EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107475/2020

Hearing Held at Edinburgh on 1st December 2021

Employment Judge McFatridge
Tribunal Member T Jones
Tribunal Member R Henderson

Miss M Oliver	**Claimant** **Represented by:** **Ms Dunnigan (mother)**
B&Q Limited	**Respondent** **Represented by:** **Mr Hughes, Advocate instructed by Messrs Foot Anstey LLP**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal was that the claimant was not unlawfully discriminated against on grounds of age. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal. Initially she claimed breach of contract, however this claim was dismissed by the Tribunal following a Hearing on 30th April 2021 on the basis that the Tribunal had no jurisdiction to hear it. At the same time the claimant's application to include a claim of unfair dismissal was refused. The claimant then sought to amend so as to include a claim of age discrimination and following a Hearing which took

place on 15th September 2021 the Tribunal allowed the amendment in part so as to permit the claimant to bring claims of direct age discrimination in respect of 2 distinct issues which were set out in paragraph 3.3 of the Judgment issued following that Hearing. The respondent's position was that they resisted all claims. They submitted Further and Better Particulars of their response in order to deal with the remaining issue before the Tribunal which Further Particulars were accepted by the Tribunal. The case was set down for a Final Hearing which was to take place over 3 days commencing on 1st December. At the outset of the Hearing both parties confirmed that the sole claim before the Tribunal was the claim of age discrimination as set out in section 3.3 of Employment Judge Campbell's Judgment following the Preliminary Hearing on 15th September. The claimant gave evidence on her own behalf. Evidence was then led on behalf of the respondents from Lorna McDonald a Digital Hub Manager (formerly Showroom Manager) with the respondents, Andrew Young, a retired Deputy Manager with the respondents and Steven Robertson, a Trade Manager with the respondents. A joint bundle of productions was lodged. In the event it proved possible to conclude the evidence and submissions within one day. On the basis of the evidence and the productions the Tribunal found the following facts relevant to the Hearing to be proved or agreed.

2. The respondents are B&Q Limited. The claimant commenced employment with the respondents on or about 5th October 2019. She was employed as Customer Advisor. The claimant's Contract of Employment was lodged (pages 81-85). The respondents' Disciplinary Policy was lodged (pages 171-182). A copy of the respondents' Absence Policy was also lodged (pages 152-170). The respondents' Disciplinary Policy contains provisions on what is termed "unsuitability" which only apply to those employees who have less than 18 months service. The relevant section of the Disciplinary Policy is set out at page 176 and states:

> "The unsuitability process is designed to discuss and address concerns with the conduct, performance or attendance of colleagues with under 18 months service (or 9 months in Northern Ireland, ROI,

IOM or the Channel Islands). It may also be followed should a colleague fail to consent to background checks and/or an unsatisfactory outcome of background checks.

In these situations your Line Manager will hold a step 1 meeting to discuss their concerns and progress to a step 2 meeting if necessary. The outcome of the step 2 meeting may be no further action, an informal action or your dismissal for unsuitability (with payment in lieu of notice). You will not be able to appeal this decision. Under the unsuitability process you will not usually be issued with a written warning or final written warning before being dismissed."

3. The respondents' attendance management process refers to what is called a traffic light system. An employee meets with a manager after each absence to have a return to work meeting. They will be warned about their attendance. A first absence generates a green warning, a second amber and a third warning within a rolling twelve month period is red. In cases where an employee has more than 18 months service there are specific provisions which deal with how matters are progressed following a red warning. For employees with less than 18 months service the policy is that the return to work meeting following a third absence generates a red warning which is also taken to be the step 1 meeting in terms of the unsuitability process. Managers' understanding of the unsuitability process is that where an employee has more than 3 absences within a running 12 month period then if they have more than 18 months service they go on to the red stage where further absence management is undertaken which can lead to dismissal. On the other hand, if they have less than 18 months service there is a truncated process whereby they go straight to a step 2 meeting. At that meeting they will generally be dismissed unless they can show that the absences which led to them receiving a red warning are linked in some way so that effectively 2 or more absences can be treated as only one. The Managers understood that this was so as to assist the respondents to comply with the terms of the Equality Act in relation to disability discrimination.

