



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Grant

Respondent: Buffery & Co. Ltd

Heard at: Reading

On: 24 and 25 October 2024

Before: Employment Judge McCooey
Mrs A E Brown
Mr F Wright

REPRESENTATION:

Claimant: Mrs Grant

Respondent: Ms E Afriyie, Litigation Consultant

JUDGMENT having been delivered orally to the parties on 25 October 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

Introduction

1. This was the hearing of a claim of direct sex discrimination presented on 10 October 2023. Early conciliation took place between 13 August 2023 and 24 September 2023. The Respondent filed a response defending the claim on 29 December 2023. The hearing was listed for two days.

Procedural history

2. On 2 May 2024, a case management hearing took place before Employment Judge Forde, where an agreed list of issues was formulated, and the case set down for a final hearing to determine liability and remedy.

3. By the conclusion of the second day, the Tribunal agreed with the parties that there was insufficient time to deal with remedy, should that become applicable, and that any remedy hearing would need to be listed for a further day.
4. The Claimant attended the hearing representing herself. The Respondent attended represented by Ms Afriye of Peninsula.
5. The evidence in the case consisted of an 86 page bundle. The last 16 pages consisted of timesheets produced by Mr Paul Buffery in October 2024 and shared with the Claimant for the first time in the two weeks before the hearing.
6. The Tribunal received witness statements from the Claimant, and on behalf of the Respondent from:
 - Mr Paul Buffery, Director of Buffery & Co. Ltd;
 - Mrs Karen Buffery, Company Secretary and office manager;
 - Ms Katie Thompson, Claimant's line manager/trainer;
 - Mr James De Laurenzy, Claimant's trainer.
7. All of the Respondent's witnesses, save for Mr De Laurenzy, attended to give oral evidence.

List of issues

8. Parties confirmed on Day 1 that the list of issues remained agreed as follows:
 - i. The Claimant is a woman and has child caring responsibilities. She compares herself to a man with child caring responsibilities.
 - ii. Did the Respondent do the following things:
 - a) Make comments to the Claimant on 16.6.23 along the lines of it being difficult for someone with children to be able to successfully discharge their work duties while working for the Respondent;
 - b) Comment to the Claimant on 22.6.23 that she was "*skiving*" and that she "*...may as well not bother working at all*" when granted additional time away from work following a request for flexible working;
 - c) By commenting to the Claimant on 13.7.23 that her job was safe;
 - d) By subjecting the Claimant to a review meeting on 20.7.23;
 - e) By dismissing the Claimant on 21.7.23;
 - f) In the course of corresponding with the Claimant between 21-27 July 2023;
 - iii. Was that (a-f) less favourable treatment?
 - iv. If so, was it because of sex?
 - v. Did the Respondent's treatment amount to a detriment?
 - vi. If the claim is successful, how much should the award be?

General approach

9. We preface our findings with a number of matters of general approach. In this case, as in others, evidence touched on points about which we make no decision. That is not an oversight or an omission on our part; it reflects the reality that not everything that was brought up in this case was relevant to our decision-making.
10. Our overall impression of the witnesses was that the Claimant was confident and direct in her questioning; she was able to formulate cross-examination questions ably and seemed clear in the case she was running. It was suggested by the Respondent that her memory appeared poor and her evidence had inconsistencies, but we did not find that to be the case.
11. The Respondent's witnesses were generally trying to assist the Tribunal and acting in good faith; they made appropriate concessions, for example, on the quality of notetaking. However, we found that overall, they were not entirely forthcoming with the true reasons for the Claimant's dismissal; they seemed at times to be retrospectively justifying their decision-making, leading to gaps in their evidence and inconsistencies as between each other, their witness statements and other documents. The key documents relied on by the Respondent were created shortly after the Claimant's dismissal.

Factual background

12. The Respondent is a small, family-run accountancy firm established by Mr and Mrs Buffery, who themselves had a young family when they first opened the firm many years ago.
13. Staff employed by the Respondent include chartered accountants, Ms Thompson and Mr De Laurenzy, who also helped to train new apprentices under a scheme. The Respondent's scheme helped people qualify to be chartered accountants and has been in place since 2013.
14. There have been 15 apprentices prior to the Claimant; these have tended to be young school leavers. The Claimant was the first apprentice with child caring responsibilities, being a mother of two small children, the youngest still breast-feeding at the time her employment commenced.

Interview on 26 April 2023

15. The Claimant had a successful interview on 26 April 2023 with Mr Buffery and Ms Thompson. She was considered to be a strong and confident candidate by the Respondent, and it was felt that she would be a "good fit".
16. At the Claimant's interview, the Claimant mentioned having children and that her husband was intending to take a sabbatical from his work to assist her with childcare. No confirmed date was mentioned by the Claimant in terms of when any sabbatical would take place.
17. Ms Thompson, in her evidence, accepted that shortly after the interview, she effectively warned Mr and Mrs Buffery against "*hiring someone with children*", as she was concerned the Claimant would not have the time necessary to

complete the work. Ms Thompson, in explaining her comment asked the Tribunal rhetorically, *"Can we not mention the fact she has children?"* and described raising this as an issue in the same way she would of an apprentice who rowed regularly or had a time-intensive hobby.

