Case Number: 3304249/2018

EMPLOYMENT TRIBUNALS

Claimant
Ms. N. Ali-Beag

Respondent
Her Majesty's Prison and Probation Service

v

Heard at: Watford

On: 4 September 2019

Before: Employment Judge Heal
Miss J Stewart
Mrs A Gibson

Appearances

For the Claimant: Mr. F. Faherinia, union representative (with Ms Shehu, observer).
For the Respondent: Mr. A. Henderson, counsel.

JUDGMENT

The complaints of race and religion and belief discrimination are dismissed.

REASONS

1.By a claim form presented on 24 February 2018 the claimant made complaints of discrimination on grounds of race and/or religion or belief.

2.We have had the benefit of an agreed bundle running to 450 pages. No new documents have been added during the course of the hearing.

3. We have heard oral evidence from:

Ms Nazia Ali-Beag, the claimant;
Mr Dean Gardiner, Governor of HMP/YOI Rochester and
Mr David Bamford, Governor of HMP Brixton.

Application to amend

4. At a preliminary hearing on 21 November 2018 Employment Judge Smail noted that the parties were attempting to refine the issues and gave them directions to enable them to do so.

5. Unfortunately, the parties did not agree the issues and no final agreed list of issues was sent to the tribunal.

6. At the end of the claimant's cross examination in this hearing, the respondent's counsel noted that the paragraphs in her witness statement from paragraph 36 onward covered matters that had not been pleaded. We told the representatives that that if matters had not been 'pleaded', that is, set out in the claim form, they were not in issue and we would not expend tribunal time upon them. Mr Faherinia at that point assented to this. Accordingly, Mr Henderson for the respondent finished his cross examination.

7. After the lunch time adjournment however the claimant's representative Mr Faherinia queried whether the matters from paragraph 36 onwards were in issue. After discussion, he made an application to amend to add those matters to the claim.

8. We heard able submissions from Ms Shehu who was present as an observer and who stepped in for the claimant apparently to aid communication.

9. Mr Henderson for the respondent objected to the application to amend.

10. Ms Shehu told us that EJ Smail had said of an email dated 20 June 2018, '*you may as well put it in*', which the claimant took as permission to amend her claim to include the matters now relied upon. We considered however that there was no written order giving leave to amend on file and if EJ Smail had intended to give permission to amend he would have produced a clear written order. Therefore, we considered that the claimant did need to apply to amend.

11. After hearing argument from both sides and after deliberating, which together took the remainder of the afternoon, we refused the application.

12. The reasons (which have been requested in writing by the claimant) were these:

12.1 The claim form was presented on 24 February 2018. There was a preliminary hearing on 21 November 2018. At that preliminary hearing issues were discussed before Employment Judge Smail. He did not give any permission to amend; what he did was to give the parties directions to enable them to agree a final list of issues.

12.2 The claimant in response to those directions sent to the respondent a list of issues which now appears in our bundle at pages 56 to 59. The text of the proposed amendment is at page 57 paragraph 1V and page 58 paragraph 5II and

III. (NB the claimant did not pursue the additional claim of sex discrimination which also appeared for the first time on p57).

12.3 The version of that list of issues in our bundle contains some comments - which we understand to be respondent's counsel's comments – which variously state that the relevant passages of text are too vague, not detailed or new.

12.4 Pausing there, because the matters set out in those passages which the claimant seeks to add postdate the claim form, they cannot have been pleaded in the claim form and therefore if the claimant wishes to rely upon them, they must, by their very nature, be the subject of an application to amend.

12.5 The parties were not able to agree the list of issues and by letter dated 14 February 2019 the respondent made that problem known to the employment tribunal with a copy to the claimant's representative. We note that that letter ends saying that if the claimant does not voluntarily clarify the issues then the respondent would have no option other than to apply to the tribunal for the claimant to be ordered to clarify her claims further.

12.6 That was not done; however, we observe from that correspondence that the claimant clearly knew that the issues were not agreed. It does not in fact lie for the respondent to make an application for the claimant to clarify her claims.

12.7 If a party knows that it is not clear what the hearing will be about, and especially if that party wishes to add to the subject matter of the hearing and so has to apply for leave to amend, it is for that party to do so.

12.8 Having said that, this tribunal does have real sympathy for the difficulty faced by someone who is (in effect) a litigant in person or does not have formal legal advice and who tries to understand the degree of exactitude with which a tribunal will approach the importance of determining its jurisdiction and which matters in fact lie within the power of the tribunal. We sympathise with that difficulty and it is one of the factors that we have borne in mind when considering our decision.

12.9 However, we also bear in mind that a legally represented respondent *does* understand the way a tribunal works to identify issues so as to enable the witnesses to give evidence relevant to the matters within the tribunal's jurisdiction. It therefore cannot be criticised for having prepared its case on the basis of the matters set out in the claim form and on the basis that no application to amend had been made or granted.

12.10 The result of that is that the necessary witnesses – in particular Sarah Poynton - are not before the tribunal; moreover, there are no witness statements from them and if we permitted this application to amend, we would be compelled to grant an application to postpone.

12.11 We have applied the law as set out in *Selkent Bus Company Ltd v Moore* [1996] IRLR 661, [1996] ICR 836.

12.12 We accept Mr Henderson's analysis that this is not an entirely new claim or new cause of action not connected to the original complaint at all, but it does add new facts to an existing jurisdiction

12.13 We take into account the nature of the amendment itself which we consider to be substantial. It adds new facts and the need to call new witnesses. We take into account the timing and manner of the application. Although we understand that the claimant does not have formal legal representation, nonetheless it was clear to those representing her interests that the issues were not agreed. Yet it was only today after the end of her evidence in chief at those representing her sought to clarify the situation. We consider that the balance of hardship weighs against the claimant. If we do not allow the amendment, she still has her existing claim which can go ahead at this hearing without further delay. If we do allow it, then the hearing and the resolution of the dispute will be delayed, and the respondent put to further expense which is unlikely to be fully recovered.

12.14 Weighing it all up and taking into account our sympathy for the claimant's position, but also our concern for the delay and expense that will be caused if we permit this amendment, we have decided to reject the application.

Issues

13. Accordingly, and using the remaining issues from the claimant's list of issues, these appear to us to be the issues in the case. At Ms Shehu's request we spent further time on the second day of the hearing clarifying exactly which issues were before us to decide (We explained to the claimant and her representatives that we were not preventing her from referring to the 20 June email as evidence, say to draw an inference of discrimination, but that it was not an *issue* as such before us):

Section 13: direct discrimination on grounds of race and/or religion and belief

14. Was the claimant subject to less favourable treatment?

14.1 The claimant contends that the following acts of less favourable treatment took place:

14.1.1 the claimant's application under the Work Life Balance (WLB) scheme being refused at first instance in July/August 2017;
14.1.2 the claimant not being able to request Flexible Working Hours whilst working under the WLB; (the parties agreed that an addition in brackets on p56 of the bundle was merely comment by the drafter and not part of the issue);
14.1.3 the claimant's requests for special leave needing to be authorised by governors; and
14.1.4 the respondent requesting the police to file a false missing person report on the claimant on 26 October 2017.

14.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on actual comparators and/or hypothetical comparators. (During the hearing it became clear that the claimant was relying on names given in an email dated 20 July 2017: initially R Idowu, S Begum, M Craze, and A Kirby-Evans; in submissions Gillian Kennedy and Aline Davis were also included).

14.3 If so, has the claimant proved primary facts from which the tribunal *could* properly conclude that the difference in treatment was because of the protected characteristic?

14.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 27-victimisation

14.5 Did the claimant do a protected act?

14.5.1 The claimant relies upon the following as protected acts:

14.5.1.1 Her appeal against the refusal of her application to join the WLB scheme in August 2017 (the respondent denied that this was a protected act and in submissions Ms Shehu conceded that it was not a protected act) and/or

14.5.1.2 the claimant submitted her ET1 to the tribunal on 24 February 2018 (the respondent notes that this act post-dates both the alleged detriments and so denies its relevance).

14.6 If so, did the respondent subject the claimant to a detriment because the claimant did a protected act?

14.7 The claimant contends and the respondent denies that she was subject to the following detriments on grounds of her doing the protected acts:

14.7.1 The respondent requested the police to carry out a welfare check on the claimant on 26 October 2017.

Facts

15. We have made the following findings of fact on the balance of probability.

16. The claimant began her employment with the respondent at HMP Pentonville on 11 July 2011. She was an administrative officer. Her contract of

employment provided that she would normally work for 36 hours a week excluding meal breaks. Her contract added:

'*You will be eligible to apply to work flexible hours*.'

17. The respondent operates a variety of flexible working schemes, including, the Work Life Balance scheme, Flexible Working and Flexitime.

The Work Life Balance scheme

18. According to the respondent's policy document, a work-life balance agreement is a temporary, short-term change to an employee's pattern of hours of working to help the employee balance her work and home life effectively. It is subject to regular review and includes no changes to the employee's general terms and conditions of employment.

Flexible Working Agreement

19. According to the respondent's policy document a flexible working agreement is a permanent change to an employee's pattern or hours of working. It represents a change to the employee's general terms and conditions of employment and does not guarantee that the employee will be able to return to their original terms and conditions should they later wish to do so.

20. The respondent's policy states:

'*As an employee you may request a work-life balance or flexible working pattern.*'

21. HM Prison Service also has a Flexible Working Hours Order issued in June 2005 which provides for staff working flexible working hours.

22. The order provides as follows, so far as is relevant,

'*What are flexible working hours?*

1.1 Flexible working hours allows for flexibility in the hours of attendance for some grades of staff provided that:

a The needs of the office come first. This means that the work must be carried out efficiently and effectively and that sufficient staffing must be on duty to meet the needs of the work. Local circumstances will determine the degree of flexibility local management can allow.

2. Who is eligible for the scheme?

2.1 All groups of staff (including job sharers) in the following grades and groups:

- *Administrative…*

2.2 For job sharers and part-timers, Standard Hours means an individual's normal part-time weekly conditioned hours. Part-time staff, including job sharers will:

a. Normally be expected to attend on the same days each week unless they are taking FWH or annual leave.

b. If they work full days but less than 5 days a week, have the same locally agreed core time and flexible starting and flexible finishing time as full-time staff in the same establishment group.

c If they attend for part of each working day, have locally and individually agreed core time, starting and finishing times.

Flexitime

23. Although we were not taken to a written policy on flexitime, both parties agreed that the respondent did permit flexitime. This is separate from the work life balance or flexible working pattern agreements and is subject to management discretion and business need.

Sick absence

24. HMP Pentonville has a local sick absence procedure. This provides that before their normal start time a member of staff who is unable to work through sickness must make contact on a telephone number provided to inform the 'Centre' of their absence. The dedicated absence line is an answer machine where all staff are required to leave details of absence in one central point.

25. The 'People Hub' then informs the manager, associated line managers covering the wing/area and Functional Head. The respondent's computer system Oracle is updated.

26. The line manager makes day 1 contact with a member of staff and updates/checks that Oracle is correct and a reason for absence is recorded. The procedure says specifically, '*regular contact must be maintained and recorded*.'

27. The procedure provides for contact to be made by the line manager on day 3 of the absence. If the staff member continues to be absent on day 8, a medical certificate should be provided. Failure to establish contact on day 1, 3 or 8 will trigger the manager to make a home visit or request a police welfare check.

28. On the staff noticeboard the respondent posted a 'sickness absence/unauthorised absence' procedure. This includes the following:

'*Your line manager should make contact with you on the first day of absence. You are therefore reminded of your responsibility to ensure your home address and contact telephone numbers are correct. Please check and update your contact details via SOP/Employee self-service*.'

29. The claimant lives with her husband and two young children who at the relevant time were aged four and three. She remains employed by the respondent albeit now in a different establishment to the one relevant to this claim.

The claimant's role

30. The claimant was an administrative officer (band 3) working in the Offender Management Unit ('OMU'). Her role was based on 'hub working'. All staff were required to cover all the tasks in that administrative role responding to busy London courts. The needs of the department required there to be staff on duty between 7.30am and 5.30pm to ensure that the OMU could serve the courts effectively. On any one day a high number of Pentonville 'residents' had to be produced to or returned from court. Core hours were 10.00am to 3.30pm. However, it was necessary to have staff available for the early and late part of the day to meet the administrative requirements of the courts.

Work Life Balance application

31. On about 10 July 2017 the claimant made an application for 'Work life Balance'. The reason she gave was 'childcare'. She wanted to work Monday to Friday 8.30 to 14.30 for 6 hours with no lunch break on a start date of 1 September 2017. At about the same time other colleagues also made WLB applications. These were R Idowu and S Begum. Two further applications made by A Craze and A Kirby-Evans were approved.

32. The WLB Committee was made up of the People Hub Manager, a trade union representative, the Human Resource Business Partner, a head of function and the Deputy Governor.

33. The panel met to consider this application. (In submissions Ms Shehu questioned whether they ever did meet, however we accept Mr. Gardiner's unchallenged evidence that they met at this stage. The email of 20 July 2017 was circulated around a list of addressees consistent with the existence of a panel and it makes reference to a 'board'.) As a result, the claimant, Ms Begum and Ms Idowu were asked to go back and re-submit their applications having discussed between themselves how to make their hours together cover the working week.

34. Applications for M Craze and A Kirby-Evans were approved by the panel because they were a match to work a full week with Gillian Kennedy and Aline Davis. There was a material difference at this stage then between the claimant and her comparators M Craze and A Kirby-Evans. We accept that those two comparators are white while the claimant, Ms Idowu and Ms Begum are respectively of Bangladeshi, African and Asian origins. (The claimant's representative expressly drew out in evidence that Ms Craze and Ms Kirby Evans are white but said that we did not need to know their religion.) However, the two that were approved were a match to work a full working week, while the claimant's, Ms Idowu's and Ms Begum's applications did not make such a match, at that stage.

35. The claimant re-submitted her application on 25 July 2017 at 14:12 to Fiona Hallett. Although the other two applicants made changes to their applications (we have not seen these and do not know what happened to them), the claimant's application was unchanged. The claimant submitted a request without making reference to the two other applicants and noted that she had not changed her hours requested from her first application.

36. At some point before 21 August Ms Hallett spoke to the claimant about the request and indicated that it might be rejected.

37. The claimant chased up her request on 21 August 2017.

38. By email dated 23 August 2017 Fiona Hallett forwarded the claimant's request to Mr. Gardiner saying,

'*Please see resubmission of wlb for Nazia Ali-Beag I have already advised her that she was unlikely to get this approved as I cannot employ someone for just 7 hours but she does not seem to think her request is unreasonable I have mentioned to her about working 18.5 hrs a week as it would be easier for us to employ someone to do the same so that they were working back to back but she dismisses this and said she could not afford to lose the money. She will probably want to appeal this decision with Kevin*.'

39. Mr Gardiner rejected the request without referring it back to a panel because the panel had already met and refused the application in the same form. He did so because of the inability to re-organise work among staff and the inability to recruit additional staff. It would have been difficult to recruit an additional staff member to work for 1 hour and 24 minutes each day (this was the difference between the hours requested by the claimant and a full working day.)

40. Mr Gardiner had in mind that the needs of the department required staff to be on duty between 07.30 and 17.30 to ensure that they could provide an effective service to the courts, due to the high numbers of Pentonville residents being produced/returned daily from court.

41. The claimant's request would have had an impact on other staff in that they would have been required to have more early starts and late finishes to compensate for the hours the claimant wished to work.

42. On 25 August 2017 the claimant met with the Acting Governing Governor Kevin Reilly to hear her appeal against the refusal of her WLB request. Mr. Reilly agreed that her request would be granted for the hours and days she requested. The claimant complains in her witness statement that the meeting with Mr. Reilly was hostile, however this does not form one of the complaints before us. She also says that the WLB application plainly contributed to a later decision by the respondent to contact the police during a sick absence. However, we see no evidence linking the two.

43. The claimant's request was granted by Mr. Reilly in time for the claimant's requested start date of 4 September 2017.

No flexible working while under WLB

44. By email dated 21 September 2017 Martin Brennan, Hub Manager, wrote to the claimant confirming a discussion held on 20 September. At that stage the claimant had no leave days left and had said to Mr. Brennan that she was coming in early to be able to accrue some hours to enable her to have some periods of time off up until the next leave year. Mr. Brennan told her that she should not be doing this because she was on Work Life Balance and working to the agreed hours within WLB request. The claimant asked why she could not work with a certain amount of flexibility and Mr. Brennan suggested that specific hours had been requested and agreed, and if worktime is varied from this there appeared to be uncertainty as to why the WLB request had been made.

Special leave application to be authorised by governors.

45. On 21 September 2017 the claimant asked Mr. Brennan about taking unpaid leave and Mr. Brennan said that any request for this would have to go to the Governor but there was certainly no guarantee that it would be granted.

False Missing Person Report

46. On Monday 23 October 2017 the claimant reported sick to the OMU hub manager at 9.27am. She left a message on the answer machine on the dedicated absence line.

47. At the weekly sick meeting on Tuesday 24 October Mr. Gardiner was told that the claimant had on 23 October 2017 reported that she was sick. This was day 2 of the claimant's sick absence.

48. The claimant's absence was raised and discussed at the meeting between Mr. Gardiner, the People Hub manager, the Governor and the Human Resources Business Partner. It was noted that the claimant had previously been absent without authorisation and that the claimant had no (or very limited) annual leave left in the year. At some point but perhaps not at this meeting, there was consideration of the claimant's personal situation including safeguarding in relation to her children.

49. Mr Gardiner was told by Fiona Hallett at the meeting that the claimant's line manager had made a number of attempts to contact the claimant by 'phone, leaving a number of messages. This was in attempted compliance with the department's attendance management procedure, using the only telephone number for the claimant on file.

50. So far as Mr. Gardiner knew, respondent did not have alternative contact for the claimant.

51. Mr Gardiner thought it important to maintain contact with the claimant to find out the reason for the absence, and when she was likely to return to work. The claimant worked in a relatively small team which made it particularly important to

know when she was likely to return. Added to this, Mr. Gardiner felt a genuine concern for the claimant's well-being.

52. On 24 October, day 2 of the claimant's sick absence, Mr. Gardiner requested an update. Not having received an update, on 26 October (day 4 of the absence) he chased Martin Brennan who was her line manager and Joanne Thompson the People Hub manager. Mr. Gardiner told Mr. Brennan and Ms Thomson if the claimant did not answer then they should call the police, report that she was not contactable and ask them to attend the claimant's house and carry out a welfare check.

53. There is no evidence of any link in Mr Gardiner's thinking between this action and the claimant's work life balance application. In each case he applied rational reasoning to the issue before him. Mr. Gardiner gave the instruction to contact the police because he was concerned about the well-being of the claimant and her children because the respondent had not been able to make contact for 4 days. Mr. Gardiner was worried that the claimant was so ill that she could not answer the phone. He was concerned that potentially her children were alone while she was unwell. He asked Mr. Brennan and Ms Thomson to update him relation to the situation. The respondent's policy allows for such an action and he has carried it out in other cases.

54. By email dated 26 October 2017 at 9:02pm, Sharon Kelly the Security and CP Custodial Manager told Mr. Brennan she had received a call from the Metropolitan Police that evening regarding the claimant. The police explained they had gone to the claimant's address and when they got no reply at the door, they forced entry. The property was empty; however, they did get a response from the mobile number the respondent had given them. A female answered that she had called work and then hung up. The police phone showed that the receiver was based in Glasgow.

55. A subsequent police report dated 1 May 2018 added that the police officer was informed that the claimant had last been at work 6 days previously and that there had been no reported issues. (We note that it appears from the police documents that the police had not been told that the claimant had called in sick on the Monday). This officer reported that on arrival at the claimant's home address she knocked on the claimant door repeatedly but received no reply.

56. The police officer noted a light on inside the property and called through the letterbox. When there was no response the police officer knocked on a neighbour's door which was answered by a woman. The police officer asked the neighbour when she last saw the claimant and the neighbour said that she normally saw the claimant on most days however she had not seen her for about a week. The neighbour told the police officer that the claimant lived at the property with young children. The claimant had not mentioned to the neighbour that she was going away on a trip. The police officer then contacted the police control room to obtain the claimant's mobile telephone number and was told that a member of staff in the control room had been trying to call the claimant's mobile telephone number without success.

57. In the circumstances that the police had not been able to locate the claimant at her home address or make contact with anyone inside the property, the police officers believed that entry should be forced to the claimant's property under section 17 of the Police and Criminal Evidence Act 1984.

58. Having forced entry to the property, the police found no one in occupation. A review of the number of attempts made to contact the claimant showed the police that 10 attempts had been made to telephone the claimant on her mobile phone number before a female voice answered the phone. The police officer introduced herself as a police officer from Kentish Town Police Station and asked if the female was Nazia Ali Beag. The voice said yes and then the call was immediately disconnected.

59. When they added that information into their consideration the police (and not the respondent) made a decision to classify the claimant as a missing person.

60. The police could not say with any certainty that it was the claimant who had answered the telephone , could not rule out the possibility that her phone may have been lost or stolen or that she was under duress when she spoke briefly to them. The police were now treating the claimant as a missing person since the previous Friday.

61. The claimant found this incident extremely stressful: she returned to her home find that the police had broken down the door of her house which, together with her children she found highly traumatic. She points out that police attention of this sort to a Muslim household is particularly traumatic given the conclusions that members of the public are likely to draw.

Breach of confidentiality

62. The claimant went off work sick with stress and as a result took part in an occupational health assessment on 11 January 2018. The occupational health adviser produced a report on the same day which says (accurately recording the claimant's instruction) at the end of the report:

'*I have discussed the content of this report with Ms Nazia Ali – Beag and have the relevant consent to release this information to you*.'

63. This is addressed to the claimant's line manager Mr. Brennan.

64. On 16 January 2018 Mr. Brennan discussed the contents of this report with the claimant. On 17 January the claimant withdrew her consent for the contents of the report to be disclosed. In these circumstances we do not consider that there was any breach of confidentiality. The claimant consented to the disclosure of the contents of the report. We deal with this because it is in the claim form even though not strictly part of our list of issues.

The law

65. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

66. Expanding on that, it is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race or religion or belief. What then, is that initial level that the claimant must prove?

67. In answering that we remind ourselves that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves.

68. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly* infer discrimination.

69. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

70. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he or she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, he or she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

71. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

72. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. This is particularly likely to be so where a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as she was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

73. Some cases arise (See Martin v Devonshire's Solicitors [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Analysis

74. We have found it helpful to analyse this case using the structure of the list of issues. We set out the claimant's case in italics, using some of her numbering.

Section 13: direct discrimination on grounds of race and/or religion and belief

1. *Was the claimant subject to less favourable treatment?*

The claimant contends that the following acts of less favourable treatment took place:

I. *the claimant's application under the Work Life Balance (WLB) scheme being refused at first instance in July/August 2017.*

75. The application was refused at first instance by the panel on or about 20 July 2017. It was then again refused at first instance by Mr Gardiner on 23 August.

II. *the claimant not being able to request Flexible Working Hours whilst working under the WLB*;

76. On 20 and 21 September 2017 Mr Brennan told the claimant that she could not work Flexi time while working under a WLB.

III. *the claimant's requests for special leave needing to be authorised by governors; and*

77. The claimant's witness statement did not give any evidence about her requests for special leave needing to be authorised by governors. Strictly therefore she has not made out or proved the primary facts of her case. The only evidence before us relevant to this is that on 21 September 2017 Mr Brennan told the claimant that any request for unpaid leave would have to go to the Governor. We deal with this therefore because we have seen this email.

IV. *the respondent requesting the police to file a false missing person report on the claimant on 26 October 2017.*

78. As framed by the claimant in her list of issues, strictly this did not take place. The respondent did not request the police to file *a false missing person report*. The respondent did however contact the police on 26 October 2017 and asked them to carry out a *welfare check*. As a result, the police did visit the claimant's home and subsequently the police decided to treat the claimant as a missing person.

79. *Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on actual comparators and/or hypothetical comparators. (During the hearing it became clear that the claimant was relying on names given in an email dated 20 July 2017: initially R Idowu, S Begum , M Craze, and A Kirby-Evans; in submissions Gillian Kennedy and Aline Davis were also included).*

80. The named comparators are only relevant to issue 1 above. Ms Idowu and Ms Begum are not strictly comparators: we need comparators who were treated differently from the claiman whereas Ms Idowu and Ms Begum were treated the same as the claimant, at least in July 2017. There is a material difference between Ms Craze and Ms Kirby Evans and the claimant's case in that their applications fitted with the hours worked by others so as to create cover for a full working week. Ms Kennedy and Ms Davis are not comparators: on the evidence, they did not make applications; they are the workers with whom Ms Craze and Ms Kirby Evans fitted.

81. Therefore, we ask whether the respondent would have treated the claimant less favourably than hypothetical comparators.

82. There is no evidence that a hypothetical comparator of a different race or religion to the claimant would have been treated differently from her in any respect. Because we have below accepted the '*reason why*' for issues 1,2 and 4, this is academic for those issues, however it is relevant to issue 3 that we have heard no evidence that anyone, let alone someone of a different race or religion would not also have had to submit an application for unpaid leave to the governor.

83. *If so, has the claimant proved primary facts from which the tribunal could properly conclude that the difference in treatment was because of the protected characteristics?*

84. The answer to this is '*no*'. In relation to all the issues there is no evidence that – even if there were a comparator actual or hypothetical – that that comparator was or would have been treated differently to the claimant. This question then is academic, but there is also no evidence from which we could properly conclude that any difference in treatment was because of race or religion or belief.

85. *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

86. The explanation for the refusal of the WLB application is in two stages. The refusal by the panel (p64) is that the board requested the three applicants to re-work their applications to ensure that all work in their area was covered all day Monday to Friday.

87. Mr. Gardiner's refusal on 23 August was because he had before him an unchanged application from the claimant. Besides that, he also had an email from Fiona Hallett urging the impracticability of the application and our findings of fact show that he also refused the application because of the practical operational reasons. Without measuring it up with the applications from the claimant's two colleagues he refused the claimant's application because it was unchanged and impractical.

88. Mr. Brennan told the claimant that she could not work flexi time because, as his email of 21 September shows, he thought she should be working to the hours agreed in her WLB request. As specific hours had been agreed and requested, if work times actually varied from this then it was unclear to him why the WLB request had been made in the first place.

89. We have not been given an explanation of Mr. Brennan's assertion to the claimant on 21 September that any request for unpaid leave must go to the Governor. (We think this is because the claimant's witness statement made no reference to this matter and so it was not dealt with by the respondent in our hearing.). However, there has been no basis on which we could properly conclude that this decision was because of the claimant's race or religion or belief. Therefore, no explanation is required of the respondent.

90. Even though the respondent did not in fact request the police to file a missing person report, we look at their explanation for what they did: which was to ask the police to carry out a welfare check. Dean Gardiner did this because the claimant had called in sick on the Monday and then it was impossible to make contact with her according to the respondent's procedure. This was to confirm the well-being of the claimant and her children. He was concerned that the claimant might be ill and unable to answer her telephone.

91. For issues 1,2 and 4 we have accepted the respondent's explanation which is one which demonstrates no discrimination whatsoever. These claims fail therefore because the respondent has shown the '*reason why*'.

Time

92. This issue too is now academic. However, any act or omission which took place before 25 October 2017 is potentially out of time.

93. Therefore issues 1, 2 and 3 are all potentially out of time.

94. Because we have rejected the claims of discrimination there is no link to make them an act extending over a period.

95. The claimant's explanation as to why she did not bring her claim earlier was not set out in her witness statement, except that she says that the pattern of events did not occur to her until he meeting with Kevin Reilly on 24 November.

96. In cross examination the claimant said that she did consider that there was discrimination involved in the refusal of her WLB application at the time, but she did not make a claim because she did not need to at the time.

97. The claimant said that she could not have put in a claim earlier because although she felt she could put in a claim after the October incident she was on stress leave at the time. She felt however that the first thing to do was to submit a grievance and then take it from there.

98. We would not extend time for the issues that are out of time, bearing in mind the guidelines set out in *British Coal Corporation v Keeble* [1997] IRLR 336. The claimant knew, she says, that there was discrimination at the time of the refusal of the WLB application. She says that she did not bring a claim then because she did not think she needed to at the time. We consider that the claimant could have brought a claim earlier but chose not to do so. It was only when the police incident took place in October that she changed her view. Indeed, this has throughout been her main concern. So, she has not acted promptly when she knew of the facts giving rise to the out of time causes of action. She has proved herself well able to bring a claim when she decided to do so. The damage

to the cogency of the evidence will not have been great although there is always some risk of damage where there is delay.

99. We would not consider in these circumstances that it was just and equitable for the claimant to delay approaching ACAS until 24 January 2018.

Section 27-victimisation

4.*Did the claimant do a protected act?*

The claimant relies upon the following as protected acts:

I. *Her appeal against the refusal of her application to join the WLB scheme in August 2017* (the respondent denied that this was a protected act and in submission Ms Shehu conceded that it was not) *and/or*

II. *the claimant submitted her ET1 to the tribunal on 24 February 2018* (the respondent notes that this act post-dates both the alleged detriments and so denies that it is relevant).

3 If so, did the respondent subject to the claimant to a detriment because the claimant did a protected act?

The claimant contends and the respondent denies that she was subject to the following detriments on grounds of her doing the protected acts:

3.1.1 The respondent requested the police to carry out a welfare check on the claimant on 26 October 2017;

100. The only detriment that remains in issue is the police welfare check. This took place before the presentation of the ET1, so cannot have been *because* of the ET1. This claim must fail.

101. For all those reasons then the claims do not succeed, and we dismiss them.

_____
Employment Judge Heal

Date: 30.9.19 ……..

Sent to the parties on: .....

.....
For the Tribunal Office