



EMPLOYMENT TRIBUNALS

Claimant: Miss G Carl

Respondent: Ant Marketing

HELD AT: Sheffield

ON: 19, 20 and 22 June 2017

BEFORE: Employment Judge Rostant

MEMBERS: Mrs S Sharma

Mr A Senior

REPRESENTATION:

Claimant: Miss Langtree (Consultant)

Respondent: Mr Sandeman (Solicitor, EEF)

JUDGMENT having been sent to the parties on 30 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 12 January 2017 the claimant raised complaints of direct discrimination because of the protected characteristics of sex and religion or belief, a complaint of victimisation, and a complaint of breach of contract. The respondent responded and applied for a hearing to have the claim struck out or any alternative deposits made on the grounds that the claims of discrimination and victimisation had no or little reasonable prospects of success.
2. That matter came before Employment Judge Brain on 8 March who dismissed the applications of the respondent by a Judgment with Reasons sent on 19 April 2017. The matter was set down by Employment Judge Brain for hearing over three days in the Sheffield Employment Tribunal and it is that hearing that this Tribunal has dealt with.

3. At the preliminary hearing the claimant was represented by Mrs B Furby, lay representative and the respondents by Mr Sandeman of the Engineering Employer's Federation a solicitor. In the hearing before us Mrs Furby did not represent the claimant, instead she was represented by Ms Langtree a consultant. The respondents were represented by Mr Sandeman.
4. In accordance with Employment Judge Brain's Orders the parties agreed a file of documents running to 468 pages and the witnesses exchanged witness statements.
5. For the claimant, the Tribunal heard the claimant herself and a former colleague Miss Aisha Najeeb. For the respondent, the Tribunal heard Mr T Balshaw, team manager, Mr J Chapman, team manager, Mr I Mirza, operations manager, gaming department, Ms D Warith (quality manager) and Miss L Hall, campaign delivery manager. In addition, the Tribunal read the unchallenged statement of Ms R Begum, petty sales agent.
6. At the outset of proceedings, the breach of contract claim based on the alleged failure by Mr D Ainsley to conduct a proper appeal was withdrawn and was dismissed by separate Judgment and Mr Ainsley was therefore not called to give evidence. The claim of sex discrimination was also withdrawn and that too is subject to a separate Judgment dismissing it.

The issues

7. The Tribunal was left with two claims for the Tribunal. The first was of direct discrimination based on religion and the second was of victimisation. The complaint of victimisation is easily defined. The claimant alleges that having had her application to attend her godfather's funeral refused she did a protected act on 27 October 2016. That protected act was to allege that the refusal was discriminatory. The claimant alleges that because she did the protected act she was dismissed from her employment. The claim in relation to race discrimination is harder to pin down. As expressed at the Preliminary Hearing that claim was as follows: Mr Mirza was consciously or subconsciously motivated to refuse the claimant's request to attend her godfather's funeral because of the difference in funeral practices between the Muslim faith and the Christian faith. The Muslim faith according to the claimant prevented women from attending a funeral whereas of course Christian funerals are open to both sexes. The case as outlined by Mrs Furby at the Preliminary Hearing was that Mr Mirza would have granted a request to a man practising the Muslim faith as that would accord with his own religion and religious beliefs. At the outset of the hearing the Tribunal were presented with a skeleton argument from Miss Langtree. That skeleton argument did not elaborate on the way in which the matter of direct discrimination had been advanced at the Preliminary Hearing. The claimant's witness statement however included photographic evidence designed to support her contention that the discrimination was based on a difference in religious practices between adherence to the Muslim and Christian faith. In particular, it included photographs of Islamic funerals where it was evident that the photographs that the mourners were only men. The claimant further gave evidence that it was not until after her dismissal when she had conducted research into the difference between Islamic and Christian approaches to funerals that she came to understand the true motivation behind Mr Mirza's refusal. However, it appeared

to the Tribunal and indeed to Mr Sandeman, that Miss Langtree shifted the way in which the claimant was putting her case during the cross-examination of Mr Mirza. Miss Langtree was invited to articulate with precision how she was now putting the case and the Employment Judge recorded the following explanation, with which Miss Langtree agreed, as an accurate description of the claimant's position.

"Mr Mirza is a Muslim. He harbours inherent bias against Christians. He knew that the claimant is a Christian because she has a godfather (the claimant's request had been to attend the funeral of her godfather and that had been relayed to Mr Mirza). He therefore knew that her request was to attend a Christian event. He was therefore pre-disposed to refuse it because of his bias".

At that point the Tribunal observed to Mr Sandeman that he could make any submissions he wished in relation to his perception that the claimant had changed tack and that that was not the case that had originally been relied on by the claimant in bringing the claim to the Tribunal and during the Preliminary Hearing.

8. Matters further developed during closing submissions. Mr Sandeman's observation was that the change of tack amounted to an application to amend the claim and the Tribunal should not grant it. Miss Langtree's submission was that it was not until the exchange of witness statements that it became obvious that the original basis on which the claim was being put could not be sustained and that that had necessitated the change of approach. It was also what had prompted the withdrawal of the claim of sex discrimination. That was a reference to the fact that the witness statements of Ms Warith, Miss Hall and Ms Begum were all to the effect that Mr Mirza had permitted them to attend funerals. Miss Langtree's submission was that in Ms Begum's case it was obvious that that was to attend the female aspect of an Islamic funeral that being Ms Begum's religion and in the case of the other two there had been no enquiry or information in relation to the religious affiliations of either the deceased or of the member of staff seeking time off and therefore nothing to alert Mr Mirza to the idea that he was dealing with a specifically Christian centred request. Miss Langtree went even further and raised a matter which had not been put to Mr Mirza. That matter was that it was against the Muslim religion to stand as a godfather for a Christian child or even to attend a baptism. Miss Langtree suggested that that fact would have caused in Mr Mirza's mind the uncomfortable idea that allowing the claimant to attend the funeral of her godfather was in some way in breach of his Islamic duty not to affirm or acknowledge the relationship of godfather to goddaughter. The Tribunal observed that that was a matter that if it was to be part of the claimant's case ought to have been put to Mr Mirza and retired to consider whether Mr Mirza ought to be recalled. We decided unanimously against the recalling of Mr Mirza giving reasons at the time. Our reasons were essentially that this was a further development of a case which had never been articulated until it began to be articulated during cross-examination, that it was significantly different to the way in which the claim had already been put and that it was based upon research into the Islamic faith which had not been established as a matter of fact before the Tribunal and which had not been drawn to the respondent's notice prior to the start of the hearing. Most importantly the proposition was such an enormous stretch from the basis for the original case (the prohibition against Muslims

standing as godparents to Christian children) that we did not think it even fair to ask Mr Mirza to respond to that question even if Mr Mirza's response would have assisted the Tribunal. Miss Langtree appeared therefore in her submissions to resile from that proposition but maintained the fact that Mr Mirza would have been alerted to the Christian nature of the request by the reference to godfather.

9. As to the claim of victimisation, the issues for the Tribunal were what the claimant had said and whether what she had said amounted to a protected act and if so whether it caused the detriment of dismissal. The Tribunal had to resolve conflicts of evidence on that point but it was not until closing submissions that Miss Langtree that even if the actual words used by the claimant did not amount in the circumstances to a protected act they would have been enough to alert the respondent to the fact the claimant was about to do a protected act and therefore prompt the dismissal. That matter too was never put to any of the respondent's witnesses and certainly was not an argument that had been articulated at any point during the Preliminary Hearing or at the outset of proceedings before the Tribunal.

The relevant law

10. Section 13 of the Equality Act 2010 defines direct discrimination as occurring when a person is treated less favourably than that person would treat another person because of a protected characteristic. In this case the Claimant relies upon the protected characteristic of religion. The Claimant is not required to identify her own religion and she does not. Section 39(2) of the Equality Act 2010 makes it unlawful for an employer to discriminate against an employee by dismissing them or subjecting them to any other detriment.
11. Victimisation is defined in section 27 of the Equality Act 2010 and it takes place when an employer subjects an employee to a detriment because the employee has done a protected act or the employer believes that the employee has or may do a protected act. A protected act is defined in subsection 2 of section 27 and in this case the relevant part is subsection 2(d), the making of an allegation whether express or not that the employer or another person has contravened the Act. Section 39(4) provides that an employer must not victimise an employee by dismissing them or subjecting them to any other detriment.
12. The burden of proof provisions require that the Claimant show such facts as could cause the Tribunal without an explanation from the Respondent to conclude that discrimination had taken place. In the case of a complaint of direct discrimination that would be to show that the conduct took place and that it was either inherently discriminatory because of a protected characteristic or the Respondent treated the Claimant differently than it would treat another person because of the protected characteristic. The treatment relied on must be proved by the Claimant and the Claimant must show such facts that would permit the Tribunal to infer that the treatment was discriminatory. In such a case the burden would then change to the Respondent to show that the reason for the treatment was in no sense at all because of the protected characteristic. In relation to a claim of victimisation, the Claimant must prove that they have done a protected act and must show the fact of detrimental treatment and such facts as would permit the Tribunal to conclude that without an explanation from the Respondent

the detrimental treatment was caused by the fact that the Claimant did the protected act.

The background facts

13. The Respondent is a telemarketing company and the Claimant was employed as a sales agent.
14. The Claimant commenced working for Ant Marketing Limited on 25 November 2015.
15. In June 2016, the Claimant began working on a campaign for customer We Buy Any Car and in September the Claimant was told that her shifts would be split so that she would work partly for We Buy Any Car and partly for a new customer Bio Eden. The Claimant was working on both of these accounts at the relevant time.
16. The Claimant's line management structure was that she was managed by two team managers Mr T Balshaw and Mr J Chapman. Those two are in turn managed by Mr M Mirza, operations manager for the gaming department. Mr Mirza has a dotted line of responsibility to Ms L Hall campaign delivery manager.
17. The Claimant was very close to her godfather. Unfortunately, towards the end of October 2016 he died.
18. The Claimant went to visit a friend in the South of England on the weekend of the 21, 22 and 23 October and had booked Monday 24 October off as a holiday.
19. By not later than 24 October the Claimant was aware of the fact that her godfather's funeral had been arranged for 28 October 2016.
20. The Claimant did not contact the Respondent on 24 October to ask for a day off for the funeral.
21. The Claimant was unable to travel back to work on 25 October as originally scheduled and rang up the Respondent to explain her absence. She did not on that occasion take the opportunity of asking for the 28th off.
22. The Claimant came to work on 26 October and on that day she requested permission for leave to attend her godfather's funeral on 28 October.
23. The matter was referred to Mr Mirza who refused permission.
24. The Claimant was unhappy about that decision.
25. On 27 October Mr Balshaw had occasion to speak to the Claimant about certain matters including the fact that she was using a personal phone at work.
26. Mr Balshaw spoke to the Claimant about the matter and told her that he would be inviting her to attend a disciplinary hearing the following week to answer his concerns.
27. Mr Balshaw then contacted Ms Remakis of human resources asking her to prepare two letters of invitation to disciplinary meetings.
28. Later in the day Mr Balshaw emailed Ms Remakis and instead of the invitation letters now asked for a letter of dismissal. Still later in that day the Claimant was advised of the fact of her dismissal.
29. The Claimant asked for the following day off as a holiday during her notice period and that too was refused.

The Tribunal's conclusions on the complaint of victimisation

30. The first matter for the Tribunal to decide is whether on the balance of the evidence the Claimant did a protected act. The Claimant alleges that during her conversation with Mr Balshaw on 27 October 2010 she alleged that the decision to refuse her permission to go on holiday was unfair, discriminatory and unequal. The Claimant further alleges that her use of those words were what prompted the change of heart on the part of Mr Balshaw causing him to move from a decision to invite the Claimant to disciplinary hearings to answer misconduct charges against her including a charge in relation to the use of a mobile phone to instead merely dismissing her. Mr Balshaw's evidence, to the contrary, is that he is not even sure that the Claimant used the word unfair although he was satisfied that she did regard the decision to refuse her permission to attend the funeral as unfair but that she certainly did not use the words unequal or discriminatory.
31. It follows that the Tribunal must therefore choose between the two conflicting versions and reach its own conclusion on the balance of probabilities about what the Claimant said, before deciding whether or not what was said could amount to a protected act. The Tribunal prefers the evidence given by Mr Balshaw to that of the Claimant on this issue. In the first place, we bear in mind the evidence that the Claimant gave us about her understanding of Mr Mirza's decision to refuse her leave to attend the holiday. Her position, held until the outset of this hearing, was that she believed that Mr Mirza's discriminatory treatment was prompted by his understanding of the proper role of women and men in funerary arrangements which in turn was founded upon his adherence to the Islamic faith. Indeed, that understanding explained the fact that the Claimant's claim was originally one of discrimination because of sex as well as religion. This understanding arose out of research that the Claimant did *subsequent to* her dismissal and in pursuit of a grievance.
32. The Claimant's grievance letter was sent on 27 October but it was not until the meeting with Ms Remakis on 3 November that the Claimant articulated the results of her research "Muslim women don't tend to go to funerals, I genuinely don't think you realise how important it was for me to be there, so I don't think you would have refused my request if I was a man".
33. As we have already observed, that line of thought was essentially abandoned during the course of this hearing but nevertheless the record of that meeting is revealing of the Claimant's mindset and how and when she developed the idea that Mr Mirza was motivated by a protected characteristic in refusing the application to attend the funeral. The Claimant's grievance letter of 22 October describes the decision not to allow her to attend her grandfather's funeral as one where the Respondent's managers failed to live up to the company ethos of promoting a sense of caring. It did not describe the decision as discriminatory or unequal. Nor yet does it describe the decision to dismiss the Claimant as caused by anything that she said to Mr Balshaw. An allegation of discrimination does appear in the meeting of 3 November but once again the Claimant does not assert that anything that she said to Mr Balshaw could have prompted her dismissal. Instead she blames her dismissal on the fact that she was threatening

to attend the funeral with or without the permission. That is true both in her statement for the meeting and during the record of the meeting.

34. Although the Claimant does mention victimisation, for the first time, in her appeal against the refusal of her grievance (see page 266) once again she ascribes the decision to dismiss her as prompted by her threatening to take the day off for the funeral in any case. The use of the word “unequal” does not emerge until the Claimant’s statements to the Tribunal and the ET1.
35. The Claimant’s explanation for not wishing to make allegations of discrimination against Mr Mirza, nor yet victimisation, which was that she was hoping that the internal grievance procedure would result in her being given her job back and she did not wish to poison the well simply does not make any sense, given the fact that by the meeting of 3 November she was perfectly willing to accuse Mr Mirza of discriminatory treatment based on her gender.
36. On balance, the Tribunal concludes, that the Claimant did not say to Mr Balshaw that she believed Mr Mirza’s decision to refuse her permission to attend the funeral was discriminatory and unequal and it follows therefore that Mr Balshaw did not relay that in to Mr Mirza in any conversation that he had with Mr Mirza and it follows her having made such an observation cannot possibly have resulted in a decision to dismiss. The Tribunal therefore finds that no protected act was made, and the claim of victimisation must fail.
37. At a relatively late stage in the proceedings the Claimant’s representative shifted tack on this part of the claim also and added for the Tribunal’s consideration the suggestion that Mr Mirza or Mr Balshaw believed that a protected act was about to be done. The difficulty with that proposition is that there is absolutely no evidence to explain what might have given them the impression that the Claimant was about to make an accusation of discrimination. Undoubtedly she was unhappy with the decision but at the time Mr Mirza refused permission he knew, as the Tribunal knows now, that he had in the past granted permission to colleagues of the Claimant to attend funerals and it appears to have taken the Claimant several days to get round to herself considering the possibility that Mr Mirza’s decision to refuse the funeral in the first place was discriminatory.
38. In addition, there is the ample evidence of other reasons for dismissal in no way associated with the possibility of a protected act having been done and which we will deal with in our conclusions on the question of the claim of direct discrimination.

The complaint of direct discrimination

39. The evidence, which the Claimant cannot challenge, is that following her application to her line managers to have the day off for the funeral Mr Balshaw and Mr Chapman took the matter to Mr Mirza. Further, it appears to be uncontroversial evidence that Mr Mirza asked to see the holiday record, which showed how many members of staff were on holiday on the relevant day. He also sought to find out through Mr Balshaw when the Claimant had learned about the date of the funeral.
40. Those findings of fact are important, bearing in mind the rival cases here. The Claimant’s contention is that Mr Mirza’s decision to refuse her permission to attend her godfather’s funeral was because of religion. Her case now is that Mr Mirza, understanding that the funeral was for her godfather, must have

concluded that the Claimant was a Christian and because of his Muslim faith must have concluded that it would have been wrong for him to permit the Claimant to attend a funeral, which permission would somehow to an affirmation or approval of the relationship of godfather to goddaughter in the Christian church. In support of this, evidence was adduced during the hearing that was contrary to the Islamic faith for Muslims to attend a baptism or to be a godfather. We have observed that that "evidence" amounted simply to information obtained from the internet and was not the subject of expert evidence before us. The Claimant no longer has the benefit of a direct comparator. The Respondent adduced before us unchallenged evidence that Mr Mirza had in the past given permission to women to attend funerals. One of those women Ms Begum is a Muslim. The other two women's faith (if any) were not explored. The Claimant asserts that the difference between her and the witnesses called by the Respondent who benefited from those permissions, was that Mr Mirza must have assumed that she was a Christian because she had a godfather. Mr Mirza was cross-examined on that and stated that he made no such assumption.

41. In cases where a hypothetical comparator is used, the application of the burden of proof can create a rather artificial series of considerations and, as in the case of **Shamoon**, it is sometimes easier to direct the enquiry as to the reason why the Respondent did what is alleged. In this case the refusal of the funeral is not in doubt. The Claimant advances a speculative reason which has changed in its basis and in its new guise, with due respect to the Claimant's representative, is even more far fetched than the first position adopted by the Claimant. It is frankly extremely difficult to see why a Muslim would regard it as contrary to their faith to permit a person, even if it was assumed that person was a Christian, to attend the funeral of that person's godfather on the basis that somehow that would amount to approving or affirming or agreeing with the relationship between godfather and goddaughter.
42. As against that we must set the reasons advanced by the Respondent. They were essentially as follows. The Respondent has a policy that no more than two members of staff can be on leave at any one time. The Claimant does not disagree that that is the policy nor does she disagree with the fact that she would have been the third member of staff to go on leave that day if leave was granted. The Respondent asserts that its holiday procedure requires notification seven days in advance of the holiday being taken. The Claimant does not disagree with that nor does she disagree with the fact that she only notified the Respondent two days before the requested leave. In the context of those matters it is entirely understandable why Mr Mirza should enquire as to what the holiday situation was and when the Claimant requested the leave. The Claimant relies on the Respondent's bereavement policy but Mr Mirza explained that the bereavement policy is applied in the cases of the death of a member of the immediate family and it did not occur to him that it applied in the case of a godfather. Although the Claimant has explained why she was closer to her godfather than might ordinarily be the case Mr Mirza was not to know that. Finally, Mr Mirza explained that both the campaigns that the Claimant was working on were in some difficulties and that insufficient staff hours had been devoted to the campaigns and that insufficient successful calls had been made in both campaigns. Accounting to the clients was done regularly and the Respondent accounted for staff hours on a monthly basis. The request to attend the funeral was for a day close to the end of the working month and as became evident from the evidence before us, which

the Claimant could not challenge, that the Claimant would not have enough time to make up the missing time before the end of the month.

43. The Tribunal therefore had to balance a highly speculative motivation advanced by the Claimant, for which there is no evidence at all, against an explanation advanced by the Respondent for which there is ample evidence. The Tribunal preferred the Respondent's explanation and concluded on balance that the reason why Mr Mirza refused the leave was that it was operationally bad for the company for the Claimant not to be at work on that particular day. Whatever the Claimant might think about that approach it is not one which has anything to do with her religion or indeed religion at all. The Claimant has complained about the fact that the Respondent made no effort to explore the possibility of persuading one or more members of staff who had booked leave for the Friday to swap leave for a day that is not evidence of discrimination. That is at most evidence of a lack of compassion.
44. Finally, we return to the reasons for the decision to dismiss. The Claimant has relied heavily on the sequence of events which resulted in her dismissal as evidence of an impermissible motive. As the Tribunal has already found, the Respondent's position towards the Claimant changed in a very short space of time. Within 20 minutes Mr Balshaw had changed from asking human resources to supply letters inviting the Claimant to disciplinary hearings in respect of the matters over which he had concerns to dismissal. The Claimant does not seriously challenge the fact that Mr Balshaw had good grounds for being concerned about her conduct on the 27th. The most serious of those grounds appears to have been the fact the Claimant had breached a very important rule about the possession of personal mobile phones on the work floor. Although it is not expressly stated as such in the Respondent's disciplinary procedure, the Respondent's managers gave evidence to the effect that the use of mobile phones was a potential gross misconduct matter and they explained that it was a matter which concerned the clients very greatly because of the possibility of the phones being used to capture confidential data. Nor does the Claimant challenge the fact that Mr Balshaw advised her that he would indeed be arranging for disciplinary hearings.
45. What then happened to change the position? The Tribunal heard evidence from Mr Balshaw, Mr Mirza and Ms Hall. The Claimant was not in a position to directly challenge their evidence which was to the effect that Mr Mirza and Ms Hall were in conversation when Mr Balshaw came over to tell Mr Mirza of his decision to invite the Claimant to a disciplinary hearing. That in turn prompted Ms Hall to ask whether the person in question (the Claimant) was the same person that she had seen Mr Balshaw in conversation earlier in that day. Mr Balshaw confirmed it was. Ms Hall then asked if that person was taking up a lot of management time and asked how long the Claimant had been employed referring to the fact that employees with less than two years service did not have protection from unfair dismissal. What is not in doubt is that that prompted an email from Mr Balshaw to human resources to ask how long the Claimant had been employed and receive a reply to the effect that she had not been employed for two years.
46. One of the matters that Mr Balshaw had been concerned about was the fact that the Claimant had been abusing her break time. On 27 October, he had observed her idling when she should be working and that prompted an investigation into her performance in relation to breaks over the previous few days showing that

she had taken excessive breaks on 17, 18, 19, 20 and 21 October totalling 68 minutes in excess. Following his conversation with Ms Hall in which she explained the various matters of concern he was prompted to contact Ms Wraith, quality assurance manager. The purpose of this was to discover whether the Claimant was an excellent performer. Ms Wraith gave unchallenged evidence to us to show that the Claimant's quality assurance records did not support the suggestion that in recent times her performance had been extremely good. That evidence was not challenged and Ms Wraith accordingly was not required to give evidence on oath. Although the Respondent was really not relying on relatively poor performance as a ground for dismissal, that being a matter that had only cropped up when Mr Balshaw had a specific check with Ms Wraith, that information meant that Mr Balshaw really had no grounds for seeking retain the Claimant in the face of her conduct on 27 and her attitude in relation to breaks previously. Indeed, the Claimant candidly admitted that her attitude had been poor although she attributed that to working on a campaign that she didn't understand or believe in. Whilst the Tribunal might deprecate a decision to dismiss without a hearing even where a person does not have the appropriate length of service to bring a claim of unfair dismissal, such a decision in this case is explained on all of the evidence before us by matters relating to the Claimant's conduct and performance and entirely unrelated to victimisation or discrimination. For all of those reasons the Tribunal dismisses this claim.

Employment Judge Rostant

Date: 3 August 2017