

EMPLOYMENT TRIBUNALS



Claimant

Miss Z. Browne

Heard at: London Central

Before: Employment Judge Mason
Members: Mr. D. Kendall
Mr. D. Carter

Representation

For the Claimant: In person.
For the Respondent: Mr. R. Chaudhry, solicitor.

Respondent

Nails Inc Ltd

On: 27, 28 and 29 March 2019

V

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The Claimant's claim that she was victimised by being subjected to a detriment because she did a protected act (section 27 Equality Act 2010) fails and is dismissed.

REASONS

Background

1. In this case Miss Browne ("the Claimant") claims that the Respondent victimised her by subjecting her to a detriment because she had done a protected act as defined in the Equality Act 2010 (EqA).
2. In brief, the Claimant says she was subjected to detrimental treatment after she settled a previous Employment Tribunal claim relating to the EqA. The protected act was the previous proceedings and the detrimental treatment was the delay in providing her with a reference in accordance with the terms of the settlement.

3. The Claimant presented this claim on 14 July 2018; the Respondent denies her claim.
4. At a Case Management Hearing on 8 November 2018, EJ Isaacson recorded an agreed comprehensive list of issues and made case management orders.

The issues

5. The issues to be determined by this Tribunal, as previously agreed by the parties and identified by EJ Isaacson, are as follows:
 - 5.1 Did the Claimant do a “protected act”? The Claimant relies on her previous claim (2205956/2017) which was brought under the EqA. The Respondent accepts this was a protected act.
 - 5.2 On 9 March 2018, did the Respondent’s representative verbally agree to provide to the Claimant directly a copy of the agreed reference on letter headed paper? If so, did the Respondent subject the Claimant to a detriment by not providing a copy of the same until 15 May 2018?
 - 5.3 On 14 March 2018, did the Claimant request from the Respondent’s representative a copy of the agreed reference on letter headed paper? If so, did the Respondent subject the Claimant to a detriment by not providing a copy of the same until 15 May 2018?
 - 5.4 Did the Claimant contact the Respondent’s Area Manager (Darren Seale) requesting a copy of the agreed reference on letter headed paper? If so, did the Respondent subject the Claimant to a detriment by not responding/providing a copy of the reference?
 - 5.5 Did Mr. Campbell (prospective employer), or indeed any prospective employer, request a reference for the Claimant from the Respondent? If so, did the Respondent subject the Claimant to a detriment by not providing the prospective employer(s) with a copy of the reference?

Procedure at the Hearing

6. It was agreed with the parties that the Tribunal would determine both liability and, if the Claimant was successful, remedy.
7. The Claimant represented herself. We encouraged her to request breaks and seek clarification whenever required. She gave her evidence - and challenged the Respondent’s evidence - in a calm, clear and focussed manner. We are also grateful to Mr. Chaudhry for his professionalism and courtesy throughout.
8. We were provided with a joint bundle of documents [pages 1-122] and any reference in this Judgment to [x] refers to page [x] in the bundle. We have only considered documents which are cross-referred to in the witness statements or which we were taken to at the Hearing.
9. Having retired to read the witness statements and key documents in the bundle, the Tribunal heard from the Claimant and on her behalf from Mr. Wayne Campbell. On

behalf of the Respondent, we heard from: Mr. Darren Seale (former Area Manager and Claimant's Line Manager); Ms. Elizabete Da Silva (Area Manager) and Mr. Reehan Chaudhry (Respondent's representative). All the witnesses adopted as their evidence-in-chief their respective witness statements and were cross-examined.

10. Mr. Chaudhry provided written submissions and made brief additional verbal submissions. The Claimant also addressed us briefly. The evidence and submissions concluded on the 2nd day (28 March 2019). The Tribunal reserved its decision and then met in chambers on 29 March 2019 to make a decision which we now give with reasons.

Findings of fact

11. Having considered all the evidence we make the following findings of fact having reminded ourselves that the standard of proof is the balance of probabilities.
12. The Respondent is a UK based nail brand, operating globally from standalone stores and nail bars and also concession stands. The Respondent employs approximately 160 employees.
13. The Claimant commenced employment with the Respondent as a Nail Technician on **9 November 2014**. She was one of 16 employees employed by the Respondent at Harvey Nichols department store. She reported to Mr. Darren Seale, Area Manager.
14. Her employment ended on **11 November 2016** and in **May 2017**, the Claimant presented a previous claim to the Employment Tribunal (case no. 2205956/2017) ("the First Claim"); this included claims of discrimination and victimisation pursuant to the EqA.
15. On Friday **9 March 2018**, the First Claim was settled. With the assistance of ACAS, an agreement was reached that day between the Claimant and (on behalf of the Respondent) Mr. Chaudhry, solicitor. The Claimant had asked for an apology as one of the terms but at Mr. Chaudhry's suggestion, accepted an agreed reference. As the settlement agreement was reached with the assistance of ACAS, the agreement reached on 9 March was binding; the ACAS conciliator wrote to Mr. Chaudhry on 9 March at 4.45 pm [28] to confirm that the Claimant had accepted the terms and the agreement was "*now legally binding*".
16. On Tuesday **13 March 2018**, both parties signed the ACAS settlement form ("COT3") [29-30]. We find that the terms agreed on 9 March 2018 were the same as set out in the COT3. The COT3 sets out various terms including a financial payment, provision of a reference and a mutual obligation to keep the terms of settlement confidential. A key term for the purposes of these proceedings is para. 10 regarding the reference which states as follows:

"10. The Respondent agrees to provide a reference to the Claimant on the following terms.

Draft Reference

I confirm that Zahara Browne worked for Nails Inc Ltd from 9 November 2014 to the 11 November 2016 as a Nail Technician. Zahara is a passionate and highly motivated individual. Zahara always worked very hard and was dedicated to providing a high standard of service for her clients. Zahara was excited to learn and develop the brand within the business. Zahara has a bubbly personality and gelled very well with the customers and the team".

17. Mr. Chaudhry now accepts that it was implicit that (i) the reference would be provided directly to the Claimant and (ii) it would be provided within a reasonable period of time, whether in response to a request for a reference directly by the Claimant or by any prospective employer. We agree with Mr. Chaudhry that a reasonable period of time for responding would be within 7-10 days.

18. Also on Tuesday **13 March 2018**, the Claimant sent a WhatsApp message [31] to Mr. Darren Seale, her former line manager:

"Good morning Darren I hope all is well with you. I just want to say thank you for your assistance in helping to reaching an agreement in this matter and closing that chapter. I was wondering if I could have a word with you. I will look forward in hearing from you. Many thanks. Zahara Browne"

Mr. Seale read the message but did not respond to the Claimant. He was aware of the First Claim proceedings and therefore referred this message to Mr. Chaudhry and Ms. Seema Paterson (former CFO/COO) who instructed him not to respond. Although it may have been the Claimant's intention to ask Mr. Seale about the reference, we find that this message was not in fact a request for a reference. Mr Seale left the Respondent on 15 May 2018.

19. On Wednesday **14 March 2018**, the Claimant contacted Mr. Chaudhry to chase up the settlement payment and the reference. They exchanged emails and the last email in the thread was sent by the Claimant to Mr. Chaudhry at 5.40pm [32]:

*"... I also would like the signed contract and the reference letter from nails inc please.
I'm sorry to be a pain, but I don't want there to be any loose ends and I want to make sure everything is done correct and fair"
"Please act on this as a matter of urgency".*

Mr. Chaudhry did not respond.

20. On **14 May 2018**, the Claimant chased Mr. Chaudhry for the reference [43]:

"On 12th of March you agreed with me that I would get a lettered headed reference from nails inc. as part of the settlement agreement which I have not yet received. Can you please inform me to why I have not received as I do recall that it would be a pdf file sent to my email. I have checked my mail (even junk) and nothing is there"

21. On **15 May 2018**, the Claimant and Mr. Chaudhry exchanged a number of emails:
 - 21.1 13:43 Mr. Chaudhry to the Claimant [42]: Mr. Chaudhry advised that he had asked the Respondent for the reference and would come back to the Claimant when the Respondent had provided the reference.
 - 21.2 14:13 The Claimant to Mr. Chaudhry [40]: The Claimant said this was not what had been agreed and queried why it had taken two months for any action.

- 21.3 14.51 Mr. Chaudhry to the Claimant [40]: Mr. Chaudhry denied there was any delay on the part of the Respondent; he said that if a prospective employer requested a reference the Respondent would provide a reference in accordance with the terms of the COT3.
- 21.4 15.47 Mr. Chaudhry to the Claimant [36]: Mr. Chaudhry attached a pdf of the reference [45]. The reference is addressed "To whom it may concern", is dated 15 May 2018 and is on the Respondent's headed notepaper and signed by Ms. Seema Paterson (former CFO/COO of the Respondent). The body of the reference is the same as the wording agreed in the COT3.
- 21.5 15.49 the Claimant to Mr. Chaudhry [40]: The Claimant pointed out that this did not reflect what had been agreed as it had been agreed that she would receive a reference on headed notepaper as a pdf file and expressed her frustration at the delay.
- 21.6 15.57 Mr Chaudhry to the Claimant [40]: Mr. Chaudhry said there had been a misunderstanding as the normal practice is for a reference request to be made by a prospective new employer; he apologised if the delay had caused her stress.
22. On **17 May 2018**, the Claimant emailed Mr. Chaudhry [47-48] asking him for an explanation for the delay in providing the reference. She stated that she had asked Mr. Seale for a reference on 14 March but he had not responded and her request was not "actioned". She also said:
"A potential employer sent two letters at two different times to nails inc head office requesting a reference on my behalf, both letters were ignored which resulted in losing an opportunity of having a stable income"
She said she was making a claim to the Employment Tribunal for victimisation but was open to resolving matters beforehand.
23. On **21 May 2018**, Mr. Chaudhry responded [47] denying her claims and stating that the Respondent would answer any reference requests in accordance with the ACAS agreement. Further emails were exchanged that day but these take matters no further [46-47].
24. In verbal evidence, Mr. Chaudhry acknowledged that he was wrong not to have "actioned" the Claimant's request for a reference until 14 May 2018 when he told the Respondent that the reference was required. We accept Mr. Chaudhry's evidence that the delay was because he was initially tied up with another case requiring his urgent attention and then he simply forgot. Mr. Chaudhry gave clear and credible evidence on this point and we accept that the delay was entirely due to an oversight on his part and not in any way a deliberate omission on the part of Mr. Chaudhry or the Respondent.
25. Mr. Wayne Campbell trades as Wayne Shorter Campbell Hair. Mr. Campbell explained in verbal evidence that he works from a salon in Knightsbridge, Errol Douglas, owned by someone else, and also does session work on a freelance ad hoc basis. He has never employed anyone. His annual turnover (based on the last two years) is around £80,000 and his annual profit is around £60,000.

26. The Claimant says Mr. Campbell wrote to Mr. Seale at the Respondent's head office (19-23 Grosvenor Hill, London, W1K 3QD) on 26 March 2018 and again on 9 April 2018 [34-35] requesting a reference for the Claimant but he did not receive a response. These letters were allegedly sent by 1st class post and not recorded or signed for. Mr. Campbell gave evidence confirming this and said he offered the Claimant "*a £25k salary with the condition of providing a professional reference from her previous employer*" [w/s para. 5]. Having considered all the evidence in the round we do not believe that the Mr. Campbell wrote these (or any other) letters to the Respondent, taking into account the following:
- 26.1 We accept the evidence of Mr. Seale that these letters were not received by the Respondent. We found Mr. Seale to be entirely credible.
- 26.2 The letters are odd in a number of respects:
- (i) They do not show the address to which they were sent.
 - (ii) They do not show the address from which they were sent.
 - (iii) They purport to enclose a job description which was not in fact enclosed.
 - (iv) Mr. Campbell asked for a response by email which makes it all the more unusual that he should send these letters by post.
 - (v) The timeline is inconsistent. The date of Mr. Campbell's first letter is 26 March 2018 but the Claimant says [w/s para. 12 and ET1 para. 9 [8]] that it was only after she "*reached out*" to Mr. Campbell on 30 March 2018 that Mr. Campbell made a request for a reference.
- 26.3 We find it unlikely that Mr. Campbell would offer the Claimant employment as a Hair Stylist Assistant and Nail Technician (subject to a reference) in view of the following:
- (i) With annual turnover of around £80,000 and annual profit of around £60,000, he would be hard pressed to afford to pay the Claimant a salary of £25,000 plus associated costs of employment (e.g. employer's national insurance).
 - (ii) He said the Claimant's role would be to assist him with the session work but did not give any indication of his income from this work or the time involved.
 - (iii) He did not in fact employ anyone in this role having elected to outsource different aspects of the role to a variety of people on an ad hoc, freelance basis. This suggests that the level of work was insufficient to justify committing to employing the Claimant.
 - (iv) The Claimant has no qualifications in hair styling, only nails, and we consider it improbable that he would take on the Claimant in the role of Hair Stylist Assistant without professional experience and qualifications given his reputation and the celebrity status of some of his clients.
 - (v) When Mr. Campbell was asked why he would not now engage the Claimant, he said he had never worked with her before and did not know what she would be like in a professional environment. This must hold true back in March/April/May 2018.
- 26.4 The Claimant did nothing to pursue the reference and secure/salvage the alleged job offer from Mr. Campbell:
- (i) Mr. Campbell's evidence was that he did not "fill the position" until the end of May when he engaged on an ad hoc basis a variety of freelancers with different skill sets. Therefore when the Claimant received the reference on 15 May, the position was still available but she did not provide him with a copy of the reference at any time. She says this is because she was suffering from depression and her confidence was low;

we accept that she has a history of anxiety and depression but in the absence of specific medical evidence that there had been a deterioration in her mental health, we do not accept this explanation.

- (ii) She did not mention Mr. Campbell's alleged job offer to Mr. Chaudhry until 17 May 2018.
- (iii) She did not attempt to contact the Respondent directly other than her WhatsApp message to Mr. Seale on 13 March 2018 [31] which we have found was not a request for a reference.
- (iv) She gave verbal evidence that she spoke to ACAS on either 12 or 13 March 2018 and her concern was to chase up the settlement payment. She was vague as to whether she spoke to ACAS again; she was unable to recall a date or the name of the person she spoke to.
- (v) The Claimant says she was focusing on her health and that this was more important than chasing for the reference but there is no medical evidence before us regarding her health at this particular time (i.e. 9 March 2018 to 15 May 2018).

26.5 The Claimant and Mr. Campbell state in their respective witness statements that they were introduced at London Fashion Week sometime during the week 16-20 February 2018. However, in verbal evidence, Mr. Campbell said that they had known each other socially for around 10 years.

27. The Claimant accepts that she did not look for work during the period 9 March 2018 to 15 May 2018. Again, she says this is because of her depression but there is no medical evidence to support a finding that her mental health was any worse than usual during this period.

28. The Claimant is in receipt of Universal Credit (£600/700 per month) [82]. With the assistance of a start-up loan of £8,000 under the New Enterprise Allowance Scheme, she started her own business, Boujie Beauty Lounge Ltd. This was incorporated in May 2018 and started trading in August 2018; her turnover last month was about £2,000.00 and she says her profits are negligible given her overheads.

The Law: Victimisation

29. S27 EqAct 2010

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or*
- (b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act –

- (a) bringing proceedings under this Act;*
- (b) giving evidence or information in connection with proceedings under this Act;*
- (c) doing any other thing for the purposes of or in connection with this Act;*
- (d) making an allegation (whether express or nor) that A or another person has contravened this Act.*

(3) [n/a]

(4) This section only applies where the person subjected to a detriment is an individual.

(5) [n/a].”

30. With regard to the meaning of “*detriment*”, this means “*putting under a disadvantage*” (Ministry of Defence v Jeremiah [1980] ICR 13 CA). There is no requirement for a

Claimant to show physical or economic consequence. It is primarily from the perspective of the alleged victim that one determines the question whether or not any 'detriment' had been suffered, and it is not proper to judge whether or not a particular act can be said to amount to victimisation from the point of view of the alleged discriminator. However, a sense of grievance which is not justified will not constitute a detriment.

31. The detriment must be 'because' of the protected act; there must be a causative link between the protected act(s) and the treatment complained of. This requires knowledge on the part of the Respondent of the existence of the protected act(s). The Respondent's state of mind is likely to be critical but there is no need to show that the alleged discriminator was consciously motivated by a wish to treat someone badly because of a protected characteristic, or because they had engaged in protected conduct. The Respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. There is no requirement for a Claimant to show that the alleged discriminator was wholly motivated to act by his or her [the Claimant's] behaviour in carrying out a protected act, only that the discriminatory reason was "*of sufficient weight*" in the decision-making process to be treated as a cause.

Submissions

Respondent's submissions

32. Mr. Chaudhry provided written submissions and made brief verbal submissions. A summary of the key points of his submissions is as follows.
 - 32.1 It is accepted that there was a "protected act" specifically the First Claim.
 - 32.2 It is also conceded that the delay in providing the Claimant with the agreed reference was a detriment.
 - 32.3 However, it is not accepted that there was any link between the protected act and the detriment; the delay in providing a reference was simply a mistake. There is no causative link.
 - 32.4 In any event, the Claimant cannot show loss as it is not accepted that she received a job offer from Mr. Campbell and she did not look for other work during the period of delay.

Claimant's submissions

33. The Claimant noted that the Respondent concedes there was a protected act and that the delay in providing a reference was a detriment. She accepts that she did not request a reference from Mr. Seale in her WhatsApp message to him but is adamant that Mr Campbell requested a reference on her behalf and that she suffered a detriment when the Respondent did not respond and this was linked to the First Claim.

Conclusions

34. Applying the relevant law to the findings of fact to determine the issues, we have unanimously concluded as follows.
35. It is not disputed that the First Claim was a protected act.
36. It is also not disputed that the delay in providing a reference was a detriment. We conclude the Claimant did not suffer any other detriment; she has accepted that she did not ask Mr. Seale for a reference and we have found that Mr. Campbell did not request a reference on her behalf and neither did any other prospective employer.
37. Having established a protected act and a detriment it is reasonable to conclude that the Claimant has proved facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has contravened s27 EqA. The burden of proof then passes to the Respondent to prove that victimisation did not occur.
38. The Respondent has provided an explanation, which we have accepted, and shown to our satisfaction that victimisation did not occur. Whilst the delay in providing the reference was regrettable and the Claimant's sense of grievance was justified, the delay was not because of the First Claim. The delay was solely due to Mr. Chaudhry's oversight; there is therefore no causative link between the First Claim (the protected act) and the delay (the detriment). Neither the Respondent nor Mr. Chaudhry deliberately delayed in providing the reference (whether consciously or unconsciously) by a wish to treat the Claimant adversely because she brought the First Claim; the existence of the First Claim played no part in the delay.
39. The Claimant's claim therefore fails and is dismissed. However, we would comment that Mr. Chaudhry's delay and initial incorrect insistence that it was not agreed that the reference would be given directly to the Claimant on headed notepaper has led to the Claimant's justified sense of grievance.
40. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 5 and all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 11 to 28; a statement of the applicable law is at paragraphs 29 to 31; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 34 to 40.

Signed by _____ on 3 April 2019
Employment Judge Mason

Judgment sent to Parties on

4 April 2019