



EMPLOYMENT TRIBUNALS

Claimant: Angela Szmolai

Respondents: (1) ISS Facility Services Ltd
(2) Atalian Servest Ltd

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 20 – 24 July 2021

Before: Employment Judge Housego
Members: Mr D Ross
Ms M Daniels

Representation

Claimant: Ibrahim Kani Aniffa (partner of the Claimant)
Respondents: Imogen Egan, of Counsel (1st Respondent)
Joseph Bryan, of Counsel (2nd Respondent)

JUDGMENT

1. The claim of sex discrimination is dismissed.
2. The 1st Respondent made unlawful deductions from the wages of the Claimant, in the sum of £109.41, net of tax and National Insurance.
3. The claim for holiday pay in the sum of £821.30 (gross) was conceded by the 1st Respondent.
4. The 2nd Respondent is ordered to pay to the Claimant £109.41 (without deduction) and a further £821.30 (less tax and national insurance) holiday pay.

REASONS

Basis of claim

1. Ms Szmolai was an area manager for the 1st Respondent, a facilities management company. The large contract she worked on (cleaning for a

high street bookmaker) was not going well, and a new manager came in to try to resolve matters. Ms Szmolai says that the way he went about things so far as she was concerned was sex discrimination. This the 1st Respondent denies. The 2nd Respondent is involved as there was a TUPE transfer to them, and Ms Szmolai remains employed by them. They accept that they are liable for any award that is made. The 1st Respondent conceded the claims for deduction from wages and for holiday pay.

Law

2. For sex discrimination, gender is a protected characteristic¹. Ms Szmolai asserts that her dismissal was direct sex discrimination².
3. It is for the Claimant to show reason why there might be discrimination³, and if she does so then it is for the employer to show that it was not. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional.
4. Ms Szmolai also asserts that the treatment she received was harassment, and victimisation, the protected act being her grievance of 29 August 2019.
5. The law about burden of proof is now clearly set out in the Supreme Court case of Royal Mail Group Ltd v Efoji [2021] UKSC 33 (23 July 2021) – handed down the day before submissions and helpfully drawn to the Tribunal’s attention by both (very alert) Counsel. It does not change the law, and the Tribunal followed the approach there set out.
6. Counsel for the 1st Respondent referred the Tribunal to Unite the Union v Nailard [2018] EWCA Civ 1203 concerning the handling of the first grievance (to the effect that a claim for sex discrimination arising from such failure requires a finding of sex discrimination against the person handling the grievance).

Evidence and the hearing

7. The Tribunal heard oral evidence from the Claimant. For the 1st Respondent there was oral evidence from Peter Joyce (the Claimant’s superior manager), William Ross (who dealt with the second grievance raised) and from Jonathan Burt (who was to take any appeal from the two grievances lodged by the Claimant). The first grievance, lodged on 29 August 2019 was heard by Ergun Kalkun. He was to give oral evidence, but was not called because of what was said by the Claimant in her oral evidence (which was that she did not think what was said in a telephone conversation on 28 August 2019 was sex discrimination).

¹ S11 Equality Act 2010

² 13Direct discrimination

(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.

