



EMPLOYMENT TRIBUNALS

Claimant: Mr P Compston

Respondent: Connect Housing Association limited

Heard at: Leeds

On: 29, 30 June and 1 July 2020

Before: Employment Judge Shepherd

**Members: Mr M Taj
Ms V Griggs**

Appearances:

For the Claimant: In person

For the Respondent: Mr Wilkinson

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The claim brought by the claimant of sex discrimination against the respondent is not well founded and is dismissed.

REASONS

1. This Hearing took place in the Leeds Employment Tribunal. The Employment Judge and members of the Tribunal were physically present in the Tribunal room and the parties and their witnesses took part in the hearing by CVP video link.

The claimant represented himself and the respondent was represented by Mr. Wilkinson.

2. The Tribunal heard evidence from:

Peter Compston, the claimant;
Andy Taylor, friend of the claimant;
Warren Stockdale, friend of the claimant;
Sophie Garnett, friend of the claimant;
Nazia Chopdat, Service Manager within the HR team;
Ilyas Lunat, Senior Manager;
Martyn Broadest, Director.

3. The Tribunal also had sight of a written witness statement from Claire O'Dowd, the mother of the claimant's former girlfriend. This statement was accorded less weight than the evidence of witnesses who appeared before the Tribunal and whose evidence could be challenged and their demeanour assessed.

4. The Tribunal had sight of a bundle of documents which was numbered up to page 436. The Tribunal considered the documents to which it was referred by the parties.

5. The complaints had been identified at a Preliminary Hearing on 10 March 2020 and the issue the Tribunal had to determine is whether the claimant was subjected to direct discrimination pursuant to section 13 of the Equality Act 2010. It will be necessary to determine whether the respondent discriminated against the claimant if, because of his sex, the respondent treated the claimant less favourably than it would treat others.

It was agreed that the appropriate comparator is a hypothetical comparator, a female employee who made a call to the domestic abuse support line and made comments revealing that her partner had drug addiction problems and had asked her to lock them in their home to prevent them from taking drugs.

Findings of fact

6. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

6.1. The claimant was employed by the respondent as a Supported Housing Officer from 28 January 2019. His main tasks included providing support to young people who are living in supported accommodation.

6.2. The Tribunal was informed by Ms Chopdat that the respondent had three units, two of which provided accommodation for vulnerable adults of mixed sex and one of which was a women's refuge. The claimant worked in one of the units providing accommodation for vulnerable adults of mixed sex.

6.3. The claimant was provided with a leaflet by a work colleague. This was the respondent's leaflet which offered support and awareness in respect of domestic abuse.

6.3. On 9 September 2019 the claimant rang the domestic abuse helpline and spoke to a call handler. In the notes of that telephone call it is recorded that the claimant informed the call handler that his girlfriend at the time, with whom he lived, had a drug addiction problem and that he had suffered a lot of abuse from her because of this. The claimant explained that his girlfriend had asked him to keep her in the house. He had locked her in the house. He had put a combination lock on the garden gate and the front door was locked from the outside when he left for work. He had taken her mobile phone and provided her with a "burner phone" in order that she could not have access to any Internet. He said that his girlfriend could text him in order to obtain the code for the combination lock.

6.4. The call handler had realised that the call was from a member of the respondent's staff and the matter was reported to her line manager.

6.5. Nazia Chopdat, a Service manager within the respondent's HR team, was contacted. She telephoned the claimant on 11 September 2019 and informed him that he was suspended on full pay.

6.6. On 11 September 2019 Nazia Chopdat wrote to the claimant confirming that he was suspended from work. The reason given was:

"On Monday 9th September you contacted the refuge to ask for support for domestic abuse. Although we encourage our staff to seek support in these situations the conduct and behaviour that you spoke about towards your partner is serious enough to give rise to the genuine concern that a risk may be posed to our service users who are vulnerable and with whom you work alone."

6.7. On 13 September 2019 the claimant was invited to a disciplinary meeting. It was stated that:

"The specific behaviours that caused particular concern can be listed as follows:

- that you have locked your partner in your home and were in control of the locking mechanism
- that you took possession of your partner's phone

It is alleged that these behaviours are a concern for Connect due to the sensitive nature of your role and your (lone) access to vulnerable service users. They also potentially indicate a serious error of judgement.”

6.8. The claimant attended a disciplinary hearing on 18 September 2019. The chair of the meeting was Ilyas Lunat, Senior Manager – Income Services. Nazia Chopdat was in attendance and the claimant was accompanied by Andy Taylor. The claimant provided written submissions.

