



EMPLOYMENT TRIBUNALS

Claimant: Ms R Smith

Respondent: Bonney Babies Limited (t/a Little Nutkins)

Heard at: Manchester

On: 19, 20 & 21 May 2021

Before: Employment Judge Sharkett
Ms J Williams
Mr A Murphy

REPRESENTATION:

Claimant: In person assisted by parent Mr A Swindells

Respondent: Ms L Halsall of Counsel

WRITTEN REASONS

1. Oral Judgment and reasons having been given in this matter of 21 May 2021 dismissing the claimant's claims of unlawful discrimination on the protected characteristic of disability, under s13 Equality Act 2010, the claimant has requested written reasons.
2. A claim of unfair dismissal had previously been struck out on the basis that the claimant did not have sufficient continuity of service under s108 Employment Rights Act 1996, to being a claim of ordinary unfair dismissal.
3. As a preliminary issue the Tribunal determined that the claimant was a disabled person for the purpose of s6 Equality Act 2010
4. The allegations raised by the claimant and upon which the Tribunal were required to determine were:
 - a. That by dismissing the claimant for the reason given she was treated less favourably than others without her disability would have been in circumstances not materially different to the claimant

- b. That Ms Bonney treated the claimant less favourably than she would have treated others without her disability by laughing at her during the appeal hearing
- c. That Ms Bonney treated the claimant less favourably than she would have treated others without her disability by writing to the claimant's new employers questioning the claimant's mental health

The claimant confirmed these were the only claims she pursued and made no application to amend the same today.

5. The claimant appeared in person assisted by her father. Ms Halsall of Counsel appeared on behalf of the Respondent and called the following witnesses to give evidence:
 - a. Ms K Reagan – Area Manager and dismissing officer
 - b. Ms R Spencer – Note taker at appeal meeting
 - c. Ms C Bonney – Appeal Officer
6. All witnesses including the claimant had produced written statements, which had been exchanged and were taken as read by the Tribunal. All witnesses gave oral evidence in cross examination and answered questions from the Tribunal.
7. The Tribunal had been provided with an agree bundle of documents and further documents were added to this during the course of the hearing.

Findings of Fact

8. Having consider all the evidence both oral and documentary the Tribunal make the following findings of fact on the balance of probabilities. Whilst we have considered all the evidence, these findings of fact are not a rehearsal of all evidence heard but are the salient facts upon which the Tribunal made its decision
9. The claimant commenced work for the respondent on 10 March 2019 as an Early Years Nursery Practitioner. Prior to commencing work for the respondent the claimant had worked for five years in a primary school. Ms Katrina Regan the Area Manager spoke with the claimant about her depression during her induction and was informed that the claimant had been on mediation for many years and suffered no effects that would impact on her health.
10. During the course of the induction the claimant was introduced to the policies and procedures in place and informed that it was her responsibility to ensure she was familiar with the same (64-65). The claimant shadowed other colleagues for 4 weeks as part of her induction and copies of the policies and procedures were available in the office of the nursery at which the claimant was based. The Tribunal find that it is common practice for employees to be required to familiarise themselves with the content of policies and procedures in the workplace as it would be overly time consuming to go through each

policy on a page by page basis. The Tribunal find that the claimant had worked with young children in a previous role for over five years so it is reasonable to expect that she would have been familiar with the need for confidentiality and safeguarding of children under her care.

