EMPLOYMENT TRIBUNALS

Claimant:	**Alannah Davies**
Respondent:	**Susan Bradford, Stephen Bradford and Cara Bradford t/a Quick Snack News Caerphilly**
Heard at:	**Cardiff** **On: 27 June 2019**
Before:	**Employment Judge RL Brace** **Members:** **Mr PH Bradney** **Ms L Bishop**
Representation:	
Claimant:	In person
Respondent:	In person (represented by Cara Bradford)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Tribunal make a declaration that the Respondents failed to provide the Claimant with itemised pay statements.

2. The complaint that claimant was subject to age-related harassment contrary to s.26 Equality Act 2010 is not well founded and is dismissed.

3. The complaint that the claimant was subject to sex-related harassment contrary to s.26 Equality Act 2010 is not well founded and is dismissed.

4. The complaint that the claimant was directly discriminated against because of age in breach of s.13 Equality Act 2010 is not well founded and is dismissed.

5. The complaint that the claimant as directly discriminated against because of sex in breach of s.13 Equality Act 2010 is not well founded and is dismissed.

6. The complaint that the dismissal was automatically unfair under s.104 ERA 1996 because the reason (or if more than one the principal reason) for it was that she had asserted statutory rights of requesting itemised pay slips under s.8 ERA 1996 is not well founded and is dismissed.

7. The complaint that the dismissal was automatically unfair under s.104 ERA 1996 because the reason (or if more than one the principal reason) for it was that she had asserted statutory rights of requesting asking to take 12 August 2018 as paid annual leave is not well founded and is dismissed.

8. The complaint that the dismissal was automatically unfair under s.99 ERA 1996 and regulation 20(3)(a) Maternity and Paternity Leave Regulations 1999 because of perceived pregnancy (the claimant was not in fact pregnant as at the date of dismissal) is not well founded and is dismissed.

WRITTEN REASONS

Background

1. There were a variety of claims before us arising out of an employment period that commenced on Friday 4 May 2018 and ended on Sunday 12 August 2018.

2. These claims had been clarified through detailed case management. At the outset of the hearing the claimant reconfirmed that the claims that we were being asked to consider were as follows:

    a. A request for a s.11 Employment Rights Act 1996 ("ERA 1996") reference for a failure to provide itemised pay statements as required by s.8 ERA 1996.

    b. A complaint that the dismissal was automatically unfair under s.104 ERA 1996 because the reason (or if more than one the principal reason) for it was that she had asserted statutory rights of:

        i. requesting itemised pay slips under s.8 ERA 1996; and

        ii. asking to take 12 August 2018 as paid annual leave

    c. A complaint that the dismissal was automatically unfair under s.99 ERA 1996 and regulation 20(3)(a) Maternity and Paternity Leave Regulations 1999 because of perceived pregnancy (the claimant was not in fact pregnant as at the date of dismissal);

    d. A complaint that the claimant was directly discriminated against because of age in breach of s.13 Equality Act 2010 ("EqA 2010"). The claimant claims she was treated less favourably than an older employee (Leeanne Silcocks) and the less favourable treatment relied upon was:

        i. The older employee being given preference when it came to overtime;

        ii. The older employee being allowed to take a day as sick leave at the last minute;

iii. The claimant being subject to a higher degree of scrutiny on a day-to-day basis than the older employee;

iv. being dismissed.

e. A complaint under s.13 EqA 2010 (as opposed to s.18 EqA 2010) that she had been dismissed on 12 August 2018 because the respondent perceived her to be pregnant (the claimant was not actually pregnant when she worked for the respondent).

f. A complaint that she was subject to age-related harassment contrary to s.26 EqA 2010. The conduct relied upon consisted of comments made by Cara Bradford about younger mothers.

g. A complaint that she was subject to sex-related harassment contrary to s.26 EqA 2010. The conduct relied upon consisted of comments made by Cara Bradford about mothers and those with childcare responsibilities.

