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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr H Eldtouny and Kuehne & Nagel Limited Respondent
Held at Cambridge on 17 and 19 February 2020.

Representation Claimant: In Person
Respondent: Mr T Perry, Counsel

Employment Judge Kurrein Members:
Mr T Chinnery
Ms K Johnson

JUDGMENT

1 The Claimant claims are not well founded and are dismissed.

REASONS

- 1 On 8 May 2018 the Claimant presented a claim to the tribunal alleging unfair dismissal and discrimination because of religion or belief.
- 2 On 11th July 2018 the Respondent presented a response in which it contested those claims.
- 3 A preliminary hearing took place before Employment Judge Foxwell on 22 May 2019 at which the issues were clarified, at least in part. We had to further clarify them in the course of the proceedings. As a consequence the claims were as follows: –

Direct discrimination/harassment

- 1 It was the Claimant's case that in 2016 when a new shift pattern was introduced he was not given any of his three ranked choices. He was placed on a shift pattern which prevented him attending Friday prayers.
- 2 In the course of Ramadan in 2017 Mr Drewett made inappropriate comments such as, 'Why do you fast?', 'You should change, it's very hard', and 'If you can't perform your job you should change your religion.'
- 3 Out of time issues clearly arose in respect of those claims.

Victimisation

- 4 The Claimant relies on protected acts as follows : –
- 4.1 His requests to Mr Doubledee and Mr Drewett to change his shift because it interfered with his attendance at Friday prayers and child care.
 - 4.2 His complaint to Mr Simpson in February 2017 concerning his shift.
- 5 The acts of victimisation alleged are: –
- 5.1 His dismissal.
 - 5.2 Mr McGuirk informing his new employers that he had been dismissed for using a mobile phone while driving.

The Evidence

6 We heard the evidence of the Claimant on his own behalf. We heard the evidence of Mr Elton Drewett, operations controller; Mr Paul Doubledee, operations manager; Mr Paul Simpson, transport manager; and Mr McGuirk, transport manager. We had regard to a written statement from the Claimant's new employer, Mr Cowley-Hurlock. We considered the documents to which we were referred and heard the parties submissions.

Procedural Matters

- 7 On the first day of the hearing Counsel for the Respondent informed us that he wanted to use a laptop to show us a video recording taken in the cab of the truck the Claimant drove to demonstrate that the Respondent had good grounds to believe that the Claimant had used a mobile phone very shortly before an accident.
- 8 We had reservations as to the suitability of adopting that course. We thought it essential that if a video recording was going to be shown it had to be visible to all those present simultaneously. Without that it would be impossible to know whether a witness, representative or tribunal member was referring to the same passage in the recording as was another witness, representative or tribunal member.
- 9 There was also a difficulty in the Claimants bundle because it had not been sent to him in one piece as a hard copy. After receipt of the original bundle he had been sent numerous pages by email and requested to interleave them. We thought that to be unsatisfactory and contrary to the guidance in the Guide to Dealing with Litigants in Person, with which all legally qualified representatives should be familiar.
- 10 It was in these circumstances that we adjourned the hearing to 2 days later, it being common ground that two days would be more than adequate to hear the case and make a decision.
- 11 When the tribunal reconvened Counsel had provided a large television screen for the benefit of those present. Unfortunately, the CCTV recording played back to show four views: one facing forward, one facing

back and one down each side. This meant that the relevant view, that facing forward, occupied only 1/4 of the screen.

- 12 Matters were further complicated because the camera was clearly designed to give the best possible view from the windscreen facing forward. It was attached to the top centre of the windscreen and we were told that we would be able to see what the Respondent's witnesses had seen as a reflection in the screen. Only one of our members, even after several viewings, could make out what it was said had been seen.
- 13 We had doubts as to whether we were entitled to make findings of fact in respect of what appeared in that video recording in light of our role being limited to considering the reasonableness of the Respondent's action. We thought the evidence before us was not sufficiently clear or probative as to what the Claimant was holding in his left hand to assist us.

Findings of Fact

- 14 It was against that background that we make the following findings of fact.
- 15 The Claimant was born on 28 May 1983. He is of Egyptian nationality, Arabic ethnic origin and a Muslim. He started work with the Respondent because of a recommendation made by his former brother in law. The Respondent trained him to HGV one driving standards, and he performed without comment or criticism until the matters we have to deal with. The Respondent clearly thought quite highly of him, he received awards or commendations at least twice for the standards he set.
- 16 The Respondent is the well-known worldwide distribution and logistics company. It operates in over 100 countries, and employs over 15,000 staff.
- 17 The Claimant worked from a distribution centre owned by Waitrose, but operated by the Respondent, near Milton Keynes where about 200 LGV drivers were also based.
- 18 As might be expected, the Respondent has numerous detailed policies that are made known to all its employees.
 - 18.1 It has a comprehensive policy prohibiting the use of mobile phones while in charge of a vehicle. Drivers were reminded of this in December 2016, and the Claimant signed to acknowledge his receipt of the reminder
 - 18.2 It's sickness absence policy required employees to maintain contact with their line manager at reasonable intervals, a failure to do so might be sanctioned with a suspension of sick pay.
- 19 Prior to the events we are concerned with the Claimant worked a Thursday to Sunday shift pattern. He told us that his breaks gave him enough time to leave work to get to the Mosque to pray and then return.

He lived in Milton Keynes at that time. He later moved to nearer Northampton. He always maintained close contact with his daughter from a previous marriage, and this was very important to him.

- 20 In 2015 all the drivers were informed of a proposed shift change and asked to complete a form setting out their exiting shift pattern, the intended new patterns, and their 3 preferences in order. The Claimant did so on 16 July 2015, identifying early shifts without rotations. His third choice involved working on Fridays. He told us he expected to get his first or second choice, which didn't, but was assigned to a pattern that required him to work on Fridays. This interfered with his attendance at prayers.
- 21 We accepted the evidence of the Respondent's witnesses that whilst they helped design the shift pattern, the assignments of drivers to particular shifts was done by the then transport manager, Ms Capone.
- 22 We accepted that the Claimant raised the issue of a change of shift with Mr Drewett and Mr Doubledee from time to time, mentioning both his religion and child care issues as justifying a change. No action ensued until he took the matter up with Mr Simpson.
- 23 That meeting was on 2 February 2018. We preferred the Claimant's evidence of what happened. When he went into Mr Simpson office he was working on his computer. When he said he wanted to raise an official complaint about religious discrimination Mr Simpson immediately stopped working on his computer and asked the Claimant, "Why?"
- 24 The Claimant explained that he had been complaining for a long time about his shifts, and the problem attending prayers and seeing his daughter, without effect, and had been promised appropriate shifts as soon as one was available. A few days earlier he had learned that a colleague, Mr Lewis, had been given a suitable shift and thought it unfair. It was Mr Simpson who had given the shift to Mr Lewis, for family reasons, and he took immediate steps to assign the Claimant to the same shift. That was confirmed to the Claimant when he next worked and Mr Simpson said words to the effect that he had heard enough and did not wish to hear any more.
- 25 We did not accept that Mr Simpson could "not recall" the Claimant raising the issue of religious discrimination. It is not an everyday occurrence. If it happened, we have no doubt it would be recalled. If it did not, someone in Mr Simpson's position would be equally clear and would make a denial.
- 26 The Claimant was signed off sick with stress from August to October of 2017. Mr McGuirk made contact with him on a regular basis in accordance with the Respondent's policy. We accepted that he may have done so more often than he needed to, and was sometimes forceful in addressing the Claimant concerning a return to work.

- 27 The Claimant's employment thereafter was uneventful until 31 January 2018, when he was involved in a slow speed minor accident on the A40 going West near Eynsham. He hit another car from behind while queueing in traffic. He reported the accident promptly by phone to his office and completed voluminous incident reports when he returned from his journey.
- 28 The Respondent also investigated the accident, not least by downloading the recordings on the in-cab camera, and giving the Claimant drug and alcohol tests, which he passed.
- 29 The Claimant returned to work on 3 February 2018 when, after being interviewed by Mr Drewett, he was suspended from his duties because of matters that come to light in the course of the Respondent's investigation. That suspension, and its terms, were confirmed to the Claimant by letter on the same day from Mr McGuirk.
- 30 On 5 February 2018 the Claimant attended a fact-finding meeting conducted by Mr McGuirk. A member of HR took notes. The record of that meeting extends over some 10 pages. During the interview the Claimant was shown the recording from his in-cab camera several times. He maintained that he was not using his phone but drinking from a bottle of water which could not be seen because it was clear plastic.
- 31 At the conclusion of that interview Mr McGuirk told him that the matter would be referred to a disciplinary hearing for using an electronic device while driving, lying about how the accident happened and falsifying company records, and because there had been a breakdown in trust between the Claimant and the Respondent.
- 32 During the meeting the Claimant had also been asked to show those present his mobile phone. Mr McGuirk thought it to be the same as the one he could see in the reflection in the windscreen. When the Claimant produced his it was clear to those present that it was "live" and had been recording the meeting.
- 33 On 6 February 2018 the Claimant was invited to attend a disciplinary meeting on 8 February 2018 to answer the charges arising from his accident. He was told that Mr Doubledee would chair the meeting and that he was entitled to be accompanied. He was provided with copies of policy documents, disciplinary policy and the role of a companion and a copy of the investigation pack including witness statements.
- 34 The Claimant attended that meeting and waived his right to have a companion present. The meeting was recorded by a member of HR in a pro forma document that was amended as the meeting progressed. Detailed notes were taken of the questions and answers. The video evidence was again shown several times. The Claimant continued to maintain that he had been drinking from a water bottle.

