



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112057/2021 & 4112399/2021

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Held in Glasgow on 13, 14, 15 and 16 June 2022

**Employment Judge - A Strain
Members – I Ashraf and S Singh**

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Mr Martin Doyle

**Claimant
In Person**

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DHL Services Limited

**Respondent
Represented by:
Mr P Grant-Hutchison -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the Claimant's claim of unfair dismissal is unsuccessful and is dismissed; and
- 25 2. the Claimant's claims of unlawful deductions/failure to pay wages and religious discrimination and/or Harassment under sections 13 & 26 of the **Equality Act 2010 (EA 2010)** are unsuccessful and are dismissed.

Background

1. The Claimant represented himself. He asserted claims (as set out in
30 paragraph 23 of the PH Note dated 22 February 2022) of Unfair Dismissal, unlawful deductions in respect of a failure to pay wages and Religious Discrimination/Harassment under sections 13 and 26 of the **Equality Act 2010 (EA 2010)**. The Claimant sought a Basic Award, Compensatory Award,

failure to pay wages and damages for injury to feelings as detailed in his schedule of loss.

2. The Respondent was represented by Mr P Grant-Hutchison, Counsel.
3. The Parties had lodged a Bundle of Documents with the Tribunal for the purposes of the Hearing. Additional documents were lodged by the Claimant and added to the bundle at the commencement of the Hearing.
4. The Tribunal heard evidence from the Claimant, Gordon Fraser (Site Operations manager – Central Station), Kenneth Reid (Supervisor) and Ray Jeffries (General Manager) for the Respondent. Witness Statements had been lodged and exchanged in advance.

Findings in Fact

5. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - a. The Claimant is of the Catholic faith.
 - b. The Claimant was employed by the Respondent from 2 June 2019 until the termination of his employment on 5 October 2021. He worked as a Warehouse Operative under and in terms of a contract of employment dated 30 April 2019 (Production 22).
 - c. The Claimant's duties and responsibilities involved loading a van with catering stock at Glasgow Central Station, delivering to Edinburgh Station and returning to Glasgow Central Station. This was pursuant to a contract the Respondent's had with Avanti West Coast.
 - d. The Claimant worked 16 hours per week and on nightshift.
 - e. Glasgow Central Station is operated by Network Rail. Network Rail have a strict Security Access Policy (Production 21). Anyone parking in the car park operated by Network Rail at the station had to display a security pass in the windscreen. Security passes were obtained from Network Rail

offices at the station. This policy was well know by employees of the Respondent and by the Claimant.

- 5 f. On 2 occasions in 2021 Marc Rhodes (senior employee of the Respondent) reminded the Claimant that he required to obtain a security pass from Network Rail before leaving his car in the car park.
- g. On 8 November 2020 the Respondent secured an additional contract for the provision of services to the operators of the Caledonian Sleeper. The Respondent was unsure of the length and/or duration of this contract and had been asked to take it on at short notice.
- 10 h. The Respondent decided to engage temporary agency workers to operate the Caledonian Sleeper contract due to this uncertainty. The Respondent engaged Best Connection Group Limited (a temporary work agency) to provide agency workers for this purpose.
- 15 i. The Claimant was informed of the availability of this work on an agency worker basis by Gordon Fraser. The Claimant was employed by the agency to work on the Caledonian Sleeper contract with effect from 8 November 2020.
- j. From 8 November 2020 onwards the Claimant worked 16 hours per week with the Respondent and the balance of his hours with the agency.
- 20 k. The Respondent's decision to engage an agency to provide agency workers for the Caledonian Sleeper contract and to inform the Claimant of the availability of such work was not motivated in any way by the Claimant's religion.
- 25 l. By email of 17 September 2021 (Production 58) Cheryl Quinn (Station Manager) of Network Rail informed the Respondent that they were revoking all of the Claimant's access to Glasgow Central Station. This was due to the Claimant parking his car in the station car park without a valid permit or permission from Network Rail. As this had happened on multiple occasions Network Rail had revoked his access to their car park. Network

5 Rail had informed the Claimant of this. The Claimant had then contacted Network Rail to question why his access had been revoked and had recorded the call without consent and spoken to the Network Rail employee in an unacceptable manner. Transcript of the call is Production 57.

