



EMPLOYMENT TRIBUNALS

Claimant: Ms Lisa Garland

Respondent: Dedman Contract Services Ltd

Heard at: Bristol (via CVP)

On: 10th, 11th & 12th February
2025

Before: Employment Judge David Hughes
Ms Valerie Blake
Ms Julia Cusack

REPRESENTATION:

Claimant: In person

Respondent: Mr Leslie Baker, Avensure

JUDGMENT having been sent to the parties on 03.02.2025 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 Claimant was employed by the Respondent as an accounts manager at the Respondent's premises in Gloucester. She was employed in that role from 04.07.2022, until 02.11.2022.
2. The Claimant claims for direct sex discrimination.

The issues

3. A CMH took place on 25.08.2023, before Regional Employment Judge Pirani. REJ Pirani identified the following issues in his Case Management Order, recording that they were agreed:

Direct sex discrimination (Equality Act 2010 section 13)

74. Was the claimant's dismissal less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant.

75. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than John Wyhatt¹. In addition, she relies on a hypothetical comparator.

76. Has the claimant proved facts from which the tribunal could decide, in the absence of any other explanation, that the respondent dismissed her because of her sex?

77. Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to sex?

4. A further Case Management Hearing took place before Employment Judge Gray on 29.01.2024. The Claimant did not attend that hearing. EJ Gray expressly included in the Case Management Order that the issues remained as per REJ Pirani's Case Management Order.
5. There was a suggestion in the material before the Tribunal of a possible claim in whistleblowing. This was not included in the list of issues prepared. Asked whether she was asking the Tribunal to consider such a claim, the Claimant said that she was not.

The hearing

6. The Tribunal heard evidence from the Claimant, from Lauren Cowle, a director² of the Respondent, and Derrick Dedman, its managing director. We saw statements from Emily Murry, on behalf of the Claimant, and Lottie Davies, whose title at R was office administrator and whose statement was prepared on behalf of R. Neither Ms Murry nor Ms Davies gave evidence before us and, although we have considered their statements, that limits the weight we can place on them insofar as their content is controversial.

¹ We understand this may not, in fact, be the correct name, but the parties were clear about the individual being discussed. To avoid possibly using an incorrect name, we will refer to this person as "JW" save where quoting directly.

² In her statement she describes herself as "the" director. As Mr Dedman is described as the managing director – and hence, presumably, also a director – it may be that it is more accurate to use the indefinite article. In any event, nothing turns on this.

7. In the course of the hearing, much of what the Claimant had said in her statement was not challenged. Whether that is because it was accepted, or simply because Mr Baker – whose arguments for the Respondent were presented with admirable economy – chose not to address matters of doubtful relevance – we treat such matters as going unchallenged.
8. The Claimant represented herself. She did so with courtesy. Although the Tribunal explained to her the need to put her case to witnesses, in closing she expressed concern that she would have liked to put more questions than she had. The Tribunal is less concerned about that than the Claimant appeared to be. This is because the scope of the factual dispute in this case is quite limited. It seems to the Tribunal that, for reasons we will explain, this case is more about what the Respondent believed, and why it did what it did, than about disputes of primary facts.
9. All findings that we make are on a balance of probabilities.

Employment documents

10. C's letter of engagement and statement of particulars both stated expressly that there was a 6-month probationary period. This was mirrored in the statement of particulars provided to her. The Employee Handbook – said by the statement of particulars to be incorporated into the contract of employment, save where the handbook expressly said otherwise – included the following:

Probationary Period

When commencing employment with us, the initial period of employment will be on a probationary basis and is normally for six months'. This period of time is to allow us to assess your performance and for you to decide if you wish to continue your employment with us. At any time during this period we may, if we are unhappy with your progress, extend your probationary period or, if we feel it is appropriate, terminate your employment without recourse to our full disciplinary/ capability procedures. You should not consider your probation period passed until confirmed in writing.

...

ABSENCE FROM WORK AND LATENESS

Attendance

You should arrive at work in sufficient time to actually start working at your normal starting time. Whilst we understand that on limited occasions, unexpected occurrences may impact your ability to attend work, or may cause you to arrive late. Lateness and absence have an adverse impact to

both the business and other employees and we trust that you will take a positive approach to punctuality and attendance at work.