3. Both parties represented themselves at the hearing. We heard evidence from the Claimant on her own behalf and Cara Bradford, on behalf of the Respondents, had the opportunity to cross examine her. We also heard evidence from Cara Bradford and Leeanne Silcox (an employee of the respondents) on behalf of the respondents, and the Claimant had the opportunity to cross examine both witnesses. Both the claimant and Ms Bradford had difficulty with cross-examination and neither chose to put fully their cases to each other/others' witnesses, particularly with regard to the allegations on the comments relied upon in relation to the age and sex-related harassment claims.

4. We had before us a bundle of documents (the Bundle) spanning some 194 pages, and allowed a further document from the claimant to be included which consisted of a coloured photograph of what the claimant indicated was a screen shot of what she alleged was her infected throat which she had sent to the respondents on the day of her dismissal excluding the location details.

Findings

5. The respondent is a family run partnership of Stephen Bradford, Susan Bradford and Cara Bradford. The business operates as Quick Snack News in Caerphilly on the train station and is managed on a day-to-day basis by Cara Bradford.

6. In May 2014, when the claimant was around 16 years old, she commenced work for the respondent and continued working for them for a period of two years until September 2016, just after her 19th birthday. The claimant left the employment at that stage as she had secured alternative employment. Nothing in the evidence indicated that the claimant had any issues with the respondents during this period.

<u>Employment in 2018</u>

7. Just under two years later, in May 2018 the claimant became aware that the respondent was re-advertising for staff and that they were looking to find someone to cover a minimum of 16 hours, working varying shifts from Monday to Saturday. We were not provided with a copy of the job centre advertisement for role but were provided with a copy of a Facebook Status that Cara Bradford had posted at around that time. This stated that the applicants for the role must be flexible, that hours vary

between 6:30 AM and 5:30pm and experience was essential. The Facebook Status also included “Over 25’s only”.

8. Whilst the claimant had not personally seen either the Job Centre advert or Facebook Status at the time, she contacted Cara Bradford by text enquiring about the role and asking to put her name forward for consideration. Before Cara Bradford replied, the claimant sent a second text, referencing Cara Bradford’s Facebook Status, indicating that she had only just noticed that the over 25 years old requirement. Ms Bradford responded on the same date in friendly terms confirming that she would consider the claimant and explaining that two students had handed their notice in after final warnings and that she was not looking to ‘*employ youngsters again really’*. She asked the claimant how many hours she was looking for and questioned what would suit with regard to childcare as Cara Bradford was aware that since leaving their employment, the claimant had given birth to her first child.

Comments by Cara Bradford on 4 and 5 May 2018

9. On Friday 4 May 2018 the claimant commenced work at the respondents and there is a dispute between the claimant and respondents regarding critical conversations which took place on 4 May 2018 (between the claimant and Leeanne Silcox) and 5 May 2018 (between the claimant and Cara Bradford).

10. The claimant alleges that on 4 May 2018 Leeanne Silcox told her that:

    a. she liked to clean for 2 hours then have a break and that Cara Bradford was aware of this; and

    b. Cara Bradford had told her that she had positioned the CCTV on the till so that she could monitor young employees.

11. The claimant alleges that the following day, 5 May 2018, when she worked alongside Cara Bradford, she was told the following by Cara Bradford:

    c. when the claimant asked for a break, that she did not work enough hours to legally be entitled to a break and that she cut shifts short to stop ‘*you youngsters from getting bored and trying to slack off’;*

    d. that the CCTV was to monitor the young employees because she thought that they might steal from the shop;

12. The claimant also alleged that Cara Bradford told her that day that:

    e. it was funny that the claimant was ‘*only a baby, who had a baby’* and that she was disappointed that the claimant had spoiled her future by having a baby so young;

    f. that she was looking for more employees like Leeanne Silcox, because they had more financial responsibilities and that older employees ensure that they come to work and do their work properly; that financial responsibilities make sure that employees want to keep their jobs;

    g. (when the claimant asked for a stool to sit as she suffers from sciatica) told her that if she could manage with her age to stand, someone of the claimant’s age should have no problem standing.

13. Neither party cross-examined each other to any great extent on these alleged conversations. The claimant's position was that no one else was present when the conversations took place, and so there were no other witnesses to them.

14. Both Cara Bradford and Leeanne Silcox denied having the conversations at all as alleged by the claimant. Cara Bradford also denied being in the shop at all on 5 May 2018. Some cross-examination did take place regarding the CCTV and the availability of a stool for staff. On cross examination Leeanne Silcox stated that she had never heard Cara Bradford make derogatory comments about young mothers.

15. Neither party had called other witnesses to confirm whether these were comments of a nature that were commonly used, or made at all at any other time, by Cara Bradford. Whilst the claimant had included within the Bundle a copy of texts she had received from other ex-employees of the respondents, these individuals were not called to give evidence and we were not provided with the texts that had been sent to them by the claimant. We therefore placed very little weight on those documents.

16. Staff Hours rosters showing when the claimant, Cara Bradford and Leeanne Silcox worked over 4 and 5 May 2018 demonstrated that Cara Bradford was not rostered to work with the claimant on either the Friday 4 May 2018 or Saturday 5 May 2018. Saturday was the quietest day of the week due to lack of work commuters and school children. There was no reason why Cara Bradford would have been there, having ensured that the claimant had the keys to open the shop on the Saturday morning, at the end of Cara Bradford's Friday morning shift.

17. We found that Cara Bradford did not work with the claimant on 5 May 2018.

18. The conversations, alleged to have taken place with Cara Bradford, did not take place with Cara Bradford on either 4 May 2018 (as Cara Bradford completed her shift at the point that the claimant commenced hers at noon and Leeanne Silcox was in the shop with the claimant at all times) or 5 May 2018 as Cara Bradford did not work that day.

19. We appreciated that an obvious difficulty for the claimant was being able to recollect w*hen* such conversations would have taken place and we were prepared to accept that the claimant may have been mistaken as to exact date despite the claimant being clear that these conversations took place on the day that she started work and the following day, and not at any other point in time. The claimant had not been hesitant to confirm, in relation to other relevant dates in her evidence, that she could not recollect or be specific about those dates, but in contrast had been very specific that these conversations had happened on the first and second days of employment.

20. In contradiction to her evidence on this point, the claimant in cross examination also admitted that she did not work with Cara Bradford in the first week of her employment (in response to when she had discussed possible pregnancy with Cara Bradford).

21. When we reviewed the Staff Hours rosters for the first few weeks of the claimant's employment it was clear that, due to Cara Bradford's leave and absence from the country, that these conversations could not have taken place in the first few weeks of the claimant's employment either.

22. We therefore found that the conversations as alleged did not take place with Cara Bradford at any later time either due to Cara Bradford's absence.

23. In any event we also considered the substance of each alleged comment and made the following further findings:

    Facebook Status by Cara Bradford

    a. When deciding whether it more likely than not that Cara Bradford would have made such comments in relation to 'younger staff', we considered the Facebook Status of Cara Bradford and 'Over 25s only' comment on recruitment for new role. We also took into account however, both the fact that the respondent did in fact employ mostly under 18s, and that the respondent had just re-employed the claimant knowing that she was 20 years old.

    b. Despite the Facebook Status, this did not persuade us that it was more likely than not that Cara Bradford would have made comments about younger staff.

    Not entitled to a break/ comments about sciatica

    c. The claimant did not work sufficient hours to be entitled to a break under the Working Time Regulations 1998 and did not request more hours from the respondent. The respondent would have provided the claimant with more hours had she requested the additional hours. The claimant did not make such a request.

    d. Both of the respondents' witnesses evidenced that staff were more than welcome to have a break and eat and that most of the staff didn't work long shifts as this was incompatible with their full-time education. We found that staff, including the claimant would have had the opportunity to take a break, and sit down on either the stool or the pack of water that was retained in the storeroom during normal working hours particularly where the business would have had quiet periods between train arrivals and departures.

    e. It was not likely, on balance of probabilities, that comments were made by Cara Bradford that she cut shifts short to stop '*you youngsters from getting bored and trying to slack off'*, or that if she could manage without a stool, someone of the claimant's age should have no problem standing, or words to that effect.

