EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102454/2020

Held in Dundee (in Chambers) on 25 March 2022

Employment Judge Cowen
Tribunal Member Ms Canning
Tribunal Member Mr Martin

Mr J Kovalkovs	**Claimant** **In person**
2 Sisters Food Group Limited	**Respondent** **Represented by:** **Mr Grant-Hutchison, Advocate** **Instructed by:** **Messrs Squire Patton Boggs (UK) LLP**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claim for indirect discrimination succeeds and the respondent shall pay the claimant Twenty Two Thousand and Seventy Four Pounds and Sixty Eight Pence (£22,074.68).

REASONS

Procedural Background

1. The original Judgment ('original Judgment') in this case was sent to the parties on 8 March 2021 and dismissed all the claimant's claims.

2. The claimant appealed to the Employment Appeal Tribunal and by way of a Judgment handed down on 2 February 2022, Lord Fairley set aside the Judgment of 8 March 2021 to the extent that it dismissed the claim of indirect discrimination. He stated that "It is obvious from the facts found by the Tribunal that the PCP which was applied to the Appellant in this case was simply the general prohibition on jewellery contained within the Foreign Body Control policy". He also stated that the "Tribunal erroneously inverted the onus of proof in relation to the issue of proportionality. In consequence it failed to make any determination as to whether or not the Respondent had discharged the burden of proof placed on it by section 19(2)(d)". He ordered that the case be "remitted back to the same Tribunal to reconsider the issue of liability and (if appropriate) remedy in the indirect discrimination claim".

3. A Preliminary Hearing for case management in the Tribunal was held by telephone on 17 February 2022, at which it was ordered by consent, that the parties would provide written submissions and any response by 21 March 2022 and that the Tribunal would meet in Chambers on 25 March 2022 to reconsider the indirect discrimination claim.

Submissions

4. The claimant's submissions referred to the fact that he had established a PCP which met the relevant test and that the burden therefore passed to the respondent. He also submitted that when considering if the policy was a proportionate means, the Tribunal must take into account the evidence of the lanyards, identity passes and keys worn by other employees around their necks. He also asserted that the respondent's witnesses had admitted that the risk assessment was not scored properly. He asserted that the respondent had failed to discharge the burden of proof.

5. The claimant referred to *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, outlining a three stage test to determine proportionality;

    a. First whether the objective is sufficiently important to justify limiting a fundamental right,

b. Second, whether the measure is rationally connected to the objective, and

c. Third, whether the means chosen are no more than necessary to accomplish the objective.

6. The claimant also referred to *Hardy & Hanson plc v Lax* [2005] EWCA Civ 846, where it was said that the Tribunal has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

7. The respondent's submissions centered on the fact that the EAT only overturned the original Judgment to the extent that the Tribunal had erroneously inverted the burden of proof on proportionality under s.19(2)(d) Equality Act 2010.

Factual Background

8. The factual findings of the original Judgment remain intact and are set out at paragraphs 11 to 26 of the original Judgment, but are re-stated here for ease of reference:-

11. "The Claimant was employed by the Respondent from 12 November 2019 as a press operative, but was quickly promoted to the role of quality inspector, in their chicken processing factory. The Claimant is a Christian who follows the Russian Orthodox Church. His belief is that a crucifix necklace should be worn close to the chest to signify his commitment to his belief. He therefore wore a necklace every day. It had been sanctified during a baptism ceremony for his godchild and had been a gift from his mother.

12. The Claimant underwent an induction training course at the start of his employment with the Respondent. This included training on the Foreign Body Control policy, which was part of the Respondent's food safety processes. This outlined that "jewellery must not be worn in the production areas on site, with the exception of a single plan band ring". A further exception was made for religious jewellery, subject to a risk assessment.

13. *The Risk Assessment Religious Jewellery was drafted on 13 November 2018 by Ms Fergusson and outlines five possible hazards associated with the wearing of religious jewellery. These were;*

    i. *Foreign body contamination from damaged items of jewellery:*
    For which the control measures included "jewellery with small parts such as watch strap links, earring clasps or necklace links must not be worn",

    ii. *Toxic reaction to metal:*
    For which the control measures included "Metal such as mercury, cadmium, lead, chromium and zinc must not be worn"

    iii. *Allergic reactions and infections:*
    For which the control measures included "Infected piercings should be removed and treated".

    iv. *Bodily fluid spillage as a result of injury:*
    For which the control measures included "Exposed piercings must be removed, non-exposed piercings must not be exposed in food production areas".

    v. *Injury due to entanglement, entrapment or tearing:*
    For which the control measures included "Jewellery work around the neck must not be worn. Jewellery with small links of chains must not be worn".

14. *The Claimant worked in a food production area of the site, which required the use of personal protective equipment ('PPE'), namely a white coat, which he wore over his own clothes. The Tribunal was not shown the necklace, nor were any photos of it placed in the bundle of productions. It was described as having small links and being made of silver.*

15. *The Claimant was promoted and began work as a Quality Inspector on 23 December 2019. That day, his line manager Ms McColl noticed that the Claimant was wearing a necklace.*

She told him to take it off as she knew that it was contrary to the Respondent's Foreign Body Control policy. The Claimant did not argue with Ms McColl but took it off. Ms McColl believed that this had dealt with the issue and that the Claimant understood he should not wear it again. She did not therefore offer to carry out a risk assessment in relation to the necklace. However, this was not the Claimant's understanding as he believed that the necklace should be allowed on the basis that it was religious jewellery. The necklace was visible under the Claimant's clothing and personal protective equipment to the extent that his line manager saw it. The Claimant did not request a risk assessment but believed that Ms McColl did not carry one out as she knew that his necklace was part of his Christian faith.

16. *Around this time the Claimant started to complain that he was being bullied by other staff and brought this to the attention of Ms McColl and also Ms Fergusson.*

17. *At a meeting with Ms Fergusson on 30 January about the bullying allegation, Ms Fergusson noticed that the Claimant was wearing a necklace. She asked him to take it off. The Claimant responded that that his necklace was a piece of religious jewellery and he did not want to remove it. Ms Fergusson asked the Claimant if a risk assessment had been carried out and he told her that Ms McColl was aware of the necklace but no risk assessment had been done. Ms Fergusson responded that she would contact Ms McColl and when the Claimant returned from holiday a risk assessment would be carried out.*

Risk assessment

18. *The risk assessment was carried out by Ms McColl on 10 February 2020 when she met with the Claimant. Ms McColl was embarrassed that the matter had been raised with her by her line manager and believed this was as a result of something said by the Claimant. She was not pleased with the Claimant on that basis.*

19. *Ms McColl filled in the risk assessment form. A copy of this assessment was not available to the Tribunal, although a generic form was placed in the bundle. Ms McColl concluded that because the chain was made of links there was a risk of contamination. She also took into account the potential for entanglement, entrapment or tearing. The other issues on the risk assessment form were not relevant in her opinion. She did not discuss the chain in any detail with the Claimant nor inspect whether the chain was in good condition. There was no conversation with the Claimant as to whether any steps could be taken to mitigate the risk, such as ensuring that it was tucked into his clothing at all times, or that his PPE could be fastened up to ensure it was not exposed. Ms McColl did not consider the list in any real detail. Ms McColl admitted to the Claimant that this was the first time she had applied this risk assessment and said that she wanted to take advice. The Claimant then returned to his workplace. Later that morning the Claimant was asked to return to speak to Ms McColl.*

20. *When they met, Ms McColl informed the Claimant that she had concluded that the necklace must be removed due to the fact that the chain contained links, which she believed to be a bar to jewellery being worn due to the first hazard listed on the risk assessment. Further, that as a result of having links, it may cause the necklace to become tangled or trapped, with reference to the fifth hazard. The Claimant refused to take the necklace off. Ms McColl told the Claimant to go to the HR office. When he arrived at the office he was told by Ms Watt, a member of the HR team, that as he was refusing to obey a management instruction, his probationary period and thus his employment would be ended immediately. He was told to leave and after returning his security pass and locker key, he did so.*

21. *On 12 February the Claimant wrote to the Respondent to raise a grievance about the bullying he had experienced, he also complained about his treatment in being told to remove the*

necklace. He did not refer specifically to the termination of his employment.

22. *The Respondent wrote to the Claimant on 14 February 2020 confirming that he had been dismissed for failure to follow a management request.*

23. *The Claimant appealed his dismissal in a letter to the Respondent dated 21 February 2020. He did so on the basis that the instruction to remove his necklace was unlawful and that the risk assessment was not carried out properly and hence it was inappropriate for him not to be allowed to wear it.*

Appeal

24. *As a result of this the Claimant was asked to attend an appeal hearing on 4 March 2020 with Mr Pillay, Continuous Improvement Manager.*

25. *At the hearing Mr Pillay pointed out to the Claimant that he ought to have declared his necklace to the company at the beginning of his employment, in order that the risk assessment could be done at that point. The Claimant pointed out that he had made a mistake in not doing so, but that Ms McColl was also mistaken on 23 December when she did not carry out a risk assessment. When the Claimant asserted that others carried keys around their necks which held the same risk of falling onto the production belt, Mr Pillay responded by saying that they would be picked up by the metal detector, but that a silver necklace would not.*

26. *Mr Pillay wrote to the Claimant, upholding his dismissal on 5 March 2020. The letter focused entirely on the fact that the Claimant had not declared the necklace during the induction course. It did not attempt to justify the decision making of Ms McColl's risk assessment, but relied on the outcome as a medium risk. It did not consider any attempt to mitigate the risk*."

The Law

9. The law which the Tribunal considered in consequence of the EAT was that of justification and in particular proportionality. The law in relation to disadvantage was set out appropriately in our previous judgment.

10. The Tribunal must consider proportionality in two separate ways – firstly as to whether the PCP is "necessary" as per the EU Directive. This has been qualified in domestic cases to be "reasonably necessary"; *Rainey v Greater Glasgow Health Board* [1987] IRLR 26, HL. It is therefore possible that although other measures would be less discriminatory, the measure taken by the employer may be justified.

11. The law on proportionality was set out by Elias J in the EAT in *MacCulloch v ICI* [2008] IRLR 846 and approved by the Court of Appeal in *Lockwood v DWP* [2013] IRLR 941, where it gave four legal principles;

    a. The burden of proof is on the respondent to establish justification,

    b. The measures must be reasonably necessary to achieve the objective

    c. An objective balance must be struck between the discriminatory effect of the measure and the needs of the undertaking.

    d. The Tribunal must decide whether the need of the undertaking outweighs the discriminatory effect of the measure.

12. The second aspect of proportionality to be considered is the relative advantage and disadvantage to the parties: *Hardy & Hansons plc v Lax* [2005] IRLR 726 sets out that it is for the Tribunal to weigh the reasonable needs of the employer against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The court emphasised that there is no room to introduce the 'range of reasonable responses' test which is available to an employer in cases of unfair dismissal.

13. If the Tribunal concludes that the means used by the employer to achieve a legitimate aim is disproportionate, the justification will not be established.

Issue for reconsideration

14. The judgment of the EAT set out that the PCP which ought to have been considered was the "general prohibition on jewellery contained in the Foreign Body Control policy".

15. The Tribunal considered their original Judgment and paragraph 49 in particular. The Tribunal remained satisfied that the application of the Foreign Body Control policy placed the claimant at a disadvantage, as he would not be allowed to wear his necklace. The Tribunal were satisfied (as stated by EAT at paragraph 26) that all elements of s.19 Equality Act 2010 which the claimant was required to prove had been established.

16. The Tribunal then considered whether the respondent could show that the Foreign Body Control policy was a proportionate means of achieving a legitimate aim. The burden being on the respondent to establish justification.

17. The Tribunal were satisfied that paragraphs 52 and 53 of the original judgment considered appropriately the legitimate aim of the respondent and stand by their decision on this point;

> "*52. The Respondent asserted that the legitimate aim was one of health and safety, both in relation to the risk of contamination to the food product and also the health of the employee, to avoid becoming tangled in machinery. Hence the policy to prohibit jewellery which may contaminate the food, or become tangled.*
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> *53. The Tribunal accepts that the health and safety of both consumers and staff is a legitimate aim. It seeks to uphold both statute and regulation of the food production industry as well as the duty of care to employees.*"

18. The Tribunal considered the three principles laid out in *Homer.* They first considered whether the objective is sufficiently important to justify limiting a fundamental right; The Tribunal considered that the respondent had asserted that this was a health and safety matter, not only for the staff, but also for the customers of the products. The consequence of injury to either staff or a customer was very serious and therefore the Tribunal were

satisfied that this was an important and worthwhile objective, which could justify limiting a fundamental right.

19. The Tribunal went on to consider whether the measure is rationally connected to the objective. The measure is the policy which contains the prohibition. The prohibition of jewellery in the policy is clearly connected to the objective in that it removes all risk of entrapment or contamination.

20. Thirdly, the Tribunal considered whether the means chosen were no more than necessary to accomplish the objective. In considering whether it was a proportionate means, the Tribunal took into account a number of factors. The respondent sought to rely on the risk assessment as evidence of the proportionality of its policy. When applied, the risk assessment may, objectively consider whether the risk is so high that it is not acceptable and whether it can be abated by any reasonable steps.

21. The Tribunal were satisfied that a fully considered and properly applied risk assessment therefore may be evidence of proportionality. However, when they considered the evidence of the risk assessment in this case, the Tribunal were not satisfied that what had occurred, in fact took into account all the relevant information. This meant that the risk assessment was not properly applied and did not amount to evidence of proportionality. To be appropriate, the assessment would have to be completed in an appropriate manner. The evidence heard by the Tribunal in relation to the risk assessment indicated that Ms McColl had never carried out such an assessment before. She did not complete all the sections of it. She admitted that she had not inspected the chain, nor considered whether it could be covered in some way, or whether there was any alternative means of wearing it which would reduce the risk. The claimant's evidence on this point, which we accepted, was that he was not consulted and that the risk assessment was cursory.

22. The evidence of Mr Pillay focused on the timing of the claimant's notification of his necklace. He centered on the fact that the claimant had failed to reveal the necklace at his induction. He failed to focus on the content of the claimant's appeal. The Tribunal did not consider that this was justification for an inappropriate risk assessment at a later time.

23. The tribunal also considered the comparison of the treatment of the claimant to the treatment of staff wearing lanyards at work. The Tribunal took into account the evidence of Mr Pillay, that lanyards are designed to be brightly coloured and highly visible and that the clasp is made to break if pulled abruptly. The Tribunal also noted that he said that the metal content would be picked up by the metal detectors on the line. The Tribunal noted that we were not shown examples of these lanyards specifically, but were satisfied that his evidence did distinguish the lanyards from a necklace.

24. The Tribunal must decide whether the need of the undertaking outweighs the discriminatory effect of the measure. On balance the Tribunal considered that the respondent had failed to produce evidence which indicated that the health and safety of staff and customers had outweighed the discriminatory effect on the claimant of being prohibited from wearing his necklace. This was because the risk assessment had not been appropriately fulfilled. It could not therefore accomplish the objective of health and safety and consequently the policy could not be considered to be proportionate or necessary.

25. The Tribunal concluded that the Foreign Body Control policy and its application to the claimant were indirectly discriminatory.

Compensation

26. The Tribunal went on to consider the compensation due to the claimant. Firstly, in relation to loss of earnings; the Tribunal took account of the claimant's evidence which highlighted that he considered that he had been the subject of bullying at work and had complained about it. Further, that he was in his probationary period at the time. We also considered the evidence that the claimant was seen to be a good worker and that he had been promoted shortly after starting work with the respondent. There were no issues over his performance or capability that were drawn to our attention. The claimant's evidence was that he wished to continue to work for the respondent and potentially work his way into other roles within the company. We accept that this was his aspiration at the time.

27. The Tribunal concluded, based on the evidence, that if this discrimination had not taken place, the claimant would have continued to work for the respondent. The Tribunal considered that if the claimant had continued to work for the respondent, the issue of the bullying would have been resolved by the respondent, as a reasonable employer would.

28. On that basis, the Tribunal were aware that the respondent had remained open and working during the pandemic and therefore the claimant would have had work on full pay available to him throughout. There is no evidence that the claimant would have been placed on furlough.

29. We therefore calculated the claimant's loss of earnings to 15 January 2021. His net pay was £361 for 48 weeks, resulting in £17,328. We also took into account the fact that the claimant had earned £13,092.45 in that period and therefore had a loss of £4,235.55 The Tribunal were content that the lost earnings during that period include payment for holidays and therefore no separate additional payment was due.

30. The Tribunal considered that as the world began to open up again in January 2021, a reasonable period of time in which the claimant would find work to place himself in the position he had been in previously would be 8 weeks. We therefore find a further £2,888 for future earnings. We considered that the claimant had made reasonable efforts to find work and had carried out some work at a time when the labour market was affected by the pandemic. The Tribunal were satisfied that thereafter the claimant's confidence that he would find work to place him in an equivalent position was justified and no further award was appropriate.

31. The Tribunal then considered an award for injury to feelings. It was clear to us that the claimant had lost a job as a result of the discrimination towards him. His religion and the wearing of his necklace were of deep and profound meaning to him. The Tribunal concluded that his feelings of discrimination by his employers were genuine and substantial. We also took into account that whilst the consequence of the discrimination was long term, in the sense that it brought to an end his employment, the actions themselves were relatively short lived involving one significant occasion.

32. The Tribunal considered the Vento guidelines as they have been updated by Da'Bell and De Souza and the 2017 Presidential Guidance to the Employment Tribunals. The Tribunal took into account the claimant's evidence of the effect and upset he experienced as a result of the discrimination. We concluded that an award in the middle band was appropriate and that the amount of £12,500 would appropriately reflect his damages.

33. The Tribunal also noted that the claimant had received £150.99 in Universal Credit and £1869.34 in Job Seekers Allowance to January 2021. These sums will not be subject to recoupment as the awards made are under the Equality Act and recoupment does not apply to such awards.

34. The Tribunal also considered the award of interest which should be applied to the compensation for the period of 14 February 2020 to 25 March 2022, when these sums are awarded. This is a period of 109 weeks. The interest to be awarded on injury to feelings is 8% for the whole period, a sum of £2,096. The interest on past loss of earnings is 4% for the whole period amounts to £355.13.

35. The total award to the claimant by the respondent is £22,074.68.

Employment Judge: **S Cowen**
Date of Judgment: **30 May 2022**
Date sent to parties: **07 June 2022**