11. During the course of the claimant's employment she was absent from work on a number of occasions but to the respondent's knowledge the absences were not for reasons related to her depression. Whilst in her witness statement the claimant complains about the way she felt treated by other staff while working for the respondent, she does not pursue any complaint before the Tribunal and there is no evidence to that this was the case or that she approached Mr Regan about the effect of the same on her health. On the contrary within the supplementary bundle provided there is a supervision meeting note dated 5 June 2019, and signed by the claimant in which she states that she is *"really enjoying working with all the girls and children"* and again in November 2019 where she records *"I am very happy working for little nutkins"* and the supervisor comments records *"Rebecca has made some close relationships with staff and children"*
12. On 5 December 2019 the claimant was told that the parent one of the two key children for whom she had care had made a complaint. The parent had apparently been upset because of something that had occurred at the nursery on an occasion when the claimant was not at work and was considering taking the child out of the nursery, because she felt the child was not wanted there. The claimant was told that the nursery was dealing with the matter.
13. The claimant was concerned that the parent was upset and wanted to reassure them that the child was wanted. Consequently when she left work that night and went home, she decided to go to the child's house that evening to speak to the parent. This was without invitation of prior notice to the parents. As a result of this visit the parent expressed concern to the nursery and questioned how the claimant could have known where they lived. The claimant has been inconsistent in her evidence about how she knew where the parent lived, what is clear however, is that the parent did not give the claimant their address although it is accepted that she may have gained an idea of the location of the house when the parent had on occasion given her a lift home in bad weather. It is also clear to the Tribunal that prior to the claimant's dismissal the claimant had never been invited to the child's home or, despite the claimant's claim to be friends with them, had any relationship by reason of friendship or otherwise, outside the nursery environment. The documents we were referred to demonstrating a relationship between the claimant and the parent, post-date the claimant's dismissal. The only document predating the dismissal is one where the claimant makes an online expression of interest in a support group in which the parent was involved. There was no evidence that this expression of interest was responded to.
14. The Tribunal accepts the undisputed evidence of the respondent that the child in question had been adopted by the parents and as such the parents were highly conscious of security and had electronic gates installed at the home. This was a relevant fact in the circumstances of this case.

15. The following day the claimant was called into the office where she readily admitted to Yvonne Sutcliffe that she had called to the house the night before.
16. On Monday 9 December the claimant was questioned again about the visit and was suspended pending a disciplinary investigation into the claimant's visit to the child's home.
17. Ms Katrina Regan Area Manager of the respondent was appointed to hear the disciplinary hearing which the claimant was invited to on 11 December 2019. At the meeting the claimant admitted that she had attended the home unannounced and that her actions were unprofessional. She maintained however that she had apologised for calling when she arrived at the house and had not discussed the matter with the parent at the house. The parent who had been upset was not at home at the time of the claimant's visit but it is clear from the claimant's own witness statement headed 'statement of events' that contrary to what she continues to assert, she had clearly spoken about the matter because she wrote:

"..... [parent] was at the door and said to me come in I asked if [they] were sure I said I'm very sorry to come to your home unannounced [they] said it was fine and to please come inside [they] led me to the from room where [child] was sitting. I again apologised and said that Stacy had spoken to me today and [parent] had expressed [they] feel like [child] isn't wanted at nursery I said that certainly isn't the case and [child] is most definitely wanted by myself and the other girls....."

18. It is also clear that the visit was not seen by the parent to be removed from a working relationship because the parent had queried with the respondent how the claimant had obtained their home address. I oral evidence Ms Regan explained that they do not have a policy which prevents staff from having friendships with the parents of children under their care, but that in this case the claimant did not suggest that there was a friendship with the parent and nor was there any evidence of the same.
19. Ms Regan concluded that by visiting the child's home in the circumstances in which she did crossed professional boundaries. The claimant was notified by letter of 12 December 2019 that she was dismissed by reason of her actions in visiting the child's home and that such behaviour amounted to gross misconduct. There is no suggestion that the claimant was the subject of the initial complaint from the parent, and the reason for dismissal relates only to the claimant's unauthorised and unannounced visit to the child's home.
20. The claimant appealed the decision to dismiss her by email of 21 January 2020. Ms Bonney the managing director of the respondent heard the claimant's appeal the following day. Ms Bonney upheld the claimant's dismissal because the claimant had admitted her actions and that they had been unprofessional. She found that the claimant's actions had breached the Respondent's safeguarding policy because by visiting the child's home already being aware that the respondent was looking into the parent's complaint, the claimant had prevented a proper investigation taking place.

