EMPLOYMENT TRIBUNALS

Claimant
Miss H Ouaaoub

Respondent

Geronimo Web Ltd

Heard at: **Southampton (by Hybrid)** **On:** **26 April 2021**

Before: **Employment Judge Dawson, Dr N Thornback, Ms J Ratnayake**

Appearances
For the claimant: Representing herself
For the respondents: Mr Hodge, counsel

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

Introduction

1. By a claim form presented to the tribunal on the 22 September 2019 the claimant brought claims of unfair dismissal, discrimination on the grounds of sex, notice pay and arrears of wages.

2. On 10 December 2019 the claim of unfair dismissal was struck out on the basis that the claimant had not been employed by the respondent for 2 years.

3. At a hearing before Employment Judge Roper on 14 May 2020 the claimant clarified that the claim for breach of contract related to a claim for accrued

holiday pay which was not included in her final salary. The claimant confirmed to this tribunal that those sums have now been paid.

4. The issues were identified by Employment Judge Roper and directions given as set out in the Case Management Summary which was sent to the parties on 15 May 2020.

5. At the same hearing Employment Judge Roper made a deposit order on the grounds that the claimant's allegations had little reasonable prospect of success. The claimant paid the deposit.

The Issues

6. The issues are recorded at pages 3 to 5 of the Case Management Summary referred to above.

7. At the outset of this hearing the tribunal discussed the issues with the parties. The claimant confirmed that her claim of harassment on the grounds of sex remained as set out in paragraph 2 of the list of issues. She also told us about other incidents with a colleague, Khalid Hamadeh. Upon clarification, the claimant told us that she was not seeking a remedy in respect of any allegations regarding Khalid Hamadeh but she wished the tribunal to be aware of them as part of the background to the claim. The relevant information was in the claimant's witness statement and we considered it as part of the evidence in the case.

8. The respondent also accepted that the issues in respect of harassment were as identified by Employment Judge Roper but considered that the humiliating and bullying email referred to within issue 2.1, in fact, was sent in February 2019. We asked the claimant whether the emails from September 2018 and December 2018 were in the bundle but she was not able to point to them. There were relevant emails in January and February 2019 (see pages 91 to 93 of the bundle).

9. In respect of the claim of direct discrimination on the grounds of sex, the claimant confirmed that she relied upon the comparator Haitham Ali and both parties confirmed the issues remained as set out within issue 3 of the Case Management Summary.

10. The issue of time only relates to the claim of harassment, the respondent accepts that the claim of direct discrimination on the grounds of sex has been brought within time.

11. As indicated, the claimant's claim of holiday pay has now been satisfied.

Applications and the Conduct of the Hearing

12. During the course of the hearing the claimant made an application to adduce two new sets of documents.

13. The first application related to 3 lots of reviews of the respondent which were on the Internet and which appear to have been created by current or former

employees of the respondent. Those documents had been disclosed to the respondent but not included in the bundle. The respondent did not object to us receiving those documents and we did so. Some of the reviews are favourable to the respondent and some are not, they were not referred to again within the course of the hearing.

14. The 2nd application, which was made at the end of Jackie Lawton's evidence, was to adduce a transcript of a covertly recorded conversation between the claimant and Ms Lawton. The claimant stated that it would show that answers given by Ms Lawton in cross examination, about whether she asked the claimant whether she had a boyfriend, were untrue.

15. The transcript (and the recordings of the conversation) had not been disclosed to the respondent. The claimant confirmed to us that she was aware that the transcript should have been disclosed at the date ordered by Employment Judge Roper but she did not disclose it. The respondent objected to the transcript being considered by the tribunal on the basis that it had not been disclosed in accordance with Employment Judge Roper's order nor, even, on the morning of the hearing. If the tribunal allowed the application the respondent would need an adjournment to listen to the recording and check that the transcript was accurate and the case could not be completed within the time allowed.

16. We noted that both parties had, in answer to correspondence from the tribunal, confirmed that the case could be finished within the time set down by Employment Judge Roper.

