EMPLOYMENT TRIBUNALS

Claimant: Miss R Ward

Respondent: Holdens Estate Agents Ltd

Heard at: Manchester **On:** 12 November 2020

Before: Employment Judge Phil Allen
Ms K Fulton
Ms C Gallagher

REPRESENTATION:

Claimant: In person
Respondent: Mr P Holden, Managing Director

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not treated less favourably because of her sex, as alleged. Her claim for sex discrimination does not succeed.

2. The claimant was not subjected to harassment related to sex. Her claim for harassment does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent as an Estate Agent from 17 June 2019 until 16 July 2019. The claimant was dismissed in a meeting with Mr Holden on 16 July 2019 with immediate effect. The claimant alleges that she was dismissed because of her sex and that the way that she was spoken to in the dismissal meeting was less favourable treatment because of her sex. The claimant also alleges harassment related to sex, arising from what she alleges was said to her by Mr Holden in that meeting.

Claims and Issues

2. Two preliminary hearings (case management) have previously been conducted in this case, the first on 24 January 2020 and the second on 9 June 2020. The second hearing took place on the date when the case was due to have been heard, but it was postponed due to the COVID-19 pandemic. A hearing had also been due to take place on 12 October 2020 (remotely by CVP video technology), but that had not been possible due to technical issues.

3. At the preliminary hearing on 24 January 2020 a List of Issues was identified. At the start of this hearing it was confirmed with the parties that those issues remained the ones which needed to be determined. In this Judgment the Tribunal has determined the liability issues only (that is issues 1-7) as it was confirmed at the start of the hearing that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimant succeeded in her claim.

4. The issues identified were as follows:

Direct Discrimination (section 13 of the Equality Act 2010)

(1) The less favourable treatment relied upon by the claimant is: the way in which Mr Holden spoke to her when she was dismissed on 16 July; and/or her dismissal.

(2) Was that treatment less favourable treatment, that is did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances?

(3) If so, was that because of the claimant's sex?

Harassment related to sex (section 26 of the Equality Act 2010)

(4) Did Mr Holden say to the claimant that she would be better off at home with her child in the meeting when he dismissed her on 16 July 2019?

(5) If so, was that unwanted conduct?

(6) If so, did it relate to the sex of the claimant?

(7) Did the conduct have the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Remedy

(8) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

(9) The issues of remedy may include:

(i) Whether the respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, whether it would be just and equitable in all the circumstances to increase any award and, if so, by what percentage up to a maximum of 25%;

(ii) What injury to feelings and or personal injury award should be made to the claimant?

5. In her claim form the claimant had also brought a claim for unfair dismissal. That claim was not one which needed to be determined by this Tribunal. That claim was dismissed following withdrawal on 27 January 2020, in the light of the claimant's length of service and following discussion at the preliminary hearing (case management) on 24 January 2020.

Procedure

6. The claimant represented herself at the hearing. Mr P Holden, the respondent's Managing Director, represented the respondent at the hearing.

7. The hearing was conducted as a hybrid hearing, partly by remote video technology (CVP) and partly in-person. The Employment Judge and one member were present in the Employment Tribunal building in Manchester, and the second panel member (Ms Fulton) attended the hearing remotely by CVP video technology. Mr Holden was present in the hearing in person. The claimant attended the hearing remotely by CVP video technology. The claimant had specifically asked that she be allowed to attend the hearing remotely by CVP as a result of health issues, and Mr Holden had wished to attend in person following the hearing which did not take place on 12 October. Both parties agreed to the hearing proceeding in this way and no issues arose for the Tribunal as a result.

8. A limited agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 48 pages. The bundle included the witness statements of each of the claimant and Mr Holden. The Tribunal read the witness statements, the claim form, the response form, and the records of the previous preliminary hearings. The Tribunal was not referred to the other documents contained within the bundle.

