mr Rauza felt unable to follow HR's advice, he should still have taken responsibility and dealt with the issue rather than simply shelving it. HR should have followed the matter up to make sure it was sent out. By not sending it out, the Respondent failed to uphold the Claimant's grievance in any respect. This was negligent, irresponsible and unreasonable behaviour which aggravated the upset which the Claimant was already feeling as the result of his removal from the court the previous year.

41. However, the fact that the Claimant may have suffered racial abuse and assault at the court in early 2019 does not mean that any shortcomings in the Respondent's treatment of his grievance in 2020 must have been racially motivated.

42. We have considered the Respondent's response to the grievance generally in determining whether the Respondent's managers and in particular Mr Rauza were affected by conscious or unconscious racial bias.

43. There are some pointers to Mr Rauza not being disposed against the race of the Claimant or against him personally - for example the manner in which Mr Rauza discussed the complaints at the hearing on 4/6/2020 appears to have been open and reasonable - and Mr Rauza's

correspondence with HR shows that they were grappling with the problem and wanting to deal with the pay issue in particular on its merits.

44. We do not have the benefit of any identified actual comparators but what we were told by Mr Rauza about his dealings with other employees of various races also does not support any finding against him.

45. In all the circumstances the Respondent's unreasonable behaviour as regards the handling of the Claimant's grievance, is not sufficient basis for drawing an inference of direct race discrimination and we do not find that the Claimant has proved primary facts to pass the burden of proof to the Respondent. If he has, then in any event we are satisfied by the Respondent's non-discriminatory explanation.

46. The Claimant has not suffered less favourable treatment in comparison with a hypothetical comparator. We conclude that in the same situation Mr Rauza and HR would have treated in the same way a comparator of another race to that of the Claimant.

47. Hence the claim is dismissed.

J S Burns Employment Judge
London Central
24/6/2022
For Secretary of the Tribunals
Date sent to parties :24/06/2022
