EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102454/2020 (V)

Hearing held by CVP on 14 and 15 January 2021

Employment Judge Cowen
Tribunal Member Ms Canning
Tribunal Member Mr Martin

Mr J Kovalkovs	**Claimant** **In person**
2 Sisters Food Group Limited	**Respondent** **Represented by:** **Mr Grant-Hutchison, Advocate** **Instructed by:** **Mr D Harford, Solicitor**

This has been a remote video hearing which was attended by the parties. A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

JUDGMENT

1. The Claimant's claims of direct and indirect discrimination on the grounds of religion or belief and a claim for breach of contract are dismissed.

REASONS

Introduction

1. The Claimant brought claims of discrimination in relation to his religion and belief and for notice pay, by way of a claim form dated 3 May 2020. The Claimant claimed that he was the subject of indirect discrimination by way of his dismissal for wearing his religious jewellery (a necklace).

2. The Respondent denied the discrimination claim and stated that in any event the dismissal (which was not part of the claim) occurred because the Claimant refused to obey a reasonable management order to remove his necklace.

3. The matter was dealt with by case management on 23 October 2020, at which the Claimant did not raise any new claims and confirmed his claim was one of indirect discrimination. He subsequently applied on the day before the final hearing to add claims of direct discrimination and harassment. He did not give details of the those claims, nor the reasons why he had not brought them up previously. These were dealt with at the start of the final hearing.

Amendment Application

4. At the final hearing the Claimant made his application and told the Tribunal that there were three acts of direct discrimination and three acts of harassment he wished to pursue. The Tribunal considered each in turn, taking into account the requirements of *Cocking v Sandhurst (Stationers) Ltd 1974 ICR 650* to have regard to all the circumstances, in particular any injustice or hardship which would result from amendment or rejection and also S*elkent Bus Co v Moore 1996 ICR 836 EAT*, which indicated that the Tribunal must consider the nature of the amendment, the applicability of time limits and the timing and manner of application.

5. The Tribunal concluded on each of the amendments as follows:-

    i. On 23 December 2019, Ms McColl told me to take off the necklace

knowing it was a religious necklace;

This arises from the facts set out in the ET1, it was therefore brought in time. This constitutes a relabelling exercise. Although it was unfortunate that the Claimant had not said until shortly before the hearing that he wished to bring this as a separate claim. However, the Respondent cannot have been surprised by the facts or law which apply to the situation. The Respondent's witness statements deal with the event and so the Respondent was not placed at any difficulty in producing evidence about it. The Tribunal therefore allowed this claim to be added as direct discrimination. The Tribunal also indicated that it would allow the Respondent to illicit further evidence in examination in chief of their witness Ms McColl, if necessary.

6. ii. The Claimant asked for Ms McColl's help and she told him to ask trainers.

iii. At hand over meetings between shifts McColl told him he need not attend these.

The Tribunal considered both these allegations together. Neither of these was mentioned in the facts in the ET1, further information or the Claimant's agenda or the Preliminary Hearing note. This is an entirely new claim and is out of time. The Tribunal considered that the Claimant must have known of it at time he issued the claim and there is no substantive reason given as to why it was not brought then. The Tribunal therefore concluded not to allow these claims to be added.

7. iv. The Claimant also sought to add three allegations of harassment, which were;

a. The Claimant reported to Ms McColl on a number of occasions that he was harassed by a group of staff, but she did nothing to assist him,

b. The Claimant informed Ms McColl of quality issues and that he was harassed by a group of staff about it, but she did nothing to assist him,

c. On 10 February 2020 the machine minders asked the Claimant to go to the car park to fight with them.

The Tribunal concluded that these are claims, for which the facts were raised to some extent in the ET1, were potentially brought in time. However, they amounted to an entirely separate claim, which it was not clear to the Tribunal was linked to the discrimination on grounds of religion. The Tribunal therefore concluded that these claims could and should have been included on the original ET1 form in detail. They noted that the Claimant had specifically been asked at the Preliminary Hearing about other claims and he did not raise these as potential claims.

8. The Tribunal considered the balance of prejudice and hardship to the parties; if the amendment was allowed, the Respondent would have to investigate and provide evidence of other incidents. This may include identifying and gathering evidence from other witnesses and documents. The inevitable consequence of which would be that the proceedings would have to be postponed. If the amendment were not allowed then the Claimant would not be allowed to pursue a claim which had not been identified by the Claimant until shortly before the final hearing. However, he would still be able to pursue indirect and direct discrimination claims. The Tribunal therefore concluded that the balance of prejudice lay in favour of the Respondent and the amendment would not be allowed in relation to harassment.

