



EMPLOYMENT TRIBUNALS

Claimant: Ms M Poblet

Respondent: TUV Rheinland UK Ltd

Heard at: Newcastle

On: 16, 17 and 18 October 2023

Before: Employment Judge Heather
Mr K Smith
Mr D Dorman-Smith

REPRESENTATION:

Claimant: In person

Respondent: Ms A Jervis (Senior Litigation Consultant)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

Direct discrimination

1. The complaint of direct sex discrimination is not well-founded and is dismissed.
2. The complaint of direct age discrimination is not well-founded and is dismissed.

REASONS

Preliminary matters

Format of the hearing

1. The hearing took place in person at the Barras Bridge Courts and Tribunals Centre.

Time estimate

2. The hearing was listed with a time estimate of 3 days. Given the nature of the claim, the number of witnesses (4) and the fact that English was not the first language of 3 of the witnesses that time estimate was an underestimate.
3. There were three applications to deal with on the first day in respect of the Respondent's late witness statements, specific disclosure and the extent of the Claimant's claim. Further, there had been late amendments to the bundle over the

weekend immediately before the hearing so the Tribunal did not have a complete set of papers until the afternoon of the first day.

Bundle

4. The bundle (when it was complete) ran to 337 pages plus 4 witness statements (totalling 30 pages).

Respondent's late witness evidence

5. The Respondent made an application to be allowed to rely on its witness evidence which was filed and served late. Having heard submissions from the Claimant and Respondent we gave oral reasons for allowing the Respondent to rely on its witness evidence. The full reasons are not repeated here but, in summary, we considered that it was fair to allow the Respondent to rely on its witness statements as the Claimant had been able to utilise the statements and had time to prepare for the hearing.

Application for specific disclosure

6. The Claimant made an application for specific disclosure of various documents. The parties had made substantial progress over the weekend immediately before the hearing and some documents had been added to the bundle by agreement. For other documents there was agreement that they were already in the bundle. The Respondent's position was that certain documents either did not exist or could not be located. The Respondent agreed that if any of the documents requested by the Claimant could be located then they would be disclosed and the Claimant accepted that position so we did not need to make any specific determination on this point.

The extent of the Claimant's claim

7. It was apparent at the outset of the hearing that there was a dispute between the parties as to the proper extent of the Claimant's Claim as regards allocation of sales leads. In the ET1 the Claimant sets out that: "*Adriana Gomes regularly allowed Bryan Erazo to access sales leads and allocated the contract renewal to Bryan Erazo because the day she decided to allocate them, I had taken the "day off on Annual Leave to spend time with my kids"*".
8. The list of issues following the Preliminary Hearing on 24 April 2023 includes the following: "*Did the respondent do the following things: On 9th August 2022, By allocating leads to other colleagues because the Claimant was on annual leave to be with her kids*".
9. The Respondent's position was that the Claimant's Claim was limited to the allocation of sales leads on 9 August 2022. The Respondent pointed to the fact that the case management order addresses the date of 9 August and the Claimant has not said that order is incorrect.
10. The Claimant's position was that her Claim was not limited to one incident or date. She said that there were examples in the documentary disclosure and that both parties had addressed the issues in their witness statements.
11. We gave oral reasons for our decision that the Claimant's claim should include: "*Did the Respondent regularly allow Bryan Erazo to access sales leads*". As we gave oral reasons we are not going to repeat them here.

The claim

12. The Claimant's claim was issued on 25 January 2023. She was employed as a Business Development Manager by the Respondent from 14 February 2022 until 31 August 2022.
13. The Claimant's claim as set out in the ET1 and supporting documents were that she had been discriminated against on the grounds of age and sex.
14. A list of issues was included in the Case Management Order of 24 April 2022 and are incorporated to this judgement by reference. Except as referred to at paragraphs 7 – 11 above in relation to the extent of the claim in relation to sales leads the list of issues in the Case Management Order was agreed.

The response

15. The Respondent's response was dated 1 March 2023. The Respondent's position is that the Claimant was employed until 1 September 2022.
16. The Respondent provides technical services to companies and organisations in relation to export/ import certifications as well as testing and inspection.
17. The Respondent denies that the Claimant was discriminated against on the grounds of age or sex.

The evidence

18. The Tribunal heard oral evidence from the Claimant and from Ms Gomes (Local Field Manager), Mr Book (Managing Director) and Ms Belleteix (HR Manager) on behalf of the Respondent.
19. Each witness relied upon witness statements which were taken as read. Each of the Respondent's witnesses introduced some additional evidence by way of examination in chief. Each of the Respondent's witness was subject to cross-examination and re-examination. Questions from the Tribunal were put to the Claimant.
20. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence (including the additional documents that had been agreed between the parties in the lead up to the hearing).

Assessment of the evidence

21. It is not necessary to reject a witness' evidence, in whole or in part, by regarding the witness as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. Is the evidence credible? Is it corroborated by other witness evidence and/or by the contemporaneous records or documents? How does the evidence withstand cross-examination? How reliable is a witness's recollection? Is a witness speculating rather than testifying? What is the witness's motive for their account? How does the witness compare to other witnesses?
22. The Tribunal is satisfied that the Claimant attempted to assist the Tribunal when she gave her evidence. However, there were a number of inconsistencies in the Claimant's evidence.

23. The Tribunal found Ms Gomes to be a consistent and compelling witness whose account was detailed, plausible and in keeping with documentary evidence.
24. The Tribunal is satisfied that Mr Book and Ms Belleteix gave their evidence honestly and to the best of their knowledge and belief.

Findings of fact

25. The Claimant was employed by the Respondent as a Business Development Manager from 14 February 2022 to 1 September 2022. The Claimant is in her 50's.
26. The Claimant worked remotely and was based in the North East of England.
27. The Respondent's business plan in 2022 was to grow its business in the UK, particularly in relation to sales.
28. Ms Gomes (the Claimant's line manager) was based in London.
29. Mr Erazo (a colleague of the Claimant who was also line managed by Ms Gomes) was based in London. Mr Erazo started working for the Respondent in January 2022. Mr Erazo is in his 30's.
30. The Claimant and Mr Erazo were the only employees working in England who reported to Ms Gomes. However, Ms Gomes managed a wider team of around 13 people (including the Claimant and Mr Erazo) who were based in Spain. Ms Gomes considered her team to be all the staff who reported into her, not just the Claimant and Mr Erazo.
31. The Claimant and Mr Erazo had the same job title and carried out the same role. However, they had different salaries and different key performance indicators (KPIs). The Claimant earned a higher salary than Mr Erazo and her sales target (and other KPIs) was greater than his.
32. The Claimant and Mr Erazo were required to undertake online training as part of their induction to their roles. They both did so.
33. The Claimant and Mr Erazo were required to provide Ms Gomes with a weekly sales report in the format of an excel spreadsheet.
34. Ms Gomes found that a number of the sales reports submitted by the Claimant were inaccurate.
35. Some of the sales reports from Mr Erazo were submitted late but Ms Gomes found them to be accurate.
36. Ms Gomes discussed work related matters during the team call following Mothering Sunday in March 2022 and did not say that the Claimant's children were a hindrance to her performance.
37. When giving evidence Ms Gomes did not know what the word "hindrance" meant.
38. The Claimant's 3 month probation review was held on 26 May 2022. Some concerns were highlighted in the probation review form regarding the Claimant's quality and quantity of work as well as her participation in team meetings. Some suggestions for improvement were noted in the probation review form. Ms Gomes considered that the

Claimant was on track as she was still learning the Respondent's systems and processes at this time.

39. On 25 July 2022, Ms Gomes set a task to the Claimant and Mr Erazo to prepare a business plan and to send it to her by 15 August 2022.
40. On 2 August 2022, Mr Erazo requested an extension to the deadline for submitting his business plan and that request was granted by Ms Gomes.
41. The Claimant did not request and was not granted an extension to the deadline for submitting her business plan to Ms Gomes.
42. The Claimant submitted her business plan to Ms Gomes on 1 September 2022.
43. The Claimant undertook the preparatory work to network, contact the Iraqi Commercial Attache and to arrange a meeting.
44. The Claimant liaised with Ms Gomes (her line manager) about the arrangements for the meeting, by email. Ms Gomes expressed her preference that the meeting be face to face and that she (Ms Gomes) would attend the meeting with a colleague. Ms Gomes suggested that if the Claimant was not available (because she was based in the North East) then another colleague could attend.
45. On 12 August 2022, Ms Gomes attended the meeting with the Iraqi Commercial Attache alone. None of her colleagues accompanied her.
46. Ms Gomes did not tell the Claimant that it would be better for a man to represent the Respondent at the meeting.
47. The Respondent's practices included allocating sales leads on the day that they were received, and the leads would be allocated to a member of staff who was working that day. This practice was applied equally to each lead from each client. The practice was applied equally irrespective of the reason why a member of staff was absent on any given day.
48. Sales leads were allocated to Mr Erazo on 9 August 2022 because he was the member of staff working that day and available to pursue the leads.
49. The Claimant made sales of €7,600 up to the end of August 2022 and she had sent out quotations to prospective clients to the value of €25,000.
50. Mr Erazo had made sales of €41,000 up to the end of August 2022 (albeit he had worked for the Respondent for approximately one month longer than the Claimant) and had sent out quotations to prospective clients to the value of €105,000.
51. The Claimant and Ms Gomes had a professional relationship and did not discuss personal matters.
52. Ms Gomes never asked the Claimant when she was planning to retire or whether she was going to retire to Spain.
53. The Claimant's 6 month probation review was held on 26 August 2022. Concerns were highlighted in the probation review form in relation to quality, quantity and accuracy of the Claimant's work as well as her motivation and relationships with colleagues.

54. The Claimant was sent a letter on 1 September 2022 by Ms Gomes which set out that the Claimant had *“failed to demonstrate your suitability for the role”* and that her employment would be terminated with immediate effect. The letter set out that the main reasons for the termination were:
 - a. Failure to meet sales target.
 - b. Failure to meet deadlines.
55. The Claimant was given the opportunity to appeal the decision to dismiss her.
56. The Claimant appealed the dismissal by way of letter to Mr Book dated 4 September 2022. The appeal letter stated that the grounds of the appeal were discrimination and insufficient evidence.
57. The Claimant’s appeal was heard by Mr Book on 31 October 2022.
58. The Claimant was notified of the outcome of her appeal against her dismissal by letter from Mr Book dated 11 November 2022.
59. The letter from Mr Book dated 11 November 2022 set out that the decision to dismiss the Claimant was upheld. Mr Book’s letter set out that:
 - a. It wasn’t appropriate for the Claimant to use a male colleague as a comparator as each salesperson has individual targets and KPIs which are based on various factors including start date and previous work experience in the field.
 - b. The Claimant had failed to meet her personal sales target and had achieved less than 2% of her sales target.
 - c. The Claimant had failed to follow management instructions by not meeting deadlines for providing a business plan and also being late in completing training.
 - d. The Claimant generated sales of €7,600 from February to August 2022, whereas her colleague generated sales of €38,463 so her assertion of sex discrimination is refuted and dismissal for poor performance is justified.
 - e. There were several instances in June 2022 when the Claimant failed to submit sales reports on time and did not respond to enquiries about cancelled quotations.
 - f. The Claimant’s sales reports were inconsistent and contained incorrect information.
 - g. The Claimant did not engage in weekly meetings.
60. Early Conciliation commenced on 15 November 2022 and ended on 27 December 2022. The Claimant issued her claim on 25 January 2023.

Claimant’s submissions

61. The Claimant’s written submissions were 3 pages. The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

Respondent's submissions

62. The Respondent's written submissions were 23 pages (75 paragraphs). The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

Relevant law

Direct discrimination under section 13 of the Equality Act 2010

63. Section 13 of the Equality Act 2010 is as follows:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”.

64. There are two parts of direct discrimination; the less favourable treatment and the reason for that treatment. Sometimes, however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was. First, if the reason is the protected characteristic, then it is likely the claim will succeed – *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.
65. The Tribunal must consider whether a protected characteristic played a significant part in the treatment of the Claimant (*IPC Media Ltd v Millar* [2013] IRLR 707.).
66. In order to succeed in any of her complaints the Claimant must do more than simply establish that she has a protected characteristic and was treated unfavourably: *Madarassy v Nomura International Plc* [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in *Igen v Wong* [2005] ICR 931. It has been said that a Claimant must establish something “more” than unfavourable treatment and a protected characteristic, even if that something more need not be a great deal more: Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279.

Time limit

67. Section 123 of the Equality Act 2010 is as follows:

“(1) proceedings...may not be brought after the end of:

- a. the period of 3 months starting with the date of the act to which the complaint relates, or
- b. such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

- a. conduct extending over a period is to be treated as done at the end of the period;

When determining whether incidents constitute “conduct extending over a period” the Tribunal must determine whether (*Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686:

- a. the incidents are linked to each other; and

b. they are evidence of an ongoing state of affairs

68. In *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548 the Tribunal's approach of grouping alleged conduct was approved by the Court of Appeal.

Discussion and conclusions

69. We will deal with the issues in dispute applying the relevant legal principles to the facts as we have found them to be.

Time limits: was the claim made to the Tribunal within three months (plus early conciliation extension of the act(s) to which the complaint relates?

70. The claims that relate to the Claimant's dismissal were brought within 3 months (plus early conciliation extension) of the date of the dismissal.

71. The following claims were not brought within 3 months (plus early conciliation extension) of the date of the act complained of:

- a. a meeting following Mothering Sunday in March 2022;
- b. comments alleged to have been made by Ms Gomes regarding the Claimant retiring;
- c. a meeting with the Iraqi Commercial Attache in August 2022 and
- d. allocation of sales leads on 9 August 2022.

Time limit: if not was there conduct extending over a period?

72. The Claimant's allegations are that there was a continuing and sustained series of acts by Ms Gomes throughout the time that the Claimant worked for the Respondent. Taking the Claimant's case at its highest we are satisfied that the acts to which the Claimant's complaints relate are conduct extending over a period of time and that the period ended when the Claimant was dismissed on 1 September 2022.

Time limit: if so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

73. The claims were all brought within 3 months (plus early conciliation extension) of the Claimant's dismissal on 1 September 2022.

Direct sex discrimination: did Ms Gomes tell the Claimant that it would be better for a man to represent the Respondent at a meeting?

74. No, Ms Gomes did not say this. The Claimant was given an opportunity to attend the meeting but she did not take up the opportunity. Ms Gomes (a woman) represented the Respondent at the meeting.

Direct sex discrimination: did Ms Gomes say that kids were a hindrance to the Claimant's performance?

75. No, Ms Gomes did not say this.

Direct sex discrimination: on 9 August 2022, did the Respondent allocate sales leads to other colleagues because the Claimant was on annual leave with her kids?

76. The sales leads on 9 August 2022 were allocated to a member of staff who was working that day and available to pursue the leads. This was in accordance with the

Respondent's usual practice for allocating sales leads. The allocation had nothing to do with the fact that the Claimant was on annual leave with her kids.

Direct sex discrimination: was there a difference in treatment between the Claimant and Mr Erazo (because she was dismissed) in that the Claimant's performance was better than his?

77. The Claimant's performance was worse than Mr Erazo's both in terms of sales received and performance against individual targets.

Direct sex discrimination: was there a difference in treatment between the Claimant and Mr Erazo in that he had also failed to complete online training?

78. The Claimant did not complete the training she was instructed to undertake on time. Mr Erazo did complete the training on time.

Direct sex discrimination: was there a difference in treatment between the Claimant and Mr Erazo in that both the Claimant sent in a business plan close to the deadline and Mr Erazo did not submit his?

79. The Claimant did not submit her business plan in time. It was due on 15 August 2022. The Claimant submitted hers on 1 September 2022. Mr Erazo requested and was granted an extension to the deadline for submitting his business plan.

Direct sex discrimination: was there a difference in treatment between the Claimant and Mr Erazo in that the Claimant was partially dismissed because her sales report was not clear and Mr Erazo also had problems with his sales report?

80. A factor in the Claimant's dismissal was that her sales reports were not accurate. Mr Erazo's sales reports were considered by the Respondent to be accurate.

Direct sex discrimination: was the Claimant treated less favourably than someone else was treated?

81. The Claimant says that she was treated worse than Mr Erazo was treated. The Respondent does not agree that Mr Erazo is a suitable comparator. The Tribunal therefore approaches the comparison based on a hypothetical comparator who has no material difference in circumstances to the Claimant.

82. The Tribunal is satisfied that a man who had materially the same sales performance as the Claimant, had failed to complete online training, had failed to submit a business plan on time and had provided inaccurate sales reports would also have failed the probation period and been dismissed. Therefore, the Claimant was not treated less favourably than someone else was (or would be) treated.

Direct age discrimination: did Ms Gomes ask the Claimant on two occasions when she was planning to retire and whether she was planning to "retire to Spain like most Brits do"?

83. The Tribunal has found that Ms Gomes did not say these things.

Direct age discrimination: was the Claimant treated less favourably than someone else was treated?

84. In relation to age the Claimant's age group is 50s and she compares herself with people in the age group 30s. The Tribunal has found that Ms Gomes did not say anything to the Claimant about retirement and therefore the Tribunal has concluded that the Claimant was not treated less favourably than someone else was treated.

Decision

85. The Respondent did not discriminate against the Claimant in relation to age or sex. The Claims are dismissed.

**Employment Judge Heather
22 April 2024**

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