Reporting Absence or Lateness If you are unable to attend work, or get to work by your expected starting time, you should notify your Line Manager personally as soon as possible, and no later than 60 minutes before your start time, to allow us to take the necessary action to cover your absence and minimise any impact it may have. If your Line Manager is unavailable, ensure you speak with another member of the management team.

You should inform your Line Manager of the reason for your absence and how long you expect to be away from work. We will then agree with you any further reporting procedures you may need to comply with prior to your return to work.

You should always report your absence yourself by telephone. You should not ask another person to call on your behalf and you should not notify us by text message, email or any other medium.

Failure to abide by the absence reporting procedures will normally be considered unauthorised absence and may result in the employee being liable to loss of pay for the period of absence and to disciplinary action.

This will not normally be remedied by the subsequent receipt of a back-dated medical certificate.

Fit Notes

Your doctor may feel that it is appropriate to suggest that whilst you are unable to carry out your job in its current form, you may be fit for work with some adjustments. If so, we will discuss your doctor's recommendations with you, where possible and if necessary we will consider reasonable adjustments.

Returning to Work

You should notify your Line Manager the day before your return to allow us to give sufficient notice to cancel any arrangements we may have made with any individual to cover your workload during your absence. If you arrive for work without such notification, we may send you home from work for the day without pay.

If you have been suffering from any contagious or infectious disease you should ensure that your doctor is happy for you to return before you do so.

Upon your return to work you will be required to attend a return to work interview/complete a return to work.

If we feel that your lateness and/or absence are unacceptable, we may invoke the disciplinary process, which could ultimately lead to your dismissal.

Absence due to sickness or injury

If you are absent for a period in excess of seven calendar days, (irrelevant if these constitute your normal working days or not) you should provide us with a medical certificate from your GP or other relevant medical practitioner. Such medical certificates should then be forwarded to us on a regular basis to cover the whole period of your absence. If your absence is for a period of seven calendar days or less, you will be required to complete a Self-Certification of Absence form on the first day of your return to work.

The above documentation is required irrelevant of whether or not you qualify for any payment during your absence.

Dependent upon your circumstances, you may be eligible for SSP during your absence, in line with current legislation. However, if you fail to follow our procedures for reporting and certifying your absence without good reason, we may withhold payment of SSP Payments and/or any contractual sick and injury payments and/or may treat it as a disciplinary matter.

Submission of medical certificates, although validating your reason for absence, will not necessarily prevent us from taking appropriate action, including invoking the disciplinary process, if we feel your cumulative absence from work is excessive.

Depending upon the circumstances of your absence/s from work, we may ask you to allow us to approach your GP or another member of the medical profession with a view to obtaining further information on your condition. We may then consider if there are any reasonable adjustments which we could implement to help you to improve your attendance. It may be necessary, if acceptable solutions cannot be found, to terminate your employment with us, in line with current legislation.

If you qualify for SSP this will be paid to you at times and in the manner you would normally receive your pay. Failure to supply the relevant certification of absence will result in non-payment of SSP. You will not normally receive SSP (statutory sick pay) for the first 3 days of sickness which is classed as 'waiting days' unless you have been off sick and getting SSP within the previous 8 weeks.

If you pursue a claim for compensation from any person, company or other entity for the injury or illness you incurred, you should consider including loss of income in the claim as we reserve the right to recover any SSP we made to you during your absence from work from any compensation which may be awarded to you.

Time Off for Medical Appointments

If you need to visit the doctor or dentist, wherever possible, you should arrange the appointment outside of your normal working hours. If the doctor or dentist cannot facilitate this then the appointment should be made as close to your starting or finishing time as possible or taken as annual leave subject to the holiday booking procedures.

You should discuss the absence with your Line Manager and give us as much notice as possible of your intended absence from work. Whilst we appreciate that this is not always possible with an emergency GP appointment, you would normally be given adequate notice to attend other kinds of appointments. Other than for emergency appointments you should provide us with a copy of your appointment card, letter etc. In the event of an emergency appointment we may ask you to provide evidence of your appointment so that we can monitor your on-going welfare.

Such time off will normally be without pay.

Time Off for Dependants

There may be occasions when you need to take a reasonable amount of time off during working hours to deal with unforeseen matters and

emergencies relating to a dependant. A dependant could be a spouse, partner, child, parent, or someone who depends on you for care.

