EMPLOYMENT TRIBUNALS

Claimant: **Miss K Galvani**

Respondent: **Mr A Walters T/A The Crown Inn**

Heard at: **Bristol (Hybrid hearing)** **On:** **9, 10 August 2021**

Before: Employment Judge Midgley
Mr H Patel
Mrs L Eden

Appearances
For the Claimant: In person
For the Respondent: Mr Walters, in person

JUDGMENT having been sent to the parties on 11 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claims and issues

1. By a claim form presented to the Tribunal on 30 April 2020, the claimant brought claims of discrimination contrary to the Equality Act 2010 (section 26 – harassment, and section 13 - direct discrimination) on the grounds of two protected characteristics. Firstly, of sex and secondly of age.

2. At a case management hearing on 11 November 2020, before Employment Judge Cadney, the issues for the Tribunal to determine at this hearing were narrowed and agreed as the following:

3. In relation to the claim of harassment on the grounds of sex and/or age the unwanted conduct identified was the comment of Mr Walters in agreeing that the claimant had not been allocated evening shifts because she was "too fat." Mr Walters accepted that he said "yes" when asked "is it because I am too fat", and therefore the issues for us in respect of that unwanted conduct were:

a. Whether the comment related to either of the claimant's protected characteristics of sex or age, and

b. If so, whether the comments had the effect of violating the claimant's dignity or created an intimidating, hostile, offensive, degrading or humiliating environment as prescribed in s.26 EQA 2010.

c. If it did so, whether it was reasonable for the conduct to have had that effect taking into account the claimant's perception and the other circumstances of the case.

4. Secondly in respect of the claim of direct discrimination, the claimant again relied on the protected characteristics of sex and age, the issues for us were therefore as follows:

a. Whether in refusing to allocate evening shifts to the claimant the respondent treated the claimant less favourably than it treated or would have treated a comparator:

i. Where the characteristic relied upon was sex, the comparator would be a member of male staff who was of a similar age and weight,

ii. Or, where the characteristic relied upon was age, the comparator would be a female staff member who was younger but of similar weight to the claimant.

5. In reaching our conclusions on those issues we have to consider whether there are primary facts from which we could properly conclude that the difference in treatment was because of the protected characteristics of either sex or age.

6. If the claimant established such primary facts, we must consider whether the respondent, Mr Walters, has demonstrated a non-discriminatory reason for that treatment (that is a reason where the factors of sex or age had no more than a trivial influence upon the conscious or unconscious mindset of Mr Walters).

Procedure, hearing, and evidence

7. Evidence began on the second day of the Tribunal given difficulties with securing the respondent's attendance on the first day, Mr Walter's having suggested that he needed to self-isolate as a waitress at The Crown had tested positive for Covid-19. When we proposed that he should attend by CVP, he advised he was unable to because of poor broadband. In the event, on the second day of the hearing, the claimant attended in person, and was supported by Mrs Carberry, the respondent attended by telephone which was connected to the CVP platform.

8. We received a witness statement from the claimant herself and from Mrs Carberry in support of the claimant's case. Both gave evidence (by oath and

affirmation respectively) and answered questions from us and from Mr Walters.

9. The claimant had also produced a bundle of documents consisting, amongst other documents, of a grievance, photographs of female members of staff employed by Mr Walters who were younger than the claimant (being in their teenage years or early twenties) and whom the claimant described and who could objectively be regarded as mildly 'overweight.'

10. The respondent had not produced a statement. Consequently, we treated the grounds of resistance as the statement for the purposes of the evidence. Mr Walters gave evidence by affirmation, having attested to the truth of the matters contained in the grounds of resistance, and answered questions from Mrs Galvani and from us.

Background facts.

11. We make the following findings of fact on the balance of probabilities, in light of the evidence we heard from the witnesses and the documents that we were referred to. We were assisted in this case because there is significant agreement between the parties in relation to the material events. In particular, the following matters are not in dispute:

12. The respondent Mr Walters is a sole trader who is engaged in the running of a licenced premises which provides food, accommodation and alcohol and is known as 'The Crown Inn.' The claimant was employed by the respondent to work at the premises on two occasions, the last of which gives rise to the matters which form the subject of this claim.

13. On the first occasion the claimant worked both weekdays and weekends, during the day and evenings. On the second it is agreed between the parties that, at her request, the claimant worked the hours of 12.00am – 6.00pm during the weekdays but did not work weekends or in the evenings after 6.00pm. There were occasions where the claimant was asked to cover by other members of staff in respect of those shifts but the evidence before us was that in the event it was not necessary for Miss Galvani to provide cover.

14. The respondent employs approximately three individuals on a permanent basis and approximately three individuals on a casual basis. One of those individuals is a man known as Richard Hall who is approximately 22 years' old. The claimant's evidence is that Mr Hall may be described as being slightly overweight, the respondent did not challenge that. We have been provided with photographs which show younger members of the respondent's female staff who are also slightly overweight.

15. The claimant for her part was and is, as we understand it, currently experiencing symptoms of the menopause. One of those symptoms which she described to us is that she has put weight on, particularly in the midriff area, and she accepts that by her own definition that she could be regarded as overweight as a consequence. We are not making any judgement as to that matter aside from that perspective that the claimant has.

16. Insofar as the protected characteristic of age is concerned, the claimant was born on 13 June 1968 and therefore is approximately 53 years of age. For the purposes of the direct discrimination claim she compares herself to staff who are under that age and in particular in the age bracket of late teens to thirties. It does not appear to be in dispute before us that the female staff working and shown in the photographs fall within the younger age bracket. Again, it is not in dispute between the parties that either Mr Hall or the younger female staff worked in the evening shifts and at the weekend shifts.

17. Turning then to the sequence of events that led to these claims, again, the following material matters are not in dispute. It was the respondent's practice in terms of rostering staff that a rota was placed in the bar in an area accessible to the staff, and staff would put their names on the rota to indicate the shifts that they were willing to work. Mr Walters would then allocate the shifts according to those who had indicated that they wished to work, exercising his discretion to determine whom he wished to work from those who had volunteered.

18. On or about 6 March 2020, the claimant had returned from a period of annual leave which ended on 5 March. The claimant worked the 5 March and wrote her name on the rota for some evening shifts later than month.

19. Two other matters are of relevance connected to the date. The first is that the country was in the early stages of the Covid 19 pandemic, Mr Walters described, and we accepted his evidence to this effect, seeing the writing on the wall for the hospitality sector and the inevitability of its closure due to the pandemic. The second is that Mr Walter's sister was suffering a period of severe ill health as a consequence of a significant health condition and Mr Walters had at or about 6 March had a discussion with his brother-in-law in which he was told that it was touch or go whether his sister would survive the night. The Tribunal accepts that the combination of those two factors meant that Mr Walters was particularly stressed both in terms of his family and his business.

20. On the 6 March, the claimant was working, as was Mr Walters. The claimant noticed that her name had been crossed out on the weekly rota sheet where she had written it for evening shifts. Miss Galvani challenged Mr Walters in relation to that act. She asked Mr Walters "how many staff do you require on Friday and Saturday nights?" Mr Walters replied to the effect that he did not need the claimant to work on either of the nights. The claimant asked why, and we accept Mr Walter's evidence that he said that he did not need to give an answer. He did not provide an explanation because (whether he voiced this opinion to the claimant at the time or not is immaterial) his view was that it was a matter of managerial discretion to allocate shifts to staff and once he had made such a decision it that should be treated as final, and not challenged, and certainly not challenged in the presence of customers.

21. We do not express any view as to whether that is an appropriate means of management, it is simply a fact relevant to our determinations.

22. Again, it is not in dispute that Mr Galvani did not accept that response and asked again why her name had been crossed off the rota. The answer that she received on that occasion was that it was a small bar area. The claimant pointed out to Mr Walters that she had previously worked on Friday and Saturday nights and by implication there had been no issue with her doing so because of a small bar then. Mr Walters responded to the effect that it was very busy on Friday and Saturday nights and again the claimant did not accept that provided a full explanation for the reason for her name being struck out on the rota. She then asked Mr Walters "is it because of my size that you don't want me to work these nights?"

23. Although the precise sequence of events is a little confused from the evidence we have heard, it is clear that at one stage Mr Walters walked away from the bar and at another stage returned and it appears that the question was reiterated by Miss Galvani at or about that point. Mr Walters therefore finally replied to the question "is it because I am too fat?" by saying "yes." Again, the parties agree that shortly after that Miss Galvani became very distressed, left the workplace, and did not return.

35. Mr Walters in his evidence said that the reason that he struck the claimant's name off the rota was because he had already allocated the shifts, as the claimant had never previously worked evenings (because she had asked not to), and it was unnecessary therefore for the claimant to work the shifts in question. That account was not directly challenged by the claimant, and we accepted it.

