Case Number: 3327712/2017

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Da Costa **v** **Boots Management Services Ltd**

Heard at: Watford **On**: 16, 17, 18 October 2018

Before: Employment Judge A Clarke QC
Members: Mrs L Thompson
Mrs A Brosnan

Appearances

For the Claimant: In Person
For the Respondent: Ms. J Coyne, Counsel

JUDGMENT

1. The claimant was fairly dismissed by the respondent and his claim for unfair dismissal is dismissed.

2. The claims for unlawful discrimination in respect of the refusal of permission to take leave (on 15 December 2017) and by alleging that the claimant's dismissal was significantly motivated by his religion or religious beliefs are dismissed.

REASONS

Introduction

1. The claimant brings claims of unfair dismissal and unlawful discrimination on the grounds of his religion. The acts of discrimination complained of are the refusal of a period of extended unpaid leave which refusal took place on the 15 December 2017 and his dismissal with effect from 5 May.

2. On the morning of the first day of this hearing the respondents renewed an application to postpone the hearing due to the non-availability of a key witness, Mr. White, the dismissing Manager. This application had already been turned down, including at a Telephone Preliminary Hearing on 31 August. We rejected the application on the basis that it was possible to continue to hear this case in Mr. White's absence and that the interest of justice pointed against further delay which would be of at least nine months

were the claim to be relisted. Full reasons for the rejection of the application were given orally at the time.

3. We heard from Mr. Mistry (a Deputy Manager) and Mr. Goubran (an Area Manager) who, respectively, made the decision not to grant the period of extended leave on 15 December and heard the appeal against dismissal. Both struck us as careful witnesses doing their best to assist the Tribunal. We read Mr. White's witness statement. We heard only from the claimant on his behalf.

4. The issues in the case are straightforward and it is unnecessary to record them here. They appear from our application of the law to the facts as found later in these reasons.

The facts

5. The claimant and his wife are Jehovah's Witnesses. Both were employed by the respondent at its Brent Cross Store as Customer Assistants. They had been so employed for several years and were valued members of staff. Both worked the morning shift starting at about 5.00am and finishing around 1.30pm. The claimant worked in the Haircare Department where he had specialised product knowledge. They were two of seven employees who worked that shift.

6. In 2016 the claimant and his wife applied for places on an eight-week course in Madrid designed to improve their skills in organising and running Jehovah's Witness activities. When they were accepted they asked for leave for the duration of the course. The claimant would have needed nearly 7 weeks of that period to be unpaid leave, as he had only a little over one week of his annual leave remaining. The application was made on 28 October and the course ran from 2 February to 3 April 2017. They had not alerted the respondent to the possibility of needing such unpaid leave when applying for their places.

7. The management at Brent Cross where they worked was used to receiving applications for unpaid leave from staff and tried always to accommodate them. However, they had to take account of the needs of the business at the particular time. Much always depended on who else had already booked holiday at that time and how flexible the employee could be with regard, for example, to holiday dates or duration of absence. Having reviewed the history of requests over a three-year period it is clear to us that many were refused, some were granted for a lesser period than that requested and others were granted in full. None were for a period so long as eight weeks.

8. The claimant's Line Manager, Mr. Seymour, first considered the request. He rejected it because he felt that the store could not cover adequately for their absence. Due to others with booked holidays the morning shift would be reduced, were they to be absent, from seven to three persons for significant periods in the eight weeks and there were a total of eighteen employees who had booked leave in the period, fifteen of them for a week or two weeks.

9. The claimant was told that he could take the matter further up the management chain to Mr. Mistry (who gave evidence before us) who was the store's Deputy Manager. He spoke to the claimant about the application and gave it careful consideration. He looked at the current booked absences, considered whether he could obtain cover from elsewhere in the store, considered whether persons from the weekend team could be used and considered whether cover could be obtained from casual workers. He rejected all of these courses of action for what we find to be good reasons which were not challenged in evidence by the claimant.

10. The claimant told us that the rule of thumb which employees expected to be used when seeking absence (paid or unpaid) was that no more than three employees should be away at any one time. The respondent had already exceeded that number in the period in question for part of the time. Mr. Mistry also sought to see whether anyone might be prepared to change their booked holidays, but no one would.

11. Having done all that he could to accommodate the claimant's request, Mr. Mistry told the claimant that the most that he could offer to the claimant and his wife was a period of three weeks, but this was of no use to either the claimant or his wife. At all times the respondent treated this as a joint application and the claimant confirmed that they were right to do so. There was no question of one or other of them going on the course for which they had applied and been awarded places as a couple.

12. Mr. Mistry discussed with the claimant what else he could do. They discussed the possibility of the claimant taking a sabbatical. This was available to him, but the scheme was for a year's absence and with no guarantee that the claimant could return to the same role and on the same shift pattern. The claimant was not interested. He was told that he could approach the General Manager, but not by way of appeal as the final decision was Mr. Mistry's, but by way of raising a grievance.

13. The claimant did approach the General Manager, but declined to raise a grievance against Mr. Mistry, saying that he was too busy to do so. Before us the claimant complained that this right to raise a grievance had not been made clear to him in writing. That is true. However, he accepts that he had been aware of his right to do so (from his general knowledge of the respondent's procedures) and had been remined of this by the General Manager. Hence, we consider that this point of complaint goes nowhere.

14. Rather than raising a grievance, the claimant and his wife made clear to colleagues that they intended to take the time off anyway and this they duly did. This led to precisely the level of disruption that Mr. Mistry had predicted. The claimant and his wife were expert in their respective areas and covering staff lacked their expertise. Indeed, the cover had to be provided largely by Mangers working on the shop floor and by reassigning some other staff. Turnover was affected in the areas in which they worked.

15. The claimant suggested that Mr. Mistry's decision not to grant his application was motivated by the fact that the request was for an activity closely linked to his being a Jehovah's Witness. He suggested that had the request been by someone from a different religion or for a different purpose, it would have been granted. On the contrary, we accept that the nature of the activities to be undertaken in the eight weeks was entirely irrelevant to Mr. Mistry. Indeed, he did all that he could to accommodate the claimant's request (as he would have done for anyone else's request for whatever purpose) and he did offer the possibility of three-week absences for both the claimant and his wife.

16. On his return after the course the claimant was interviewed by Mr. Liu, the Store Manager, as was Mr. Mistry. This process eventually led to the claimant being invited to a disciplinary meeting by letter of 10 April 2017. The charges were that he had taken unauthorised leave in breach of the respondent's holiday rules and that he had undermined trust and confidence by deliberately absenting himself when permission had been refused. All relevant documents were copied to the claimant with that letter, including the records of his own interviews and that of Mr. Mistry. The claimant was told that these allegations were ones of gross misconduct under the respondent's disciplinary policy (as indeed they were) and that he risked dismissal (as the policy makes clear). That he had not followed the absence policy and acted in breach of contract was not disputed by the claimant, neither did he dispute that such behaviour could constitute gross misconduct under the respondent's disciplinary policy.

17. The disciplinary hearing was conducted by Mr. White, a Store Manager hitherto not involved in these matters. As already noted, we did not hear from Mr. White, but we have carefully considered the detailed notes of his disciplinary hearing and the letter of 4 May 2017 which sets out his reasons for dismissal. The notes, whilst not verbatim, are signed on each page to indicate the claimant's acceptance of what is recorded and he did not dispute that this was an accurate (albeit not verbatim) record of what took place. We also read Mr. White's witness statement, but reminded ourselves that this was evidence which had not been challenged by way of cross-examination. It is clear to us that Mr. White looked at the matter in great detail. He gave the claimant the opportunity to explain his actions and to provide any mitigation and he kept in mind the claimant's long-service. At the end of the hearing (on 25 April) he took time to consider his decision. He would normally have informed the claimant of the outcome face-to-face at a further hearing. However, the claimant was at that time in Leeds and asked that he simply be sent the letter that he would otherwise have been given at the conclusion of such a meeting. That letter, of 4 May, found the two allegations of gross misconduct to be proved and that the claimant should be summarily dismissed.