The leave can be taken for example to:

- *Deal with a breakdown in childcare;*
- *To put longer term care in place for children or elderly relatives; or*
- *If a dependant falls ill or is taken into hospital.*

You have a statutory right to a reasonable amount of time off to deal with any such matter. The legislation does not prescribe what amount of time is reasonable but does suggest that in most cases a day or two will be sufficient to deal with the immediate crisis. If you wish to take time off work you must speak to your Line Manager to discuss your situation and agree a reasonable amount of time away from work, which will normally be without pay.

...

Smoking

Smoking, including the use of electronic cigarettes, is not allowed on our premises/client premises or at any public entrance to our premises/client premises. Smoking is only allowed in the designated outside area and only during your authorised break times. After smoking, you should ensure that you wash your hands and take whatever steps are reasonable to ensure that you do not return to your workplace smelling of smoke. Your failure to comply with these rules may result in disciplinary action.

...

What happened

11. The Claimant was interviewed by Mr Dedman, Ms Davies and a woman named Sue, who we were told was the bookkeeper. The Claimant said that, in interview, she told those present that she was awaiting an emergency hospital appointment concerning the extraction of a wisdom tooth, and other dental problems from which she had suffered for some months. This was not challenged, and we accept it.
12. In her statement, the Claimant said that she did not receive a “*job description*”. This was not challenged, and it is therefore not entirely clear to what she was referring. However, she did sign the statement of particulars, which as noted above refers to the employee handbook, and she did complete an induction form. We therefore find that she did receive those documents.
13. The Claimant described her duties, and her performance in her job. She said that she found evidence of a certain laxity in the Respondent’s administration, into the detail of which we need not go. She says that she received “*only praise*” in her 5 months working for the Respondent. None of

this was challenged, we think for reasons of relevance rather than because of any oversight.

14. In her statement, Ms Davies said that the Claimant arrived late for work on several occasions, and that she had an informal chat with the Claimant on 17.10.2022. Ms Davies said that she was aware that the Claimant had a practice of “...*taking several cigarette breaks during the day which would last between 10-15 minutes each*”. She also says that she saw the Claimant using her phone “*quite a lot*” during the working day, making calls and texting.

15. Because Ms Davies did not give live evidence and could not be cross-examined, we are cautious about accepting what she says.

Informal chat 17.10.2022

16. However, the hearing bundle included a manuscript note, apparently dated 17.10.2022.

17. Although Ms Cowle was the Claimant’s line manager, she appears to have had little to do with the Claimant’s day-to-day work. Page 1 of the note – about which the Claimant was asked – reads as follows:

Informal chat.

17-10-22

I had an informal chat with Lisa regarding her lateness.

I approached her and said about her lateness, as she is often late due to the bus.

She cannot help being late. I suggested that she get an earlier bus, and to get in on time.

Since 17 – 10 – 2022, Lisa has managed to get in on time apart from one occasion, where she had to take her dog to the vets.

18. There was a second page to this note – at least, it was described as a second page in the index prepared on behalf of the Respondent – which was not put to the Claimant.

19. Although the Claimant disputed that the note was an accurate record of the conversation, we find that it is a reasonably reliable record of what Ms Davies said. It is not, and does not purport to be, a verbatim transcript. But

it seems to us to be improbable that it was created significantly later than the date on it, for some ulterior motive.

20. A consideration of the second page supports this finding. The second page records a series of bullet points about the Claimant, and goes on to say:

*Spoken to, hold a probationary review.
We are going to let her go.*

....

21. This second page appears to be a note of actions that Ms Davies was to take, or someone at the Respondent was to take, and has the appearance of being prepared after a conversation with an HR adviser. We note that no privilege was asserted in respect of it.

22. The note indicates that the Claimant's assertion that she received only praise in the course of her employment, was not accurate. It records that she was spoken to, in October 2022, about lateness.

Probation review meeting

23. A meeting was held on 02.11.2022. It was described as a "*probation review meeting*". That is something of a misnomer. The note of 17.10.2022 indicates that someone at the Respondent had already decided before that meeting, that the Claimant was to be dismissed.

