EMPLOYMENT TRIBUNALS

Claimant: **Ms T Swerdlow**

Respondent: **Bills Restaurants Ltd**

Heard via Cloud Video Platform (London Central) On: 13, 14, 15 April 2021

Before: **Employment Judge Davidson**

Representation

Claimant: Mr J Jackson, FRU
Respondent: Mr S Joshi, Advocate

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that the claimant's complaint of religion discrimination fails and is hereby dismissed.

Employment Judge Davidson

Date 4 May 2021

JUDGMENT SENT TO THE PARTIES ON

05/05/2021.

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

REASONS

Issues

1. The issues for the tribunal to determine were as follows:

   1.1. whether between 20 September and 17 December 2019 the claimant's manager, Ms McIlroy, did what the claimant identifies in her grievance as acts of discrimination/harassment;

   1.2. if she did any of those acts, whether they amount to religion-related harassment or direct religion discrimination as defined in the Equality Act 2010;

   1.3. whether the Tribunal has jurisdiction to consider complaints about any acts that occurred before 30 October 2019;

   1.4. whether the dismissal was an act of religion discrimination.

Evidence

2. The tribunal heard evidence from the claimant on her own account and from Odette Schwartz (formerly the respondent's People Director), Lesley McIlroy (formerly the respondent's Marketing Director) and Charley O Toole (Head of People) on behalf of the respondent.

3. There was a bundle of documents together with some other documents before the tribunal, running to a total of nearly 200 pages.

The Hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

6. The parties and observers were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no major difficulties.

7. The participants were told that is was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence. There was a single moment,

which was witnessed by some of the participants in the hearing, where there was an echo or a whisper during Ms McIlroy's evidence. This was unexplained but it did not affect the reliability of the evidence in the view of the tribunal.

Facts

9. The respondent is a large high street restaurant chain with 78 sites in England, Wales and Scotland, employing approximately 3400 employees.

10. The claimant was employed by the respondent as a Regional Marketing Manager (North) from 12 November 2018 until her dismissal on 9 January 2020.

11. The claimant was a remote worker, based in Liverpool, and as part of her role she visited and promoted the respondent's 27 northern-based restaurants. She worked from home on Fridays. The two other Regional Marketing Managers worked in the other two regions – London & Kent and South - and had one day that they worked from home. The claimant's role with the respondent was much larger than her previous role, where her portfolio was smaller and she had autonomy over her budget.

12. The claimant reported to the respondent's Marketing Director, Ms Lesley McIlroy, who was based at the respondent's Head Office in London. As part of her role, the claimant was expected to attend the respondent's London office every week, normally on a Monday. This was in order for her to partake in the weekly marketing team meeting and to meet other regional based staff but also, later on in her employment, for Ms McIlroy to undertake one to one meetings with the claimant. It was also an opportunity for the claimant to catch up with other stakeholders in the business and discuss shared projects or workstreams. She also worked with the Regional Manager of her region (North), Ben Litchfield.

13. After the claimant had been in the role for four months, she had an appraisal in which she scored '3's and '4's (out of 5). Her own assessment of her performance was better than her manager's assessment in five out of the seven categories.

14. In June 2019, the claimant informed Ms McIlroy that she could not attend the London office meeting on 24 June and 1 July. Ms McIlroy replied that there was no meeting anyway on 24 June (it had been moved to the following day) and she should phone in to the meeting on 1 July 2019. This was the only evidence before us of the claimant not attending the London meeting before she raised her grievance.

15. In July 2019, after she had been in post for eight months, the claimant challenged Ms McIlroy as to why she had not received a pay review because she thought she deserved a pay rise.

16. During the course of 17 September 2019, the claimant sent Ms McIlroy a number of emails about various work matters. Ms McIlroy complained to claimant that she felt 'bombarded' by emails and she clarified that she preferred the claimant to collate her requests and to keep non-urgent matters until their weekly meeting.

17. On Friday 20 September 2019 at 7.49pm, the claimant sent an email to Ms McIlroy asking for a change to her holiday dates because she had forgotten that the Jewish festival of Rosh Hashanah (Jewish New Year) was taking place the following week.

18. On Sunday 22 September 2019, Ms McIlroy emailed the claimant and asked her to clarify some expenditure incurred by the claimant in relation to the Trafford Centre in Manchester, which was being sent for approval by Ms McIlroy by the respondent's procurement department.

19. On Monday 23 September 2019 Ms McIlroy sought clarification of the holiday days the claimant wanted and then granted her request within a few minutes.

20. Later that day, they had further email exchanges about the expenditure at Trafford Centre in Manchester. Ms McIlroy challenged the cost of digital screens and the claimant compared the cost to that spent by her colleagues in Bluewater and Exeter. Ms McIlroy explained to the claimant that she was not comparing like with like.

