



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Natalie Wanliss

v

Iceland Foods Limited

Heard at: Cambridge

On: 11 and 12 May 2022

Before: Employment Judge Bloom

Members: Ms J Stewart and Ms F Tankard

Appearances

For the Claimants: In person

For the Respondent: Mr R Hignett, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that the Claimant's Claims of Constructive Unfair Dismissal, Direct Discrimination and Unlawful Harassment, all fail and are therefore dismissed.

REASONS

1. This case came before us on 11th and 12th May 2022. It was conducted via the CVP platform. There was insufficient time at the conclusion of the case on 12th May 2022 for the Tribunal to consider and then give its Judgment on that day. As a result Judgment was reserved.
2. The Claimant represented herself. The Respondents were represented by Mr Hignett of Counsel. The Respondent heard detailed evidence from the Claimant. She produced a Witness Statement which dealt with some of the allegations she was making before the Employment Tribunal but did not cover all of them. However, she was able to expand on those matters during the course of her evidence. She was subjected to detailed cross examination by Mr Hignett. The Respondents called three witnesses. The first was Sean Mooney who was the Claimant's Line Manager at the commencement of her employment. The second was Mr Kashif Kashif who was the Claimant's Line Manager in the period leading up to the end of her employment. The third witness was Mr Nadir Samiev a Human Resources Case Manager in the Respondent's employment who dealt with

the Claimant's grievance dated 29th May 2020. Those witnesses had all produced detailed Witness Statements. They were cross-examined by the Claimant. During the course of the Hearing and reaching its Judgment the Tribunal has also considered a Joint Bundle of Documents consisting of some 544 pages as well as viewing CCTV footage and listening to a recording of a conversation between the Claimant and Mr Samiev after the submission of her May 2020 grievance.

3. The Respondent is a well-known national food retailer employing around 29,000 employees in Great Britain. They have a considerable number of outlets across the country one of which was the store in Enfield. The Claimant was employed at the Enfield store as a part-time Sales Assistant. Her employment began on 22nd February 2018 shortly before the Enfield store opened in March 2018. She worked 16 hours per week. Her employment came to an end when she resigned with immediate effect on 30th June 2020. The Claimant presented her Claim to the Employment Tribunal on 22nd September 2020. A Preliminary Hearing took place at the Reading Employment Tribunal on 1st July 2021 before Employment Judge Gumbiti-Zimuto. The Claimant represented herself at that Preliminary Hearing. The Respondents were represented by their solicitor. We were informed by both parties during the course of this Hearing that the Employment Judge at the Preliminary Hearing took a considerable amount of time with the Claimant to identify the issues. Those issues are set out in the Case Management Summary following the Preliminary Hearing (pages 538 – 544 of the Bundle). The Employment Judge identified issues relating to time limits with regard to the Claimant's Discrimination Claims. The Claimant's Claim of Constructive Unfair Dismissal was identified. The Claimant was relying on an alleged breach by the Respondent of the implied term of mutual trust and confidence. The Claims of Direct Race Discrimination and Harassment were identified as fifteen separate complaints which are set out in the List of Issues (page 540 of the Bundle). They are lettered as (a) – (o). The Tribunal has heard detailed evidence in respect of all fifteen allegations and the Respondent's subsequent denials thereof.

The Law

4. In order to bring any Claim of Constructive Unfair Dismissal a Claimant must have been dismissed. The Claimant relies on Section 95 (1) (c) of the Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the Contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of her employer's conduct. The burden of proof is on the Claimant to show, on the balance of probabilities, that she was dismissed.
5. The classic test for such a claim was identified in the well established authority of Western Excavating (ECC) Limited v Sharp 1978 IRLR 27CA where it was stated:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat herself as discharged from any further performance. If she does so then she terminates the contract by reason of the employer’s conduct. She is Constructively Dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively she may give notice and say that she is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle her to leave at once. Moreover she must make up her mind soon after the conduct of which she complains or if she continues for any length of time without leaving, she will lose her right to treat herself as discharged. She will be regarded as having elected to affirm the contract”.

6. In this case the Claimant asserts there to have been a breach of the implied duty of mutual trust and confidence. The case of *Malik v Bank of Credit and Commerce International* 1997 IRLR 462 provides guidance clarifying that there is imposed on any employer a duty that he will not without reasonable and proper cause conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. The effect of the employer’s conduct must be looked at objectively.
7. The Court of Appeal in the case of *London Borough of Waltham Forest v Omilaju* 2004 EWCA CIV 1493 considered the situation where an employee resigns after a series of acts by her employer. The Claimant in this case brings her case on such a basis.
8. An employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw, i.e. the last of the acts complained of, does not have to be of the same character as the earlier acts but it has to be capable of contributing something to the series of earlier acts. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to a dismissal, it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to the provisions of Section 98(4) Employment Rights Act 1996.
9. Insofar as the Claims of Discrimination are concerned the Claimant relies upon the protected characteristic of her Race. The definition of Race includes colour (Section 9 Equality Act 2010). The Claimant relies upon her colour. She is a black woman.
10. In relation to the Claim of Direct Race Discrimination the relevant statutory provision is Section 13 Equality Act 2010. There are two issues, namely

alleged less favourable treatment and the reason for the alleged less favourable treatment. These questions need not be answered strictly sequentially (Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337). Given that the treatment complained of must be less favourable a comparison is required. A comparator must be in the same position in all material respects as the Claimant save only that he or she is not a member of the protected class. The Claimant in this case relies on an actual comparator namely Yvonne Purcell a white woman also employed as a Sales Assistant at the Enfield store and further hypothetical comparators.

11. The burden of proof in such cases is set out in Section 136 of the Equality Act 2010. The leading cases on the burden of proof are Igen Limited v Wong 2005 EWCA CIV 142 and Madarassy v Nomura International Plc 2007 EWCA CIV 337. Section 136 Equality Act sets out that it is for the Claimant to prove, on the balance of probabilities, facts from which a Tribunal could conclude, absent any explanation from the Respondent, that the Respondent has discriminated against the Claimant. If the Claimant does that, the burden of proof shifts to the Respondent to show that it did not discriminate as alleged. The burden of proof does not shift to the Respondent simply on the basis that the Claimant establishes a difference in status and a difference in treatment. This merely gives rise to the possibility of a discriminatory act or acts. Something more is required.
12. The Claimant's Claim of Harassment related to her protected characteristic is brought pursuant to the provisions of Section 26 Equality Act 2010. That provision states as follows:-

“A person (a) harasses another (b) if –

 - (a) engages in unwanted conducted related to a relevant protected characteristic; and
 - (b) the conduct has the purpose or effect of violating (b's) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for (b). In deciding whether conduct has the effect referred to, each of the following must be taken into account – the perception of (b), the other circumstances of the case and whether it is reasonable for the conduct to have that effect”.
13. In a case such as this where there is as clear disagreement between the parties it is important for an Employment Tribunal to make clear findings as to what conduct actually took place including, where relevant, what words were actually used (Cam v Matrix Service Development and Training Limited UK EAT 0302/12).
14. A single incident can amount to an unwanted allegation of conduct and can result in a complaint of harassment if serious and whether or not any single act is sufficiently serious is a question of fact and degree. The word

“unwanted” is the same as “unwelcome” or “uninvited” and means, not surprisingly, unwanted by the employee.

Findings of Fact

15. Having heard the evidence from the Claimant, the Respondent’s witnesses and considering the additional evidence contained in the Bundle, the CCTV footage and the telephone recording, on the balance of probabilities, the Tribunal comes to the following findings of fact in relation to the fifteen allegations made by the Claimant:-

- 1) The Claimant alleges that the Respondent failed to give her access to the opportunity for advancement to the position of Supervisor. During the course of the Claimant’s evidence the allegation in fact was one that the Respondent failed to give her access to advance to the position of Non-Trade Duty Manager which was the next rung up the ladder from Sales Assistant in terms of seniority in the store. To consider any employee for such a promotion the Respondent requires that the employee complete a Non-Trade Duty Manager training booklet. Completion of the booklet required the Claimant not only to set out her basic information such as her name etc., but also required her to complete further detailed information regarding the role of the Non-Trade Duty Manager. In essence it required her to show an understanding of the role involved. A degree of commitment and enthusiasm was essential to that process in completing the information. We find that the Claimant only completed the very basic information required and made no further attempt thereafter to complete the remaining parts of the booklet. Mr Mooney in his evidence satisfied us that an essential part of any consideration to be promoted to that role was a display by the employee of a commitment and drive to proceed to that advancement. The Claimant failed to show it. In contrast her colleague Yvonne Purcell did complete fully the booklet. She showed additional enthusiasm by speaking regularly to Mr Mooney as to the requirements of a satisfactory completion. The Tribunal is satisfied that the Claimant and Ms Purcell were given the same opportunity of advancement to the role of Non-Trade Duty Manager. Ms Purcell showed enthusiasm for the task and completed it satisfactorily. The Claimant, in marked contrast to Ms Purcell, failed to do so. The Claimant has failed to satisfy us that there was any discriminatory explanation for Ms Purcell’s appointment to the role. Ms Purcell is a white woman but the evidence is clear to us as to why she was appointed and the Claimant was not. Both the Claimant and Ms Purcell were given the same opportunity, i.e. encouragement from management and were issued with the Non-Trade Duty Manager training booklet. The simple

fact is that Ms Purcell completed the task and the Claimant did not. Insofar as an allegation that this constituted a repudiatory breach by the Respondent justifying a Claim of Constructive Dismissal, the Tribunal takes note that the relevant events took place some two years before the Claimant's final resignation and were highly unlikely to be a reason for such resignation. The Claimant's failure to complete the application process does not amount to a repudiatory breach of the Claimant's contract of employment.

- 2) The second complaint made by the Claimant is an allegation that the Respondent failed to carry out a twelve week review after she commenced her employment. As we have stated, the Claimant's employment began shortly before the Enfield store opened to the public. The Claimant was one of twenty or so new employees engaged by the Respondent at that time in the Enfield store. Mr Mooney signed off the Claimant's six week and twelve week reviews on 15th July 2018 (pages 339 and 340 of the Bundle). He put no comments on the review due to the significant number of new hires at the time. This was the same position in relation to the other new employees recruited at the store at that time. One of those, namely Ms Purcell was treated in exactly the same way (pages 302 and 303 of the Bundle). It was not a contractual requirement that a twelve week review should be completed. There was no differential treatment between the Claimant and Ms Purcell. The Tribunal finds that such matters did not constitute a repudiatory breach of contract by the Respondent and they cannot have been a subsequent reason for the Claimant's resignation two years later. There is no evidence of less favourable treatment because of the Claimant's Race.
- 3) The Claimant complains that the Respondent did not carry out an annual review of the Claimant's work. The Tribunal finds as a matter of fact having heard the evidence that the Respondent did not carry out yearly reviews/appraisals for Sales Assistants. As an alternative to an annual review Sales Assistants obtain regular feedback and supervision on an as and when required basis. The Tribunal notes the Respondent's Human Resources records in that regard. These records are known as Nexus notes (pages 529 and 520 of the Bundle). There was no express or implied term that annual reviews would be carried out and consequently the absence of one cannot constitute a repudiatory breach by the Respondent. No less favourable treatment was suffered by the Claimant. There was no differential treatment between herself and Ms Purcell or any other hypothetical comparator.

- 4) The Claimant alleges that the Respondent failed to pay her the correct salary in September 2019. This in fact was an issue that the Claimant raised in the second of her five grievances. It is worth noting in this case that the Claimant raised five grievances against the Respondent on 23rd August 2019, 29th October 2019, 5th February 2020, 14th May 2020 and 29th May 2020. As stated, the second grievance raised the issue regarding the September 2019 salary. Following that grievance the Respondent instructed its Payroll Department to make a payment to the Claimant representing 15 additional hours of work. This consisted of 4 hours holiday pay, 9.5 hours representing untaken breaks and 1.5 hours taken up in respect of the grievance hearing. The 15 hours of work were paid on 15th December 2019. There is clear evidence that this sum was paid by the Respondent (page 104 of the Bundle). An e-mail was sent to the Claimant with a full explanation of payments made to her. The Claimant agreed during the course of giving her evidence to the Employment Tribunal that she had received payment for this sum. There was no foundation therefore in the Claimant's allegation.
- 5) The Claimant alleges that the Respondent failed to correctly record her entitlement to annual leave in September 2019. The Claimant's evidence in this regard was confusing and muddled. The Tribunal concludes that it is clear the Claimant took holiday entitled to her. She was absent through illness for the period 17th September – 12th October 2019. Her sickness and holiday record correctly reflected those events (pages 330 and 331 of the Bundle). There was no breach of any express or implied term of the Claimant's contract of employment. There is no evidence before the Employment Tribunal of any less favourable treatment because of her Race.
- 6) The Claimant alleges that the Respondent unilaterally changed her hours of work. She had originally worked four days per week and each day worked 4 hour shifts, i.e. a total of 16 hours. In or around January 2020 that working arrangement changed and thereafter she worked two days of 6 hour shifts on each and one day a 4 hour shift, again making a total of 16 hours per week. The Tribunal finds no evidence that there was a unilateral change imposed on the Claimant by the Respondent. In fact to the contrary, the change was agreed between the parties. There had been a discussion about changing the Claimant's hours in October 2019 for business reasons but the change did not come into effect until January 2020 at which time the Claimant consented to it. (Evidence in the Bundle clearly confirms that fact – pages 325 and 326). The change took effect from 19th

January 2020. The Tribunal agrees with the Respondent's case, namely that the Claimant was asked to change her hours and she consented to such change. There is therefore no evidence of any fundamental breach or any less favourable treatment. The change to the Claimant's working hours is completely unrelated to her colour.

- 7) The next and seventh allegation made by the Claimant is an allegation that she was required to work shifts between 6:00 a.m. and 12 noon without a break in March 2020. The Tribunal rejects that allegation. There is no evidence to suggest that the Respondent imposed such a condition on the Claimant. The Claimant was able to take a break if she had asked for one during the course of each shift. In relation to one particular incident on 10th March 2020 the Claimant did not take her break until shortly before her shift was due to end. The Tribunal is satisfied that she was approached by the Respondent and encouraged to take her break at that time. In fact she refused to do so. The Claimant herself accepted in evidence that she did not ask to take a break earlier in the shift. In short, there is no evidence before the Employment Tribunal that the Respondent did not permit the Claimant to take breaks. There is no evidence of any other employee being treated differently to the Claimant.
- 8) The next allegation made by the Claimant is that her Line Manager Mr Kashif Kashif wrote bad reviews about her relating to the Claimant failing to hit targets relating to picks for online shopping. The Respondent accepts the evidence of Mr Kashif Kashif. The Claimant did not match the required targets for such work. Mr Kashif Kashif monitored all employees including the Claimant. The Claimant was not treated any differently or less favourably to any other employee. In February and April 2020 there is clear evidence that the Claimant was not achieving the required targets and, as a consequence, was spoken to about this by Mr Kashif Kashif. Nothing substantive arose from this in any event because following a complaint made by the Claimant the Respondent ruled that entries in the Nexus HR notes about it should be deleted.
- 9) The Claimant alleges that the Respondent incorrectly recorded her as being absent from work on 14th, 15th and 16th April 2020 when in fact she was at work on those days. During the course of giving her evidence the Claimant narrowed this allegation down to one that she had been incorrectly recorded as being sick on 14th April 2020. She was at work on 15th and 16th April 2020 and the records that she was at work on those days were therefore correct. In the Tribunal's Judgment it is clear that the Claimant was absent

from work through illness on 14th April 2020. The Claimant's sickness records and pay records confirm that fact (pages 331, 535 and 310 of the Bundle). This allegation therefore cannot constitute a repudiatory breach by the Respondent or any less favourable treatment because of the Claimant's Race.

- 10) The next allegation is probably the most serious brought by the Claimant against the Respondent. In May 2020 the Claimant arrived at work. The Respondent has a uniform policy and all staff, including the Claimant, are required to wear the Respondent's uniform. The Claimant was wearing a "bum bag" over her shoulder. She was approached on the shop floor by Mr Kashif Kashif. The Tribunal is satisfied that there were no other persons present who heard the conversation. Viewing the CCTV footage shows no-one else to be present. Unfortunately the CCTV footage did not have sound. Mr Kashif Kashif denied the allegation made by the Claimant that during the course of the conversation he said to her "you look like a drug dealer". The Claimant stated that the comment was made to her and that she was distressed by it. On the balance of probabilities the Tribunal prefers Mr Kashif Kashif's evidence namely that the comment was not made. The Claimant subsequently alleged during the course of her fifth grievance that the comment was made and relied upon the fact that Ms Purcell had heard the comment. There is no evidence that Ms Purcell confirmed that fact and during the course of being interviewed as part of the grievance process Ms Purcell denied that she had heard it and in fact stated that she was working on a till at the time. On the balance of probabilities the Tribunal finds therefore that the comment was not made and the Claimant's Claims in this regard therefore fail.
- 11) The Claimant alleges that the Respondent failed to uphold her grievance made in May 2020. As we have stated, the Claimant raised five grievances during the course of her period of employment with the Respondent. Each one was properly investigated. Detailed reasons relating to the outcome of each grievance were always conveyed to the Claimant. She was given the right to appeal against each finding. Any appeal process was correctly conducted and the outcome of any appeal quite properly conveyed back to the Claimant. The grievance relating to the alleged comment made by Mr Kashif Kashif was raised by the Claimant on 20th May 2020. A detailed investigation and process was undertaken by Mr Samiev. He interviewed not only Ms Purcell but other employees. The Claimant chose to resign from her employment in the early hours of the morning on 30th June 2020 before the outcome of her grievance was

