



EMPLOYMENT TRIBUNALS

Claimant: MR CATHAL McDONNELL

Respondent: A M SURVEYING AND PROPERTY SERVICES LIMITED

Heard at: CROYDON (by cloud video platform)

On: 23, 24 & 25 February 2021 and for reserve decision making on 11 March 2021

Before: EMPLOYMENT JUDGE P BRITTON

With Members: Ms Yvonne Batchelor
Ms Janet Jerram

Appearances
For the Claimant: In Person
For the Respondent: Mr J Gilbert, Consultant (Peninsular)

RESERVED JUDGMENT

1. The claim of discrimination by reason of religion or some other philosophical belief is dismissed.
2. By consent, the claim for outstanding holiday pay succeeds in the sum of £172.55.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal on 18 October 2019. The Claimant had prepared it himself. As to the scenario, it was set out in a timeline that he provided. First claimed was unfair dismissal.
2. Stopping there, the Claimant had commenced his employment on 2 January 2018. He was dismissed with notice pay in lieu on 10 July 2019. Thus, he

does not have the necessary two years qualifying service to bring a claim of unfair dismissal.

3. In that respect, at the preliminary hearing heard by Employment Judge Ferguson in this matter on 4 May 2020, as a consequence the Claimant withdrew that claim and thus it was dismissed.
4. As to the remaining claim, that Judge, with the agreement of the Claimant, confirmed that it was a claim of direct discrimination pursuant to Section 13 of the Equality Act 2010 (the 'EQA').
5. What is crucial is to point out that there was no claim identified of victimisation pursuant to Section 27 albeit the Claimant has raised the same in his statement to the Tribunal. This we will address in due course.
6. As to the main stream therefore of this claim, essentially what the Claimant was saying is that he was dismissed in order to be replaced by Beth Lawrence, who joined the Respondent on 1 July 2019, and because she was a Jehovah Witness; and the Respondent's management team and, indeed, the family ownership structure, is one where they are practicing Jehovah Witnesses: hence this was the reason for his dismissal.
7. Thus, the core point becomes was he treated less favourably in terms of his dismissal because he was not a Jehovah Witness whereas Beth was?
8. Cross-referencing to the response (ET3) and as amended (Bp¹ 32 onwards) post the hearing before Employment Judge Ferguson, the Respondent sets out fully its defence, essentially on the basis that no part of the reason for the dismissal linked at all to the fact that he was not a Jehovah Witness.

Law engaged: also whether or not the victimisation claim is sustainable

9. The law engaged, essentially, is as follows. Thus,

S13(1): " 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. It is necessary to dwell briefly on the burden of proof about which there has been extensive jurisprudence. Essentially, it remains as per the seminal Judgment of **Igen Limited v Wong 2005 (IRLR 258CA]**. Thus, there is a first stage where the burden of proof is on the Claimant. Essentially, on the facts he has to show that those facts permit of an inference to be drawn that a reason or the principal reason for, in this case, the dismissal, was because of the protected characteristic engaged; that is to say in this case, religion and that the Claimant was not a Jehovah Witness.
11. The second stage if there is an inference to be drawn, is that the burden of proof switches and it is for the Respondent to then show that it did not commit or was not to be treated as having committed the unlawful act.

¹ Bp= bundle page number in the bundle before the Tribunal.

12. However, it is essential to point out as per the same Judgment:

'although there are two stages in the Tribunal's decision-making process, Tribunals should not define hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence including the Respondent's explanation before deciding whether the requirements of the first stage are satisfied and if so, whether the Respondent has discharged the onus that has shifted'.

13. The definition of victimisation is at Section 27.

1. A person(A) victimises another person (B) if A subjects B to a detriment because

(a) B does a protective 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;

(b) giving evidence or information in connection with 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

14. It is self-evident that the obvious first starter is that there must be a protected act.

15. We can deal with that point now. Having been dismissed on the 10 July 2019, the Claimant raised an extensive grievance (Bp 256-262). It is articulate and well written. He did not raise therein this issue of religious discrimination and that he had been dismissed because he was not a Jehovah Witness, or in that respect that he had been substituted by Beth who was a Jehovah Witness thus, his dismissal being 'trumped up,' so to speak, and unfair.