³ Igen v Wong (above), Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

8. The Claimant's evidence:
 - 8.1. Mr Aniffa said that in addition to the Claimant there would be two other witnesses, one of them being MJ. Mr Aniffa said that they were not available until day three of the hearing. On day 2 Mr Aniffa said that one witness would not be called. MJ was not available when needed towards the end of day two. The Tribunal adjourned for the day, but MJ did not appear on day three and Mr Aniffa said that he was not being called.
 - 8.2. There was a bundle of documents of over 600 pages.
 - 8.3. There was considerable discussion at the start of the hearing about documents. The Claimant stated that documents had been withheld. This should have been dealt with long ago, as the bundle of documents was provided to the Claimant four and a half months ago, but she and her representative had not looked at it until the week before the hearing. The 1st Respondent's solicitor made very clear submissions by email about the documents and this is reproduced in my record of proceedings. After hearing from Mr Aniffa the Tribunal accepted those submissions. The 1st Respondent's solicitor Wai Ling Pang worked very hard and extracted documents that were not in the bundle of documents (principally attachments to emails that had been stripped out in being assembled) and added them to an augmentation to the bundle of documents, as a new Part 8.
 - 8.4. There was also a 53 page bundle of emails, which were unattributable. It appeared that there were without prejudice emails amongst them and the Tribunal did not read any of them.
 - 8.5. There was a list of issues. In her oral evidence the Claimant stated that this was not her list of issues. As her evidence continued on the first day of the hearing, it became apparent that she was advancing a case that was not in the list of issues, other than tangentially. It was to the effect that she was made to work nights cleaning, but that her male subordinates were not.
 - 8.6. Overnight the Tribunal carefully considered the ET1, the notes of the Case Management hearings in the bundle of documents, of EJ Jones and EJ Elgot and the witness statements.
 - 8.7. It was made clear at the start of the second day of the hearing by the 1st Respondent there had been discussion between the parties about the list of issues and on 02 December 2020 Mr Aniffa had accepted the list of issues, subject only to clarification of the victimisation detriments the Claimant said had occurred (the protected act being her grievance of 29 August). He and the Claimant accepted that this was so.
 - 8.8. The Tribunal noted the guidance of the Court of Appeal in Parekh v LB Brent [2012] EWCA Civ 1630 at paragraph 31. There was no material change of circumstances, and no reason to depart from a list of issues agreed fully six months ago. This was in some ways unfortunate as

one of the issues in that list was who the comparator was, and in the case summary which was in the second half of the case management order of EJ Jones the names of two of the Claimant's subordinates was given. The claim that male subordinates were not made to work nights as she had been is discernible, if not clearly, in the ET1. The combination of the naming of the comparators in EJ Jones' case management order and the issue that the Claimant claimed that Peter Joyce made her work nights are both dots that could have been joined to make this claim. The issue is also hinted at in the Claimant's witness statement. However, it was not made by the Claimant in this way, and was not apparent to the Tribunal until after two hours of the Claimant's evidence. The Respondents are not to be criticised for not identifying it in preparing the list of issues for agreement, for it does not feature in the list set out in EJ Jones case management order. Nor is the Tribunal critical of the case management orders where experienced judges have tried to set out the claim as best they could in relatively short hearings, faced with a Claimant in person, or represented by a partner, whose strength does not lie in the identification of issues.

- 8.9. Towards the close of the Claimant's cross examination the 1st Respondent conceded the claim that there had been an unlawful deduction of £109.81 (net) from the Claimant's wages, and of £831.31 holiday pay (gross). The 2nd Respondent accepted that they were liable for the judgment that was required by reason of these admissions.

Issues

9. These were set out in an agreed list of issues, as below.

1. The Claimant brings claims of sex discrimination under S 13, 26 and 27 of the Equality Act 2010 and unlawful deduction from wages. (The unlawful deduction claim was conceded by the 1st Respondent.)

2. An out of time point. (This became redundant as the last day was the day before the first grievance, but claims based on that telephone conversation leading to the grievance were abandoned, and everything else post-dated that and so was in time.)

3. Is it just and equitable to extend time for any claim which is out of time? (Likewise redundant.)

4. Who is the Claimant's comparator (actual or hypothetical)?

5. Was the comparator in materially the same circumstances, save for the protected characteristic (sex)?

6. Did the Respondents treat the Claimant less favourably than the comparator was or would have been because of her sex in the following ways: (It can only be the 1st Respondent who treated the Claimant in any way, as the 2nd Respondent was not her employer at the time of these allegations, but if so the 2nd Respondent is liable as there was a TUPE

transfer.)

6.1 Peter Joyce's treatment towards the Claimant on a telephone call with her on 28 August 2019 in which he said "I will get rid of you.....you are a liar". (This was abandoned, as a claim for sex discrimination, during the Claimant's evidence.)

6.2 Peter Joyce forcing the Claimant to work night shifts, when she had previously worked day shifts.

6.3 The Respondents not upholding the Claimant's grievance of 29 August 2019. (As the Claimant did not say that the conversation was related to sex this cannot succeed based on that conversation. The Claimant also said in her grievance that Peter Joyce was (in an unspecified way) discriminating against her on the grounds of sex. In her interview she raised night working, so this head is about 6.2 being the substance of the grievance. She says, correctly, that in the outcome letter (500) this was not dealt with at all.)

6.4 The Respondents suspending the Claimant on 24 October 2019.

6.5 Peter Joyce directing Paris Noble and her colleagues to collect company property from the Claimant. The Claimant is not aware of the names of Ms Noble's colleagues.

6.6 The Respondents not upholding the Claimant's grievance of 25 October 2019 (the outcome of which was issued on 20 December 2019).

6.7 The Respondents' failure to respond to the Claimant's grievance of 27 December 2019.

HARRASSMENT – SECTION 26 EQUALITY ACT 2010

7. Did the Respondents engage in acts set out in paragraph 6 above?

8. Was this treatment "unwanted conduct" for the purposes of s.26(1) Equality Act 2010?

9. If so, was this treatment related to the Claimant's sex and had the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment?

VICTIMISATION – SECTION 27 EQUALITY ACT 2010

10. What was/were the protected act or acts on which the Claimant relies? The Claimant relies on the grievance raised by her on 29 August 2019 in which she asserts she raised allegations of sex discrimination. (The protected act was based on the conversation of 28 August 2019 which the Claimant accepted was not sex discrimination, and so there cannot be a victimisation claim whatever occurred.)

11. *What detriments did the Claimant suffer? (This becomes academic because even if everything is as the Claimant says there cannot be a victimisation claim without a protected act.) The Claimant relies on the following:*

11.1 Peter Joyce forced the Claimant to work at night between 30 August 2019 and 23 October 2019 but pressurised her to fulfil her daytime duties within the same timeframe.

11.2 Consideration was not made for the Claimant's request to be relieved from continuous night duties due to childcare issues.

11.3 Peter Joyce excessively monitored the Claimant between 29 August 2019 and 23 October 2019.

11.4 Peter Joyce suspended the Claimant unlawfully.

12. *Did the Claimant suffer these detriments? If so, did she suffer these detriments because of the protected act(s)?*

Submissions

10. Both Counsel prepared full written submissions, to which they spoke. My record of proceedings sets out the oral submissions and the written submissions can be read by a higher Court if required. The submissions are models of effective submissions and save for one minor difference about fact (about how YK obtained the Claimant's telephone number, immaterial to the outcome) the Tribunal found that they accurately assessed the facts, law and conclusions to be drawn.
11. Mr Aniffa spoke for some 40 minutes, and I made a note of his submissions, the import of which was as follows. The Claimant had difficulty getting evidence as she was suspended without access to her work emails, and when returned to work had been TUPE'd to the 2nd Respondent, and so had no access after that. None of the allegations made by Peter Joyce on which he suspended her had been upheld. She had been flexible and recovery cleans were allowed during the working day. There had never been any disciplinary action about her non use of the T&A system or paper audits, which she had always used and part of that had been due to her not having a functioning tablet. He spoke about his own contract and why there was no reason for the Claimant to be criticised over it or her involvement with it. She had no responsibility for the 16 year old found to be cleaning a branch of a bank, which contract was nothing to do with her. She had nothing to do with the AA matter. She had never refused to work nights but the implementation was unfair and sex discrimination. While EdC (one of her male subordinates) had worked nights he was paid overtime to do so. There was an unacceptable difference between the way her suspension and that of MJ, who was male, had been effected. There was a deliberate paucity of evidence in the bundle of documents. It was correct that the claim for sex discrimination was limited to injury to feelings.

Findings of Fact

12. The Claimant was an area manager for ISS. She started with another company on 17 September 2016, working on a contract to clean the shops of a well known high street bookmaker. She TUPE'd over to ISS on 01 February 2017. She was employed by them until 01 February 2020 when she was TUPE'd to Atalian, by whom she remains employed.
13. The Claimant was a salaried area manager. Her job title was "*mobile area manager*" and the Claimant objects to the word "*mobile*" which she says was added by ISS without her consent. The Tribunal finds that nothing turns on that, for her duties did not change and in any event she had worked under this title for some time. Below her were four hourly paid supervisors each of whom themselves cleaned and also had a mobile cleaner to organise. There were about 60 shops in the Claimant's area. There are four areas in the London region of the bookmaker (which extended as far as Aldershot and Hoddesdon, so is bigger than Greater London). The Claimant's area was centred on Croydon, and so in the south. Broadly the areas were north south east and west.
14. There were issues with the performance of the contract, in particular with missed cleans and poor performance. Shops open at various times, from 8am onwards. All the shops close at 10pm. Cleaning is done at night and (for the most part) one hour is allowed to clean each shop. Cleaners often clean five or six shops in a night. If a clean is missed, or is substandard, then a "*recovery clean*" can be carried out when the shop is open, but only if early in the day.
15. The Claimant's job involved organising the cleaning of the shops in her area, and then auditing the cleans by visiting shops, ideally soon after they opened. There was a system of clocking in and out at each shop (time and attendance or "T&A"). Cleaners were loath to use it, because they had to be on site for the whole hour allocated to clean, for otherwise they did not get paid. They preferred to come and go as quickly as possible, so as to reduce the length of their shifts. In most cases a clean could be done in less than an hour, so this was understandable, but meant that ISS could not show the client that there had been a clean, or how long a cleaner had been on site.
16. The rate of pay is not high for cleaners, and it is night work, and the insistence on using T&A meant that many left ISS. The high level of vacancies worsened the problem, and some shops were not cleaned for a week or more. This caused more issues, particularly with the toilets.
17. In June 2019 Peter Joyce was brought in to try to resolve the issues with the performance of the contract. He was appointed Regional Operations Manager responsible for the London shops of the bookmaker and of a major high street multiple retailer. In total that was 800 shops, the bookmaker having some 300 of them.
18. The Claimant reported to a Regional Support Manager, MJ, who reported to Peter Joyce. Unknown to ISS, MJ, who was a full time employee of ISS, was also (and simultaneously) a full time employee with Atalian. This became known when ISS provided employee information to Atalian. MJ

resigned with immediate effect when this came out, in December 2019. It may be a reason why he was less than effective for ISS, and why Peter Joyce found it hard to contact him. This also meant that Peter Joyce contacted the Claimant direct on occasion.

19. Peter Joyce came across a series of issues in addition to poor service:
 - 19.1. He discovered that a 16 year old boy was working in another contract (for a bank, and in North London). This was discovered as the person being paid for that work was AA, who was supposed to be engaged on the bookmaker contract. It transpired that AA was out of the country. One of the supervisors reporting to the Claimant (EM) had a mobile cleaner, JV. Peter Joyce investigated as JV was down to clean six days a week for the bookmaker in South London, yet was also shown cleaning a bank in North London. Apparently, JV had given the boy a home, and in return the boy was required to clean. The boy was said to be the son of AA. EM and JV (and JV's wife I, another cleaner) resigned. Peter Joyce had suspended them on 30 August 2019. Peter Joyce was concerned that the Claimant might be complicit in this, as EM was one of her four supervisors, and the Claimant had submitted documentation purportedly signed by AA when he was out of the country (see below). Subsequently the Claimant was found not to have been involved.
 - 19.2. AA was not in the country but was down as having cleaned shops, and MJ had told Peter Joyce that he was a reliable cleaner who could be deployed at short notice. What was happening, of course, was that MJ was using the name of the absent AA to send in his own people, and payment was made to AA, doubtless to their mutual benefit. The Claimant was suspected of being complicit in this, because on 13 July 2019 (when AA was not in the country) there were health and safety forms for five sites purporting to be signed by him, and submitted by the Claimant. For this reason Peter Joyce suspected that the Claimant was involved, particularly as on 30 August 2019 the Claimant had processed him as a "leaver" and the reason given was "dismissed". This was the same date as Peter Joyce confronted EM and JV about this.
 - 19.3. Ibrahim Aniffa (the Claimant's representative) was on the books of ISS, although not paid for some time. His pay rate, as a cleaner, was stated to be £25 an hour. As the average cleaner is paid at or near NMW rates this was a concern for Peter Joyce. Ibrahim Aniffa was the Claimant's partner, and she had filed his right to work documents and seemingly put in place the contract at this pay rate. Ibrahim Aniffa was also a former business partner of MJ. Peter Joyce was concerned at the Claimant's conflict of interest in this employment relationship. (Again subsequently there was no allegation of misconduct about this, it apparently being the case that the work was the occasional "bioclean", required to clean up after a murder or serious assault in a shop.)
 - 19.4. When Peter Joyce went to the Claimant's house on 05 October 2019 he saw in the back of her ISS van a buffing machine that was clearly

marked as belonging to Asda, and he was concerned that she was working somewhere else, or using Asda equipment in the bookmaker's shops (or allowing someone else to use her ISS van for work at Asda).

20. On 28 August 2019 there was a conversation between the Claimant and Peter Joyce, which marked the start of a deterioration of relationships. Peter Joyce said that until they could get sufficient cleaners to service the shops the Claimant would have to do some cleaning. She did not object.
21. On 29 August 2019 the Claimant raised a grievance about the way Peter Joyce had spoken to her, and claiming that there was sex discrimination (it appeared from that conversation as there was no other detail given).
22. On 17 September 2019 Ergul Kalkan took the hearing, and the Claimant said that she objected to night work for child care and referred to her supervisors. On 03 October 2019 Ergul Kalkan issued his outcome letter dismissing the grievance about 29 August but did not deal with other matters.
23. On the same day the Claimant said that she wanted to appeal, but gave no details and it was not progressed.
24. The Claimant was clear in her oral evidence that she had no objection in principle to cleaning shops. She complained that she could not both do cleaning, necessarily at night, and do audits, necessarily in the day (as it involved discussion with the shop manager). She complained that her child care responsibilities also made this hard for her. (There is, however, no indirect discrimination claim. As there had been three case management hearings and an agreed list of issues the Tribunal did not explore why not.)
25. After objecting to this, the Claimant says (witness statement paragraph 12) that MJ (her line manager) said that it was an instruction from Peter Joyce and that she would have to do so.
26. Peter Joyce made it clear that there would have to be a plan for the 20 most difficult shops. He told MJ that they would have to come up with a plan. On 15 October 2019 he sent a blank document which was a table to be filled in, by MJ and by the Claimant, with the names of people listed to clean those 20 shops. The Claimant was fully involved in filling in the table.
27. Some of the supervisors were in that table, in particular EdC, who was one of the comparators named in the Case Management Order of EJ Jones. The Claimant objects that he was paid overtime to do this and she was not. She is salaried. It appears that the supervisors are not. The Claimant was not required to work more hours than before. She would have to work some night hours occasionally to check up on the supervisors and mobile cleaners.
28. There was no reason why the Claimant could not have populated the table as she wished, and while she states that it was imposed on her by MJ and by Peter Joyce, and the final plan was from Peter Joyce, it was open to the Claimant to arrange matters with her team as she wished. Indeed, it was

she who herself populated the table with the roles to which she objected. When she said to Peter Joyce that she could not work nights she was given 6am slots, and fewer of them. While the Claimant's evidence is that this meant a 4:30am start to get there (Croydon – Aldershot) that is unlikely at so early in the day. More fundamentally, the Claimant did not object to the rota. Peter Joyce amended it in the light of what the Claimant said, and on both plans one of her supervisors (EdC) was working nights, and he is male and one of the comparators named by the Claimant in the EJ Jones case management hearing.

29. When the Claimant did night work, she did not clock in. She was not obliged to remain the whole hour, as she was not an hourly paid cleaner but a salaried manager. The absence of clock in record (she was not obliged to clock out, and if she finished in, say, half an hour, she could leave) caused Peter Joyce problems, because the stats coming from the computer T&A system did not show cleans at the shops she had visited.
30. Peter Joyce found it hard to get hold of the Claimant (and MJ). He sent several emails setting this out. The Claimant says that this was because she would be asleep after working at night. That does not account for not later returning a call. The Tribunal notes the oral evidence of Paul Kelly, of Atalian, that he has never had a problem in contacting the Claimant who has responded swiftly to him in urgent matters and at the end of the day for non urgent ones. However, there is no reason to doubt the contemporaneous emails in which Peter Joyce complains of this difficulty.
31. Because MJ was hard to get hold of, Peter Joyce would sometimes bypass him and liaise direct with the Claimant.
32. On 24 October 2019 Peter Joyce suspended both the Claimant and MJ, after consulting human resources. He felt that the Claimant was not doing her job:
 - 32.1. He found it hard to get hold of her,
 - 32.2. and there was the Asda buffing machine in her ISS van (05 October 2019): he thought that either she was working at Asda (when full time with ISS) or that she was using unauthorised equipment in the bookmaker's shops, which is impermissible, or that someone else was using her van for Asda work.
 - 32.3. He thought she might be involved in the AA matter.
 - 32.4. There had been a complaint from the Aldershot shop on 22 October 2019. She had not come back to him about it.
 - 32.5. She was not adhering to the plan set out, or report to him about why not (and was not clocking in).
33. Peter Joyce asked the Claimant (by email) to attend a meeting, but she did not attend, and he suspended her in a telephone conversation. He suspended MJ by telephone also.

34. These were entirely adequate reasons to suspend pending an investigation. The Claimant objects that a man about whom there was a complaint made by the same shop was not suspended. This was not mentioned before the Claimant's oral evidence, but as Peter Joyce pointed out this was but one of the matters leading to the suspension of the Claimant. There is no true comparison between the two.
35. Normally suspension is by line manager, but the Claimant's (MJ) was suspended at the same time. ISS thought (whether correctly or not) that the Claimant and MJ contacted the bookmaker and were negative about ISS, which was a further reason to suspend both.
36. The Claimant was holding (entirely properly) keys to the shops. It was necessary to collect them without delay. MJ did not have such keys. Attempt was made to collect company property from him the same day he was suspended, but was not proceeded with when it was learned that he had suffered a family bereavement. It was collected a few days later. These are not comparable for both reasons (keys and bereavement).
37. The Claimant was contacted, and arranged to meet PN at a fast food restaurant, and did so. Plainly this was an unpleasant meeting and PN contacted the police about it. Whatever happened at this meeting is irrelevant to a claim for sex discrimination.
38. The Claimant's first objection is that it was YK, a person at the same level as the Claimant but engaged in the contract for the high street retailer who rang her. She objects that he knew her number, and said this was a GDPR issue. First, the number was on ISS database, and it was used for ISS purposes, so there can be no GDPR issue, and secondly it has nothing to do with gender.
39. Secondly, the Claimant objects that PN was subordinate to her and should not have been involved in her suspension. Peter Joyce's evidence (which was not challenged) was that she was simply the nearest person available to collect the keys. Again, it is also not possible to detect any link to gender.
40. The Claimant then raised her second grievance, on the same day, 24 October 2019 about suspension and about PN being sent to collect her phone etc. This was handled by William Ross. There is no suggestion from the Claimant that he is involved in sex discrimination. While the Tribunal could see no sex discrimination in the suspension or in the way it was effected, the Claimant runs into the same problem as with the first grievance – there is no allegation that William Ross was motivated in any way by sex discrimination and *Naillard* means there can be no successful claim for sex discrimination arising from his handling of the grievance.
41. For reasons of brevity this judgment does not give detail about the Claimant's wish to appeal, as whatever the merits of a complaint about that, there is no suggestion of it being for sex discrimination reasons and *Naillard* is again an insuperable obstacle for the Claimant.