conveyed to her later that day (pages 227 – 233 of the Bundle). She therefore chose to resign before she knew the outcome of the grievance and before any subsequent appeal was dealt with. On 2nd July 2020 she lodged her appeal post-resignation. The outcome of her appeal was conveyed to her on 11th August 2020 (pages 227 – 233 and 297 – 300 of the Bundle). The Tribunal finds that the outcome of the grievance in any event was reasonable in all the circumstances. The Claimant had alleged that many witnesses supported her version of events relating to the alleged comment made by Mr Kashif Kashif. When the witnesses were interviewed as part of the Respondent's detailed investigation into the grievance they did not agree with the Claimant's position. The Claimant's allegation does not constitute a repudiatory breach by the Respondent and does not constitute less favourable treatment as alleged.

- 12) The Claimant complains that the manner in which her grievance was handled by Mr Samiev in the way that he investigated the grievance and subsequently rejected the grievance, constituted a breach of the implied term of trust and confidence and/or constituted less favourable treatment. This allegation is again rejected by the Tribunal. The Tribunal finds that Mr Samiev quite properly undertook a comprehensive and detailed examination in relation to the Claimant's allegations. Based on the evidence before him he took a reasonable decision to reject the Claimant's grievance. There was no basis for inferring that any hypothetical comparator would have had their grievance dealt with in any different way.
- 13) The Claimant complains about the manner in which her grievance appeal was handled by the Respondent. As stated, the appeal took place after her resignation. It cannot therefore support an allegation relating to her Claim of Constructive Unfair Dismissal. The Respondent properly investigated the grievance and conducted a proper appeal process. There was no basis for inferring any hypothetical comparator would have had their appeal dealt with in a different way. In fact the Claimant went on to state that the Respondent's handling of the grievance appeal could not have been the reason for her resignation given the chronology of events. That allegation therefore is again rejected.
- 14) The Claimant in the fourteenth of her allegations alleged that she was shunned by other employees. She alleges that they stopped talking to her, greeting her or acknowledging her during working hours. The Claimant was unable to expand

on that allegation. There was no other evidence that she was shunned by other employees.

16. The Claimant alleges that she was dismissed by the Respondent. Based on our findings of fact above we do not find that the Claimant was dismissed.

Conclusions

17. As a result of our findings it was not consequently necessary to determine the issue of whether the Claimant's Claims were presented to the Tribunal in time. The Claim for Constructive Dismissal was clearly in time. Had it been necessary to determine issues relating to the Discrimination Claims being in or out of time we conclude that they were in time. The acts complained of by the Claimant ending with the incident between herself and Mr Kashif Kashif in May 2020 constituted a series of continuing acts as determined by the provisions of Section 123 (3) Equality Act 2010.
18. As we have found, the Tribunal rejects all fifteen allegations made by the Claimant. There is no evidence that any of the acts she complains of either individually or cumulatively constituted a breach of the implied term of trust and confidence. The Claimant was not dismissed by the Respondent within the meaning of Section 95 (1) (c) Employment Rights Act 1996. As a consequence the Claimant's Claim of Constructive Dismissal fails and is dismissed.
19. Similarly, as a result of our findings of fact, the Tribunal finds no evidence that the Claimant was treated less favourably than any comparator actual (Yvonne Purcell) or hypothetical. She was not treated less favourably because of her colour. Consequently the Claimant's Claim of Direct Discrimination fails and is dismissed.
20. Again, based on the Tribunal's findings of fact, there is no evidence that the Claimant was harassed in the way alleged. There is no evidence of unwanted conduct related to the Claimant's colour and any conduct complained of did not have the purpose or effect of violating the Claimant's dignity nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant's Claim of Unlawful Harassment also fails as a consequence and is dismissed.

6 July 2022

Employment Judge Bloom

Sent to the parties on: 10 July 2022

For the Tribunal Office: GDJ