- 35 At the conclusion of the meeting there was an adjournment, following which Mr Doubledee informed the Claimant he had found him guilty of the offences that he faced, took the view they were offences of gross misconduct, and had decided the Claimant should be summarily dismissed.
- 36 That outcome was confirmed to the Claimant in a letter dated 8 February 2018 in which Mr Doubledee set out his reasons in some detail. The Claimant was told of his right of appeal, but did not exercise it.
- 37 The Claimant started a new job as an HGV1 driver, earning less than with the Respondent, on 11 April 2018. Submissions
- 38 It is neither necessary nor proportionate to set out the submissions we received from the parties. The Law
- 39 We are concerned with the provisions of sections 13, 26, 27, 123 and 136 Equality Act 2010 in respect of discrimination and victimisation.
- 40 We refer ourselves to S.98 Employment Rights Act 1996 in respect of unfair dismissal.

Further Findings and Conclusions

- 41 We refer to and incorporate all our above findings of fact.

Direct Discrimination and Harassment

Shift Allocation

Direct Discrimination

- 42 The Claimant did not identify an actual comparator, beyond alleging some drivers didn't work Sundays because of family and/or church commitments. They were not suitable because they were not identified, and because Friday was the Respondent's busiest day every week.
- 43 We used a hypothetical comparator, being a Jewish male with all the same characteristics as the Claimant who wished to avoid working on Fridays for religious reasons.
- 44 We were unanimous in concluding that there was no evidence at all that the Claimant would have been or was treated less favourably than such a person.
- 45 In addition, there was no evidence to suggest that any difference in treatment that might have been perceived could have been because of religion.

Harassment

- 46 The Claimant gave no evidence about the effects of these matters on him or on the working atmosphere. Ramadan Comments
- 47 We make a preliminary finding that the Claimant has failed to establish on the balance of probability that these events took place as alleged. He asserts they did. Mr Drewett asserts they did not.

48 We thought it unfortunate that the Claimant's evidence on this issue was so limited. He did not set a scene or give a context in which the comments were allegedly made. He made no contemporaneous note, and told no one else about them. He did not make a complaint before he made his claim.

49 In all the circumstances of the case these claims are not well founded and must be dismissed. Out of time

50 In any event, these claims are very out of time. The Claimant gave no evidence of why he had delayed, or why it might be just and equitable to extend time.

51 We therefore had no jurisdiction to hear these complaints.

Victimisation

Protected Acts

52 We accepted that the Claimant's complaints to Mr Drewett, Mr Doubledee and Mr Simpson of religious discrimination were protected acts.

Unfavourable Treatment

Dismissal

53 We have no doubt that dismissal was an unfavourable act.

54 However, the authorities are clear: the Claimant must show a causal connection between the protected act and the unfavourable treatment.

55 Unfortunately, the Claimant's evidence on this issue was unsatisfactory. Despite explaining causation to him more than once, and in simple terms, he was unable to tell us the basis for what was, in reality, no more than a bare assertion.

56 Even if he had been able to raise a case that there might be some connection, we would have found against him: the Respondent's evidence satisfied us that the reason for the dismissal was his conduct on 31 January 2018.

Passing information to new employer

57 The Claimant's evidence on this issue was also unsatisfactory. Mr Crowley-Hurlock's statement told us that he had been told the Claimant had been dismissed for using a phone when driving by another employee of his, a former employee of the Respondent, Mr Jackman.

58 It was only in his submissions that the Claimant told us that Mr Jackman had told him that Mr McGuirk had told him. Once again, there was no context given for how and when these exchanges had taken place. It was not put to Mr McGuirk in cross examination.

59 Having regard to the above evidence we have concluded that there was no evidence on which we could find the necessary causation.

- 60 In all the above circumstances the Claimant's claims alleging victimisation must be dismissed. Unfair Dismissal
- 61 We make the following unanimous findings on this claim:-
- 61.1 The Respondent has established on the balance of probabilities that the reason for the Claimant's dismissal was his conduct.
- 61.2 Mr McGuirk carried out a full, thorough and reasonable investigation into this accident. There was no suggestion he had acted unreasonably at any stage. He gathered the relevant information, showed it to the Claimant, and gave him every opportunity to respond.
- 61.3 In our view Mr Doubledee's conduct of the investigation cannot be impeached. He presented the evidence to the Claimant and gave him every chance to answer to it.
- 61.4 Mr Doubledee had watched this video several times before this hearing, and again, more than once, during it. We were in no doubt that he honestly believed the Claimant to be using a mobile phone and to be guilty of the offences he was charged with.
- 61.5 The sanction of dismissal was clearly provided for, and the Claimant was fully aware of that. It was reasonable in a case of this nature.
- 62 The Claimant's claims are not well founded and are dismissed.

Employment Judge Kurrein

20 February 2020

Sent to the parties and
entered in the Register on : :

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For the Tribunal

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