Conclusions

42. The claim for victimisation is based on the grievance of 29 August 2019 being a protected act. As the Claimant withdrew her assertion that the treatment of her by Peter Joyce on 28 August was sex discrimination, there can be no complaint of sex discrimination by victimisation. That is because there has to be a protected act which is causally connected with detriment. Since the Claimant abandoned her claim that the grievance was connected with sex, it follows that any victimisation by reason of her lodging that grievance cannot be related to gender.
43. The out of time point falls away, because that was related to the conversation of 28 August 2019, which the Claimant no longer says was sex discrimination.
44. The Claimant also complained that Ergul Kalkan failed to deal with the sex discrimination element of her grievance of 29 August 2019, and she is correct in so saying. However, Counsel for the 1st Respondent referred the Tribunal to Unite the Union v Nailard [2018] EWCA Civ 1203 which makes it clear that for the claim to succeed the Claimant would have to show that Ergul Kalkan had omitted dealing with this as an act of sex discrimination. She made no such allegation. The same applies to the second grievance.
45. Turning to the list of issues,
 - 45.1. 6.1 fell away.
 - 45.2. 6.2 – the Claimant did not object to working night shifts per se. She was unhappy that she was doing so more than short term, and that she was expected to do some audits (in the daytime) as well. Thus, the claim that she was “forced” was sex discrimination cannot succeed, because she agreed. The amount of work she did was not forced on her: all Peter Joyce required was that for the 20 most problematic shops MJ and the Claimant must have them covered. How they did so was up to them. This means that even if the Claimant had put her case as she wished during her oral evidence it would not have succeeded, first because she could have told her subordinates to work nights, and secondly at least one of them (EdC) did. That he was paid extra is neither here nor there, because he was hourly paid and did this work in addition to his other work, and so got overtime pay. The Claimant did not work extra hours, and was salaried. There is no comparison for these two reasons.
 - 45.3. 6.3 – not upholding the grievance – the telephone conversation itself was not said to be sex discrimination, and the omission of anything else was not said to be sex discrimination by Ergul Kalkan.
 - 45.4. 6.4 The suspension was fair. It is not rendered unfair because no action was taken subsequently. It was odd, for example, that it was the Claimant who marked Mr Aniffa as a leaver by reason of dismissal on the very day Peter Joyce raised the fact that he had not worked for some months and had a very high hourly rate. The potential conflict of interest with the Claimant organising this for her

partner is apparent. The Aldershot allegation was one of several reasons for the suspension, and that someone else was not suspended over a similar allegations (if it happened – the Tribunal makes no finding of fact that it did, and application would have been needed to allege this). The Claimant's connection to the AA matter was also worthy of suspension. These were potentially matters of gross misconduct and the policy of ISS permits suspension in such circumstances (and the policy was not said to be unfair). More fundamentally, whether fair or not, MJ, a male, was suspended at the same time for similar reasons, so it was, if unfair, not sex discrimination.

- 45.5. 6.5 PN collecting keys etc from the Claimant. The Tribunal's reasons why this was not unfair or sex discrimination have been set out above.
- 45.6. 6.6 Not upholding the second grievance – this is again dealt with above and was not sex discrimination.
- 45.7. 6.7 Failing to respond to a grievance of 27 December 2019. This meets the *Naillard* obstacle.
- 45.8. 7 Harassment. This refers back to the factual allegations in 6.
- 45.9. 8 Suspension was plainly "*unwanted conduct*" as were the other matters complained of.
- 45.10. 9 Did it have the purpose of effect of violating the Claimant's dignity (etc)? This was plainly not the purpose of any action, all of which were driven by a wish to improve ISS's performance in a failing contract (unsuccessfully since the contract was lost). Nor was any effect on the Claimant related to the Claimant's sex. Plainly being suspended is humiliating, and that this is not intended does not make it less so. There is no plausible or credible link to the Claimant's gender. PN, who collected the keys was female. MJ was suspended and he was male. Men and women worked night shifts cleaning when they had not done so before.
- 45.11. 10-12 are about victimisation, which cannot succeed for (in short) want of a protected act.
- 46. For all these reasons the claim for sex discrimination fails and must be dismissed.
- 47. The S13 claim for unlawful deductions was conceded. The Tribunal awarded the net sum, as it appears that tax and NI has already been paid on it while the Claimant was employed by ISS.
- 48. The holiday pay claim was stated gross, and the Tribunal so awards. However, as the Claimant is still employed by Atalian (and the Tribunal records that Paul Kelly's evidence was that this is a successful working relationship) the 2nd Respondent can satisfy this judgment by processing the amount through payroll in the usual way (probably as additional holiday

pay, for that is what it is) and should deduct tax and NI when doing so.

Employment Judge Housego
Date: 29 July 2021