EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
CELINE DURHAM	**V**	**BRYNNA COMMUNITY CENTRE**

HEARD AT CARDIFF ON: 24, 25 & 26 JULY 2024

BEFORE: EMPLOYMENT JUDGE S POVEY
MS S HURDS
MR C STEPHENSON

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON
FOR THE RESPONDENT: MISS WAHABI (LITIGATION CONSULTANT)

JUDGMENT having been sent to the parties on 30 July 2024 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

1. The decisions of the Tribunal are unanimous and although it is the Employment Judge providing the decision and reasons to the parties, they are the decisions of all of us and have been contributed to by all members of Tribunal.

Background

2. This is a claim by Celine Durham ('the Claimant') against her former employer, Brynna Community Centre ('the Respondent'). The Claimant was employed by the Respondent from 1 August 2022 until the termination of her employment with effect from 26 May 2023. She began early conciliation on the 22 June 2023 which ended on the 14 July 2023. On 6 September 2023, the Claimant presented her claim to the Employment Tribunal.

3. The Claimant brings a single complaint of direct sex discrimination. At a Case Management Hearing on 2 January 2024, a List of Issues was agreed between the parties and directions issued to prepare the case for final hearing.

4. The final hearing was conducted in person over three days. We heard oral evidence from the Claimant. For the Respondent, we heard from:

    4.1. Roger Turner (Trustee and Chair of the Management Committee)
    4.2. Julian Phelps (Trustee and Treasurer)
    4.3. Rosina Morgan (a church warden and hirer of the community centre)
    4.4. Lloyd Matthews (Caretaker)

5. The Respondent also relied upon witness statements from Graham Odlum (Groundskeeper) and Richard Hughes (Trustee and former Committee Member). Neither party had any questions for these witnesses and neither did the Tribunal. As such, they were not called to give evidence and their witness statements were adopted into the evidence unchallenged.

6. Each witness we did hear from adopted their written statement. In error, the Respondent (who had previously been conducting the litigation without legal assistance) had sent to the Tribunal and the Claimant the draft statements of Mr Matthews and Mr Odlum. There was no objection from the Claimant to the revised statements being included in evidence.

7. In addition, the Respondent had provided a summary of emails and text messages which it relied upon, without providing the actual emails and texts. Those were subsequently provided in a supplementary bundle of documents at the start of the second day of the hearing ('the Supplementary Bundle'). This was in addition to the paginated bundle of documents prepared in advance of the hearing ('the Bundle').

8. The Tribunal received submissions from Miss Wahabi for the Respondent and from the Claimant. The Tribunal had regard to all the evidence seen and heard and the submissions from the parties in reaching our findings and conclusions.

9. The Claimant is conducting this litigation without legal assistance. The judge explained the process and procedures to the Claimant, checked her understanding, encouraged her to ask questions and gave her guidance throughout the hearing. The Tribunal was satisfied that the Claimant was able to fully engage in the process and present her claim to the best of her abilities.

10. We were grateful to the Claimant, to the Respondent and to Miss Wahabi for the assistance they provided and the work they undoubtedly undertook both before and during the hearing. We were also grateful to all the

witnesses who attended and answered the questions asked of them to the best of their recollections.

The Law

Discrimination

11. So far as relevant, section 39(2) of the Equality Act 2010 ('EqA 2010') states:

> An employer (A) must not discriminate against an employee of A's (B)—
> (a) …;
> (b) …;
> (c) by dismissing B**;**
> (d) ….

12. Direct discrimination is defined by section 13(1) of the EqA 2010, and states as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

13. The "relevant protected characteristics" include race and nationality (per section 26(5) EqA 2010).

14. A claimant claiming direct discrimination must show that they have been treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of a protected characteristic. This requires the Tribunal to consider the reason why the claimant was treated less favourably.

15. In respect of a comparator, section 23(1) EqA states as follows:

> On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

16. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the Claimant's less favourable treatment. In Gould v St John's Downshire Hill 2021 ICR 1, EAT, Linden J included the following explanation:

> The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious.

Discrimination: standard & burden of proof

17. The standard of proof is the balance of probabilities. The burden of proof in discrimination complaints has two stages, as follows (per section 136 of the EqA 2010, Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC and Igen Ltd (formerly Leeds Careers Guidance) v Wong 2005 ICR 931, CA):

    17.1. The Claimant has to prove facts from which the Tribunal could infer that discrimination has taken place;

    17.2. If so, the burden 'shifts' to the Respondent to prove that the treatment in question was in no way because of a protected characteristic.

18. If the Claimant succeeds in shifting the burden of proof, it then falls to the Respondent to prove, again on the balance of probabilities, that its treatment of the claimant involved no discrimination whatsoever. This would normally be in the form of cogent evidence. because the relevant evidence in most discrimination cases will normally be in the hands of the Respondent rather than the Claimant. The Respondent must at this stage prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever based on the protected ground that the Claimant is a woman (per Igen v Wong, above).

19. The protected characteristic does not need to be the only reason for the treatment complained of. It need not even be the main reason for the treatment, as long as it was an 'effective cause' (per O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT).

Judicial Notice

20. Judicial notice is the practice whereby the Tribunal can take note of a fact without the need for evidence to prove that fact.

21. In Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 ICR 1699, EAT, it was held that the tribunal in that case had erred in failing to take judicial notice of the 'childcare disparity' — i.e. the fact that women bear the greater burden of childcare than men and that this can limit their ability to work certain hours. With regard to the childcare disparity specifically, the EAT observed that this was a matter in respect of which judicial notice had been taken without further inquiry on several occasions by courts at all levels. The childcare disparity is so well known in the context of indirect discrimination claims, and so often the subject of judicial notice in other cases, that it was incumbent on the tribunal, in the circumstances, to take notice of it.

Findings of fact

Introduction

22. The Respondent is a registered charity and its trustees and volunteers are responsible for the provision, and maintenance of the Brynna Community Centre. The Claimant was employed from 1 August 2022 as Facilities Manager. The post was advertised at approximately 10 hours per week at £100 per week gross. Duties included taking bookings, helping with the running of the centre and liaising with hirers, trustees and the caretaker (per the job advert at [118] of the Bundle).

23. Most of the duties being undertaken by the Claimant had previously been performed by Mr Phelps on a voluntary basis. The Claimant's main contact was Mr Phelps and there was evidence of some issues with errors, adjustments and clarifications regarding bookings and income, particularly in the early months of her employment. It was not in issue that the Claimant was employed on a probationary basis for an initial six months or that her probationary period was extended in or around March 2023.

24. However, the circumstances of that extension were in dispute. At a meeting held on 9 March 2023, the Claimant reported that her probationary period was due to end and Mr Phelps was recorded as saying that such issues were for the trustees to deal with (at [33] of the Bundle). However, there was no documentary evidence that the Respondent ever formally extended the Claimant's probationary period or notified her that it was being extended or gave any reasons for the extension.

25. The Claimant said in her evidence that she was told that the probationary period had been extended but no reasons were given and there were no conversations about her role as such. This was in contrast with Mr Turner's written evidence, where he claimed that the trustees had agreed to extend the Claimant's probationary period and that he had told the Claimant shortly after the meeting of 9 March 2023 that it was being extended and the reasons why, which related to her performance in the role (per Paragraph 11 of his witness statement).

26. However, Mr Phelps, another of the trustees and so, by reason of Mr Turner's evidence, party to the decision and reasons for extending the Claimant's probationary period made no mention of such a meeting or any agreement as to the decision or reasons for extending the probationary period.

27. There was no evidence of the extension ever being confirmed to the Claimant in writing or of her being told the reason or reasons why it had been extended. Mr Turner's recollection in his witness statement was not supported in evidence by his fellow trustee. That, and the absence of any written record of the alleged reasoning or those reasons being communicated to the Claimant, led the Tribunal to prefer the Claimant's

recollection, that whilst her probation period was extended, she was not told why.

28. On 8 May 2023, Mrs Morgan had booked the community centre from 12.30pm to 4.30pm. It was not in issue that usual practice was to open the centre 30 minutes before and close it 30 minutes after a booking, to allow time for setting up and packing away.

29. In this case, the Claimant had agreed with Mrs Morgan to allow her access to the centre at 11.30am. However, as she was about to leave for the centre, the Claimant's son fell down the stairs, banging his head. Concerned about whether she needed to take him to hospital, the Claimant rang Mrs Morgan and informed her of the accident and that she was running late (this was at about 11.15am, according to Mrs Morgan's oral evidence) and also tried to contact Mr Phelps by phone but without success (per [76] of the Supplementary Bundle).

30. The Claimant went to the centre and arrived at 11.43am (per the GPS record in her mobile phone, at [92] of the Bundle). She opened the centre for Mrs Morgan and returned home at 12.01pm. Thereafter, she texted Mr Phelps at 12.32pm to let him know about her son's accident, explained that she had asked Mr Matthews to clean up after Mrs Morgan's event finished at 5pm and that there was a booking in at 8pm and did he need her to return to open up for the 8pm booking. Mr Phelps replied at 2.34pm to say he was unable to open up at 8pm but would be able to lock up at 9pm (per [76] of the Supplementary Bundle).

31. Mrs Morgan gave evidence that no one had attended by 5pm to lock up the community centre. The Claimant's text to Mr Phelps earlier in the day was that Mrs Morgan's booking was not finishing until 5pm. Mrs Morgan rang Mr Turner at 5pm, he arrived at 5.05pm and locked up. Mr Matthews' written evidence (at Paragraph 6) was that he had been asked and had agreed to clean up on 8 May 2023 after Mrs Morgan's group had finished. There was some confusion in his evidence as to whether he attended on 8 May or the following morning. In his witness statement, he said that he attended that evening but in his oral evidence, he said that he might have attended the following morning. He also confirmed that when he attended to clean up, he would lock the community centre afterwards.

32. For those reasons and having regard to the evidence, we found that the Claimant had made arrangements for Mr Matthews to attend the community centre to clean and lock up after Mrs Morgan finished. Any delay in him attending by 5pm did not appear to the fault of the Claimant.

33. Notwithstanding that, Mr Turner instigated a discussion with his fellow trustees (himself, Mr Phelps, Rose North & Robert Lewis Watkin) about the Claimant's competency in the role as result of the events of 8 May

2023 (per Paragraph 15 of his witness statement). The decision was taken to terminate the Claimant's employment. Mr Turner drafted an email to send to the Claimant which he circulated to the other trustees for comment. His oral evidence was that they all agreed with the email and that it reflected their discussion and decision. Mr Phelps said that the events of 8 May 2023 were why the Claimant was dismissed (per Paragraph 63 of his witness statement).

34. Mr Turner sent the email to the Claimant at 10.28am on 10 May 2023, as follows (at [164] of the Bundle, emphasis added):

> Dear Celine,
>
> I have spoken to my fellow trustees regarding your probationary period and unfortunately we feel that due to your domestic commitments you are unable to carry out the duties of facilities manager at Brynna Community Centre as we would expect and therefore sadly, we would ask you to step down with immediate effect.
>
> The trustees have agreed to pay you up to the end of the month, last payment being Friday 26th May,
>
> We would be very grateful if you could return your diary, mobile phone, keys ect. to my home as soon as possible.
>
> Finally, the trustees would like to thank you for your services over the past 9 months but we feel that this is the best outcome for both parties.
>
> Regards,
> Roger Turner
> Trustee and Chair of Management Committee,

35. The decision was made and the email was sent in response to the events of 8 May 2023. Those events were that the Claimant had been delayed in opening up for Mrs Morgan because her son had fallen down the stairs and banged his head. The Claimant had made arrangements for Mr Matthews to clean and lock up afterwards. For reasons unknown, Mr Matthews did not attend by 5pm, prompting Mrs Morgan to call Mr Turner. Mr Phelps confirmed that, in reaching the decision to dismiss the Claimant, the trustees made no enquiries of Mr Matthews as to what arrangements had been made with him about closing up. Similarly, no one made any enquiries of the Claimant as to what had (or had not) been arranged for 8 May 2023.

36. This was all the more surprising as the Claimant had told Mr Phelps in her text message to him on 8 May 2023 that she had arranged with Mr Matthews to clean up after Mrs Morgan was finished and Mr Matthews confirmed in his evidence that he had been asked and had agreed to

clean up after Mrs Morgan finished and confirmed that he was aware that they were due to finish by 5pm.

37. The Respondent dismissed the Claimant with immediate effect and paid her in lieu of notice.

Analysis & conclusions

38. The Respondent accepted early in these proceedings that the use of the phrase "*due to domestic commitments"* in Mr Turner's email of 10 May 2023 was potentially discriminatory. The Tribunal agreed. Despite Mr Phelps referring in his evidence to concerns about the Claimant's other job impinging on her role with the Respondent (she worked at a comprehensive school), that could not, in our judgment, have been what "*domestic commitments"* referred to. Given the direct link between the decision to dismiss and the events of 8 May 2023, it could only be reasonably read as a reference to the Claimant's caring commitments for her son.

39. In addition, it was not materially in issue that reference to "*domestic commitments"* meant the Claimant's child care responsibilities.

40. Those findings permitted the Tribunal to infer that the reason that the Respondent dismissed the Claimant was because of her role as carer for her child, a role which both statistically and historically is undertaken by women (and upon which the Tribunal had judicial notice). We were able to infer that the Respondent dismissed the Claimant because of her caring responsibilities, which disproportionately fall on women. We were able to take judicial notice that mothers have the lion's share of caring responsibilities, as compared to fathers. For those reasons, the Claimant discharged the initial burden of proof upon her to make out a prima facie case of discrimination.

41. That passed the burden onto the Respondent to show that it did not treat the Claimant differently because she is a woman. In other words, it did not dismiss her because she is a woman. The Respondent had to prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever based on the protected ground, namely that the Claimant is a woman (per Igen v Wong*,* above*)*.

42. In addition, we reminded ourselves that the protected characteristic did not need to be the only or main reason for the treatment complained of, as long as it was an 'effective cause' (per O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School, above).

43. The Tribunal went on to examine the Respondent's explanation for why it said it dismissed the Claimant.

44. In Mr Turner's oral evidence, it was suggested that the Respondent used the phrase "*domestic commitments"* in order to be kind to the Claimant and mask the real reasons, which were that she was not performing the job to the standards expected. Mr Turner's evidence was that there were concerns over the Claimant's use of volunteers to undertake tasks. He believed that her other commitments adversely impacted on her ability to dedicate sufficient time to the role. Mr Turner confirmed that the Claimant's "*domestic commitments"* played a part in that perception. Mr Phelps, for his part, referred to concerns about how the Claimant was recording and accounting for bookings.

45. That "*domestic commitments"* were, in reality, the reason for the decision to dismiss the Claimant was reinforced by the Respondent's email to the Tribunal of 8 December 2023 (at [158] – [159] of the Bundle). After initially stating that the use of the phrase "*domestic commitments"* had been erroneous and borne out of a lack of employment law awareness, the Respondent stated the following (emphasis added):

> By reference to the numerous text requests made by [the Claimant] for assistance in opening the centre and preparing for booked events, and for closing and tidying away after the booked events, it is evident that substitutes were provided on several occasions. <u>For many of the occasions where it was inconvenient for [the Claimant] to execute her duties, it was because of her domestic commitments, which is why the Trustees used the terminology they did.</u>

46. In addition, in his oral evidence, Mr Turner said, in respect of why the decision was taken to dismiss the Claimant, "*I don't think it was her ability, it was a time factor*" and that what impacted on her time included her "*domestic commitments"*. That was somewhat at odds with the suggestion that the Claimant was dismissed because of her inability to undertake the role as required. Rather, it was the Claimant's perceived inability to do job as the Respondent wished because of her "*domestic commitments*", not a lack of capability.

47. In addition, and as we have found, there was no evidence that the Respondent ever raised any concerns with the Claimant that her "*domestic commitments"* were compromising her ability and commitment to undertake the role. There was a similar lack of evidence that the Respondent ever formed or held that that view themselves, prior to 8 May 2023.

48. For all those reasons, we found that the Claimant was dismissed because of her child care commitments, with the events of 8 May 2023 being the trigger for that decision.

49. We went on to consider whether the decision to dismiss the Claimant was less favourable treatment. That required the use of a hypothetical comparator (as it was not contended that there was a real comparator who fulfilled the requirements of section 23(1) of the EqA 2010).

50. The hypothetical comparator in a compliant of direct discrimination must be someone who is in the same material circumstances as the Claimant, save for the protected characteristics. In this case, that would be a man with child care commitments who was employed by the Respondent as facilities manager in exactly the same circumstances as the Claimant.

51. In her submissions on behalf of the Respondent, Miss Wahabi contended as follows (per Paragraph 17 of her written submissions):

> The Respondent submits that if the above events [the events of 8 May 2023] had occurred to a hypothetical male in the same circumstances with the same performance issues, they would have been dismissed for the exact same reasons.

52. Had the Respondent shown that it would have dismissed a man with the same "*domestic commitments*" as the Claimant in the same circumstances as arose on 8 May 2023? We had a number of evidential difficulties with that submission:

    52.1. Nowhere in their written or oral evidence did Mr Turner or Mr Phelps suggest that they would have treated a man in the same manner that they treated the Claimant;

    52.2. The submission relied upon was not put to either Mr Turner or Mr Phelps, whether by way of examination in chief or re-examination. This was despite the fact that the Respondent presumably intended to rely on that submission and was aware that neither witness had made any mention of it in their written evidence;

    52.3. We were not taken to any documents in the Bundle which supported the submission that the Respondent would have treated a man in the same way that it treated the Claimant; and

    52.4. There were no applications to amend any of the Respondent's witness statements or adduce additional evidence on this specific point.

53. In addition, and as we have explained, we did not accept the Respondent's contention that there had been a litany of performance issues which informed its decision to both extend the Claimant's probationary period and then dismiss her. There was insufficient evidence of performance issues being raised in any material sense with the Claimant and, as we have found, she was not given any reasons for why her probation period was being extended. At no time prior to 10 May 2023 did the Respondent raise concerns with the Claimant about her "*domestic commitments"*.

54. The reason the Claimant was dismissed was not because of continuous performance issues, as contended by Miss Wahabi but because of her child care commitments, with the events of 8 May 2023 being the trigger for that decision.

55. As such, the submission by Ms Wahabi that the Respondent would have treated a man in the same circumstances as the Claimant in the same way was wholly unsupported by the evidence before us.

56. In contrast, and as alluded to already, we took judicial notice of the 'childcare disparity' (the fact that women bear the greater burden of childcare than men and that this can limit their ability to work certain hours). As the burden of proof had shifted, it was for the Respondent to show on balance that it would have also dismissed a man in the same circumstances as the Claimant. Given the judicial notice and our analysis of the evidence, we found that the Respondent had not discharged that burden, that it had failed to show on balance that it would have treated a man in the same way, given the societal norm of where the burden of childcare tends to lie.

57. Given the reason for dismissing the Claimant (as determined by the Tribunal) and the repeated references to "*domestic commitments"*, the Respondent failed to show, mindful of the perception of childcare responsibilities as per the judicial notice, that it would have treated a man in identical circumstances in the same way as it treated the Claimant.

58. As the Respondent had been unable to show on balance that it did not dismiss the Claimant because of her child care responsibilities and also failed to show that it would have treated a man in identical circumstances in the same way, and mindful of the childcare disparity, it followed that the Respondent subjected the Claimant to less favourable treatment compared to a man in identical circumstances.

59. The decision to dismiss the Claimant therefore constituted an unlawful act of direct discrimination on grounds of sex and the claim succeeds.

EMPLOYMENT JUDGE S POVEY
Dated: 16 August 2024

Order posted to the parties on 16 August 2024

For Secretary of the Tribunals 20 August 2024