    CCTV

    f. In relation to the CCTV the claimant confirmed that she based her claim (that it was focussed on the 'young employees') solely on her conversation with Leeanne Silcox on 4 May 2018.

    g. We found that the CCTV was placed in the shop to focus on the till, to deal with customer queries on mistakes in change, and the rear store cupboard as the store had break-in and not to focus on young employees. The claimant confirmed that she could see the CCTV screen. There was no evidence from the claimant, nor indeed any suggestion, that the respondents had faced any issues involving employee' theft. It was considered likely common practice for retail to focus a CCTV on the till and it was not credible to suggest that the claimant was told that it was in the store to monitor 'young staff'.

h. It was not likely, on balance of probabilities, that a comment was made by Cara Bradford that the CCTV was to monitor the young employees because she thought that they might steal from the shop, or words to that effect.

Comment about claimant being '*a baby, who had a baby'*

i. We have dealt with this below in relation to the similar comments that the claimant alleged that Cara Bradford had made in May/June/July 2018.

24. We therefore considered that the claimant was not able to show on balance of probabilities that Cara Bradford was more likely than not, to have made any of the comments alleged and we found that as a result, it had not been proven that these conversations had taken place between Cara Bradford and the claimant at any time during the claimant's employment.

Comments by Cara Bradford later in May/June/July 5 May 2018

25. The claimant also relied on the further comments which she alleged had been made by Cara Bradford later in the employment. As these comments were of a similar nature, where no other witnesses were present, and there was no contemporaneous documentation to assist, we dealt with them collectively.

26. In addition to the allegation (above) that Cara Bradford had said that the claimant was '*a baby, who had a baby',* the further comments alleged to have been made by Cara Bradford were as follows:

j. on or around late May 2018 / early June 2018 about two young mothers who entered the shop:

i. that the mother '*she should keep her legs closed'*; and

ii. that young mothers '*don't know how to keep their kids under control';*

k. On Monday 23 July 2019 (in relation to a friend of the claimant's who was a young mother) that she was a '*tramp'* and *'never had a future'.*

27. Cara Bradford denied such comments in her witness statement and Leanne Silcox also confirmed however that she had never heard Cara Bradford make such comments. Neither the claimant nor Cara Bradford cross-examined each other on these alleged comments. Again, there was no evidence from other witnesses as to whether these were comments that were of a nature commonly made by Cara Bradford.

28. Documentary evidence was of little assistance. Whilst little weight was attached to the texts that the claimant had provided from ex-employees, it was noted that none of those texts made any reference to Cara Bradford making comments of a similar nature about young mothers. No mention was made of such comments in the claimant's letter to Cara Bradford on 14 August 2018 (page 124 Bundle).

29. The claimant was not able to demonstrate to us that it was more likely than not that Cara Bradford would have made such comments and we did not find, on balance of probabilities that such comments would have been made on the dates given by the claimant or indeed at any other time.

Request to young employees to work without pay

30. Again, there was no evidence provided, beyond the witness statement provided by the claimant, that the young staff were expected to work without pay before the start of the morning shift. The claimant did not challenge the respondent's witness statement evidence on this point, which was that staff were only ever asked to arrive on time and were not expected to work without pay.

31. The rationale provided by Cara Bradford within the Scott Schedule, which was that it did not make sense that the respondents would ask staff to arrive early to sort out newspapers, resonated with us.

32. We therefore found that the claimant was not able to demonstrate that young staff were expected to arrive for work early and found on balance of probabilities that this did not happen.