4. The effect of this policy is that if an employee with less than 18 months service has 3 unrelated absences within a rolling 12 month period then they will automatically go to a step 2 meeting where there is a very high chance indeed that they will be dismissed. At the step 2 meeting the Manager is essentially looking only to see whether the absences were linked in some way. The Manager is not looking at individual mitigation in respect of each absence on the basis that this ought to have been done at the time of the return to work meeting.

5. The claimant was absent on 8th September 2020. The claimant had had 2 previous absences since commencing work on 5th October 2019. Both of these absences were unrelated to each other and to the third absence. The claimant was absent for one day. On her return to work on 9th September the claimant had a return to work meeting with a Manager. A red return to work form was completed (pages 86-87). The Manager noted that there was no pattern to the absences which were for different reasons.

6. As noted above the red return to work form contained a note on page 87 stating for colleagues with less than 18 months service::

> "If the colleague is on a third (red) absence invite to a step 2 formal meeting (unsuitability).
>
> If you have concerns about unsatisfactory levels of attendance in combination with other concerns e.g. conduct/performance/capability open a first step inquiry to investigate then (if applicable) invite to a step 2 formal meeting (unsuitability) in line with disciplinary policy under 18 months."

7. The following day the claimant was at work and was handed a letter inviting her to a step 2 unsuitability meeting. This was lodged (page 89-90). The claimant was invited to a step 2 meeting which was to take place on 15th September 2020. Although the letter was prepared by the respondent's

ER (Employee Relations) Department it was signed by Lorna McDonald, a Manager with the respondent who was known to the claimant.

8. The claimant's Line Manager (Tricia) is the mother of the claimant's boyfriend. The claimant and her Line Manager discussed the matter. Neither appreciated that Lorna McDonald was the Manager who had been asked to deal with the Hearing. The claimant's Line Manager suggested that the claimant might wish to approach Lorna McDonald with a view to asking her to accompany the claimant to the Hearing as her companion/representative. At the same time the claimant looked online to see if there were any other jobs available. The claimant's Line Manager spoke to Lorna McDonald and said that the claimant would be coming to ask her to be her companion and also told her that the claimant had been looking at online websites for other jobs.

9. The claimant went to see Lorna McDonald and spoke to her. She had the letter with her and took it to show Lorna McDonald who then noticed that the signature on the back was hers. At that point Lorna McDonald said that she could not discuss the matter further with the claimant since she was to be the Manager dealing with the Hearing. Up until the point where she saw her signature on the back of the letter she had not appreciated that she was to be the manager dealing with the step two hearing.

10. The step two Hearing took place on 15th September. The claimant attended alone. She was aware that she could bring a companion/representative but decided not to. At the commencement of the Hearing there was a discussion between the claimant and Ms McDonald. There is a dispute between Ms McDonald and the claimant as to who first raised the issue of the claimant resigning rather than proceeding with the Hearing and potentially being dismissed for unsuitability. The Tribunal's view of the matter was that Ms McDonald clearly believed that if the meeting proceeded then there was a very high possibility amounting almost to a certainty that unless the claimant could show that the absences were linked (which they were not) then the claimant would have to be dismissed. The Tribunal's view was that the claimant was also aware of this given her discussions with Tricia the day

before and the fact that she had herself already been looking for jobs. The Tribunal did not believe that Ms McDonald expressly advised the claimant that she had 2 choices as set out in the claimant's ET1.

11. In any event the claimant told Ms McDonald that she wished to resign. Ms McDonald did not know how she should deal with this matter. Ms McDonald had previous experience of implementing the unsuitability policy. This was in respect of a 62 year old truck driver who had amassed 3 absences in a rolling 12 month period during his initial 18 months. He was dismissed. He had not sought to resign. Ms McDonald decided to go next door to the respondents' Employment Relations Section to ask for advice. She was unsure whether or not she should allow the claimant to resign and then no longer proceed with the step 2 meeting or whether she required to proceed with the step 2 meeting in any event and simply note within this that the claimant had already indicated an intention to resign.

12. The advice which Ms McDonald received from the ER Department was that if the claimant resigned with immediate effect then there would be no need to proceed with the step 2 meeting. They advised that it was important that the claimant write that her resignation was to take immediate effect. They gave Ms McDonald a blank piece of paper. Ms McDonald went back through to the claimant and the claimant wrote out her resignation in her own handwriting. She signed and dated it in her own handwriting. The document was lodged (page 91). It states:

> "15.09.20 Please accept this as my resignation with immediate effect
> Macy Oliver"

13. The claimant handed this to Ms McDonald. Ms McDonald wrote out the claimant's name in block capitals beneath her signature because she believed the claimant's signature to be unclear. Ms McDonald also signed the document at the bottom.

14. Following this there was a brief general discussion between the claimant and Ms McDonald. Ms McDonald expressed the view that the claimant had done the sensible thing in a difficult situation. She advised the claimant that she knew there were a lot of shop workers whose fixed term contracts were coming to an end and suggested that the claimant go across the road to one of the other shops in the retail park and see if they were hiring. Ms McDonald told the claimant that in the normal course of events if the step 2 meeting had proceeded and the claimant had been dismissed then Ms McDonald's job would be to escort the claimant out of the building. She suggested to the claimant that in order to avoid this, which could potentially be embarrassing, she would ask Tricia to come up so that Tricia and the claimant could both walk out of the store together. The claimant agreed to this. Ms McDonald called on Tricia who then came up and went out of the building with the claimant. The claimant then went home.

15. On 16th September Lorna McDonald prepared a letter to the claimant which was lodged (page 92). This was essentially a standard template letter where it is felt an employee may have resigned in haste. It states the respondent will delay acting on the resignation for seven days in case the employee wishes to reconsider her decision. It is unclear whether or not this letter was ever received by the claimant. In any event the claimant contacted the respondents using the respondents' online intranet which she was able to access from her home. The service is called "Speak Up". She left a note on this to the effect that she wished to withdraw her resignation. Following this contact from the claimant the respondent's Manager Cameron Miller telephoned the claimant and said that she would be permitted to rescind her resignation and return to work. He said that if this happened then the step 2 process would still have to be completed.

16. The claimant was told that the first stage would be for her to attend a step 1 investigation meeting which was to take place on 30th September 2020. The claimant was invited to this by a letter dated 28th September 2020 sent to her home (page 95).

17. The claimant duly attended this meeting. The claimant was accompanied by her mother. The meeting was a lengthy one and it was adjourned on several occasions. A note of the meeting was lodged (page 96-116) which the Tribunal considered to be an accurate record of what took place. The upshot of the meeting was that the claimant was encouraged to submit a grievance and she was advised that whilst the grievance was being dealt with she could return to work and the unsuitability process would be suspended until such time as the claimant's grievance had been dealt with.

18. The claimant completed a formal grievance form and handed it in. This was lodged (pages 121-124). It does not mention age discrimination.

19. The respondent asked Andrew Young, the Deputy Manager of a different store from the one where the claimant worked to conduct the grievance process. Mr Young met with the claimant on 8th October 2020 accompanied by a note taker. The claimant was again accompanied by her mother. A note of this meeting was lodged (pages 125-131). The Tribunal considered this to be an accurate record of what took place at the meeting. During the course of the meeting Mr Young advised the claimant that he had gone through the return to work notes in respect of each of her absences. He had noted that the return to work interview in respect of her second absence had not taken place until around 14 days after her return to work. This was a breach of the respondent's policies.

20. Towards the end of the meeting the claimant was asked by Mr Young if she was happy with the way the meeting had been conducted. The claimant said that she was not happy that the "Lorna subject had not been touched on much". This was in relation to the claimant's allegation that Lorna McDonald had told her that she must either resign or be dismissed. Mr Young's response to this earlier in the Hearing had been to say that he would require to speak to Lorna McDonald before he could get back to the claimant regarding this. Mr Young advised the claimant again that this was what he would be doing. The claimant confirmed she was happy with this.

21. On 12th October the Mr. Young met with Lorna McDonald. A note of this meeting was produced (132-134). Mr Young noted the issue which was being addressed as "aborted step 2 hearing as meeting failed to proceed due to offer of resignation by Macy Oliver who now claims she was coerced into writing resignation by yourself". Ms McDonald produced a written statement which she signed which is set out in pages 133-134. Essentially her position was that immediately prior to the step 2 meeting commencing the claimant had said "It's not looking too good for me is it?" and then said, before Ms McDonald could take the step 2 paperwork out of the envelope "I think I'll just resign". Then said that matters had proceeded as per our findings in fact above.

22. Mr Young's view was that given that there were 2 different accounts of what had taken place at the meeting on 15th September and given that there were no witnesses he was not in a position to make any specific finding as to what exactly had been said. In any event he noted the claimant had been permitted to rescind her resignation. Mr Young, however, went on to consider that the breach of the respondent's processes as a result of the second return to work interview being held 14 days too late was significant. He took advice from the respondents' Employee Relations Department on this and they advised him that in those circumstances the second absence ought to be disregarded. Given that the second absence was disregarded this meant that the claimant would not have had 3 separate absences within a rolling 12 month period and therefore would not warrant a red warning or a referral to a step 2 unsuitability meeting. This effectively meant that the step 2 process would not proceed.

23. Mr Young advised the management at the store where the claimant worked of his findings and the outcome. He also communicated to them various learning points which he considered arose from this issue. He did not formally communicate his findings in writing to the claimant. He checked with the management of the store where the claimant worked that the claimant had been advised of his findings and that she was fully reinstated and the step 2 process abandoned.

24. The claimant was informally advised by her Manager what the outcome was. She was also formally invited to a step 2 meeting which was set to take place on 14th October. At that meeting the claimant was formally advised that because of the issue regarding the late return to work interview her second absence was not valid and that no further action would be taken. A note of this meeting was produced (pages 137-138).

25. The claimant was very happy to be reinstated and continued to enjoy her work. The claimant felt that her personal relationship with Lorna McDonald had suffered and they would no longer speak to each other. On or about 11th November the claimant was asked to move to another department within the store. The claimant did not like this. The claimant became ill and was absent from work for a time before resigning. None of the events which took place after 16 October were the subject of the hearing.

26. The claimant sought to rely on a comparator Z. Z was an individual employee who commenced employment with the respondent in January 2019. In October 2020 her Manager referred her to informal action because she had turned up for the wrong shift multiple times. She had not been absent. The manager met with Z and completed an informal action form on 7th October 2020. Z was not subject to the suitability process because she had not had any absences and at the time she was referred for informal action she had more than 18 months service. She was not a valid comparator for the claimant's claim.

Matters Arising from the Evidence

27. The Tribunal considered that all of the witnesses were genuinely trying to tell the truth and assist the Tribunal by giving accurate evidence as they saw it. The Tribunal was concerned that the claimant often appeared to have limited understanding of what had been happening and that some of her evidence was difficult to reconcile with other parts. It appeared she had rehearsed a lot of the evidence in her head prior to the hearing and some of her recollection

was inaccurate. The tribunal did not consider her to be an altogether reliable witness. During her evidence the claimant was clear that Ms McDonald had not at any time told her what would happen if she did not submit her letter of resignation. This contrasted with her position as set out in the ET1 which was that Ms McDonald had expressly given her two choices. The Tribunal was satisfied that Ms McDonald had not in fact given the claimant the two express choices as set out in the ET1. The Tribunal members had mixed views as to which of the 2 had first raised the issue of resignation. The Tribunal's eventual unanimous view was that, to some extent, both the claimant and Ms McDonald knew full well that the most likely outcome of the step 2 Hearing proceeding was that the claimant would be dismissed and the issue of resignation was 'in the air'.

28. Ms McDonald was quite clear in her evidence that the respondents' policies gave Managers no discretion in these circumstances. This was confirmed by Mr Young who said that essentially the only way out was if some procedural irregularity could be found (as he found in the claimant's case) or if the employee could show that the absences were somehow related. Given that the respondents' Manager at the third return to work interview had specifically stated that there was no pattern to the absences it was clear that the claimant was going to have some difficulty with this. In those circumstances it would have been clear to both parties that a sensible option might well be for the claimant to resign. During her evidence the claimant expressed not to know what the term "with immediate effect" meant. She also accepted that at an earlier stage in the process she had claimed that the resignation letter was not in her handwriting and was not the document she had signed. At the tribunal hearing she expressly accepted that this was not the case and that she had written out and signed the document herself.

29. Mr Young accepted that he had not advised the claimant formally of the outcome of the grievance. He said he had spoken to ER and understood that there was no specific requirement for him to do so. He had advised management of the outcome and the claimant had been verbally told. The claimant had also been formally told that the stage 2 process was at an end.

30. A feature of the claimant's evidence was the almost total absence of any reference to age as being one of the factors which led to her being treated as she was. The claimant complained of being treated unfairly. Her complaint was generally about the unfairness of dismissing her for three genuine absences where there were, in her view, strong mitigating circumstances in the case of each absence. The claimant asserted on several occasions that she felt that she was treated badly because of her age and her representative also stated this but apart from sheer assertion absolutely no evidence was offered. The claimant did refer to someone that she considered to be a comparator (Z) who she said had been given informal action for turning up for the wrong shift. She was unable to give any details of this individual other than her belief that this individual had also been there less than 18 months. In cross examination she accepted that the individual she referred to was an individual (Z) who was the subject of an informal action form which was lodged by the respondent (page 183). I have redacted this individual's name in terms of rule 50 so as to protect her convention rights as it is not necessary or appropriate she be identified. The claimant accepted that she did not have any specific detail as to how long this individual had been employed by the respondent. The Tribunal accepted Mr Robertson's evidence that this individual had started in January 2019 so that by the time of the informal warning in October 2020 she had more than 18 months service. In any event this person had not had any absences and had been subject to a completely different policy which deals with informal disciplinary issues. There was therefore absolutely no evidence before the Tribunal from which we could draw any inference that the claimant was treated differently on account of her age.

Issues

31. As noted above the case has a somewhat odd procedural history in that the claimant had first of all lodged a claim of breach of contract while she was still employed by the respondent. The Tribunal had no jurisdiction to hear this, however the claimant subsequently applied to amend her claim so as to

make it a claim of age discrimination. This was permitted by Employment Judge Campbell following a Preliminary Hearing, however Employment Judge Campbell made it clear in his Judgment that there were only 2 specific issues which were before the Tribunal. It is probably as well to set these out in this Judgment.

On 15th September 2020 the claimant was forced into resigning in the course of a disciplinary meeting with her Manager Lorna McDonald. Ms McDonald treated her harshly and unfairly in that meeting. She allowed and offered the claimant no support and took advantage of her lack of awareness of employment rights or procedure. This was direct discrimination. In her treatment of the claimant Ms McDonald took advantage of the claimant's young age (she was 17 at the time) and she would have treated an older employee more favourably. The claimant's comparator is a Ms (Z) who worked at the same store but a different department. She was aged in her 20s at the relevant time. She had been asked to attend a similar meeting but was not treated as severely as the claimant and was told she would be given a warning in relation to her attendance – the first complaint.

Between 8th and 16th October the claimant was unfairly treated by Mr Andrew Young in the way that he dealt with the grievance she raised. He did not consider her grievance properly that he widened the discussion to cover other issues outside of the grievance in a way which was critical of the claimant and did not provide a written outcome of the grievance despite being requested, but instead merely told her that she should be happy that she was back at work. Again this was direct discrimination by way of Mr Young taking advantage of her youth and inexperience to treat her less favourably than he would an older employee. The same comparator is relied upon as for the first allegation of discrimination above."

At the start of the tribunal I checked with the claimant and her representative that these were indeed the only claims before the tribunal. They confirmed that this was the case.

Discussion and Decision

32. Direct discrimination is defined in section 13 of the Equality Act 2010:

> "(1) A person (A) discriminates against other (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim …."

33. In approaching the issue of whether or not section 13 applies the Tribunal is required to apply the burden of proof rules set out in section 136. This states:

> "… (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 sub-section (2) does not apply if A shows that A did not contravene the provision. Potentially this provision recognises the fact that discriminators rarely admit a discriminatory motive for their behaviour. In deciding whether or not discrimination has occurred the Tribunal is usually in the position of having to infer discrimination from the parties actings. Effectively the provision is that if the claimant succeeds in showing that there are facts from which the court could decide in the absence of any other explanation discrimination occurred the burden of proof then passes to the respondent to show that in fact there is a non-discriminatory explanation for both facts.

34. In this case the Tribunal accepted the respondents' position that in this case the claimant was required to show that because of her age she had been treated less favourably than the respondents would treat others of a different

age. With regard to the first issue there was absolutely no evidence to suggest that Lorna McDonald was influenced by the claimant's age in any way in making the decisions which she did. The claimant told Ms McDonald prior to the formal step 2 meeting starting that she wanted to resign. Lorna McDonald took instructions from the Employee Relations Department and behaved accordingly. The Tribunal did not find that Lorna McDonald coerced the claimant in any way. The claimant did feel under pressure due to the circumstances.

35. The circumstances in which the claimant found herself as a result of the respondents' policy were undoubtedly extremely harsh. We say at once that we feel some sympathy for the claimant's feeling that she was being treated unfairly. The respondents' unsuitability policy is extremely harsh in the way it applies to individuals who have less than 18 months service. It may well be that if this policy were applied to someone who was in a position to claim unfair dismissal that any dismissal based on the unsuitability process would be deemed unfair. That is no doubt why the respondents confine the application of the process to those employees who cannot take a claim of unfair dismissal to a tribunal because they do not have sufficient qualifying service. That having been said Ms McDonald was not personally responsible for the policy. We agreed with the respondents' representative that essentially the claimant's claim in respect of this falls at the first hurdle in that there was no unfavourable treatment by Ms McDonald. Ms McDonald took advice and processed the claimant's resignation in a straightforward way. At the Tribunal Hearing Ms McDonald expressed the view that as a Manager she had no discretion in the matter and had the stage 2 Hearing proceeded the claimant would most certainly have been dismissed. Even if we were to accept that Ms McDonald had treated the claimant unfavourably in some way the fact remains that there is no evidence whatsoever apart from the claimant's assertion that Ms McDonald was influenced in any way by the claimant's age.

36. In addition to this we note that the respondents agreed to the claimant being permitted to rescind her resignation and return to work. The claim in respect of issue number 1 fails.

37. With regard to issue number 2 the claimant's evidence at the Hearing was somewhat confusing. She accepted that she was actually happy with the outcome of the grievance in that she was happy that she was reinstated and able to return to work with the threat of the stage 2 action removed. By the end of her evidence it appeared that the only thing which she considered to be unfavourable treatment was the fact that she had not been given any formal written outcome of the grievance by Mr Young. She indicated that that meant that she was not in a position to appeal the outcome but the tribunal did not accept that this was the case. She was also asked what more she would have hoped to gain from an appeal and she was unable to answer this in a satisfactory way.

38. At the end of the day, the Tribunal's view was that it could well amount to less favourable treatment if an employee was not given a formal outcome of a grievance in circumstances where this was mandated by a policy and where she wanted it. The difficulty for the claimant was that there was absolutely no evidence to suggest that Mr Young's decision was based in any way on the claimant's age. There was absolutely nothing to suggest that an employee of a different age would have been treated differently. On this basis the balance of proof did not transfer to the respondents and the claimant's claim must fail.

Employment Judge: Ian McFatridge
Date of Judgment: 07 December 2021
Entered in register: 09 December 2021
and copied to parties