EMPLOYMENT TRIBUNALS

Claimant. **Ms J Holleran**

Respondent **WR Group Limited trading as Webrecruit**

Heard at: **Bristol remotely via CVP** **On: 7 and 8 January 2021**

Before: **Employment Judge Hargrove,**

Appearances
For the Claimant: **In person**
For the Respondent: Mr DG Jones, managing director

RESERVED JUDGMENT AND REASONS

The judgement of the tribunal is as follows: –

1. The claimant's claim of direct sex discrimination contrary to section 13 of EQA is not well founded and is dismissed.

REASONS

1. it is now agreed that the claimant was employed by the respondent as a client relationship manager (CRM) from 29 May 2018 until her dismissal at a meeting on 9 December 2019 after which she was paid in lieu of notice up to 9 January 2020.
2. The claimant presented her claims to the Employment Tribunal on 26 February 2020 having entered into early conciliation from 27 January. Her claims were originally of unfair dismissal, of sex discrimination in respect of her dismissal and of a failure to grant the right to be accompanied at a disciplinary or grievance meeting under section 10 of the Employee Relations Act 2010.
3. The claim of unfair dismissal was subsequently struck out as the claimant did not have the relevant two years length of service required to bring such a claim under section 108 of Employment Rights Act.
4. The issues arising from the remaining two heads of claim were identified at a case management hearing on 15 October 2020 and are set out in the orders at page 145 of the bundle of documents. There were identified two specific acts of

discrimination. In particular the acts of sex discrimination identified were: –(1) Not allowing the claimant to move departments/remain in employment until a position became available in accounts management; (2) Dismissing the claimant.

5. The hearing was originally listed at the Exeter Employment Tribunal and the parties agreed that it be listed before an employment judge sitting alone, having regard to Covid . The hearing was subsequently converted to a CVP remote hearing. There were two witnesses; the claimant and the respondent's managing director, Mr David Jones. Both relied upon witness statements and there was a bundle of documents consisting of 154 pages to which additions were made.

6. **Background facts.**

6.1. The respondent is a digital recruitment advertising reseller. It offers commercial clients online recruitment services which are purchased from and advertised in electronic media such as Facebook and LinkedIn. Prior to Covid the respondent employed around 35 employees in six different departments. The gender breakdown of the staff is of some relevance. The claimant was employed in the sales department as one of six CRMs reporting to Head of Sales, originally Adele Small, and lastly from 11 November 2019, reporting to a Sales Manager, Sean Kelly. The respondent claims that the reason for the change was concerns about the claimant's performance, as evidenced by the following :

6.2. The claimant's last appraisal (Q3) was by Adele Small on 25th October 2019. See pages 5 to 11. The claimant says there was no meeting at which she signed off the document, which I accept, but she accepts that she did receive it, and that it incorporates her comments by way of self assessment at page 8. Its contents are of some relevance to the outcome of the case. In addition, at page 12 of the bundle there is a document headed "Jessica Holleran revenue data" which sets out on a monthly basis from June 2018 to November 2019, the revenue targets given to her, the actual revenue achieved, the percentage of the revenue targets achieved, and in further columns, whether the revenue was from new business or inherited accounts or from marketing leads. This purports to show a significant drop in performance from June 2019, but I note that her targets were increased from that period.

6.3. In order properly to understand and place the issues in context, the employment judge ordered the respondent at the outset of the hearing to produce organisation charts. The relevant parts of it identified the occupants of posts not only in the sales department (including the claimant), but also the account management department. The sales department would be in initial contact with commercial clients to advertise vacancies, but once a placement was booked it would be passed to an account manager in that department, although the CRM would continue to work with the account manager and the customer in relation to the filling of the vacancy. The claimant frequently worked with Glenn Weeks, an Account Manager, in managing a placement for customers.

6.4. For the purposes of the claimant's claim of sex discrimination, GW is relied upon as a comparator, whose treatment, the claimant claims, demonstrates that her subsequent treatment, including her dismissal, was because of her sex.

6.5. **Relevant statutory provisions**.

Section 13(1) of EQA provides: – "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".