16. He told us that he could not do that because he had become stressed following the difficult meeting that he had on 4 July 2019 with Mathew Mackintosh (MM), who is the managing director and one of the two shareholders of the Respondent. Post that meeting the Claimant was signed off as unfit to work by his GP by reason of workplace stress. But that explanation does not fit with his ability to put together the extensive grievance to which we have now referred, and which demonstrates that the Claimant had mental capacity to put fully what his claim was and therefore does not explain the omission of any allegation relating to religious discrimination.

17. Furthermore at the meeting on 4 July, and which focused on performance issues (see Bp248 -251), the Claimant was able to put his position clearly in relation to the criticisms being made of him. He did not raise the Beth point or the connection to Jehovah Witnesses at all albeit he knew that Beth had been appointed into the property manager assistant role on 1 July and that she was a JW.

18. When he raised his grievance on 10 July 2019 in relation to the meeting of

the 4th (Bp 256-262), he did not raise the point. He also did not raise it at all in his appeal against dismissal of the same date (Bp 271-278). What he did do is to raise in relation to the handling of his sickness absence post 4 July, but of course he had by now been dismissed, that he had been treated differently in that respect from the absences, albeit not at the material time, of Nigel, Elliott and Aaron (Bp 275). He did not raise a connection in that respect to the Jehovah's Witness issue at all.

Conclusion on the victimisation claim

19. What it means is that there is no protected act pre the presentation of the ET1. Furthermore there are no acts alleged by him that would constitute victimisation thereafter. Thus, it follows that the victimisation claim simply does not get off the ground and so in that respect, and even though Judge Ferguson had not identified it as a head of claim, it follows that it is dismissed.

Findings of fact as to the remaining direct discrimination claim

20. That brings us back to our findings of fact in relation to the Section 13 claim. In making our decision, we have heard first the sworn evidence of the Claimant who was extensively cross-examined. We have cross-referenced to the very extensive witness statement that he produced.
21. Then we heard from Matthew Mackintosh (MM). Again, he gave evidence in-chief by way of a witness statement. He was extensively cross-examined by the Claimant. Next we heard the sworn evidence of Sharon Jermy Her evidence in chief was also by way of a witness statement. Mrs Jermy (SJ) is currently head of accounts and a team leader. She has been employed since 2008.
22. Last we heard the sworn evidence of Beth Lawrence (Beth). Again, evidence in-chief by way of a written statement.
23. The Claimant was appointed by the Respondent as a property manager on 2 January 2018. His salary was £40k pa. Before us in the bundle is the job description. By the time of his appointment, the Respondent's business under the driving force of MM had moved from being a traditional Chartered Surveyors firm under his father into property management. Thus its core business was to secure contracts whereby it managed the maintenance of such as apartment blocks for the owner or the relevant tenants' association.
24. The core role of the Claimant, who had some thirty years' experience in property, was to manage those contracts delegated to him by MM as managing director of this expanding business.
25. Crucial to the role would therefore be to liaise with the owners or the tenants' associations to ensure that issues relating to repairs needed were dealt with swiftly and effectively. Obviously this would include preparing the specification of works if one was needed; getting quotations; commissioning and thence supervising the work; signing it off and authorising payment. Additionally as to the tenants' associations it included chairing such as AGMs.

26. MM had high expectations of the Claimant. But developing from early on were concerns about the Claimant's work.
27. The Tribunal has looked at all the documentation relating to this aspect of matters. It concludes that these justify the escalating concerns. A good example, particularly as the Claimant seemed to be unable to accept under cross examination any responsibility, and which was a concern that led MM to dismiss him, were the issues that had been flagged up to the Ombudsman (see Bp 155 on) in terms of the Claimant not dealing with urgent issues at 218C High Street, Croydon, and in particular the impact on a tenant, Miss Y. The criticism started circa 22 June 2018. The failure to deal with the problem led to a formal complaint, primarily about him being made to the Respondent on 30 December 2018. It was however addressed to him and his reply of 15 January 2019 is heavily criticised in the final report of the Ombudsman dated 30 October 2019 for his lack of proactivity.
28. The documentary evidence shows that this was a serious water leak. Ms Y was left bereft for some months. Rats appear to have got into common parts of the building. The Claimant's excuse was that there was an issue as to the lack of insurance. But he told us how Ms Y was a prompt contributor as to such as annual ground rent. There is no evidence that the Claimant actively pursued the matter up the chain to such as the landlord. Also why not check out something so elementary as insurance if applicable and ensure ie when taking on the contract, or chairing such as an AGM, or when acting for the Owner, that the insurance was in place or had been renewed. In other words, duty of care. This is particularly so as the Respondent offers insurance as part of its services along with such as conveyancing viz leases.
29. Leaving aside the Ombudsman issue, but in the context of other concerns emerging, MM, who otherwise takes a low-key approach in managing his team, held an appraisal with the Claimant on 8 May 2019 (Bp 188-189). Issues were flagged up, an example being that the Claimant had directed a sub-contractor to the wrong part of a multi occupancy building which had a leaking flat roof. The point in that sense being that he simply sent them a photograph of where he said the work was needing to be done and which was not the roof that needed repairing. MM's concern was that the Claimant should have checked.
30. He also raised the point that the clearance rate in terms of addressing these types of issues was with the rest of the team around 80%, whereas with the Claimant it was only 20%. He was also concerned at the Claimant's lack of attention to detail and that he needed to focus. He decided to intensify his management approach in that he sent a follow-up letter on 12 May informing the Claimant that he would have a further 1:1 on 17 May.
31. All that needs to be said in that context is that in the period thereafter there are two examples of where contracts were lost and which MM said was down to the Claimant: as to one of these see 26 June 2019 and the Pembroke Road Association cancelling their contract (Bp 232).
32. As a result of that MM held a meeting with the Claimant to which we have referred on 4 July and which is minuted. All that needs to be said is that all

the issues were clearly set out and that MM was clearly deeply concerned. He gave the Claimant a draft of a performance improvement plan but made it plain that he was not at that stage incepting it because he was going to go away and think about what to do, but it would give the Claimant time to think about his own position. In other words, was he really right for the job?

33. As it is, MM having thought about things decided to dismiss the Claimant as to which see his letter of 10 July and which coincided with the Claimant having sent in the extensive grievance to which we have referred, and which MM clearly got on that day because he refers to it in the dismissal letter (Bp 262-263).
34. We have already referred to the fact that the Claimant sought to appeal that decision, but MM, who had by now been taking legal advice, i.e., from Peninsula, and indeed by the time of the dismissal, took the view that he did not need to offer him an appeal and because he lacked qualifying service to pursue such as an unfair dismissal claim. He did offer him a hearing on his grievance, but the Claimant understandably did not go down that route as MM would be hearing the grievance.
35. If this had been a case where the Claimant had qualifying service, this clearly would have been at least procedurally an unfair dismissal; but he did not. Therefore, does that in itself raise an inference? The answer is not without linking to the Beth issue. Otherwise, an employer has freedom to dismiss, even unfairly, somebody within the two-year period prior to them obtaining the necessary qualifying service.
36. That brings us to the Beth issue. MM does not dispute that he is a practicing Jehovah's Witness. Members of his family such as his wife, Paris, or mother-in-law who work in this business are also Jehovah's Witnesses. So are some other members of the team. On the other hand, it is to be noted from the evidence that he gave us that, as an example, the buildings surveyors were not. There is no evidence that MM or anybody else in the business proselytized their faith as a Jehovah's Witnesses whilst at work. He told us that he never did bring religion into work. He was not challenged in this respect by the Claimant.
37. Also, if he was against employing anyone other than Jehovah's Witnesses, then why did he employ the Claimant who is not of that faith?
38. This brings in the issue of Beth. First, we have considered the emails commencing on 10 May 2019 (Bp 190). Thus, Beth was an attender at the same Jehovah's Witness Kingdom Hall as was MM and his family. She was at that stage working for a firm of solicitors. She was hoping to qualify in due course as a Legal Executive, but she was not happy in her employment and inter alia that she was only paid £21,000 per year. So, she mentioned this to MM and Paris.
39. The Respondent at that stage in its employment Tim Henshaw, undertaking the role of what was known as the conveyancing and insurance assistant. This would have to do with such things as leases and also the offering of the insurance brokerage. He had taken leave of absence because of a

bereavement. It is clear that MM MMhad some doubts about his abilities and also thought that he might not be coming back. So, we can see from that email trail that he was canvassing to Beth as to whether she might like to take that role on if it became vacant. That was where the discussion started. But then it became plain that Tim would be coming back, and so the discussion was developing shortly thereafter circa 16 May as to whether she might like to take on a property management assistant role. The Respondent regularly advertises for these jobs. It seems to have some turnover in that role. At that stage it had had been advertising a vacancy since at least early April. The role would pay between £24-26,000. Set out was what it would entail, and that it would give the opportunity for some site visits one or two days per week.

40. To cut a long story short, to start with Beth was reluctant. She did not want to move from her legal career path. Also, she could not see the point of moving if she had to do a five-day week. Negotiations took place. MM made plain that the role offered the opportunity for career development, i.e., she might end up in one- or two-years' time as a property manager. Second there was also the possibility, depending on what Mr Henshaw did in the future, that she might be able to take on that role with of course its legal aspects.
41. Thence, there was a second part in the negotiation; because if she was going to take on the role, she wanted to not work five days per week but by shortening her lunches have half a day off on a Friday in order to undertake the mission of seeking to convert people to become Jehovah's Witnesses.
42. The upshot was that she was offered the role of a property management assistant on 28 May 2019 on a salary of £26,000 per year. She started on 1 July 2019 and, indeed, the Claimant was introduced to her. So, he knew that she was there and in the role of an assistant property manager from that time.
43. He told the Tribunal that he knew that she was a Jehovah's Witness around that time.
44. We assumed that he was going to tell us that, in fact, the role that she undertook was in reality the same as the one that he had done, but he made plain that he was not saying that several times during his cross-examination or questioning by the Tribunal.
45. Encapsulated and in answer to a question from the Judge, he said "*So, yes, it is a junior position to mine*".
46. That it was a junior position was obvious from the contrasting job descriptions and thence the evidence of MM and Beth. For instance, she did not chair AGMs for tenants' associations as she did not have that authority. She might take the minutes for a property manager. The site visits she made were routine. She did not write specifications or agree quotes.
47. The Claimant did however allege in his evidence and his submissions, that MM was getting rid of him because Beth would be cheaper. But that does not square with the fact that it was a junior role and that Beth had no property management experience and would need training up.

48. What MM did do, because he had lost trust and confidence in his previous aim of recruiting talent in from elsewhere to the role of property manager ie the Claimant; was to now put the focus on developing such as Zach who was an employee in a property management assistant role. In due course after some months, he duly became a property manager. He is a Jehovah's Witness.
49. But also, some time after the Claimant was dismissed, the Respondent recruited in Abi who is not a Jehovah's Witness. She started off as an assistant property manager. By the time of this Hearing, she had been promoted to a property manager. Conversely Beth did not pursue that role. Post the recent departure of Mr Henshaw, she has obtained the job that she always wanted and is now the conveyancing/insurance supervisor.
50. None of that squares with the Respondent having dismissed the Claimant to make way for Beth as a Jehovah's Witness. The Claimant has endeavored to persuade us that these developments are a cynical attempt by the Respondent to belatedly bolster its case. We are not persuaded. We found the evidence of the Respondent's witnesses credible on this issue. The recruitment of Abi and her promotion is particularly probative.
51. An issue that might have undermined the credibility of the Respondent, and in particular MM, was that the Claimant challenged that he was responsible for the loss of the majority of contracts during his employment. And so a list was produced at our direction by MM and which appeared to suggest that during the Claimant's tenure, he had been responsible for the loss of nearly all the contracts listed. But when we explored this, it turned out that many of them related to a single business called Ganco and, which it may be that MM was happy to see the back of.
52. If we take them out of the equation, that left fifteen contracts which were lost. Thirteen of these can be attributed to the Claimant. We have already referred to the last two in the chain in terms of what led to the Claimant's dismissal.
53. It squares itself off and thus does not significantly impact upon the credibility of MM.
54. There is conversely a big credibility point relating to the Claimant. Thus, why did he not raise the issue of Beth and the connection to Jehovah's Witnesses and his demise starting with the criticisms of him at the meeting of 4 July and flowing through to his dismissal?
55. We have already rehearsed that he had raised an extensive grievance and thence, an appeal and then his reasons why he would not go to the grievance hearing. On none of those occasions did he mention the connection to Jehovah Witnesses or the Beth issue at all.
56. We repeat that he first raised it in the claim to the Tribunal. We also reiterate the Claimant's contention was that this was down to stress having been signed off by the doctor because of events on 4 July. This just does not square with the detail that he could put in his grievance. It follows that we

found his evidence on that point discredited or as the Respondent's representative put it "*nonsensical*".

57. And, on core points like 'she replaced me' and which following his concession as to the difference in the roles is now a non-starter, his case is significantly undermined.
58. That brings us to references. The Claimant did ask for two things shortly after his dismissal and well before the ET1. First, the giving to him of references that it seemed the Respondent had obtained when he was appointed, and second, that he be provided with a reference in relation to his employment. Essentially, the Respondent's position is that it does not give references.
59. This brings us back to Elliott Nyman. On the evidence as it was before the Tribunal, the Claimant could only say that he thought Elliott asked for a reference and was given one. This was denied by the Respondent witnesses. He had not obtained a statement from Mr Nyman despite having had plenty of time to do it. He had not arranged for him to give evidence if he was willing. On the third day of the hearing after lunch and the Respondent having completed its closing submissions, the Claimant sought to introduce evidence from Mr Nyman who had "eventually "told him that he had got a reference. But he told us:" I didn't ask him if he was Jehovah's Witness." He had not obtained a statement, and he did not have Mr Nyman ready to give evidence. He did not seek an adjournment. The Respondent objected to the introduction of this evidence, such as it was. Having retired to consider the issue, we ruled that the evidence was inadmissible, if that is what it was, it being too late.
60. Subsequently in the period before we met to make our reserved decision, he tried to resurrect this issue. He now sought to introduce a statement from Mr Nyman which could contradict the Respondent's evidence on the reference issue. We refuse his application. It is not in the interests of justice and where there should be finality, to other than in exceptional circumstances review our previous decision. The fundamental is that the Claimant was aware of the directions for this Hearing made at the case management hearing before EJ Ferguson as long ago as the 4 May 2020. He knew the reference point was engaged, despite seeking to argue that he was unaware of it before the Hearing. He has not put forward an argument which remotely comes near the exceptional circumstance.
61. It follows that insofar as there is evidence on the reference point that is admissible before this Tribunal given our ruling, it does not assist the Claimant and in any event, it is peripheral. The core point is that Beth was not recruited, albeit she was a Jehovah's Witness, in order to replace the Claimant. He was not dismissed because of that. He was dismissed on the balance of the evidence before us because he was performance failing and MM had lost all trust and confidence.
62. It follows that there is no inference to be drawn that a reason or the principle reason for the dismissal of the Claimant was by reason of him not being a Jehovah Witness.

63. Conclusion

64. For all those reasons, the claim is dismissed.
65. There was an issue before us as to whether the Claimant was owed outstanding holiday pay. The Judge, by reference to how to calculate outstanding holiday leave by reference to the Working Time Regulations, was able to assist the parties and it was agreed that he was, in fact, owed outstanding holiday pay of £172.55: hence our Judgment in that respect.

Employment Judge Britton
Date: 1 April 2021

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