



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs J Watts

Respondent: Dimensions (UK) Limited

Heard at: Newcastle Hearing Centre (by CVP)

On: 12 March 2021

Before: Employment Judge Morris

Members: Mrs C Hunter
Mrs D Newey

Representation:

Claimant: In person

Respondent: Ms C Meenan of counsel

REASONS

Representations and evidence

1. With the agreement of the parties the Hearing was conducted by way of the Cloud Video Platform. The claimant appeared in person and gave evidence herself. The respondent was represented by Ms C Meenan of counsel who called Ms L Graham, Operations Director of the respondent, to give evidence on its behalf.
2. The evidence in chief of or on behalf of the parties was given by way of written statements, which had been exchanged between them. The Tribunal also had before it an agreed bundle of documents comprising some 130 pages that were relevant to the issues it had to determine. The numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle.

The claimant's complaints

2. As had been identified at a Preliminary Hearing conducted on 20 January 2020, the claimant's complaints are as follows:

- 2.1 The respondent had subjected the claimant to harassment contrary to sections 26 and 40 of the Equality Act 2010 (“the Act”).
- 2.2 The respondent had directly discriminated against the claimant because of age contrary to sections 13 and 39(2)(d) of the Act.

The issues

3. The issues in this case were also identified at the above Preliminary Hearing as being as follows:

Harassment

- 3.1 Did the respondent engage in conduct as follows:
 - 3.1.1 Ms Graham “telling the claimant on 2 October 2019 that Ms Graham hadn’t bothered to inform DBS or safeguarding of the error due to the fact that the claimant only had 22 months working life left”;
 - 3.1.2 Ms Graham “telling the claimant on 2 October 2019 that the claimant would not be a potential risk to clients as the claimant would probably not get another job at her age”?
- 3.2 “If so, was that conduct unwanted?”
- 3.3 “If so, was it related to the protected characteristic of age?”
- 3.4 “Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?”

Direct discrimination

- 3.5 “Did the respondent treat the claimant less favourably by reason of conduct of Ms Graham as alleged above?”
 - 3.6 “Was such conduct because of the protected characteristic of age?”
 - 3.7 “Can the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim?”
4. It is appropriate that it should be recorded that at the Preliminary Hearing the claimant clarified that her complaints related to her regarding the comments of Ms Graham as being unpleasant and discriminatory on grounds of age. She did not complain that her dismissal was unreasonable or unfair or was on grounds of age.

Consideration and findings of fact

5. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.
 - 5.1 The respondent is a charity that provides support for people with learning disabilities, autism and complex needs, helping them lead ordinary lives in their local communities.
 - 5.2 The claimant was employed by the respondent as a Support Worker. Her employment commenced on 22 May 2018 and ended on 22 July 2019 when she was dismissed for gross misconduct.
 - 5.3 In June 2019 certain of the respondent's staff reported concerns relating to medication errors when the claimant was working. This led to the claimant being interviewed by her manager at which Ms Graham understood that the claimant had said something to the effect that she could not believe that she done this again when she had only one year left before she retired. At this time, the claimant had an extant "improvement notice" as a result the two previous medication errors she had made and failed to report in May 2019 (65).
 - 5.4 The claimant was suspended from work on 7 June 2019 while two alleged errors were investigated (88). During the course of the investigation the claimant admitted the first allegation and although she first denied the second allegation she later admitted that too.
 - 5.5 Following the investigation it was determined that the matter should proceed to a disciplinary hearing, which Ms Graham would conduct. The disciplinary hearing took place on 22 July 2019 at which the claimant was represented by a trade union representative (106). The notes of that hearing record that towards its conclusion the trade union representative stated that the claimant was "pleading guilty' to both allegations".
 - 5.6 The outcome of the hearing was that Ms Graham decided that the claimant had committed the medication errors and had wilfully falsified records in an attempt to cover a mistake, which constituted gross misconduct of which she would be dismissed with immediate effect. That outcome was confirmed to the claimant in a letter dated 22 July 2019 (120).
 - 5.7 The claimant was offered a right of appeal, which she exercised by letter of 12 August 2019 in which she set out four grounds of appeal (124).
 - 5.8 The appeal hearing took place on 2 October 2019 and was conducted by Mr R Mears, Regional Director of the respondent. The claimant was again

accompanied by the same trade union representative. Ms Graham was also in attendance to provide context and explain the decision to dismiss the claimant and the reasons for it. The claimant did not dispute the record in the notes of that hearing that the claimant stated, "I'm only here so I can line-up everything so I can take it to the next step and get a solicitor".