18. At the disciplinary hearing the claimant argued that he had been discriminated against because others had been given time off when he was not. He referred (but only in very general terms) to a person previously given time off because their father was dying and to someone else given time off

for fertility treatment. Mr. White's view (which is consistent with all of the evidence that we have seen and heard) was that all such requests would have to be considered in the light of the needs of the business at the time and that the claimant's request was dealt with in exactly that way.

19. Mr. White took the view that for the claimant to absent himself from the business for eight weeks when he knew that the request for unpaid absence had been turned down on the basis that the business could not cope with such a period of absence, was an act of gross misconduct. He considered that in all the circumstances dismissal was the appropriate penalty.

20. Mr. White's decision to dismiss was said by the claimant itself to be an act motivated or influenced by the fact that he was a Jehovah's Witness and/or that the activity to be undertaken in his eight-week absence related closely to his Jehovah's Witness faith. Unlike Mr. Misty, we have not had the advantage of hearing from Mr. White in person. However, we have looked at the contemporaneous notes of the hearing he conducted, which notes that the claimant approved as already indicated above. Those notes do not in any way suggest that Mr. White's thinking was influenced by the nature of the activity to be undertaken during the eight-week period.

21. The claimant's basis for suggesting that Mr. White was so influenced is that this is the only possible explanation (so far as he is concerned) for the failure to grant the leave and as Mr. White failed to accept that, then he must have been so motivated. We reject that reasoning. As we have stated, the notes, his dismissal letter and his witness statement all support the view that he was concerned with the ability of the business to cope with the absence of these two people for eight weeks (so far as his consideration of the refusal of consent was concerned) and the wilful disobedience of the implicit instruction not to take the leave. Hence, we consider that the reason for the leave was to him entirely irrelevant. The claimant does rely in this regard upon an actual comparator (Mr. M). As we shall find below, when dealing with each of the alleged comparators, that individual's circumstances were very different from those of the claimant and in no way suggest that the claimant was in some way treated less favourably because he was a Jehovah's Witness than someone in materially similar circumstances would have been treated who did not have that faith, or was absenting themselves for an entirely different reason.

22. In closing submissions, the claimant made a point not put to the respondent's witnesses and not raised at this disciplinary hearing or the appeal hearing. He suggested that the respondent had acted unfairly because it had not followed its own procedures which require an absence letter to be sent to someone absent without permission seven days after the commencement of that period of absence. The claimant accepts that he was sent such a letter, being the first step in what turned into a disciplinary process, on his return. We do not consider that this did amount to a breach of the respondent's procedures and in any event, it was not unfair. It made complete sense not to seek to investigate the absence and consider whether to commence a disciplinary process until after the claimant had returned to work. To have sent him a letter to his last known place of residence (as the

claimant suggests should have been done) would have been entirely pointless when the respondent knew that the claimant was not there.

23. The claimant appealed against Mr. White's decision. The appeal meeting took place before an Area Manager, Mr. Goubran, on 15 June. Whether or not the appeal amounted to a re-hearing of the matter, it is clear to us that Mr. Goubran took great pains to establish the facts, to hear for himself from the claimant and to consider for himself both 'guilt' and the appropriate penalty. He did take Mr White's decision and reasoning into account.

24. As the claimant was complaining that the store should have accommodated his and his wife's requests (and only did not do so because of the link between the reason for the suggested absence and their faith) Mr Gouban had a detailed examination of the store's records undertaken to see who else had already booked holiday in the eight-week period.

25. We have seen the report made to him (which was provided to the claimant as part of the documentation provided on appeal). This established that eighteen people were to be absent for parts of that eight-week period. However, Mr. Goubran discounted a junior Manager and two persons who were to be absent for less than a week. However, the report still showed that any one time in the period in question between two and four people were to be absent for a period of one or two weeks. He concluded that the decision to deny the couple eight weeks of absence had been made for good operational reasons. The claimant accepts that if this is what the material indeed showed then that would be the case. He could not explain why it did not show that and we find that it did.

