



EMPLOYMENT TRIBUNALS

Claimant: Miss P Bertrand
Respondent: Steinhoff UK Retail Limited
Heard at: Bristol On: 24 July 2018
Before: Employment Judge Sutton QC

Representation

Claimant: Mr A. Graham, lay representative
Respondent: Mr R. Lassey, counsel.

REMEDY JUDGMENT

Default judgment having been entered in respect of her claim for unlawful discrimination on grounds of race, the Claimant is awarded compensation for injury to feelings in the sum of £500.

REASONS

The Claim

1. The Claimant brought a claim against the Respondent alleging unfair dismissal and unlawful discrimination on grounds of race. The procedural history of the claim is explained by Employment Judge Pirani in an Order sent to the parties following a case management hearing which took place on 9 April 2018 (hereafter 'the Order').
2. In short, judgment was entered against the Respondent in default in consequence of their failure to enter a response to the claim in accordance with the prescribed time limits. The complaint of unfair dismissal was dismissed by reason of the fact that the Claimant failed to satisfy the minimum service requirement to pursue such a claim.

Case Management Directions for Remedy Hearing.

3. The matter was accordingly set down for determination of the Claimant's remedy claim. It was left open to the judge with conduct of the hearing to determine the extent to which it would be appropriate to permit the Respondent to participate in the remedy hearing (paragraph 12 of Employment Judge Pirani's Case Management Summary). In the event, the Tribunal considered it fair to permit the Respondent to adduce evidence and make submissions in response to the remedy claim.
4. At the aforesaid Case Management Hearing, the learned employment judge provided clear directions to the parties, represented in the Claimant's case by Mr A. Graham, on the steps that would have to be complied with in advance of the remedy hearing. Such directions included the production of schedules of loss; disclosure of documents, including in relation to mitigation, and the exchange of witness statements.
5. The learned employment judge directed that there should be mutual exchange of witness statements (including statements of the parties themselves) by 'no later than 25 June 2018'. Employment Judge Pirani made it explicitly clear that no witness would

be permitted to give evidence, (without leave of the tribunal), unless a witness statement has been prepared and exchanged in accordance with the Order. (Order paragraph 4.2).

6. The Order made clear (paragraph 4.3) that witness statements must contain 'all the evidence upon which the witness wishes to rely' and that they must refer to documents with reference to the page numbers in the bundle. Each party was directed to ensure that sufficient copies of the witness statements intended to be relied upon were supplied to the Tribunal by 9.30 am on the morning of the hearing.

The Remedy Hearing

7. The commencement of the hearing was delayed by some 30 mins by reason of the Claimant's late arrival. At the start of the hearing, it was explained by counsel for the Respondent that the Claimant had failed to provide any witness statement of her own addressing the issues which the Tribunal would be required to consider at the remedy hearing: issues which were clearly described in paragraph 15 of Employment Judge Pirani's Order.
8. These included the level of injury to feelings award; the level of loss of earnings; the extent to which the Claimant had taken steps to mitigate her loss and the prospects that the Claimant would have been dismissed in any event.
9. Counsel for the Respondent explained that his client had acted in conformity with the Order by providing, in encrypted format, the witness statement of its sole witness, Miss C. Waddington, on the date stipulated in the Order. A few days later, the Claimant supplied a copy of a short witness statement prepared by or on behalf of Mr Graham, whereupon the an unencrypted version of Ms Waddington's witness statement was disclosed to her.
10. The Claimant, however, produced no statement of her own. Mr Graham's statement contained nothing which materially addressed the issues which the Tribunal was required to consider. She did however produce a schedule of loss setting out the basis of her financial claim in detailed and structured form, claiming losses in the total sum of £54,028.39.
11. Having explored the Claimant's appreciation of the terms of the case management Order, the Tribunal was quite satisfied that the Claimant had read the Order, including

specifically the paragraphs which addressed the need to produce witness statements; that she understood what a witness statement was (as reflected in the fact that she produced such a document on behalf of Mr Graham and indeed received Ms Waddington's) and was aware of the importance of providing to the Respondent an account of her evidence sufficient to enable it to prepare its case in advance of the hearing and to challenge her testimony, and knew that she had failed to produce such a document ahead of the hearing.

Application to strike out the Claim

12. The Respondent's counsel invited the Tribunal to exercise its powers to strike out the Claimant's remedy claim on the basis that it had no reasonable prospects of success; that there had been substantial non-compliance with the Tribunal's Order; that it could be inferred that the Claimant no longer intended to pursue her claim and finally that a fair hearing was no longer possible.
13. Having heard submissions in reply from Mr Graham, the Tribunal declined to strike out the claim. Although the Respondent had indicated to the claimant and to the Tribunal, in pre-hearing correspondence, that the Claimant was in substantial breach of the Tribunal's case management directions, and had made reference to seeking an unless order if she continued to ignore the Tribunal's direction, the Tribunal was not wholly satisfied that the Claimant was placed sufficiently on notice that she would be required to meet such an application at the start of the hearing.
14. The Tribunal noted that the Claimant had offered no excuse or explanation for her failure to comply with its Order as to witness statements. Having regard, however, to considerations of proportionality and fairness to both sides, the Tribunal concluded that the hearing could proceed if the parties confined themselves to the witness evidence they had chosen to adduce: in the Claimant's case, that of Mr Graham and in the Respondent's, that of Ms Waddington. The hearing proceeded on that basis.

Findings of Fact

15. The Claimant was employed by the Respondent as a sales assistant in one of its retail outlets known as Harveys Store, in Charlton, South East London. Her employment commenced on 28 November 2016. Section 5 of the employment contract stipulated that, at any time during the 3 month probationary period, the Claimant's employment

could be terminated if the company was not satisfied with her performance, conduct or suitability.

