Case Number: 4121920/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Khan**

Respondent: **Vigilant Security (Scotland) Limited t/a Croma Vigilant**

Heard at: **East London Hearing Centre**

On: **12, 13 and 14 February 2020**

Before: **Employment Judge Gardiner**

Members: **Mr G Bishop**
Mrs A Berry

Representation

Claimant: In person
Respondent: Mr R Chaudhry, solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's complaint of harassment related to his religion contrary to Section 26 of the Equality Act 2010 partially succeeds in relation to the comment made by Mr Thomson in his conversation with the Claimant on 15 June 2018.**

2. **The remainder of the Claimant's complaints fail either because the Tribunal lacks the jurisdiction to consider them or on their merits, and are accordingly dismissed.**

3. **A Remedy Hearing is to be held on 21 April 2020 to determine the remedy that the Claimant should be awarded for the successful complaint.**

REASONS

Introduction

1. The Claimant, Mr M Khan, has worked for the Respondent, Vigilant Security (Scotland) Limited, since 2014 as a Security Officer. He was never employed by the Respondent under a permanent employment contract, but worked on a temporary bank

basis. His claim against the Respondent is a claim for direct religious discrimination and harassment related to his religion, and a claim for breach of the Working Time Regulations in relation to rest breaks.

2. The hearing was due to start on Wednesday 12 February 2020. Unfortunately, there were only two panel members available to hear the case on that day. As a result, this was discussed with the parties. It was agreed that the case would start on Thursday 13 February before a Full Panel. The parties agreed that the case should take no more than two days. As a result, it could be completed within the original three-day listing.

3. The Tribunal had previously identified the issues for determination at a case management Preliminary Hearing held on 4 October 2019. These were defined and numbered in the record of the Preliminary Hearing as follows:

Time limits/ limitation issues

4.1 Were all of the Claimant's discrimination complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred.

4.2 Were all of the Claimant's claims for breaches of the right to daily and weekly rest brought within the time limits set out in Section 30 of the Working Time Regulations 1998? Dealing with this issue may involve consideration of subsidiary issues including whether it was not reasonably practicable for a complaint to be presented within the primary time limit.

4.3 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 June 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 13: direct discrimination because of religion or belief

4.4 Has the respondent subjected the Claimant to the following treatment:

4.4.1 Mr Andrew Thomson asking the Claimant to work a night shift on 4 December 2017 whilst the Claimant was fasting;

4.4.2 Mr Andrew Thomson telling the Claimant on 4 December 2017 that "you Muslims are always a pain in the ass", and laughing at the Claimant;

4.4.3 Mr Andrew Thomson telephoning the Claimant on 4 December 2017 and telling him that the comment about Muslims being a pain in the ass was a joke and if the Claimant reported it to anyone, the Respondent would not be offered further work and would not be considered for a permanent position at the Respondent;

4.4.4 Requiring the Claimant to work three back-to-back shifts between 2 and 3 June 2018, namely the day and night shifts on 2 June 2018 and the day shift on 3 June 2018;

4.4.5 Requiring the Claimant to work several back-to-back shifts between 9 and 11 June 2018 over a total period of 78 hours;

4.4.6 Mr Andrew Thomson forcing and/or threatening the Claimant to cover a shift on 16 June 2018, even though the Claimant had already worked the previous night shift and had refused the request to work due to Eid prayers. The Claimant says that Mr Thomson started shouting at him and made a disparaging comment about Muslims praying, namely "That's why all Muslims are going to pray" [It is common ground that the date of this incident was in fact 15 June 2018].

4.5 Was that treatment "less favourable treatment" ie did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on hypothetical comparators.

4.6 If so, was this because of the Claimant's Muslim religion?

EQA Section 26: Harassment related to the Claimant's Muslim religion

4.7 Did the Respondent engage in conduct as follows:

4.7.1 Mr Andrew Thomson telling the Claimant on 4 December 2017 that "you Muslims are always a pain in the ass" and laughing at the Claimant;

4.7.2 Mr Andrew Thomson telephoning the Claimant on 4 December 217 and telling him that the comment about Muslims being a pain in the ass was a joke and if the Claimant reported it to anyone, the Respondent would not be offered further work and would not be considered for a permanent position at the Respondent;

4.7.3 Mr Andrew Thomson forcing and/or threatening the Claimant to cover a shift on 16 June 2018, even though the Claimant had already worked the previous night shift and had refused the

request to work due to Eid prayers. The Claimant says that Mr Thomson starting shouting at him and made a disparaging comment about Muslims praying, namely "That's why all Muslims are going to pray" [It is common ground that the date of this incident was in fact 15 June 2018];

4.8 If so, was that conduct unwanted?

4.9 If so, did it relate to the protected characteristic of his Muslim religion?

4.10 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Unpaid annual leave

4.11 Did the Respondent provide the Claimant with a rest period of not less than eleven consecutive hours in each 24-hour period during his work in June 2018 as required by Regulation 10 of the Working Time Regulations 1998 on the following occasions:

4.11.1 Between 2 and 3 June 2018;

4.11.2 Between 9 and 11 June 2018;

4.11.3 Between 15 and 16 June 2018

4.12 Did the Respondent provide the Claimant with an uninterrupted rest period of not less than 24 hours in each seven-day period during which he worked in June 2018 as required by Regulation 11 of the Working Time Regulations 1998? The Claimant alleges he was given no time off work between 7 and 16 June 2018 and was required to work 13 shifts.

4. It was agreed that the parties and the Tribunal would work from a bundle prepared by the Claimant, supplemented by additional documents in the Respondent's bundle. The Respondent's representative kindly agreed to provide two further copies of the Claimant's bundle. The Tribunal heard evidence on liability first, with the issue of remedy awaiting our decision on liability.

5. The Claimant gave evidence by reference to the narrative he had attached to his ET1, and a document headed Grounds of Complaint which was contained in the Respondent's bundle. He was cross examined on the contents of these statements. In addition, he called one witness, Mr G Akram, who attended and was cross examined. Further, he sought to rely on a witness statement of a further witness, Mr S Ahmad. The Respondent called three witnesses, Mr Andrew Thompson, Control Supervisor, Mr Paul

Brady, Contracts Manager, who heard the Claimant's grievance, and Mr Paul Williamson, Operations Director, who heard the Claimant's grievance appeal. A second witness statement from Mr Thompson was produced on the second day of the three-day hearing. Mr Khan did not object to its inclusion.

6. At the conclusion of the evidence, both sides made closing submissions.

Factual findings

7. The Claimant worked on a regular basis for the Respondent as a Security Officer. He was never guaranteed a minimum number of hours by the Respondent but worked on a bank basis. His P60 for the tax year ending 5 April 2018 shows that he had earned £22,685.72 during that twelve-month period in terms of his work for the Respondent.

8. The Claimant worked for the Respondent on what was described as a Casual Work basis, subject to standard terms set out in his letter of engagement. This made it clear that he was working on an ad hoc basis and he was free to accept or decline any work offered. Further terms were set out in a document entitled New Officer Information Pack. The Respondent also employed security guards on a permanent basis. When he started with the Respondent, the Claimant signed a document agreeing to opt out of the 48-hour limit on the average working week imposed by the Working Time Regulations 1998. The remainder of the Working Time Regulations continued to apply. The Respondent did not have a specific policy on working time. It did not have a specific policy that security guards were prevented from working back to back shifts.

9. Between 2016 and 2018, the Claimant was also accepting work under a contract with Knight Frank. The Claimant's evidence was that he was sometimes working two twelve-hour shifts, and sometimes working four twelve-hour shifts each week. With no guarantee of minimum hours, the Claimant was very keen to work whatever shifts were offered by the Respondent. This was in order to boost his income to assist him with his immigration application and subsequently that of his family. The Tribunal finds that the Claimant voluntarily chose to work the hours he did, genuinely concerned that if he turned down particular shifts he would not prioritised in relation to future work. However, there is no evidence that he was ever told he would be refused future work if particular shifts were not accepted.

10. Between the two companies the Claimant was working very long hours every week.

11. On 10 July 2017, the Claimant sent a message to Paul Williamson on Facebook Messenger asking if he could speak to him when Mr Williamson was next in London. Mr Williamson was based in Scotland but travelled to London in connection with his work on a regular basis.

12. On 23 November 2017, the Claimant texted the Respondent's control room about the forthcoming rota. The text was worded as follows:

> "Put me for as many as u can Boss all doubles never mind"

13. The Tribunal finds that the reference to doubles was a reference to back to back shifts. The Claimant wanted as much work as possible, even if this would mean working two consecutive twelve-hour shifts. At the time, he was in the process of applying for British citizenship. One factor in the citizenship application was an assessment of his annual earnings. It would therefore assist his citizenship application to maximise his income.

14. On 4 December 2017, the Claimant says he had a telephone conversation with Mr Thomson. Mr Thomson was based in the control room at Dumfries. The Claimant says that the conversation took place after he had driven for two hours across London to Fulham to work a night shift. When he arrived, he was told he was not in fact required. During the subsequent telephone call with Mr Thomson, the Claimant's evidence is he told Mr Thomson he was fasting. Mr Thomson, the Claimant alleges, replied that "you Muslims are always a pain in the ass", and started laughing at him. Later the Claimant remembers Mr Thomson phoning him again, telling him his remarks were a joke and if the Claimant chose to report it, he would 'take him out' of the company. The Claimant says Mr Thomson was aware that he needed evidence of income to support his application for his British passport.

15. The Tribunal accepts that Mr Thomson made this comment about Muslims during the conversation as the Claimant describes. He did so in response to the Claimant's reference to fasting, and it was his attempt at a joke. The Tribunal does not accept that the Claimant was offended by Mr Thomson's remark. He did not object to this comment at the time, or that Mr Thomson rang him later to threaten retaliation if the Claimant chose to report the comment. Had such a threat been made, the likelihood is that the Claimant would have included reference to it during his grievance. He did not do so at any point in the grievance process. It is telling that in the text exchange on 15 June between the Claimant and Mr Thomson, the Claimant had said that "I never expected this from you", reinforcing our view that the Claimant's perception of the two incidents was very different.

16. The Claimant did not make any complaint at the time about Mr Thomson's conduct.

17. On 29 May 2018, the Claimant emailed Guy Rampe, General Manager, attaching his British Citizenship acceptance letter from the Home Office. He said that he would be getting his Naturalisation Certificate and after that would receive his British Passport. His email was a request for a permanent contract so he could apply for his family to join him in the UK. He ended his email by saying that he would be really thankful to the Respondent for this act of kindness.

18. The response from Mr Rampe was that the Claimant was employed on a casual contract from the start, and that remained the basis on which he was engaged. He quoted to the Claimant from the wording of the contract. There were further email exchanges in which each maintained their stance. The Claimant said that he desperately needed a permanent contract so he could progress his family's immigration application. As a result,

Mr Rampe offered to speak with HR Legal to ascertain the implications from a company perspective.

19. The Claimant's case is that on 2 and 3 June 2018 he worked three consecutive shifts and that this was in breach of the requirements as to rest periods in the Working Time Regulations 1998. He first complained about this in a text message on 15 June 2018, and then in a grievance lodged on 16 June 2018 when he said that "in the first week of June 2018 control force me to do 3 shifts (32 hours) in a row". He attached the June roster in support of his grievance. This showed he had worked a night shift, followed by a day shift, followed by a further night shift. The Respondent made no findings about the length of the Claimant's hours in the grievance outcome or in the grievance appeal.

20. The Claimant's case is that on 9 to 11 June 2018 he had to work continuous shifts and that this was in breach of the same provision in the Working Time Regulations 1998. The Claimant complained about the length of his total hours during this period in the same text message on 15 June 2018 and in his emailed grievance on 16 June 2018. He said this:

> "In the 2nd week of June they pushed me to do 5 shifts (60 hours) in a row back to back without any rest and now again they were pushing me for 3 back to back shifts … all these 4 years the same is happening … these illegal activities are not from today but they are from years and I am not the only one suffering from all this but there are many officers in bench team."

21. The Claimant relies on the same roster document as in relation to 2 and 3 June 2018 to support his case. This appears to show three successive day shifts and three successive night shifts over the three-day period between 9 June 2018 and 11 June 2018. The Respondent has not sought to provide any additional documentary evidence to dispute that the Claimant worked these shifts. In his oral evidence, Mr Williamson sought to suggest, for the first time, that the Claimant could have been paid for the same total number of hours, but many of these hours were taken as paid holiday rather than worked. This contention is at odds with the relevant payslip, which does not record any holiday as taken during June.

22. On 13 June 2018 Mr Rampe told the Claimant that it would not be immediately possible to offer him permanent employment at this time. However, he went on to write that there was a potential vacancy at 5 Pancras, and provided the Claimant with the details of the Security Operations Manager recruiting for that role. The Claimant's evidence to the Tribunal, which we accept, was that at this point he thought that the Respondent was confirming they would not be able to offer him a permanent contract. The reference to the vacancy at 5 Pancras was just the Respondent "playing with him", and was not a serious proposal.

23. Despite his disappointment at this response – and its potential implications for his attempts to help his family to join him in the UK **-** the Claimant responded on 15 June 2018 as follows:

> "Thank you very much for your reply and for all your cooperation in this matter. I will contact Gavin and will have a look for the opportunities available with him.
>
> Meanwhile I will look around for any other possibilities within the company and will inform you for any further assistance."

24. On 14 June 2018, the Claimant worked a night shift, starting at 7pm. In the control room in Dumfries, Andrew Thomson started work at 6.30am the following morning. As he arrived at work, Mr Thomson was told that there was a problem covering another site in London, because the security guard who was expected to work there could not arrive in time for the start of the shift, as his car had broken down.

25. That day, 15 June 2018, was the Muslim festival of Eid. Many of the Respondent's security guards had booked holiday, with the result that the Respondent was short staffed. The urgent priority for staff in the control room was to find a security guard who could cover this day shift. There may or may not have been a call from the control room to the Claimant shortly after 6.30am to see if he was available. However, a controller called Doug texted the Claimant at 6.35am as follows:

> "Can you work today have a shift at new city Court
> Your help would be appreciated"

26. Given the way in which it was worded, the text appeared to want the Claimant to work a day shift, immediately after the end of the night shift.

27. The Claimant responded immediately, saying "I can after 11am plzzzz – Khan". This was because he wanted to go to the mosque to pray, given that this was a significant religious day. At the time, he was about to leave the site where he was working, and was with a friend, Ghazanfar Akram.

28. Shortly after the Claimant had sent this text, he received a phone call from Mr Andrew Thomson. Mr Thomson, on his own admission, was stressed at the need to find urgent cover for this particular shift. He asked the Claimant if he would be prepared to work a shift that day. The Claimant told him that he had to go to the mosque to pray. Mr Thomson was frustrated at the Claimant's refusal. He said to the Claimant "Do all Muslims have to go to prayers?". He said this out of frustration rather than in a spirit of open minded enquiry. Given the urgent need for cover, and his stress at the lack of options available, we do not find that his choice of words was intended to start a discussion about aspects of the Islamic faith, as he has told the Tribunal in his evidence.

29. This conversation was overheard by Mr Akram, who was able to hear both sides of the discussion. This is because the Claimant had put his phone on speaker. The Claimant was upset at the way that Mr Thomson had spoken to him, and was particularly aggrieved he had referred to his faith in what he regarded as a derogatory manner. He texted Mr Thomson at 06:49 in the following terms:

> "Andy trust me I don't like ur attitude today … how can you say all that after doing 36 hours and 60 hours in a row just in last 2 weeks !!!!! Last 5 years I never say no

& U reward me like this …. Look at the tone of ur voice and attitude … I never expected this from u trust me …. That is the extreme of rudeness and unprofessionalism."

30. In this text, he did not accuse Mr Thomson of acting in a way that amounted to discrimination.

31. Mr Thomson responded at 08:26 in the following way:

"Khan, im not arguing with you, im the only allie you have in the control room, you have shafted me many times, remember Christmas 2016, you take new job and I still give you work on your days off, then you get fired then I give you more work, now you want a perminant contract, you need to think carefully about what you say to me on your texts."

32. That led to the following reply from the Claimant at 08:52:

"Andy – I m the only one in the Bench Team serving u & ur threats from last 5 years …. I done 5 shifts means 60 illegal hours in a row and 3 shifts 36 hours in the last 2 weeks …. The way how u threaten me this morning and yelling on me and discriminated me is not acceptable !!!!! Atleast I was not expecting this kind of unprofessional & racist behaviour from U …. I m still suffering from that shock and it just ruined my all 5 years hard work in a blink !!!!! I can never tolerate this kind of extreme racist & unprofessional behaviour from anyone"

33. At 08:58, Mr Thomson said in response "Ok khan, I apologise, under extreem pressure this morning … if you you don't want to deal with me anymore I understand".

34. The Tribunal finds it significant that Mr Thomson recognised that what he had said was unacceptable and considered it important to apologise promptly. The Tribunal finds that in the text message at 08:26, Mr Thomson was threatening the Claimant that there may be consequences for his hope of a permanent contract if he refused to work the day shift. That is how it was regarded by the Claimant, as the wording of his response at 08:52 makes clear.

35. During the day, on 15 June 2018, the Claimant requested a record of his roster for the hours worked in June. This was sent to him by email at 8.30pm. That evening, the Claimant worked the shift he had been booked to perform.

36. On Saturday 16 June 2018 at 5:31AM, the Claimant sent a detailed email to Gay Dudley, which he copied to Guy Rampe and to Paul Williamson. It was a grievance, although was not labelled as such. The focus of the email was to complain about his conversations with Andrew Thomson on 15 June 2018. He also complained he had been forced to do three shifts in a row in the first week of June 2018, and five shifts in a row in the second week of June 2018. He said that this was causing him stress and impacting on his health. This had been a common feature of the last four years but this time a boundary had been crossed in that it was "hitting my religion". He stated that he wanted "a strict action against these racial abuses discrimination threatening and forcing for illegal hours".

He did not make specific reference to any earlier dated incidents in which Mr Thomson had treated him in a way that amounted to discrimination.

37. He received a response from Paul Williamson the same day, promising to look into his complaint. He added that he would tell the Claimant now that "five shifts in a row is not illegal". He said that "it is perfectly fine for an employee to work 60 hours under the European working time directive". In evidence, Mr Williamson said that he was referring to five shifts worked over five days totalling 60 hours, with rest periods in between each shift. The Claimant responded 10 minutes later, writing "Its 5 shifts back to back means 60 hours continuous starting on Friday night 1900 and finished at 0700 on Monday morning (June roster attached)". There was no further response from Mr Williamson.

38. On 26 June 2018, the Claimant emailed control management asking if there were any further shifts. The response was "When work comes in we will let you know once you have had days to rest". He followed up with a further email on 29 June 2018 saying that he was still waiting for any work. The payslips indicate that he had worked after 16 June 2018. It is unclear from the evidence whether some shifts he had been originally offered were removed.

39. It is clear from the June 2018 roster sent to the Claimant on 15 June 2018 that up until that point he had worked in three blocks, between 2-3 June, between 9-11 June, and between 14-16 June. The subsequent communications show he had not worked since those dates in the period up until the end of June.

40. On 2 July 2018, the Claimant emailed Mr Rampe again asking him to refer him to Paul Brady in relation to three available security officer positions. Mr Rampe forwarded the Claimant's email to Mr Brady two days later, passing on the Claimant's request. Mr Brady responded that the Respondent had now recruited for the three positions.

41. On 23 July 2018 at 11:50am, the Claimant sent a further email to Guy Rampe and Paul Williamson. He stated that it had now been six weeks since his complaint with no reply. He alleged that control had been victimising him. He said that if Mr Rampe "was not interested then he would forward his grievance at work to deal with it in accordance with HR Grievance at work policies". He concluded his email by saying that he was looking for a positive reply as he "did not want to skip the 3 months minus 1 day policy for registering discrimination and breach of TWR case with the employment tribunal".

42. That afternoon, Mr Thomson emailed Mr Rampe with his version in response to the grievance. Two further emails were sent to Mr Rampe, the first by Kenny Mills at 16:03 on 23 July 2018, and the second by Grant Mitchell at 09:07 on 24 July 2018.

43. On 23 July 2018, prompted by the Claimant's chasing email, his grievance was finally acknowledged and he was invited to a grievance hearing to consider his complaint, to be conducted by Guy Rampe. The Claimant objected to Mr Rampe conducting the hearing.

44. On 30 July 2018, Paul Brady wrote to the Claimant acknowledging receipt of his previous emails and inviting him to a meeting on 31 July 2018 to be held at the Respondent's premises in Hanover Square, to discuss his grievance. He was sent an almost identical letter the next day, in which the date of the grievance meeting was amended so that it would now take place on 7 August 2018.

45. In advance of the grievance hearing, the Claimant was not provided with a copy of the emails from Mr Thomson, Mr Mills or Mr Mitchell. The meeting lasted just under an hour and a half, starting after 1pm and finishing just before 2.30pm. Notes were taken during the meeting, although there is no record that these notes were sent to the Claimant for approval. No decision was made on the day of the hearing as to the outcome of the grievance.

46. On 16 August 2018, the Claimant was sent a letter notifying him of the outcome to his grievance. This letter, signed by Paul Brady, rejected his allegation that he had experienced discrimination, forced illegal hours, threatening behaviour and alleged racial abuses. Mr Brady recognised that a disagreement had occurred between the Claimant and Mr Thomson which he said possibly amounted to an "unprofessional approach". The tribunal infers that this was how he regarded Mr Thomson's behaviour in the telephone conversation on the morning of 15 June 2018. No findings were made about the length of the shifts that the Claimant had been expected to work.

47. On 3 September 2018, the Claimant chose to appeal against the grievance outcome. The appeal was acknowledged by Paul Williamson, who invited him to a grievance appeal hearing to be held on 19 September 2018. That meeting went ahead on 19 September 2018 and lasted more than an hour. Notes were taken during the meeting.

48. Following the grievance appeal meeting, Mr Williamson wrote to the Claimant on 26 September 2018 with the outcome of the appeal. He said that having given the matter full consideration he was writing to confirm that the original decision taken by Paul Brady stands as "you have failed to provide any further information to demonstrate nor provide any suitable evidence with regard to these allegations".

Legal principles

Direct discrimination

49. Section 13 of the Equality Act 2010 is worded as follows:

> (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.

50. The Claimant seeks to compare himself against how a hypothetical non-Muslim comparator would have been treated. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from his faith.

51. The focus is on the mental processes of the person that took the action said to amount to discrimination. In the present case, that is the mental processes of Mr Thomson.

52. Section 136(2) of the Equality Act 2010 provides as follows:

> (2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

53. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

54. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that alleged detriment was in part the result of his faith.

55. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). There must be something more, which is capable of giving rise to an inference of discrimination if not adequately explained.

56. If such facts potentially giving rise to an inference of discrimination are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decision to reject the Claimant's application.

Harassment

57. Section 26 of the Equality Act 2010 is worded as follows:

> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) The conduct has the purpose or effect of –
>
> (i) Violating B's dignity, or
> (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B;
>
> (4) In deciding whether conduct has the effect referred to in (1)(b), each of the following must be taken into account-

(a) The perception of B;

(b) The other circumstances of the case

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

58. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission : Code of Practice on Employment (2011) states as follows :

> "7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.
>
> 7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

59. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

60. In assessing whether the conduct met the proscribed threshold, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates his dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said:

> "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

Section 212 Equality Act 2010

61. Section 212 Equality Act 2010 provides:

> (1) In this Act-
>
> …
>
> "detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

(5) Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic.

62. Paragraph 18.107 of the IDS Handbook on Discrimination at Work explains that the purpose of Section 212 is to prevent double recovery in circumstances where a claimant succeeds in establishing that a particular course of conduct amounts to both direct discrimination and discrimination by way of harassment. It is still open to a claimant to argue both claims in the alternative, on the understanding that both cannot succeed.

63. It would be appropriate to consider the claim for harassment before the claim for direct discrimination. If the harassment claim succeeds, then the same conduct cannot amount to detriment, and therefore cannot give rise to a claim for direct discrimination.

Time limits under the Equality Act

64. Section 123 of the Equality Act 2010 is worded as follows:

(1) Proceedings on a complaint brought within Section 120 may not be brought after the end of –

(a) The period of 3 months starting with the date of the act to which the complaint relates; or
(b) Such other period as the employment tribunal thinks just and equitable.

(2) …

(3) For the purposes of this section –

(a) Conduct extending over a period is to be treated as done at the end of the period;

(b) Failure to do something is to be treated as occurring when the person in question decided on it.

65. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the Early Conciliation Certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B(4), Equality Act 2010).

66. In the present case, the Claimant applied to ACAS for Early Conciliation on 7 September 2018 and was granted an Early Conciliation Certificate on 1 October 2018. These proceedings were issued on 24 October 2018. The consequence is that acts occurring on or before 7 June 2018 are potentially out of time, unless part of conduct extending over a period.

67. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530).

68. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the Early Conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434, CA).

69. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However:

> "There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (*Abertawe* at para 25)"

70. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

71. It will frequently be fair to hold claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuse a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (*Hunwicks v Royal Mail Group plc* EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

72. Awaiting the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA per Peter Gibson LJ at p719).

Rest periods

73. Regulation 10(1) of the Working Time Regulations 1998 is worded as follows:

"A Worker is entitled to a rest period of not less than eleven consecutive hours in each 24 hour period during which he works for his employer."

74. Regulation 11(1) of the Working Time Regulations 1998 is worded as follows:

"Subject to paragraph (2) a worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer."

75. A worker is entitled to bring a complaint to an Employment Tribunal for a breach of those Regulations if the complaint is brought before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted, or within such further period if it was not reasonably practicable for the complaint to be brought within three months.

76. Given the effect of the Early Conciliation dates in the present case, a complaint relating to a failure to provide a rest period before 7 June 2018 is out of time. This is because Early Conciliation was not initiated until three months later on 7 September 2018. The Early Conciliation provisions only pause the three-month limitation period. They cannot bring events occurring more than three months before Early Conciliation was initiated within time. By that point, the claim was already out of time.

77. There is a conflict of authority as to whether a Tribunal can find that a claimant has been refused a rest break or rest period in the absence of an express request – see *Miles v Linkage Community Trust Limited* [2008] IRLR 602, which was not followed in *Grange v Abellio London Limited* [2017] ICR 287. This Tribunal prefers the reasoning and the result in *Grange v Abellio*, namely that there is no requirement for a claimant to have made a prior request for a rest break before the claimant can complain to an Employment Tribunal that it has not been granted. As Judge Eady QC put it :

"The Directive entitlement to a rest break is intended to be actively respected by employers. It is required not merely that employers permit the taking of rest breaks … but – allowing that workers cannot be forced to take rest breaks – that they proactively ensure working arrangements allow for workers to take those breaks" (para 43)

"The employer has an obligation ("duty") to afford the worker the entitlement to take a rest break. That entitlement will be "refused" by the employer if it puts into place working arrangements that fail to allow the taking of 20-minute rest breaks. If however the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so" (para 47).

78. As appears from the issues remitted to the Tribunal for determination in *Grange v Abellio* (at paragraph 49), it is a question of fact for the Tribunal to decide whether in the practical arrangements made a respondent has failed to allow the claimant to exercise his entitlement.

79. If the Tribunal has jurisdiction to consider such a complaint and considers that it is well founded, then it can make a declaration to that effect and may make an award of compensation in such sum as is considered just and equitable. This is to be determined having regard to the employer's default in refusing to permit the worker to exercise his right and any loss sustained by the worker which is attributable to the matters complained of.

80. Where no financial loss has been suffered, and the Tribunal is considering the employer's default, in *Miles v Linkage Community Trust Limited* [2008] IRLR 602 the EAT gave guidance as to the factors that the Tribunal should consider in determining the amount of compensation. These are :

a. The period of time during which the employer was in default;

b. The degree of default, ie how outrageous or offensive the employer's behaviour was; and

c. The 'amount' of the default in terms of the number of hours the employee was required to work and the number of hours he was to be given as rest periods.

81. Whilst there is no entitlement to an award of injury to feelings (*Santos Gomes v Higher Level care Limited* [2018] ICR 1571), there is an entitlement to an award for 'discomfort and distress'. In *Grange v Abellio* (EAT 8 October 2018), the EAT upheld the Tribunal's award of £750 for the discomfort and distress for failure to afford him rest breaks to which he was entitled under Regulation 12. An award of personal injury is also permissible where justified by the evidence.

Conclusions

Time limits

82. The Tribunal concludes it has no jurisdiction to consider whether the incident on 4 December 2017 amounts to an act of discriminatory harassment or direct discrimination. Proceedings in relation to that incident were started over six months after the relevant time period expired. The Claimant has not discharged the onus of showing it would be just and equitable to extend time for that matter to be considered on its merits. No good explanation has been provided by the Claimant for waiting as long as he did before complaining about this to the Employment Tribunal. The Claimant has said that he did not understand the procedure in the Employment Tribunal. However, by July 2018, it is clear he was aware of the applicable time limit and yet still delayed by a further two months before initiating early conciliation. The Respondent is potentially prejudiced in that Mr Thomson cannot now recall the details of the alleged conversation on 4 December 2017. If this claim is not considered on its merits, the Claimant is still entitled to bring a claim in relation to the later incident on 15 June 2018. Balancing the prejudice to the Claimant against the prejudice to the Respondent, we find that it would not be just and equitable to extend time.

83. In relation to the events on 2 and 3 June 2018, the Claimant is outside the primary limitation period so far as the discrimination claim is concerned. However, the claim is only four days out of time, and the Tribunal considers it would be just and equitable to extend the time period by this short length to enable this claim to be considered on its merits.

84. In relation to the claim under the Working Time Regulations 1998, we find that the incident on 2 and 3 June 2018 is out of time for the reasons given above. It was reasonably practicable for the Claimant to have brought his claim under this legislation within the three-month period. Therefore, the tribunal does not have the jurisdiction to consider it on its merits.

Section 26 : Harassment

85. The Tribunal does not have the jurisdiction to consider issues 4.7.1 and 4.7.2, given that the claim was issued out of time in relation to these issues.

86. In relation to issue 4.7.3, namely the comments made by Mr Thomson on 15 June 2018 :

a. Mr Thomson asked the Claimant "Do all Muslims have to go to prayers?", and did threaten the Claimant that if he did not work the day shift it could impact on his request for a permanent contract.

b. The Tribunal finds that Mr Thomson's conduct was unwanted. This is clear from the Claimant's immediate reaction in his text message to Mr Thomson, and his grievance sent within 24 hours;

c. The conduct was conduct which did create an intimidating, hostile, humiliating and offensive environment. The Tribunal has regard not just to what Mr Thomson said, but to the way he said it, in an angry and threatening manner. It notes the relatively contemporaneous written reaction of the Claimant, in submitting a grievance in which he describes Mr Thomson's conduct as "crossing all the boundaries by hitting my religion".

d. It was reasonable for the Claimant to regard this comment as unacceptable and offensive, particularly in the context of the day on which it was said, namely the festival of Eid, given that the Claimant was expecting to go to the mosque to pray as part of his observance of a significant religious festival.

87. Therefore, issue 4.7.3 is established. It amounts to harassment related to the Claimant's Muslim faith.

Section 13: Direct discrimination

88. The Tribunal does not have the jurisdiction to consider issues 4.4.1 to 4.4.3 given that the claim was issued out of time.

89. In relation to issue 4.4.4, the Claimant's shifts on 2 and 3 June 2018 were allocated to him because he had asked to be given as many shifts as possible. They were not allocated to him on the grounds of his faith. Someone of a different faith or no faith at all who had been similarly eager as the Claimant to work as many shifts as possible would have been allocated the same pattern of shifts. Therefore, this direct discrimination claim fails.

90. The Tribunal reaches the same conclusion for the same reason in relation to the shift pattern between 9 and 11 June 2018, which is issue 4.4.5.

91. In relation to issue 4.4.6, this is the same factual issue as issue 4.7.3, which we have held amounts to harassment. When the Tribunal's Reasons were announced orally, we stated that this allegation was proved as an allegation of direct discrimination. However, as a matter of law, as a result of our finding on harassment, it is deemed not to be a detriment. Therefore, we cannot make a determination of direct religious discrimination in relation to issue 4.4.6, and this direct discrimination claim fails.

92. If we are wrong about that, we find that Mr Thomson's threat that his refusal to work a shift would impact on his permanent contract and his reference to Muslims praying, were acts of direct religious discrimination. The reference and the threat not to give him a permanent contract would not have been made to a non-Muslim. The reference to Muslims needing to pray was, in the Tribunal's view, a derogatory statement made about Muslims' priority of prayer over work on this day. It was an act of direct religious discrimination in which the Claimant was treated less favourably than a non-Muslim would have been treated and this was because of his faith. Given that the reference to prayer was an act of direct religious discrimination, we find that the threat not to grant him a permanent contract was also less favourable treatment on grounds of his religion, and therefore direct discrimination.

93. The comment about prayer itself raises a prima facie case that any other detrimental treatment from Mr Thompson that morning was tainted by a hostility to the Claimant's faith. That prima facie case causes the burden of proof to shift to the Respondent to show on the balance of probabilities that the threat made was not related to the Claimant's faith. It has not done so. It was made as part of the same series of communications and was prompted by the same issue, namely the Claimant's unwilling to cover a shift for which Mr Thomson needed cover.

Rest periods

94. In relation to issue 4.11, namely failing to provide the Claimant with a rest period of not less than eleven consecutive hours in each 24-hour period, the Tribunal only has the jurisdiction to consider the period from 9 to 11 June 2018, which is issue 4.11.3. The other two periods, issues 4.11.1 and 4.11.2 occurred before 7 June 2018 and therefore the Tribunal does not have jurisdiction to consider these issues.

95. The test is whether in fact, there was a failure by the Respondent to allow the Claimant to exercise his right to an 11 hour rest break. On our findings, the normal roster

for June would have had the Claimant working shifts which were punctuated with at least 11 hour breaks in a 24 hour period. At a later point, the Claimant was offered and chose to accept additional shifts that caused him to work when he would otherwise have been resting, in return for additional payment. He was not forced to do so and there is no evidence that he would have been denied shifts in the future if he chose to decline. In these circumstances, the Respondent was not failing to allow the Claimant to exercise this right. Rather it was the Claimant that was choosing to waive his right by working these hours.

96. In relation to issue 4.12, namely whether the Respondent provided the Claimant with an uninterrupted rest period of not less than 24 hours in each seven-day period during which he worked in June 2018, this issue does not arise on the facts. The Claimant was provided with an uninterrupted period of at least 24 hours in each seven-day period during June 2018. He was not required to work 13 shifts without time off, as the issue asserts.

97. Therefore, the claims brought under the Working Time Regulations 1998 for breaches of Regulations 10 and 11 in relation to rest periods must fail.

Employment Judge Gardiner

9 March 2020