EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms S Kaur	v	**Capita Retail Financial Services Limited**

Heard at: **Leeds and CVP** **On:** **20-21 August 2020**
Before: **Employment Judge Davies**
Mr K Lannaman
Mr Q Shah

Appearances:
For the Claimant: **Ms T Hand (counsel)**
For the Respondent: **Ms H Boynes (solicitor)**

JUDGMENT having been given to the parties on 21 August 2020 and sent to them in writing and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Technology

1. This hearing was conducted in part by CVP (V- Video). The parties did not object. A face to face hearing was not held because it was not practicable. The Tribunal panel sat together at Leeds Employment Tribunal, but most of the parties and witnesses connected by CVP. At the start of the hearing the Claimant was unable to connect to the CVP. We gave her the option of attending Leeds Employment Tribunal and participating in the hearing by CVP from there. She did so and the hearing started in the afternoon on the first day. The Claimant was in a different room from the Tribunal panel.

Introduction and Issues

2. These were claims of victimisation brought by the Claimant, Ms S Kaur, against the Respondent, Capita Retail Financial Services Ltd. The Claimant was represented by Ms Hand, counsel, and the Respondent by Ms Boynes, solicitor. The Tribunal had before it an agreed file of documents. The Claimant gave evidence on her own behalf. For the Respondent evidence was given by Mr D

Glucksman (Senior Operations Manager), Mr J Scanlon (Team Leader) and Mr W Pilmer (Team Leader).

3. The issues to be decided were agreed at a preliminary hearing conducted by employment Judge Maidment in January 2020 and were as follows:
   3.1 Did the Claimant do a protected act? Did the Respondent believe that the Claimant had done or might do a protected act, in that she initiated ACAS Early Conciliation in respect of a complaint of race discrimination?
   3.2 If so, did the Respondent do any of the treatment identified below because the Claimant had done or it was believed that she might do a protected act:
      3.2.1 the Claimant being asked to attend an investigatory meeting on 15 April 2019;
      3.2.2 the Claimant not being required to work the rest of the day on 15 April 2019;
      3.2.3 Mr Scanlon collecting the Claimant's belongings from her desk on 15 April 2019?

Findings of fact

4. The Claimant worked as a customer services advisor for the Respondent from January 2018.

5. There was an incident at work that eventually led to a successful complaint of race discrimination in the Employment Tribunal brought by the Claimant against a colleague, whom we shall call JW. At the time of the events we are concerned with, that Tribunal claim had not yet been brought.

6. On around 12 April 2019 JW received a call on his personal mobile phone from somebody saying that they were from ACAS and wanted to talk to him about a complaint of race discrimination by Claimant. On the evidence before us, JW was not even sure that the person was from ACAS and had no way of knowing if they were. JW raised a concern with a manager, Mr Gates, about his personal mobile number being given to a third party by the Claimant. Mr Gates referred it on to Mr Glucksman. Mr Glucksman was concerned that there had been a possible breach of the GDPR and wanted somebody to ask the Claimant about it. In her evidence to the Tribunal, the Claimant was very fair in agreeing that it was legitimate for the Respondent to want to ask her about this.

7. Mr Glucksman asked Mr Scanlon to ask the Claimant about what happened. At that time Mr Glucksman was aware that the Claimant had raised a grievance about JW's conduct and that this was a grievance about race discrimination. In cross-examination Mr Glucksman accepted that a rational person who found out that the Claimant had started early conciliation about a matter relating to JW and who knew that the Claimant made a grievance complaining of race discrimination by JW would conclude that those things were connected. However, Mr Glucksman's evidence to us was that his focus was not on whether there was a connection between those two things or on why Claimant contacted ACAS. His focus was on whether there had been a breach of GDPR. We accepted that clear evidence.

8. The Claimant invited us to rely on a number of emails within the hearing file, which she said demonstrated a general culture at the Respondent of not being happy about people who complained. She also said that they indicated that Mr Glucksman tended to see people who made complaints as difficult.

9. The first of those emails was sent by someone else altogether and was not seen by Mr Glucksman at that time. It does not assist us. The rest post-date the events of 15 and 16 April 2019. They arise from an emerging course of events and the picture is one of Claimant raising and escalating her concerns during that period. Some of Mr Glucksman's wording was not appropriate. For example, he referred to trying to "shut down" the Claimant's complaints. But we accepted his evidence that he was concerned with closing off processes, rather than shutting down complaints without properly investigating them. He was embarrassed that he had not been able to bring this matter to a conclusion. The Tribunal were quite satisfied that the tone of the emails and the language used did not reflect any prior attitude of Mr Glucksman, either towards the Claimant particularly or more generally. These were emails sent as events unfolded and in response to those events.

