



THE EMPLOYMENT TRIBUNALS

Claimant Miss K Toth

Respondent C W Publishing Limited

HELD AT: London Central

ON: 31 May to 2 June 2016

EMPLOYMENT JUDGE: Mr J Tayler

**Members: Mrs MA Brooks
Ms N Foster**

Appearances

For Claimant: In Person

For Respondent: Mr O Wolf, Managing Director

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The name of the Respondent is amended as above.
2. The Claimant's claims fail and are dismissed.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 9 December 2015 the Claimant brought complaints of Race Discrimination, Sex Discrimination, Breach of Contract, Unlawful Deduction from Wages and failure to pay holiday pay.

2. The matter was considered at a Preliminary Hearing for Case Management before Regional Employment Judge Potter on 1 March 2016 where the issues were identified (p27). It was noted that the Claimant was complaining about a number of derogatory comments allegedly made by Mr Hayward, the particulars of which were unclear. As the Claimant is a litigant in person Regional Employment Judge Potter, rather than requiring the Claimant to provide additional information, ordered that she set out the full particularity of

the comments in her witness statement. Paragraph 11 the Order provided that the allegations should be set out in a separate paragraph for each day:

“identifying precisely what she says was done which amounts to unlawful discrimination on the grounds of sex or race. For example, she needs to detail the precise words of Warren Hayward she says amounts to unlawful discrimination and, where other staff reported what he had said, the details of that also. It is vital that the Claimant includes in her statement every detail that she wishes to rely on to make out her case.”

3. The specific allegations against Mr Hayward remained somewhat unclear in the Claimant’s witness statement.

4. A number of the money claims were not pursued.

Issues

5. The issues remaining for our determination were:

5.1 Was the Claimant subject to direct race discrimination or race harassment by Mr Hayward making derogatory comments about her

5.2 Was the Claimant subject to direct sex discrimination or sex harassment by Mr Hayward making derogatory comments about her

5.3 Was the Claimant dismissed because of her sex or race

5.4 Did the Respondent fail to pay the Claimant sick pay to which she was entitled

5.5 Did the Respondent fail to pay the Claimant commission to which she was entitled

Evidence

6. The Claimant gave evidence on his own behalf.

7. On behalf of the Respondents we heard from:

7.1 Oren Wolf, Managing Director

7.2 Warren Hayward, Sales Director

8. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

9. We were provided with an agreed bundle of documents and a further bundle of documents from the Claimant. References to page numbers in this judgement are to the page number in the agreed bundle of documents.

Findings of fact

10. The Respondent is a contract publisher producing publications on behalf of third parties funded by advertising. The advertising is sold by the Respondent by telephone. This requires the Respondent’s staff to have a very high standard of spoken English, including colloquial English, as they need to be able to persuade the initial points of contact, referred to as gatekeepers, to allow them to speak to decision makers who

they need to persuade to place advertisements. Although the Respondent provides a script it is still necessary for staff to bring considerable powers of persuasion to bear to successfully sell advertising.

11. The Claimant is Hungarian. The Claimant had considerable difficulty in explaining how she described her race for the purpose of her race discrimination complaint; in the end referring to having a Hungarian accent and/or being a non-native English speaker.

12. Hungarian is the Claimant's first language. The Claimant started learning English at school. The Claimant has been working in the UK since September 2005 and has been involved in sales from 2008. In some respects, the Claimant had a good standard of spoken English, having an extensive vocabulary, but is somewhat limited in her comprehension, particularly where dealing with nuances of meaning, and has a tendency to misuse words, and on occasion is unable to communicate her ideas clearly.

13. The Claimant was interviewed by Mr Hayward on 17 July 2016 having been recommended by an employee of the Respondent. The interview only lasted 10 minutes. Mr Hayward had some concerns about the standard of the Claimant's spoken English but accepted at face value her contention that she had been successful previously in telephone sales. The Claimant told us that she specifically asked Mr Hayward whether her accent would be a problem and he said that it would not. We accept her evidence.

14. On 21 July 2015 Naomi Highfield the Respondent's Office Manager sent an email to the Claimant offering her employment (p88). The email referred to salary and commission as follows:

"You will receive a base salary of £18,000 per annum a commission rate of 20% flat. A monthly qualifier £5,000 must be met to earn commission on your sales. Commissions due are paid one week in arrears, usually on the last working day of the week (Friday) following the sale week. Commission on sales to clients that do not meet credit checks will be paid upon receipt of payment from the customer, on the end of the month (EOM) commission run."

15. The Claimant commenced employment for the Respondent as a Sales Advisor on 3 August 2015 (p41) selling media packages over the telephone to corporate clients. She initially worked on the British Banking Association team that was managed by Mr Rose.

16. On 7 August 2015 the Respondent contends that the Claimant was sent a contract of employment and a copy of the employee handbook (p91). The Claimant denies that she was provided with them. On balance we consider it is more likely than not that the Claimant was sent the contract and employee handbook under cover of the letter dated 7 August 2015. It is clear that the Respondent had recently spent a considerable sum in having new contractual terms and a staff handbook produced. We cannot see a rational reason why they would not have provided copies to the Claimant; whereas it is considerably in the Claimant's interest to dispute the fact that she was provided with the contract because of the terms it contains as to the payment of commission (p42):

"Commission payments: if you are entitled to receive commission payments as part of your remuneration (which are based on achievement of performance criteria), a more detailed explanation of the scheme, targets and payment procedure will be issued to you under separate cover.

In instances where no payment is received by the Company from the contracting party for the advertising sale, for whatever reason, any commission paid to you in respect of

this advertising sale, secured by you on behalf the company, will be repaid by you immediately upon demand by the Company and where applicable you authorise the company to deduct this from any payment duty. Upon leaving the company, you will forego any outstanding commission.”

17. The Staff Handbook provided for payment of company sick pay; but only after an employee had been employed for one year; otherwise the entitlement would be to Statutory Sick Pay.

18. On 17 August 2015 the Claimant asked for a transfer from the British Bankers Association to the British Dietetics Association project. This was agreed and she moved to work with Mr Hayward.

19. As part of their standard procedures the Respondent record and listen to a proportion of calls made by their staff to check how they are performing. In addition, Mr Hayward would often be present while the Claimant was making calls. He became increasingly concerned that problems in spoken English were resulting in discussions with gatekeepers becoming fractious with the consequence that the Claimant often was unable to speak to a decision maker and creating a risk that the lead would be lost permanently; in the Respondent’s terms that the lead would be “burnt”.

20. On a date that the Claimant was unable to specify between 17 August and 26 August 2015 the Claimant states that Mr Hayward made a sexist comment. The Claimant has not been clear about precisely what he said. At the Preliminary Hearing there she suggested he said that women are not as good as men at selling. However, in the Claimant’s statement and during her oral evidence she explained that she had a discussion with Mr Hayward during which he raised concerns about her performance. The Claimant states that she asked that she should be given an equivalent period of time in which to perform as a colleague, Jenny Olsson, who the Claimant stated started work a week before her. The Claimant alleged that Mr Hayward said that the “other woman will not make it” in a way that was derogatory about her gender. We do not accept that this comment was made as we consider it is inconsistent, should the Claimant have thought that Mr Hayward was adopting a sexist attitude, for her to continue with the very friendly text messages that she exchanged with him; and because the Claimant did not raise this allegation prior to her claim to the Employment Tribunal.

21. We accept that on numerous occasions Mr Hayward spoke with the Claimant and explained his concerns about her spoken English, the disputes that she was having when making calls on behalf of the Respondent and her poor level of performance.

22. Mr Hayward’s concerns were such that on 26 August 2015 he sent a text message to the Claimant stating “I’m hoping that you can pick the BDA pitch up and I’m not there which is bothering me as I don’t feel it’s fair on you or the company - you have to be honest – can you sell in England in English? Please keep in touch with me” (p132). The Claimant replied “Yes it is a fucking BIG FAT HUNGLISH YES that I will sell on BDA in England in English.” (p133)

23. We consider that had the Claimant at the time considered that Mr Hayward was discriminating against her because of her Hungarian nationality she would not have responded in these terms.

24. On 27 August 2015 the Claimant brought in new business for a Hungarian company in the sum of £20,000 for a product made by Norbi Update Lowcarb (“Norbi”) (p134). The Claimant conducted the telephone call in Hungarian. Norbi was not successfully credit checked.

25. On 7 September 2015 the Claimant alleges that Mr Hayward said to her that "I opened my mouth and made myself look stupid in front of others". There was a meeting of the BDA team on 7 September 2015 during which there was a discussion about providing contracts to clients. The Claimant misunderstood, becoming irate and repeatedly stating that she wished to be provided with a copy of the contract herself. After the group meeting Mr Hayward spoke to the Claimant and explained to her that she had misunderstood the position. He did not refer to the Claimant's accent. He only explained that she had misunderstood what was being discussed in the group meeting.

26. On 8 September 2015 the Claimant alleges that Mr Hayward said to her that the business she brought in from Hungary was not a deal, that due to her accent she should not do business for the company and that people would think the Respondent was "a refugee/illegal immigrant employer". We do not accept that these comments were made by Mr Hayward. While he may have commented that the deal had not been completed we do not accept that he stated that the Claimant should not be doing business for the company because of her accent or that people would think that it was "a refugee/illegal immigrant employer". If such comments had been made, we consider that the Claimant would have complained about them prior to bringing her complaint to the tribunal. We do not accept her evidence that she complained orally after having left the Respondent, but before putting in her claim to the Tribunal. If she had raised such complaint and it had not been dealt with we consider that she would have put it in writing.

27. On 9 September 2015 the Claimant sent a text to Mr Hayward stating that she had to go to the dentist (p136)

28. On 11 September 2015 the Claimant was absent from work. She states that she made a telephone call and spoke to a colleague, Patrick. We do not accept that the Claimant made this call. The Claimant regularly communicated by text message with Mr Hayward. We consider that she would have sent a text to Mr Hayward to explain that she was absent due to ill health if she had not been able to speak to him on the telephone.

29. On 14 September 2015 the Claimant states she spoke to Mr Hayward and explained that she was unwell. Mr Hayward denied that the conversation took place. We accept his evidence as the Claimant's contention is inconsistent with the text messages that passed between her and Mr Hayward from 21 September 2015 onwards, which do not refer to this alleged conversation.

30. On 18 September 2015 the Claimant contacted her GP surgery (p12).

31. On 21 September 2015 the Claimant sent an email and text stating that she would be going to the Dr so would not be able to make it in to work (p97, 136). We accept that this was the first day on which the Claimant informed the Respondent that she was absent due to ill health.

32. On 22 September 2015 sent an email stating that she required an X Ray and was sick (p98).

33. On 22 September 2015 at 08.46 Mr Hayward sent an email to the Claimant stating that he would telephone the Claimant that evening but that he thought "it's best if we call it quits as I don't think it will work out for you here for the reasons we discussed. I need to fill your chair" (pC/11). On 22 September 2015 at 17.17 the Claimant replied "you will fill my chair with me." Mr Hayward responded "There is no place it has gone as we did not hear from you for 4 days so we assumed you had left, This is for the best – it wasn't going to work out you will be paid on the deal when they pay us." The Claimant's employment was terminated on 22 September 2015.

34. On 23 September 2015 the Claimant sent an email to Ms Highfield about her sickness absence (p100).

35. Ms Highfield replied on 24 September 2015 enclosing a letter seeking details of the Claimant's sickness absence (p99).

36. On 29 September 2015 Ms Highfield sent an email to the Claimant stating that she had not had a response to her letter of 24 September 2015 and stating that if she did not hear from the Claimant by close of play that day she would treat the Claimant as having resigned (p99).

37. On 5 November 2015 the Claimant was sent a self-certification sick form that she partially completed, but did not sign. (p108)

38. On 3 March 2016 the Norbi advertising was rejected by the BDA because it contained claims that could not be scientifically substantiated.

39. On 23 March 2016 sum of £20,000 was repaid to Norbi because the advertising had been refused by the BDA.

The Law

40. Race and sex are protected characteristics pursuant to Section 4 of the Equality Act 2010 ("EQA"). Direct discrimination is defined by Section 13 EQ:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

41. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there is no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this meant, in the majority of cases, the Tribunal will have to consider how the Claimant would have been treated if she had not had the particular protected characteristic. This is sometimes referred to as relying upon a hypothetical comparator.

42. Harassment is defined by Section 26 EQA:

26 Harassment

(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 subsection (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.

43. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA: 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

44. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. However, there may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the reversal of the burden of proof: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v. Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054.

45. In **Shamoon** it was stated that, particularly when dealing with a hypothetical comparator, it may be appropriate to consider the reason why question first; why the treatment was afforded.

46. The Employment Tribunal has jurisdiction to consider complaint of breach of contract that occur or are extant on the termination of the contract of employment pursuant to the Employment Tribunals Extension of Jurisdiction Order 1994.

47. It is for an officer of HM Revenue and Customs to decide any issue arising as to, or in connection with, entitlement to SSP (Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8(1)(f), (g) and the Statutory Sick Pay and Statutory Maternity Pay (Decisions) Regulations 1999, SI 1999/776). An employment tribunal has no jurisdiction to consider disputed questions of entitlement to SSP: see **Taylor Gordon & Co Ltd (t/a Plan Personnel) v Timmons** [2004] IRLR 180, (2003) Times, 7 November, EAT; **Sarti (Sauchiehall St) Ltd v Polito** UKEATS 0049/07. However, Mr Recorder Luba QC suggested in **Timmons** that the position is different where there is no issue as to entitlement, but the question is only whether there has been non-payment of an amount of SSP that is due.

Analysis

48. As set out in our findings of fact, we do not accept that Mr Hayward made the derogatory comments alleged by the Claimant. In those circumstances, the claims of direct race or sex discrimination and/or of harassment by making those comments necessarily fail. The alleged comments cannot form the basis for any inference to be drawn in respect of the Claimant's dismissal.

49. We accept that the Respondent has established that the reason for the termination of the Claimant's employment was, in circumstances where she had absented herself from work without informing the Respondent, that they

had decided that her poor standard of communication in English when dealing with telephone sales was such that she was unlikely to make sufficient sales. We accept that the concern was solely as to the poor standard of the Claimant communication in English, and had nothing to do with her accent or nationality. The Respondent would have acted in the same way with any person who had a similarly ability to communicate in English whether they were British or of any other nationality. We do not accept that the Claimant's dismissal was in any sense because of her sex.

50. The Claimant had not been employed by the Respondent for one year so was not entitled to contractual sick pay. There is a dispute between the parties as to whether the Claimant complied with the notification requirements to obtain Statutory Sick Pay and, accordingly, the dispute fall outside the tribunal's jurisdiction.

51. We accept Mr Wolf's evidence that the payment from Norbi was held pending approval from the client which was not forthcoming. The sum was repaid to Norbi. We accept that the Claimant was bound by the terms of the written employment contract sent to her on 7 August 2015. She received it and thereafter continued to work for the Respondent pursuant to its terms. Under the terms of the contract in circumstances in which the sum was only ever held pending approval of the client and then was repaid to Norbi, we do not accept that there was a payment to the Respondent, that triggered an entitlement to commission. The same analysis would apply to the offer email. Furthermore, under the terms of the contract any entitlement to commission ceased on the Claimant's termination of employment.

52. In the circumstances the claims fail and are dismissed.

EMPLOYMENT JUDGE TAYLER
2 JUNE 2016