24. There is a note of the meeting, which was attended by Ms Cowle and Ms Davies, as well as the Claimant. The note does not purport to be a transcript of all that was said, but we think it is probably a reliable record of the substance of what happened.

25. The note starts off by recording that "*Lauren and I have terminated Lisa's employment*". It goes on as follows³:

Lauren said about Lisa's sick record, as it is high. Lisa came back and said that we don't monitor it or document it. I said that we do monitor it, and Lauren passed me the sick record, I made a quick note as she was off yesterday as well. I then passed it to Lisa. Lisa then said that she came in from two weeks in August with glandular fever. Lisa has never mentioned glandular fever to me or to Chrizzelle.

³ Spelling and punctuation as per the original.

Lauren said that it's not fair on the rest of the team having to pick up a work, Lisa did not respond back to that.

Lauren explained it's a busy office, which she did agree with.

Lauren explained that she texts on her phone a lot, and again she did not respond back to that.

Lauren explained that the cigarette breaks were 10 – 15 minutes which he did not agree with. She said that she came in 15 minutes early which entitles her to a cigarette break. (Lisa had to make it 15 minutes from Friday as we let go early to go to the pub to meet old workmates)

Lisa wanted to extend her probation period.

Lisa stopped the meeting and said, 'do you want me to go'

Lauren said unfortunately we won't be continuing your employment. Lisa then got up and went to get things.

Dismissal letter

26. C was sent a dismissal letter on the same date. It reads as follows:

Further to the probationary review meeting on 02.11.2022, I am writing to confirm my decision.

As you are aware, when you started work with us we had high hopes and expectations that you would meet the standards we require. Unfortunately, that has not been the case.

Our concerns were as follows:

- Excessive time off (High sickness absence, with a pattern forming of a Monday and Tuesday)*
- Excessive mobile phone use*
- Excessive length of cigarette breaks*

I considered the responses you gave at the meeting but have reached the conclusion that you have failed to demonstrate your suitability for the role.

It is with regret that I confirm that your employment was terminated with immediate effect. You will be paid in lieu of notice.

I will arrange for any outstanding wages and holiday pay to be paid into your nominated bank account by BACs and your P45 will be sent to you once this payment has been made.

You may appeal against my decision and any appeal must be received in writing via a letter or an email within 5 working days addressed to me. Your letter of appeal must state the full reasons for your appeal.

Appeal against dismissal

27. C appealed against her dismissal, by a letter which reads:

Please accept this as a request to appeal the decision to terminate my employment at Dedman Contract Services. My reasons for this appeal is a chance to outline how company procedures have not been followed, and discuss my performance in the short time I was employed. There was much more discussed in our meeting than was recorded and I was totally unaware that it was a probation review meeting therefore I had no time to prepare or ask for a witness to attend.

I accept that the absences look bad in a probation period however I had disclosed a medical issue with my teeth in my interview with the company owner and bookkeeper. None of my workload or work performance were discussed, I dispute excessive mobile phone use and certainly don't see 2 cigarette breaks to be deemed as excessive which can be proven should you look at the company CCTV. I have had discussions with Derrick Dedman who did not have a problem with the cigarette breaks.

I believe that an extension of my probation period would have been fair, however I also believe that you had made your decision without the unscheduled appointment as I could not access my work computer on Wednesday 2nd 2022. There is also confusion on my job role, being that I never received a job description and verbally was told I was Office Manager, sadly existing staff felt extremely threatened by me and obviously continue to do so.

I have not received any verbal warnings to the concerns that you have stated nor have these so called problems been discussed with me. A point that I would like make is whilst carrying out my duties i was asked to take minutes of Health and wellbeing meeting for another member of staff who has only just got through their probation period who had what I deem excessive time off work much more that I had however they are still employed, this feels somewhat like discrimination and I am currently waiting to hear back from the citizens advice over my termination.

I have read the disciplinary procedure and it feels like my employment has been logged as misconduct which I do not accept.

28. An appeal meeting took place on 21.11.2022. In attendance were Mr Dedman, Ms Davies, one Glenn Seer (whose status at the meeting was not addressed before us) and the Claimant herself. There is a note of the meeting, which is long – 7 closely-typed pages – and which we do not produce here.

