Case Number: 2301376/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mrs J Satchell**

Respondent: **Sussex Partnership NHS Foundation Trust**

Heard at: London South Tribunal On: 6 and 7 February 2017

Before: Employment Judge Freer
Members: Ms S Campbell
Mr W Dixon

Representation:
Claimant: In person
Respondent: Ms T Thaung, Solicitor

REASONS FOR JUDGMENT

1. These are the written reasons of the Tribunal for its unanimous judgment sent to the parties on 13 February 2017 that the Claimant's claim of sex discrimination is unsuccessful and that the Claimant shall pay the Respondent's costs in the sum of £2,400 with the deposit paid by the Claimant to be used as part payment towards discharging that sum.

2. These written reasons are produced at the request of the Claimant, oral reason having been provided at the hearing.

3. This is a claim arising out of an incident that occurred on 19 March 2016. The Claimant contends that whilst attending at work in the Respondent's Southview Low Security Unit she was asked to work a shift on Willow Ward in the Respondent's Hellingly Centre, whereas a male colleague, Mr Gordon Clark was not similarly requested to do so, which the Claimant argues amounts to direct sex discrimination under section 13 of the Equality Act 2010.

The Law

4. Section 13 of the Equality Act 2010 ("the EqA") provides:

"(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".

5. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

6. The burden of proof reversal provisions in the EqA are contained in section 136:

"(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".

7. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

8. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

9. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

10. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the

Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

11. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

"The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

12. Some main principles applicable in cases of direct discrimination have helpfully been summarised by the EAT in **Law Society v Bahl** (as approved by the Court of Appeal [2004] IRLR 799) and have been taken into account by the Tribunal in the instant case.

13. A tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A tribunal should not extend the range of complaints of its own motion (**Chapman v Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Findings of fact and associated conclusions

14. The Claimant was a Healthcare Assistant working for the Respondent as a 'Bank' worker. No issue is raised by the Respondent over the employment status of the Claimant for Equality Act 2010 purposes.

15. When the Claimant worked for the Respondent she worked in the Southview Low Security Unit of the Respondent's group of premises known as the Hellingly site, which comprised the Southview Low Security Unit ("Southview"), the Hellingly Centre and the Badgers Occupational Therapist Centre and cafe.

16. The Southview is a low secure unit that provides assessment, treatment and recovery for men who have either committed a criminal offence or have significant challenging behaviour.

17. The Hellingly Centre is a medium secure site that cares for men and women who have mental health problems and are involved in the criminal justice system.

18. The Willow Ward in the Hellingly Centre cares only for women.

19. The Tribunal has heard evidence from the Claimant and was provided with e-mails from two witnesses relied upon by the Claimant but who did not attend at the Tribunal hearing. Neither witness was present at the material time under review.

20. The Respondent gave evidence through Ms Una Bennett, Deputy Ward Manger and Ms Kate Mc Lachlan, Head of Workforce Resourcing.

21. The Tribunal was provided with a bundle of documents comprising 150 pages.

22. The Tribunal has carefully considered all the evidence.

23. The Tribunal finds as fact that on the morning 19 March 2016 at handover Ms Bennett, Deputy Ward Manger, was aware that a patient needed to be transferred into the community. The Tribunal accepts Ms Bennett's evidence that at that stage she had decided in her mind to allocate Mr Gordon Clark to escort the patient on that transfer with another member of staff, Mr Richard Beale, as Driver and asked them to do so at the end of the handover session.

24. The Tribunal accepts that Ms Bennett took that decision based on purely clinical reasons and Mr Clark's particular suitability based upon his rapport with the particular patient, experience in dealing with anxious patients, and experience of transfers generally. Whether or not the Claimant agrees with that decision, the Tribunal accepts that it was the genuine reasoning of Ms Bennett.

25. After the handover session Ms Bennett received a call notifying her that the Willow Ward in the Hellingly Centre was short staffed and cover was required for that shift from Southview.

26. The Tribunal is satisfied that on the evidence the Hellingly Centre required a higher patient to staff ratio and as it was a higher secure unit than Southview, it also required a full compliment of staff.

27. The staff potentially available at the time were the Claimant; Mr Souper; Ms Woodrow; Mr Clark; and Mr Beale. There was also a nurse on duty know to this Tribunal as 'MJ', to which we will return later.

28. It is not in dispute that Mr Souper and Ms Woodrow could not undertake the shift at the Hellingly Centre due to past incidents.

29. The Claimant argues that in a choice between herself and Mr Clark, she was the person who had been requested to transfer to that shift.

30. However, the Tribunal concludes after reviewing all the evidence that Ms Bennett had already decided to allocate Mr Clark (and Mr Beale) to transfer the patient and the Claimant was one of the remaining choices. The Tribunal also concludes, as stated above, that this decision was on genuine clinical grounds and not because of gender.

31. The Tribunal has heard some evidence that, during the discussion over allocation to the Hellingly Centre, Mr Clark said that he could not go because he was a member of Bank staff, which might indicate that Ms Bennett had not already made up her mind and/or communicated to Mr Clarke and Mr Beale which members of staff were going to transfer the patient into the community.

32. However, in her evidence Ms Bennett contended that after the request for assistance had been made she stated that "someone" needed to go to Willow Ward. At that stage she had not mentally calculated who was available to do so. She had, however, decided that Mr Clark and Mr Beale would transfer the patient.

33. Mr Clark had said that he could not go because he was Bank staff, which was said in a jokey way. The Tribunal finds as fact that this was likely to have been said due to the evidence the Tribunal received on the prevailing tensions with Bank staff and their movement to other wards.

34. The Tribunal accept Ms Bennett's evidence on this matter. We found her evidence to be balanced and credible.

35. The Tribunal finds as fact that there followed a brief conversation during which Ms Bennett stated that there was an expectation that staff would move to other Wards if the need arose, to which the Claimant stated that if that was the case she would choose not to work there. Ms Bennett replied that this was her choice, to which the Claimant responded that she was leaving her shift and said "good luck with the rest of the shift", which is consistent with the e-mail written by Ms Bennett at 08.58 the same day (page 65A of the bundle).

36. There was an investigation into the circumstances and during this period the Claimant was not to be provided with work at the Hellingly site, which the Respondent accepts included Southview. After the investigation that position was made permanent.

37. The Tribunal reiterates the decision in *Madarassy* (above) that for there to be sex discrimination there must be something more than a detriment and being of a particular gender. There must also be a causal link from primary findings of fact from which the Tribunal could conclude, including by inference, that the alleged act was because of sex.

38. With regard to the comparator, there must be no material difference between the circumstances of the Claimant and the comparator relied upon.

39. The Claimant relies upon Mr Clark as actual comparator. The Tribunal concludes that as soon as the Claimant removed herself from work Mr Clark ceased to be a comparator. He had never taken that action and therefore his position was materially different to that of the Claimant, particularly with regard to the provision of future work.

40. More fundamentally, the Tribunal has concluded as fact that Ms Bennett had allocated Mr Clark to the patient transfer on clinical grounds and was not a

decision that related in any sense to sex, and Ms Bennett's request for the Claimant to attend on the shift at the Hellingly Centre was also not based on reasons related to sex.

41. Therefore, there is no necessity to analyse comparators. When adopting the *Shamoon* 'reason why' approach, the Tribunal unanimously concludes that the reason why Ms Bennett had allocated Mr Clark for the patient transfer and the Claimant to a shift at Willow Ward was for genuine clinical reasons unrelated to sex.

42. The Tribunal returns to 'MJ' who was also on shift at the time. MJ was a female nurse. She was not asked to transfer shift. There was a need for two nurses to remain on the ward. This fact also supports the Tribunal's conclusion above and militates against Ms Bennett's decisions being conscious or subconscious sex discrimination. There was a female member of staff who was also not requested to move shift.

43. Therefore, it is the unanimous judgment of the Tribunal that the Claimant's claim of direct sex discrimination is unsuccessful.

44. The Respondent made an application for its costs. At a Preliminary Hearing on 22 November 2016 a Deposit Order was made for the Claimant's continuance of her claim.

45. The Tribunal has referred itself to the reasons for that Order, particularly paragraphs 5 to 8. Paragraph 8 states: "In relation to the sex discrimination claim, although the Claimant has made the case that there was differential treatment she has not given any indication of the added component that would be required by the Tribunal to consider whether the burden of proof had been satisfied and whether the respondent is under a duty to provide an explanation for potentially discriminatory treatment".

46. Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

> "(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
>
> otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order".

47. The missing component was the risk involved for the Claimant in continuing with her claim under the Deposit Order. It was a risk that manifested itself and therefore under rule 39 the Claimant is to be treated as having acted unreasonably for the purposes of costs under rule 76.
48. The Tribunal has received no reason to show the contrary and why it should exercise its discretion. No matters were put to us by the Claimant and none have been identified by the Tribunal of its own initiative.

49. The Tribunal has considered the Respondent's schedule of costs, which totals £9,408.50 and has also taken the Claimant's means into account after receiving evidence on that matter. From that evidence the Tribunal was able to gain a general picture of the Claimant's monthly income and expenditure. The Tribunal has taken all the circumstances into account and makes a costs order that the Claimant shall pay to the Respondent the sum of £2,400 with the deposit paid of £250 to be used as part payment towards discharging that sum.

Employment Judge Freer
Date: 26 July 2017