18. Mrs Buffery sought to add further context to that statement by saying Ms Thompson was single and had no children of her own.
19. Ms Thompson said in oral evidence, following this comment, that she was then *"ticked off"* by Mr and Mrs Buffery, who were willing to give the Claimant, *"a chance"* as Mr Buffery put it; he added *"I am well aware that other employers might not even consider her application."*
20. Neither Mr nor Mrs Buffery mentioned, perhaps understandably, Ms Thompson's comment to them in their witness statements or in oral evidence until they were asked about it. Ms Thompson accepted that she had told the Claimant about making this comment.

Initial reduction of hours

21. On 27 April 2023, the following day, the Claimant was offered the apprenticeship initially on the Respondent's usual work pattern of 9-5.30pm, and Fridays 9-1.30pm.
22. On 2 May 2023, Mrs Buffery sent an email to the Claimant asking whether she was happy with the contract or wished to negotiate any points.
23. On 3 May 2023, the Claimant replied requesting fewer working hours for the immediate start. She also clarified in the same email that her husband would be keeping his job for the short term until her role with the Respondent was more secure. A telephone conversation then took place between the Claimant and Mrs Buffery about reducing her hours.
24. On 5 May 2023, it was agreed in writing that the Claimant's working hours would be 9.30-4.30pm on a trial basis.
25. On 15 June 2023, the Claimant had her first day. On arrival, she requested a space to express breastmilk. The Respondent accommodated that request, though the Respondent described being slightly surprised as this accommodation had not been requested during their email communication, but that it was not a problem and they had space to do so.
26. In his witness statement by way of background, Mr De Laurenzie accepts saying to the Claimant in reference to her children, *"you're off to your second job"* and *"glad it's you and not me"*, which he said was light-hearted and that no offence was taken. The Claimant did not suggest these comments formed any part of her case and we therefore make no finding in relation to them.

Further reduction in hours on Fridays

27. A factual dispute arose regarding how the Claimant was supposed to use her time on Fridays.

28. It was agreed that there came a point not long into her employment at which Mrs Buffery, having discussed the matter with Mr Buffery, told the Claimant she did not need to come into the office on Fridays. We found that Mrs Buffery was mindful of the Claimant's long commute and family circumstances and that was the reason for this further reduction in hours and flexibility; it was an additional accommodation.
29. From 23 June 2023, this change was implemented by the Respondent.
30. It was the Respondent's case that the Claimant was expected to be training or otherwise working on Fridays whilst she was at home, and that the Claimant had wrongfully not been doing so. The Claimant denied this, her case being that Mrs Buffery, in their conversation, had never told her she should be training on Fridays in the short-term. Rather it was their mutual understanding and agreement that, in future, she would use Fridays to complete training at home, particularly when she started formal studies with BPP. But that point had not arrived and was going to be confirmed in a future 'second' conversation with Mrs Buffery. Furthermore, Mrs Buffery used the term, "*ghost pay*" when explaining to the Claimant the temporary situation of her being paid for hours that she was not technically working. The Claimant's case was that this was a term she had not heard of before and shows the Respondent understood she would not be working or training on Fridays in the short-term.
31. The Tribunal accepted the Claimant's version of events on this point, namely, that there was an expectation that in the future, Friday mornings would be used by the Claimant for training purposes; either her BPP studies or internal training. However, we found that the 'second' conversation to concretise this arrangement never took place because Mrs Buffery herself struggled to recall having such a conversation, saying only that she "*would have.*"
32. We noted the Claimant's comment to the Respondent in her reply to dismissal which says she, "*was under the impression less hours worked for you too, seeing as you suggested not working on Fridays.*"
33. This correspondence close to the event corroborates the Claimant's version which is that there was no expectation, for the time-being, of her to be training on Fridays and she effectively had it off. We found that indeed was a cause of tension from another junior colleague, Kim, who was further into her apprenticeship and struggling with exams; she had not been afforded a similar option.
34. We also found it implausible that Ms Thompson or Mrs Buffery would not raise the issue of the Claimant failing to complete training, if indeed that was the expectation. Both had access to her timesheets and Ms Thompson was monitoring her work. Further, where Fridays are referenced in the Respondent's documents, they read as the Claimant having Friday's off, rather than her not completing expected work or training.
35. We therefore found that the Claimant was not required, or expected, to complete work on Fridays for the time being.

