



EMPLOYMENT TRIBUNALS

Claimant: Mr J Olatunde
Respondent: Athena Care Limited
Heard on: 8th and 9th August 2022
Before: Employment Judge Pritchard
Members: Ms N O'Hare
Mr C Wilby

Representation

Claimant: In person
Respondent: Mr D Jones, counsel

REASONS

1. These written reasons for the Tribunal's judgment of 9 August 2022 are provided at the Claimant's request.
2. The Claimant claimed direct sex discrimination, victimisation, harassment, unpaid wages, notice pay (breach of contract), holiday pay, and failure to provide a written statement of employment particulars. The Respondent resisted the claims. At the commencement of the hearing, the Respondent withdrew its employer's contract claim. During the course of the hearing, the Claimant withdrew his claim that the Respondent failed to provide itemised pay statements. On the second day of the hearing, settlement was reached in respect of the claims for unpaid wages, notice pay, holiday pay and failure to provide a written statement of employment particulars.
3. The Tribunal heard evidence from the Claimant and from Ami Hobday, the Respondent's Bournemouth Branch Manager at relevant times. The Tribunal was provided with a bundle of documents to which the parties variously referred. The Claimant provided a further bundle of documents which he labelled as exhibits. The Respondent helpfully provided a schedule in the form of a table containing data extracted from various relevant emails. At the conclusion of the hearing the parties made oral submissions.

Issues

4. The issues were discussed with the parties at the commencement of the hearing which, following the withdrawals and settlements referred to above, can be described as follows.

Direct sex discrimination

5. Did the Respondent subject the Claimant to a detriment by not accepting his offer to work on an assignment on 1 April 2021?
6. If so, did the Respondent treat the Claimant less favourably than it treated a female carer, referred to as AD in this judgment, who the Respondent concedes is an appropriate comparator for the purposes of this claim?
7. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because the Claimant is male?
8. If so, what is the Respondent's explanation? Has the Respondent proved a non-discriminatory reason for the proven treatment?

Harassment

9. Did the Respondent engage in unwanted conduct as follows:
 - 9.1. Pestered and upset the Claimant with a reiteration of work placement offers on 31 March 2021, 1 April 2021, 2 April 2021 and 8 April 2021 after the Claimant had already rejected the offers?
 - 9.2. Ignoring the Claimant's grievance?
10. If so, was the conduct related to the Claimant's sex?
11. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
12. If not, did the conduct have that effect having regard to the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

Victimisation

13. Has the Claimant done a protected act? The Claimant relies on his acceptance of the work offered as being the protected act which, he claims, demonstrated his right to equality of opportunity which was any other thing for the purposes of or in connection with the Equality Act 2010 as set out in section 27(2)(c).
14. If so, did the Respondent decline to accept his offer to work on the assignment because he had done the protected act?
15. The Tribunal directed that it would consider the question of liability only at this hearing and that a further hearing would take place to consider the question of remedy if the Claimant were to succeed in all or any of his claims.

Findings of fact

16. Part of the Respondent's business is domiciliary care. It supplies workers to care for clients, often vulnerable adults, in their own homes.
17. On 25 November 2020, the Claimant responded to an advertisement to be employed by the Respondent as a live-in care worker.
18. On 4 December 2020, the Claimant attended an interview by telephone with a member of the Respondent's recruitment staff. The Tribunal is satisfied that the form completed by the recruiter is likely to be an accurate and truthful account of what the Claimant said at the time. Among other things, the form shows the following question relating to client preference and the Claimant's answer:

Question: *Do you prefer male or female?*

Answer: *Not quite, would be more comfortable with males but I am open to care for anyone who is happy with me.*

19. The Care Worker Selection Record completed by the recruiter confirms that the Claimant was told that the contract was usually zero hours and the implications of this on both sides. When giving evidence, the Claimant accepted that he had the right to accept or refuse any assignments offered to him.
20. Following the interview, the recruiter sent the Claimant an application form, a DBS application form, and a request to provide proof of identity, national insurance number, proof of eligibility to work in the UK, proofs of address, qualification certificates and the address, phone number and email of the Claimant's last two employers so references could be obtained.
21. On 17 December 2020, the recruiter emailed the Claimant to inform him that he would undergo training over three days: 21 to 23 December 2020 from 9.00 am to 5.00 pm on each day. The Claimant undertook that period of training which took place in a classroom setting.
22. By judgment dated 24 January 2022, Employment Judge Siddall determined that by 24 March 2021 the Claimant had become an employee and a worker.
23. After the Respondent had completed a DBS check relating to the Claimant and sought relevant references, the Claimant undertook a further period of training when he shadowed a care worker on 24 and 25 March 2021.
24. On 27 March 2021, Rebecca Cash, Branch Manager, emailed the Claimant to inform him that a live-in package assignment had become available in Leicester for a wheelchair-bound young man with cerebral palsy. The rota would be 2 weeks on and 2 weeks off. The Claimant was asked to reply by mid next week if he was interested in the assignment. The Claimant was not interested in the assignment and did not reply.
25. By email dated 31 March 2021, timed at 15.43, Rebecca Cash emailed carer AD to inform her that an assignment was available to look after a female end of life client in Worthing and set out the applicable rate of pay. AD was asked to reply asap if it was something she was interested in.
26. By email the same day, timed at 18.06, Rebecca Cash and Ami Hobday were informed that two carers were needed in Worthing: one to cover the palliative

care already referred to and a further carer to provide temporary cover for about 12 days. Rebecca Cash and Ami Hobday were asked to remind potential carers that an additional payment of £100 would be made for picking up the assignment at short notice.

27. By mail timed at 18.17, Rebecca Cash informed AD of the £100 additional payment and that two carers were required at Worthing.
28. At 18.20, Ami Hobday sent emails to the Claimant and other carers to inform them of the end of life care requirement for the female client in Worthing and the applicable rate of pay.
29. By email timed at 01.28 on 1 April 2021, AD informed Rebecca Cash that she was available to undertake the end of life care assignment in Worthing and asked for further details. By email timed at 07.04, Rebecca Cash thanked AD and told her that she would book travel tickets for AD and get further details to her a little later that morning.
30. At 08.30 the same morning, the Claimant emailed Ami Hobday to say he was interested in the work opportunity and asked for details. He sent an identical email ten minutes later which Ami Hobday, who was on family leave at the time, forwarded to Rebecca Cash 15 minutes after receipt.
31. Rebecca Cash promptly replied to Ami Hobday, in terms, that both positions had now been covered but that she had made enquiries as to whether three carers might be required in Worthing.
32. At 10.20 the Claimant emailed Rebecca Cash informing her that he had decided to accept the work assignment in Worthing of which Ami Hobday had informed him the previous evening. Rebecca Cash replied to say she was awaiting details from the Manager at the Worthing care home and asked the Claimant if he would need travel arranged. The Claimant replied that he would need travel arrangements to be made. In the event, no further carers were required in Worthing.
33. At 11.30 am, Rebecca Cash emailed the Claimant to say that she had just received notification that:

“...cover has been found as the client is a female, so there is current cover at [name of care home]”
34. Rebecca Cash informed the Claimant of the work which remained available in Leicester to support the young male with Cerebral Palsy. The Claimant did not reply.
35. The following day, Rebecca Cash again emailed the Claimant to check he had received the email explaining that there was no requirement for cover in Worthing but an assignment remained available in Leicester.
36. By way of reply, the Claimant emailed Rebecca Cash later that day. Among other things, he stated, in terms:

- He had confirmed at interview that he was comfortable caring for a female
- The issue of a male caring for a female could not have been a concern because the offer had been made to him
- The offer of work in Leicester did not reflect the details set out in the job advertisement
- The original offer of work in Leicester made on 27 March 2021 should not have been repeated
- He had not been provided with a placement despite having been recruited four months ago
- Someone should decide on the remuneration to which he was entitled to date.

37. Rebecca Cash replied and apologised that the job advertised was incorrect, that the work in Worthing was no longer available because the vacancy had been filled and that was the reason why the Claimant had been offered the ongoing vacancy in Leicester. She again provided details of that assignment. The Claimant did not reply.

38. On 8 April 2021, Rebecca Cash emailed the Claimant asking whether he was accepting or declining the assignment in Leicester and asked him to reply by noon the following day.

39. The following day, 9 April 2021, the Claimant emailed his resignation letter to Rebecca Cash and others. Rebecca Cash confirmed receipt and explained that the points the Claimant had raised had been forwarded to HR to be considered as a grievance.

40. The Claimant's employment ended on 9 April 2021.

Applicable law

Direct sex discrimination

41. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

42. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (sex in this case), A treats B less favourably than A treats or would treat others.

43. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the act itself: see James v Eastleigh Borough Council [1990] IRLR 572. The council had applied a criterion, though on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator

– whether described as his intention, his motive, his reason or his purpose - will be irrelevant.

44. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502.
45. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.
46. It is not inappropriate for a Tribunal to go straight to the second stage of reasoning. If the Tribunal satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with the protected characteristic. See Laing v Manchester City Council [2006] ICR 151.

Harassment

47. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:
- (a) A engages in unwanted conduct related to a protected characteristic (sex in this case); 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.
48. Section 26(4) provides that 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.
49. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the

Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

50. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?
51. The words 'related to' in section 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; Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT.
52. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 held that alleged discriminatory words must be considered in context. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

Victimisation

53. Section 39(3) of the Equality Act 2010 provides that an employer (A) must not victimise an employee of A's (B) –
 - (a) As to B's terms of employment;
 - (b) In the way A affords B access, or not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
 - (c) By dismissing B;
 - (d) By subjecting B to any other detriment.
54. Section 27(1) provides that a person (A) victimises another person (B) if A subjects B to a detriment because
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
55. Under section 27(2)(c), doing any other thing for the purposes of or in connection with the Act is a protected act.

Conclusion

Direct sex discrimination

56. The Tribunal has considered the reason why the Claimant's application to undertake the Worthing assignment was not accepted by the Respondent. This approach, going straight to the "reason why", is permitted as described in Laing.
57. By email timed at 07.04 on 1 April 2021, Rebecca Cash thanked AD and told her that she would book tickets and get further details to her a little later that morning. The Tribunal infers from that email that the Respondent had filled the vacancy by 07.04 on the morning of 1 April 2021.

58. It is curious as to why Rebecca Cash later informed the Claimant that “cover has been found as the client is a female, so there is current cover at [name of care home]”. However, it is clear that the vacancy had been filled even before the Claimant communicated his interest in it. Rebecca Cash could not possibly have been motivated, consciously or unconsciously, by the fact that the Claimant is male if she did not know of his interest in the vacancy at the time she allowed AD to fill it.
59. The Tribunal concludes that the reason why AD was assigned to the care role was for the reason asserted in evidence by Ms Hobday: namely, that the Respondent operated on a first come, first served basis and AD had come first. Ms Hobday was a clear and credible witness. She explained in clear terms to the Tribunal that clients could expect to be in receipt of carers of either sex. The Tribunal accepts that evidence, the force of which is supported by the fact that the Claimant was informed of the opportunity to care for a female client in the first place. It is further supported by his own evidence that had AD not been first assigned, he would have got the job.
60. The Tribunal finds that the reason why the Claimant’s application to work in Worting was not accepted had nothing whatsoever to do with his sex.
61. The Tribunal concludes that the Claimant was not directly discriminated against on grounds of sex.

Harrasment

62. Turning to the allegation that the Respondent’s repetition of information relating to the assignment in Leicester amounted to harassment. Although Ms Cash did not appear before the Tribunal to give evidence, the content of her emails upon which the Claimant relies were placed before the Tribunal. The Tribunal is not persuaded that the emails sent by Rebecca Cash had the purpose of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Rather, the purpose was to seek a qualified carer to work in Leicester to care for a disabled person as reasonably required by the Respondent’s business.
63. The Claimant claims to have been upset or offended by these emails and thus the Tribunal must consider the effect of them having regard to the Claimant’s perception, the other circumstances of the case, and whether it was reasonable for the emails to have had such an effect on him.
64. The Tribunal has no hesitation in finding that in the circumstances of this case, it was not reasonable for the emails to have had such an effect on him. He had signed up in order to work in the care sector. He was offered the job to work in Leicester. It was his own failure to respond that led to the information relating to assignment being reiterated to him.
65. The Tribunal is satisfied that the emails were not related to the Claimant’s gender. The fact that the Claimant is male and the potential client was male is simply the context to circumstances of the case, nothing more.
66. Turning to the allegation that the Respondent harassed the Claimant by ignoring his grievance. The Tribunal is not satisfied that the Claimant’s email of

2 April 2021 amounted to a grievance as reasonably understood. Even, if that is wrong, it was not ignored by the Respondent: Rebecca Cash promptly replied addressing the points raised by the Claimant as she reasonably understood them.

67. When the Claimant raised what could reasonably be understood as a grievance in his resignation letter, and highlighted what he perceived as the Respondent's failure to address his concerns, it was referred to Human Resources. Again, it was not ignored as alleged.
68. In any event, the Tribunal is not persuaded that the purpose behind the actions or inactions taken by the Respondent with regard to any complaint or grievance was to harass the Claimant. It would not have been reasonable for the Respondent's actions or inactions to have had such an effect on him to cause him to feel that they violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.
69. Nor was there any evidence to suggest that any actions or inactions by the Respondent relating to the complaints he had made related to his gender.
70. The Claimant was not harassed as alleged.

Victimisation

71. The Claimant relies on his acceptance of the work offered as being the protected act which, he says, demonstrated his right to equality of opportunity.
72. The Tribunal is not persuaded that this amounted to a protected act, even under the broad definition in section 27(2)(c). If this were the correct interpretation of section 27(2)(c) then almost any act could be said to amount to a protected act and deprive the victimisation provisions within the Equality Act 2010 of any real meaning.
73. As to causation, the Tribunal is unable to find that the Respondent declined to accept the Claimant's offer to work because he had applied for it. That is circular reasoning and does not make sense.
74. The Claimant did not do a protected act and his victimisation claim cannot succeed.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 26th August 2022