The Hearing

9. Having provided the parties with the decision of the Tribunal on these amendments, the hearing progressed over two days to hear evidence from the Claimant and from Ms McColl, Miss Fergusson and Mr Pillay on behalf of the Respondent. A joint bundle of documents was provided which the parties referred to throughout. The Respondent provided a skeleton argument to accompany his closing submissions. Closing submissions by the Claimant were also heard.

10. The issues between the parties to be determined by the Tribunal were as follows:

    a. What was the Claimant’s protected characteristic;

b. Did the Respondent treat the Claimant less favourably than they would treat someone who did not share that characteristic (s.13 Equality Act 2010- direct discrimination);

   i. On 23 December 2019 did Ms McColl treat the Claimant less favourably than a non-Russian Orthodox Christian by asking him to remove his necklace.

c. Did the Respondent subject the Claimant to a provision, criterion or practice (‘PCP’) which put the Claimant at a particular disadvantage when compared to those who are not Russian Orthodox Christian;

   i. On 10 February 2020 did the application of the risk assessment for Religious Jewellery put the Claimant at a disadvantage

d. Can the Respondent show that applying the risk assessment was a proportionate means of achieving a legitimate aim;

   i. Is the application of the risk assessment for Religious Jewellery a proportionate means;

   ii. Is the safety of the food produced and workers on the production line a legitimate aim

e. Did the Respondent breach the Claimant’s contract when they failed to pay him notice pay.

The Facts

11. The Claimant was employed by the Respondent from 12 November 2019 as a press operative, but was quickly promoted to the role of quality inspector, in their chicken processing factory. The Claimant is a Christian who follows the Russian Orthodox Church. His belief is that a crucifix necklace should be worn close to the chest to signify his commitment to his belief. He therefore wore a necklace every day. It had been sanctified during a baptism ceremony for his godchild and had been a gift from his mother.

12. The Claimant underwent an induction training course at the start of his employment with the Respondent. This included training on the Foreign Body

Control policy, which was part of the Respondent's food safety processes. This outlined that "jewellery must not be worn in the production areas on site, with the exception of a single plan band ring". A further exception was made for religious jewellery, subject to a risk assessment.

13. The Risk Assessment Religious Jewellery was drafted on 13 November 2018 by Ms Fergusson and outlines five possible hazards associated with the wearing of religious jewellery. These were;

    i. Foreign body contamination from damaged items of jewellery:

    For which the control measures included "jewellery with small parts such as watch strap links, earring clasps or necklace links must not be worn",

    ii. Toxic reaction to metal:

    For which the control measures included " Metal such as mercury, cadmium, lead, chromium and zinc must not be worn"

    iii. Allergic reactions and infections:

    For which the control measures included "Infected piercings should be removed and treated".

    iv Bodily fluid spillage as a result of injury:

    For which the control measures included "Exposed piercings must be removed, non-exposed piercings must not be exposed in food production areas".

    v. Injury due to entanglement, entrapment or tearing:

    For which the control measures included "Jewellery work around the neck must not be worn. Jewellery with small links of chains must not be worn".

14. The Claimant worked in a food production area of the site, which required the use of personal protective equipment ('PPE'), namely a white coat, which he wore over his own clothes. The Tribunal was not shown the necklace, nor were any photos of it placed in the bundle of productions. It was described as having small links and being made of silver.

15. The Claimant was promoted and began work as a Quality Inspector on 23 December 2019. That day, his line manager Ms McColl noticed that the Claimant was wearing a necklace. She told him to take it off as she knew that it was contrary to the Respondent's Foreign Body Control policy. The Claimant did not argue with Ms McColl but took it off. Ms McColl believed that this had dealt with the issue and that the Claimant understood he should not wear it again. She did not therefore offer to carry out a risk assessment in relation to the necklace. However, this was not the Claimant's understanding as he believed that the necklace should be allowed on the basis that it was religious jewellery. The necklace was visible under the Claimant's clothing and personal protective equipment to the extent that his line manager saw it. The Claimant did not request a risk assessment but believed that Ms McColl did not carry one out as she knew that his necklace was part of his Christian faith.

16. Around this time the Claimant started to complain that he was being bullied by other staff and brought this to the attention of Ms McColl and also Ms Fergusson.