5.9 In light of the issues that the Tribunal has to determine, as set out above, the principal factual matter in dispute, and in relation to which the Tribunal has to make a decision, is what was said by Ms Graham during part of the appeal hearing. In answering that question, the Tribunal brings into account the following evidence before it:

5.9.1 The notes of that hearing (127) are not verbatim but the Tribunal accepts that they represent a reasonably accurate record of what was said at the hearing; those notes being contemporaneous in that they were typed-up while those present at the hearing were making their respective contributions. At one point Mr Mears is recorded as asking Ms Graham "if this case was referred to DBS?" The answer Ms Graham gave is recorded as follows:

"I did consider a referral but considered that JW, by her own admission would be retiring in a year's time and I did not feel that she would have presented an ongoing risk."

5.9.2 This comment is reflected in the claimant's claim form (ET1) but in very different terms as follows:

"She hadn't bothered to inform DBS or Safeguarding of the error, due to the fact I only had 22 months working life left, and that I wouldn't be a potential risk to clients, as I probably wouldn't get another job at my age". (AGEISM)."

5.9.3 In her oral evidence the claimant changed this account somewhat in that she did not recount Ms Graham having referred to "Safeguarding" but to CQC. She said that Ms Graham had said that she "didn't have to contact DBS or CQC because I won't get another job". In this regard, in her oral evidence Ms Graham explained that there was no requirement to report a medication error to CQC.

5.9.4 In the claimant's witness statement she states that the comments in issue that were made by Ms Graham were "in reply to a question from" her trade union representative whereas it is clear from the notes (as confirmed in Ms Graham's witness statement) that the question was asked by Mr Mears.

5.9.5 In her witness statement the claimant states that during the appeal meeting Ms Graham stated as follows:

"Because of my age as I probably wouldn't get another job" – "So that future Clients wouldn't be at risk from me".

In oral evidence the claimant supplemented her witness statement by adding that her representative had stepped in and said that the claimant “would get another job, no problem”, at which point she had stepped in and said, “Nothing like rubbing salt in the wound”.

5.9.6 The evidence in Ms Graham’s witness statement reflects the notes of the appeal hearing to the effect that she had answered Mr Mears’ question of whether she had referred the matter to DBS saying as follows:

“I did consider a referral but considered that JW, by her own admission would be retiring in a year’s time and I did not feel that she would have presented an ongoing risk.”

5.9.7 On the evidence before the Tribunal it is satisfied that it was at this point, in response to Ms Graham’s answer to Mr Mears that the claimant’s representative made his observation that the claimant would get another job, no problem.

5.10 On balance of probabilities, the Tribunal prefers the evidence on behalf of the respondent for the following reasons:

5.10.1 The somewhat different accounts given by the claimant in her claim form and in her witness statement, which she then supplemented in her oral evidence.

5.10.2 The claimant suggesting that the comment in issue was made by Ms Graham in reply to a question from her trade union representative when the notes record it was asked by Mr Mears.

5.10.3 As found above, although not verbatim the notes of the appeal hearing are a reasonably accurate contemporaneous record of what was said.

5.10.4 There is no suggestion in those notes or in the claimant’s witness statement or her oral evidence that either she or her representative had reacted to anything Ms Graham said at the appeal hearing to the effect that her comments were discriminatory in nature. The Tribunal is satisfied that a trade union representative (who on the claimant’s evidence did contribute to the hearing) would have interjected if any discriminatory remarks had been made. Further, there is nothing to support the claimant’s recollection of her remark about rubbing salt in the wound.

5.10.5 The reference to “22 months” in the claimant’s claim form does not appear in the record of the appeal hearing and the Tribunal accepts Ms Graham’s explanation, first, that she is had no reason to refer to 22 months and, secondly, as to why she had actually referred to the claimant retiring in one year’s time; namely that she understood that when the claimant had been interviewed by her manager the claimant had said something to the effect that she could not believe that she

had done this again when she had only one year left before she retired.

5.10.6 In light of Ms Graham's evidence before the Tribunal does not find credible the claimant's allegation in her claim form that Ms Graham had behaved unprofessionally at the appeal hearing in that her "attitude towards me personally on the day was appalling; undermining my integrity as a Support Worker/Carer". In this regard, the Tribunal notes that the claimant's evidence was that Ms Graham did not behave in any way unprofessionally towards her at the disciplinary hearing and it cannot identify any reason why she would have changed her conduct so dramatically between the two hearings as the claimant asserts.

5.11 In short, the Tribunal is not satisfied as to the principal allegation made by the claimant that Ms Graham, at the appeal hearing, made any of the discriminatory remarks as alleged by the claimant including that she had not bothered to inform DBS, Safeguarding or the CQC of the error due to the fact that the claimant only had 22 months working life left and/or because of the claimant's age she probably would not another job.

Submissions

6. After the evidence had been concluded Ms Meeran and the claimant made submissions; Ms Meeran by reference to a written skeleton argument, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law some of which she cited. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from our findings and conclusions below. Suffice it to say that we fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to our decision.
7. That said, the key points made by Ms Meeran on behalf of the respondent, included as follows:

Harassment

- 7.1 Ms Graham's comment is not serious enough to constitute "unwanted conduct" or to pass the threshold of violating dignity.
- 7.2 The claimant's evidence regarding subjective "effect" relates not to the comment but to being dismissed and, objectively, it would not be reasonable for the claimant to have felt the comment had the necessary effect; there is no evidence that it was said with the intention of upsetting the claimant. Further, there was no "environment" created as this was a one-off, and can only be described as an incident.

Direct discrimination

- 7.3 Failing to refer the claimant to DBS is not an act of less favourable treatment. The treatment was likely more favourable than that which a hypothetical comparator would receive as they would likely have been referred to DBS.
8. The claimant's submissions were brief, "That's exactly what was said", and since then her trade union representative had confirmed that. "I was treated unfairly and I stick by that."

The law

9. The principal statutory provisions that are relevant to the issues in this case are as follows:

9.1 Direct discrimination - section 13 Equality Act 2010

"13 Direct discrimination

(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."

9.2 Harassment - section 26 Equality Act 2010

"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 -

(i) violating B's dignity, or

(ii) 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 -

age;
....."

9.3 Section 39 - Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)-

.....

(a) by dismissing B;

(b) by subjecting B to any other detriment.

9.4 Section 40 - Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)-

(a) who is an employee of A's

9.5 Section 136 - Burden of proof

(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 subsection (2) does not apply if A shows that A did not contravene the provision.

9.6 Section 212 - General interpretation

(1) In this Act -

.....

“detriment” does not, subject to subsection (5), include conduct which amounts to harassment;

Application of the facts and the law to determine the issues

10. The above are the salient facts relevant to and upon which the Tribunal based its judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law. The Tribunal also brought into account relevant aspects of the Equality and Human Rights Commission Code of Practice on Employment (2011) (“the Equality Code”).
11. While not wishing to limit that general statement, the Tribunal records that in considering the claimant’s complaints under the 2010 Act it paid attention to ‘the reverse burden of proof’. In this regard the Tribunal sought to apply the guidance contained in the decision in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 as approved and adjusted by the Court of Appeal in Igen Ltd v Wong [2005] IRLR 258. The Tribunal reminded itself that, in summary, this involves a two-stage approach. First, it is for the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. Only if the claimant satisfies that initial burden of proof is the second stage engaged whereby the burden then shifts to the respondent to show that, in no sense whatsoever, was

the particular treatment on the protected ground. At each stage, the standard of proof is the balance of probabilities.

Harassment on grounds of age – section 26 of the Act

12. The Tribunal first considers the complaint of harassment, which is defined in section 26 of the Act as set out above. In doing so the Tribunal has used the phrase “intimidating etc” as an abbreviation for the phrase “intimidating, hostile, degrading, humiliating or offensive” environment in section 26(1)(b) of the Act.
13. The Tribunal reminds itself that there are three essential elements to a harassment claim: unwanted conduct, which has the proscribed purpose or effect, and which relates to a relevant protected characteristic.
14. The unwanted conduct relied upon by the claimant is quite simply the answer Ms Graham gave to the question of whether this case had been referred to DBS. The Tribunal has found the answer to be as set out above.
15. In the Equality Code it is stated at paragraph 7.8 as follows, “The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’. ‘Unwanted’ does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident also amount to harassment.”
16. Accepting that interpretation of the word “unwanted”, the Tribunal cannot identify what it is about Ms Graham’s comment (as the Tribunal has found it be) that the claimant did not want or found to be unwelcome or uninvited. That being so, the claimant does not satisfy the first limb of the definition of harassment.
17. Lest the Tribunal’s decision on that point had been to the contrary, it nevertheless moved on to consider whether Ms Graham’s answer had the purpose or effect of violating the claimant’s dignity or creating an intimidating etc environment for her.
18. On the evidence available to the Tribunal it is not satisfied that it can be said that this was Ms Graham’s purpose. Rather, her purpose was to answer honestly the question that she had been asked, which she did; she had considered such a referral but had not done so because the claimant would be retiring in a year’s time and would not have presented an ongoing risk.
19. The question of whether the comment had that effect requires the Tribunal to take three particular matters into account as set out in section 26(4) of the Act follows:
 - 19.1 The perception of the claimant; which the Equality Code explains means did the claimant, subjectively, regard it as violating her dignity or creating an intimidating etc environment for her.
 - 19.2 The other circumstances of the case; which the Equality Code explains can include the claimant’s personal circumstances and the environment in which the conduct takes place.

- 19.3 Whether it is reasonable for the conduct to have that effect; which the Equality Code explains is an objective test which a tribunal is unlikely to find satisfied if it considers a claimant to be hypersensitive and that another person would not have been offended.
20. In these respects, whatever the claimant might subjectively have felt, in all the circumstances the Tribunal is not satisfied (applying the guidance given in the decisions in Pemberton v Inwood [2018] IRLR 542, CA and Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT) that it was objectively reasonable for her to consider that Ms Graham's comment had effect of violating her dignity or creating an intimidating etc environment for her.
21. In short, whether by reference to the question of unwanted conduct or such conduct having the proscribed purpose or effect, the Tribunal is not satisfied that the claimant has established facts from which it could conclude, in the absence of an adequate explanation, that the respondent subjected her to harassment.

Direct discrimination on grounds of age – sections 13 and 39 of the Act

22. The first consideration arising from the issue of direct discrimination as set out above is whether Ms Graham's comment constituted the respondent treating the claimant less favourably. This requires a comparison to be made with how the respondent has treated other workers or would have treated them in similar circumstances. As explained in the Equality Code, "If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable".
23. As was said by the House of Lords in the decision in Chief Constable of West Yorkshire Police v. Khan [2001] UKHL 48, "... it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently."
24. Even if the claimant did not appreciate Ms Graham's comment, with its reference to retirement, in light of the evidence of Ms Graham the Tribunal is entirely satisfied that she (and therefore the respondent) would have treated in precisely the same way other workers in the same or not materially different circumstances as the claimant. That has two elements as follows:
- 24.1 first, having considered whether a referral should be made, not doing so because the worker would soon be retiring and would not have presented an ongoing risk;
- 24.2 secondly, explaining that reason for not making a referral when asked to do so at an appeal hearing or in similar circumstances.
25. Further, even if Ms Graham did treat the claimant differently in not referring her to DBS (which the Tribunal repeats it is not satisfied she did), given the possible consequences of such a referral for the claimant, in light of the above guidance in Equality Code and the decision in Khan, the Tribunal is not satisfied that the claimant can reasonably say that she would have preferred not to have been

treated differently in light of her upcoming retirement. To put it another way, the Tribunal is not satisfied that the claimant can reasonably say that she would have preferred to have been referred to DBS even though the respondent would not take that step in relation to other workers in the same or not materially different circumstances.

26. As was said in the decision in London Borough of Islington v Ladele [2009] IRLR 154 EAT, it cannot constitute direct discrimination to treat all employees in precisely the same way.
27. As such, the Tribunal is not satisfied that the respondent treated the claimant less favourably than it treats or would treat others and, therefore, it is not satisfied that the claimant has established facts from which it could conclude, in the absence of an adequate explanation, that the conduct of the respondent amounted to direct discrimination.

Conclusion

28. The unanimous judgment of the Employment Tribunal is as follows:
 - 28.1 The claimant's complaint that the respondent harassed her contrary to sections 26 and 40 of the Act is not well-founded and is dismissed.
 - 28.2 The claimant's complaint that the respondent directly discriminated against her on grounds of age contrary to sections 13 and 39 of the Act is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE
ON 28 April 2021**

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.