- m. By email of 20 September 2021 Ray Jeffries responded to the email and informed Network Rail that the Claimant would be subject to disciplinary action (Production 58).
- n. On 5 October 2021 the Claimant attended a Disciplinary Hearing conducted by Gordon Fraser to discuss the allegation that he had been verbally abusive to a Network Rail employee and had not complied with Network Rail rules and procedures. Notes of the meeting are Production 67.
- o. After the Disciplinary Hearing concluded Gordon Fraser considered redeployment of the Claimant and offered a position at the Respondent's East Kilbride site. The Claimant refused the offer of redeployment as the alternate post was nightshift and he didn't want to work nightshift.
- p. By letter of 6 October 2021 (Production 62) the Claimant was informed that his employment was being terminated on the basis that Network Rail had requested his removal from site and no alternative role had been identified. The termination was by reason of some other substantial reason – third party pressure. The Claimant was advised of his right to appeal.
- q. The Claimant's religion formed no part of the decision to dismiss.
- r. After the Disciplinary Hearing Ray Jeffries attempted to contact Network Rail on 2 occasions to persuade them to change their position regarding the Claimant (Production 65).

- s. The Claimant appealed the termination of his employment and an Appeal Hearing took place on 27 October 2021. The Appeal Hearing was convened by Ray Jeffries. Notes of the Appeal Hearing are Production 67.
- t. The Appeal Hearing refused the Claimant's appeal and confirmed this in writing to him by letter of 28 October 2021 (Production 68).
- u. During the course of his employment with the Respondent the Claimant made no complaints of religious discrimination.
- v. The Claimant received payment of all hours worked with the Respondent.

The Relevant Law

6. The claimant asserts unfair dismissal.

Unfair Dismissal

7. Section 94 of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

- "(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) *the reason (or, if more than one, the principal reasons) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it –*
- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) *relates to the conduct of an employee,*

(c) is that the employee was redundant, or

(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

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(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer`s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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(b) shall be determined in accordance with equity and the substantial merits of the case.”

15 8. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

20 9. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

25 10. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

11. The Tribunal must also consider whether the respondent carried out a fair procedure taking into account the terms of the ACAS Code of Practice. In that regard, any procedural issues identified by the Tribunal should be considered

alongside the other issues arising in the claim, including the reason for dismissal (*Taylor v OCS Group Ltd [2006] EWCA Civ 702, paragraph 48*).

Direct Discrimination

12. Section 13 of EA 2010 provides:

5 (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.*

13. Direct discrimination occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1),
10 EqA 2010).

14. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment?

15 15. The tribunal will need to consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

16. If the treatment of the Claimant puts them at a clear disadvantage compared
20 with others, then it is more likely that the treatment will be less favourable.

17. A tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of B and the comparator (Section 23(1) EA 2010).

Burden of proof

25 18. In summary, a two-stage approach to the burden of proof applies:

Stage 1: can the Claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.

(b) *The other circumstances of the case.*

(c) *Whether it is reasonable for the conduct to have that effect.*

Compensation

5 25. Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation.

An award in discrimination cases can include:

i. Financial Loss, such as past and future loss of earnings.

ii. Injury to Feelings

10 26. A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039)**.

15 27. Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

Submissions

20 28. Both Parties made oral submissions at the conclusion of the case and referred to the Schedule of Loss. The Respondent lodged and referred to outline written submissions in addition.

The Claimant

25 29. The Claimant submitted that he had been unfairly dismissed, harassed and discriminated against due to his religion. The reason he was told to register with the agency for the Caledonian Sleeper contract was because he was of the Catholic faith. Other employees of the Respondent worked on that

contract and were not required to register with the agency. The other employees (comparators) were of the Protestant faith.

5 30. The incidents referred to in his email to the tribunal of 25 January 2022 that took place between March and April 2020 were direct religious discrimination and/or harassment due to his religion.

31. The actions of the Respondent in dismissing the Claimant for not having a security permit were direct discrimination due to his religion.

10 32. The Claimant maintained that he had been paid at incorrect rates and under paid for hours worked on the Caledonian Sleeper contract. This related to hours worked in excess of 16 hours per week.

The Respondent

15 33. The Claimant was dismissed for some other substantial reason – third party pressure. The dismissal was fair as all alternatives had been explored, the Claimant offered and refused redeployment so there was no other option available to the Respondent.

34. There was no evidence that the offering of extra hours on the Caledonian Sleeper contract through an agency was motivated by the Claimant's religion. Rather for sound business reasons.

20 35. The incidents alleged in March to April 2020 did not occur. In any event such claims were time barred.

36. The Claimant had made no complaints of religious discrimination whilst an employee of the Respondent.

25 37. The Claimant had received payment for all hours worked with the Respondent. The hours in excess of 16 per week were the responsibility of the agency.

Observations on the Evidence

38. The Claimant sought to argue that he had not failed on a number of occasions to obtain parking permits for his car at Glasgow Central Station on the basis that if he had failed to obtain permits his car would have been identified and he would have been told about it. He had not. This evidence was contradicted by the clear evidence from Network Rail contained within the email to the Respondent (17 September 2021 (Production 58)) and also the evidence of Gordon Fraser to the effect that the Claimant had been told by Marc Rhodes on 2 occasions about the need to obtain parking permits.
39. The Claimant stated before the tribunal that he recorded all conversations on his phone as justification for recording the conversation with the Network Rail employee on 17 September 2021 yet he was unable to provide any evidence of complaints to Gordon Fraser about religious discrimination and the behaviour of Kenneth Reid. He asserted that he was not abusive towards the Network Rail employee during the call yet Network Rail confirm he was in the email of 17 September 2021.
40. The Claimant explained that the reason he refused the offer of redeployment to East Kilbride was that he no longer wished to work night shifts (which was the job he was doing) and that the East Kilbride post was full time. When asked about why he had refused this job he said there was no discussion about the terms of the redeployed post just an offer and his rejection.
41. The tribunal accordingly did not find the Claimant to be a credible or reliable witness. Where the Claimant's evidence was contradicted by the Respondent's witnesses the tribunal preferred and accepted the evidence of the Respondents. The Respondent's witnesses all gave their evidence in a clear and consistent manner. The documentary evidence produced by the Respondent supported their position regarding the reason for the dismissal and the steps taken to try and redeploy the Claimant.
42. The evidence of Gordon Fraser and Kenneth Reid was clear to the effect that no complaints had been made by the Claimant as alleged by him.

30 Discussion and Decision

43. The Tribunal then considered the various claims advanced.

Unfair Dismissal

5 44. The tribunal accepted and found that the reason for the dismissal was “some other substantial reason”. This is a potentially fair reason under section 98(1) of ERA 1996.

45. The tribunal then considered whether the dismissal was fair in accordance with section 98(4) of ERA 1996.

10 46. The tribunal concluded that the steps taken by the Respondent were substantively and procedurally fair. The Claimant needed to have access to Glasgow Central Station to perform the duties of his employment. Due to his own actions this access had been removed by Network Rail. The Respondent had endeavoured to contact Network Rail to resolve the situation but Network Rail would not change their decision. The Respondent offered alternative
15 employment to the Claimant at their East Kilbrie site. The Claimant rejected this out of hand even although he was being offered night shift work which he was already doing with the Respondent. His reasoning for this was that he no longer wished to do night shift work. The Respondent had no other work for the Claimant. The Respondent had no alternative other than to dismiss. The
20 dismissal was fair.

47. The Tribunal considered each of the discrimination claims and alleged unlawful deduction in turn.

Direct Discrimination (section 13)

25 *Less favourable treatment because of his Catholic religion being told to register with an agency to work on the Caledonian Sleeper Contract.*

48. The tribunal accepted and found that the Respondent had sound business reasons to engage an agency to provide agency workers on the Caledonian Sleeper contract. The Respondent did not know how long they would have

this contract. Accordingly the tribunal find that the decision to engage workers on this basis was not motivated by the Claimant's religion. In any event, the engagement of individual workers was a matter for the agency (not the Respondent). This claim is unsuccessful and is dismissed.

5 *Direct discrimination and/or harassment related to his religion in the various incidents March to April 2020.*

49. The Claimant relies upon the conduct and comments allegedly made in March to April 2020 as evidence of direct discrimination and harassment. The tribunal did not accept the Claimant's evidence that these incidents occurred.
10 The tribunal accepted and preferred the evidence of Gordon Fraser and Kenneth Reid that these incidents did not occur and the Claimant had made no complaints to Gordon Fraser. This claim is unsuccessful and is dismissed.

Direct Discrimination in that the Claimant's religion was a significant influence on the decision to dismiss him.

15 50. The tribunal find that the Claimant's religion played no part in the decision to dismiss. This claim is unsuccessful and is dismissed.

Unlawful deductions from wages.

51. These claims all related to hours worked on the Caledonian Sleeper contract for which the Respondent was not responsible. This claim is unsuccessful and
20 is dismissed.

Employment Judge: A Strain
Date of Judgment: 10 August 2022
Entered in register: 17 August 2022
25 **and copied to parties**