



EMPLOYMENT TRIBUNALS

Heard at: Exeter On: 19 April 2022

Claimant: Ms Rosemary Carter

Respondent: Tesco Stores Limited

Before: Employment Judge Fowell

Representation:

Claimant In Person

Respondent Mr H Zovidavi of counsel, instructed by Pinsent Masons LLP

JUDGMENT

The complaints of harassment and discrimination on grounds of race are dismissed.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given on the day of the hearing.
2. Ms Carter is originally from Zambia. For about six months, from March to September 2020 she worked for Tesco as a Customer Assistant in their Tesco Express store in Budleigh Salterton. She was one of a number of temporary staff taken on to deal with the Covid situation. Her complaint is not about the way her employment ended but about an incident on 29 July 2020 when she was searched at work. Tesco has a policy that no member of staff may carry money or personal possessions on them while at work. That is presumably to avoid any confusion if money goes missing and someone is accused of taking it. It stops them saying, "but this is my money". On this particular day there is no dispute that Mrs Carter bought a scratch card on her break, won £30, was given the money by a colleague on the till (Samantha) and shortly afterwards went through a search procedure with her manager, Ms Carrie Crawford. She says that this was unfair and demeaning,

and that but for her race – she was the only non-white member of staff in the small store - this would not have happened.

3. The complaints she brings as a result of this incident are (a) of direct discrimination and (b) harassment on grounds of race. I heard evidence from Ms Carter, and on behalf of the company from Ms Crawford, the manager in question, and Mr Robert Willey, the Store Manager.
4. As may be expected from this single incident there were few original documents and I had a bundle of 89 pages, including Tribunal paperwork. Having considered this evidence and the submissions on each side, I make the following findings. I should add that the parties gave permission for me to hear this case on my own rather than sitting with members.

Findings of Fact

5. The Tesco Express store at Budleigh Salterton is a small one. It opened in November 2019 and employs about 14 people. Mr Willey was the store manager. He was appointed in March 2020, just before the first lockdown period. One of his first jobs was to recruit temporary staff to cope with the demands of Covid. Mrs Carter was one of them, as was her colleague Samantha. At first it was a very short term contract, ending on 18 June, but it was extended until 4 September that year. Like all the staff, Mrs Carter worked shifts. Ms Crawford was one of the shift leaders. On a day shift there might be three or four members of staff, with perhaps just one extra person on a night shift.
6. Personal searches are a fact of life for staff there. There is a company policy about it and each search takes a minute or two. According to the policy, staff being searched should be accompanied but that is often not possible in small stores like this, particularly during Covid with the need to maintain a two-metre separation. The only place to do them was in the small office at the back of the store. An informal practice had grown up that searches could be carried out without another colleague present providing that it was done with CCTV coverage, and there was a camera in the office.
7. The searches used to be recorded in a handwritten ledger. In the bundle there are nine pages of such entries. They show that a search was carried out on most days, and often there were two or three each day, which is a lot for such a small team. It is not just cash which is prohibited but other personal items, and the records show that the searches picked up members of staff for carrying valuable items like phones and ear phones, and also small things like cough sweets, mints or lip balm. Where these items were permitted, that fact was recorded in the ledger. In other cases the member of staff would be told to put it in the locker. That would be also be written down. With items like phones, or cash, a more detailed record would be made. This involved the “Let’s Talk” procedure, which essentially means that the circumstances

are recorded on a separate form, together with the person's reaction or response, and that would be placed on their file. The record keeping became electronic at some point after March 2020, and the initial search results would be recorded on a PDA or palm-top device.

8. It is agreed that Mrs Carter did not have any search herself until this one on 29 July. That may seem rather surprising given the number of searches carried out, but it was a part time role, and she was off work for several weeks from mid May 2020 after the unfortunate death of her husband.
9. Both before and after that compassionate leave Mrs Carter had a good relationship with Ms Crawford. While she was off work, Ms Crawford told her to call at any time and she also arranged to meet up with her out of work time. There are some photos of them sitting at the beach, together with a third colleague, and also photos of them together in the store, presumably at an earlier stage, looking happy.
10. On the day in question Mrs Carter was working in the store with Ms Crawford and Samantha. She bought her scratch card and during her morning break she found out that she had won £30. She went over to the till and told Samantha. Samantha got her the money out of the till and handed it over. That obviously posed a problem, given the policy on not having cash at work.
11. Surprising as it may seem, Mrs Carter did not know about this rule either. It was not in her induction pack and of course she had not been searched before. Although she might have noticed or heard about these searches, they were always carried out in private, in the back office. There is a poster in the office (at page 53A) stating that there was a right to search members of staff, but it does not mention the rule about handling cash and she did not pay it any particular attention. The company was sceptical about her claim not to know about searches, but it seems to me unlikely that she would allege that she was the first person in the store ever to have been searched if she was in fact aware of the practice and the reason for it.
12. Samantha, however, was aware of the policy and the search procedure. She gave a statement later on in connection with the grievance process (p.72) in which she said that she told Mrs Carter that she was not supposed to have cash on her. There was some dispute over whether these words were used. Samantha's statement was written on 14 September, nearly two months later, so she may not have had a clear recollection of the words used. When this was put to her at this hearing, Mrs Carter initially agreed that this had been said, then said that Samantha just told her that she should put it away. The point does not strike me as particularly important. Being told to put the money away must have indicated that she ought not to have cash on her, and the fact is that she did not put the money away. She put the money in her bra for safekeeping and went back to work on one of the tills.