21. Ms McIlroy told the claimant that she was proposing to introduce a new process for signing off higher cost expenditure. We accept Ms McIlroy's evidence that this was not particular to the claimant and it was due to pressure that Ms McIlroy's line management were putting her under regarding costs.

22. On 27 September 2019, Ms McIlroy and the claimant had a one-to-one to discuss a number of issues relating to sites in the claimant's region, where there were disappointing results and in relation to which Ms McIlroy had been asked by her managers to ensure that the marketing was being done effectively. Ms McIlroy followed up with a lengthy email dated 7 October 2019 detailing points under the headings 'Quality of Work' and 'Working Relationship'.

23. From this point, Ms McIlroy took a more active management interest in the claimant's work. We accept the respondent's explanation that this was a reaction to concerns which had been discussed previously with a view to assisting the claimant in improving her performance and addressing issues which had arisen in relation to their working relationship.

24. The claimant's October expenses were paid late. This did not form part of the claimant's grievance. We accept Ms McIlroy's explanation that she missed a deadline and that this delay affected all employees claiming expenses that month. The claimant did not complain about it to the respondent at the time although she did complain to friends privately.

25. In November 2019, there was a launch of a new site opening at Spinningfields in Manchester, which was in the claimant's region. Many of the respondent's senior executive team, including the founder, Bill Collison, attended. The respondent reorganised its Budget Meeting to take place in Manchester so that the senior team could attend both events. Ms McIlroy attended which was in accordance with her usual practice to support the founder when he attended openings.

26. On 12 December 2019, there was an Instagram post on Manchester Bill's Instagram Page which misspelt the founder's name. The Development Director, Louise Neilson, pointed this out in an email to the claimant, copying in Ms McIlroy. The claimant dealt with the issue promptly but omitted to inform Ms McIlroy that she had done so. She did not 'reply to all' nor did she inform Ms McIlroy separately. Later that day, Ms McIlroy, believing that the error had not been corrected, sent an email to the claimant asking her to deal with the matter and suggesting some wording for the claimant to use.

27. In mid-December, the claimant and Ms McIlroy were discussing the issue of train times for travel to London. The claimant was travelling on a train which meant she arrived in the office at 11am. Ms McIlroy asked her to get an earlier train so that she would arrive at 10am. She also asked her to take a later train back so that she would be in London for a longer period. Ms McIlroy's evidence was that she wanted the claimant to make use of the day in London to interact with other stakeholders and team members.

28. The claimant objected to this as it made her working day very long and she felt it was unfair as her London-based colleagues did not have to leave so early to arrive at the London office on time. The claimant also complained (as she had done previously) that, by the time she arrived in the London office, there was no desk for her and she ended up sitting at a table in the kitchen area.

29. On 20 December 2019 there was a difficult conversation between the claimant and Ms McIlroy regarding train times. Ms McIlroy reiterated the requirement for the claimant to be in the office every Monday, whether or not Ms McIlroy was there herself. Ms McIlroy made contemporaneous notes of this meeting and recorded that the claimant laughed when Ms McIlroy said she didn't know whether she would be in the office herself but that the claimant was required to be in the office to meet other team members.

30. It is the respondent's practice for support staff to help out in restaurants during the busy Christmas period. The claimant had done some shifts 'hosting'. Ms McIlroy then asked the Operations Team if they needed any administrative help. Ben Litchfield, Regional Operations Director (North) said he could do with help with some data analytics tasks but it is not clear if he approached Ms McIlroy or if she approached him to find tasks for the claimant. Ms McIlroy asked the claimant to help out with this on 24 December. The claimant was unhappy about this as it was unrelated to her job and she felt put upon by Ms McIlroy and treated differently from the other two Regional Marketing Managers.

31. In late December, Ms McIlroy arranged a meeting to discuss the launch of a competitor's restaurant in Nottingham and fixed a date of 3 January 2020 which suited her and Ben Litchfield. She did not check the claimant's availability. She then invited the claimant to the meeting.

32. On 18 December, the claimant raised a grievance by email attaching a letter dated 17 December. The grievance was investigated by Ms O Toole.

33. A grievance hearing was held in Birmingham on 30 December 2019. The claimant submitted supplementary notes by email later that day expanding on her grievance. Although it is not clear from the List of Issues that the additional material forms part of the case, we have considered all the matters raised by the claimant during the grievance process rather than restricting ourselves to the matters in the grievance letter.

34. The matters raised in the grievance related to the breakdown in the relationship with Ms McIlroy amounting to bullying. The claimant requested that all future communications between her and Ms McIlroy should be on email not by phone.

35. The issues raised by the claimant were as follows:

    35.1. 17 September 2019, Ms McIlroy saying she felt 'bombarded'
    35.2. Train times for getting to the London meeting
    35.3. Communication problems
    35.4. Being micromanaged
    35.5. Feedback focussing on negatives
    35.6. Being undermined
    35.7. Checking up on her

36. The grievance made no allegation of discrimination.

37. By email dated 2 January 2020, the claimant requested a new line manager and suggested Ben Litchfield.

38. On 30 December Ms McIlroy asked why the claimant was not in London. That was the day of the grievance hearing in Birmingham and the claimant told Ms McIlroy she had a work meeting in Birmingham.

39. Also on 30 December, Ms McIlroy asked the claimant to share a summary of her future plans to visit the Trafford Centre as she noted she had visited twice in two weeks. Ms McIlroy asked the claimant to keep her informed of her movements during the working week.

40. On 31 December, Ms O Toole informed the claimant that she had told Ms McIlroy to limit communications to email rather than telephone. She told Ms McIlroy that she was not able to tell her the reason for this request.

41. The claimant did not attend the meeting in Nottingham on 3 January 2020 as she did feel comfortable attending with Ms McIlroy bearing in mind the grievance she had raised against her.

42. On 7 January 2020, Ms McIlroy was interviewed as part of the grievance. By this time, she was aware of the claimant's grievance.

43. On 7 January, the claimant was invited to a grievance outcome meeting on 8 January 2020. In the event, this was postponed until the following day. On 9 January, the claimant was told by Ms O Toole that her grievance was not upheld. After that, Ms Schwartz informed the claimant that the respondent had concluded that her position was untenable because her relationship with her manager had broken down and her request for an alternative manager could not be met. The respondent therefore dismissed her.

44. There was some confusion among the respondent's witnesses regarding the primary reason for dismissal, with conduct and capability being mentioned as well as the claimant's unreasonable request for a new manager. We find that the reason was the breakdown in the relationship between the claimant and Ms McIlroy which meant that it was impossible for them to continue working together.

45. The claimant appealed against her dismissal by letter dated 12 January 2020 to Nick Grey, CFO. Her appeal grounds included the allegation of discrimination on grounds of religion alleging that Ms McIlroy held it against her that she wished to work at home on Fridays for religious reasons and their relationship broke down after she asked to take leave on the Jewish New Year. An appeal hearing was held on 20 January 2020. Mr Grey investigated the grievance by seeking comments from Ms O Toole and Ms McIlroy. He did not uphold the appeal and he confirmed the original decision.

46. The claimant relies on Jamie Head as a comparator because he was asked to do a handover when leaving his employment and he had a dismissal meeting. We find that Jamie Head is not a relevant comparator as he was dismissed on notice following a Performance Improvement Plan and was asked to do a handover during his notice period. The claimant did not work out her notice.

Law

47. The relevant law is as follows:

100. Section 13 EqA provides: "(1) A person (A) discriminate against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

The shifting burden of proof

101. Section 136 EqA provides for a "shifting burden of proof" in discrimination claims:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Determination of the issues

48. We find that the claimant has failed to show facts from which the tribunal could infer that she was treated less favourably because of her Jewish faith. Although in the pleadings and her witness statement, the claimant relies on her working from home on a Friday for religious reasons as evidence of knowledge of her Jewish faith, she did not pursue this at the hearing and appears to base her claim on Ms McIlroy finding out she was Jewish on 20 September 2019 when she requested a day off for Rosh Hashanah. Ms McIlroy confirms that she was unaware that the claimant was Jewish until then.

49. Therefore, the claimant's case rests on the difference in treatment by her manager before and after 20 September 2019. All parties accept that the relationship deteriorated towards the end of 2019 but we find that the claimant has not established primary facts from which we could infer that the reason for the relationship breakdown was the claimant's religion.

50. We base this conclusion on the evidence that there were problems with the relationship before 20 September 2019 and we find nothing in the manner that Ms McIlroy dealt with the holiday request to indicate any negativity towards the claimant for celebrating a Jewish holiday. We do not accept the claimant's categorisation that she had a positive working relationship prior to 20 September 2019 and note that the first issue mentioned in her grievance pre-dates 20 September 2019. It appears that Ms McIlroy is not an easy manager for any of her reports and can be seen as unfriendly, which had been noted by the other two Regional Marketing Managers. Indeed, Ms McIlroy accepts that there are learning points arising from her communications with the claimant and her other reports.

51. Aside from the fact of the holiday request and the fact of the relationship breakdown getting worse after that date, the claimant has accepted that there is no other evidence she relies on.