36. In other matters of factual dispute, the Claimant challenged Mr Buffery on the impression he conveyed in his witness statement of her being demanding and unreliable, notwithstanding the Respondent's various accommodations. For example, Mr Buffery says her request for a breastfeeding space was '*accommodated and no adjustment made to salary*', implying another employer might have. He also suggested she was late on her second day, which according to her timesheets, the Tribunal found was factually incorrect.
37. Similarly, the Claimant's lateness and sickness were mentioned in the witness statement in a negative light but it is clear that at the time, these two points were not a cause of concern to the Respondent, as they told her not to worry about arriving exactly on time whilst she got used to the commute. They also told her '*these things happen*' when she fell sick for 3.5 days during July 2023 and took no issue with it.
38. We also found that the Respondent seemed to have retrospectively taken issue with the quality of work undertaken by the Claimant. Mr Buffery produced timesheets comparing the Claimant's completion of the same set of accounts with their latest apprentice in March 2024. This postdates events significantly and it was not clear why her fellow apprentice, Kim's, records were not provided from the time period when she joined, in the same way. Further, the Respondent seems to have been accommodating of apprentices who are struggling, for example, Kim. Yet there was never a direct conversation with the Claimant herself about her productivity.
39. Matters like this gave us a general impression that the Respondent was seeking to portray the Claimant in a more negative light than was justified on the facts and thereby retrospectively justify its decision to dismiss.

Comments on 16 June 2023 by Ms Thompson

40. The Claimant's case was that Ms Thompson told her during her first week that it would be difficult for someone with children to be able to successfully work for the Respondent. We find that this was said by Ms Thompson. In doing so, we bore in mind the admission already discussed above by Ms Thompson of her comment to Mr and Mrs Buffery shortly after the interview.
41. We also note the consistency in the Claimant's account with contemporaneous correspondence; the Claimant's email response to her dismissal dated 21 July 2023 includes reference to Ms Thompson's comment: "*I was even told it was suggested I shouldn't be employed by you as I had children.*"
42. This comment was also consistent with the oral evidence Ms Thompson gave that she considered children a barrier to success, in the same way any activity requiring time and energy would be a potential barrier eg someone with a keen rowing hobby.
43. We also bore in mind Ms Thompson's note of a conversation she had with the Claimant around the time of her dismissal in which she asks the Claimant how she is going to juggle her work with her child caring responsibilities, suggesting it was an ongoing concern for her.

Comment by Ms Thompson on 22 June 2023

44. Ms Thompson also accepted making a comment to the Claimant that she was “skiving” off work, referencing the Fridays the Claimant now spent at home. She denied making the second part of the comment: “*you might as well not bother working at all*”.
45. Ms Thompson said the context was an atmosphere of mutual “banter”, said in a joking way, and taken by the Claimant in a joking way, who later herself told Ms Thompson she was ‘skiving’ when Ms Thompson took annual leave.
46. We noted, as above, the consistency in the Claimant’s account, as she also references this comment in her response to her dismissal dated 21 July 2023:

“This maybe should not have come as a surprise seeing as I got regular comments such as “you may as well not bother working at all” and “skiving again on a Friday?” directed towards my flexible working pattern.”

47. Given the admission and the reference above, we found that Ms Thompson did make the totality of the comment, including: “*you might as well not bother working at all*”; the remainder is of a similar sentiment and tone.
48. We also found that as it was just one week into her apprenticeship, the Claimant may well have joked along but was unlikely to have considered it merely ‘banter’, knowing that it was in connection to her adjusted hours and child caring responsibilities, a topic she had been told by Ms Thompson would make it harder for her to succeed.
49. We also found it unlikely that the Claimant said other colleagues were ‘skiving’ around the same period of time, as she was so new in her role.

Comment on 13 July 2023 that the Claimant’s job was safe

50. It was the Claimant’s case that Ms Thompson said to her, “*Your job is safe,*” on the basis of her good performance. The Respondent denied this comment being said. The context described by the Claimant in her witness statement was that Ms Thompson’s word had the power to determine whether the Claimant was kept on or not. It was agreed that Ms Thompson on occasion fed back positive news to Mr and Mrs Buffery when the Claimant successfully completed work.
51. We accept, as suggested by Ms Thompson, that the Claimant sought reassurance about her job security from Ms Thompson on occasion. We also found that Ms Thompson did have a degree of influence with Mr and Mrs Buffery, by virtue of her position as trainee supervisor.
52. However, we do not find that Ms Thompson said that particular comment in the way the Claimant describes. Ms Thompson strongly denied saying it and explained she did not have that kind of authority. She did not present as a dominant personality in her oral evidence and we accept she had the informal management style she described.

53. We also noted that the Claimant did not put to Ms Thompson in cross-examination the comment mentioned in her ET1 that: *'your future here depends on whether or not I like you'*. For these reasons we find that particular comment was not made.

Review meeting on 20 July 2023

54. On 20 July 2023, Mr and Mrs Buffery convened a review hearing with the Claimant. A typed note of that meeting was prepared by Mrs Buffery titled, *"Note of an informal review meeting"*. As mentioned above, this note was created after events, upon learning that the Claimant challenged her dismissal.
55. Mrs Buffery described the note as being, *"cobbled together"* from hand-written notes; she conceded that her notetaking was *"sketchy"* and that she *"lives her life on black and reds"*, meaning the notebooks. No copies of any handwritten notes were in the bundle. She also acknowledged that she was not very clear on dates.
56. The Respondent's written case was that this review meeting was routine and not directed at specific concerns regarding the Claimant; however, this contradicts the note itself which says, *"our weekly check-ins with Katie [Thompson] and James had yielded some concerning matters regarding Holly's attitude to work"*.
57. When explored, this concern in respect of attitude was a feeling that the Claimant was too confident about her ability to complete her work and studies successfully and that she did not feel she needed to study out of office hours. Ms Thompson said in oral evidence: *"you had become a very confident individual,"* and, *"you barely asked me for help."*
58. The issue with the Claimant's attitude in the meeting itself is expressed by Mrs Buffery as: *"it came across from that meeting that Holly thought she was doing brilliantly and that she was happy"*. The Respondent clearly had doubts about this but they did not voice them to the Claimant at any point. We found that the Respondent's doubts derive from Ms Thompson's, and then their own assumptions about the Claimant's ability to manage her child caring responsibilities, and that these were a barrier to her success.
59. Indeed, the Claimant's unchallenged evidence was that the central topic of the review meeting was *"how the Claimant would juggle her child caring commitments with her work"*. We therefore find that was the central concern of that meeting.
60. Mr and Mrs Buffery accepted that they did not raise with her any of the issues or concerns they now mention in their witness statements, for example, poor productivity; competency; the Claimant's attitude; creating an atmosphere in the office. Nor did they give her any opportunity to respond to them.
61. We found it hard to believe that Mr and Mrs Buffery would not mention their genuine concerns about the Claimant in the review meeting. In explanation, Mrs Buffery said they were waiting to see what the Claimant was going to say and whether she would acknowledge how hard it will be to study. Mr Buffery said because it was a probationary period, they did not think they had to voice

their concerns or give any reason for their dismissal. We were not convinced by this explanation.

62. Bullet-pointed reasons mentioned in the Respondent's own document describe other topics of concern:

- *A reduction in her working hours might fall shorter than the necessary hours required to fulfil the Level 7 Apprenticeship;*
- *She was finding commuting difficult;*
- *Her partner did not seem to be planning a sabbatical, a fact mentioned at the interview; there was 'an atmosphere' developing.*

63. The Claimant's husband not taking a sabbatical was an ongoing theme of concern from the Respondent's side; again, not voiced with the Claimant. It seems because the Claimant volunteered this at interview, the Respondent then felt free to return to it and keep it in mind, almost as an unspoken condition of her apprenticeship.

64. We find that Mr and Mrs Buffery finalised their decision to dismiss the Claimant at the end of that meeting. This is because, on their own case, they were not sure of the timings of events on 20 July 2023. Further, there were inconsistencies between the chronology and dates mentioned in their oral evidence as compared with other documents in the case.

65. For example, in the '*Note of a decision to terminate the Claimant's employment*,' Mrs Buffery mentions calling a meeting with Ms Thompson **after** looking at Ms Thompson's note of her conversation with the Claimant on 20 July 2023. However, Ms Thompson was clear in saying she wrote that note **after** the review meeting, when Mrs Buffery texted her requesting it, having learned that the Claimant was not taking news of her dismissal well and '*things were kicking off*'.

66. Mr Buffery later wrote in the dismissal letter to the Claimant: "*Comments made by you to other staff members which we learned of after your dismissal would have been sufficient in any event to justify immediate dismissal*". This suggests discussions with Ms Thompson took place after the review meeting.

67. We therefore find that any discussions with Ms Thompson came after the decision was already made in Mr and Mrs Buffery's mind to dismiss the Claimant at the conclusion of the review meeting; this decision was likely consolidated further by their discussion with Ms Thompson.

Conversation with Ms Thompson and the Claimant on 20 July 2023

68. Around lunchtime on 20 July 2023, Ms Thompson had a conversation with the Claimant following the review meeting in which the following themes were recorded by Ms Thompson as being discussed:

- Whether the Claimant could study on the train during her commute;

- The Claimant's struggle to wake the children on time to get them to the childminder's home;
- Whether the Claimant would extend her hours to 9.30-5pm which the Claimant rejected as she would not see the children before they went to bed;
- The Claimant's worries about winter sickness and how the Bufferys would respond to any absence due to that;
- The Claimant, "*appreciated it wasn't going to be easy to juggle studying with the kids as she can only study after they have gone to bed; however she thought it would be easier in a few years*";
- The Claimant, "*wasn't worried about exams and said 2-3 hours a night and weekends was unnecessary*";
- Her weekend plans and the fact her husband was also studying and would not be taking a sabbatical until May;
- She would put the children in for more hours on Fridays to give time to study once training began properly.

69. Ms Thompson also notes the '*issues last week were with Claimant's attitude*' and described that in oral evidence as "*not accepting her professional judgment*", not asking her for help frequently enough, and being argumentative.

70. We do find that the Respondent did have concerns around the Claimant's attitude namely that she was too "*confident*"; and there were concerns about how she was affecting office dynamics. We accept there may have been friction between Ms Thompson and the Claimant because of this, though Ms Thompson's note seems to indicate a lengthy and open conversation on 20 July 2023. We also accept there was friction with Kim. However, as indicated by Ms Thompson's own note, the focus of attention is primarily directed on the Claimant's family life, child caring commitments and how she was going to manage her studies in light of them. None of Ms Thompson's other, and it is now suggested, main concerns, were mentioned to the Claimant herself.

71. Mr Buffery in oral evidence also mentioned that the Claimant made "*horrendous comments*" to Ms Thompson by the Claimant about her dating life; these comments were not mentioned or addressed Mr Buffery in his witness statement, and were not mentioned by Ms Thompson herself in her witness statement. The only possible reference to them is by Mr Buffery in the dismissal letter, which says. "*comments made after your dismissal to Ms Thompson would have justified dismissal in any event.*" Mr Buffery did not clarify in oral evidence whether he was referring to the '*horrendous comments*', or instead to the comments made to Ms Thompson on 20 July 2023. We are not satisfied that any '*horrendous*' comments were made on the balance of probabilities in these circumstances. Even if we found that they were made, the comments came after the dismissal and Mr Buffery did not rely on them as the reason for dismissal. Therefore, they could not have had a bearing on the Respondent's decision to dismiss the

Claimant.

Dismissal 21 July 2023

72. By an email dated 21 July 2023 at 11.35am, Mrs Buffery sent a dismissal letter signed by Mr Buffery to the Claimant, titled, "Unsuccessful Probation". It dismissed her with one week's pay in lieu of notice.

73. The dismissal letter includes the comment:

"We were prepared to be as flexible as possible to facilitate your employment. Our experience of successfully training many staff members to qualification over the years (and some unsuccessfully) has led us to conclude that you will struggle to complete the training required to pass the exams."

74. By email dated 21 July 2023 at 14.50pm, the Claimant replied criticising the decision to terminate her employment, saying:

"I must admit, I was a little shocked to receive your email, seeing as I was progressing well in the job (as per feedback from others), and nothing was highlighted in the progress review meeting only yesterday."

"The hours were agreed upon at the beginning and were flexible, I would have been up for more if necessary but was under the impression less hours worked for you too, seeing as you suggested not working on Fridays."

"If the exams/training in the future was the main concern due to my home life, which is what I (fairly) deduced from your email, I am not sure it's fair of you to make that assumption. I am fully capable of doing the work alongside the children and with my current circumstances. To end my employment because my home life does not suit your model is immoral (and frankly illegal) regardless of whether I am in my probation period."

75. Mr Buffery then responded to the Claimant by letter, to the Claimant on 27 July 2023 at 13.48pm, the letter having been sent, along with a P45, by Mrs Buffery.

76. In that letter Mr Buffery mentions four other apprentices who failed their probationary period out of the 15 taken on by the Respondent. He goes on to write:

"It is important to realise that training to be a Chartered Accountant is not an easy option... We know what is required to succeed and consider it very unfair to allow someone to proceed with an apprenticeship if we do not consider them suited to the grind to qualify (and it is a grind) that will last at least 4 years".

"Your work during the probation period did not reflect your apparent academic ability. Productivity was poor and you failed to realise how much in the way of basic skills need to be acquired in order to proceed in such a career."

The Law

Direct discrimination

77. Employees are protected from discrimination by Section 39 Equality Act 2010 (EqA) which reads:

“(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.”

78. Direct discrimination is rendered unlawful by Section 13(1) EqA:

“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.”

79. In order to succeed with a claim of direct discrimination under section 13, a claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, Lord Scott explained that this means that, *“The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”*. In Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937, HL Lord Hope said with the exception of the prohibited factor, *“all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator”*.

80. The definition of the comparator is at s23 EqA:

“(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.”

“Because of”: reason for less favourable treatment

81. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is “less favourable”. While the Claimant’s perception is, strictly speaking, irrelevant, the Claimant’s subjective perception of their treatment is likely to inform the Tribunal’s conclusion as to whether, objectively, the impugned treatment was less favourable.

82. The test to determine whether less favourable treatment is “because of” the protected characteristic is not a simple “but for” test. In other words, it is not sufficient that, but for the protected characteristic, the treatment would not have occurred, James v Eastleigh Borough Council [1990] IRLR 288.

83. In terms of the required link between the Claimant’s sex and the less favourable

treatment, the two must be “inextricably linked”, Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

84. The correct approach therefore is to determine whether the protected characteristic, here sex, had a “significant influence” on the treatment, Nagarajan v London Regional Transport [1999] IRLR 572.

85. The ultimate question to ask is “what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?”, Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal and is different to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

86. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, sex) was an “effective cause” of the treatment, O’Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Burden of proof under the Equality Act 2010

87. The burden of proof for discrimination claims is set out in s136 EqA:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from 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 subsection (2) does not apply if A shows that A did not contravene the provision”.

88. In Laing v Manchester City Council and anor [2006] ICR 1519, Mr Justice Elias held that:

“the onus lies on the employee to show potentially less favourably treatment from which an inference of discrimination could properly be drawn”.

89. This requires the Tribunal to consider all the material facts without considering the Respondent’s explanation at this stage. However, this does not mean that evidence from the Respondent undermining the Claimant’s case can be ignored at stage one, Efobi v Royal Mail Group Ltd 2021 ICR 1263. It is not enough for the Claimant to show that there has been a difference in treatment between him and a comparator, there must be “something more”.

90. In Madarassy v Nomura International plc 2007 ICR 867, Lord Justice Mummery held:

“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient

material from which a tribunal “could conclude” that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination”.

91. In Virgin Active Ltd v Hughes 2023 EAT 130, it was highlighted by the Employment Appeal Tribunal that the consideration of whether there are material differences in the circumstances of an actual comparator compared to those of the Claimant needs to take place before applying the shift in the burden of proof. Regarding a hypothetical comparator, the Claimant must provide evidence consistent with the position that the comparator would have been treated more favourably. This requires the Tribunal to be able to draw inferences of likely treatment of a hypothetical comparator from the evidence before it.
92. It is only if the initial burden of proof is reached that the burden shifts to the Respondent to prove to the Tribunal that the conduct in question was in no sense whatsoever based on the protected characteristic, Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.
93. The word “detriment” has been construed broadly by Courts and Tribunals. In the leading case of Shamoon, the House of Lords held that it is only necessary for the Claimant to show some disadvantage. He or she need not show any material physical or economic consequence that was materially to his or her detriment.
94. Finally, on the topic of child caring responsibilities in respect of sex discrimination, the case of Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] 6 WLUK 306 (22 June 2021) establishes that all tribunals must accept as fact the childcare disparity between men and women where it is relevant in a case. In the cited case, the Tribunal was wrong to dismiss the Claimant’s claim of indirect discrimination because of the lack of direct evidence of group disadvantage; the Judge erred by not taking judicial notice of the fact that women, because of their childcaring responsibilities, were less likely to be able to accommodate certain working patterns than men and that women are more likely to bear the greater responsibility for childcare than men.
95. The Judgment noted: “*whilst things may have progressed in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal*”.

Discussion

96. We compared the Claimant to a hypothetical comparator, namely a man with child caring responsibilities, as agreed in the list of issues. We took judicial notice of the general position, pursuant to case law, that the childcare disparity between men and women remains; whilst the issue has lessened over time, women continue to be more likely to bear the greater responsibility for childcare than men. Though the case of Dobson is not directly applicable to this case, this being a complaint of direct discrimination rather than indirect discrimination, we considered that the societal position it reflects led to an assumption made

by the Respondent that a female partner is more likely to have a greater share of the child caring responsibilities than her male partner; for example, if their child falls ill, a concern voiced by the Claimant to Ms Thompson. In other words, there was an assumption present that the Claimant would be likely to bear the majority of the child caring responsibilities outside work hours than her husband, even though they were both working at the time.

97. It was suggested by the Respondent that, at all times, they would have treated a man in the same way as the Claimant, but we rejected that argument for reasons outlined below in respect of each incident.

98. We then considered each allegation in turn as set out in the list of issues. We firstly asked ourselves whether each incident amounted to less favourable treatment; if it did, we then asked ourselves whether the Claimant's sex had a significant influence on the Respondent's actions. We looked at the hypothetical comparator of a man with child caring responsibilities in making this analysis. For completeness, we then carried out the two-stage process of applying the burden of proof. This is where we set out the inferences that we have drawn in doing so.

99. Dealing then with each incident in turn:

1.2.1: Making comments to the Claimant on 16.6.23 along the lines of it being difficult for someone with children to successfully discharge their duties whilst working for the Respondent.

Less favourable treatment

100. We consider this comment to be less favourable treatment because it would create anxiety for the Claimant to be told that her family life and child caring responsibilities put her at a disadvantage with the Respondent and that she may not do well because of this.

101. In submissions, Ms Afriyie denied any negative connotation to this comment but we find there must have been as Ms Thompson herself said she was '*ticked off*' by the Bufferys for making it.

Because of sex

102. This comment is explicitly connected to the Claimant's child caring responsibilities. There is a direct connection to her sex because of the reality that women continue to shoulder more of the child caring responsibilities than men.

103. We do not accept that a convincing analogy can be drawn between a woman with child caring responsibilities and a man with a time-intensive hobby, like rowing. Whilst we accept there is likely to be a large amount of work involved in completing the apprenticeship, and that Ms Thompson would have managed all apprentices' expectations about this, we find she had an unconscious discriminatory view that by virtue of being a mother with children, the Claimant was less likely to be able to complete the work than others. This

view, and the comment itself, was directly based on the Claimant's sex.

104. We do not accept Ms Thompson would have made the comment to a man with child caring responsibilities, because she had an underlying assumption that men do not have the same level of child caring responsibility as a woman in the same position.

a) 1.2.2: comment to the Claimant on 22.6.23 that she was “skiving” and “may as well not bother working at all”

Less favourable treatment

105. We find this comment was less favourable treatment because the Claimant is likely to have felt self-conscious, having only recently requested the accommodation, and having been told already that it would be harder for her to succeed because of her family circumstances. The comment also gives the impression that she was doing something wrong by not being present on Fridays, despite it being an agreed accommodation.

106. We do not find that the comment would have been received as mere “banter” by the Claimant, as she was only one week into her employment, and was interacting with a supervisor. We therefore think it unsurprising she did not raise any concerns about it at the time, a point raised by the Respondent, and may well have went along with it. That does not discount the impact of the comment in our view.

Because of sex

107. This comment by Ms Thompson was connected to the accommodations granted to the Claimant because of her child caring responsibilities, namely to not work on Fridays. We do not accept that this comment would have been made to a man in the same position, because we have found that Ms Thompson was operating from the assumption that a mother with child caring responsibilities would be less likely to succeed than a man in the same position; we find that Ms Thompson would not have made this comment to a man with children who did not work on Fridays.

108. We also find Ms Thompson would not have made the comment to a man with child caring responsibilities because she also had an underlying assumption that men do not have the same level of child caring responsibility as a woman in the same position.

b) 1.2.3 comment on 13.7.23 that ‘her job was safe.’

109. We have not found that this comment was said at all, or in the way described by the Claimant. Accordingly, there was no less favourable treatment regarding this comment.

c) 1.2.4 – 1.2.6: review meeting, dismissal and post-dismissal correspondence

Less favourable treatment

110. We have considered these three items together as we find the review meeting and post-hearing communication forms part of the evidence surrounding the reasons for the Claimant's dismissal, rather than being separate incidents of less favourable treatment.
111. We consider the dismissal itself to clearly be less favourable treatment. We acknowledge that the Claimant found alternative employment soon after dismissal, yet clearly dismissal in these circumstances would have knocked her confidence and caused her to have some concern about asking for accommodations again, and whether to disclose her family circumstances to an employer in future.
112. In reaching our decision, we acknowledge that Mr and Mrs Buffery had children of their own when starting their business; we also acknowledge they were initially very accommodating of the Claimant and genuinely wished for her to do well at the outset of her employment. However, we consider that their stance changed when they adopted Ms Thompson's assumptions about her ability to complete her studies in light of her child caring responsibilities and family circumstances.

Because of sex

113. We consider that the Claimant's sex had a significant influence on her dismissal by the Respondent for the reasons outlined below.
114. The Respondent's own documents disclose a recurring theme of how the Claimant will manage her work with her child caring responsibilities, as well as topics of discussion which include: how the Claimant will deal with absence for child-winter illness; using the weekends to study; getting further childcare. We do not accept these discussions would have been had in this way with a man.
115. We find that if a man's hours were reduced by agreement at the outset of his employment, the issue of his child-caring responsibilities would fade away and not remain a live and ongoing concern for the Respondent. This is partially because of the societal assumptions outlined above that women will provide a high level of assistance to their partners when it comes to child-care, even if they too are working.
116. We did not consider that a man would continue to be asked about his wife's sabbatical if he mentioned it in an interview, nor that it would then be held against him if it had not yet materialised. We consider that in the case of a man, it would be assumed that appropriate child-care arrangements would be in place regardless of his wife's sabbatical. We also find it would be assumed that a man's child caring responsibilities would not adversely impact his work, unlike in the case of the Claimant.
117. We also find that a man's confidence would not be used against him in the way it was for the Claimant. The Respondent's witnesses all expressed their surprise and concern in various ways that the Claimant felt confident she would be able to complete her exams and studies given her family situation. Mr

Buffery writes: *“Karen and I were astonished by the comments made by Holly in the meeting. Holly made it very clear in the meeting that she considered the need to study in the evenings and at weekends completely unnecessary... She considered herself well able to pass the accountancy exams in any case.”*

118. Regarding the review meeting itself, we find that a man in the same position as the Claimant would have been approached directly about any productivity concerns or performance issues; the Respondent would not have waited to see how he responded in a review hearing. The Respondent, by its silence, presumed constraints on the Claimant's life and time that it would not have done to a man with child caring responsibilities.

119. We therefore find that the incidents described, namely, the Claimant's dismissal and the two comments made to her by Ms Thompson, were significantly influenced by her sex.

Burden of proof

120. In considering the burden of proof provisions, and for completeness, we have found that the first stage of the burden of proof is met by the Claimant, namely, that there are facts from which we could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant. In doing so, we have drawn inferences from the following:

- a) In oral evidence, Mr and Mrs Buffery were quick to say it was a matter for the Claimant whether she felt able to complete her work alongside her child caring commitments, and that it was 'none of their business' how practically this would be achieved. However, that was not the impression given by the oral evidence of Ms Thompson and the documents provided by the Respondent. These included repeated enquiries of how the Claimant would juggle child caring responsibilities and work; her husband's sabbatical and other matters focused on her children and family circumstances.
- b) Ms Thompson's admissions of fact suggest unconscious discriminatory assumptions regarding the Claimant's sex and child caring responsibilities; this included that it would be a difficult to succeed in working for the Respondent with children.
- c) The Respondent did not raise any of its concerns with the Claimant or give her an opportunity to respond; this suggests to us that her child caring responsibilities were a significant influence on the Respondent's decisions and behaviour, and were accordingly not articulated, because they derived from unspoken assumptions.
- d) The Respondent accepts the only thing they specifically raised with the Claimant in the review meeting is how she would juggle work and her child caring responsibilities; this is the last conversation they had with her before her dismissal the next day; we therefore consider that was a central operative reason for dismissal.
- e) Further aspects of the Respondent's documents disclose a concern about

the Claimant's child caring responsibilities as a barrier to her work and progress;

- f) The Respondent referred to its attempt '*To be flexible*' in the dismissal letter, which suggested the accommodations made surrounding the Claimant's child caring responsibilities were an operative reason for dismissal;
- g) All documentary evidence provided by the Respondent was all produced after the events in question, in the context of the Claimant's reaction to the dismissal where she says, "*See you in court*".
- h) The reasons for dismissal differed between the witnesses and was not, overall, coherent or consistent.

121. We therefore conclude that there are facts from which we could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant. We find that the Claimant's child caring responsibilities were the basis for considering that she could not cope with the future workload and study requirements to pass the exams involved.

122. The burden of proof therefore shifts to the Respondent. We remind ourselves that the Respondent at this point must present cogent evidence to discharge its burden. On the balance of probabilities, and for reasons mentioned above, we do not consider that they have proven that the comments and dismissal were for a reason other than sex. We do not consider an adequate explanation has been given by the Respondent for the less favourable treatment, namely, the Claimant's dismissal, and why Ms Thompson made the comments she did.

123. We were not convinced by the explanation that the Respondent's did not feel they had to give reasons or raise concerns with the Claimant simply because she was in a probationary period. This is because the Respondents were otherwise supportive employers and, on their own case, were keen to educate and improve apprentices; they were familiar with other apprentices struggling, as Kim had been. If any non-discriminatory concerns were genuine, we consider that there would have been a conversation with at least one member of staff before the Claimant's dismissal.

124. The Respondent's documents do not assist them, given their contents, and being produced after events with the knowledge of potential litigation in mind. Further, the timesheets produced by Mr Buffery came over a year after events and gave the impression of a retrospective attempt to justify the decision on the grounds of productivity.

125. We therefore do not consider the Respondent to have shown that they did not discriminate against the Claimant.

Detriment

126. In light of the discussions and findings we have made above, we do consider that the Claimant's treatment, namely the two comments and

dismissal, amounted to a detriment.

Conclusion

127. Having found that the Respondent treated the Claimant less favourably by making two comments related to her childcaring responsibilities and ultimately dismissing her, we have considered that her less favourable treatment was because of sex and that it amounted to a detriment. Accordingly, we find that the Claimant's complaint of direct sex discrimination is well-founded and succeeds. Remedy will be determined at a hearing listed on 7 March 2025 for 1 day.

EJ McCooey

**Employment Judge McCooey
20 November 2024**

Judgment sent to the parties on:
20 November 2024

For the Tribunal:

Note

Reasons for the judgment were given orally at the hearing. Written reasons were requested by the Respondent at the conclusion of the hearing.

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