



EMPLOYMENT TRIBUNALS

Claimant: Mr M Said

Respondent: PCC Abbey Ltd

Heard at: Bristol **On:** 12 – 15 February 2018

Before: Employment Judge H Oliver
Members Mrs G A Meehan
Ms S Maidment

Representation

Claimant: Mr S Salhi

Respondent: Mr A McMillian, Counsel

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

REASONS

1. This was a claim for constructive unfair dismissal, direct race discrimination and direct religion or belief discrimination.

The issues in the case

2. The issues had been agreed at a previous Case Management Discussion as follows.
3. **Unfair Dismissal**
 - a. Whether the claimant resigned in circumstances entitling him to treat himself as being dismissed?
 - b. Whether there was a fundamental and repudiatory breach of contract by the respondent?

- c. Whether the claimant resigned in response to this breach?
 - d. Whether the claimant waived this breach or affirmed the contract, by delay or otherwise?
 - e. If necessary, whether any dismissal was for a potentially fair reason and fair in all the circumstances?
4. **Race and religion/belief discrimination.** There were also claims for direct discrimination based on race (being the claimant's colour) and on religion or belief (the claimant being a Muslim).
5. The issues here were:
- a. Whether the claimant was subjected to the detriments of which he complains?
 - b. If so, was this because of race or religion?
 - c. The detriments were set out in a schedule from the claimant that he provided after the case management discussion and listed five specific incidents. We have also in our decision looked at some additional issues that were raised during the hearing.

Evidence

6. We had a bundle of documents which we read to the extent referred to by the witnesses in their statements and by the parties during the hearing. We took the witness statements as read.
7. There was a side issue, as the claimant said he had not received all of the documents and the witness statements. The respondent's representative provided emails showing that these were provided to the claimant in advance of the hearing, although some of them were provided in stages with extra documents being added later. It appears that the claimant was confused about the extra documents being added to the bundle, and this may have caused some to have been missed out from his own bundle, but we were able to resolve this during the hearing.
8. For the claimant we heard evidence from the claimant himself. He had not prepared a written statement. He relied on the ET1 and his schedule of detriments, and also gave additional information during questioning. There were also statements from Mr Shady Debb, Mr Adel Hajri, Mr Soufian Salhi and Mr Omar Said (although he did not give oral evidence).
9. For the respondent we had statements and heard evidence from Mrs Louise Polledri and Mr Yousof Hemaïd. Ms Erzsebet Veress submitted a statement in writing only.

Facts

10. The respondent owns four Subway shops in Bristol and in Weston-Super-Mare.
11. The claimant worked for the respondent as a Shop Manager in the Regent Street shop in Weston-Super-Mare. He worked from 4 January 2011 to 18 March 2017 and his employment ended by resignation. He was responsible for running this shop. That included setting rotas, providing information to payroll, counting and ordering stock, cleaning and food hygiene. He lived in a flat above the shop. The claimant did not have any written contract of employment.
12. Mrs Louise Polledri was the Area Manager of the respondent from January 2017. She had spent the previous six months shadowing the previous Area Manager, and she is also the Director and owner of the respondent. Mrs Polledri would visit all of the shops regularly, including the claimant's shop.
13. The claimant relies on various alleged detriments as set out in his schedule provided to the Tribunal.
14. On **4 January 2017** (corrected during the claimant's evidence to **14 January 2017**) the claimant says that Mrs Polledri made him feel uncomfortable. She said in front of customers that she needed to put Peter as the manager and Kata as the assistant manager, with the claimant as the team member. The claimant's evidence was that Mrs Polledri would come to the shop all the time and would always intimidate him by making these comments. Mrs Polledri's evidence was simply that this never happened at all.
15. This is the claimant's word against that of Mrs Polledri. We have considered this carefully. The claimant was quite unclear on dates when this is alleged to have happened. We also feel that it must have been overstating the case to say that his happened every time she was in the shop. This allegation was not supported by any of his witnesses, some of whom were in the shop regularly. This raises some concern about the claimant's credibility on this point. We don't find there was sufficient evidence from elsewhere to substantiate this allegation. On balance, we prefer Mrs Polledri's evidence on this issue, and find that it did not happen as described by the claimant.
16. On **18 January 2017** the claimant alleges that Mrs Polledri disrespected him in front of customers, and she said to him why was his uniform not ironed and that he looked dirty for serving customers. The claimant says that he was always clean and tidy for serving customers and that he was always clean and tidy in appearance, and in fact Mrs Polledri agrees with this. She says she definitely did not make this comment, and also pointed out that the claimant wore a nylon uniform that did not need ironing.
17. Mr Debb gave evidence that he heard something when he was in the shop about the claimant's uniform not being clean, but he was very unclear on the detail about what he heard, exactly what was said or when this happened.
18. On balance, and in particular taking into account the fact that both the claimant and Mrs Polledri agree that his standard of cleanliness was good

and he was always neat and tidy, we find that this comment was not said to the claimant in the way that it was put by him in his list of detriments.

19. On **15 February 2017** the claimant says he was talking to customers in his own language. Mrs Polledri saw him talking to them on his break, and afterwards she told him not to bring his “foreigner friends” here. Mrs Polledri denies this completely.
20. We heard evidence on this issue from Mr Salhi, although he was unclear whether this was on 15 February or another date. He did describe how he heard Mrs Polledri say to the claimant “stop talking and get back to work” when he was a customer in the shop and they had been talking together. He recalls feeling upset, but he did not remember the rest of what he heard.
21. The Tribunal formed the view that Mr Salhi was a truthful witness as he gave very clear but also limited evidence about what he could remember. On balance, we find that Mrs Polledri did say to the claimant on a date around 15 February “stop talking and get back to work”. However, we do not find that he referred to the claimant’s “foreigner friends” or used similar racist language. This was not recalled by Mr Salhi, and we do feel that he would have remembered a comment of this nature if he had heard it.
22. On **27 February 2017** the claimant says that there was an email from Mrs Polledri to the claimant saying not to bring his unpaying friends here to eat. This did happen, and we have seen two versions of the same email.
23. These emails were in response to a customer complaint that was made on 18 February 2017. This complaint was forwarded to Mrs Polledri on 26 February, and related to friends of staff not purchasing anything and taking up too much room in the shop. Mrs Polledri sent an email on 26 February to all of those who were working in the store at the time. She said this was not acceptable, that friends and family were welcome in the store if they were buying products, and she also said “I am running a business not a meeting centre for you and your non-paying friends”. She also stated that this was a verbal warning to all staff who were sent the email, although this was not done under any kind of written procedure.
24. There was another version of this email which included a photo taken from CCTV in the shop. The photo showed the claimant and Mr Hajri, and above it the email stated “I know this is Naz and Adel I have photo evidence attached”. The name “Naz” refers to the claimant. In evidence Mrs Polledri accepted in hindsight that the second email may not have been appropriate. There is an issue about the date this was sent. We accept the explanation from Mrs Polledri that this was sent later than the first email, after Mrs Polledri had reviewed the CCTV. There is a handwritten date of 18 February at the top of this email, but we accept that this was the date of the incident being referred to and the CCTV rather than the date when it was sent.
25. Due to this confusion, the claimant was alleging that this complaint had been fabricated by the respondent. We do accept Mrs Polledri’s evidence that it was a genuine complaint, and we have seen that she went on to reply to the customer in response to that complaint.

26. The next detriment relates to **1 March 2017**. Mrs Polledri is alleged to have said to the claimant “you’re not looking for another job”, and also said that she wanted to get rid of Mr Hajri, she wanted the claimant to help, and she wanted to get rid of old management and have a new management team. Again, Mrs Polledri completely denies this. We have no witnesses, so this is a conflict of evidence between the two of them. This appears to be linked to the first allegation we have already considered about comments being made about replacing the claimant as manager. We have already found that those comments did not happen, and therefore on balance we also prefer Mrs Polledri’s evidence on this point and find that this did not happen as described by the claimant.
27. The final detriment relates to 21 March 2017, and is an allegation relating to when the claimant was acting as a witness for Mr Hajri. This occurred after he resigned, so it is not relevant to the claims for constructive dismissal or discrimination during employment. We make no finding on this point, although we note it was also denied by Mrs Polledri.
28. Those are the specific detriments set out by the claimant. There were also additional allegations in the ET1, and additional allegations that came up during the evidence. Taking into account the fact that the claimant was not legally represented in these proceedings, we felt it was right to consider these allegations as well rather than limiting him to what was set out in the list of detriments.
29. Starting with the ET1, there was a general allegation that every time Mrs Polledri came into the shop she would make comments about his skin colour, race and religion. The allegations about skin colour and race were quite vague with no specific examples. We also think it was implausible that this happened every time Mrs Polledri came to the shop, as a number of the claimant’s own witnesses said they regularly were in the shop but they did not report any of these comments. The exception is Mr Hajri, whose evidence we consider below.
30. The Tribunal specifically asked the claimant to give examples of what was said to him. The only example he could put forward were comments made in the kitchen by Mrs Polledri about replacing foreign and African managers. This was denied by Mrs Polledri. Again, this is similar to the other allegations about Mrs Polledri saying she would replace the claimant as the manager. We have found that those other incidents did not happen, and so on balance we also find that this further allegation not happen as described by the claimant.
31. Turning to Mr Hajri’s evidence, we did not find him to be a credible witness. Mr Hadri used an interpreter at the Tribunal hearing. That not necessarily an indication that he had very poor English, as witnesses who do speak reasonable English may still require an interpreter to assist in a formal court setting. However, on his own evidence when he was asked about this, he said he had very little English. He couldn’t, for example, follow a radio programme.
32. Mr Hajri claims that he heard Mrs Polledri say to the claimant that he didn’t shave, and asked why did he smell bad. In oral evidence Mr Hajri added that

Mrs Polledri would refer to the claimant by his colour, being black. However, the claimant himself did not put forward any of these particular allegations, even though the Tribunal was careful to ask him whether there was anything else that he could explain to us as examples of comments based on race that were made to him by Mrs Polledri. On the basis of Mr Hajri's own evidence that he has very poor English, and the fact that it was not the claimant's own case that these specific comments were made to him, we reject Mr Hajri's evidence. We find that this did not happen as described by Mr Hajri.

33. The claimant did give some additional oral evidence that Peter David and his wife Kata had made comments about replacing black pepper with white pepper or salt, and they would then laugh about this. He says that he complained to Mrs Polledri and she took no action. This was a verbal complaint only. Mrs Polledri denies either hearing these comments or that this was reported to her. We note this was not included in the claimant's ET1 or the list of detriments. We cannot resolve the issue of whether this said to the claimant or not, as the other individuals were not here to be asked about it. However, on balance we prefer Mrs Polledri's evidence on this point and we do not find that the claimant complained about this to Mrs Polledri and/or that she failed to deal with it.
34. Turning finally to religion or belief discrimination, the claimant did not provide any evidence about specific comments in his list of detriments, or when he was asked about this in oral evidence. However, he did make the allegation that Mrs Polledri would not allow him time off for Friday prayers, so he would use his break and make up his hours later. He says that she told him to put work first. We note that this was not included in his ET1 or the specific list of detriments. The claimant was unable to specify any particular Fridays when this happened or give any dates. He did say that the previous Area Manager allowed him time off to pray.
35. During January 2017 the claimant did not work on any Fridays, which was the start of period when Mrs Polledri had become the Area Manager, meaning this allegation can relate to February 2017 only. Mrs Polledri denies these allegations altogether, and says she never discussed prayer with the claimant or knew what he was doing about praying. Mr Hajri supported the claimant's version of events but he was very unclear on the dates, suggesting it was in January. We have also rejected his evidence on other points as being unreliable, and for the same reasons we don't find his evidence on this point was credible. The respondent also called the witness Mr Hemaïd on another point. He is also Muslim and an Assistant Manager at another shop, so he gave some oral evidence that he has been allowed to not work on Fridays in order to accommodate his prayer requirements.
36. Taking all of this into account, we find on balance that Mrs Polledri did not prevent the claimant from attending Friday prayer and the events were not as described by the claimant.
37. We now deal with the events leading to the claimant's resignation. Mrs Polledri worked for six months shadowing the Area Manager. Part of this time she spent assisting the claimant in managing his shop, and in particular coaching him in relation to ongoing issues. These issues were particularly about organisation and ordering of stock in the shop. The claimant had also

failed to take a compulsory food hygiene course, and Mrs Polledri reminded him about this a number of times. There were periodic evaluations of all shops. We have seen some of these, and they contain positive comments about the claimant's shop but also some points for improvement.

38. On 15 February 2017 Mrs Polledri sent the claimant a written list of various issues and problems about the claimant's performance. This included problems with stock ordering and food hygiene. At the end she says she believed the claimant was incapable of doing the job to the standard required. Mrs Polledri admitted in hindsight that this was not an appropriate comment to put this in this document. On 20 February 2017 a formal letter was sent to the claimant setting out various issues with performance, and on 21 February there was a meeting to discuss these issues. During the meeting Mrs Polledri referred to previous verbal warnings, and the claimant was issued with a written warning giving one month to improve his performance. The next formal meeting was due to take place on 8 March. However, the claimant was then off sick with work related stress (according to his GP note) from 3 to 18 March.
39. On 6 March 2017 the claimant sent Mrs Polledri a letter which he described as a grievance and appeal against his written warning. This included an allegation that there had been discrimination against him through the process, although it did not specify the type of discrimination. Mrs Polledri's evidence is that she was not sure when she got this letter. It was addressed to the shop where the claimant worked, so it was likely she picked it up on Wednesday 8 March.
40. Mrs Polledri postponed the planned performance meeting as the claimant was off sick, and it was rescheduled for 20 March. We have also seen a letter dated 8 March 2017. This was headed "Your grievance and appealing my written warning" and it appears to be Mrs Polledri's response to the claimant's grievance. However, the content of it relates to a further disciplinary hearing on 20 March, and it gives a list of both existing and additional allegations against the claimant. It also includes various words in square brackets and looks incomplete. It is unclear whether or not this letter was sent to the claimant. We note that in evidence Mrs Polledri initially said that it was sent (although later in re-examination she agreed with the suggestion that it may not have been sent), and the content was not correct as she was not used to following this kind of process.
41. The claimant's case is that he resigned on 3 March 2017. There is a photograph taken on the claimant's phone of a letter dated 3 March, giving an end date of 17 March. The respondent's case is that the claimant resigned on 10 March 2017 with an end date of 18 March. We have seen a copy of this alternative letter, and we have also seen a photograph of this letter on Mrs Polledri's phone as sent to her on that date by her colleague in the shop (Ross Regent). Mrs Polledri's explanation is that the claimant handed this letter to Mr Regent, she asked him to send a photograph, and we have seen the photograph and accompanying texts from that date on Mrs Polledri's phone. The two letters are slightly different in that there appears to be some correction fluid underneath some of the dates on the second letter, and some of the text and spacing is slightly different. Both letters appear to be in the same or very similar handwriting.

42. The claimant seemed to be alleging at the hearing that the respondent has fabricated the second resignation letter. It is very unclear what purpose this would have served for the respondent. It did appear during the Tribunal hearing that the claimant was genuinely confused by the various different letters included in the bundle, and he said this in response to the Tribunal's questions on this point. We do not know if the earlier letter dated 3 March was sent or not. However, having seen the evidence, we do accept that the letter of 10 March 2017 was genuine. This was written and delivered by the claimant, and Mrs Polledri relied on this as the resignation letter from the claimant as of that date.

Applicable law

43. **Constructive dismissal.** There can be a dismissal where an employee terminates the contract in circumstances where he is entitled to do so without notice by reason of the employer's conduct (section 95(1)(c) of the Employment Rights Act 1996).
44. This requires a breach of contract by the employer, such that the employer shows they no longer intend to be bound by the essential terms of the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 (CA)). It is not sufficient for there to simply be unreasonable conduct by the employer - something more is required, a significant breach which goes to the root of the contract. This fundamental breach can be due to a breach of trust and confidence, which requires conduct by the employer that is calculated or likely to destroy and/or seriously damage the relationship between the parties (*Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 (HL)). This can be a single incident, and can also be an accumulation of different incidents with a final straw.
45. **Direct discrimination.** Discrimination in employment is regulated by the Equality Act 2010 ("EA"). Both race (which includes colour) and religion or belief are protected characteristics under the EA (sections 9 and 10). Under section 13 of the EA, 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.
46. Section 136 of the EA deals with the burden of proof in discrimination cases. It is for the claimant to show facts from which the court could decide, in the absence of any other explanation, that the respondent has discriminated. It is then for the respondent to show that it did not discriminate.

Conclusions

47. We will deal first with the claims for race and religion/belief discrimination.
48. We have found that the majority of the alleged detriments did not occur as stated by the claimant. We have also found that the various additional allegations by the claimant and his witnesses in evidence about race and religion/belief discrimination did not occur as described. This leaves two remaining detriments for us to consider.

49. Firstly, Mrs Polledri telling the claimant to stop talking and get back to work, on or around 1 March 2017. The question here is - was this because of the claimant's race and/or religion? We find that it was not. This is potentially a legitimate instruction from manager, asking an employee to return to work. We have rejected the claimant's allegations that Mrs Polledri also used the words "foreign friends" or similar, which would provide a link with race. There is nothing else in the evidence we have heard to suggest this incident was affected by the claimant's race or religion.
50. Secondly, there are the emails sent on 26 February 2017, including the email containing the photograph which named the claimant and Mr Hajri. We find this is capable of being a detriment and was less favourable treatment, as the claimant was being singled out (along with Mr Hajri) in an email that was circulated to all staff. There was a verbal warning to everybody, but it was clear that this was directed at those two individuals when the photograph was included and they were named. They were the only two Muslim employees of a different race who were involved.
51. Was this because of race or religion? There is potentially sufficient evidence here to shift the burden of proof to the respondent to explain and show there was not discrimination, in circumstances where the two Muslim employees of a different race were being singled out. However, we accept Mrs Polledri's explanation that she intended to warn everybody in the shop in her first email. She then saw the CCTV, and this showed that it was the claimant and Mr Hajri who were involved, and so she sent the second email. She named them in this email because they were the only two employees involved.
52. The Tribunal would note that it is not good practice to single out two employees in this way in an email to all staff, particularly where one of them is the manager who may feel undermined by this treatment. However, we do not find that this was done because of the claimant's race or because of the claimant's religion.
53. Turning finally to constructive dismissal. The first issue is whether there was a fundamental breach of contract by the respondent. We are mindful that we are looking for more than simply unreasonable conduct by the employer.
54. We have found there was no unlawful discrimination by the respondent, so that cannot be the fundamental breach relied on by the claimant.
55. We have considered the email of 26 February 2017. We have noted that the way this was dealt with, by sending a group warning and then singling out the claimant and Mr Hajri, was not good practice. However, we do accept Mrs Polledri's reasons as to why she sent this email. The email raised legitimate concerns about conduct in one of the respondent's shops, in response to a customer complaint. Taken on its own we do not find that this was behaviour calculated and/or likely to undermine trust and confidence, or otherwise a fundamental breach of contract. It does not reach that bar.
56. The claimant also took issue more generally with the performance and disciplinary allegations. This is a claim for constructive dismissal where the claimant resigned part-way through the process. It is not our role to decide whether the disciplinary allegations were correct or not, but whether there

has been a fundamental breach of contract in the way the allegations were raised and dealt with.

57. We are satisfied on the evidence we have heard that at least some of the allegations were genuine - in particular, the stock ordering issues. We accept that Mrs Polledri had been coaching the claimant on this issue for some time, and we have seen some of the relevant figures. We have also looked at the serious hygiene issues, and in particular the claimant's failure to do the required hygiene course. These are legitimate concerns that an employer could have related to stock, hygiene and the reputation of the shop, and it was potentially correct for these to be considered by way of formal action.
58. We do find that the letter of the 8 March 2017 was not an appropriate way to respond to a grievance and an appeal sent in by the claimant on 6 March. Whether this letter was sent or not, it is clear that the respondent did not deal at all with the allegations made by the claimant in this letter - including the allegation that he was being discriminated against. This caused the Tribunal some concerns.
59. However, the claimant's case was not that he resigned in response to this letter and/or in response to a lack of action from the respondent. The claimant was insistent throughout the hearing that he resigned on 3 March, which was before these events took place. We found that actually his resignation was on 10 March. But, on the claimant's own case, the failure to deal with his grievance and appeal cannot possibly be the reason why he resigned - because he says he resigned before he sent the grievance and appeal letter. In addition, in evidence in response to questions, the claimant said that the breaches of contract were the alleged harassment incidents in the shop. Even if this failure to deal with the claimant's grievance was a fundamental breach of contract, the claimant did not resign in response to this.
60. On that basis, there was no fundamental breach of contract before the claimant resigned, and the claimant did not resign in response to any such breach. The claim for constructive dismissal cannot succeed.
61. That means the claimant's claims for unfair dismissal, race discrimination and religion or belief discrimination fail and are dismissed.

Employment Judge H Oliver

16 March 2017

Date

FOR THE TRIBUNAL OFFICE