17. We agreed with the submissions made by the respondent that it would be unfair to allow the transcript into the hearing without giving the respondent an opportunity to listen to the recording and check the transcript. The respondent's counsel would also need to take instructions from the respondent and it may be necessary to recall the claimant to adduce the transcript and answer questions on it. The case was already subject to pressure of time given that it had only been listed for one day and it was inevitable that the case would have to be adjourned if the transcript was admitted. Having considered the overriding objective, we did not consider it would be fair to the respondent, or to other litigants waiting for their cases to be heard, for the case to be adjourned with the resulting delay and increase in costs. The claimant had made a choice not to disclose the transcript at the appropriate time and, in the circumstances, it was not unfair to her to refuse to admit the transcript during the hearing at the point when the claimant's evidence had finished and the claimant had largely finished cross-examining Jackie Lawton.

18. The case was conducted on a hybrid basis pursuant to earlier orders made by the tribunal. The claimant attended in person, as did the tribunal, but the respondent attended by video. In some respects the sound quality was unsatisfactory because of the technology available to the tribunal. The respondent could not always hear the claimant's answers or the tribunal's comments. By a process of repetition and speaking loudly the case was dealt with and neither of the parties sought to move the case to a fully "in person" hearing.

19. At the outset of the hearing we agreed a timetable with the parties. The respondent indicated that it would complete cross examination of the claimant within 40 minutes and did so with some time to spare. The claimant indicated that she would cross-examine Ms Lawton for 45 minutes, in the event the cross examination took around 1 hour and 15 minutes. The tribunal did not stop the claimant asking questions.

20. The claimant had produced witness statements of 3 witnesses in addition to herself. Those witnesses were not called to give evidence and although we have read them we have given them limited weight, given the inability of the respondent to cross-examine the witnesses.

21. The claimant gave evidence and the respondent called evidence from Jackie Lawton, its Chief Executive Officer. We had a bundle running to 139 electronic pages which we observe, regrettably, did not comply with, amongst others, paragraphs 24.1 and 24.4 of the Presidential Guidance on remote and in-person hearings. It is of real assistance to the tribunal if parties comply with that Guidance, it enables the hearing to run more smoothly and also speeds up both the initial reading time and the decision-making process. Compliance with the Guidance is not optional or voluntary.

22. Although the tribunal had intended to give judgment and, if appropriate, deal with remedy during the one-day hearing, the various applications and slippage in the timetable meant that the tribunal reserved its decision.

Findings of Fact

23. The respondent is a digital marketing company which provides digital marketing services in the motor industry to Ford and Lincoln dealerships worldwide.

24. The claimant was employed by the respondent from 27 November 2017 as an Arabic/French speaker to work in the respondent's Basingstoke office as an account manager for motor dealerships in North Africa and the Middle East.

25. We accept the claimant's evidence that her role was to manage the content and websites of dealers in 4 countries in the Middle East and 3 countries in North Africa. The countries included Saudi Arabia, Bahrain, Kuwait and Iraq.

26. We accept the claimant's evidence that there was friction between her and a colleague- Khalid Hamadeh. The claimant says that there were particular issues in September 2018. As we have indicated, the allegations made in that respect do not form part of the allegations in this case but the claimant say they are relevant background information. The relevance of the allegation to the issues in this case is that the claimant says that when she raised matters with Ms Lawton, Ms Lawton said that she was shocked and she would arrange a meeting with the respondent's lawyers but the meeting never happened. Khalid Hamadeh resigned in October 2018. We were not taken to any evidence to suggest that the claimant sought to pursue the matter with Ms Lawton.

27. Khalid Hamadeh had a close relationship with the marketing manager of a client of the respondent based in Saudi Arabia called AJVA or Al Jazirah. AJVA was

a major client of the respondent in the Middle East and is described by Ms Lawton as being one of the largest Ford dealerships in the world.

