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EMPLOYMENT TRIBUNALS

Claimant: Mr M French

Respondent: Fenn Wright

Heard at: East London Hearing Centre

On: 18 & 19 July 2019 and (in chambers) 30 August 2019

Before: Employment Judge M Warren

Members: Mr T Burrows
Mrs S Jeary

Representation

Claimant: In person

Respondent: Ms J Coyne (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim of breach of contract is dismissed upon having been withdrawn.
2. The Claimant's complaint of sex discrimination fails and is dismissed.

REASONS

Background

1 By a Claim Form dated 25 June 2018, Mr French brought claims of unfair dismissal, sex discrimination and breach of contract. Lacking two years' service, his unfair dismissal claim was struck out by Employment Judge Gilbert on 23 July 2018. By an email dated 25 April 2019, Mr French withdrew his breach of contract claim. I dismiss those claims upon withdrawal.

2 Mr French was dismissed from his employment on 11 April 2018 and, it is

common ground, was told at the time that the reason for dismissal was redundancy. The Respondent's pleaded case is that the reason for dismissal was redundancy or in the alternative, poor performance.

Issues

3 The issues in the case were identified at the Preliminary Hearing before Employment Judge Russell on 24 September 2018 as follows:

“Sex Discrimination

4.1 *Was the Claimant treated less favourably than the other three members of the team when he was dismissed?*

4.2 *If so, was it because of sex? The comparators are the three other members of the accounts team. The matters that the Claimant will rely upon as inferential material are (a) his female colleagues were not even considered for dismissal; (b) there was no consultation or prior warning, the Claimant was simply told that he was subject of restructuring and/or (c) subsequent untrue allegations of poor performance.”*

4 Employment Judge Russell recorded that although there were references to harassment and victimisation in the ET1, Mr French withdrew those aspects of his discrimination claim at the Preliminary Hearing and they were dismissed on withdrawal.

5 At the outset of the hearing, I confirmed with the parties that paragraphs 4.1 and 4.2 of Employment Judge Russell's Preliminary Hearing summary correctly identify the issues that we are to decide in this case.

Evidence

6 The Tribunal heard evidence on 18 and 19 July 2019. Unfortunately, we were unable to start the hearing until 2.15 on 18 July as I was required to hear another case first. This meant that we were unable to complete the case in the allocated timeframe and have had to reconvene in order to provide a reserved judgment.

7 We had before us witness statements from Mr French and for the Respondents, from Ms Anne Jones and Mr Joseph Hall. We heard evidence from each of those individuals.

8 We had a chronology from the Respondent.

9 We had before us a paginated and indexed bundle of documents running to page 374.

The Law

10 The relevant law is set out in the Equality Act 2010. Section 39(2)(c) proscribes an

employer from discriminating against an employee by dismissing him. Sex is one of a number of protected characteristics identified at section 4.

11 Mr French says that he was directly discriminated against because of his sex. Direct discrimination is defined at section 13(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”.

12 Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

13 How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, “on the ground of” the particular protected characteristic. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwivu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40 that there was no difference in meaning between, “because of” and “on the grounds of”.

14 As Lord Justice Underhill explained in Onu v Akwivu and Taiwo v Olaigbe, what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator’s mind in leading him to act in the manner complained of. The leading authority on the latter is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, see paragraphs 13 and 17: was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should there be inferences drawn that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic?

15 The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”.

16 Section 136 deals with the burden of proof:

“(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.

17 The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps which we have carefully observed in the consideration of this case.

Facts

18 The Respondent is an estate agent, providing also the services of chartered surveyors and property consultants. They have ten branches in East Anglia and approximately 150 employees.

19 The Claimant is a qualified accounting technician.

20 After an interview with Ms Jones, (Finance and HR Director of the Respondent) and Ms Flack, (Accounts Manager) on 12 December 2017, Mr French commenced employment as a Senior Accounts Assistant with the Respondent on 15 January 2018.

21 Mr French's contract of employment was in the bundle at page 59. This stipulates that his first three months of employment would be a probationary period.

22 Mr French was experienced in purchase ledger, accruals, credit control, bank reconciliations and pre-payments. He was not experienced in operating payroll. The Respondent's plan was to provide him with training in that function.

23 At the time Mr French joined the Respondent, its accounts team consisted of four women namely: Ms Bennett (Lettings Accounts Assistant), Ms Tang (Assistant Accounts Manager), Ms Grove (Part-Time Accountant Clerk) and Ms Flack (Accounts Manager).

24 Upon starting his employment, Mr French was inducted on the Respondent's systems and processes by the Accounts Manager, Ms Flack. He took detailed notes of the training with which he was provided during his initial period of employment, which are copied into the bundle at pages 73 – 80. He was provided with training on the Respondent's purchase ledger by Ms Bennett and Ms Tang. Ms Tang also provided him with training in respect of credit control and provided him with annotated training notes to be found in the bundle at pages 81 – 99.