Section 23 (1)–"Comparison by reference to circumstances" provides that: "On a comparison of cases for the purposes of section 13… There must be no material difference between the circumstances relating to each case".
Section 39 prohibits discrimination in the employment field. Section 39(2) provides that: "An employer A must not discriminate against an employee of A's, B-
(a) as to B's terms of employment;
(b) in the way they affords B access or by not affording B access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service,
(c) By dismissing B;
(d) By subjecting B to any other detriment.
Section 136(2) and (3), **burden of proof,** provides: "If there are facts from which The tribunal 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, but subsection (2) does not apply if A shows that A did not contravene the provision".

6.6. The claimant claims that in August 2019 she had some personal issues and that she approached Mr Jones for help. There is an exchange of emails at pages 66 to 73 of the bundle dating from 27 August to 18 September. In an email at page 66 she confidentially details monetary problems, as a result of which she had had to move back to her Mother's house, serious concerns about her grandparents' health, to whom she was close, and that she was behind with her financial targets. The claimant had consulted her GP about her mental health. It appears that she was asking for financial help in the form of a loan against future commission. The exchange does not show that the approach was dealt with unsympathetically, but the claimant claims that Mr Jones' attitude to her changed and that he became unsympathetic to her. Mr Jones claims that he passed the request on.

6.7. On 3 December 2019 the claimant emailed Mr Jones for a meeting. see page 13. It is common ground that the claimant said that she was very unhappy in her present sales role and that she requested a move of department to an account manager role. The claimant claims that GW had made a request to move from accounts to sales. It is also common ground that the claimant said that if she did not get an accounts manager role she would resign. The claimant says that GW had made a similar request to move to Sales.There is also an issue as to whether or or not she described it as a "strategic" role, which Mr Jones says does not exist, but I do not regard that dispute as relevant. Mr Jones claims, and I accept, that it had been noted that she was she appeared unmotivated and that her performance had been declining. I also accept that Mr Jones told her he would refer the matter to the head of recruitment services, Tim Chapman, and to the head of sales. Jones also says that he said that he would speak to the Head of the Charity team in Sales, but that the claimant indicated she was not interested.

6.8. I accept that Mr Jones subsequently spoke to Mr Chapman and Mr Kelly, the claimant's then line manager, and that it was decided to dismiss her on the basis that it was not standard practice in the industry to allow sales employees to continue in their roles if demotivated. Another male employee in Sales. Matt Goulette, had been peremptorily dismissed for poor performance, but the claimant submits that he had been the subject of performance management, which is disputed by the respondent.

6.9. That decision was communicated without warning at a meeting with Mr Kelly and Jasper Kashap on 9 December. She was called into the meeting at

9:15 am. The notes of that meeting are at page 17. It lasted no more than 15 minutes.

The claimant expressed a belief that she had been discriminated against because she was a single working mother. She claims, and I accept, that she had been removed without prior notification from the sales WhatsApp group at 1 am that morning. She asked for the whistleblowing policy. She was in effect summarily dismissed and handed her belongings.

The claimant was placed on garden leave and paid up to the 9th of January 2020. She claims that it had been agreed that she would be paid for the whole of January. I conclude that this was a misunderstanding as to what she had been told at the Dismissal meeting.

6.10. On 20 December 2019 a termination letter was sent to the claimant by her line manager Sean Kelly. See page 20. In particular, The second paragraph stated: "The reason for the termination of your employment is due to you expressing your incapability to work within the sales team in your current role as the CRM and unfortunately, there were no alternative vacancies within the account management team as per your request". The letter did not ostensibly mention any issues about her performance. There remains an issue as to whether or not there was or was not any alternative vacancy at that time within the account management team.

6.11. On 6 January 2020 the claimant sent a letter headed "direct discrimination". The claimant materially raised the following issues: – the absence of notice of the meeting to dismiss her; the refusal of the respondent to allow her to move to the Accounts Department on the basis that there was no position for her, whereas it was claimed that when GW had made a request to move from the account management to the sales department earlier in the year when there was no position for him, he was allowed to remain within his current role until a new opening became available and was not instantly dismissed. She also complained that she had been given no notice to attend the meeting that had resulted in her dismissal, and had been denied representation. She stated a belief that she had been treated less favourably because she was female.

6.12. At the grievance meeting on the 20th of December the claimant was attended by Wayne Brown, and the respondent's attendees were Mr Jones and Mr Chapman, head of recruitment services. In essence, the claimant raised in more detail the issues that she had raised in her grievance letter. The claimant handed in a proposed Settlement agreement under ACAS guide lines. Mr Jones wrote to the claimant on the 24th of January see page 31 rejecting the grievance and notifying her of her right of appeal, but the claimant did not appeal, and presented her claim to the tribunal on 26 February 2020. That concludes the chronology of events.

7. **Conclusions.**

The two-stage burden of proof provisions in section 136 of EQA requires that the claimant has to show at the first stage prima facie evidence from which the tribunal could conclude, in the absence of any other explanation that the reason for the treatment is the prohibited act i.e. sex. The burden then shifts to the respondent to show that sex discrimination had nothing to do with that treatment. This test is set out in more detail in the 12 point guidelines in Igen v Wong 2005 ICR page 931 Court of Appeal. In applying the guidelines in circumstances where the claimant relies upon an actual or hypothetical comparator the employment tribunal has to apply section 136 as set out at paragraph 6.5 above. The provision is further explained in paragraph 3.23 of the EHRC code of practice on employment of 2011. This demonstrates that the circumstances of the actual comparator relevant to the circumstances of the

treatment of the employee, (other than the difference of sex), must not be materially different. In this case, I am satisfied that Mr Jones did have in mind in the case of the claimant (1) that her performance in her current job in sales had genuinely declined as demonstrated in some aspects of the Q3 appraisal, and in the performance figures; (2) that the claimant was not motivated to continue in the sales job and was expressing an intention to resign if she was not moved to an account management job, having applied for jobs elsewhere. This is to be contrasted with the circumstances of the male comparator GW. There is no suggestion that he was underperforming in his role in account management. He was considered a highflyer. It is correct that he applied in early December 2018 to move into sales and was refused, but not, I accept, in the same circumstances whereby the claimant requested a move from sales to accounts management and was refused. The explanations for the differences in treatment were that that the claimant was not performing in her role and GW was performing well. In addition, I accept that there were commercial reasons why GW should not be moved at that time arising from concerns about the performance of the account management team as a whole. This resulted in a decision that his requested transfer to sales be delayed until March/May 2019. This is corroborated by internal emails in December January at pages 37 to 42. I had in addition to consider the continuing advertisement for a vacancy in the account management department set out at paragraph 1 (i) of the bundle showing dates advertised from 12th of July 2019 to 14th February 2020. This appears to contradict the respondents explanation that there was no vacancy for the claimant to move into at the time of her request on 3 December 2019. I have accepted however that the vacancy, to replace a female going off on maternity leave, was filled by Lauren (female) in November 2019. This does not appear to explain why the vacancy was advertised beyond that date. Mr Jones explains that it advertised for a short period as a pipeline vacancy, referring to the respondent's expectation to fill a vacancy in the future. I note that an earlier vacancy for an account manager on the same page had also been advertised as a pipeline vacancy for May to June 2018. Mr Jones admits that he ordered the pipeline advert to be taken down on or shortly after 19th of December because of concerns as to how it might appear to the claimant. However, I am satisfied that the reasons why the claimant was dismissed and not offered any alternative post in accounts management were genuinely because of the perception of her lack of motivation in the sales post; because she was not wanted by management in the accounts department and to a lesser extent there was no current vacancy in that Department . I have accepted that these reasons had nothing to do with the claimant's gender. The reasons why GW's application for a move from the accounts department to sales was allowed but postponed were entirely different. In addition I accept that there are a significant number of female employees in this organisation, even if not at all levels. There is little basis for a finding of underlying discrimination.

Finally, I note that another male member of the sales team, Matt Goulette, was also summarily dismissed for performance issues in 2018 in similar but not identical circumstances to the claimant. As I stated during the evidence in this case, I consider it reprehensible that the respondent seems to have adopted a practice of not warning employees, in advance, of capability issues and dismissing without proper notice of a hearing and without giving them the opportunity of representation – a clear breach of section 10 of the Employment Relations Act 1999. Unreasonable or reprehensible conduct on the part of an employer does not per se amount to discrimination, for example if all employees of whatever sex are treated in the same way.

Employment Judge Hargrove
Date: 9 January 2021.

Judgement and Reasons sent to the parties: 22 January 2021

FOR THE TRIBUNAL

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