28. In paragraph 12 of her witness statement the claimant sets out bullying which she says that she was subjected to by Mr Ahmed[1] of AJVA. She does not give any specific dates. She does not suggest that the bullying by AJVA was because of her sex. Indeed paragraph 12 gives the impression that AJVA was unhappy because Khalid Hamadeh had not done a handover to the claimant when he left and was also unhappy because Khalid Hamadeh had left at all, being under the impression that the claimant was behind his departure.

29. There is no evidence of humiliating and bullying emails being sent from a Saudi client in September 2018 and December 2018, including in the claimant's witness statement.

30. We do, however, find that the was ill will from AJVA towards the claimant by January 2019 and she would have found that distressing. There is an email in the bundle at page 91 which shows AJVA complaining about the claimant's work.

31. We accept the respondent's evidence that, on 24th of January 2019, the claimant went into the COO's office and was in a distressed state and said that she could no longer continue to work on the AJVA account. We also accept that the COO acted on that information and contacted Jackie Lawton. Ms Lawton then telephoned Mr Ahmed and the notes of the conversation appear at page 92 of the bundle. Those notes show that Jackie Lawton said to Ahmed that the claimant had collapsed in the office and was in pieces as she couldn't cope any more with the rude way in which she was being spoken to. There is then an interjection by someone called Giri who exploded stating that the claimant should be fired and asking what sort of company the respondent was. There was clearly an argument on the phone and we accept that in the course of that conversation AJVA said that it did not want to work with the respondent and vice versa. Ms Lawton asked that if there was complaint about the claimant it should be put in writing.

32. A complaint was put in writing as appears at page 93 of the bundle. It states "…we need to assign Ford and Lincoln Saudi accounts to Haitham as he is more capable than [the claimant] who failed to serve us in a professional way and has put us is in trouble many times". It then sets out a number of particulars. None of those particulars obviously relate to the claimant's sex.

33. On the same day Ms Lawton wrote to representatives of Ford stating "following a telephone conversation I had with Ahmed at Al Jazirah [AJVA] this morning, I'm sadly having to let you know that the relationship is untenable so therefore we will not be able to give Al Jazeera a contract extension and we will need to terminate the contract on 21 May 2019. We will continue to service Al Jazirah up until this date and continue delivering the services included in the programme."

[1] This individual is variously referred to as "Ahmed" and "Mr Ahmed".

34. Having regard to paragraph 19 of Jackie Lawton's witness statement it is apparent that whilst this email referred to the Ford contract with AJVA, the Lincoln contract with AJVA was to continue until October 2019.

35. On the same day the respondent told the claimant that she did not need work on that account any more as is evidenced by an email at page 94 the bundle where the claimant writes "Ahmed's last email is the most ridiculous email I have received in my career to date. As agreed today with Jackie and Jodie, Haitham will be handling AJVA Ford and Lincoln moving forward." The claimant did not indicate that she was at all unhappy with that arrangement.

36. We find that the respondent did, therefore, give the claimant support in the circumstances in which she found herself. Part of the claimant's argument is that the respondent only took action when, on the telephone call, representatives of AJVA were abusive towards Ms Lawton. That, however, cannot be the whole picture since the reason that the telephone call took place was because of the treatment which the claimant had received. The respondent did take action in response to the circumstances that the claimant was in. The respondent did not require the claimant to continue working on the account and the claimant did not suggest that she wanted to do so (indeed, to the contrary, we find that she said that she could no longer do so).

37. Even if, contrary to our view, the respondent's reaction to the situation was lacking, there is no evidence that it was lacking because of the claimant's sex and we are satisfied that the claimant's sex played no part in the decisions being taken by the respondent.

38. Moreover there is no evidence that the actions of AJVA were because of her sex- not only has AJVA made specific complaints about the claimant but we also repeat the matters we have set out above in paragraph 28.

39. Between January and April 2019 the respondent's business in the Middle East declined. The respondent had not only had difficulties with AJVA, but had also lost dealerships in Bahrain, Kuwait and Iraq.

40. As we have indicated earlier AJVA was a significant client for the respondent and we accept Ms Lawton's description of them being one of the biggest and most valuable customers.

41. Haitham Ali was a colleague of the claimant who had been employed in the same team as the claimant doing similar work from December 2018. The claimant was to manage North Africa and she and Haitham Ali were to manage the Middle East together.

42. Haitham Ali resigned from the respondent on 17 April 2019 and was, thereafter, on a 2-month notice period. According to Ms Lawton, whose evidence we accept, he left the UK to go to Egypt at the end of April 2019. It was explained to us that in May 2019, Haitham Ali ceased being an employee of the respondent and started work as a contractor for it, based in Egypt.

43. The order of Employment Judge Roper dated 14 May 2020 records that the respondent told him that Mr Ali had already resigned at the time of the claimant's dismissal and returned to Egypt and was not an employee of the respondent at the time complained of. It is on that basis (at least in part) that he made a deposit order. The respondent now accepts that is wrong and, in fact, although Mr Ali had given notice of resignation at the date of the claimant's dismissal, he was still an employee and had not, at that point, returned to Egypt. There is no basis for believing that Employment Judge Roper did not properly understand what was told to him. The claimant asks us to find that he was deliberately misled. Having heard the evidence of Ms Lawton we do not find that the respondent deliberately misled him at the hearing, it is more likely that its representative got confused. We note that paragraph 20 of the Amended Grounds of Resistance (dated 27th of July 2020) is accurate and there has not been any attempt to hide the real position.

44. The respondent's explanation as to the decisions it made at this point has not been provided with much clarity. Ms Lawton states "the decision to terminate Hasna's employment was certainly not based on her sex, it was due to the amount of work that was available. We could not sustain two people in the role and a large part of it was seeing out the AJVA contract which Haitham was doing already and we could not offer Hasna a part-time role because of her sponsorship visa minimum pay requirements"

45. The respondent did not engage in any redundancy selection process, it took the view that there was no need to do so because the claimant had less than 2 years qualifying service. It told the claimant on 25 April 2019 that she had been made redundant and gave her a letter to that effect.

46. At the same time the respondent sent a memo to all staff which appears at page 123 of the bundle. It refers to the fact that Haitham Ali (whilst presumably still in his notice period) had flown to each market in the Middle East and done a great job in securing four market contracts. It goes on to say that he will take on a new role where he will be responsible for the Middle East region across Ford and Lincoln and the Arabic part of North Africa.

47. There is a certain illogicality in the statement of Ms Lawton that "we could not sustain two people in the role" in that once Haitham Ali had resigned there was no need for the respondent to sustain 2 people in the role. From the end of his notice period, the only remaining manager for the Middle East would be the claimant.

48. We find that more than one factor was operating on the mind of Ms Lawton and the other directors of the respondent in making decisions about the employment of the claimant. We accept that there was a downturn in work but that alone does not explain why the claimant was selected for redundancy when Haitham Ali was persuaded to carry on working for the respondent, albeit on a contractor basis.

49. The claimant says that it was because he was a man and the respondent had a view that the market in the Middle East did not like working with women. The claimant put to Ms Lawton that she had said that to the claimant, Ms Lawton

denied the allegation. There is no contemporaneous evidence to support the assertion made by the claimant in this respect and we did not find either witness to be obviously lacking in credibility. We have not been persuaded, on the balance of probabilities, that this comment was made.

50. We find that the real reason why the respondent persuaded Haitham Ali to become a contractor in the Middle East and decided to dismiss the claimant was because it believed that the claimant would not work on the AJVA account and, even if she would, AJVA would not accept her as their account manager. That explanation was given by Ms Lawton in answer to questions by the tribunal when she said that the decision in respect of the claimant came down to the AJVA business because that was a very powerful client which took up 70% of their time. She went on to say that in addition the respondent had lost 60% of its revenue but confirmed that if the claimant could have worked on the AJVA account things would have been different. We accept that evidence, noting that the AJVA Lincoln contract was always to continue to October 2019. We note that is the explanation given in the Amended Grounds of Resistance in Paragraphs 22 and 23.

51. We find that Haitham Ali was not in the same situation as the claimant. The primary difference between him and the claimant was not that he had resigned but that he was willing to work on, was able to work on and was, in fact, working on the AJVA account.