25 Ms Jones provided Mr French with means to access the Respondent's intranet and directed him towards a handbook containing policies, forms, health and safety information and so on. He was also provided with a hard copy.

26 Mr French was provided with templates to use including for example, of an email to use when chasing payment of invoices.

27 Ms Flack left the Respondent's employment on 19 January 2018.

28 Ms Jones was concerned at an early stage about Mr French's lack of progress. At

a meeting with him on 29 January 2018, she set him a target of improving his accuracy and his speed.

29 On 1 February 2018, Ms Tang spoke to Mr French about a number of concerns. She recorded that conversation by an email to Ms Jones, which is in the bundle at page 109. She reminded him to use the company name in the subject line of emails. She asked him to be more clear in his emails and when chasing payment, to make sure he includes the company details and a copy of the invoice. She had to remind him that payment of invoices should be chased by reference to the payment date, rather than the size or value of the invoice. She had also noticed that he had telephoned the wrong person in chasing a particular invoice, even when the correct number to call was noted on the information he had been provided with.

30 On 8 February 2018, Ms Jones had a further meeting with Mr French and set him further targets. These included getting up to date, ensuring notes were grammatically correct and in the correct format, ensuring notes were up to date and included contact details, keeping the purchase ledger trays clear, going through the creditors list and chasing for missing invoices on the purchase ledger, sorting out direct debits for a particular customer (Anglian Water) and checking mileage sheets. Ms Tang joined this meeting. It was agreed with Mr French that they (Ms Jones and Ms Tang) would review his work daily and that Ms Tang, who sat opposite him, would answer any queries which he may have at any time.

31 On 9 February 2018 as a training exercise, Mr French and the part-time accounts clerk Ms Grove, went through the Respondent's staff mileage claims, each doing one half of the total then exchanging and checking each other's work. Many inaccuracies were found with Mr French's work.

32 On 20 February 2018, Ms Grove wrote an email to Ms Jones raising issues that she was experiencing with Mr French, (page 118). She complained that whenever she and Ms Bennett tried to help him, he dismissed them and seemed to think that he knew better. She complained that when she had pointed out to him that he was not following correct processes with invoices, he had been dismissive of her and had become argumentative.

33 On the same day, Ms Tang wrote to Ms Jones, (page 119). She wrote:

"So when I told him we want him to find the next lot of accruals and pre-payments in the list I gave him relates to last year, he has been finding all of last year's invoices against the list again. He said I had not been clear but I've tried to be as clear as I can for everything and he has not asked for help on it once.

He doesn't seem to understand the concept of accruals and pre-payments much at all... he does not take on what you tell him the first time around and he always ends up having to do the job more than once."

34 On 23 February 2018, Ms Jones met with Mr French and spoke to him about pre-payments and accruals. She expressed concerns about his lack of accuracy and his failure to follow the Respondent's procedures.

35 On 27 February 2018, Ms Tang wrote by email to Ms Jones with regard to continuing ongoing problems with the work that Mr French was doing, explaining a number of mistakes that he was making and including the following:

"I've still been checking everything he has been posting, he is still making mistakes such as trying to code stuff to office costs rather than department costs. Today I've had to get him to repost a few invoices which have gone onto incorrect accounts and his REF II (signatures) has slipped a bit today too."

36 At a team meeting on 19 March 2018, Ms Tang reminded Mr French of the importance of using the Respondent's templates when chasing clients for payment of invoices.

37 Notwithstanding that, Ms Jones noted that Mr French continued to send emails not using the Respondent's templates.

38 On 23 March 2018, Ms Tang wrote an email to Ms Jones updating her on various matters prior to her being away from work for a few days. Of Mr French she comments:

"The purchase ledger accuracy is not great. Several invoices are still going on three or four times before they are correct. I am trying to go through searching for P & A's and this is making it extremely difficult to check. You will probably need to check everything which goes on carefully. Quite a few invoices haven't been going to the correct manager to sign which is delaying invoices coming back in. I've done a PL transfer this afternoon and to check through that so if we avoid doing a transfer while I'm off we can see what has been posted... Michael hasn't gotten round to everything I asked him to do this week (scanning and I had to chase him a couple of times about RESI invoices) so he'll need a kick up the backside I think."

39 On the same day, Ms Tang wrote to the team setting out work they should be doing during her absence. In respect of Mr French, she stressed to him the importance of accuracy and reminded him of what was required.

40 During Ms Tang's absence, Ms Jones supervised Mr French's work. She found that he was continuing to make a lot of mistakes and was not keeping up with his work.

