



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Dawn Mossayebi

AND

Respondent

Mr Mark Dicken and Others
(In partnership trading as The Crusty Loaf Bakery)

HELD AT Exeter

ON 09 August 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Did Not Attend

For the Respondent: Mr A Dicken, Partner

JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

RESERVED REASONS

1. In this case the claimant Mrs Dawn Mossayebi, who was dismissed by reason of redundancy, claims that she has been discriminated against because of a protected characteristic, namely her age. The claim is for direct discrimination (which is limited to the act of dismissal), and for harassment. The respondent denies the claims.
2. This parties have consented to the matter being heard by an Employment Judge sitting alone pursuant to section 4(3)(e) of The Employment Tribunals Act 1996.
3. The claimant failed to attend today to pursue her claims. The respondent was present and prepared to defend the claims. I made reasonable enquiries as to any possible reason why the claimant failed to attend. I was not made aware of any notification by the claimant that she was unable to attend, nor was there any application for a postponement for any reason. Given that witness statements had been exchanged, there was an agreed bundle of documents, and the respondent was present to defend the claims, I decided to proceed with the hearing in accordance with the provisions of Rule 47.

4. The claimant had prepared a written witness statement which I have read and considered. For the respondent I have heard from Mrs Karen Dicken and from Miss Adele Crowe. I also considered a statement from Mrs Rebecca Dicken but she was not present to be questioned on this statement and I can only attach limited weight to it. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts
6. The respondent is a family partnership. Its full name is Mr Mark Dicken, Mrs Alex Dicken, Mr Alan Dicken, Mrs Karen Dicken, Mr Thomas Dicken, and Mrs Rebecca Dicken, trading together in partnership as the Crusty Loaf Bakery. The business is based in Torquay, Devon. The claimant Mrs Dawn Mossayebi was born on 20 August 1966. She commenced employment with the respondent on 22 August 2018, and she worked as a shop assistant in one of the respondent's shops. As at the beginning of 2020, the respondent had 25 employees.
7. As was not unusual at the time, the respondent business faced considerable difficulties as a result of the Covid-19 pandemic, and it had to close its business. During May 2020 the respondent faced considerable financial hardship. It decided to make a number of staff redundant and commenced a redundancy process. In the first place the respondent sought volunteers for redundancy, and then adopted a selection process. The selection process involved selecting employees for redundancy in accordance with the needs of the business, which included length of service, attendance and efficiency, and flexibility with regard to shop locations and working hours.
8. Of its 25 employees the respondent made nine employees redundant on 28 May 2020. This included the claimant. At the time of her dismissal for redundancy the claimant was aged 54. The other eight employees who were made redundant at that time were aged 58, 33, 33, 33, 45, 37, 29 and 39. With the exception of two employees who had volunteered, the remaining seven employees including the claimant all had short periods of service with the respondent of under two years in total.
9. Mrs Karen Dicken, from whom I have heard, made the decision as to which employees to dismiss following discussion with her husband Mr Alan Dicken. The respondent valued the claimant as a worker and considered that her performance was good. I accept Mrs Dickens' evidence that she was selected for redundancy because of a combination of her length of service and flexibility with regard to her place of work, and her commitments to working on Saturdays. I am satisfied that the decision to dismiss the claimant was in no way related to her age. During July, August and September 2020 the respondent made another four employees redundant based on the same selection criteria.

10. The claimant has made an allegation of age-related harassment, which is limited to the following four comments, which are said to have been made to her by Mrs Karen Dicken between March and/or April 2020: (i) You're getting too skinny and it makes you look a lot older than you are; and (ii) Why do you need to have to wear make-up at work; and (iii) Why do you have to have your nails painted, don't you think you are too old for that; and (iv) You look like Mystic Meg riding your bicycle with your dog in the basket.
11. Mrs Dicken denies making these comments she insists that these allegations are untrue. She makes the point that the second and fourth allegations appear to have no relevance or reference to age, and as for the fourth allegation, Mrs Dicken says that in any event she had never heard of Mystic Meg (who some years ago was a clairvoyant on television) until she received the claimant's allegations. Miss Crowe gave evidence to the effect that she worked the same shifts as the claimant at the relevant times as the claimant and Mrs Dicken, and she had never heard Mrs Dicken say any such comments to the claimant, and gave evidence that she believed that Mrs Dicken would never do so.
12. On the balance of probabilities I therefore find that Mrs Dicken did not make the comments to the claimant which the claimant now alleges.
13. The claimant presented these proceedings on 26 June 2020. Her claims were clarified at a case management preliminary hearing on 18 February 2021. By Judgment dated 18 February 2021 the claimant's claims of unfair dismissal; for discrimination on the ground of marital status; and for unlawful deductions from wages, were all dismissed. Her remaining claims to be determined at this hearing are for direct age discrimination (which is limited to the act of dismissal), and for harassment related to her age, being the four specific allegations of age-related harassment set out above.
14. Having established the above facts, I now apply the law.
15. The Law
16. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination and harassment.
17. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.
18. As for the claim for direct discrimination, under section 13(1) of the EqA 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.

19. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
20. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
21. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
22. I have considered the cases of: Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Hewage v Grampian Health Board [2012] IRLR 870 SC; Ayodele v Citylink Ltd and Anor CA [2017]; Royal Mail Group Ltd v Efoji [2021] SC; and Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 56.
23. Bearing in mind all of the above, the decision of the Tribunal is as follows.
24. Direct Age Discrimination
25. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her age than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed.
26. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant 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 act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme

Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efoji [2021] SC.

27. In this case, I find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. On the contrary, with regard to the claimant's sole claim of direct discrimination which relates to the act of dismissal, I have found that the decision to dismiss the claimant was in no way related to her age, and in no way tainted by any discrimination. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.

28. Harassment:

29. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).

30. There are four specific allegations of harassment as follows, which are the following comments which the claimant alleges Mrs Dicken made to the claimant in about March or April 2020: (i) You're getting too skinny and it makes you look a lot older than you are; and (ii) Why do you need to have to wear make-up at work; and (iii) Why do you have to have your nails painted, don't you think you are too old for that; and (iv) You look like Mystic Meg riding your bicycle with your dog in the basket.

31. For the reasons explained above, I have found on the balance of probabilities that Mrs Dicken did not make these comments to the claimant as the claimant now alleges. Accordingly, there was no conduct on the part of the respondent which related to the claimant's age and which had purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for the claimant. For these reasons I also dismiss the claimant's claim for harassment.

32. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 13; a concise identification of the relevant law is at paragraphs 16 to 22;

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how that law has been applied to those findings in order to decide the issues is at paragraphs 24 to 31.

Employment Judge N J Roper

Date: 09 August 2021

Sent to the Parties: 17 August 2021

FOR THE TRIBUNAL OFFICE