9. During his questioning of the claimant, Mr Holden made reference to a letter which he had received from a vendor about the claimant and a viewing of a property. The opportunity was provided for Mr Holden to obtain and provide to the claimant and the Tribunal a copy of the document to which he referred (and it was agreed that it could be redacted to remove the vendor's details). When obtained, this document transpired to be an email from the vendor which had been sent in January 2020, rather than at the time of the relevant events. The Employment Tribunal read and considered that email. The claimant was able to give evidence about the email and its contents prior to her evidence concluding.

10. At the start of the hearing the Tribunal identified to the parties that neither of the witness statements were as detailed as the Tribunal would expect, and, as a

result, both witnesses would be given the opportunity to expand upon their evidence at the hearing to provide evidence in addition to that contained within the statement. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. The claimant confirmed that her statement was true and accurate and did provide such additional evidence as she wished to, before she was asked questions. Mr Holden gave evidence for the respondent, was cross examined by the claimant and was asked questions by the Tribunal and the panel. As was the case for the claimant, Mr Holden was given the opportunity to expand upon his (very brief) written statement, before he was cross examined and/or asked questions.

11. After the evidence was heard, each of the parties was given the opportunity to make submissions if they wished to do so. In fact, both parties did not wish to make further submissions as they believed that what they needed the Tribunal to hear had been included in their statements and in the evidence the Tribunal had already heard. The claimant asked that the Tribunal re-read her witness statement, and the Tribunal reminded itself of the contents of both witness statements before reaching its decision.

12. In the light of the current status of the rules relating to the Covid-19 Pandemic, the Tribunal explored with the parties their preferred approach with regard to the Tribunal's determination and Judgment. At the time of the hearing all retail premises in Manchester are currently closed, and premises serving food are only able to do so on a take away basis. As a result, Mr Holden expressed a preference for Judgment to be reserved and provided in writing, instead of him being asked to return to the Tribunal approximately two hours after the hearing was adjourned to receive Judgment (or to be informed that more time was required). The claimant agreed with that approach. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

13. The Tribunal was grateful to the claimant and the respondent's representative for the way in which the hearing was conducted.

Facts

14. The claimant worked for the respondent for a very short period of time. She commenced employment on 17 June 2019. She was recruited as she was an experienced Estate Agent, having worked previously for at least two other firms. Mr Holden's evidence was that the claimant's work was very good for the first week and she was personable on the phone and good with clients.

15. When the claimant started work with the respondent she had a young baby, which was something which the respondent knew when she was recruited. The working arrangements of an existing member of staff were changed when the claimant was recruited, at least partly in response to the claimant's circumstances and her childcare arrangements.

16. The claimant was provided with no induction or training at the start of her employment. The respondent had no policies or procedures of any kind in relation to employees in place. There was no policy around internet use and it appears that no

information whatsoever was provided to the claimant about what was expected of her and/or what she should or shouldn't do in terms of use of the internet.

17. The respondent is a very small business, consisting of the Managing Director and three other staff. In his evidence, Mr Holden emphasised his casual approach to staff matters, explaining that he preferred to deal with things informally and preferred to address matters with individuals on their own without anyone else being present (he explained this as being to avoid embarrassment). It was clear that Mr Holden had very limited experience of dealing with employment matters and his evidence was that he had very little experience of dismissing employees.

18. During the time in which she was employed by the respondent, the claimant worked no more than 20 days.

19. On Wednesday 3 July the claimant undertook a viewing of a property, about which the Tribunal was provided with some evidence. Unfortunately, the claimant locked her keys in her car. The claimant wore trainers when she first attended the premises being viewed, which the claimant explained as being the shoes that she wore to travel to the viewing (rather than for the viewing).

20. It was clear to the Tribunal that the viewing clearly did not go well (at least from the viewpoint of the vendor). There was a dispute in the evidence about what happened at the viewing, which the Tribunal does not need to determine. The claimant in her evidence provided her explanation in response to concerns raised.

21. The vendor raised concerns with the respondent. Mr Holden could not recall precisely how it had been raised and with whom. There was no evidence before the Tribunal that the matter had been raised at the time in writing (the document provided was not a complaint made at the time). However, it is clear that the vendor did raise some issues with the respondent in some way.