52. We also find that a man in the same position as the claimant would have been treated in the same way as the claimant. That is to say that a man who had indicated he was unwilling to work on the AJVA account and in respect of whom AJVA had made complaints and said they would not work with him would also have been selected for dismissal in the same way that the claimant was.

The Law

53. The following are relevant sections from the Equality Act 2010.

> **13 Direct discrimination**
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> 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.
>
> **26 Harassment**
>
> 1) 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—
>
> a. violating B's dignity, or

b. creating an intimidating, hostile, degrading, humiliating or offensive environment for B

4) In deciding whether conduct has the 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.

5) The relevant protected characteristics are—

…

sex;

109 Liability of employers and principals

(1) ...

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(as the case may be).

54. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

(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.

55. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

56. In Shamoon v Chief Constable RUC [2003] IRLR 337, the House of Lords held "No doubt there are cases where it is convenient and helpful to adopt this two-

step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined" (paragraph 8).

57. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate 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.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Conclusions

59. We give our conclusions by reference to the issues set out in the order of Employment Judge Roper.

Harassment on Grounds of Sex

60. In respect of issue 2.1 we do not find that the respondent engaged in unwanted conduct by failing to support the claimant in challenging sexist views of the client. In fact there is no evidence that the client expressed sexist views about the claimant or that was the reason for its complaints about the claimant. We find, in any event, that the respondent did support the claimant in the situation which existed.

61. In respect of issue 2.2, even if there was a failure by the respondent to support the claimant we do not find that was because of the claimant sex.

62. In respect of issues 2.3 and 2.4 we accept that if, contrary to our finding, the respondent had failed to support the claimant in the situation which existed that would have had the purpose or effect set out in those issues.

63. We have taken account of the point in issue 2.5 in reaching our conclusions in relation to issues 2.3 and 2.4.

Direct discrimination on Grounds of Sex

64. Issue 3.1 is a statement of fact in respect of which we need to draw no conclusions.

65. In relation to issue 3.2 we accept that the claimant was treated less favourably than Haitham Ali in that she was selected for dismissal whereas he was persuaded to continue to work for the respondent, albeit on a contractor basis.

66. In respect of issue 3.3, the claimant has proved that Haitham Ali was male and was treated differently to her, however given the difference in their circumstances we do not find that the claimant has proved facts from which we could properly and fairly conclude that the difference in treatment was because of the protected characteristic. That would be the case even if we constructed a hypothetical comparator who was all material respects the same as the claimant but male.

67. However, even if we were wrong and the burden of proof had shifted, the respondent has satisfied us that dismissal of the claimant was not because of her sex but because of the issues around the AJVA account as we have set out above. Thus in respect of issue 3.4 we find that the respondent has proved a non-discriminatory reason for the treatment which means that it has shown that it did not contravene section 13 Equality Act 2010.

Time

68. Given our findings of fact, we do not need to go on to consider the question of time.

Accrued Holiday Pay

69. The holiday pay to which the claimant was entitled has been paid. Under regulation 30 Working Time Regulations a declaration is not made by the tribunal unless a worker has been refused permission to take leave. Because no sums are now due to the claimant, no order is made in that respect.

Costs

70. The respondent indicated that if the claimant were unsuccessful it would apply for costs. Although we have heard no submissions in that respect and such an application would not normally be surprising where a deposit order has been made, before it makes any application we urge the respondent take into account the fact that the deposit order was made in circumstances where Employment Judge Roper had incorrectly been told that Haitham Ali had already resigned and returned to Egypt and was not an employee at the time of the claimant's dismissal. We also invite the respondent to reflect upon the points made in paragraph 45 above.

71. That is, of course, merely to highlight points which would need to be addressed if an application for costs were to be made. If an application is made them Tribunal will consider it, on its merits, at the time.

Employment Judge Dawson

Date 29 April 2021

Judgment sent to the parties: 05 May 2021

FOR THE TRIBUNAL OFFICE

Notes

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Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP

The hearing was conducted by some of the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.