21. It is the claimant's case that during the course of the appeal hearing Ms Bonney laughed at her when she gave her version of events and mentioned approaching ACAS. The Tribunal note that the claimant was invited to sign the minutes of this meeting by email and that although she made some amendment to those minutes she did not mention that Ms Bonney had laughed at her (p92-97). Ms Spencer who was the note taker at the meeting gave evidence that the meeting was friendly and that the claimant was given the opportunity to speak in her own words.
22. The Tribunal find that there is no evidence that Ms Bonney laughed at the claimant during the course of the appeal hearing or any evidence that the matting with anything other than as described by Ms Spencer. Had there been any issue at this meeting the claimant could have made reference to it when she was subsequently asked to approve the minutes, which she did. For this reason we find that on the balance of probabilities Ms Bonney did not laugh at the claimant as alleged during the course of the appeal hearing.
23. Within a short time of the claimant's appeal being dismissed, a number of incidents occurred that led the respondent to believe that the claimant may have had some role to play in them. The full detail of these events are not relevant to the issues to be determined by the Tribunal but it is sufficient to say that there was a suspicious requests for a reference for the claimant from a personal email and the same person then left a negative review on the nursery, in addition the respondent had also had an OFSTED compliance visit, a food hygiene visit and delivery of a Chinese takeaway. Suspecting the claimant's involvement she emailed the author of the email and review along with the claimant to highlight her concerns and her proposed actions if the behaviour did not stop. The claimant denies any involvement in these events and the Tribunal make no finding of fact in relation to the same because it is not an issue to be determined by the Tribunal and is included in this Judgement by way of background to the claimant's last allegation
24. The claimant has claimed that as a result of Ms Bonney writing to her new employers questioning her mental health, the job offer made to her was withdrawn. Ms Bonney denies providing any written reference for the claimant. In her witness statement the claimant refers to a reference that had been provided to the claimant's new employer Poppy and Jacks. She explains that she obtained a copy of that reference under a Freedom of Information Request. We have not had sight of this reference but we have had sight of a note made by a Claire Black dated 24 February 2020 who is the HR manager of the nursery that had offered the claimant a job. In this note Ms Black notes that Ms Bonney told her – the reason for the claimant's dismissal and the events that followed the dismissal of her appeal. The note also records Ms Bonney's concern about the claimant working in an early years' environment because of her inappropriate behaviour. The Tribunal does not accept Ms Bonney's denial that she provided this information and she was on leave on the day it is said to have taken place. The Tribunal make this finding for two reasons, the first that it is clear that Ms Bonney was engaged in work related correspondence on that day because there is evidence of communication with her legal advisor on that date and also because Ms Black could not have known the information she records in her telephone note had she not been

given that information by either Ms Bonney or some purporting to be her (given that it is Ms Bonney's name on the note). Ms Bonney was unable to provide an explanation about where the information in the note had come from. The Tribunal invited Ms Black to contact the Tribunal to assist it further but she was not contactable. In the absence of an explanation and in light of the fact that the evidence that she was on leave on 24 February is inconsistent with the evidence that she was working that day, the Tribunal find, on the balance of probabilities that she did provide the information contained in the note made by Claire Black on 24 February 2020.

Submissions

25. For the respondent Ms Halsall asked the Tribunal to have regard to the fact that the case before it was one of direct discrimination only. She submitted that the burden is on the claimant to show not only that she was subjected to less favourable treatment, but that the effective cause of the alleged treatment was her disability. She referred the Tribunal to the shifting burden of proof under s136 Equality Act 2010 and the need for the respondent to show reason for any less favourable treated in circumstances in which the burden shifts. Ms Halsall asked the Tribunal to prefer the evidence of the respondent's witness, who she submits have been consistent in their evidence and made concessions where appropriate.
26. For the claimant her father explained how the claimant's disability impacts on her and her feelings. He submits that it was unfair to dismiss the claimant because she did not discuss nursery business with the parent and went to the home in a gesture of friendship only and with a desire to help. He asked the Tribunal to find that the claimant's evidence was correct and submitted that the allegations about Amber Green etc had been made up by Ms Bonney in order to show the claimant in a bad light. He reminds the Tribunal that although the allegations raised by Ms Bonney about events arising after the claimant's dismissal were serious, the respondent did not reported them to the police.