10. On 15 April 2019 Mr Scanlon asked Mr Pilmer to help him by making notes of his planned conversation with the Claimant. Mr Scanlon and Mr Pilmer both gave evidence that they knew nothing about the Claimant's issue with JW or the grievance she had raised about that. Indeed, Mr Scanlon said that he did not know the Claimant before. He was simply given questions to ask her, which he intended to do. The Tribunal accepted their evidence that they did not know anything about the Claimant's issue with JW, the fact that she had brought a grievance or the content of the grievance. There was nothing in the evidence before us to suggest otherwise and we found both of their evidence about this credible. We also accepted their evidence that Mr Glucksman did not tell them on 15 or 16 April 2019 that the Claimant had raised a grievance about JW, or that it related to discrimination.

11. On 15 April 2019 at around 1:40pm Mr Scanlon and Mr Pilmer approached the Claimant at her desk and asked her to come with them to answer a few questions. The Claimant agreed and the three of them went to a meeting room together.

12. The Claimant says that she was "frog marched" to the meeting and that Mr Scanlon and Mr Pilmer were deliberately acting in this heavy-handed way to target her and put her off making a Tribunal claim about JW. The Respondent says that the Claimant was not "frog marched" from the room; a request was made, she agreed and walked to the meeting with them with no fuss. The Respondent says that this was entirely appropriate.

13. The Tribunal preferred the Respondent's version. In reaching that view, we took into account the Claimant's evidence in cross-examination. She agreed that what she had labelled as being "frog marched" was Mr Scanlon and Mr Pilmer approaching her desk and asking her to come and answer some questions, her agreeing and the three of them walking off together. We also took into account what Mr Scanlon said in cross-examination. His evidence was that he thought it

was entirely appropriate for himself and Mr Pilmer to approach the Claimant in person. He did not send an email inviting the Claimant to a meeting because she might not receive it before the meeting start time. He also thought that sending an email or scheduling an appointment was more formal and was more likely to cause alarm. He preferred to approach her desk in person and suggest a five-minute chat, really so as to keep matters low-key. Mr Scanlon only said that for the first time in cross-examination, but it often happens that evidence only comes out for the first time in cross-examination. That may simply be because the person has not been asked the question before, rather than because they are not telling the truth. The Tribunal found it entirely credible that Mr Scanlon chose to approach the Claimant personally for the reasons explained and we accepted his evidence about that. There was no dispute that Mr Scanlon did not know the Claimant and Mr Pilmer did. Mr Scanlon said that is why they both went to her desk - so Mr Pilmer could show him where the Claimant sat. The Tribunal also took into account Mr Pilmer's evidence that they were on their way to the meeting room and that it would have made no sense for one person to collect the Claimant, walk back to collect the other person and then re-trace their steps to the meeting room. The Tribunal accepted that this was entirely straightforward. Mr Scanlon wanted a five-minute conversation with Claimant with Mr Pilmer making notes. He thought that the best and most informal way to deal with it was for them to walk to her desk and ask if she minded having answering some questions for a few minutes.

14. Mr Scanlon and Mr Pilmer each said that the decision that they would both walk to the Claimant's desk and ask her to come to the meeting had nothing to do with her contacting ACAS or any concern that she might bring a Tribunal claim complaining of discrimination. We accepted that evidence. As we have indicated, they did not know about the grievance relating to JW.

15. When they got to a meeting room, Mr Scanlon told Claimant in outline what he wanted to talk to her about. The Claimant said that she was feeling anxious and wanted a trade union representative to support her. There is no dispute that she told Mr Scanlon that she was feeling panicky. This was not a disciplinary or grievance meeting and the Claimant was not entitled under the Respondent's policies to be accompanied by a trade union representative. Mr Scanlon adjourned the meeting briefly so he could talk to Mr Glucksman about it. That is reflected in the brief notes of the meeting made by Mr Pilmer. Those notes record a short five-minute adjournment after which Mr Scanlon said he had spoken to the operational manager and identified three options: (1) can answer questions (2) can have colleague instead (3) can speak to union rep for advice. The notes record the Claimant saying that she would like to speak to her union as soon as possible and Mr Scanlon saying, "You can speak to union rep this can be done at home …you will be called on next steps."

16. The Claimant confirmed in her witness statement that she was given those three options and chose to speak to her union representative. Her case was that Mr Scanlon then told her that she could speak to her union representative but only at home. She said that she was told to go home and that this was an instruction to send her home. She said that this was not in line with the Respondent's policy. The Respondent said that the Claimant was not given an instruction to go home,

she was given choices. When she said that she wanted to speak to her union representative, she was told that she could go home to do this.

17. The Tribunal preferred the Respondent's version. We found that the Claimant was not instructed to go home, she was told that she could go. In reaching that view we placed particular weight on the Claimant's evidence in cross-examination. Initially she said that she was told that she "must" go home, but eventually she accepted that the word used was "can." That is also the word used in the written note of the meeting. It was clear to the Tribunal that the Claimant had interpreted word "can" to mean "must." Rather like the use of the expression "frog marched" previously, it seemed to us that she was giving a label to events or a description of events that did not line up with the actual words used in the context in which they were used. We noted that this meeting took place about an hour from the end of the Claimant's shift, so it made sense for her to go home at that stage to try and contact her trade union representative rather than returning to complete her shift. We also noted that the Claimant's own evidence was that she was feeling anxious. Mr Scanlon said that she was breathing hard and wafting herself. He said that he has experienced panic attacks and he recognised the signs. That was part of the context in which a decision was made to allow the Claimant to go home. Again, that evidence was given for the first time in cross-examination, but the Tribunal found it compelling, particularly given that the Claimant accepted that she was feeling anxious and panicky and said so.

18. For these reasons, the Tribunal found that the Claimant was not sent home, she was given the opportunity to contact her trade union representative and was allowed to leave her shift early in order to do so.

19. Furthermore, the Tribunal was entirely satisfied on the evidence that the actions of Mr Glucksman, Mr Scanlon and Mr Pilmer, and the decision to allow the Claimant to leave early to contact her trade union representative, had nothing to do with any concern that she might bring a Tribunal claim or that she had contacted ACAS. As already explained, the Tribunal accepted that Mr Scanlon and Mr Pilmer were unaware of the grievance or the issues between JW and the Claimant. While Mr Glucksman was aware of those things, we accepted that his focus was on whether there had been a breach of the GDPR. The notes record that there was a five-minute adjournment during which Mr Scanlon spoke to Mr Glucksman. The evidence that they simply discussed the three options, which were then outlined to Claimant, was entirely plausible. There was nothing to suggest that there had been a conversation at that stage in which Mr Glucksman briefed Mr Scanlon on the background or that they did anything other than agree the three options, one of which, for the Claimant's benefit, was to allow her to leave her shift early to contact her trade union.

20. After the Claimant had said that she wanted to speak to her trade union representative and was told that she could go home, the Claimant's evidence is that she said she needed to collect her belongings, which were still at her desk. In her witness statement, she said that Mr Scanlon informed her that she was not allowed to collect them herself and that he would collect them for her. She said that he collected them in full view of her colleagues and that she felt

humiliated and intimidated by this. In cross-examination her evidence was again that Mr Scanlon told her she was not allowed to collect her belongings and that he would get them. Mr Scanlon's evidence was that he offered to collect the Claimant's belongings because she seemed upset. He said that she seemed genuinely thankful for the offer, which she gratefully accepted. Mr Scanlon said that he did not tell the Claimant that she could not go and collect her belongings. The Tribunal preferred Mr Scanlon's version of events. It seemed to us that the Claimant was misguided in her view. Just as she had interpreted being told that she could go home as an instruction that she must go home, it seemed to us that she was interpreting an offer to go and collect her belongings as an instruction that she was not permitted to do so.

21. The Tribunal carefully considered the notes of the meeting that were made the next day in reaching that conclusion. The Claimant did indeed speak to her trade union representative overnight and was advised to go along to the meeting first thing the next day and answer the questions. She did that with a colleague. She explained that she had given JW's telephone number to ACAS because she was starting the early conciliation process. We note in passing that the Respondent accepted the explanation and no further action was taken. After those two questions were asked, the notes of the reconvened meeting indicate that the Claimant said more than once that the previous day she had not been allowed to return to her desk and asked why that was. The notes suggest that the answer given by Mr Scanlon was that he did not know and that he was following advice. The Claimant invited the Tribunal to place weight on that. She said that it shows that she was saying all along that she had not been allowed back to her desk and that Mr Scanlon agreed with her.

22. The notes from the previous day, when it was said to have happened, did not record that the Claimant was not allowed to return to her desk. Further, on 16 April 2019, Mr Pilmer was recording the Claimant's question. It may be that she had come to the view overnight that the offer to collect her belongings was in fact an instruction. As explained, we think she was misguided in that view. In cross-examination, Mr Scanlon said that by this part of the meeting both the Claimant and her colleague were asking a series of questions, some of which were unrelated, at the same time. Therefore, the notes did not reflect fully what had been said. Mr Pilmer agreed. The Tribunal accepted that evidence. It may be that the answer "I don't know" or "I was following advice" did not relate to the Claimant's question about why she had not been allowed to return to her desk. But in any event the mere fact that the notes did not report Mr Scanlon as saying, "You are wrong, you were allowed back" does not mean that he accepted the premise of her question. This was a fast-moving meeting with two people asking questions. The fact that no such a response from Mr Scanlon was recorded in the notes does not bear the weight the Claimant seeks to place on it.

23. The Tribunal therefore found that an offer was made by Mr Scanlon to go and collect the Claimant's belongings for her, in the context that she was feeling panicky and Mr Scanlon recognised the signs of a panic attack. The offer was accepted by the Claimant and Mr Scanlon collected her belongings for her.

24. Again, on the evidence before us, the Tribunal found that Mr Scanlon's offer to collect the Claimant things was entirely unrelated to the fact that Claimant contacted ACAS and had nothing to do with any concern that she had done or might do a protected act.

25. We now understand that a colleague of Claimant had also started early conciliation at this time. However, there was no evidence before the Tribunal that anybody at Respondent was aware of this at the time. Further, there was no evidence before us about whether or not there was any GDPR concern in the other case. In those circumstances the colleague was not of particular assistance to either party by way of comparator.

Legal principles

26. Section 39 of the Equality Act 2010 makes it unlawful for an employer to victimise an employee. Victimisation is defined by s 27 of the Equality Act 2010, which provides, so far as material:

> **27 Victimisation**
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act -
> (a) bringing proceedings under this Act,
> …
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> …

27. The burden of proof is dealt with by s 136 Equality Act 2010. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of the burden of proof provisions That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. The Tribunal had regard to it.

28. In essence, the guidance outlines a two-stage process. First, the complainant must prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act.

29. The guidance in *Igen* and *Madarassy* was expressly approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054. However, as the Supreme Court made clear in *Hewage*, it is important not to make too much of

the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage* at para 32.

30. There is no definition of "detriment" in the Equality Act 2010. However, it is well-established that subjecting to a detriment means "putting under a disadvantage". A detriment exists where "a reasonable worker would or might take the view that [the conduct] was in all the circumstances to his detriment." Accordingly, an unjustified sense of grievance is not sufficient. However, there is no requirement for a physical or economic consequence: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL. The EHRC Employment Code advises (para 9.8) that a detriment is generally "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

Application of the law to the facts

31. We turn to apply those principles to the detailed findings of fact set out above. As both representatives submitted, this is one of those cases where for the most part the answers turn on those findings of fact.

32. There was no dispute that the Claimant did do a protected act by contacting ACAS and initiating early conciliation with regard to complaints of race discrimination by JW.

33. The Tribunal found that the Respondent did believe that she had done or might do a protected act. Mr Glucksman had the relevant information and he accepted that the rational inference to draw was that the Claimant was contacting ACAS to talk about JW because of the matters in the grievance. Although he may not explicitly have turned his mind to it, the Tribunal found that on this basis Mr Glucksman knew that the Claimant had done a protected act or might do one.

34. Therefore, the real issue was whether the Claimant was subjected to detriment and, if so, was that because she had done or might do a protected act. In each case the Tribunal found both (1) that the Claimant was not subjected to detriment and (2) that even if the treatment were detrimental, it was not done to her because she had done or it was believed she might do a protected act:

    34.1 The Claimant was asked to have a conversation to discuss whether there had been a GDPR breach. This was not done in a heavy-handed way and she was not marched out. Simply, two colleagues approached her desk to ask if she could answer a few questions, she agreed and they walked to the meeting room. This was simply a request to answer questions readily agreed to by the Claimant. She accepts that it was legitimate for the Respondent want to ask those questions. In those circumstances, the Tribunal did not consider, applying the test set out above, that this was detrimental treatment. A reasonable worker would not take the view this changed her position for the worse or put her at a disadvantage. In any event, for the reasons given in the findings of fact, the Tribunal were quite

satisfied that this was not done because Claimant had done or it was believed she might do a protected act. Mr Scanlon and Mr Pilmer were not aware of the relevant facts and we accepted on the evidence that Mr Glucksman's sole concern was with whether there had been a breach of GDPR. We accepted all their evidence about this.

34.2 The Claimant was not sent home on 15 April 2019, she was told that if she wanted to speak to her trade union before continuing the conversation, she could go home and get union advice. It was not an instruction. The Tribunal considered that this was not detrimental, applying the relevant legal principles. It was for the Claimant's benefit. A reasonable worker would not take the view this changed her position for the worse or put her at a disadvantage. In any event, even if it were detrimental, it was not done because she had done or it was believed she might do a protected act, for the reasons set out in the findings of fact.

34.3 The Claimant was not told that she was not allowed to return to her desk. An offer was made by Mr Scanlon to collect her belongings because she seemed panicky and upset and the Claimant accepted that offer. The Tribunal gain found that this was not detrimental treatment, it was for the Claimant's benefit. A reasonable worker would not take the view this changed her position for the worse or put her at a disadvantage. Even if it had been detrimental treatment, for the reasons set out in the findings of fact it was not done because the Claimant had done or might do a protected act.

Employment Judge Davies

11 September 2020

Sent to the parties on:

22 September 2020