17. At a meeting with Ms Fergusson on 30 January about the bullying allegation, Ms Fergusson noticed that the Claimant was wearing a necklace. She asked him to take it off. The Claimant responded that that his necklace was a piece of religious jewellery and he did not want to remove it. Ms Fergusson asked the Claimant if a risk assessment had been carried out and he told her that Ms McColl was aware of the necklace but no risk assessment had been done. Ms Fergusson responded that she would contact Ms McColl and when the Claimant returned from holiday a risk assessment would be carried out.

Risk assessment

18. The risk assessment was carried out by Ms McColl on 10 February 2020 when she met with the Claimant. Ms McColl was embarrassed that the matter had been raised with her by her line manager and believed this was as a result of something said by the Claimant. She was not pleased with the Claimant on that basis.

19. Ms McColl filled in the risk assessment form. A copy of this assessment was not available to the Tribunal, although a generic form was placed in the bundle. Ms McColl concluded that because the chain was made of links there was a risk of contamination. She also took into account the potential for entanglement, entrapment or tearing. The other issues on the risk assessment form were not relevant in her opinion. She did not discuss the chain in any detail with the Claimant nor inspect whether the chain was in good condition. There was no conversation with the Claimant as to whether any steps could be taken to mitigate the risk, such as ensuring that it was tucked into his clothing at all times, or that his PPE could be fastened up to ensure it was not exposed. Ms McColl did not consider the list in any real detail. Ms McColl admitted to the Claimant that this was the first time she had applied this risk assessment and said that she wanted to take advice. The Claimant then returned to his workplace. Later that morning the Claimant was asked to return to speak to Ms McColl.

20. When they met, Ms McColl informed the Claimant that she had concluded that the necklace must be removed due to the fact that the chain contained links, which she believed to be a bar to jewellery being worn due to the first hazard listed on the risk assessment. Further, that as a result of having links, it may cause the necklace to become tangled or trapped, with reference to the fifth hazard. The Claimant refused to take the necklace off. Ms McColl told the Claimant to go to the HR office. When he arrived at the office he was told by Ms Watt, a member of the HR team, that as he was refusing to obey a management instruction, his probationary period and thus his employment would be ended immediately. He was told to leave and after returning his security pass and locker key, he did so.

21. On 12 February the Claimant wrote to the Respondent to raise a grievance about the bullying he had experienced, he also complained about his treatment in being told to remove the necklace. He did not refer specifically to the termination of his employment.

22. The Respondent wrote to the Claimant on 14 February 2020 confirming that he

had been dismissed for failure to follow a management request.

23. The Claimant appealed his dismissal in a letter to the Respondent dated 21 February 2020. He did so on the basis that the instruction to remove his necklace was unlawful and that the risk assessment was not carried out properly and hence it was inappropriate for him not to be allowed to wear it.

Appeal

24. As a result of this the Claimant was asked to attend an appeal hearing on 4 March 2020 with Mr Pillay, Continuous Improvement Manager.

25. At the hearing Mr Pillay pointed out to the Claimant that he ought to have declared his necklace to the company at the beginning of his employment, in order that the risk assessment could be done at that point. The Claimant pointed out that he had made a mistake in not doing so, but that Ms McColl was also mistaken on 23 December when she did not carry out a risk assessment. When the Claimant asserted that others carried keys around their necks which held the same risk of falling onto the production belt, Mr Pillay responded by saying that they would be picked up by the metal detector, but that a silver necklace would not.

26. Mr Pillay wrote to the Claimant, upholding his dismissal on 5 March 2020. The letter focused entirely on the fact that the Claimant had not declared the necklace during the induction course. It did not attempt to justify the decision making of Ms McColl's risk assessment, but relied on the outcome as a medium risk. It did not consider any attempt to mitigate the risk.

The Law

27. In s.10 Equality Act 2010 (EqA) the definition of religion is given as "any religion and a reference to religion includes a reference to a lack of religion".

Direct Discrimination

28. 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.

29. The Claimant seeks to compare himself to how a hypothetical non-Russian Orthodox Christian 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.

30. 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 Ms McColl.

Indirect Discrimination

31. s.19 Equality Act 2010

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

32. All four of these conditions must be met in order for the Claimant to succeed. The Claimant must show the first three, before the burden passes to the Respondent to address the fourth (see Burden of Proof below).

33. It is for the Claimant to identify the PCP which must be of neutral application. It

can be a provision which is applied on only one occasion; *British Airways plc v Starmer 2005 IRLR 862, EAT*. They must then persuade the tribunal that people with the same characteristic will be placed at a disadvantage and that he in fact did suffer a disadvantage. *Essop v Home Office (UK Border Agency) [2017] IRLR 558,SC*, set out that all four elements of the definition must be met.

34. In H*omer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] IRLR 601*, Lady Hale set out that the consideration of a defence should include the following: 'To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so.' (at [22],). Thus the Tribunal must look for four aspects of justification for the discrimination;

    a. Whether there is a legitimate aim;
    b. Whether the PCP is appropriate to achieve that legitimate aim
    c. Is the PCP reasonably necessary to achieve the aim,
    d. It is proportionate when balancing the discriminatory effect of the measure and the legitimate aim.

35. It is not for the Tribunal to decide whether an alternative legitimate aim could have been applied which was not discriminatory. The Tribunal must consider the aim relied upon by the Respondent; *Chief Constable of West Midlands Police and others v Harrod and others [2017] ICR 869,CA*.

36. The Tribunal must also consider whether the Respondent had a real need and that this policy addressed that need. The Tribunal must apply an objective balance between the discriminatory effect of the PCP and the reasonable needs of the party that applies it; *Hampson v Department of Education and Science [1989] ICR 179*.

37. Finally the Tribunal must consider whether it is an appropriate means of achieving a legitimate aim. The issue is whether the justification outweighs the disparate impact; *Craddock v Cornwall County Council and another, EAT 0367/05*.

38. *Allonby v Accrington and Rossendale College and others* [2001] ICR 1189, set out that the responsibility of the Tribunal is to scrutinise the alleged business needs put forward by the employer to justify indirect discrimination.

39. The Tribunal took into account that it was suggested in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others [2010] IRLR 136, SC* that direct and indirect discrimination cannot occur concurrently.

40. The Tribunal was addressed about the relevance of *Eweida and others v United Kingdom [2013] IRLR 231* where the issue of the wearing of a necklace with religious significance was considered in detail.

Burden of Proof

41. 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.

42. 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).

43. 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 the alleged detriment was at least in part, the result of his faith.

44. 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.

45. 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.

Decision

Jewellery

46. The Tribunal accepts that the necklace and crucifix worn by the Claimant, which was not shown to the Tribunal, is a piece of religious jewellery as it has been blessed by a priest and carried a crucifix. It is a manifestation of his religion.

PCP

47. The Claimant's assertion as to the PCP was inconsistent throughout the final hearing. At times he asserted that it was the fact that the risk assessment was applied, at other times he asserted it was the outcome of the risk assessment. In his closing submission, the Claimant asserted that the PCP was the matters taken into account in the application of the risk assessment, which amounted to discriminatory treatment. At times he referred to the PCP as "everything". The Respondent argued that on the basis the Claimant asserted the application of the risk assessment, this was not a valid PCP. The Tribunal concluded that the PCP which the Claimant asserted was the conducting of the risk assessment in relation to the religious jewellery and that the application of it is a practice. The Tribunal accept that this is a practice applied by the Respondent to all those who wish to continue to wear jewellery which would otherwise be contrary to the Respondent's Foreign Body Control policy. The Risk Assessment for Religious Jewellery is non specific as to the religion it applies to and therefore can be considered to be a policy applicable to all who wish to wear jewellery

and assert that they wish to do so for religious reasons.

48. The Claimant suggested that the application of the policy places all Russian Orthodox Christians at a disadvantage in that they are less likely to be able to comply with the risk assessment. The Tribunal understood this to mean that they are less likely to be able to satisfy the control measures set out and therefore be asked to remove the jewellery. The Claimant asserted that it did in fact place him at such a disadvantage. The Tribunal accepted that the Claimant believed that he was required to wear a necklace, close to his chest at all times as a representation of his commitment to his faith. Given that the risk assessment addresses religious jewellery, the Tribunal understood the claim to be a disadvantage in comparison to other religions/or none for whom there is not a requirement to wear a necklace with crucifix close to the chest. The Tribunal accepts that the application of the risk assessment is more likely to be applied to those of the Russian Orthodox church for that reason.

49. The Tribunal also accepts that the application of this risk assessment did place the Claimant at a disadvantage, in that he was not allowed to wear his necklace as a result and ultimately was dismissed for not obeying the order to remove it. The Tribunal considered that the application of the risk assessment led to the refusal to make an exception to the Foreign Body Control policy. Hence the policy was applied and the Claimant was not able or willing to comply with it. The Tribunal were satisfied therefore that if the PCP had been asserted as the application of the Foreign Body Control policy, then the result of a disadvantage to the Claimant would be the same in the application of that policy.

50. The Claimant raised the issue of whether his necklace should have been scored in the way in which Ms McColl registered it on the risk assessment. This was not the basis of the pleaded claim and was not therefore considered in detail by the Tribunal.

51. The Tribunal considered whether the practice put forward by the Respondent i.e. the risk assessment, was a proportionate means of achieving a legitimate

aim:

52. The Respondent asserted that the legitimate aim was one of health and safety, both in relation to the risk of contamination to the food product and also the health of the employee, to avoid becoming tangled in machinery. Hence the policy to prohibit jewellery which may contaminate the food, or become tangled.

53. The Tribunal accepts that the health and safety of both consumers and staff is a legitimate aim. It seeks to uphold both statute and regulation of the food production industry as well as the duty of care to employees.

54. The Respondent asserted that the application of the risk assessment was a proportionate means of achieving that aim. The Tribunal considered whether there was a real need to achieve this aim and concluded that there was, in order to protect the public in the production of food and also to protect employees from injury at work. The Tribunal also concluded that the balance of discriminating by refusing to allow the Claimant to wear the necklace was not outweighed by the health and safety aspects to both the public and the Respondent’s employees.

55. The Tribunal further considered the comments made by the Claimant in respect of the manner in which the risk assessment was carried out. The Tribunal acknowledge that Ms McColl was not experienced in carrying out risk assessments. She was cursory in her application of the risk assessment and did not seek to find ways to control the risks she found. She did not engage sufficiently with the Claimant to establish if his necklace was damaged, or if there was a way it could be secured inside his clothing. The Tribunal were not provided with any explanation of why she acted in such a way. However, as this did not form a basis for the claim, the Tribunal concluded that it was not relevant to the decision to be made.

56. The Tribunal also considered the effect of the case of Eweida and others. The Claimant did reference this in his claim, but did not specifically state that he was relying on a consideration of the European Convention of Human Rights Article 9. In the conjoined case of Ms Chaplin, whose employer was the NHS,

the ECHR said that the "protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida". This is a reference to the fact that Ms Eweida was not allowed to wear her necklace as it did not fit with the Respondent's brand image. The issue of public health is therefore said to have greater weight than the legitimate aim of a brand image.

57. The Tribunal concluded that whilst the Claimant's wearing of the necklace may have engaged the Claimant's article 9(1) rights, the freedom to manifest his religion would be limited by Article 9(2), public safety and health, as well as potentially prescribed by law in relation to safety at work issues. The Tribunal therefore concluded that if that issue had been set out by the parties and relied upon, it would not have reached a different outcome.

Direct Discrimination

58. The Claimant asserted that Ms McColl telling him to remove his chain on 23 December 2019 was an act of direct discrimination.

59. The Respondent's rules were made clear to the Claimant during his induction at the start of his employment. The Tribunal were satisfied, that the Claimant had understood what was being said and that he was aware of the policy, even if he did not have a copy of it handed to him. The Tribunal were also satisfied that the Claimant understood that there was a prohibition on jewellery (except for a plain wedding band) as he agreed to remove the necklace when challenged by Ms McColl.

60. The Tribunal concluded that Ms McColl was aware of the policy and first saw the necklace on 23 December, the first day that the Claimant worked under her direct line management. She immediately challenged him about it and asked him to remove it. This was in accordance with the Foreign Body Control policy. The Claimant agreed to remove the necklace and did not identify to her at that time that it was a piece of jewellery which he wished to continue to wear for religious reasons.

61. The Tribunal concluded that Ms McColl acted towards the Claimant in a manner which was consistent with the Respondent's policy and that she did not treat him any differently to any other employee whom she saw wearing a necklace for the first time. She would have asked any employee to remove jewellery which she considered was not allowed under the policy.

62. Furthermore, even if the Tribunal is wrong about that, we concluded that the reason for the Claimant's treatment was not due to his religion, but was for clearly stated health and safety grounds.

Breach of Contract

63. The Claimant ticked the box on the ET1 to claim notice pay. There was a dispute between the parties over how the dismissal occurred. However, the Claimant failed to articulate in any of his ET1; his further information; his witness statement or his oral evidence, on what grounds he says he was entitled to notice pay, or why it was not paid. The documentary evidence has not been shown to the Tribunal to show what the Claimant's entitlement was or indeed how much the Claimant says he was owed. On that basis, the Tribunal concluded that the Claimant has failed to prove his claim.

64. All the Claimant's claims are therefore dismissed.

Employment Judge:	**Sally Cowen**
Date of Judgment:	**02 March 2021**
Date Sent to Parties:	**08 March 2021**