22. The claimant accepted that Mr Holden spoke to her about the viewing. This conversation was not a formal conversation.

23. Mr Holden was away from the business on Monday 15 July 2019, having taken a long weekend away. In his evidence Mr Holden described how he decided over that long weekend that he would be terminating the claimant's employment, which he explained was for a few reasons.

24. The claimant attended at work on Tuesday 16 July 2019. The claimant's statement said that she attended at 8.30am ready to start work at 9.00am. Another employee was also present in the building.

25. Mr Holden asked the claimant if he could have a word with her in the office at the back of the building. The other employee was left in the public facing part of the office, at the front. Mr Holden did not provide the claimant with any advance notification of this meeting nor did he give her the opportunity to be accompanied. It was Mr Holden's evidence that: he liked to deal with things informally; and that he felt it was better to talk to employees on their own rather than to embarrass them by

speaking to them in front of other staff. This approach was reflected in the way in which this meeting was arranged and conducted.

26. It was not in dispute that Mr Holden told the claimant in the meeting that the claimant's employment was not working out, that her contract was being terminated, and that she should go home immediately. This was a complete and utter shock to the claimant. The meeting was very brief. Neither of the attendees took any notes of the meeting, nor did either record in writing an account shortly after it had ended. The claimant burst into tears and was upset. The claimant took her bags and left the office. The Tribunal has no doubt that the claimant did not expect: the meeting; or to be dismissed.

27. What is in dispute in relation to this meeting is precisely what else (if anything) Mr Holden said and whether or not the claimant said one particular thing.

28. In her evidence to the Tribunal the claimant alleged that Mr Holden *"went on to say that a mother should be at home with their baby anyway"*. Mr Holden denied that he said this, and in answer to questioning referred to the fact that the company employed other women with children (albeit, as the claimant highlighted, those children were significantly older than the claimant's). Accordingly, there is a dispute between the parties about whether Mr Holden said what the claimant alleged in her evidence.

29. The Tribunal did note that in the claim form the claimant had alleged that what was said was slightly different. In the claim form, the claimant alleged that, *"he said he thought I'd be better off at home looking after my baby then working"*. However, the claimant's evidence at the Tribunal hearing was not that he said this, but rather that he said what is recorded at paragraph 28.

30. The second issue in dispute was what the claimant said when she was informed that she was dismissed. Mr Holden's evidence was that the claimant had referred to the dismissal as being a relief, and in answer to questions he said, *"she did say she was relieved".* The claimant denied that she said anything in response.

31. In his witness statement for the Tribunal hearing Mr Holden did not provide details of the reasons for dismissal; he also did not give any reasons for the dismissal to the claimant on the day that she was dismissed. The response form makes reference to: members of staff noticing that appointments were being changed to suit the claimant; the incident on 3 July; and the claimant browsing websites during working hours. In his oral evidence to the Tribunal Mr Holden made reference to each of these matters, as well as recounting an occasion when the claimant had been vocal in the office after suffering a flat tyre. In the light of the fact that this latter reason was omitted from the response form prepared in November 2019 (that is at a time which was significantly closer to the events and in a document which had clearly been prepared with considerably more care than Mr Holden's witness statement), the Tribunal does not accept that the latter issue was genuinely a material factor in the dismissal.

32. The claimant was not given the opportunity to respond to Mr Holden's view about each of these issues, prior to him dismissing her.

33. At the Tribunal hearing, the claimant explained what had occurred with regard to appointments and that, who from the office attended some appointments, had been changed in agreement with other staff to sensibly fit with location, finishing times and travel arrangements. However, as Mr Holden neither explained this reason to the claimant at the time, nor asked her to explain her response to what he perceived, that explanation was not something which Mr Holden would have considered at the time.

34. As explained above, the respondent had no procedures in place whatsoever about internet use.

35. What appears to be the case, in summary, is that Mr Holden perceived the claimant as not fitting in to the office and the very small team which worked for him, based upon the factors he outlined (without discussing his perceptions with the claimant or providing her with an opportunity to respond to him).