29. On 30.11.2022, the Respondent wrote to the Claimant, to tell her that her appeal had been unsuccessful. The substance of the letter read as follows:

Further to your appeal hearing held on 21st November 2022 in which you appealed against the decision to terminate your employment following your probationary review meeting.

During the hearing we discussed and confirmed the grounds of your appeal and these were:

- ***That the company has failed to follow proper procedures***
- ***You had failed to understand that the meeting was a probationary review and therefore did not properly prepare for the meeting***
- ***The reasons for your absences were not properly considered***
- ***There was confusion over your job role as you were never issued with a Job Description***
- ***The issues discussed at the meeting had never previously been addressed and you had not previously received any warnings***
- ***You feel that you have been treated less favourably than a colleague***

With regard to each you point you have raised in your appeal, I have addressed them separately for clarity.

- *I have investigated further and I have found no evidence that our company has failed to follow procedures.*
- *It was confirmed upon your attendance on 2nd November 2022 that you were there for a probationary review meeting due to concerns regarding your high level of sickness absence and excessive use of your personal mobile phone.*
- *The reasons for your sickness absences were considered during your appeal but I consider your level of absenteeism unacceptable during your probationary period.*
- *You were fully inducted by Lottie Davies, Office Supervisor, on 4th July 2022 and were made aware of what your roles and responsibilities were in Accounts.*
- *As you are aware when you started with the company on 4th July 2022 your initial period of employment was subject to a probationary period of six months. At any time during this period if we have concerns about your performance we can terminate your employment.*
- *During your appeal hearing you did not provide any evidence to support your claim that you were treated less favourably than colleague with regard to cigarette breaks. I can assure you that all employees are aware of the company's smoking policy and if said policy isn't address the matter will be addressed accordingly in line with our procedures.*

Having given the matter full consideration, I am now writing to confirm that the original decision taken by Lauren Cowle, Director, stands.

You have now exercised your right of appeal under the company procedures and the decision is final there is no further right of appeal.

R's complaints against C

30. The dismissal letter identifies 3 concerns: excessive time off, excessive mobile phone use, and excessive length of cigarette breaks.

Excessive time off

31. The bundle included what the index described as an “*absence schedule*”. This consisted of a systems printout from the Claimant’s employee absence record, with different coloured entries, and a series of dates on which the Claimant was said to have been off.

32. The record appeared to show the Claimant as having had 5 days off unauthorised absences, and 5.5 days off authorised, in addition to bank holidays. Individual dates totalled 10.5 days. The Claimant did not dispute the listed dates put to her.

33. Perhaps more importantly, before us the Claimant readily conceded that her level of absence was high.

34. Before us, the Claimant was keen to explain the reasons for her absences. The Respondent did not dispute these reasons. Its position was simply that the level of absences was unacceptable.

35. We find that the Respondent’s decision makers – Ms Cowle, and then Mr Dedman on appeal – genuinely believed that the Claimant’s level of absence was such that her employment should be terminated, for that reason, combined with the other concerns identified in the dismissal letter.

36. As for the allegation in the dismissal letter of a pattern forming of Mondays and Tuesday being taken off, 3 of the 5 unauthorised absences were on a Monday or Tuesday (as shown by the graph) and 3.5 of the authorised absences. This seems to us to be a reasonable foundation for Ms Cowle to form the view that there was something of a pattern, although the pattern allegation wasn’t put in the meeting of 02.11.2022 and does not, in fact, appear to have formed a significant part of the decision to dismiss.

37. The Claimant recognised in cross-examination that, if she was dismissed for excessive time off, that would not have anything to do with her sex.

Excessive mobile phone use

38. The Claimant says that her use of her mobile phone wasn't excessive, and that the first she ever heard of this issue was in the dismissal letter.
39. We do not accept the latter assertion. The notes of what was called the probation review meeting have this being put to the Claimant. Before us, the Claimant said that it was not correct to say that she made no response to this at that meeting. She told us that she said that she quite often used her phone to contact Mr Dedman and another person, named Sam, about work-related issues.
40. This suggests that the question of excessive phone use was indeed raised with the Claimant at that meeting, and we find that it was. We find that the Claimant's answer sought to explain an apparently high-level of mobile phone use, which is consistent with Ms Cowle having reason to believe that the Claimant was using her mobile phone to an excessive extent whilst at work.
41. There is no evidence that this allegation was raised before the meeting of 02.11.2022, and we find that it was not.
42. The Claimant recognised in cross-examination that, if she was dismissed for excessive mobile phone use, that would not have anything to do with her sex.

Excessive cigarette breaks

43. The dismissal letter referred to excessive length of cigarette breaks. That would indicate that it was the length of the breaks, rather than their number or a combination of length and number, that the Respondent viewed as the problem.
44. We find it unlikely that a cigarette break would take 15 minutes. Although none of the Tribunal members are smokers, we draw upon our general knowledge and experience to find that it does not usually take 15 minutes to smoke a cigarette. Time estimates are notoriously unreliable.
45. In evidence before us, it seemed that it was the number of cigarette breaks, as well as their length, that was an issue.

46. The Claimant told us that she took one cigarette break in the morning, and would have another cigarette in her lunch break. She told us that she smokes 10 to 15 cigarettes a day, or 2.5 to 3 packs of 20 per week. Sometimes she smokes rolling tobacco, and when she does so, she smokes fewer cigarettes. She would smoke fewer cigarettes too on a working day.
47. We think it unlikely that the Claimant took only one cigarette break each day, and find that she probably took more than that. Given that level of her smoking, we think it unlikely that she would smoke just two cigarettes during the course of the working day.
48. We are not satisfied that the issue of cigarette breaks was raised with the Claimant before the meeting on 02.11.2022. It was put to the Claimant that it was raised in an email exchange between her and Mr Dedman on 19.10.2022. There is a passing mention of cigarette breaks in an email from the Claimant to Mr Dedman, in an email dealing primarily with timekeeping, and Mr Dedman's response does not deal with cigarette breaks at all.
49. The Claimant recognised in cross-examination that, if she was dismissed for excessive cigarette breaks, that would not have anything to do with her sex.

Lateness

50. Lateness was also discussed before us, although it was not said to be a reason for dismissal in the dismissal letter. It was, however, discussed with the Claimant on 17.10.2022, included as a reason for dismissal in the Respondent's ET3, and put in cross-examination as one of the reasons for dismissal.
51. The Claimant lived some distance from R's premises. The parties agreed that we could look at Google Maps, which showed the distance to be in the region of 12 kilometres. The Claimant was reliant on public transport, and had told the Respondent this in interview. She told us that the bus service had become unreliable, and that at times she had to get a lift into work, and on some occasions had had to take a taxi. This was not challenged, and we accept it.

52. Cross-examined about lateness, the Claimant accepted that there had been a conversation about it, albeit she didn't accept that the note of the chat on 17.10.2022 was accurate. She said that at some point, she had discussed with Mr Dedman the unreliability of the bus service. She had mentioned taking an earlier bus, which left at 06:20hrs, but that Mr Dedman had dismissed the idea that she should get so early a bus. She said that Ms Davies had asked her about an earlier bus service.

53. In the email of 19.10.2022, to which we have already referred, the Claimant wrote:

I have popped a sign in sheet for the office staff to use in order to track our time. It was brought to my attention yesterday that I was regularly late due to issues around public transport. Unfortunately I have to rely on stagecoach and will always make up any time missed, when the bus service runs normally I arrive 15 minutes early every day. The sign in sheet will keep track of that along with my cigarette break/s (1 or two each day) it will also keep track of the time Lottie spends over at Prima.

54. This is consistent with the issue having been raised on 17.10.2022, and indeed with it having sufficient prominence in the Claimant's mind that she felt a need to address it.

55. It is not necessary to find the exact level of lateness. The material before us leads us to conclude that the Claimant's level of lateness was such as to cause the Respondent a genuine belief that it was unacceptable.

JW

56. JW was another employee of the Respondent. He started working for the Respondent on 01.03.2022. His probationary period ran until September 2022. He was dismissed on 22.11.2022, shortly after the Claimant.

57. The Claimant contended that JW was an appropriate comparator.

58. It did not appear to be in dispute that JW took more time off, during his probation period, than the Claimant had. Some instances related to a heart attack that his mother had suffered or ill health of other family members.

59. Perhaps strangely, given that she was contending that JW was an appropriate comparator, the Claimant put to Mr Dedman that JW was a

more valuable employee to the Respondent than she was. Mr Dedman denied this, but the Claimant revisited this line of argument in closing. She said that JW had been being trained for working at heights, with a view to allowing Mr Dedman to stop doing this. Mr Dedman had not been questioned about this, and we do not put any weight on it.

60. The Claimant also made allegations of misuse of the Respondent's van, and inappropriately using fuel bought by the Respondent, against JW. We note these allegations, but do not need to make any finding on them and consider it would be inappropriate to do so not having heard from JW.

Law

Equality Act 2010 ("EA")

61. EA s13 provides as follows:

13 Direct discrimination

- (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.*
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*
- (6) If the protected characteristic is sex—*
 - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
 - (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy, childbirth or maternity.*
- (8) This section is subject to sections 17(6) and 18(7).*

62. EA s136 provides as follows:

136 Burden of proof

- (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.*

- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
- (5) *This section does not apply to proceedings for an offence under this Act.*
- (6) *A reference to the court includes a reference to—*
 - (a) *an employment tribunal;*
 - (b) *the Asylum and Immigration Tribunal;*

Re comparators

63. EA s23 provides:

23 Comparison by reference to circumstances

- (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.*
- (2) *The circumstances relating to a case include a person's abilities if—*
 - (a) *on a comparison for the purposes of section 13, the protected characteristic is disability;*
 - (b) *on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.*
- (3) *If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married is not a material difference between the circumstances relating to each case.*
- (4) *If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is married to, or the civil partner of, a person of the same sex while another is married to, or the civil partner of, a person of the opposite sex is not a material difference between the circumstances relating to each case.*

64. A person can be an appropriate comparator even if the situation is not precisely the same as C. It is a question of fact and degree – see Hewage -v- Grampian Health Board⁴.

65. In Shamoon -v- Chief Constable of the RUC⁵, Lord Nicholls of Birkenhead said:

11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was....

⁴ [2012] UKSC 37 [2012] ICR 1054

⁵ [2003] UKHL 11 [2003] ICR 337

Conclusions on the issues

Was the Claimant's dismissal less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant.

66. It was not seriously disputed before us that the Claimant's dismissal was unfavourable treatment.

67. To ask whether it was less favourable treatment invites the question, less favourable than whom? The Claimant contended that it was less favourable than the treatment of JW.

68. We are not persuaded that it was, in fact, significantly less favourable treatment than JW received. JW was dismissed shortly after the end of his probation period.

69. More fundamentally, we consider that this case is one in which the Shamoon approach is preferable. A consideration of whether or not JW is an appropriate comparator is apt to lead into a lengthy and unenlightening discussion of the differences between his situation and that of the Claimant, and a consideration of whether those differences are material. In this case, the Tribunal considers that it is well able to consider, and answer, the question posed by Lord Nicholls in Shamoon: why was the Claimant treated as she was?

70. The Claimant was dismissed because the Respondent's decision makers, Ms Cowle and Mr Dedman, had genuinely concluded that her level of absence, her level of lateness, her use of her mobile phone and the amount of time she spent on smoking breaks, were such that it didn't want to continue to employ her. As the Claimant herself recognised in cross-examination, none of these reasons had anything to do with her sex.

71. The Claimant was unhappy about the fairness of the decision, and the process followed to reach it. We have some sympathy with that. The decision to dismiss her was taken on or shortly after the discussion on 17.10.2022. She had no notice that she was at risk of dismissal, and what

was called a probation review meeting on 02.11.2022 was, in reality, a meeting to tell her that she was being dismissed.

72. The Respondent took the view that it could take that approach because the Claimant was still in her probation period. For the purposes of this claim, it is sufficient to find that the Claimant's dismissal was not related to her sex.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than John Wyhatt. In addition, she relies on a hypothetical comparator.

73. For the reasons given above, we think the Shamoon approach is more appropriate to this case. We were not addressed on a possible hypothetical comparator.

Has the claimant proved facts from which the tribunal could decide, in the absence of any other explanation, that the respondent dismissed her because of her sex?

And

Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to sex?

74. As stated above, in this case the Tribunal has been able to find the reason why the Respondent dismissed the Claimant. It is therefore not necessary to resolve these issues.

Employment Judge David Hughes
Date 11.03.2025

REASONS SENT TO THE PARTIES ON
23 April 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE