



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Rana Rana

v

Bestway Wholesale Limited

Heard at: Watford
2019

On: 28-30 October

Before: Employment Judge Jack

Appearances

For the Claimant: In person

For the Respondent: Mr M Curtis - Counsel

JUDGMENT

1. The complaint of unfair dismissal fails.
2. The complaint of discrimination on grounds of religion or belief fails.
3. We refuse the respondent's application for costs.

REASONS

1. By an ET1 presented on 25 January 2018, the claimant complains of unfair dismissal and discrimination on grounds of religion or belief. Claims for a redundancy payment and other monies were not pursued.
2. The claimant appeared in person with the aid of an interpreter but he was able to make the majority of his case in English. The respondent was represented by Matthew Curtis of Counsel.
3. We heard live evidence from the following witnesses:

For the respondent:

- Hassan Azim
- Kamran Ashfaq
- Mahmood Mannan, and

- Anthony O'Connor

For the claimant:

- The claimant himself, and
 - Mohammed Laqib
4. In addition, the respondent relied on the written witness statement of Mark Darnbrook and the respondent on the written witness statement of Tahir Butt.
 5. The respondent also sought to rely on the evidence of Rizwan Pervez. His witness statement was served late. Mr Pervez had no direct knowledge of the matters in issue. In these circumstances we refused permission to rely on it on the basis that this could be revisited at any remedies hearing.
 6. In addition, on the second day of the hearing, the claimant produced some undated records which appeared to be undated signing in sheets for some salaried staff. He had, he said, found these the previous Saturday. The documents seemed of little relevance and, in any event, had not been put to the respondent's witnesses on the Monday. In so far as they were relevant there would be prejudice to the respondent from their late production and we refused to permit them to be adduced in evidence.
 7. No cases were cited to us.

The law

8. The questions of law in relation to unfair dismissal are accurately summarised in the list of issues.
9. In relation to discrimination section 13(1) of the 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."
10. Religion is a protected characteristic. The claimant complains that he was discriminated against on the ground that he is of the Ahmadi faith.
11. The burden of proof is on the claimant. However, in certain circumstances the burden can shift onto a respondent to show an absence of discrimination. Those circumstances do not arise in the current case, so we shall not set out the full law in relation to it.

The issues

12. The issues were discussed at a case management hearing on 6 July 2018. The issues were summarised as follows:

"8. **Unfair dismissal claim**

- 8.1 What was the reason for the dismissal? The claimant challenges the respondent's assertion that it was for a reason related to conduct.
 - 8.2 Did the respondent hold the belief in the claimant's misconduct upon reasonable grounds? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:
 - 8.2.1 The respondent has historically been trying to terminate the claimant's employment, taking him through a number of disciplinary actions.
 - 8.2.2 The respondent failed to carry out a reasonable investigation, in that it was common practice for staff colleagues to clock one another out.
 - 8.2.3 The claimant had not committed an act of gross misconduct by having his staff colleague clock in out from work.
 - 8.2.4 The claimant had informed his manager of his leaving work early, and had not thereby committed an act of misconduct, on leaving work when he did.
 - 8.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
 - 8.4 If the dismissal was fair, did the claimant contribute to the dismissal by culpable conduct?
 - 8.5 If the dismissal was procedurally unfair can the respondent prove that, if it had adopted a fair procedure, the claimant would have been fairly dismissed in any event, and/or to what extent and when?
- 9. Direct discrimination on grounds of Religion and Belief.**
- 9.1 Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act? namely;
 - 9.1.1 Conduct by the actions of his managers (Particulars of which are the subject of directions herein)
 - 9.1.2 Finding the charge of misconduct made out despite the practice of which the claimant was accused being widely practiced within the respondent's establishment.
 - 9.1.3 Dismissing the Claimant on grounds of gross misconduct
 - 9.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator? The claimant relies on non "Ahmadiya" Asians and/or a hypothetical comparator.
 - 9.3 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of Religion and/or Belief

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

13. So far as the particulars which were going to be given under 9.1.1 are concerned, we deal with those in the chronology. There are a number of discreet issues which do not form a course of action.

The facts

14. The respondent is a very large company with a turnover of £3 billion. The current case concerns a much smaller unit of the business called Map with a turnover of £15 to £16 million per annum. There were a total number of employees of about 30. The Unit was primarily a trading business importing food from abroad. There were two halves to the business; one was importing rice from Pakistan, which the Unit then milled. The rice was imported in 20 ft containers in 50 kilogramme sacks. The other part was foreign food products which were imported in containers and then broken down and pelletised so that the goods could be sold on.
15. There were three separate groups of employees in Map. The Administrative staff, the Warehousemen and the Milling staff. The Administrative staff were salaried workers. The Warehousemen were paid hourly. We are not concerned with the Milling staff. The Administrative staff signed in manually to note their attendance. By contrast the Warehouse staff had to clock in and clock out and were paid for the hours actually worked.
16. Turning to the chronology:
17. On 4 March 1970 the claimant was born. He started work for the respondent on either 9 or 11 August 2009. We do not need to determine which. He was employed as a Warehouse Assistant.
18. The director of Map at the time was Mozaffarullah Chowdry, who was an Ahmadi himself. The claimant's immediate supervisors were Mr Mannan and Mr Hassam Azim.
19. We should say something about the Ahmadi religion. They consider themselves as a branch of Islam. However, many branches of Islam do not consider Ahmadis as true Muslims. We heard no evidence about the doctrinal differences between Ahmadi and, without meaning any disrespect, mainstream Islam and, in any event, would be unable to resolve such issues.
20. We heard evidence that there is much tension between the different religious communities in Pakistan. However, there was no evidence that this tension existed in the Map Unit.

21. The evidence was that there were a variety of different religions in the Unit with Christians, represented particularly by Polish workers, Hindus, Sikhs, Ahmadis and mainstream Muslims.
22. As we have said, Mr Chowdry was an Ahmadi. After his retirement in 2016 he came back from time-to-time to see his old workmates. Likewise, there was another Ahmadi employed in the business who left to work as a chauffeur. He too would occasionally visit to see his former work colleagues. On 29 November 2009 the claimant says that Mr Azim inspected his locker twice. This is an incident relied on as part of the discrimination claim. The claimant has no direct evidence that Mr Azim did in fact inspect his locker. It was common ground that, if he had, nothing was taken and nothing was put into the locker. Mr Azim denied that he had inspected the locker. We find as a fact that the incident did not take place.
23. The next incident is 23 December 2010. This incident was one where the claimant needed gloves in order to clear a container of rice. Moving sacks generally requires the use of gloves. Mr Mannan is said to have shouted at him and asked why the claimant had come to his office. In our judgment this was a trivial incident of which no-one except the claimant has any recollection. The claimant made no complaint at the time. We do not find this incident is proved and in any event there is no evidence of any religious motivation for Mr Mannan to shout.
24. On 6 June 2014 the claimant complains that four workers including himself had filled up all the pallets which were available with the goods from a particular container. Mr Hassan Azim complained to the men that they had not been working and should do so and made a complaint against the claimant to his supervisor but that manager did not agree. The incident occurred when Mr Azim was doing stock-taking in the warehouse. He shouted at three men because they weren't working. They became aggressive and he went into the office. Only the claimant was an Ahmadi among the three. Mr Azim was in our judgment entitled to criticise the men for not working. There is no differentiation on religious grounds. Accordingly, we find that incident does not justify any complaint of religious discrimination.
25. Mr Laqib says that Mr Ashfaq on various occasions spoke with Mr Mannan and Mr Azim about getting rid of the claimant when Mr Chowdry retired. The claimant complains that the only reason for this was his faith. We do not accept their evidence. Mr Laqib left his work as a warehouse assistant in 2016.
26. Following Mr Chowdry's retirement in 2016 a new director of Map was appointed, Mr Anthony O'Connor. Bestway brought him in to run the business of Map in a more professional and profitable way. Before Mr O'Connor arrived it had been common for people to clock-in and clock-out on others' behalves. Mr O'Connor clamped down on this practice. He had a meeting of all staff where he said that there would be a zero-tolerance policy on clocking-in or clocking-out for others. This was reinforced by

notices at the clocking machine. The claimant accepted he had been at that meeting shortly after Mr O'Connor's appointment and knew of the new zero-tolerance policy. He accepted that he knew it was wrong to have someone else clock-in or clock-out on his behalf and that such behaviour would constitute gross misconduct. He also accepted that claiming for hours not worked was gross misconduct. He denied having seen the notice next to the clocking machine but in the light of his other admissions we consider that this is immaterial.