16. Shortly into her probationary period, the Claimant raised concerns about the conduct of her immediate manager, Sarah Field, who was assistant manager at the store. These concerns were detailed in an email from the Claimant to the Store Manager, Alton Francis, dated 29 December 2016. It is apparent that some of the Claimant's concerns were themselves triggered by critical remarks which Ms Field had made about her performance at work. She maintained that Ms Field had spoken to her in a patronising manner.
17. These concerns were dealt with under the Respondent's grievance procedure and were in due course considered by Mr Lassman, the Regional Sales Manger. Mr Lassman put in place a range of initiatives. A mediation meeting was arranged for 11 January 2017, attended by Mr Lassman, Mr Francis, Ms Field and the Claimant. The mediation did not result in improved relations between the Claimant and Ms Field, who declined to work with her.
18. On 23 January 2017, Mr Lassman called the Claimant to a meeting to inform her that her probationary employment had been unsuccessful and that she was being dismissed. She was paid a week's notice pay in lieu.
19. The reasons for Mr Lassman's decision are detailed in a letter of 26 January 2017, which sets out a range of deficiencies in the Claimant's performance under the headings of 'attendance'; 'timekeeping'; 'ability to work as part of a team' and 'attitude and insubordination'. Each criticism was explored in some detail, with reference to the explanations which the Claimant had provided for her criticised conduct. Mr Lassman noted contradictions in the Claimant's account of her dealings with store manager, whom she described, at the meeting, as 'an excellent manager'.
20. Criticisms included the assertion that the Claimant was inclined to approach colleagues' customers, in what was a commission earning environment, and that she took personal calls whilst at work. It was noted that the Claimant had repeatedly emailed Mr Lassman and HR, thereby circumventing the Store Manager, contrary to instruction. The Claimant's pattern of lateness at work and absence (for a total period of 5 days during her short time with the business) attracted some criticism.

21. The Claimant appealed Mr Lassman's decision. The appeal was in due course heard by Mr Blewett, Acting Divisional Controller. In a detailed decision letter dated 3 April 2017, Mr Blewett explained his reasons for rejecting the Claimant's appeal.
22. One of the arguments advanced by the Claimant at her appeal was that Ms Field had behaved towards her in a manner which was tainted by race. It was asserted by the Claimant that Ms Field had made negative and racist comments about two employees at the Charlton Store on the first day of her probationary employment, had refused to transfer sales into the Claimant's name and had attempted unfairly to blame the Claimant for the mistakes of others. The Claimant suggested that Ms Field saw her as a threat because she was 'a black woman'.
23. In relation to the assertion that Ms Field had made racist comments, Mr Blewett had questioned the Claimant as to why she had not raised this at the time it had allegedly occurred. Mr Blewett undertook his own investigation into Ms Field's complaint of race discrimination and maintained that he had found no evidence to substantiate any of her assertions.

Issues for determination: Remedy

24. Although, by reason of the default judgment, the allegations of race discrimination have not been assessed on their merits by the Tribunal, for the purposes of the remedy hearing the Tribunal proceeded on the basis that such allegations were established. The substance of those allegations, derived from the claim form, is helpfully summarised at paragraph 14 of the Order under the following topic headings:-
- (i) the Claimant's dismissal;
 - (ii) manager looking away;
 - (iii) not giving the Claimant praise;
 - (iv) saying the Claimant 'walked around like a manager';
 - (v) manager complaining about the Claimant and not wanting to work with her;
 - (vi) giving her 'filthy looks'
 - (vii) manager saying 'why come to her'.
25. Addressing the first of the issues for consideration at the remedy hearing, namely 'injury to feelings', the Claimant provided no evidence to explain the impact of any of

these matters upon her. The Claimant offered no medical evidence to substantiate the assertion, made on her behalf in closing submissions, that she had suffered ongoing mental health issues including anxiety and stress as a result of her experiences during her brief period of employment with the Respondent.

26. Although, in consequence of the default judgment, the Tribunal was bound to conclude that the termination of the Claimant's employment was affected by considerations of race, it was satisfied on the basis of Ms Waddington's evidence that the decision to dismiss was supported by objectively evidenced factors related to the

Claimant's deficient performance and attitude, which were wholly unconnected with the matters which she relied upon as being racially motivated. These included, by way of example only, her poor timekeeping and absence record. Ms Waddington drew upon the examples of other probationary employees whose contracts had been terminated, at the same sort of stage in their probation and on closely similar grounds.

27. The Tribunal was quite satisfied on the evidence of Ms Waddington that, absent the discriminatory behaviour alleged by the Claimant, she would nonetheless have been dismissed when she was for reasons entirely unconnected with race. Ms Waddington was clear and balanced in her evidence and the Tribunal regarded her as a credible and dependable witness. The Tribunal rejected the Claimant's claim for compensation based on loss of earnings accordingly.

28. Although it was urged upon the Tribunal by the Respondent that the Claimant should be awarded nil compensation for injury to feelings on the basis that she had failed to adduce any evidence to support that heading of claim, the Tribunal rejected that submission. Notwithstanding the lack of evidence to support this heading of claim and the Tribunal's finding that her probationary employment would have come to an end when it did for reasons entirely unconnected with the Claimant's race, the Tribunal considered that an award very much at the lower end of the spectrum was nonetheless appropriate to mark the inevitable insult of being subjected to discriminatory treatment at work. An award of £500 was just and equitable compensation for injury to feelings in the circumstances of this case.

29. The Claimant's further headings of claim for compensation were without merit, including for loss of statutory rights and a statutory uplift.

Employment Judge Sutton QC

Date: 24 July 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS