

# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Christine Armoo-Torto

**Respondent:** McDonald's Restaurant Limited

**Heard at:** London South

**On:** 6, 7 and 8 November 2017

**Before:** Employment Judge Mary Siddall, Ms Carol Bonner and Ms Celia Edwards

## Representation

**Claimant:** In person

**Respondent:** Mr N Caiden, Counsel

# JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The claim for unfair dismissal is well founded and it succeeds.
2. The claim for automatic unfair dismissal contrary to Section 103A of the Employment Rights Act 1996 is not well founded and it does not succeed.
3. The claims brought under sections 26 and 27 of the Equality Act 2010 of harassment and victimisation because of the protected characteristic of race do not succeed.
4. The claim that the Claimant was subjected to a detriment because she made a protected disclosure contrary to Section 47B of the Employment Rights Act 1996 does not succeed.
5. The Claimant is awarded a basic award of £741 and a compensatory award of £1843.

# REASONS

1. Following her dismissal by the Respondent on 9 November 2016 the Claimant brought claims of unfair dismissal, automatic unfair dismissal because of a protected disclosure, harassment on the grounds of race and victimisation, and a claim that she had been subjected to a detriment because she had made protected disclosures.
2. The Tribunal heard evidence over three days from 6-8 November 2017. We heard from the Claimant and from three witnesses who came in her support: Mr Anthony Newell, Mr Hussein Karimi and Ms Lesley Mckenzie. For the Respondent we heard from Mr Bholah Arvinsingh (Branch Manager), Ms Erica Stephens (an HR Officer), Mr Damian Williams who was the dismissing officer, Mr Chris Pennington who dealt with the Claimant's first grievance and Mr Mark Maher who dealt with the Claimant's second grievance.
3. The Claimant provided an additional witness statement from a Miss Sade Wright. Miss Wright did not attend and the Respondent indicated that the contents of the statement were disputed. Although we read the statement we give very little weight to it because Miss Wright was not available to be questioned.
4. The facts that we have found and the conclusions we have drawn from them are as follows.
5. The Claimant started working at the "Poppy" branch of McDonalds in September 2013.
6. On 16 February 2016 she brought a complaint about her previous line manager.
7. On 16 May 2016 Mr Arvinsingh, who was referred to by everyone as 'Jose', transferred to the Poppy store and became the new Branch Manager. On 20 May the Claimant raised a grievance alleging that she and others had been harassed by the new Branch Manager.
8. The Claimant alleges that Mr Arvinsingh did not use her name but referred to her as 'hey you' or 'hey lady'. She took this as referring to her black African ethnic origin.
9. On 20 June 2016 the Claimant made a further complaint that her branch manager was favouring staff from his previous store at Waddon. She also claimed that equipment at the store was not being cleaned properly and that out of date food was being sold to customers.
10. On 21 June an email was sent on behalf of "old Poppy crew members". The email was sent anonymously but the Claimant agreed that she sent it on behalf of staff members at the store. The email contained allegations of harassment by the Branch Manager and also alleged that the store was not being cleaned properly, that out of date food was being used and that there were other issues related to food hygiene. Attached to the email was a petition that had been signed by around twenty seven members of staff at the branch. (For some reason no copy of the petition was contained in the bundle but a copy had been sent to the Employment Tribunal by the Claimant). The Respondent does not deny receiving the petition although we note that Mr Pennington and Mr Maher stated in evidence that they had not seen it.

11. On 23 June 2016 the Claimant met with Chris Pennington to discuss her grievance. Mr Pennington later met with Mr Arvinsingh and talked to him about the complaints and about his conduct.
12. On 4 July the Claimant met with Mr Pennington and Mr Arvinsingh. This was a meeting arranged by Mr Pennington in an effort to restore working relations at the Poppy store. He reported that he felt that the meeting went well.
13. On 7 July 2016 Mr Pennington wrote to the Claimant upholding a number of her complaints but dismissing others. He did not uphold any of her complaints about food hygiene issues, but he gave the Claimant his mobile number and advised her to contact him if any other similar issues arose. During his evidence Mr Pennington said that he did not believe the Claimant's concerns about food hygiene issues at the store. No action was taken by the Respondent to investigate the concerns raised about food hygiene.
14. On 8 and 10 October 2016 the Claimant raised further complaints against her branch manager. She submitted a separate, specific complaint about the way in which the milkshake machine was being cleaned. In her email she stated that "Bholah discriminates against the employees he brought from Waddon and the old Poppy staff".
15. The tribunal were shown statements dated 12 October 2016 in which it is alleged that the Claimant called Sophie Scamp (a colleague at the Poppy store) a "jihadi bride" and that she added "hey pregnant jihadi bride, you'll be on TV as a jihadi bride". We heard that Sophie Scamp is not herself a Muslim but that she was rumoured to be going out with a Muslim employee named Saeed Ahmed. It was even rumoured that she was pregnant by him. (According to the evidence of Lesley McKenzie which was not challenged, we note that this rumour may have been started by Sophie Scamp herself, possibly in jest). The conversation was witnessed by Tim Michaelsen and by a trainee, Yahir. We have seen statements provided by Ms Scamp, Mr Ahmed and Mr Michaelsen all dated 12 October. These statements are accompanied by two further statements (one from Agnes Lorincz, a Romanian employee) alleging that the Claimant had made offensive comments to her.
16. On 13 October the Claimant met with Mark Maher to discuss her further grievances. Following that meeting the Claimant went to her GP and was signed off with stress from 13-20 October 2016.
17. It is not clear how the statements prepared by members of staff were submitted to the Respondent. Mr Arvinsingh said he was told of the allegations and advised the employees to contact HR. The statements appeared to be addressed to Mr Maher but he said he can't recollect whether he received them direct or via Mr Arvinsingh or anyone else. We have noted that all the statements appear to have been typed on the same computer.
18. However he came by them, Mr Maher asked another manager, Majdi Allan to commence an investigation. Mr Allan started his interviews on 14 October 2016 and interviewed the Claimant, Ms Lorincz, Mr Michaelsen, Ms Scamp and Mr Ahmed.
19. The Claimant's evidence is that on 17 October 2016, while she was still off sick,

she was contacted by Lesley McKenzie who asked her if she had done anything wrong and told her that staff at the branch were saying that she was going to be suspended or dismissed. The evidence of the Claimant and Ms McKenzie on this point was not challenged, and we accept that this incident took place.

20. On 21 October the Claimant was suspended on the basis of an allegation of using "obscene, vile, abusive or threatening language" to customers and staff. She was not provided with details of the statements at this point.
21. On 24 October the Claimant attended an investigation interview with Mr Allan at which details of the allegations were put to her. We find that she was briefly shown a video on Mr Allan's 'phone of CCTV footage from 12 October 2016. She was not given a copy of the CCTV footage. We have been told that the CCTV footage, which was not shown to the tribunal, showed the Claimant and Ms Scamp having two conversations on the afternoon of 12 October 2016. There was no audio accompanying the footage.
22. After conducting the investigation interviews Mr Allan decided there was a case to answer and the Claimant was requested to attend a disciplinary hearing on 31 October which was conducted by Mr Damian Williams.
23. We find that prior to the hearing the Claimant was sent both copies of the interview records from Mr Allan's investigation and also the original statements supplied by Ms Scamp, Mr Michaelsen, Mr Ahmed, Ms Lorincz and one other employee dated 12 and 13 October 2016. She was not sent the CCTV footage although she had requested that this be supplied to her.
24. When the allegations were put to her at the disciplinary hearing, the Claimant denied that she saw Sophie Scamp on the day in question. She alleged that the allegations had been made against her purely because she had raised a grievance against her branch manager, and that they were fabricated. Mr Williams adjourned the hearing to view the CCTV footage which he watched by himself in the absence of the Claimant. During the break he took advice from human resources. When the hearing resumed he advised that he wanted to carry out further investigations. On the same day, following the disciplinary hearing, Erica Stephens, HR Officer, wrote to Mark Maher highlighting a number of issues with the evidence collected to date in relation to the allegations against the Claimant, suggesting further lines of enquiry. Mr Williams said in evidence that the advice he received from HR closely resembled the matters set out in this email, although Ms Stephens said that she did not speak to Mr Williams herself. It is the evidence of Mr Maher that he did not discuss any of these matters with Mr Williams. We have to say that we find it very strange that Ms Stephens wrote to Mr Maher with such a level of detail about an ongoing disciplinary process with which he was not directly involved.
25. On 4 November 2016 Mr Williams interviewed other members of staff including Ann-Marie Gordon, Sophie Scamp, Tim Michaelsen and Flory Mursat. He did not interview Yahir, the trainee who was stated to be present during the conversation in question. He says he was told that she was not available. No explanation has been offered as to the reason for this.
26. The interviews with Ann-Marie Gordon and Flory Mursat suggested that either the alleged remarks about Romanian staff had not been said or that they had

been made, or received 'in jest'.

27. Mr Williams did not interview all the people suggested by Erica Stephens in her email of 31 October – one omission being Lesley Mckenzie.
28. On 9 November 2016 there was a further meeting with the Claimant. She was asked if there was anything else that she wanted to say, and replied that there was not. She was then advised that she was being summarily dismissed. The letter of dismissal confirms that her employment was terminated because of the remarks allegedly made to Sophie Scamp. The allegations of remarks made about Romanian staff were not pursued.
29. We note that at the meeting on 9 November Mr Williams did not provide the Claimant with any detail about the outcome of the additional investigations he had carried out. He said that he compiled a pack of information for the Claimant to take away with her but she refused to accept it. In any event by this point it is clear that the decision to dismiss her had been taken and implemented. Mr Williams said he directed that a copy of the CCTV footage be sent to the Claimant but she says this did not happen and Ms Stephens agreed that this must have been an "oversight".
30. On 17 November the Claimant received a response to her grievance lodged in October against her branch manager, set out in a letter from Mr Maher. The Claimant appealed against the grievance outcome which did not uphold a number of her complaints, but later withdrew her appeal.
31. On 18 November 2016 the Claimant indicated to the Respondent that she wanted to appeal. This was followed up by a letter from her solicitor setting out her grounds of appeal and asking to have sight of the CCTV.
32. There was a significant delay in setting up the appeal. The Claimant chased up the situation on 18 December, 28 December and 5 January. She was then given a date for her appeal of 16 January at 9.30am. The Claimant stated that she would attend. On 9 January she was contacted and told that the hearing may have to take place on 20 or 24 January. It was then reinstated for 16 January but at a new time of 12.30am. The Claimant advised the Respondent on 11 January that she would not attend the appeal as she had already been advised that the appeal would not take place on 16 January. She felt she could not go back to her new employer to change her shifts again and she also pointed out that she had notified the Respondent that attending an appeal in the middle of the day would be difficult as she needed to be at college. At that point the Respondent treated the appeal as having been abandoned.
33. We have noted (page 395A of the bundle) an email sent by Ms Stephens during the course of efforts to set up the appeal in which she described the dismissal as 'weak'. She also said that the Claimant was a 'VERY difficult employee' and suggested that she was not the sort of person whom the Respondent would want to retain.
34. On 11 November the Claimant commenced employment with Asda. Her net earnings from the Respondent had been £1,000 per calendar month and her new earnings (as taken from payslips she has provided) averaged £918 per calendar month, a net loss of £82 per month. However the Claimant was able to walk to

work at the Respondent's store and her evidence is that she now has to buy a bus pass at a cost of £95 per month. On her Schedule of Loss she states that she believed it would take her until the end of April 2018 to find full time work at an equivalent salary to that she previously earned.

Decision

***Unfair Dismissal***

35. The Respondent's case is that the Claimant was dismissed for misconduct. The Claimant alleges that the allegations against her were fabricated in order to get rid of her after she had made protected disclosures. The Respondent concedes that the Claimant made a number of protected disclosures about food hygiene issues, and that the earliest of these were made prior to 23 June 2016.
36. There are a number of features of this case which have given us concern. First the Respondent's evidence was that they have a programme of unannounced visits to stores. However despite the Claimant raising concerns about food hygiene and despite the Respondent receiving a petition signed by a number of staff at the store attached to an email which set out similar concerns, no unannounced visit was made to the Poppy store and indeed no enquiry into these allegations was carried out. Mr Pennington concedes that he did not believe her, and he simply told her that if anything happened in the future she should contact him directly.
37. We also note that Sophie Scamp's allegations against the Claimant were made just two days after the Claimant had brought a further grievance against her branch manager.
38. Despite these concerns, after taking all the evidence into account we find on the balance of probabilities that the Claimant was dismissed because of her conduct. The decision to dismiss was taken by Damian Williams who had no prior involvement in her grievances and did not know the details of them. We note that during his evidence he stated that he did not give any serious weight to the allegation of fabrication and therefore did not investigate it at all because he focused on the alleged incident and decided that it had taken place. As a result we find that he knew very little, if anything, about the detail of the earlier disclosures and did not have these in his mind when he decided that dismissal was the appropriate sanction.
39. Misconduct is a potentially fair reason for dismissal. We must then go on to find whether dismissal was reasonable in all the circumstances. In a case of misconduct we must apply the case of **Burchell v British Home Stores** and consider whether the Respondent had a genuine belief on reasonable grounds and after reasonable investigation that misconduct had occurred; and if so whether dismissal was a reasonable response.
40. When considering this test we have identified a number of concerns about the process followed by the Respondent:
  - (i) There was a failure to supply a copy of the CCTV footage to the Claimant at any stage up to or following her dismissal despite numerous requests from her and from her solicitor.

- (ii) There was a failure to provide the Claimant with details of the outcome of the further investigations made by Mr Williams following the disciplinary hearing on 31 October and the Claimant was given no opportunity to comment on the further evidence before her dismissal.
  - (iii) The Respondent has provided no satisfactory explanation as to why they did not interview a direct witness to the events of 12 October (Yahir).
  - (iv) The Respondent failed to arrange an appeal for the Claimant within a suitable time period. They then attempted to rearrange the appeal to a time that was not convenient to the Claimant. We find that the Claimant acted reasonably in deciding that ultimately she would not attend the appeal.
  - (v) We are concerned that when the Claimant complained that members of staff had heard that she was to be suspended and dismissed the Respondent did nothing to investigate this. At the very least this was a serious breach of confidentiality and at worst it could suggest a degree of conspiracy between members of staff at the Branch.
41. Despite this when the Claimant argued at the disciplinary hearing that the allegations had been fabricated because she had brought a grievance against her branch manager, Mr Williams gave no credence to this whatsoever and did not look into her allegations at all. We find that the Claimant's assertion of fabrication made it particularly important that Mr Williams should interview the other witness to the alleged incident on 12 October, Yahir, yet he failed to do so. Nor did he seek to inform himself about the prior grievances that had been raised, and the issues raised about food hygiene. Instead he focused directly on the complaints and decided that they were true. As a result he reached the conclusion that the Claimant had committed gross misconduct and took the decision to dismiss her.
42. Mr Williams placed particular weight upon the CCTV evidence, which he says showed that the Claimant had in fact spoken to Sophie Scamp on the day in question, contrary to her assertion that she had not seen her that day. We have not seen the CCTV footage but it is not in dispute that it does not reveal what was actually said between them. Our concern is that if the Claimant had been given a copy of the CCTV footage prior to the disciplinary hearing she would at least have had the opportunity to reflect further on her statement that she had not seen Ms Scamp, and on what she might have discussed with her. Advance notice of the evidence in support of allegations is a fundamental part of procedural fairness.
43. We accept that Mr Williams was entitled to place weight upon the statements supplied by Ms Scamp and Mr Michaelson as to what happened, and to decide whom he believed. However our concern about this matter is that he did not even consider the possibility that the statements may have been fabricated as part of a plan to get rid of the Claimant.
44. We have also given some weight to the contents of Ms Stephens email at page 395A. Ms Stephens was new to the business area on 31 October and we find that her comments must have reflected the views of the management directly involved with the branch. Her words suggest that the Respondent may have been keen to ensure that the Claimant's employment was terminated. This in turn resulted in her defence not being looked at with sufficient care.

45. Our conclusion taking all these matters into account is that whereas we accept that Mr Williams had reached a genuine belief that the comments had been made, the underlying investigation was flawed for the reasons set out above. The Claimant had not had sight of all the relevant evidence in advance of her dismissal, a key witness had not been interviewed and a substantial element of her defence had not been looked into at all.
46. We therefore find that the dismissal was unfair.
47. As a result we have asked ourselves what chance there was that the Respondent would have carried out a fair dismissal if the steps set out above had been taken. This is a difficult question for us to answer as it involves speculation as to what the further investigation might have revealed. We note that although there are suspicious circumstances surrounding the production of the complaint letters and the timing of these, the witnesses supported what they had said at interview. It is certainly possible that if Mr Williams had looked into the allegation of fabrication and examined the circumstances in which the statements were produced, he may have found nothing to support the Claimant's arguments. We agree that the words allegedly used would have been highly offensive in a multi-ethnic working environment and could justify dismissal if the **Burchell** test was satisfied. In all the circumstances we consider that it is appropriate to make a **Polkey** reduction of 50% to represent the chance that the assertions made by the Claimant would have come to nothing. Because we have allowed for this possibility, we find it impossible to speculate any further as to whether the Claimant did make the alleged offensive statements. In our view the Respondent has not demonstrated that it is more likely than not that the words were said and therefore we make no further separate reduction for contributory conduct.

#### Race Claims

##### ***Harassment relevant to the protected characteristic of race***

48. We accept that the Claimant's branch manager, Mr Arvinsingh may have referred to the Claimant as "hey you" or "hey lady". The Claimant asserts that this amounts to racial harassment. However we note that this seemed to be Mr Arvinsingh's manner towards other employees. For example, Mr Hussein Karimi said in evidence that Mr Arvinsingh refers to him as "lazy boy" and did not use his name.
49. The Claimant also complained that Mr Arvinsingh referred to "you people". Again she asserts that this is a reference to black africans (her ethnic background). We find on the evidence that in fact this was a reference to staff at the Poppy store as opposed to staff who are transferred from Waddon. We note Lesley McKenzie's evidence that Mr Arvinsingh had told her that he was finding the new store a real challenge and that he thought staff there were not working hard enough. She took 'you people' to be referring to Poppy staff as a whole. She described herself as black African or black Caribbean but stated that she had a good relationship with him and did not suggest that he was racist. We note also the contents of the Claimant's grievance where she states that Poppy staff were discriminated against. We find that "you people" is a reference to Poppy staff, not to people of black African heritage.



50. In conclusion we find that a claim of harassment because of race is not made out.

***Victimisation***

51. We have considered the evidence carefully but cannot find anything that would amount to a protected act. At no stage throughout all her grievances does the Claimant raise a specific complaint of race discrimination. Any victimisation claim can therefore not succeed because the Claimant is not able to show that she suffered a detriment because of making any protected act.

***Whistleblowing Detriment***

52. The Claimant alleges that she was subjected to a detriment after she made protected disclosures. She states that other members of staff were instructed to keep a close watch on her; that wholly unjustified allegations of racism towards Romanian staff were made against her; and that she was subjected to an unjustified grievance and disciplinary process.
53. No evidence was produced in support of the assertion that she was closely monitored and indeed we note the Respondent's evidence that Mr Arvinsingh was brought in to improve the performance of the Poppy store. We find that as a result he was closely monitoring the performance of all staff. The Claimant was not singled out in this respect.
54. In relation to the allegation that 'unjustified' complaints were made that the Claimant had made racist comments about Romanian members of staff, we note the statement originally made by Ms Lorincz. One witness who was interviewed suggested that such comments might have been made but only 'in jest'. We have noted that in some of her emails the Claimant makes a number of adverse comments about East European staff. We find there is no evidence that Ms Lorincz and her colleague made fabricated allegations against the Claimant even if ultimately these were not supported by other staff members and were not pursued at the dismissal hearing.
55. Finally the Claimant asserts that the statements made by Sophie Scamp and others about the incidents on 12 October were also fabricated. Overall the evidence in relation to the production of the statements is not satisfactory and it is not a matter that the Respondent ever looked into or asked the complainants about. However it is for the Claimant to prove her case and having considered all the evidence we find that this claim is not made out.
56. As a result the claim made under section 47B of the Employment Rights Act 1996 does not succeed.

**Remedy**

57. The Claimant is entitled to compensation in relation to her successful claim for unfair dismissal. Her basic award is calculated as £741 on the basis of three years' service multiplied by net earnings of £247 per week.
58. In terms of the compensatory award we have considered the Claimant's Schedule of Loss which was calculated as at 30 April 2017. In her schedule the

Claimant states that she thinks it will take her another twelve months from that date (ie until 30 April 2018) to find full-time work (she is currently working part-time at Asda on a contract for eleven hours a week but works overtime when it is available). She has a net loss following her dismissal of £82 per week in terms of earnings plus the cost of her bus pass at £95 per month. That amounts to a monthly loss of £177. To date of hearing her net loss comes to £2,124 and we award her six months of future loss (£1062) to allow for the period to 30 April 2018 which the Claimant says is the period she will need to find a job earning an equivalent amount. We have also awarded the Claimant £500 for loss of statutory rights. The total compensatory award comes to £3,686 to which we have applied the **Polkey** reduction of 50%. The amount of compensatory award is therefore £1,843 to which we add the basic award of £741, a total award of £2584.00.

Employment Judge Siddall

Date 14 November 2017