27. On 23 September 2016 the claimant's wife had a Caesarean section. This was followed by housing difficulties on the claimant's behalf. He says that on 1 May 2017 his landlord gave him notice to quit the house which he had been living in in Southall. We do not need to determine the truth or otherwise of that. On 15 May 2017 Ealing Borough Council gave the claimant bed and breakfast accommodation in Hayes which is much further from the premises of Map than Southall. The claimant says that he wife had serious health difficulties at this time which required him to take his children to school. The limited medical evidence we have seen does not bear this out but we do not need to determine this issue. It was common ground that the claimant never told the relevant managers at Map about any particular health difficulties of his wife at this time. Occasionally Mr Mannan would let the claimant go early if he had a particular difficulty but the claimant was always required to clock in and out when he left in this way. This was subject to checking with other supervisors that the claimant leaving would not be a problem. Mr Mannan would advise Mr Chowdry what was required.
28. On 11 July 2017 the claimant was given a verbal warning by Mr O'Connor. He explains the background to this in his witness statement at paragraph 4 where he says: "Upon a regular audit of our employee records in July 2017 it became apparent that [the claimant] was consistently working below his contracted hours. In the 27 week period between 8 January 2017 and 9 July 2017 for example [the claimant] had failed to fulfil his contractual obligations in 15 of those weeks." This was witnessed by Mahmood Mannan and can be found at page 61 of the bundle. That document substantiates what he said. The claimant had worked less than 38 hours in those 15 weeks. Mr O'Connor proceeded to say: "This was not deemed to be acceptable and [the claimant] was issued with a verbal warning by myself on 11 July 2017."
29. On 10 August 2017, so just under a month later, the claimant had a sore hand, although he may also have had some back pain. He himself wanted to be put on light duties but his supervisor sent him home instead and told him that he should visit his general practitioner. The following Monday, 14 August, the claimant arrived late for work and left early just after 1pm. He says that this was because of his wife's sickness and because his children needing collecting. He had no permission for leaving early. The following day he again arrived late and he asked Mr Ashfaq at about 10 past 12 if he could leave at 1pm because his daughter had an appointment at 4pm. Mr Ashfaq consulted Mr Azim and they together decided that they could not

spare him because they were hard pressed that day. The claimant left at 1.30pm anyway. This is particularly remarkable because he had at 10.30 that day been the subject of an investigatory meeting which Mr Digby had carried out about his absence on 14 August, in other words the previous day. As a result, on 16 August 2017 Mr Digby carried out another investigatory meeting into the claimant's absence on the Tuesday. That resulted in a disciplinary meeting before Mr O'Connor on 21 August 2017. He decided to issue a final written warning which appears at page 64. He said:

“It has been decided as an alternative to dismissal that you will be given in accordance with the company disciplinary procedure a final written warning. You are reminded that any further breach of discipline may result in demotion or dismissal. This warning will remain live on your file for 12 months. The reason for the warning is unauthorised absence and leaving the depot without permission. My findings are based on the following grounds:

- You were issued with a verbal warning in July 2017 for not fulfilling your contracted hours and this is still live on your file
- On 14 August you left site without getting permission from a member of management
- Your request to leave early on 15 August 2017 was denied. However, you chose to leave the site.

You have the right to appeal against this decision. If you decide to appeal you should do so in writing giving your reasons for appealing within five working days of receiving this letter.”

No appeal was brought by the claimant.

30. On 15 October 2017 the claimant told his supervisors that he needed to go after the end of the morning shift in order to look at a house. This was a result of the housing difficulties which had resulted in him being put in bed and breakfast accommodation in Hayes. The following day, 16th, the claimant left before 1 o'clock in the afternoon after the end of the morning shift. We have heard conflicting evidence on precisely when the claimant left. The claimant says he left at 12.40pm, Mr Azim and Mr Mannan say he left 20 minutes earlier. Nothing turns on this. It was common ground that the claimant had asked another warehouse assistant, Mr Qadir, to clock him out at 1pm. Mr Azim saw the claimant leaving before 1pm which is how the claimant was caught.
31. On 20 October there was a disciplinary hearing. The only points taken by the claimant in relation to the disciplinary hearing is that the claimant was dismissed, whereas Mr Qadir was merely given a verbal warning. The cases are however quite different. Mr Qadir, who had done the clocking out, was an exemplary employee with a clean disciplinary record and felt intimidated by the claimant into clocking the claimant out at 1pm whereas the claimant was on a final written warning for a very similar offence.

32. On 26 October 2017 a letter of dismissal without notice was sent. That letter, written by Mr O'Connor, says:

"I am writing to confirm the outcome of the disciplinary hearing meeting held on Friday 20 October 2017 in the presence of myself and Simon Digby (note taker). As you are aware this meeting was held to investigate alleged gross misconduct namely leaving the depot without informing a member of management. To reach my decision regarding your continued employment with the company I considered the following points:

On Monday 16 October 2017 you left the depot without prior authorisation from a senior member of staff and requested a colleague to clock you out. You state that you were working in the container until 12.30 and requested your colleague Abdul Qadhir Nuur to clock you when he was free at about 12.40 to 12.45. It is my belief that you tried to cover up the time you left the depot by pressuring a colleague to clock you out at a pre-agreed time and to fraudulently claim wages for a period of time that you were not at work by asking someone to clock you out after you had left the building. Asking someone to clock you out when you are not in the building is fraudulent time-keeping which could be viewed as gross misconduct. You were issued with a final written warning on 21 August 2017 for leaving the depot without prior authorisation on two separate occasions as well as being issued with a verbal warning in July 2017 for not fulfilling your contracted hours, both of which are still live on your file. This was a further act of misconduct following the final written warning being issued."

and it then gives the details of immediate termination and says:

"If you wish to appeal against this decision you should do so in writing giving your reason for appealing within five days from receiving this letter."

33. The claimant sought to appeal in a letter of 14 November 2017 but this was well out of time. In our judgment religion had nothing to do with the claimant's dismissal. Mr O'Connor was a Christian and was not even aware that Ahmadiis were different to mainstream Muslims. The claimant said that a fellow warehouseman, Shaqeel had shown him a moving cartoon of the founder of the Ahmadi regime which he found offensive. He never complained at the time about that incident. The respondent is not in our judgment responsible for a fellow employee showing the claimant something to which he took offence. If there was no complaint there was nothing the respondent could do.

Costs

34. Following our judgment Mr Curtis made an application for the respondent's costs of the proceedings. He bases this on two grounds: the first is that the claim had no reasonable prospect of success which gives us jurisdiction under Rule 76(1)(b) of the Tribunal's procedure rules and that the claimant has refused two offers made by the respondent, one was an offer of £22,000 made on 24 April 2019, that lapsed the following day but that is explicable because that was the original date for the final hearing of this matter. That offer of £22,000 was repeated on 3 October this year and was stated to lapse on 17 October 2019. The relevant principles in our judgment are to consider whether the respondent has taken sufficient steps to show

that there was no reasonable prospect of success. There was no application for a Deposit Order, nor any application to strike out the claim despite the very long period between the case management conference last year and today. In those circumstances it seems to us to be wrong to consider the question of Rule 76(1)(b). Although the claim has failed, it was not something where the claimant would necessarily have realised that he had difficulties and so far as the offers are concerned, the amounts may or may not be reasonable but the claimant was entitled in the light of having a reasonable prospect of success to go on to a hearing of the matter. In those circumstances we refuse the respondent's application for costs.

The issues

- 35. We turn then to the issues. As regards the first issue, the reason for dismissal was gross misconduct. As to whether the respondent held the belief in the claimant's misconduct upon reasonable grounds, yes. Whether the decision to dismiss was a fair sanction, in other words within the reasonable range of responses of a reasonable employer, yes. Issues 8.4 and 8.5 do not arise. As to 9.1, has the claimant subjected the claimant to discriminatory treatment, no. As to 9.1.1, the conduct by the actions of his manager particulars of which are the subject of directions, we found those not proven and in relation to the moving cartoon, that was not a matter for which the respondents have any liability. As to 9.1.2 we find there was no practice within the respondent's establishment in 2017 at the time when he was dismissed. As to 9.2, would the respondent have treated the claimant as alleged less favourably than it treated or would have treated a comparator, the answer is no. 9.3, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of religion and/or belief, no. 9.4, what is the respondent's explanation does not arise.

- 36. As to issues of timing, the complaints except in relation to dismissal are out of time and do not form a course of conduct. Because we do not find them proved, it is not just and equitable to extend time under s.123 of the Equality Act 2010.

Employment Judge Jack

Date: 5 November 2019.....

Sent to the parties on:

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For the Tribunal Office