41 On 10 April 2018, Mr French sent invoices to one of the partners for approval which in fact, had already been approved twice before. The partner informed Ms Jones. Mr French agreed in evidence that there may have been other occasions when he had sent invoices for approval more than once.

42 The Respondent's accounts department was about to become much more busy, with the imminent acquisition of a property lettings business. Ms Jones decided that Mr French's lack of competence was going to be a hinderance. She discussed the situation with the Head of Lettings, Mr Hall. They decided to dismiss Mr French.

43 On 11 April 2018, Mr French was called into a meeting with Ms Jones and Mr Hall. They informed him that he was being made redundant. This was explained by reference to

the acquisition of the new lettings portfolio. They said that the Respondent needed to restructure the accounts department. Ms Jones acknowledges that the real reason was in fact Mr French's incompetence. He was dismissed with one week's notice as confirmed in a letter that day, page 66. The letter confirmed the reason for dismissal as the Respondent's plan to restructure.

44 Ms Jones provided Mr French with an open reference, which included the following:

"Michael's role did not extend past this period due to necessary changes to internal infrastructure within the office that he was employed. This was not a reflection of his ability to perform the role."

45 The Respondent recruited an additional accounts person with letting experience in November 2018.

46 There has been a turnover in accounts staff since Mr French left. We heard of three new members of staff replacing leavers, all of whom were women.

Conclusions

47 Mr French was subjected to detriment, in that he was dismissed. He was also treated less favourably than his comparators, in that his three female colleagues in the accounts department were not dismissed.

48 As identified in the list of issues, Mr French argues that there are three matters from which we can draw the inference that the reason for his dismissal was that he is a man:

48.1 That his women colleagues were not considered for dismissal. That is true.

48.2 That there was no consultation or prior warning before his dismissal. That is also true.

48.3 That subsequent untrue allegations about his poor performance were made against him. It is true that allegations about poor performance were made subsequently. However, we do not consider the allegations to be untrue. We accepted the evidence of Ms Jones as being truthful: she was frank in acknowledging the dishonesty and foolishness of her reference and the implications for a future employer, her evidence was corroborated by the documents. We conclude that the allegations were true and that Ms Jones and Mr Hall genuinely believed that Mr French's performance was poor.

49 We must ask ourselves whether there are facts from which we could properly conclude, absent an explanation from the Respondent, whether Mr French's gender played any part in the decision to dismiss him? We have regard to the following facts in considering this question:

- 49.1 Mr French was the only man in the accounts team and he was the one who was dismissed.
- 49.2 The Respondent gave Mr French a false reason for dismissal: the reason for dismissal was not redundancy, there was not a redundancy situation.
- 49.3 Ms Jones gave a dishonest open reference. If she was prepared to be dishonest in that respect, one has to ask oneself whether she would be prepared to be dishonest when giving an explanation for dismissal?
- 49.4 The Respondent failed to follow any process in effecting Mr French's dismissal. There was no attempt at a fair procedure.
- 49.5 Everyone recruited to the Respondent's accounts department since Mr French's dismissal, was a woman.

50 Absent any explanation from the Respondent, we think that one could draw inferences from these facts and properly conclude that gender is the reason for, or played a part, (more than trivial) in the decision to dismiss. The burden of proof therefore shifts to the Respondent to satisfy the Tribunal that Mr French's gender played no part whatsoever in that decision.

51 We therefore looked to the Respondent for an explanation and in doing so, we had regard to the following:

- 51.1 From the start of his employment, Ms Jones and Mr French's colleagues in the accounts department made significant efforts to try and train him and bring him up to speed in the tasks which he was to perform.
- 51.2 During the few weeks of his employment, Ms Jones and Mr French's colleagues in the accounts department tried to explain to him where he was going wrong.
- 51.3 Ms Jones gave Mr French opportunities to improve, setting him targets.
- 51.4 Mr French's performance was poor; he made mistakes and he was slow. He did not follow the Respondent's processes, despite being reminded that he should do so.
- 51.5 Most of Mr French's failings appeared to be in relation to tasks he was supposed to have been experienced in, not payroll.
- 51.6 Mr French's abilities were not those the Respondent had expected of him when it recruited him.
- 51.7 We are satisfied on the evidence, as I have indicated above, that the decision to dismiss was based purely on Mr French's poor performance.

51.8 That Ms Jones told Mr French the reason for his dismissal was that he was being made redundant, was an act of misguided concern for Mr French's self-esteem and his future employment prospects.

51.9 Ms Jones provided a dishonest open reference for the same misguided reasons.

52 The reason for the difference in treatment was Mr French's poor performance. This distinguished him from his comparators. The Respondent has therefore satisfied us that Mr French's gender played no part whatsoever in the decision to dismiss him. His complaint of sex discrimination therefore fails and is dismissed.

Employment Judge Warren

4 September 2019