Notes on notepad

33. Notes were written for all staff on specific duties, or 'jobs' that required doing and all staff were asked to undertake cleaning duties. These notes were not only written in the diary but were also left as Post-It notes for all staff.

34. None of the Post-It notes were retained by the respondent. The claimant was only left one note which she took offence with, as she believed that she worked hard.

35. None of the entries in the diary provided in the Bundle evidenced a higher degree of scrutiny on a day to day basis of the claimant (or indeed any other member of staff) to Leeanne Silcox.

36. It was found that notes, highlighting work that had been missed or should have been done, were not left for the claimant or other younger employees, any more than left for Leanne Silcox. This was an assertion only, made by the claimant but unsupported by any evidence.

Overtime

37. No overtime records were available. Overtime was generally worked by Cara Bradford as she was a salaried member of staff/business owner or offered to all staff through a group WhatsApp chat, where overtime was given on a 'first come first served basis'. The claimant had stated that she had been offered overtime on two occasions, but the claimant perceived this to be an unfair system.

38. Leeanne Silcox was not paid more than the claimant on an hourly rate basis and would not have been a more 'expensive' employee to work overtime.

39. The respondent's business accounts, contained in the Bundle, gave little assistance on how overtime was offered, or even worked by each employee, as the core hours and shifts worked by each member of staff, including Leeanne Silcox differed weekly.

40. There was no evidence that all or even more overtime was exclusively given to Leeanne Silcox as had been alleged by the claimant. Leeanne Silcox was not given preference when offered overtime.

Knowledge of possible pregnancy

41. Leeanne Silcox denied that the claimant had told her that she thought that she was pregnant and denied telling the claimant that she should take a pregnancy test. Whilst we accept that memory recall can be poor, we considered that if such a

conversation had taken place, it is likely that this would have been in Leeanne Silcox's recollection as this would have been a significant piece of news and it is likely that she would have remembered the conversation, or at least the gist of it.

42. Further the claimant states that she believed that she was pregnant on 16 July 2018. A text disclosed in the bundle from the claimant to a friend indicates that the claimant thought that she might have been pregnant as early as 11 July 2018. The claimant did not, on her own evidence take a pregnancy test until some date between 23 July and 30 July 2018, some one to two weeks later. This is a surprising delay and we did not consider it likely that even if such a conversation had taken place, that it would have been as late as 30 July or even 23 July 2018. We also considered that the claimant would not have needed prompting from a co-worker to buy a pregnancy test.

43. We therefore found that in the absence of any other information, the claimant was not able to demonstrate that such a conversation had taken place between her and Leanne Silcox.

44. Cara Bradford did however have a conversation with the claimant about the possibility of her having another child in the future. She confirmed to the claimant that she had not had an employee on maternity leave before and that she would need to 'look into it'.

45. We found that it is not likely that this conversation did take place in the first week of the claimant's employment however, for the reasons given above (i.e. Cara Bradford was away on holiday in Turkey) and that such a conversation was more likely to have taken place some weeks later, when Cara Bradford had returned from holiday.

46. We were unable to make any findings as to exactly when such a conversation would have taken place but, for the reasons given above, considered that such a conversation would have been more likely to have taken place on or around 11-16 July 2018 at around the time that the claimant believed herself to be pregnant.

47. However, we also found that simply because the claimant and Cara Bradford had a conversation about the possibility of the claimant having another child, it did not follow that Cara Bradford perceived the claimant to already be pregnant. We therefore did not find that there was any evidence to demonstrate that Cara Bradford perceived the claimant to be pregnant at any time during her employment with the respondents.

Request for itemised pay statements

48. In her claim form the claimant pleaded that she had asked for itemised wage slips *'many times'* and in her witness statement stated that she also mentioned that she would need a P60 as evidence for Child Tax purposes.

49. The cross examination on this issue was confused, focussing more on the P60 which replaced the P46. It was clear however that Cara Bradford denied that the claimant had asked for pay slips during her employment and that she accepted that she had been mistaken in believing that employees were not required to have payslips.