13. Samantha must have been disconcerted by this. She knew that it was an important rule and it would not look good on CCTV if she was seen handing over cash to Mrs Carter, so she went to speak to Ms Crawford. Ms Crawford then took Samantha into the office and went through the search procedure with her. When that was done she asked Mrs Carter to come in. Samantha took over on the tills. The PDA records show that the two searches were 10 minutes apart.
14. That record is important because it shows that Mrs Carter's recollection of events cannot be quite right. She was not aware that Samantha was searched at all until these records were disclosed. Her account was that after handing over the money, Samantha went off to see Ms Crawford immediately and that they both came back together, before she had a chance to put the money away. The ten minute gap shows that she did have that chance, and that it is not a case of Samantha being unexpectedly quick to point out some failing, or of Ms Crawford being unexpectedly quick to pounce on the error. Ms Crawford went through the normal process methodically.
15. I asked her why she did not simply speak to Mrs Carter about it and tell her she needed to put the cash away. She explained that managers are not supposed to do that but instead they should go through the search procedure. That is why she started with Samantha. I accept that. The process is very detailed. They are supposed to record even the presence of cough sweets or mints, to build up a picture of who is breaching the policy and to record the reminders or warnings given, so it would be odd to take a less formal approach with £30 in cash which has just come out of the till.
16. Some other details of Mrs Carter's recollection are also at fault. In her grievance she said that the search was done in front of the customers, but in her evidence today she accepted that it was done in the office. She suggested that she spoke to Ms Crawford in the doorway and had to ask to go into the office for some privacy but I prefer the view that it was all done in the office as usual, without any unnecessary embarrassment.
17. In the office she was asked to turn out her pockets. Despite this, she did not produce the £30, just a £1 coin. She may have been a bit embarrassed as the money was in her bra, but she was then asked about other money and produced it. As per standard procedure, Ms Crawford then noted all this as part of the Let's Talk Procedure, for which there is a paper record at page 66. Mrs Carter wrote down that she did not know of the rule and was sorry. I prefer Ms Crawford's recollection that during the search Mrs Carter was friendly and co-operative, and there is no suggestion on the record at p.66 that she was offended in any way.
18. The next day she came in to work and spoke to Mr Willey, the store manager. He had a poor recollection of the event, but it was nearly two years ago. He agreed that it was quite a long chat and that Mrs Carter mentioned the recent coverage of the Black Lives Movement. This was done in the context of the search the

previous day. He may well have been perplexed by this, knowing that such searches were routine, and the conversation rang no alarm bells. He said he would speak to Ms Crawford to see what had gone on. He did not say to Mrs Carter, as she suggested, that she was the first member of staff to have such a search. Nor did he say that they had begun doing random searches the day before and started with her. That was simply not the case. It follows that there was also no discussion, as suggested, about why they would start with her, so Mrs Carter's recollection of this conversation cannot be correct.

19. Mrs Carter also gave evidence that she came in to the store the day after this, i.e. on 31 July, to speak to Mr Willey again. She described it in some detail. She practices lawn bowls, indeed is a professional bowler, and came in wearing her bowling whites as she was on her way to a competition. She says she brought in her sick note and then asked Mr Willey what Ms Crawford had said.
20. There is no question that Mrs Carter was signed off sick shortly after this search, but Mr Willey could not remember any such conversation and there is no mention of it in her witness statement. It also seems slightly unusual for her to bring in a sick note in person, especially when dressed up for a bowls match. I think it is more likely that she has confused this with another occasion, perhaps when she came in with a sick note after the death of her husband. It follows that I find that things were left as they were after the conversation with Mr Willey on 30 July. He told Mrs Carter that he would have a word with Ms Crawford, but he did not get back to her as she was signed off sick.
21. When Mrs Carter reflected on the incident she felt that she had been picked on. As far as she knew, she was indeed the only person to have been searched, and she made the link with her race. Hence, she was signed off sick, and did not return to work before the end of her contract on 4 September. It was not until after her contract ended that she raised her grievance. She then sent an emotive email about it on 24 September to the most senior person she could, the CEO of Tesco. By then, the CCTV footage from 29 July was no longer available. However, her email had some effect. An investigator was appointed from out of store, a Ms Holt. She took statements from Ms Crawford and from Samantha, then had a meeting with Mrs Carter. Her complaint of race discrimination was not upheld, but Ms Holt did find that there should have been a companion with her during the search.
22. All this took some time, and the employment tribunal claim was not submitted until 15 December 2020. I asked Mrs Carter why she did not bring her claim earlier and she told me that she tried the ACAS number every day for two months until someone picked up. The person then explained that they had not been answering the phones. I have some difficulty with that explanation. It is the first time I have heard any mention of difficulties in contacting ACAS, and this was some time after the first lockdown period. It is also at odds with her other point, which is that there

was little delay after the outcome of her internal grievance process. I conclude that she waited until the grievance was over before she contacted them.

Applicable Law

23. The test of harassment under section 26 Equality Act is as follows:
 - (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
24. The test of direct discrimination under section 13 is as follows:
 - (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.
25. The question here is whether the company, in carrying out this search, treated her less favourably than it treated or would have treated someone else in the same circumstances apart from her race.
26. There is also a particular provision at section 136 dealing with the burden of proof:
 - (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.
27. This was considered by the Court of Appeal in Ayodele v CityLink Limited [2017] EWCA Civ 1913, where the Court explained that this involved a two-stage approach: in the first stage, having heard from both sides, it is for the claimant to prove facts from which the Tribunal could conclude, in the absence of an explanation from the respondent, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case. This is in keeping with the guidance in Madarrassy v Nomura [2007] ICR 867 which established that it is not enough a claimant to show that she had a protected characteristic and the alleged act of discrimination - "something more" is required.

Conclusions

28. As already noted, after this incident, Mrs Carter was signed off sick for an extended period, and no doubt felt herself to be the victim of an injustice. She did not appreciate that this was a routine search. It was carried out for good reason under the respondent's policy. Indeed, Ms Crawford would have been open to criticism if she had failed to follow it.
29. It is not necessary to go into the law very far. As submitted by Ms Zovidavi, there is no reason to believe that this search was in any way out of the ordinary. There is nothing here to suggest discrimination beyond the fact that Mrs Carter has a protected characteristic and that she was searched at work, as is everybody else. There was an obvious reason for the search - the £30. I have already concluded that none of the alleged disturbing features of this event took place. It was not the first such search. It was not announced as the start of a programme of random searches. It was not conducted in public. The only extent to which it can be criticised, as found in the internal investigation, is that there was no companion present and it is difficult to see how that could have been avoided. Even that was the same for everyone, so there was no less favourable treatment involved, and so it cannot have been an act of discrimination. Nor, I am satisfied, was it in any way related to race, and so cannot have been an act of unlawful harassment.
30. Mrs Carter complains that the CCTV footage was not kept and suggests that this would show that she was telling the truth, but she accepts that the search was in the office so a recording would not have taken things very much further. There is no reason to be suspicious because it was not kept. That is simply because the allegation was not raised until much later. In any event, the search was documented on the Let's Talk form.

Time Limits

31. I will just add a few words about time limits. The claim form was presented on 15 December 2020, within a month of the end of efforts at early conciliation through ACAS. That period began on 13 November 2020 and so any act or omission which took place more than three months before that date, i.e. before 14 August 2020, is potentially out of time.
32. The question of whether it would be just and equitable to extend time is a broader one. In *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, Lord Justice Auld held that:
- “25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and

equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

33. Quite recently the Court of Appeal has revisited the correct approach to this in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* 2021 EWCA Civ 23. Tribunals were cautioned against relying on the factors listed in s.33

of the Limitation Act 1980 as a checklist. The main questions were:

- a. the length of the delay,
 - b. the reasons for the lateness, and
 - c. the potential prejudice to the other party.
34. Here there was a modest delay, and no obvious prejudice to the company, but no real explanation has been given for the delay, and so, applying the guidance in *Robertson*, there is no reason to make an exception here and extend time.
35. So, for all of the above reasons, the claim is dismissed.

Employment Judge Fowell

Date 7 April 2022

Judgment & reasons sent to parties: 19 April 2022

FOR THE TRIBUNAL OFFICE