26. Mr. Goubran carefully took the claimant through his contract and the handbook and the claimant accepted to him that he knew that he had to get consent and that he had not got consent for his absence and that to absent himself in those circumstances was a very serious matter. As before us (and before Mr. White) the claimant's position was that he had been denied leave because of the link to his being a Jehovah's Witness and, hence, to absent himself without permission in those circumstances was acceptable. Like us, Mr. Goubran rejected that there was link to his being a Jehovah's Witness and accepted that the reason for the refusal was the likely impact on the store. Hence, he felt that it was clearly established that the claimant had acted very wrongly and deliberately so. He upheld the decision to dismiss.

27. We turn now to deal with the comparators relied upon by the claimant. At the preliminary hearing in his case which took place on 5 January 2018 the comparators were identified as follows:

    27.1 Ms.PP: "Who some three or four years ago was granted two months and two weeks unpaid leave to undertake IVF treatment in India."

    27.2 Mr.J: "who within the last two years or so was granted two months unpaid leave in respects of bereavement of his father.

27.3 Mr.M: "Who was not dismissed until his third occasion of unauthorised leave."

28. None of those individuals has given evidence before us. The claimant did produce a document described as "Witness Statements" the day before this hearing was to commence. It gave a brief description of the evidence which he said could be given by two of those comparators and added a further comparator. The additional comparator is a Mr.O who is said to have taken a month off some six of seven years ago for a pilgrimage to Mecca.

29. We deal with each comparator in turn. All but the last (Mr. M) are relied upon in relation to the refusal permission to take unpaid leave:

29.1 Ms.PP. She was not absent for two months and two weeks, but for two weeks paid and two weeks unpaid leave. Her request for leave had been supported by her Medical Advisor who considered that it would significantly aid her state of health. The claimant now accepts that this was the period of absence and that she may have told colleagues a different reason for her absence because she was unwilling to explain the true reason. She is presently on sick leave and the claimant did not press to have her called as a witness. Her circumstances are clearly very different from the circumstances of the claimant and his wife. The period of absence is significantly different and only one person was requesting it. Furthermore, it is the unchallenged evidence of the respondent that, at most, one other person was to be absent at the relevant time.

29.2 Mr.J. The situation is more complicated than the claimant suggested (or, possibly, knew) but he does not dispute what the respondent says. Mr.J's family came from Bangladesh. His father was dying of cancer and wished to return home. It was necessary for Mr.J to accompany him. He was granted five weeks of unpaid leave. Again, only one other person was to be absent at the same time for any significant part of that period. Again, the circumstances are materially different from those of the claimant and his wife.

29.3 Mr.O. A Mr.H was, according to the claimant, to be a witness for what happened in relation to Mr.O, but the claimant was unable to trace him. We know nothing of the circumstances of Mr.O's absence, save what Mr.H has apparently told the claimant. The differences between what the claimant understood, or recalled, and the true facts in relation to the other alleged comparators, mean that we cannot simply accept what is now alleged to be true. In saying that, we do not consider that the claimant is necessarily seeking to deceive us. However, there is the possibility for confusion and mistake. In any event, there is an obvious material difference between the claimant's case and that of Mr.O. The period of time in question is significantly less and in the claimant's case two persons were to be absent together. Of course, we know nothing of the circumstances

surrounding the request for permission, for example how long in advance it was requested, or who else was to be absent at the time.

29.4 Mr.M. Mr M. was not dismissed for taking unauthorised leave. He was given a final written warning for having stock in his pocket on the shop floor contrary to the respondent's security rules. He was dismissed when he was caught (a little later) again breaching the shop floor security rules. The dismissal of the claimant was, therefore, in materially different circumstances and the case of Mr. M provides no assistance to us whatsoever.

The law

30. We were addressed in detail on the law by Ms. Coyne. Sensibly, given that the claimant was in person, she set out all relevant basic principles with supporting authorities, taking us briefly to key passages. It is necessary for us only to set out a brief summary of the basic principles, none of which we regard as controversial.

Claim in time

31. The claim in respect of the alleged act of discrimination on 15 December 2017 is said to have been presented outside the primary limitation period of three months. The Tribunal only has jurisdiction over any particular complaint of discrimination if it is brought by the end of:

> "(a) the period of three months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable."

32. In relation to extending time into the secondary limitation period, the Employment Appeal Tribunal has made clear on a number of occasions that this is a fact sensitive matter where the Tribunal must look at the particular facts relevant to the particular case, but that what are known as the "Keeble" factors may be of assistance. These include:

32.1 The length of and reasons for the delay;
32.2 The promptness with which the claimant acts once he or she knows of the facts which are said to give rise to the claim;
32.3 The steps taken by the claimant to obtain appropriate professional advice;
32.4 The extent to which the cogency of the available evidence is likely to be affected by any period of delay;
32.5 The extent to which the party sued has cooperated with any requests for information.

33. Direct Discrimination. Section 13(1) Equality Act 2010 provides:

> "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."

34. Religion (or belief) is a protected characteristic.

35. Section 23(1) of the 2010 Act provides:

> "On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."

36. The test for whether the particular treatment relied upon is "because of" the protected characteristic (here religion) is whether that characteristic "had a significant influence on the outcome" (Nagarajan v London Regional Transport [1999] ICR 877).

37. We also have born in mind the provisions as to the burden of proof contained within section 136 of the 2010 Act. In that regard, the apparent rationality (or otherwise) of the decision making as alleged may well be relevant. In that context we have been taken to the decision of the Northern Ireland Court of Appeal in Nelson v Newry and Mourne District Council [2009] IRL 548. When considering whether an act was motivated by an improper discriminatory motive we consider that it is relevant to look to see whether the act in question appears to have been a rationale act undertaken for apparently rational reasons, or otherwise.

Unfair dismissal

38. When dealing with a claim for unfair dismissal an Employment Tribunal:

    38.1 Must find the reason for dismissal and, if it is a statutorily permissible reason, must go on to consider whether the dismissal was reasonable in all the circumstances.

    38.2 "Conduct" is a statutorily permissible reason. If that was the reason, or principle reason, for the claimant's dismissal then we must proceed to consider whether that dismissal was fair in all the circumstances.

    38.3 Fairness is a concept which relates both to the procedure adopted and the disciplinary sanction which was imposed at the end of that procedure. In this context it is not for an Employment Tribunal to substitute its own view as to the fairness of the procedure adopted, or the appropriateness of the sanction, for those of the employer. The test is whether the procedure and the penalty were within the range of responses available to a reasonable employer.

    38.4 In the context of dismissals for conduct the Court of Appeal has approved a three-fold test which it is useful for Tribunal's to adopt. That test requires the following:

        38.4.1 The employer must satisfy the Tribunal that it believed that the employee was guilty of misconduct.

        38.4.2 The Tribunal must consider whether the employer had in mind reasonable grounds upon which to sustain that belief.

38.4.3 At the stage which that belief was formed on those grounds, the Tribunal must consider whether the employer had carried out as much investigation as was reasonable in all the circumstances.

Application of law to the facts

Discrimination

39. As we have heard all of the evidence concerning the events relating to the 15 December refusal of permission and those matters are closely related to the other allegation of discrimination and to the allegation of unfair dismissal, we deal with that matter on its merits first and then turn to consider whether the claim in respect of it was brought in time.

40. We do not consider that asking ourselves whether facts have been established so as to shift the burden of proof to the respondent under section 136 is helpful in this case. We were able to (and have) looked at all the facts and reached a conclusion as to the respondent's motivation for refusing permission. Hence, we do not proceed by way of a two-stage analysis.

41. We consider that the refusal of permission had nothing whatsoever to do with the claimant's religious beliefs and everything to do with the efficient operation of the business. His comparators are not materially the same as the circumstances of his case, but they (and the other evidence we have seen and heard as to how this application and other applications were dealt with) support our conclusion that so far as the respondent is concerned each application for unpaid leave is looked at on its merits. Some absences are granted in full, some only in part and some are turned down. We are satisfied that a hypothetical comparator would have been treated the same as the claimant. For example, someone wanting to be absent for eight weeks with their wife on those dates in order to learn to become a better Scout Leader, or a better Christian or Muslim lay leader of worship, would have been dealt with in exactly the same way, as would someone wanting to be absent for reasons wholly unconnected with their faith, or lack of any faith.

42. The claim was presented outside the primary limitation period which expired on 14 March 2017. The claimant's reasons for not claiming in time are a lack of awareness of time limits and a desire to exhaust all internal processes. He says that he considered the disciplinary process as part of that internal set of processes. Having heard him cross examined on this aspect of the matter, we doubt that, at the material time, the claimant had any clear understanding of his rights and how to enforce them. Ignoring the merits of the case for present purposes, we would find that it was just and equitable to extend time to the point where the present ET1 was submitted. We consider that there is little prejudice to the respondent, given the existence of the other discrimination claim and the close factual relationship of those claims and the claim for unfair dismissal. All of the evidence would have had to be heard in any event and almost no additional submissions have had to be made. Of course, it follows from our rejection of the claim

that were one to put the strength of the claim into the balance, then the extension of time into the secondary limitation period would not have been granted.

43. We then turn to the claim for unlawful discrimination based on the claimant's dismissal. We are satisfied that the claimant was not discriminated against by reason of his religion. He was dismissed because he had deliberately absented himself without permission knowing that his absence had been considered as one which would be likely to have a serious adverse impact on the respondent's business due to the inability of the business to provide adequate cover for himself and his wife. The reason for their intended absence had no significant (indeed no) influence on that decision. A rational, sensible and detailed assessment of the needs of the business was carried out by persons who were disposed, if they could, to assist by allowing the whole or part of the absence sort. Indeed, the claimant and his wife were offered three weeks absence but this was declined. The claimant was dismissed because, against that background, he deliberately absented himself for eight weeks. As we have already noted, we find no assistance whatsoever in the circumstances of the alleged comparator, Mr.M.

Unfair Dismissal

44. We are satisfied that the reason for dismissal in this case was the claimant's conduct, being a statutorily permissible reason.

45. Hence, we turn to consider the Burchell Test. Looking at each of the three elements in turn:

    45.1 At the time of dismissal, the respondent did believe the claimant to be guilty of the misconduct in question.

    45.2 The respondent had in mind reasonable grounds upon which to sustain that belief. Indeed, as we have already noted, the claimant accepted that he was in breach of contract in a manner that amounted to gross misconduct, subject only to the excuse (or explanation) that this should not be seen in a serious light because he had been discriminated against. We have rejected the allegation of discrimination.

    45.3 Had a reasonable investigation been carried out prior to dismissal? We find that it had. We consider that the investigation which took place prior to the original decision to dismiss by Mr. White, was an investigation which was reasonable in all the circumstance. Indeed, we find it to have been a thorough investigation. Mr White did not ask that the store's absence records be looked at: he accepted that they had been considered at the time. Of course, the matter did not halt there. The claimant appealed. That appeal was conducted in a manner which involved a reconsideration of the existing materials and further detailed investigations by or on behalf of Mr. Goubran in order to see whether the underlying records at the store supported the view that careful consideration had been given to the request and

that it had been rejected for good reason, namely that many others were already booked to be absent at the time. Were there to have been any defect in the investigation hitherto, we are satisfied that it would have been made good by the extremely thorough appeal process.

45.4 Standing back from those findings, we consider that the procedure was a fair one in the sense that it was a procedure available to be adopted by a reasonable employer. We consider that the outcome, summary dismissal, was an outcome available to a reasonable employer. This was a serious breach of a clear procedure. Moreover, it was a quite deliberate breach. In reaching that conclusion, we note that the impact on the business has to be viewed not only in terms of its bottom line (profitability), but also in terms of the impact on those who had to try to provide cover for the absent claimant and his wife and also in terms of the fact that had the claimant not been dismissed this could have established (in the mind of other employees) some kind of precedent. In all of the circumstances, we consider that for this respondent to dismiss this claimant in the particular circumstances was well within the band of reasonable responses. Hence, the dismissal was a fair dismissal.

45.5 For all of those reasons all three claims within the claimant's claim form are dismissed.

_____
Employment Judge A Clarke QC

Date: …31.10.18……..

Sent to the parties on: ...07.11.18.....

.....
For the Tribunal Office