50. There was no evidence, beyond the claimant's assertion, that she had asked for an itemised pay statement during her employment. We therefore again turned to the documentary evidence for assistance.

51. The claimant did not refer to a request for pay slips/itemised pay statement or indeed ask for pay slips in the letter she sent to the respondent sent immediately after her dismissal on 14 August 2018. She asked the respondents for a P45, not itemised pay statements, on 3 September 2018 and again on 20 September 2018.

52. We noted that the claimant had felt comfortable enough to send Cara Bradford a text on 31 May 2018 explaining that payment in cash was inconvenient and it was not credible that she felt unable to have sent a text requesting a payslip for fear of losing her job, which had been suggested.

53. There was no other document of assistance in the Bundle and nothing in cross examination which assisted us further and we therefore concluded that on balance of probabilities that it was not likely that the claimant asked Cara Bradford for itemised pay statements or payslips.

Reason for dismissal

54. On Saturday 11 August 2018 the claimant worked a 7.00-12.30 shift with Cara Bradford working the 12.30-5.00pm shift. On Sunday 12 August at 11.54am (a non-working day) the claimant sent Cara Bradford a text explaining that she had sought 'out of hours' medical assistance with an ear infection and tonsillitis the night before and that she had been prescribed antibiotics and painkillers. She asked if there was any possibility that she could take the following day as a holiday but that she was not sure if she had any holiday left. She stated that she needed the money, and that if she did not have any holiday left, she would 'drag' herself into work but needed to explain that the infection was contagious.

55. Cara Bradford responded that she was sorry that the claimant was unwell but that there appeared to her to be an issue all too often and the claimant's behaviour was not what she expected of an employee. She told the claimant that she did not consider that she could rely on her and that she was already aware that she had been trying to take the following day off due to traffic. She told the claimant to drop off the keys to the shop and that she could no longer employ her.

56. The claimant was therefore dismissed by text that day and this ended the claimant's employment with immediate effect on 12 August 2018.

57. The claimant responded expressing disbelief that she was being sacked because she had an ear infection. She followed this up with a letter to Cara Bradford on 14 August 2018 and further letters on 3 and 20 September 2018 to Stephen Bradford.

58. The text was a contemporaneous document written immediately by Cara Bradford at a time when litigation was not in her contemplation. We concluded that this was the most reliable source of information to determine Cara Bradford's reason for dismissing the claimant. We found that the reason that the claimant was dismissed was because she was considered by Cara Bradford to be unreliable and that Cara Bradford did not have the trust and confidence that the claimant was genuinely unwell as she had believed her to already to have been trying to get out of her Monday morning shift.

59. The claimant asserted that Leanne Silcox had called in sick and had not been dismissed. There was no evidence of this from the claimant beyond the assertion in the pleadings which was not repeated in the claimant's witness statement or in cross examination.

The law

60. The relevant legal principles that we must apply are not in dispute.

Itemised pay statements

61. Section 8(1) ERA 1996 provides that a worker has 'the right to be given by his employer, at or before the time at which any payment of wages or salary is made, a written itemised pay statement' and a worker who has not been provided with an itemised pay statement has the right to refer the matter to an employment tribunal under s11(1) ERA 1996.

Direct discrimination

62. Section 39(2) EqA provides that an employer must not discriminate against an employee and sets out various ways in which discrimination can occur including subjecting them to a detriment and dismissal. The characteristics protected by these provisions include age and sex (Section 5(1) and 11 EqA).

63. In this case, the respondent will have subjected the claimant to direct discrimination if, because of her age, it treated her less favourably than it treated or would have treated Leanne Silcox, as an older employee to the claimant if:

    i. Leanne Silcox was given preference when it came to overtime;

    ii. Leanne Silcox was allowed to take a day as sick leave at the last minute;

    iii. The claimant being subject to a higher degree of scrutiny on a day-to-day basis than the older employee;

    iv. being dismissed.