6.9. In the report provided by Mr Lunat he states:

“Before I go into my findings on the conduct issues I will cover the allegation that Peter Compston has made about sex discrimination. He feels that, when he rang the woman’s refuge for support and advice, he has not been treated fairly and in the same way a female would have been treated. I am satisfied that this is not the case. The refuge specialises in providing a service for women suffering from domestic abuse and staff can signpost others appropriately. Peter Compston was signposted to an appropriate service. There was not anything more I see the service could have offered to Peter. In terms of the decision to suspend and take formal disciplinary action against Peter, I am satisfied that if a female staff member had called the refuge and made the same comments that the same action been taken against them.”

6.10. It was noted that the claimant had admitted locking his ex-girlfriend within the home with limited capability to leave while he was at work, and that the claimant had said that the action was consensual and was approved by drug advice agencies but he had not provided any evidence to support this.

6.11. The claimant repeatedly said that he had had professional advice. He said that he had spoken to a friend who was a social worker, other professional services and that he had support from his girlfriend’s family. The Tribunal had sight of statements from Claire O’Dowd, the claimant’s former girlfriend’s mother and Sophie Garnett, the claimant’s friend and a social worker, but they did not refer to the actions carried out by the claimant which had caused the respondent’s safeguarding concerns.

6.12. On 3 October 2019 Nazia Chopdat wrote to the claimant informing him of the outcome of the Disciplinary Hearing. The claimant was dismissed. In the Chair’s report Ilyas Lunat said that he was recommending dismissal but not summary dismissal on the grounds of gross misconduct, but rather a dismissal for “Some Other Substantial Reason” as it appeared that the errors of judgment displayed by the claimant meant that he was not suitable to continue in his role of Supported Housing Officer, which involved lone working with vulnerable people.

6.13. The claimant appealed against his dismissal and the appeal was heard by Martyn Broadest, a Director of the respondent. The claimant indicated

that he was not able to attend the appeal meeting as he was not well enough. He provided written submissions.

6.14. On 9 January 2020 Martyn Broadest wrote to the claimant providing the outcome of his appeal. In that letter Mr Broadest referred to ground of appeal which was “unclear reasoning behind dismissal” he stated:

“In this case, the behaviours discussed in the hearing such as restricting your ex-partner’s freedom and possibly putting her at risk called into question your suitability to work as a Supported Housing Officer, which involves lone working with vulnerable people, some of whom have very similar issues as your former girlfriend.”

6.15. With regard to the grounds of appeal “extreme prejudice and discrimination” it was stated:

“... I cannot see any evidence to support your assertion that the conversations were prejudiced, or that you were treated any differently because of your gender. Indeed, I am satisfied that if a female staff member had called the refuge and made the same comments as you had that exactly the same action would have been taken against them.

... Whilst a general rule of confidentiality does apply in these situations, where we are concerned about the safety of individuals affected, an overriding safeguarding duty applies. I’m sure you will be familiar with this principle.

Therefore I have to conclude that Connect colleagues acted entirely appropriately in the manner in which they dealt with your case, and that you were dealt with fairly and without prejudice, taking into account what was known at the time. I regret that the circumstances resulted in the situation in which you now find yourself. However, the root cause of those circumstances lies with the extremely unfortunate and difficult situation in which you found yourself with your former girlfriend, and they are not Connect’s responsibility.”

6.16. The other grounds of appeal referred to fraudulently promoting a service for vulnerable people that wasn’t provided, abusive conduct and an improper suspension procedure. It was indicated that these grounds of appeal were not considered to be either relevant grounds for appeal or valid grounds of appeal.

6.17. On 16 January 2020 the claimant presented a claim of sex discrimination to the Employment Tribunal.

The Law

Direct discrimination

7. Section 13 of the Equality Act 2010 states:

(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.

Burden of Proof

8. Section 136 of the Equality Act 2010 states:

“(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal.”

9. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved in **Madarassy v Normura International plc [2007] EWCA 33**.

10. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as it did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only 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”.

11. In the case of **Strathclyde Regional Council v Zafar [1998] IRLR 36** the House of Lords held that mere unreasonable treatment by the employer “casts no light whatsoever” to the question of whether he has treated the employee “unfavourably”.

12. In **Law Society and others v Bahl [2003] IRLR 640** the EAT agreed that mere unreasonableness is not enough. Elias J commented that

“All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour ... Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way ... The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable.”

13. In the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003]** the House of Lords emphasised the importance of the hypothetical comparator. Instead of relying on like with like comparators, a claimant may rely on the ‘evidential significance’ of non-exact comparators in support of an inference of direct discrimination, even though their evidential value will become weaker the greater the difference in circumstances. It was also stated that:

“Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?”

14. This approach has been adopted in a number of subsequent cases. In **London Borough of Islington v Ladele UK EAT/0453/08** Elias J (that then Employment Appeals Tribunal President) said that often, in practice a Tribunal will be unlikely to be able to identify who the correct comparator is, without first asking the question why the claimant was treated as he was. Until that question is answered, the appropriate attributes of the comparator will not be known. His conclusion was that whilst comparators may have evidential value, often they cast no light on the ‘reason why’ question.

15. Stereotypical assumptions may amount to direct discrimination. In the case of **Aylott v Stockton on Tees Borough Council [2010] IRLR 994** the Court of Appeal agreed with a Tribunal’s finding that the dismissal of an employee with bipolar disorder was direct discrimination, based on evidence that the employer had a stereotypical view of mental illness.

16. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

17. The Tribunal had the benefit of oral submissions from Mr Wilkinson and the claimant. These are not set out in detail but both parties can be assured that the Tribunal has considered all the points made, even where no specific reference is made to them.

Conclusions

18. The Tribunal has to consider whether the claimant has established facts from which the Tribunal could decide, in the absence of any other explanation, that the claimant had been subject to direct sex discrimination.

19. The respondent's Safeguarding Adults Policy includes a reference to examples of types of abuse, one of which is headed 'Restraint' and refers to:

"Unlawful or inappropriate use of restraint or physical interventions. In extreme circumstances unlawful or inappropriate use of restraint may constitute a criminal offence. Someone is using restraint if they use force, or threaten to use force, to make someone do something they are resisting, or where an adult's freedom of movement is restricted, whether they are resisting or not.

Restraint covers a wide range of actions. It includes the use of active or passive means to ensure the person concerned does something, or does not do something they want to do, for example, the use of keypads to prevent people from going where they want from a closed environment."

20. The claimant said that he knew the protocols "in his sleep". He agreed that his former girlfriend could be seen as a vulnerable person and at risk.

21. The Tribunal has a considerable amount of sympathy for the claimant who was in an extremely difficult and urgent position. He appeared to be acting out of the best motives. He was not served well by the helpline which was confidential. He was seeking help in a difficult situation. The fact that it led to his dismissal was extremely unfortunate and, had this been an unfair dismissal claim, there may have been an argument as to the fairness of the dismissal.

22. However, this case is purely about direct discrimination and the reason why the claimant was treated as he was. The call handler had identified a safeguarding issue. The claimant acknowledged that what he said about restraining his girlfriend could have been seen as a safeguarding issue. If the call handler had concerns she was under a duty to raise or 'escalate' those concerns.

23. The claims of direct discrimination brought by the claimant were that he was disregarded as the victim on the basis of his sex and that this opinion was then upheld by Nazia Chopdat and Ilyas Lunat by making the decision to dismiss. The claimant has, in his evidence, referred to a lack of support. This was not part of his pleaded claim. However, the respondent referred to the helpline as a 'signposting' service and the claimant was provided with details of other agencies he could contact.

24. The claimant suspects that had he been a female making the same call to the helpline at the women's refuge he would not been treated as he was. However, this remained a suspicion. Even if the Tribunal had shared that suspicion it must consider whether there was evidence on which to base this suspicion. As set out by the Court of Appeal in the case of **Madarassy**, the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination. There must be something more that provides sufficient evidential basis for the Tribunal to be satisfied that it could conclude, in the absence of any other explanation, that the claimant had been subject to direct discrimination.

25. The Tribunal has given careful consideration to the evidence, both oral and documentary. The claimant has a genuine belief that the call handler dealt with the matter on the basis of a stereotypical assumption. This was that, as the claimant was a man, in a domestic abuse situation he would be the abuser rather than the victim and that, as a result, he was treated less favourably than the hypothetical comparator, a woman making the call who was the same, in all material circumstances, as the claimant save for gender. The respondent's evidence was entirely clear and consistent in that the claimant would have been treated in the same way had he been a woman. There was no evidence from which the Tribunal could conclude that the claimant had been subject to less favourable treatment because he was a man.

26. The burden of proof has not shifted to the respondent and, if it had, the respondent has established a clear non-discriminatory reason for the treatment of the claimant. There were genuine safeguarding concerns that they considered needed to be raised and, after investigation, they led to the investigation and dismissal of the claimant. The Tribunal is satisfied, on the balance of probabilities, that the treatment of claimant by the respondent was not on grounds of his sex.

27. In the circumstances, the Tribunal finds that the claim of sex discrimination is not well founded and is dismissed.

**Employment Judge Shepherd
10 July 2020**