52. She asks us to draw an inference from Ms McIlroy not failing to wish the claimant a 'Happy Rosh Hashanah' or showing any interest in the festival and from Ms McIlroy wishing the claimant a Happy Christmas, knowing she was Jewish. We do not find this sufficient to draw any inference of anti-Jewish sentiment.

53. We also find that the claimant did not link her religion to the treatment she complained of in her grievance. We find that this is because she did not believe this to be the case and we reject her evidence that she was too scared of losing her job to raise the issue. The content of the grievance was genuinely felt and

there were clearly serious issues in the working relationship between the claimant and Ms McIlroy but, at the time, the claimant did not connect them with her being Jewish. It appears to be an explanation she reached on reflection when preparing her appeal but, even then, she puts forward no reason or evidence other than the coincidence of dates.

54. We therefore find that the claimant has failed to shift the burden of proof.

55. If we are wrong about this, we find that the respondent has provided an adequate explanation for the treatment complained of by the claimant.

56. Dealing with the incidents relied on by the claimant in turn, we find as follows:

    56.1. On 27 September 2019, Ms McIlroy and the claimant had a one-to-one. Ms McIlroy followed up with a lengthy email dated 7 October 2019 detailing points under the headings 'Quality of Work' and 'Working Relationship'. We find that the issues raised in this email predate 20 September and we find that these matters would have been raised whether she was Jewish or not. They illustrate the performance concerns that Ms McIlroy had and explain the changes in her way of managing the claimant.

    56.2. The delayed payment of expenses of £500 in October 2019 was due to an oversight on the part of Ms McIlroy but related to everyone claiming expenses and was not directed at the claimant.

    56.3. The email of 12 December 2019 in which Ms McIlroy suggests the wording the claimant should use in her reply to Louise is a reasonable response given that the claimant, whether deliberately or inadvertently had not informed Ms McIlroy that she had dealt with the matter. In the context of Ms McIlroy believing that an embarrassing error had not been corrected, Ms McIlroy's response including some suggested wording was an effort to help the claimant, rather than to micromanage her. If the claimant had kept Ms McIlroy informed, there would have been no need for her to get involved at all.

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    56.4. Ms McIlroy's attendance at the launch of the Manchester Spinningfield site on 7 November 2019, was not directed at undermining the claimant and she attended as a member of senior team and to support the Founder. To the extent that Ms McIlroy contacted the claimant during this event, we do not find that the level of contact or reason for it to be unreasonable or unusual.

    56.5. The operational work assigned to the claimant on 23 December 2019 fell outside of the scope of the claimant's normal duties but we accept that it is the industry norm for all staff to help out with operational tasks during the busy Christmas period. We do not have sufficient evidence to conclude that Ms McIlroy acted unreasonably towards the claimant in asking her to help out in this way.

56.6. The meeting with Regional Director, Ben Litchfield on 3 January 2020 to discuss the Nottingham site was in relation to the opening of a competitor's restaurant which could affect the respondent's business. We accept that this was an important issue for the local restaurant and that Ms McIlroy had been asked by her managers to take an interest. We find that Ms McIlroy's conduct in arranging this meeting was reasonable, checking her availability and Ben Litchfield's without also checking the claimant's.

56.7. Ms McIlroy asked the claimant to share a summary of her future visit plans on 30 December 2019 but she did not do this with the other Regional Marketing Managers. We find that not every employee is treated in the same way in every respect. We accept Ms McIlroy's evidence that she had specific concerns about the claimant's and we do not find it unreasonable for a manager to check the whereabouts of their team.

57. We accept that we must also look at the totality of the situation. Having done so, we accept that there was a change in Ms McIlroy's management style towards the claimant from September 2019 but we accept the respondent's explanation for this.

58. As regards the claimant's dismissal, we find that Ms McIlroy was not the decision maker. We find that the reason for dismissal was that the claimant's position had become untenable because the relationship had broken down with her manager. We accept that it was not appropriate for the claimant to be managed by Ben Litchfield and the respondent was reasonable in refusing that request. It would have been difficult for the claimant to continue to be managed by Ms McIlroy and the respondent took the view that dismissal was the only solution.

59. We remind ourselves that this is not an ordinary unfair dismissal claim and we must only consider whether the claimant would still have been dismissed if she was not Jewish. It is not for us to make findings about the fairness or reasonableness of the grievance and dismissal procedures other than to determine whether anything would have been done differently if the claimant was not Jewish. We find that, in these circumstances, the fact that she was Jewish played no part whatsoever in her treatment.

60. We therefore find that the claimant was not discriminated on the grounds of her Jewish faith. Her claim is dismissed.

Employment Judge Davidson
Date 4 May 2021