The relevant Law

22. The relevant law is contained in sections 39 and 13, 15, 20, 23 and 26 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

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.

23. Comparison by reference to circumstances

(1) 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.

s.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.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(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.

Section 13

23. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

24. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

25. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

26. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on 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.

27. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

28. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

29. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

30. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

31. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

32. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. 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 (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

33. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr

Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

34. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Harassment

36. The words 'related to' in S.26(1)(a) have a broad meaning; conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it, what is required is some connection even if not directly causal between the conduct and the protected characteristic — Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT.

37. The "related to" causation test is broader and arguably a lower threshold than a but for causation test. Unlike direct discrimination, there is no requirement to make a comparison with the treatment afforded to others. This is supported by the EHRC Employment Code, which states that the necessary connection with a protected characteristic can arise where 'the unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic'— para 7.10.

38. The context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic— particularly in cases where the conduct cannot be described as 'inherently' racist, homophobic, etc. (see Warby v Wunda Group plc EAT 0434/11). It is not enough however that the conduct complained occurs 'in the circumstances of' a protected characteristic, it must be related to it.

39. Some key concepts set out in Dhaliwal and Grant v Land Registry [2011] ICR 1390 are as follows:

    a. when assessing the effect of a remark, the context is always highly material. Context will also be relevant to deciding whether the response of the alleged victim is reasonable (Grant, para. 13);

    b. tribunals must not "cheapen the significance" of the meaning of the words used in the statute (i.e. intimidating, hostile, degrading, etc.). They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. Being "upset" is far from attracting the epithets required to constitute harassment (Grant, para. 47);

    c. it is not enough for an individual to feel uncomfortable for them to

be said to have had their dignity violated, or the necessary environment created (Grant, para. 51);

d. if a tribunal finds that a claimant was unreasonably prone to take offence, then, even if he did genuinely feel his dignity to have been violated, there will be no harassment (Dhaliwal, para. 15).

Discussions and conclusion.

Direct Discrimination

40. As stated, the facts in the case are largely not in dispute. What is in dispute is the crucial question (applying the test in Nagarajan) of the reason why.

41. We firstly address the claimant's arguments as to the evidence from which she says we should draw an inference that the reason that Mr Walters said she was fat and/or refused to allocate her an evening shift was the protected characteristics of sex or age.

42. That evidence takes the following forms. Firstly, the claimant points to an actual comparator, Mr Richard Hall, who was 22 and (it is accepted between the parties for the purpose of this litigation) was overweight. The claimant says that he was permitted to work on Friday and Saturday nights, and we are invited to draw the inference therefore that the reason that reason that Mr Walters did not allocate the claimant an evening shift was because she was female.

43. Secondly, the claimant says there were younger female staff who were permitted to work evening shifts and weekend shifts, who were also overweight, and we should infer the reason for the difference in treatment was because they were younger than the claimant.

44. Thirdly, insofar as we understand the claimant's argument, she seeks to argue that Mr Walter's action in agreeing that she was too fat suggests that he has a discriminatory mindset either towards women generally or those of an older age specifically. The basis of that argument is as follows - dealing with the protected characteristic of age first, she argues that a symptom of the menopause for many women is weight gain. The claimant was experiencing this symptom and had gained weight, and therefore we should draw an inference that comment as it was directed to the claimant, whether consciously or unconsciously, was connected to her age. In relation to the protected characteristic of sex, the claimant argues that only women experience the menopause.

45. We address each of those arguments in turn.

46. Firstly, we consider the arguments in relation to the comparators. There is a difference in treatment and there is a difference in characteristic on the claimant's case, Mr Hall and the younger staff were permitted to work evening shifts. The difficulty for the claimant is that we cannot look at matters in isolation and must look at them as a whole. The claimant argues, necessarily, for the purpose of the direct sex discrimination claim

that Mr Walters refused to allow her to work evenings was because she was a woman, yet the younger women who were permitted to work the shifts. It follows that the reason for the decision cannot have been sex because the comparison simply does not work on the facts.

47. Separately the claimant says that the reason was in the alternative her age. Here, although the agreed evidence is that those who were working included both men and women and that they were younger than the claimant, there must be something more (applying Madarassy) that would entitle us to say that the reason Mr Walters refused to permit the claimant to work evenings was connected to her age. There is nothing in the conversation related to the claimant's weight which is directly connected to her age. In so far as the claimant's arguments relating to the connection between the menopause and weight gain is concerned, the agreed evidence between the parties was that the claimant had not told Mr Walters that she was experiencing symptoms of the menopause and he did not know. It follows as a necessary consequence of those accepted facts that it is not a matter from which we could or should draw an inference because it cannot have played an active part or even a partial part in Mr Walter's decision.

48. Even were we to have concluded that the claimant had established a prima facie case that the reason was her age, the respondent has proved on the balance of probabilities a reason that was not in any way connected to that characteristic, namely that he had identified from the staff who had volunteered for the evening shifts before the claimant sufficient staff to meet the business needs.

49. The claims of direct discrimination relying on both the protected characteristics of age and sex are not therefore well founded and are dismissed.

Harassment

50. It does not require any great explanation that to say to any individual that they will not be offered shifts because they are too fat would be unwanted conduct, and that such a comment would undermine the dignity or create a hostile, degrading, humiliating or offensive atmosphere for the person to whom it is directed. Mr Walters sought to argue that he did not intend the remark that the claimant was too fat to be insulting, but rather wanted to shock the claimant so as to stop the conversation as quickly as possible. Intention is of course irrelevant, we have to consider the effect of the comments, but we observe in so far as it is relevant to credibility generally that we do not accept Mr Walter's evidence in that respect; any reasonable individual exercising even a modicum of common sense would recognise the nature and inevitable effect of the remark.

51. We have to determine whether the remark related to either of the protected characteristics of sex or age. As we have indicated that test is not one of a direct causative nature but requires be some connection or nexus. The claimant argues that the conduct was related to her sex alternatively her age because her weight gain was attributable to her menopause and

thereby to her sex. The reason for the comment advanced by Mr Walters was that he had lost patience with the claimant he snapped: he was asked for an explanation which he gave, it was not accepted, thereafter he was asked repeatedly for an explanation and his view was that the questions were asked with the intention of goading him into confrontation adopting the words of the response. Mr Walters eventually lost patience and in the hope of ending the conversation replied, "yes."

52. We do not find that the purpose of the claimant's actions was to goad Mr Walters, but we must carefully consider the conduct and intent of Mr Walters. If Mr Walters consciously or unconsciously made the remark because he thought the claimant looked fat for a female member of staff, it would be easier for us to find that the remarked related to sex given that we accept, in general, that in the hospitality industry there may be a bias for younger, thinner female staff at busier times such as evening shifts, and that that might go some way to establishing the necessary connection. Here, however, the evidence did not support such a view; the staff include females and males, and both were, in the claimant's eyes and on an objective view, slightly overweight. It follows that the evidence does not show that Mr Walters has a conscious or unconscious bias for thin staff, whether male or female generally or to work any particular shifts.

53. In so far as the claimant argued that the comment related to age, because of the connection between weight gain and the menopause, the argument was again not supported by the fact of the overweight members of staff (of both sexes) working the evening shift, and we declined to draw the necessary inference.

54. We must also consider the respondent's explanation for Mr Walter's comment - do we accept the explanation that he lost patience and snapped? In that context, two matters are of particular pertinence. One is the general stress that would apply to any publican in or around the 6 March 2020 against the impending disaster for the hospitality sector caused by its closure due to the pandemic. The second is the very personal circumstances of Mr Walters' sister's ill health. Those two matters, we find, would cause any individual in Mr Walter's position to be stressed and anxious, and therefore less tolerant and less patience than usual. We also take into account the claimant's evidence that there had been previous occasions where Mr Walters had said to the claimant that he believed that she was nagging him, and that he had been short and offensive to other members of staff.

55. We do not need to make any finding as to whether that is his general way of dealing with staff but conclude that these are matters that do suggest that the reason that he indicates for his actions on this occasion is a genuine reason. That reason is one unconnected either to age or sex. Had a male of the claimant's age asked the question of him as the claimant did, we accept that he would have responded in the same way. Similarly had a young female asked the question he would have responded in the same way.

56. On balance, therefore, we have concluded that the comment did not relate to the claimant's sex or age. For those reasons the claims of harassment on the grounds of sex and age are not well founded and are dismissed.

Employment Judge Midgley
Date: 23 September 2021

Reasons sent to the parties: 21 October 2021

FOR THE TRIBUNAL OFFICE