64. The respondent will have subjected the claimant to direct discrimination if, because of her perceived pregnancy, it treated her less favourably (no comparator is needed) in dismissing her.

65. Under Section 23(1) EqA, when a comparison is made, there must be no material difference between the circumstances relating to each case. We must consider the reason why the claimant was treated less favourably than her comparator: in this case, it requires us to identify the respondent's conscious or subconscious reason for the dismissal. An inquiry into Cara Bradford's conscious or subconscious mental processes is needed.

66. Section 136 EqA sets out the manner in which the burden or proof operates in a discrimination case and comparable provisions were analysed in Igen Ltd & others v. Wong & others [2005] IRLR 258, where a two-stage approach is set out:

    a. At the first stage, we consider whether the claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

        i. This can be described as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and that there is a difference of age between them; there must be some evidential basis upon which the tribunal

could infer that the claimant's age, consciously or subconsciously, was the cause of the treatment. This can extend to an examination of circumstantial evidence.

ii. At the first stage, we must assume that the respondent has no adequate explanation for its behaviour and therefore ignore any explanation it advances. This only becomes relevant at the second stage.

b. The second stage is reached where a claimant has succeeded in making out a prima facie case.

i. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) EqA provides that we "must" (not "may") uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act.

v. The standard of proof is again the balance of probabilities and to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

vi. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way it did was non-discriminatory. Where there is evidence of unreasonable behaviour by a respondent, the critical question is whether such behaviour would have been afforded to the comparator (Glasgow City Council v. *Zafar* [1997] IRLR 228).

Automatic Unfair Dismissal

67. The claimant has the evidential burden to show, without having to prove, that there is an issue which warrants investigation, and which is capable of establishing the automatically unfair reason that she is advancing. Once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which one of the competing reasons was the principal reason for dismissal (Maund v Penwith District Council 1984ICR 143, CA).

68. Once claimant had produced some evidence in support of her case, the burden lay on the employer to establish that the reason for the dismissal was not the automatically unfair reason but it may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not advanced by either side. It is a matter for the tribunal to come to a view as to whether, on the balance of probabilities, the employer has satisfied them as to the reason.

Conclusions

Itemised pay statements

69. Whilst the respondent disputed that the claimant had requested itemised pay statements, it was conceded that they had failed to provide itemised pay statements to the claimant in respect of the whole of the period of her employment from 4 May

2018 to 12 August 2018. A declaration to that effect would therefore be made in the claimant's favour.

Harassment because of age and/or sex contrary to s26 EqA 2010

70. Within these conclusions, we deal firstly with the allegations of harassment contrary to s.26 EqA 2010 which the claimant alleged were borne out of the comments made by Cara Bradford on 5 May 2018 and again later in May, June and July 2018 with particular focus (but not exclusive focus) on young mothers.

71. Having concluded that Cara Bradford had not made any of the comments alleged to have been made to the claimant, we readily concluded that the claimant had not proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination of harassment on either age or sex.

72. It therefore followed that there was no evidential basis upon which we could find that the claimant had been subjected to unwanted conduct related to protected characteristics of age and/or sex and the claimant's harassment claims under s.26 EqA therefore failed.

Direct discrimination because of age contrary to s.13 EqA 2010

73. Whilst we did conclude that the Facebook status did give rise to a real inference of age discrimination, again we had to consider whether the claimant had proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

74. In this instance however we did not consider that the claimant had been able to demonstrate that there had been any less favourable treatment. There was no evidence that Leanne Silcox had been given preference when it came to overtime or that there had been comparable circumstances when she had been allowed to take a day as sick leave at the last minute. The claimant had not been refused sick leave. The claimant in fact had proactively not sought to take sick leave, but sought to take a holiday.

75. Likewise, there was no evidence that the claimant (or indeed any other young member of staff) had been subjected to a higher degree of scrutiny on a day-to-day basis than Leeanne Silcox. Indeed, the claimant in her own evidence conceded that she had only been left one negative comment.

76. What we were left with, was a series of allegations from the claimant, with nothing in the Bundle nor clarified on cross examination which could have left us to conclude that the claimant had been treated less favourably (because of age or at all). It therefore followed that the claimant had been unable to demonstrate that she had been subjected to less favourable treatment because of her age.

Dismissal

77. Finally, we turned to the question of dismissal and the reason for the claimant's dismissal.

78. Firstly, dealing with whether the claimant had been dismissed for asserting a statutory right, under S.104 ERA 1996 an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that:

    a. the employee brought proceedings against the employer to enforce a relevant statutory right — S.104(1)(a), or

    b. the employee alleged that the employer had infringed a relevant statutory right — S.104(1)(b)

79. Having made a finding that the claimant had not requested itemised pay statements from the respondent, we concluded that the claimant had not discharged the evidential burden of showing that there was an issue which warranted investigation.

80. It followed that it was our conclusion that the claimant was not dismissed because she had requested itemised pay slips and/or that the alleged that the respondent had infringed a statutory right to itemised pay statements.

81. Likewise, whilst the claimant had on 12 August 2018, as alternative to taking sick leave asked if she could take annual leave, this was not in our minds the same as the claimant asserting any rights under the Working Time Regulations 1998 or even providing notice under s15 of those regulations to elect to take such leave. There was nothing in the evidence, or in our findings, which could lead us to conclude that the claimant made any allegation that the respondent had infringed her right to annual leave and/or had made it reasonably clear to the respondent what the right claimed to have been infringed was.

82. It followed that it was our conclusion that the claimant was not dismissed because she had asserted any statutory right to paid annual leave under the Working Time Regulations 1998.

83. In relation to the question of whether the claimant had been dismissed because of perceived pregnancy, whilst we accepted in principle that perceived pregnancy could be relied upon to claim that the dismissal was contrary to s.99 ERA 1996 and/or s.13 EqA 2010, we concluded that there was insufficient evidence to demonstrate that the respondent's perceived the claimant to be pregnant at all.

84. The claimant was therefore neither able to prove on balance of probabilities that there was an issue which warranted investigation which was capable of establishing the automatically unfair reason that she was advancing i.e. perceived pregnancy (under s.99 ERA 1996), nor provide any evidential basis upon which we could infer that the claimant's perceived pregnancy was the cause for the dismissal (claim under s.13 EqA 2010).

85. It followed that it was our conclusion that the claimant was not dismissed because of her perceived pregnancy.

86. Finally, the issue of whether the claimant was dismissed because of her age.

87. Here we also revisited the issue of the Facebook status and the 'Over 25s only' comment within that status. We also considered the manner in which the respondent had dismissed the claimant and concluded that had the claimant sufficient continuity to bring an ordinary unfair dismissal claim, the dismissal would have been procedurally unfair and that the respondent acted unreasonably in dismissing the claimant by text without recourse to either the disciplinary procedure or some form of

capability process. Due to the Facebook status and the lack of process that the respondent followed in dismissing the claimant, we concluded that the claimant had proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination based on age.

88. At this point we assumed that the respondent had no adequate explanation for its behaviour, and we ignored any explanation for the treatment of the claimant. The burden of proof in our minds shifted to the respondent and we looked to assess if the respondent proved that it did not commit the alleged discriminatory act i.e. dismiss the claimant because of her age.

89. In this regard we concluded that there was an explanation for acting the way that Cara Bradford did and that this was a non-discriminatory explanation. We concluded that Cara Bradford would have treated any employee who she considered to be unreliable in the same manner and it followed that the claimant had not been dismissed because of her age. Therefore, the claimant's direct discrimination claim that she had been dismissed because of age, was also dismissed.

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Employment Judge RL Brace
Dated: 19 July 2019

JUDGMENT SENT TO THE PARTIES ON

……20 July 2019……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS