EMPLOYMENT TRIBUNALS

Claimant: Ms M Urbas

Respondent: Team Industrial Services (UK) Limited

Heard at: Manchester **On:** 24 and 25 October 2022

Before: Employment Judge Robinson
Ms S Howarth
Ms P Owen

REPRESENTATION:

Claimant: In person (with an interpreter in attendance)
Respondent: Mr Scaife, Solicitor

JUDGMENT having been sent to the parties on 27 October 2022 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

Introduction, claims and Issues.

1. The claims of Ms Urbas are concerned with direct discrimination and they relate to the protected characteristics of race/nationality, sex and age. The claimant did apply to amend her application to include harassment but her application was refused by Employment Judge Doyle on 22 October 2021.

2. Firstly, with regard to age, we considered the age group the claimant was in and the age group of the person or persons with whom she compares herself.

3. The claimant is female and Polish and we are required to establish the facts in relation to the allegations and whether the claimant reasonably saw her treatment as detrimental to her.

4. In order to decide whether the claimant has been treated less favourably than others and, consequently, therefore been discriminated against with regard to the

protected characteristics of age, sex and race, we considered whether the claimant has proved facts from which the Tribunal could conclude that the less favourable treatment was because of age, race or sex. The law in this regard has been set out below.

Findings of Fact

5. We set out below the facts we find from the evidence that we have taken over the last two days. We have not repeated all the evidence we have heard, just the relevant facts necessary to enable us to come to our decision.

6. The claimant worked for a short time for Team Industrial Services (UK) Limited, from 6 January 2020 to 3 April 2020, when she was dismissed. The claimant was dismissed within her six month probationary period. The respondent company had a contractual right to dismiss within that six month probationary period. Because the claimant did not have two years' service working for the respondent she has not been able to make a claim for unfair dismissal. The issue is whether the dismissal and the way the claimant's appeal were dealt with during the appeal process were tainted by discrimination. We needed an explanation from the company as to why she had been dismissed.

7. The relevant protected characteristics are that the claimant is female and has a sex discrimination claim. The claimant is aged 35 and she compares herself with a younger man, David Thomas, who, at the relevant time, was in his early twenties. That is her age discrimination claim. The claimant is Polish (that is her nationality) and she claims race discrimination because of her nationality.

8. David Thomas received a salary of £19,000 per annum. He was a more junior employee than the claimant with a different job than her. The claimant received a salary of £23,700 per annum. She was more senior to David Thomas. She had many more years' experience in finance than Mr Thomas.

9. David Thomas and the claimant received a dismissal letter in the same terms on 3 April 2020. The letter had already been written and was handed to the claimant at a meeting on Friday 3 April 2020 with Mr Rohan Badenhorst. She was not taken through a dismissal process. The respondent accepted that and, as both witnesses for the respondent (Mrs Dixon and Mrs Clement) said, the decision had already been taken to dismiss the claimant and to dismiss David Thomas. The reason given to both of them was their performance levels. The restrictions around COVID-19, in the third week of March 2020 which were biting at that time, required the company to consider its manpower requirements. There was pressure from the respondent's United States parent company to save costs. The company decided that those who were failing their probation should, at that point, be dismissed in order to save those employment costs. David Thomas and the claimant were two employees who were sacrificed on that particular pragmatic altar.

10. David Thomas appealed immediately pleading for his job in a letter dated 8 April 2020 (the Wednesday following the Friday he was told of his dismissal). He asked to be furloughed. The claimant thought that there would have been a group appeal by those persons who had been dismissed because of the economic situation with regard to the pandemic. Consequently, she did not appeal until 14 April 2020

because that group appeal did not transpire. What the claimant wanted (like David Thomas) was to be rehired on furlough.

11. David Thomas was reemployed until June 2020, on furlough as requested and then was dismissed from his job at that point.

12. The difference in treatment between the claimant and her comparator was because David Thomas was employed in a more junior role. The cost of furloughing him and taking him back because of his smaller salary were going to be less. Furthermore, his details had not been taken off the HR system whereas the claimant's details had. In other words, signoffs had been completed for the claimant by the respondent company. David Thomas had not had the level of support the claimant had had during their short period of employment and therefore, given his lack of experience in his role, he was given another chance. Unlike the claimant, he had not had prior experience in a financial support role. Furthermore, Mr Thomas had not been making as many errors as the claimant. Both Mrs Dixon and Mrs Clement felt that Mr Thomas was capable of improvement whereas the claimant, despite her experience, was continually making the same mistakes even though she had had the correct procedure explained to her a number of times. They also felt that the demands made by the claimant's managers of her were appropriate and reasonable.

13. The respondent also thought that, even if the claimant was taken back on, either by furlough or fully, she would still not have reached the standard required within her probationary period for the role she was employed to carry out. The claimant had only completed half her probationary period (three months of the six month probationary period), but the claimant's managers decided not to reconsider her dismissal because of her continued underperformance and the claimant's employment details had been taken off the HR system. Her late application to be furloughed meant that the company had gone through the administrative process of wiping her details from its records. It would have taken the administration some time to re-establish the claimant onto the system.

14. There was no requirement for employees' details to be retained until an appeal had been dealt with. The claimant had also returned all her work equipment with no hint, in any correspondence or any communication, that she was going to appeal until she actually did so a few days later. The respondent felt it was highly likely that the claimant would not pass her probationary period in any event.

15. The claimant has suggested to us that there was no evidence of her poor performance, and she is upset that she was criticised for her work. There is evidence of her poor performance. At page 426 of the bundle there is a note, dated 16 March written by Andy Sutton, which sets out real concerns about the claimant's performance. For example, he says she was repeatedly asking the same questions, tasks were taking longer than they should have done, she was not checking mailboxes, there were complaints from technicians about her work, she was not prioritising tasks and not updating logs accurately. That meeting was a week before the lockdown on 23rd March 2020. It was a meeting which was asked for by the claimant, and she made much of that when giving her evidence, but it is clear that Mr Sutton took the opportunity to set out for the claimant the deficiencies in her work. The claimant did not take kindly to that criticism. Although the claimant attended the

Tribunal with an interpreter, she was clearly capable of understanding these proceedings and able to explain her case with clarity to us. There was never any suggestion by her that she was failing at work because she was Polish or because of any perceived or actual language difficulties. Indeed, the claimant was adamant that she was not failing and, she felt, the respondent's managers just got it wrong when dismissing her.

16. Both Mrs Dixon and Mrs Clement did consider all work carried out by the claimant during the short period of time she worked for the respondent company and the way she had carried out the tasks asked of her. The decision by Mrs Dixon, not to allow the appeal, was not taken lightly nor was it taken without a great deal of thought as to how the claimant had been performing. Mrs Dixon looked back at the work of the claimant and concluded that she should go because her work was not up to scratch. In essence, Mrs Dixon agreed with Mr Sutton's analysis of the claimant's work.

17. Those are the facts.

The Law

18. Was the claimant treated less favourably compared with others because of her three protected characteristics – age, race/nationality, and sex? Tribunals may not have direct evidence of discrimination but can infer discrimination and consequently we have considered all the evidence to see if there is a taint of discrimination in the decision making process of the respondent.

19. The process that we go through is a two stage process. The decision in **Igen Ltd v Wong (2005) IRLR 258 CA** sets out that two stage process. The burden is initially upon the claimant. The first stage in the process requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the claimant. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that it did not commit, or was not to be treated as having committed, the unlawful act. If the second stage is reached, and the respondent's explanation is inadequate, it will not be merely legitimate but also necessary for the Tribunal to conclude that the complaint should be upheld.

20. With regard to the age discrimination claim, only, we also have to consider whether the treatment of the claimant was a proportionate means of achieving a legitimate aim. In particular were the aims legitimate and of a public interest nature, was the treatment an appropriate and reasonably necessary way to achieve those aims and could something less discriminatory have been done instead and how should the needs of the claimant and respondent be balanced? However that particular element of the direct discrimination claim relating to age would only come into play if we found that there had been less favourable treatment of the claimant or a disadvantage caused to her.

21. If a claimant is directly discriminated against, in that she believes she has been treated less favourably than someone else, i.e. her comparator, and the treatment is based upon one of her protected characteristics, the question then

arises whether that comparator has to be a real person or a hypothetical comparator. Section 23 of Equality Act 2010 requires that in a comparison of cases for the purposes of direct discrimination there must be no material difference between the circumstances relating to each case. For the avoidance of doubt the claimant's comparator is for all her claims Mr. David Thomas. A younger, British male.

Application of Law to Facts

22. The claimant feels she has been treated badly and unfairly and outside process. However, the real question here is: was her treatment tainted by discrimination? Was the dismissal so tainted and was the appeal process so tainted? The less favourable treatment the claimant pleads is her dismissal and what led to it and the appeal thereafter.

23. Applying the law to the facts of this case we concluded as follows. For the ease of presentation further facts are set out below as required to explain our decision. We accept the claimant feels hard done by, but the treatment of her leading to her dismissal was exactly the same as her comparator, David Thomas. We were not satisfied that Mr Thomas was a true comparator because he was more junior than the claimant, carrying out a different role and paid considerably less. There were clear material differences between his situation and the claimant's. However, we were happy to treat him as a comparator, at this stage, and also use him as someone from whose circumstances we could construct a hypothetical comparator. We concluded from that comparison exercise that both were not performing in the eyes of the respondent's managers. There was an imperative to reduce costs. The managers decided that both David Thomas and the claimant should go. They both received the same letter in the same terms explaining why they had been chosen. It is a letter couched in broad-brush terms and does not go into detail, but its contents to both of them confirms that they were not performing and that they had failed their probationary period. A contractual probationary period is a risk for any employee. But it is a term used in employment contracts to consider whether, in the early part of the employment relationship, the two parties are suited to each other. Such a clause in the contract is not discriminatory in itself. If the two employees were both treated the same, we have to ask: can there be discrimination and has the claimant proved facts which would suggest that? We decided that the claimant had not passed the burden to the respondent. We find no facts which suggested, during the treatment of her up to and including her dismissal, that the dismissal was tainted by discrimination as she was not treated less favourably than others. Even if we are wrong and the burden has shifted to the respondent, we find that the respondent's witnesses have explained the company's position appropriately with regard to the way they treated the claimant. They treated the claimant in a non-discriminatory way. They decided, without taking either the claimant or Mr Thomas though a formal process, to dismiss them both. The decision had already been taken when the two interviews took place and both employees were faced with a fait accompli. Even if the claimant has chosen the wrong comparator in Mr Thomas, a hypothetical comparator, in the same circumstances as the claimant who does not have the protected characteristics of the claimant, would still have been treated in the same way as the claimant. The issue in this case is about cost and performance and there is clear evidence that the claimant was not performing as required by the

company. She was told as much before the pandemic repercussions were known. There has been no evidence to suggest the claimant was treated in the way that she was treated because she was female or because of her age or because she was Polish. We have considered whether we should infer discrimination from the evidence we have heard. The respondent may have been handed an opportunity to rid itself of poor performing employees as the impact of the pandemic hit but we cannot infer that that had anything to do with the claimant's protected characteristics. In short, the respondent chose the claimant to be dismissed to save costs and because of underperformance and for no other reasons.

24. The final issue required us to consider her post dismissal treatment i.e. the appeal process. Here the issues are more complex. We find that the burden has shifted to the respondent to explain itself. We wanted to know why the claimant was not treated in the same way as David Thomas. Why did the respondent not furlough the claimant as they had done David Thomas and bring her back into the fold as it did with Mr Thomas?

25. The reasons given on the face of them are non-discriminatory. It had nothing to do with sex or race. David Thomas got his job back, not because he is male or because he is British, but because he appealed quickly, threw himself on the mercy of the respondent's managers at an early stage and was put on furlough as he requested. The claimant did not do that and, whereas David Thomas' details were still on the HR system when he requested his job back, the claimant's details had been taken off and it would have been an effort (it might have been an appropriate effort in other circumstances to make), but it would have been an effort and cost the respondent time and money to put the claimant back on its system. David Thomas' details were still there. Mr Thomas was also the cheaper option to retain. He was receiving £4700 pa less than the claimant.

26. With regard to age, we asked ourselves was David Thomas kept on because of his youth and the age difference between him and the claimant? We concluded that keeping David Thomas on had nothing to do with his age or with the disparity in age between the claimant and David Thomas. It had to do with his immediate sending of the letter of appeal, the fact that he was in a different role from the claimant (a more junior role, with a smaller salary), and because the respondent would have had to go through the HR system and re-apply the claimant's details in order to put her on furlough. The company were not prepared to do that. That in itself might seem unfair and harsh for the claimant to accept, but it was not a discriminatory act. There is an age difference of some 15 years between the claimant and Mr Thomas. The claimant was referencing a particular age. She was 35 and Mr Thomas 20, but the age difference in itself and the different treatment on appeal does not mean, in these circumstances, that the claimant's direct age discrimination claim should succeed. The claimant was in a much more senior position, with greater responsibility with a larger salary than Mr Thomas. Their respective situations were entirely different and it was those differences which meant that Mr Thomas was kept on and the claimant was not. None of those issues relate to age.

27. Consequently, and for all the above reasons, all the claimant's claims are dismissed.

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Employment Judge Robinson

Date: 19 January 2023

REASONS SENT TO THE PARTIES ON

20 January 2023

FOR THE TRIBUNAL OFFICE

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