The Law

Unlawful Discrimination

27. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2) prohibits discrimination against an employee by dismissing him or by subjecting him to a detriment.
28. By section 109(1) an employer is liable for the actions of its employees in the course of employment.
29. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material 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 subsection (2) does not apply if A shows that A did not contravene the provision.”

30. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

31. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct Discrimination

32. Direct discrimination is defined in section 13(1) as follows:

“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.”

The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

“On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

33. . Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person’s abilities.

34. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the “reason why” the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race or disability) had any material influence on the decision, the treatment is “because of” that characteristic.

Application of the Law and Secondary Findings of Fact

- 36 In respect of the claimant's first allegations that she was subjected to less favourable treatment than others without her disability would have been subjected to if had they been disciplined in circumstances not materially different to her. It is obvious that not all unfavourable treatment will amount to less favourable treatment. It is important also to note that in this case although the claimant was known to suffer from depression that was nothing to put the respondent on notice that the claimant's behaviour might have been because of her depression and nor did she suggest it was at the time she was dismissed. The claimant has admitted that she went to the home of the child in question. The Tribunal have found that there is no evidence to support the claimant's argument that she went there as a friend to support the parent, and the Tribunal has also found that contrary to her evidence that she did not discuss the matter that was to be investigated by the respondent, in her witness statement she confirms that she told the parent who was at home that she knew of the complaint from Stacey and then went on to tell the parent that contract to their belief the child was wanted. This can be nothing other than discussing the complaint with the parent. During this hearing the claimant appeared to think that because she had apologised for her presence when she arrived at the home of the child and the parent had accepted that apology, she had done nothing wrong. It is clear that she did not have insight into the professional relationship that existed and that it was not appropriate for her to take in upon herself to address those matters which should more properly have been dealt with by her superiors as the respondent had intended. The claimant's actions not only interfered with the proposed investigation with the parent's complaint but her uninvited and unannounced attendance at the child's home had the potential to erode the trust the parent had in the respondent, as is evidenced by the concerns they raised about how it was the claimant was able to obtain their home address.
- 37 The respondent's actions in dealing with the misconduct of the claimant claimant were reasonable in all the circumstances and the claimant has been unable to show that she has been subjected to less favourable treatment than others would have been subjected to in the same circumstances. Given the circumstances the Tribunal have no doubt that any other employee would have been treated in the same way.
- 38 The Tribunal have found that Ms Bonney did not laugh at the claimant in the appeal meeting and therefore she has been unable to show that she was subjected to any unfavourable treatment that might amount to less favourable treatment.
- 39 On a strict interpretation of the claimant's allegation, Ms Bonney did not provide a written reference to the claimant's new employer. What the Tribunal did find was that she spoke to Claire Black who made a note of what she had said. The content of that note makes no reference to the claimant's depression or any other illness. The fact of the claimant's dismissal is accurate and although not proven the Tribunal finds that Ms Bonney did have a genuine belief that the claimant had a role in the events that followed the

dismissal of her appeal based on the fact that she instructed solicitors about it. The Tribunal do not find it credible that Ms Bonney would make the whole story up and incur costs for legal advice on the matter, just to place the claimant in a bad light.

- 40 The burden of proof directive provides that if the claimant can show prima facie facts that she has been treated less favourably than others would have been treated in the same circumstances then the burden shifts to the respondent to show the reason for the treatment. The Tribunal do not find that the claimant has shifted that burden; it is clear that Ms Bonney believed that the claimant had a role to play in the events that followed the dismissal of her appeal and that she would have acted in the same way had it been anyone else. There has been no suggestion that the respondent's actions in any of its dealings with the claimant have been driven in any way by the fact that the claimant is disabled by reason of her depression. Whilst Ms Bonney's actions may have been regrettable they do not amount to an act of unlawful discrimination on the basis of the claimant's disability.

Conclusion

- 41 The claimant has been unable to show that she has been treated less favourably than others who do not share her protected characteristic, would have been treated in similar circumstances to her. Her claims of direct discrimination are not well founded and are dismissed.

Employment Judge Sharkett

Date: 7 OCTOBER 2021

JUDGMENT SENT TO THE PARTIES ON

20 October 2021

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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