The Law

36. The claimant claims direct discrimination because of the protected characteristic of sex. As the claimant has not identified a specific comparator, the comparison is whether she was treated less favourably than a hypothetical comparator.

37. Section 13 of the Equality Act 2010 provides that:

> **"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."**

38. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

39. In this case, the respondent will have subjected the claimant to direct discrimination if, because of her sex, it treated her less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

40. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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".**

41. In short, a two-stage approach is envisaged:

    i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated less favourably than she hypothetically could have been (but for her sex); there must be something more.

    ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must 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. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

42. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the Employment Appeal Tribunal summarise the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

43. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift in a case of direct sex discrimination it is not enough for a claimant to show that there is a difference in sex and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

44. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.**

45. The claimant alleges harassment on the grounds of sex.

46. Section 26(1) of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a)**

the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

47. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds (here of sex). Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

48. The ACAS code of practice on disciplinary and grievance procedures sets out the basic approach which all employers should take when dealing with disciplinary situations in the workplace (and says that employers should follow the same basic principles of fairness when addressing performance issues). It emphasises that fairness and transparency are promoted by using the rules and procedures outlined. A fair process should include: informing the employee of the problem; notifying the employee of the time and venue for a meeting and the right to be accompanied at the meeting; holding a meeting to discuss the problem; giving the employee the opportunity to put their case in response before any decisions are made; and allowing an appeal. The Tribunal is required to take account of the code when reaching its decisions when considering relevant cases. However, the code is a guide to fair practice, it does not necessarily follow that a failure to follow the code means that any action taken is discriminatory or because of a protected characteristic.

Conclusions – applying the Law to the Facts

49. This is a claim in which the Tribunal has not had the benefit of much corroborative or supporting evidence which provides it with assistance in reaching a decision, or in providing support for either party's case. The core issue of whether Mr Holden said what is alleged in the meeting, effectively comes down to one person's word against the other. Why he dismissed the claimant is also, to an extent, a decision where the Tribunal has needed to determine whether one person's assertion is correct, which conflicts with the reason given by the other.

50. The process followed and the decision reached by Mr Holden to dismiss the claimant after no more than 20 days' work, was unfair and unreasonable. Mr Holden failed to follow any of the elements of the ACAS Code of practice on Disciplinary and Grievance Procedures explained above. He gave the claimant no information about the meeting or forewarning about what would occur. He deliberately gave the claimant no opportunity to be accompanied. He provided the claimant with no opportunity to discuss the matters for which he was proposing to dismiss. There was no policy or procedure followed, nor was there any policy or procedure which applied to the matters which resulted in the dismissal. The meeting was brief and cursory and Mr Holden failed to explain to the claimant why he was dismissing her. Mr Holden did not confirm the decision in writing or provide any explanation after the event. Had the claimant had the required length of service, it is highly likely that this Tribunal would have decided that the dismissal was unfair (albeit it must be

highlighted that the Tribunal was not hearing such a claim, and it might have been that a fuller process would have been followed had the claimant had a longer time in employment).

Harassment

51. The Tribunal found both Mr Holden and the claimant to be witnesses who endeavoured to give the Tribunal accurate evidence about what occurred.

52. With regard to the comment that the claimant alleged in her evidence that Mr Holden said in the meeting *("a mother should be at home with their baby anyway"),* the Tribunal does not find, on blance, that Mr Holden said what is alleged. This wording as alleged by the claimant in her evidence in the Tribunal, is very pointed wording which on balance the Tribunal does not find that Mr Holden would have said, based upon his evidence and the Tribunal's view of the evidence he gave (and his denial that it was said). The Tribunal understands and acknowledges that it was a brief and very difficult meeting for the claimant, at which there is no dispute that she was shocked, upset and in tears. In those circumstances it is understandable that recollections may differ. However, the Tribunal does not find that Mr Holden said the words that the claimant alleged in her evidence at the hearing.

53. If either of the attendees at the meeting raised any issues in relation to childcare, the Tribunal finds (on balance) that it was the claimant who made reference to them, when she said she was relieved - as evidenced by Mr Holden. These words were said when the claimant was in a state of shock and in tears, in a brief meeting.

54. The Tribunal notes that what the claimant alleged was said in her evidence, differed from what she alleged was said when she completed the claim form.

55. In the light of the Tribunal's finding on issue 4, the Tribunal has not needed to determine issues 5-7 (as identified in the list of issues and at paragraph 4 above). However had the Tribunal concluded that Mr Holden had said the words alleged, it is clear that: such conduct would have been unwanted; would have related to sex; and would have reasonably had the effect of violating the claimant's dignity and creating a humiliating or offensive environment for her.

Direct discrimination

56. In terms of the reasons for the claimant's dismissal, Mr Holden provided a variety of reasons. Whilst, as explained, the process followed in dismissing for these reasons was unfair, none of them are sex or issues relating to sex (or indeed childcare). The Tribunal finds that Mr Holden's reasons were his perception of: the claimant's internet use in the office; the claimant re-arranging appointments; and a vendor complaint. Whilst these perceptions may have been erroneous and/or unfairly formed, the Tribunal finds that it was these perceptions which resulted in Mr Holden deciding that the claimant did not fit in to the office and the very small team which worked for him.

57. The Tribunal has carefully considered the burden of proof. Under the burden of proof, the burden is initially on the claimant to prove that she was treated less favourably than a hypothetical male comparator (in circumstances which do not materially differ) and the reason for such treatment was her sex. In the view of the Tribunal, the claimant has neither proved on balance: that she suffered such less favourable treatment than a hypothetical male comparator in materially the same circumstances; or that the dismissal was because of her sex.

58. The Tribunal has not identified the "something more" which is required to reverse the burden of proof, that is (in summary) the something which would demonstrate a potential connection to sex. The Tribunal find that there was not anything which pointed to the dismissal being about the claimant's sex (or about her childcare responsibilities). As a result, the burden remains on the claimant and the Tribunal does not believe that she has satisfied the burden as explained in paragraph 57. This decision is, of course, reached in the light of the Tribunal's findings about what was said in the meeting as explained under the harassment sub-heading above – had the Tribunal reached a different decision about what was said, the decision about the application of the burden of proof (and the identification of the something more) would have been different.

59. In summary in relation to issues 2 and 3 and the decision to dismiss, there is no evidence that the claimant's treatment was due to her sex. The claimant has not proved on the balance of probabilities that she was treated less favourably by being dismissed than would have been a hypothetical male comparator in the same circumstances.

60. The claimant's direct discrimination claim was also brought on the basis that the way in which Mr Holden spoke to her when she was dismissed on 16 July, was less favourable treatment on the grounds of sex. Mr Holden's evidence was that his informal and to the point approach to employment matters, and the fact that meetings were conducted without other employees being present, was the approach that he always took (irrespective of sex and albeit that such an approach might be unfair and poor employment practice).

61. As with the allegation of dismissal, there is no evidence that the cursory way in which the meeting was conducted was about the claimant's sex. The Tribunal does not find that the "something more" has been proven such as to reverse the burden of proof. On balance the claimant has not proved that she was treated less favourably than a hypothetical male comparator in the same circumstances (which did not differ materially).

62. In reaching the decision explained above, the Tribunal has also taken into account (albeit as a relatively minor factor) that when the claimant was recruited, Mr Holden knew that she had a young baby, and that some account would need to be made in working arrangements in respect of her childcare. Whilst it may be considered poor-practice for Mr Holden to reach a decision to dismiss after such a short period of employment, nonetheless there is no evidence to demonstrate that either the decision made or the way in which the dismissal was conducted was as a result of the claimant's sex (or her childcare responsibilities).

Summary

63. For the reasons explained above, the Tribunal does not find that the claimant has been treated less favourably on the grounds of sex, and does not find that she was subject to unlawful harassment related to sex.

Employment Judge Phil Allen

13 November 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 November 2020

FOR THE TRIBUNAL OFFICE

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