Case Number: 2202442/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR J WALSH**
MS S PLUMMER

BETWEEN:

Mr S Jafar

Claimant

AND

Capital Enterprise (UK) Ltd

Respondent

ON: **13, 14 and 15 May 2019 (final day In Chambers)**
Appearances:
For the Claimant: **Mr S Perhar, counsel**
For the Respondent: **Mr P Wareing, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By a claim form presented on 18 April 2018, the claimant Mr Simon Jafar claimed unfair dismissal, race discrimination, breach of contract and unlawful deductions from wages.

2. The unfair dismissal claim was struck out on 10 August 2018 because the claimant did not have two years service.

3. The claimant worked for the respondent as a front of house officer from 31 October 2016 to 2 February 2018.

4. The respondent is a not for profit membership organisation assisting entrepreneurs to start up and grow their businesses. The respondent employs around 31 people in Great Britain. It employed about 10 people in the place where the claimant worked.

5. The issues were identified at a preliminary hearing before Employment Judge Tayler on 13 August 2018.

6. The issues are:

7. Race discrimination: the claimant describes his race as being of Iranian ethnic origin. Was he discriminated against because of race in the following:

    a. not being paid overtime in full
    b. being told not to apply for the new roles that were said to be replacing his role
    c. by being dismissed

8. Breach of contract/unlawful deductions from wages: did the respondent breach the claimant's contract of employment and/or make an unlawful deduction from wages by failing to pay overtime in full?

9. A second preliminary hearing took place before Employment Judge Snelson on 22 November 2018. At that hearing the claimant was given leave to pursue as harassment claims, those claims set out as direct race discrimination. Therefore the above points, a. b. and c. are also pursued as race related harassment.

10. The case was originally listed for hearing commencing on 5 December 2018. Unfortunately it had to be postponed on the afternoon of 4 December 2018 due to lack of judicial resource.

11. We confirmed with the parties that there was no claim for holiday pay. The claimant accepted that he had been paid his holiday pay.

Witnesses and documents

12. The tribunal heard from the claimant

13. For the respondent to the tribunal heard from three witnesses: (i) Ms Carly McNally, Chief Financial and Administration Officer and Company Secretary, (ii) Ms Justine Clark, Business Development and Partnership manager and (iii) Mr Niall Roche of University College London, who has at no time been an employee of the respondent. He was one of the co-partners of the respondent and worked in the same building as the claimant.

14. There was a bundle of documents of just over 300 pages. Unfortunately many of the pages in the bundle were unnumbered.

Findings of fact

15. The claimant was employed by the respondent as a front of house officer at IDEALondon which is a centre run by a collaborative with Cisco, UCL

Engineering and EDF Energy. It is a small organisation founded in 1993. The centre has about 80 tenants and is situated in London EC2. The claimant's role was one of front of house officer ensuring that the premises were managed efficiently.

16. The team in which the claimant worked consisted of about 10 employees. They included in addition to the claimant, one employee of Iraqi origin, one black Nigerian, one Armenian and their in-house lawyer who is of Indian origin. Ms Clark, the claimant's manager is white Canadian. We were told that the others were white "English". We find that as a small group, in percentage terms they were ethnically very diverse. The claimant in his statement at paragraph 11 also referred to a "*former female subordinate*" from the Czech Republic.

17. The claimant was recruited in October 2016. He was interviewed by Ms Carly McNally on 28 October 2016. She took the view that although the claimant did not have the experience for the front of house role, he showed a willingness to learn. The claimant was the only person interviewed. He started work on Monday 31 October 2016.

18. Ms McNally was the claimant's line manager for the first six months of his employment. She was a very busy person as she held a number of roles in this very small organisation. She dealt with finance matters. She also dealt with HR matters although has no HR qualifications or training. Ms McNally has been with the respondent since 2010 and has worked her way up in the organisation. She has and had at the material times a good working relationship with the CEO, Mr John Spindler.

<u>The contract</u>

19. We saw the claimant's contract of employment commencing at page 42 of the bundle. His job description was on the final page (page 51). His responsibilities were: managing the reception of the Innovation Centre Monday to Friday; providing help and practical support to the centre's tenants and guests in a friendly and professional manner; providing administrative assistance; managing room and event space; helping with the physical setup of the facilities both pre and post events; attending events organised by the team to assist with event delivery. This expressly said that it might include events outside normal working hours and to undertake other tasks as appropriately directed by management.

20. We therefore find that there was a contractual obligation upon the claimant to attend events to assist with event delivery and that this could contractually require him to work outside normal working hours.

21. The claimant was employed on a fixed term contract to the end of October 2018, with an option to be extended. This was consistent with the funding available for the project on which the respondent was working.

22. The respondent's staff at the centre generally got on well and liked to

socialise together.

Ms Clark becomes line manager

23. On 3 April 2017 Ms Justine Clark was recruited as Centre Manager and she became the claimant's line manager. Ms McNally passed this responsibility to Ms Clark as Ms McNally had so many other responsibilities she was finding it hard to find the time to manage the claimant. M,When Ms Clark joined, Ms McNally told her that the claimant was not performing the role as she had hoped. Ms Clark had the task of finding ways to improve the claimant's level of performance.

24. Ms Clark was asked in cross-examination whether she knew that the claimant was Iranian. She said: "*To be honest not really, I would identify him as a white British male, it was only later that I found out he was Iranian".* She was asked when she found this out, she said it was in the course of casual conversation about family. She was not sure when this was but thought that it may have been at around a mid-point during the claimant's employment.

25. On 12 July 2017 Ms Clark told Ms McNally "*I think we need to look into his contract and not extending :(*" - page 112. The claimant requested annual leave for 17 and 18 July 2017 (a Monday and Tuesday). Ms Clark said that this was not convenient as they had a huge launch party on 18 July and they were very short staffed. She did not approve the leave for those dates. The claimant told her it was "*too bad*" as he had already booked his flights and he was going. Ms Clark was very disappointed and we find this was one of the reasons that she sent Ms McNally the email about considering terminating his employment.

26. In support of his claim for race discrimination the claimant said that his colleague Omar, who we were told is of Iraqi ethnic origin, was "*so tormented*" by Ms McNally that he sent a text message to Ms Clark not long after he started working with the respondent.

27. The message had not been disclosed. After discussion with the parties it was agreed that Ms Clark would show the message to the claimant and his counsel from her phone and in the tribunal. It was agreed that the message said words along the lines of "*Hey Justine, I have a question for you, since CE is such a close knit team, why isn't Carly McNally answering my emails. I don't think she likes me*". Ms Clark said Ms McNally did like him but she was busy and overloaded. She suggested that he use Google Chat with her and he said "*oh phew*". Ms Clark saw this, to quote her, as "*a perfect example of something [the claimant] has taken and spun and fantasised in his head*". The date of the message was 26 July 2017.

28. We find that this message did not show that Omar was "tormented" by Ms McNally because of race or at all. He queried why she did not reply to his emails and was given a rational explanation and a suggestion of a better means to communicate with her.

29. Ms Clark said that she discussed this with Ms McNally who is an incredibly busy person and she was upset to learn that Omar thought that she did not like him.

30. Ms Clark looked at ways to improve the claimant's performance including offering him some tasks that she thought he might find more interesting, such as the newsletter and uploading items to the website.

The performance review meeting

31. On 23 August 2017 Ms Clark carried out an annual review with the claimant. Ms McNally was also present. The document setting out the review was at pages 114-115. It was the first review carried out by Ms Clark as she had joined in April 2017, four months earlier.

32. The claimant was on a nine-month probationary period (clause 10.1 of the contract, page 45). By the time the review was carried out the claimant had worked for the respondent for nearly 10 months. We find that he was not given a probationary review. Ms McNally had not been happy with the claimant's performance and discussed this with Ms Clark when she joined at the beginning of April 2017. They agreed that with Ms Clark becoming the line manager, they would give him a fresh start and Ms Clark would manage his performance from there. This approach was not communicated to the claimant.

33. We find that the review that took place on 23 August 2017 was an annual review rather than a probationary review. It stated as much on the form (page 114). The review form was completed by Ms Clark. Both Ms Clark and Ms McNally were present at the review. Ms Clark wrote out the review form in the claimant's presence and discussed the matters with him. She agreed that she did not give him a copy of the document.

34. The claimant was marked "*improvement required*" for quality and accuracy of work, efficiency, time keeping and competency in the role, which was borderline with satisfactory. He was marked satisfactory for attendance and good for work relationships including team work and interpersonal communication skills. His overall outcome was "*needs improvement*".

35. The claimant's evidence was that Ms McNally "*diagnosed him as a retard*" in that meeting. Ms McNally and Ms Clark both strongly denied that this was said at the meeting. We find on a balance of probabilities that Ms McNally did not call the claimant a "*retard"* in that meeting. We have the corroborating evidence of Ms McNally and Ms Clark. We found from hearing from them that this is unlikely to be terminology that either of them would find acceptable in a professional meeting. We find that they did discuss the ways in which the claimant was not performing to the correct standard, relatively routine and simple tasks and we find that the "*diagnosis as a retard"* is the way in which he wrongly interpreted what he was told. It is not what was said.

36. Ms McNally and Ms Clark decided to give the claimant a few more months to see whether there was any improvement. We find based on the ET3 (referred to below) that they were mindful of the two year service requirement for ordinary unfair dismissal.

37. Ms Clark's evidence was that the decision to terminate the claimant's employment was a joint decision between herself and Ms McNally but that her view (Ms Clark's) carried more weight because she was the line manager. Ms Clark thought that if she had said they should allow the claimant to stay on, Ms McNally would have agreed. Ms McNally confirmed this in her evidence.

38. The claimant relied on a number of emails thanking him for performing certain tasks which included emails from the tenants of the building. Ms Clark and Ms McNally's evidence was that just because the claimant performed certain tasks well did not mean that he was performing satisfactorily the full scope of his job description.

39. One of the outcomes of the performance review was the introduction by Ms Clark of checklists. This was simple checklist to help the claimant tick off and ensure that he performed all his duties each day. It was a software based checklist, an example of which we saw at pages 122-123.

40. Ms Clark tried all sorts of ways to help the claimant improve his performance. As we have found above she offered him the opportunity to work on the newsletter and uploading items to the website. Ms Clark was clear and we find that she asked the claimant if he wanted to do these things and he agreed. He was also offered the opportunity to manage the 3D printing lab but he was not interested in this and it was not taken forward.

41. The claimant argued that one of the reasons for the standard of his performance was that he was "*overloaded*". We find that he was given the freedom to refuse additional tasks and he did so in relation to the 3D printing lab. The additional tasks were only offered by Ms Clark to make the job more interesting for him and to motivate him to perform better.

42. It was frankly admitted in the ET3 Grounds of Resistance (paragraph 9) that due to ongoing concerns with the claimant's performance Ms Clark and Ms McNally agreed to keep an eye on the claimant's performance and began to talk about terminating his employment before he acquired two years service, should his performance not improve.

<u>The restructure</u>

43. At the same time the respondent began to consider a restructure. They took the view that they could provide a better service to the tenants if they could keep the reception open for longer. The problems with the claimant's performance led them to consider whether there were better

ways they could provide their service.

44. They decided to create two part time roles: the first was to be the role of operations coordinator similar but junior to the claimant's role to cover the hours of 8am to 2pm and a second role of community coordinator covering reception from 2pm to 8pm to include marketing, business development and events. We saw the advertisements for the two roles in the bundle.

The dismissal meeting on 5 January 2018

45. The claimant covertly recorded the dismissal meeting. We make it clear consistent with the dicta of Underhill P (as he then was) in ***Vaughan v London Borough of Lewisham EAT/0534/12*** that we do not condone covert recordings. Nevertheless, there was an agreed transcript at pages 197 – 199. In many of the documents before us at this hearing the claimant highlighted or put in bold the passages he wished to draw to our attention. In the transcript of the dismissal meeting he highlighted the fact that Ms McNally said: "*you've been great*". He did not highlight himself saying to Ms McNally and Ms Clark "*you've been great too you guys you really have*" (page 198).

46. On Friday16 February 2018, the claimant sent an email to the CEO Mr John Spindler setting out his intention to bring proceedings in the employment tribunal. He specifically stated in that email that he had taken legal advice and he was acting on advice received (page 32).

47. He set out his grounds of claim in paragraphs A to I. At paragraph F he said he believed the dismissal was "*prejudicial/discriminatory*" but he gave no details.

48. On Monday 19 February 2018 Ms McNally replied to his email setting out Mr Spindler's responses next to his points. Mr Spindler pointed out that he had less than two years service so he did not qualify for the right to claim unfair dismissal. This did not prevent the claimant from claiming unfair dismissal, notwithstanding that he had taken legal advice. This was followed by an email from Mr Spindler on 22 February 2018 (page 35) also explaining that the claimant did not have the right to claim unfair dismissal.

The reason for dismissal

49. Ms McNally and Ms Clark's evidence was that the reason for dismissal was his performance. They explained that reviews of the performance had taken place in which he was informed that they were unhappy with his performance and suggested ways to ensure that he was more productive within his role. They saw no improvement.

50. We heard evidence from Mr Niall Roche of UCL, one of the respondent's partners. They hold Partner Meetings, attended by the respondent, UCL, Cisco and EDF Energy. These were operations meetings below Board level. Minutes are kept but we did not have any of these in the bundle.

Mr Roche said that at a Partner Meeting, Ms McNally and Ms Clark said that they were not happy with the claimant's performance.

51. They discussed the general state of the office and premises where they hold frequent events and have meeting rooms. They require a high level of cleanliness with clients and visitors coming through. Mr Roche said that during the claimant's employment, it was not really up to a standard they found acceptable. This fell within the scope of the claimant's duties.

The 2 new roles

52. The claimant's case is that he was not permitted to apply for the new roles within the restructure and that this was because of his Iranian ethnicity. We were taken to the note of the dismissal meeting and find that Ms McNally told him that they did not feel that he was the right fit for either of the new roles. She said that the operations role was a bit of a downgrade and the communications and marketing role was not right for him because he did not have the marketing experience. On the question of the words used at the meeting, we find that the claimant was not told that he was not permitted to apply for the roles. We find he was not encouraged to apply but he was not told that he could not apply.

53. The claimant did not say in that meeting that he had marketing experience. In this tribunal hearing he said he had some marketing experience from 2009 and that he started at a public health company in 2014 and did some marketing there. His CV was not in the bundle, nor was his application for employment with the respondent. If he possessed marketing experience, he did not convey this to Ms McNally and/or Ms Clark either during or after the meeting on 5 January 2018. He did not express any interest in either role.

54. Ms Clark and Ms McNally both said that if the claimant had told either of them that he had marketing experience and was interested in the marketing role, they would have considered him. He did not leave the respondent's employment until Friday 2 February 2018 and they asked him from time to time how he was doing in his search for work. He did not tell them during that four week period that he would like to demonstrate his experience in marketing and go for that role.

55. We saw the advertisements for the roles at pages 161 and 165. They were both part time roles. The respondent only found a suitable candidate for the operations role who started in February 2018. They had difficulty in finding a suitable person for the community coordinator role. The made the operations role full time.

56. At page 152 we saw Ms Clark's email to the respondent's partners, including Mr Roche, informing them of the decision to terminate the claimant's employment. The email was dated 8 January 2018. It said:

"This is a note to inform you that we have decided to let go of Simon.

As some of you may know it has been something that we have been considering for quite some time but it is still never easy to do. We love him and what he has brought to the CE team and IdeaLondon but I'm afraid he just wasn't quite right in this specific job and the growth going forward for IDEAL. His last day will be February 2nd."

57. We find that the view of the claimant's performance was shared by the respondent's partners and had been under consideration for some time. We find that the reason for dismissal was the claimant's performance. We find that the claimant was well liked by the respondent's managers. They were a close knit team, they socialised together and we saw photographs in the bundle showing this and they regarded each other as friends. This is borne out by Ms Clark's comment in the above email that "*we love him".*

58. We find that the claimant was not dismissed because of his race. We find that the respondent was a racially diverse team that got on well and regarded each other as friends. Ms Clark did not know for some time that the claimant was of Iranian ethnicity, she thought he was British and we find that Ms McNally would have taken it on board if Ms Clark had wanted to give the claimant a further chance to improve. The performance concerns were genuine, they were shared by the respondent's partners, they had attempted to address those concerns and we find that race played no part in the dismissal.

59. Our primary finding of fact is that the claimant was not told not to apply for the new roles. We accept that the claimant was not encouraged to apply and he was told that the respondent did not consider him a fit for either of the roles. We have considered whether this was because of the claimant's race.

60. At the dismissal meeting Ms Clark told the claimant (transcript page 197) that she was *"stepping back"* a bit from being full time with the respondent as there was a proposal for her to work 2 days per week for one the respondent's partners. Ultimately this did not happen, but it was fully contemplated as at 5 January 2018.

61. We have found that Ms Clark and Ms McNally both legitimately considered the claimant to be a poor performer and it was anticipated that Ms Clark, as the line manager was no longer going to be around for two days per week to supervise. We find that the reason they did not encourage him to apply for the roles was because they considered him a poor performer. We find that this was not because of his race.

<u>The comment admitted by Ms McNally</u>

62. There is an admission of a remark made by Ms McNally. It is admitted that in 2017 when the claimant returned from a trip to Iran in March, she jokingly asked him if he had returned with a wife. The respondent contends that this was "*not out of place in the context of the office banter".* Ms McNally now accepts that as a manager she should not have made

the comment.

63. The claimant said in oral evidence that he did not hear Ms McNally make this comment. It was reported to him. In paragraph 9 of his statement he said that she "*had the audacity to say it to [him] directly".* Ms McNally said that she made the comment in his presence and we find that she did. The comment she admitted to was asking the claimant if he had returned with a wife. This was consistent with his ET1 (page 18). In his witness statement this changed from asking if he had returned with a wife to asking if he had "*purchased*" a wife whilst away. We find that the comment made by Ms McNally was the comment she admitted which was that she asked the claimant if he had returned with a wife. We accept that this could have racial connotations.

64. It is not in dispute that a colleague Mr Slater went on holiday with his girlfriend at around the same time and came back engaged.

65. From this comment the claimant considered that Ms McNally was a self declared racist. Subsequent to the termination of his employment he viewed all her negative actions towards him as because of his Iranian ethnicity. In evidence the claimant said he thought Ms McNally had a problem not just with Iranians but Muslims in general and people "*from that region*". The claimant was asked what he meant by "*that region*". He said he meant the Middle East, Asia and areas of North Africa. Ms McNally was asked by the tribunal if she knew the claimant's religious group. She said that to the day of giving her evidence, she did not.

66. We were also told that the employee named Omar is of Iraqi origin and therefore from the "*region*" to which the claimant referred. He was not dismissed by the respondent. His employment came to an end when he was employed by one of the respondent's partners and he remains working in the same building.

67. Ms McNally agrees that she should not have made the comment and apologises for it. She admitted she said it stupidly and in jest.

68. After the comment was made about coming back with a wife, the claimant admits that he accepted an invitation and attended a Sunday roast lunch at Ms McNally's home. It was an invitation extended to about 10 employees and three employees attended. Ms McNally's husband Nathan McNally is also an employee of the respondent and the claimant's position was that he considered himself invited by Mr McNally and not Ms McNally. We did not accept this evidence. We find that the invitation was from them both to their home and Ms McNally cooked the food. Ms McNally considered the claimant a friend. She asked him about what he would like to eat at the meal and he brought gifts for her and her son.

69. The claimant made no complaint about this comment until after he was dismissed. He did not mention it in his email of 16 February 2018, six weeks after the dismissal meeting and two weeks after he left, when the

gave the CEO notice of his intention to bring these proceedings.

70. The claimant said that Ms McNally also called him a "*dirty Iranian"* in relation to loading the dishwasher. One of his duties (checklist page 121) was to make sure all 3 kitchens were tidy with any dishes in the dishwasher. The claimant did not mention this comment in his witness statement in his evidence in chief. Ms McNally denied even using the word "*Iranian"* to the claimant let alone using the word "*dirty"* together with it. She said she did not even say this in a jokey way.

71. Ms McNally was aware that the claimant was of Iranian ethnic origin. In about the second week of his employment, she asked him why on his job application he had not given his last name. He told her that his ethnic origin was Iranian and that he thought people judged him for this. Ms McNally was shocked to hear it and could not understand why anyone would judge him for this.

72. Ms McNally was asked what she had learned from these proceedings. She said she had learnt that she could not be a senior manager and be friends with the team and she had decided she could no longer take her lunch breaks with her team. She was visibly upset by this.

73. We find that Ms McNally did not call the claimant a "*dirty Iranian".* The first time this was ever mentioned by the claimant was in his oral evidence before this tribunal. If the comment had been made, it is serious and is likely to amount to racial harassment. We find that if it had been made, it was highly important to his case and the claimant would have raised it well before this hearing. We also found Ms McNally to be a credible witness who considered the claimant to be a friend and we preferred her evidence.

<u>The overtime claim</u>

74. The claimant's annual salary was £22,000 per annum for a 40 hour week. This was shown in his contract of employment at page 43, clause 3. The claimant's case was that he was entitled to £25 per hour for overtime. He relied upon a verbal agreement to this effect, made with Ms McNally in September 2017, at his desk at the front of house. The agreement was not recorded in writing.

75. In September 2017 Ms Clark reached an agreement with the respondent's partners on overtime. It was agreed that for external events the respondent would charge the external organisation £45 per hour to cover staff overtime. The respondent would then pay their staff £25 per hour for working overtime on that external event, regardless of their basic pay. It was a flat rate, regardless of grade, that applied to working overtime on external events. This was to take effect from 1 October 2017 and applied to three people, Ms Clark, Ms Rabin and the claimant.

76. Ms McNally conveyed this information to the claimant verbally at his workstation. It was not confirmed in writing. The three employees were

also told that as an alternative to overtime pay, they could take time off in lieu of working on the external event. If they chose to take it as time off, their basic rate of pay applied. The claimant's basic rate of pay was calculated by Ms McNally as £12.09 per hour. His gross annual salary was £22,000. We find that this was a generous figure based on £22,000 divided by 52 weeks and 40 hours per week.

77. As we have found above that the claimant otherwise had a contractual obligation as part of his job description to attend events to assist with event delivery which might include events outside normal working hours (page 51, penultimate bullet point).

78. Clause 6.3 of his contract stated that he agreed that he may work for more than an average of 40 hours a week and if he changed his mind he could give one weeks notice to opt out of this agreement (page 43).

79. On 12 December 2017 the claimant raised a query with Ms McNally about his overtime for November. It was around £200 less than he expected. Ms McNally replied saying: "*Please note the paid overtime is only for covering external events where CE [the respondent] gets paid a staff management fee all other overtime falls within your standard contract and salary – this is the same for all employees*." The claimant replied within 20 minutes saying "…*that would explain the deficit*" (pages 104 – 105).

80. The claimant's case in evidence was that he was the only person who had monies withheld. He accepted that he was not aware of the terms and conditions of service of other employees. He said he was told by other employees and when asked who they were he said it was Ms Clark and Ms Rabin.

81. The relevant comparators are Ms Clark and Ms Rabin who respectively are white Canadian and white British.

<u>Looking at the figures</u>

82. In his ET1 presented on 18 April 2018 the claimant said that £1,033.31 was outstanding for overtime (bundle page 18). In his email to the CEO on 30 July 2018 (page 40) the figure increased; he said that £1,164.56 was due. We saw a spreadsheet at page 52 of the bundle which arrived at this figure. The claim was for 91.5 hours at £25 per hour. The overtime claim went back to 19 January 2017. We find that the rate of £25 per hour only applied from 1 October 2017 when the new agreement was reached as to charging external providers £45 per hour for external event overtime. We find the claimant had no entitlement to £25 per hour from 19 January 2017.

83. Ms McNally's evidence was that for overtime from 20 October 2016 to 30 September 2017, it was agreed that the claimant would receive his hourly rate of £12.09.

84. The claimant has claimed all his overtime at the rate of £25 per hour. We find that this is wrong because he was not entitled to that rate until 1 October 2017. He incorrectly claims 63.5 hours from 19 January to 13 September 2017 at that rate. That is a claim for £1,587.50 which should only be claimed at £12.09. He has overclaimed for that period by £819.78.

85. Ms McNally's evidence was that one of the difficulties she had was the claimant changing his mind about how he wished to treat the time. There was the choice of overtime pay or time off in lieu. Ms Clark preferred time off in lieu. Ms Rabin preferred the overtime pay. The claimant wanted a mixture and it became hard for Ms McNally to keep track. In February 2018 she created the document we saw at pages 59-60 to help her work this out.

86. On 14 March 2017 the claimant claimed 1 hour of overtime for working on the newsletter. Ms McNally considered this part of the claimant's normal duties which he had agreed to do in discussion with Ms Clark. She decided and it is our finding that the claimant was not entitled to overtime pay for this. It was part of his normal duties. That was an overclaim of £25.

87. Ms McNally's evidence was that on 19 January 2017 there was a drinks event for a company called Capitalist. Employees of the respondent were not obliged to stay and no-one was paid. Ms Rabin attended and was not paid. We find that the claimant was not entitled to overtime for that date. As we have already discounted this to take account of the fact that the claimant was not entitled to £25 per hour in January 2017, the sum falls to be reduced by a further £12.09. The same applied for 28 June and 31 July 2017. The claim was for one hour on each date, a further overclaim of £24.18.

88. On Ms McNally's evidence attendance at the event on 24 April 2017 was optional and no member of the team was paid. The claimant claims 2.25 hours for this which for the same reason as above, we find reduces his claim at the rate of £12.09 x 2.25 = £27.20.

89. On 8 and 13 November 2017 the claimant simply claimed "overtime" unconnected to any external event. Ms McNally said that the overtime claim was because the claimant had not completed his normal duties within the working day. It was not a claim for overseeing an event and was for 1 hour on each of those dates, an overclaim of £50. On 22 November 2017 the claim was for "*overtime early morning and clean up".* Once again this was not for an external event and we find that overtime did not apply, this was an overclaim of 1 hour at the £25 rate.

90. We prefer Ms McNally's evidence for the reasons as to why overtime was not paid. Our reason for this is that the claimant clearly knew that there was a distinction in the overtime rate that applied to external events before and after 1 October 2017 yet post-dismissal he chose to prepare his spreadsheet on the basis of £25 per hour throughout. We also find that

on occasions he improperly claimed overtime for his normal duties which did not attract overtime and fell within the scope of his contract. This left a balance on his claim of £181.31.

91. We also took account of the fact that in his ET1 he claimed £1,033.31 and in his schedule at page 53 he had increased this to £1,164.56 an increase of £131.25. We discounted the increase. This left an outstanding balance of £50.06.

92. On page 105 we saw the claimant's email of 12 December 2017 which contained a complicated paragraph about using the accrued time and swapping it back between overtime and annual leave. He wanted time released back to him and swapped for annual leave. It was a confusing request.

93. We find on a balance of probabilities that Ms McNally properly paid the overtime due to the claimant and that the complex request at page 105 accounts for the balance of £50.06.

94. It is not in dispute that at no time did the claimant raise a grievance or a complaint in writing about any of the matters about which he now complains. Ms Clark said that the claimant could have come to her as his line manager with any concerns. She considered him as a friend. She was visibly upset in evidence that the claimant had not felt that he could bring his concerns to her.

The relevant law

95. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

96. Very little direct discrimination today is overt or even deliberate. The guidance from the case law tells tribunals to look for indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias – ***Anya v University of Oxford 2001 IRLR 377 CA.***

97. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

98. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(1) 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 B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

99. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

100. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

101. Section 136 provides that 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

102. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

103. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

104. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable

treatment question until after they have decided why the treatment was afforded.

105. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

106. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

107. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

108. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed.

109. The agreed list of issues confines the scope of the tribunal's enquiry. As the CA has recently confirmed in ***Scicluna –v- Zippy Stitch Ltd & Ors 2018 EWCA Civ 1320*** the claimant is limited to the issues identified in that list:

> *14 … Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case. Employment tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.*
>
> *15 In paragraphs 32-33 of Land Rover v Short (2011) UKEAT/0496/10/RN Langstaff J approved the submission of counsel that:-*
>
> *"it was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought, rather than the claims which he*

might have brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues."

So likewise must the respondent be limited to the defences set out in the agreed list of issues.

Submissions

110. We had oral submissions from each side which were fully considered but are not replicated here. Only one case was cited in submissions, ***Richmond Pharmacology*** (above) by the claimant. The only legislative provision on which submissions were made was section 26 EqA. We had no submissions on the figure work in the overtime claim.

Conclusions

Whether Ms McNally's admitted comment was in issue for the tribunal

111. It was not until closing submissions that the claimant submitted that we should find in the claimant's favour as an act of racial harassment in relation to a comment admittedly made by Ms McNally in March 2017. We reminded the parties that the issues had been identified on 18 August 2018 before Judge Tayler and confirmed before Judge Snelson on 22 November 2018 at which leave was given to amend to add harassment on those matters relied upon as direct race discrimination.

112. The issues were also confirmed with the parties by this tribunal at the start of day 1 based on those Orders. Both sides confirmed that these were the issues for our determination. No submission was made by the claimant at that point, that the tribunal should determine a harassment claim on the issue of the comment.

113. Judge Snelson was clear at paragraph 2 of his observations in the Order of 22 November 2018, that the extent of permission to pursue harassment was based on the same subject matter as the racial discrimination claim and that to the extent that a wider harassment claim was proposed, the application was refused for the reasons given orally.

114. It was submitted for the claimant that it would be unjust to the claimant for us not to determine the issue and there was no prejudice to the respondent. The respondent submitted that the case had not been presented on the basis, otherwise they would have addressed it. They had not addressed it and submitted they were therefore prejudiced.

115. It was accepted by the claimant that the comment relied upon was in early 2017 and there was a time point. We had heard no evidence on the timing of the presentation of the claim on this issue so that we could consider the just and equitable test and we had no submissions from the respondent on continuing act. We had a submission from the claimant that it was a continuing act with another comment – denied by Ms McNally – as to allegedly calling him a "*dirty Iranian*". We have found that Ms McNally did

not make this comment and therefore it is not linked to any other act.

116. We find that if the claimant wished this to be included in the list of issues, it could and should have been raised prior to closing submissions. It was only raised after the respondent had made their closing submissions, in other words at the conclusion of the hearing. The claimant was represented by counsel who understands the purpose of a list of issues.

117. The claimant told us that he took advice from counsel at the end of November 2018. As we have said above, the case was originally listed for hearing on 5 December 2018 but was postponed on the afternoon of 4 December 2018 due to lack of judicial resource. The claimant was represented by his father at the first preliminary hearing and in person at the second. We find that he had legal advice in preparation for a hearing commencing in December and there was time to deal with any concerns about the list of issues in advance of this hearing.

118. Following ***Scilcluna*** we have taken a strict approach to the list of issues and considered that whilst the comment was relevant background evidence it was not an issue for our determination. If we are wrong about this, counsel for the claimant conceded in submissions that there was a delay in bringing the claim and relied upon a continuing act with the "*dirty Iranian*" comment. This was not in the list of issues and we have found in any event that the comment was not made.

119. We therefore find that even if we are wrong on our finding as to the list of issues, the claim in relation to the comment was substantially out of time. The comment was made at its latest at the end of March 2017 and the claim was presented on 18 April 2018. The Early Conciliation rules do not operate in these circumstances to extend time and it is therefore 10 months out of time. We had no evidence from the claimant to show us why it would have been just and equitable to extend time and the respondent did not cross examine on this point as it was not understood to be in issue.

120. We also take the view that widening the scope of the harassment claim had also already been refused by Judge Snelson on 22 November 2018.

<u>Direct race discrimination</u>

121. Our finding is that the claimant has been paid his overtime. The claim for direct discrimination on this issue fails on its facts.

122. We have found firstly that the claimant was not told not to apply for the new roles and secondly that in not being encouraged to do so, this was because the respondent considered him a poor performer. It was not because of his race. No comparators were mentioned by the claimant either in evidence or submissions. We find that a hypothetical poor performer would have been treated the same whatever his or her racial group.

123. We have found that the reason for dismissal was poor performance and was not because of the claimant's race. No comparators were mentioned by the claimant either in evidence or submissions. We find that a hypothetical poor performer in the same or similar circumstances, with less than two years service, would have been dismissed in the same way (ie without a formal process) whatever his or her racial group.

Racial harassment

124. We have considered the same issues under the harassment claim. To succeed in a claim for racial harassment the claimant has to show under section 26(1)(a) that the conduct was related to the relevant protected characteristic, namely his race. We have found that his dismissal and the failure to encourage him to apply for the new roles was solely based on his poor performance. It was not unwanted conduct related to race and the harassment claim therefore fails.

The remaining claims

125. We have found as a fact that the claimant was paid his overtime pay in full and this claim fails on its facts for breach of contract, unlawful deductions, direct race discrimination and harassment.

126. We conclude by saying that we acknowledge that these proceedings were difficult and upsetting for all parties, including the claimant.

127. We drew no adverse inference from Ms McNally's ill-chosen comment. It was in the context of a friendship between them and he raised no complaint about it until after he was dismissed. He did not mention it in the February 2018 email to the CEO giving notice of his intended proceedings, after saying he had taken legal advice.

128. We find that the claimant "upped the stakes" of his claim by introducing for the very first time during oral evidence, the allegation of the "*dirty Iranian*" comment, which, had it been made, was more persuasive and significant than the comment admitted by Ms McNally. We also find that the claimant sought to make more of that comment in evidence by saying in his statement that she asked if he "purchased" rather than "returned with" a wife. We have also found that the overtime claim was inflated to apply the £25 rate across the board rather than from 1 October 2017 and to include overtime unrelated to external events.

129. For these reasons the claims fail and are dismissed. The provisional remedy hearing is vacated.

_____

Case Number: 2202442/2018

Employment Judge Elliott
Date: 15 May 2019

Judgment sent to the parties and entered in the Register on: 17 May 2019.
_____ for the Tribunals