



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Ms S Campbell
Ms T Williams

BETWEEN:

Ms M Elsewafy

Claimant

AND

Aspects Beauty Company Limited (1)
Debenhams (2)

Respondent

ON: 2- 5 July 2018

Appearances:

For the Claimant: In person

For the Respondent: Shareen Murphy, Solicitor

RESERVED JUDGMENT

All claims against R1 and R2 fail and are dismissed.

REASONS

1. By a claim form presented on 18 July 2016, the claimant complains of direct discrimination on grounds of religion or belief and harassment against her former employer (R1) and Debenhams (R2) and breach of contract against R1.
2. The claimant gave evidence on her own behalf. The respondents gave evidence through Lauren Dowdle (LD) Selling Support Manager; Sharon Azira (SA) Head of Retail Sales R1, and Sanja Mann (SM) London Area Sales Manager, R1.
3. The parties presented a joint bundle of documents and page references in square brackets in the judgment are to pages within that bundle.

The issues

4. The agreed issues are attached to the tribunal's order of 2 November 2017 and are referred to more specifically in our conclusions below. [84-86]

The Law

5. Section 13 of the Equality Act 2010 (EqA) provides that 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.
6. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic,and 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.
7. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Findings of Fact

8. R1 operates within the luxury cosmetic and fragrance industry and is a UK fragrance distributor to a number of stores. R2 is a major high street department store. R2 has a commercial arrangement with R1 under which R1 provides members of staff to work within the Fragrance department in some of R2's stores.
9. The claimant commenced employment with R1 on 26 September 2014 as a Beauty Sales Consultant. Her role entailed selling fragrance and beauty products, traffic stopping customers and stacking shelves, as well as some administration, promotions and communication with the store.

10. The claimant was based in the cosmetic's department at the Debenhams store in Harrow. Her line manager was Sanja Mann (SM), Area Sales Manager of R1. However on a day to day basis she was supervised by Alina Balaci, Sales Manager, R2. Alina Balaci left R2 in mid-February 2016, at which point the claimant was supervised by the interim manager, Lauren Dowdle (LD). The claimant's allegations of religious discrimination are all directed at LD.
11. The claimant is a Muslim by religion. She alleges that in November 2015, LD was aggressive in stopping her from using a room within the store as a prayer room, by standing in front of her to stop her praying.
12. R2 had a dedicated prayer room for its Muslim employees. The claimant did not use this room to pray but instead used the beauty room. She told us that the reason she did not use the designated prayer room was because it was used by both sexes. She said that she had been given permission by Alina to use this room as her religion forbade her from praying alongside men. The claimant during the course of her evidence made a number of references to Alina in support of her allegations. The claimant did not call Alina as a witness, claiming that she did not know how to get hold of her after she left R2. However, at a preliminary hearing on 2 November 2017, which I conducted, it was agreed that the claimant could write to her proposed witnesses, via R2, who would pass the correspondence on. She did not do so, claiming that she had been abroad and that it would have been a waste of time anyway. We have therefore treated the hearsay evidence relating to Alina with some caution.
13. By the time of this hearing, the allegation relating to the prayer room had evolved from how it was originally pleaded. In the ET3 the claimant said that LD saw her and was very sarcastic about her religion and started to bully her continuously [7]. On 11 October 2017, in her response to R2's request for further and better particulars of the claim, the claimant alleged that while she was praying, LD stormed into the room, got her out of her prayers and told her to go somewhere else. [79]. At the hearing, the claimant said that LD stopped her from praying and said get out you are not supposed to pray here.
14. The allegation was denied by LD though she told us that there may well have been a conversation with the claimant about the use of the room. She told us that R2 did not want the claimant to use the Beauty room for security reasons as various items of stock had been found in the Beauty room that should not have been there and so they wanted to keep it locked.
15. We are satisfied that there was a conversation, not least because LD does not deny it. However we do not accept the claimant's account of the conversation, given the lack of consistency in her evidence. The claimant put the inconsistency in her evidence down to ill health, affecting her brain and memory. She told us that she had had a Transient Ischemic Attack (mini stroke) in December 2015, suffered from depression and Bells Palsy; and was on medication. No medical evidence was produced in support of this. It was certainly the case that the claimant had difficulty providing specific details of events complained of, which may or may not have been due to her medical conditions. Either way, the tribunal could not be confident that her account was reliable. LD told us that other Muslim men and women used the prayer room and sharing it had never been an issue as they arranged between themselves to take it in turn to use the room. That was not challenged by the claimant and it was not her case that she was the only female

Muslim employee that prayed at work or that other Muslim women prayed other than in the designated room. We therefore accept LD's evidence on this.

16. The claimant wore a headscarf for religious reasons and she alleges that LD pulled her headscarf off her head, exposing her hair and causing her great embarrassment. LD denied that she had ever done this. This allegation was not in the ET1 and was first identified as an issue at the preliminary hearing on 7 October 2016. [32]
17. The date of the incident varies as does the number of occasions. At the preliminary hearing the claimant said that it happened on 2 occasions in 2015. [32] However, in her further particulars dated 11 October 2017, she refers to one occasion, in December 2014. [79] When asked in cross examination how she could be so certain about this date, she said that she had written it down in a diary. That diary entry was not produced at the hearing. When asked in cross examination and by the tribunal to clarify whether it occurred once or twice, the claimant said that she could not remember.
18. The incident as described is of the utmost seriousness. If it happened as the claimant alleges, she would have some recollection of each occasion. The claimant's account of the aftermath of the incident is also incredible. She said that when LD pulled the scarf off, it dropped on the floor. She did not put it back on because it was dirty so instead she left her hair exposed all day. We find it extraordinary that, given the religious significance of the scarf to the claimant, and the fact that she worked in a department store that sold scarves, that she did not bother to acquire a replacement.
19. Further, the claimant told us that there were 3 witnesses to the incident yet she did not produce any of them to the hearing to give evidence on her behalf.
20. The claimant claims that she reported the matter to Alina and SM. We did not hear from Alina but we did hear from SM who said that she knew nothing about it. In our view, we consider it unlikely that SM would have done nothing had this been reported to her and we find that it was not.
21. For all of these reasons, we prefer LD's evidence and find that the incident did not happen.
22. The claimant contends that on one occasion, LD called her Miss Bin Laden. LD denies ever making such a comment. In her further particulars, dated 3 November 2016, the claimant says that this occurred in June 2015. [40]. In her later particulars, dated 11 October 2017, she says that it occurred in February 2015. When asked in cross examination why the dates were different, she said that she had made a mistake. When asked why she did not raise a complaint with R1, she said that she had tried to ignore it as she enjoyed her work at Debenhams, the inference being that her job would have been at risk if she had. The claimant said in her further particulars that she reported it to Alina, who told her to ignore it. Again, we did not hear from Alina.
23. Also, it is noteworthy that the claimant did not refer to any of these incidents during the disciplinary investigation, dismissal meeting or appeal meeting. During the investigation meeting on 29 February 2016, the claimant made a number of comments about LD's treatment of staff but no reference to the matters that she now complains about. [109-110] On that occasion also, she refers to LD telling her that she should not pray in the beauty room, which is not in dispute. However, she made no reference to the other

elements of the complaint. Further, in her appeal against dismissal, she stated that Alina told her that LD was after her and trying to get her out. That would have been the ideal opportunity to raise the matters against LD that she complains about now. Finally, on 15 April 16' the claimant raised a grievance against one of R2's employees, Ahmed Ibrahim, but did not take one out against LD. [118] By this stage, the Claimant had nothing to lose by raising a complaint as her role at R2 had ceased. We did not have a satisfactory explanation for her failure to do so.

24. Taking all of these matters into account, we prefer LD's evidence and find that the alleged comment was not made.
25. In early February 2016, Ahmed Ibrahim, Loss Prevention Assistant at R2, raised with LD concerns that the claimant had been behaving suspiciously and was seen taking items from the shop floor, putting them in the back room and then moving them to her locker. LD was told that the Loss Prevention Team had decided to monitor the claimant's behaviour as a result. It was subsequently reported to LD by Ahmed Ibrahim that the claimant was seen on CCTV on 18 and 21 February, giving samples, testers and GWP (gift without purchase) items to 2 separate R2 employees, in breach of R2's policies.
26. On 24 February 2016, the interim Store Manager, John Dillon, called SM to report R2's concerns about the claimant. As a result, the claimant was suspended that same day pending an investigation and this was confirmed in writing the next day. The allegations were: i) that the claimant had been giving away gifts, discounts and samples to other sales consultants; ii) complaints from customers; iii) spending time away from the counter - visiting and trying on items from other departments when she should have been working. [98-99]
27. On 29 February, the claimant attended an investigation meeting conducted by SM with Tracey Cresswell, (TC) HR Manager of R1, present as a notetaker. [104-115]
28. On 12 April, the claimant was invited to a disciplinary meeting. The allegation of customer complaints had been dropped but there was an additional allegation, of failing to follow grooming guidelines and wearing inappropriate footwear. [116-117]
29. On 15 April, the claimant attended a disciplinary hearing, chaired by Sharon Azira, (SA) R1 Head of Retail Sales. [120-131]
30. On 19 April and again on 21 April, TC wrote to R2 informing it that the investigation had been concluded and that the claimant had been issued with a final written warning (In fact the claimant was never issued with a final written warning). In the letter, TC went on to ask R2 whether it had any objections to the claimant resuming work at their store. [133 & 135]
31. On 19 April 16, LD emailed Sandra Pitt, Deputy Store Manager, objecting to the claimant's return as she believed she would "*stir the pot and create bad feeling within the store*". [132] LD expanded upon this in evidence. She told us that the claimant often caused disruption, becoming quite aggressive in tone whenever she was given negative feedback. She also told us that she also took into account the suspicions of the Loss Prevention team.
32. On 22 April 2016, R1 wrote to the claimant with the outcome of her disciplinary hearing, which was her dismissal. The reason given for the dismissal was that R1 was not

satisfied with her explanations in response to the allegations and the fact that she had short service (18 months). [140-142]. The claimant appealed against her dismissal but following an appeal hearing on 20 May 16' the decision was upheld. [194-196]. The dismissal is not one of the issues in the current claim and is only referred to as part of the chronology of events.

33. At various points in the year R1 ran incentive schemes primarily to boost staff sales and performance. Between 25 January and 26 March 2016, R1 ran a promotion relating to the Ferragamo Sinorina collection of fragrances. The person who achieved the highest percentage of sales over target would receive a Ferragamo handbag, which the claimant said was worth £500. Runners up received a Ferragamo purse. The Claimant received a runner up purse.
34. The claimant contends that she was the winner because she achieved the highest percentage of sales nationally. R1's case is that an employee called Elizabeth Carlin was the winner and that the claimant was one of 65 runners up. We were shown a spreadsheet provided by R1 with all the names of the participants and their sales results. [201]. The claimant said that that document was wrong because the promotion only lasted for 2 weeks, not 2 months, as indicated. In saying this, she relies on the promotional literature which refers to National roll-out (February last 2 weeks). However, we do not consider this to be conclusive evidence that the promotion will last for 2 weeks and we prefer R1's spreadsheet, which gives the dates as 25/1/16-26/3/16.
35. The claimant also claimed that her sales figures for the 4 days prior to her suspension had not been taken into account. However we were shown an attendance form showing her daily sales figures, which she signed, and which confirmed that the days in question were taken into account. Even if they had not been, the margin between her sales figures and those of the winner meant that it would have made no difference.

Submissions

36. All parties made oral submissions, which we have taken into account

Conclusions

37. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Breach of Contract

Was the Claimant contractually entitled to a designer handbag worth approximately £500 for winning a competition by achieving the highest percentage sales figures over target.

38. Based on our findings at paragraphs 33-35 above, the factual basis for this claim has not been made out as we are satisfied from the evidence that the claimant she was not the winner of the competition, merely runner up. Indeed, the claimant has received her runner up prize. Therefore any obligation – contractual or otherwise – to give the claimant a designer bag had not crystallised. The breach of contract claim fails.

Direct Discrimination on grounds of religion and belief

Allegation I - from October 2014, LD was aggressive towards the claimant in relation to her use of a room as a prayer room, by standing in front of her to stop her praying

39. Our findings in relation to this allegation are set out at paragraphs 11-15 above. As we have preferred LD's evidence, it follows that the claimant has not proved facts from which we could conclude discrimination.

Allegation ii - in December 2014, LD pulled the Claimant's headscarf

40. Our findings in relation to this issue are at paragraphs 16-21 above. Again, we have preferred LD's evidence that the incident did not occur. In those circumstances the factual allegation is not made out.

Allegation iii - in June 2015, LD called the claimant "Miss Bin Laden"

41. Based on our findings at paragraphs 22-24 above, the allegation is not made out.

Allegation iv – v in February 2016, LD told lies about the Claimant to SM which led to an investigation being carried out by R1

42. The claimant told us that LD had lied about the allegations investigated by R1. Those allegations are referred to at paragraph 26 above. In relation to the first and third allegation, as indicated in our findings at paragraph 25, these were made by the Loss Prevention Team, who referred them to LD. LD told us that ordinarily she would not have raised allegation 3 with R1 but did so because of the claimant's defensive and aggressive reaction when she told her about the complaints. Nevertheless, as the allegations were potentially of misconduct, we consider that it was reasonable for LD to bring them to the attention of the claimant's employer. In so doing, LD was not making any judgments about the truth or otherwise of the allegations, but was leaving them to R1 to establish through its own investigations. We note that during the course of the disciplinary process, the claimant substantially accepted allegations 1 and 3 and it is therefore wrong for her to characterise them as lies. In relation to allegation 2, the claimant argued that it was untrue because she was a high achiever, who was good at her job and was constantly praised by customers and by R2 for her level of sales. The claimant's skills as a Beauty Sales Consultant were not in issue. Indeed the fact that she was runner up in the sales competition, even though she was unable to participate for the whole period because of her suspension, is indicative of her high skill set. However, that is not necessarily inconsistent with receiving customer complaints. Unfortunately, customer complaints are a fact of life in the retail sector and being good at your job does not make you immune from them. The claimant accepts that in or around January/February 2016, LD told her that she had been approached by a customer who complained about her (the claimant). LD also told her that there had been complaints online. We see no reason for LD to make this up and we accept her evidence. In all the circumstances, we do not accept that LD told lies about the claimant.

43. The claimant repeatedly claimed at the hearing that LD had accused her of theft, even though this was not one of the allegations in the list of issues. LD denied this, stating that there was only ever a suspicion that went no further. LD did not at any time confront the claimant with an allegation of theft, nor did such an allegation form part of R1's investigation. Even though LD told us that her decision not to have the claimant back

following her disciplinary was in part because of the suspicions of the Loss Prevention Team, there is no evidence that she made these known to R1. Further, there is no reference in the investigation notes or dismissal letter to allegations, or indeed suspicions of theft. We therefore accept LD's evidence that she did not at any time accuse the claimant of theft. The claimant has not proved facts from which we could conclude discrimination.

Allegation vi – In February 2016, LD took pictures of the claimant whilst she was on her breaks

44. The claimant clarified in evidence that she was referring to the fact that she was monitored by CCTV. Our findings at paragraph 25 make clear that the decision to monitor the claimant was taken by the Loss Prevention Team. The fact that LD was responsible for the team does not mean that she instigated the monitoring. At best, she tacitly approved the decision. The reason for the monitoring is also clear from paragraph 25 and we are satisfied that it had nothing whatsoever to do with religion.

Allegation vii – LD gave the Claimant “dirty looks”

45. This allegation was extremely vague. The most the claimant was able to say was that LD rolled her eyes, which LD denied. This allegation was not sufficiently specific to meet the evidential burden upon the claimant and is not made out.

Allegation viii – LD told other colleagues that she “hates Muslims” and that she would eventually get the Claimant out of the store.

46. This was denied by LD. The claimant does not allege that the comment was made to her directly or that she heard it. Her case is that she was told about the comment by “Lucy”. Lucy did not attend to give evidence nor is there a contemporaneous statement from her. The claimant has not provided the names of the colleagues to whom the alleged comment was made, claiming that she had forgotten their names. For such a serious allegation, we would have expected to see some compelling evidence but there is none. The claimant did not complain about this matter at the time nor did anybody else (the claimant was not the only Muslim at R2 so the potential for others to be offended and complain was high). We also note that there is no reference to this matter in the disciplinary investigation or dismissal appeal. The reason the claimant gave us for not complaining – that she did not want to cause aggravation – was in our view highly implausible. She did not feel so constrained in lodging a grievance against Ahmed Ibrahim so its unclear why her approach towards LD would be different. In all the circumstances, we prefer the evidence of LD and find that the comment was not made.
47. In conclusion, we find in respect of all the above allegations, that the claimant has not proved facts from which we could conclude discrimination because of religion or belief. The direct discrimination claim therefore fails.

Harassment

48. The factual allegations relied upon as unwanted conduct are the same as those for direct discrimination. Our findings are therefore the same. We have rejected all of the factual allegations save that we accept (and it was not in dispute) that the claimant was monitored on CCTV. However we are satisfied from the evidence that the reasons for

monitoring the claimant were not related to her religion. The harassment claim therefore fails and is dismissed.

Judgment

49. The unanimous judgment of the tribunal is that all claims against R1 and R2 fail and are dismissed

Employment Judge Balogun
Date: 7 September 2018