EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Holmes	v	Lazer Radio Taxis LLP

Heard at: Sheffield (by CVP) **On**: 5 and 6 February 2024

Before: Employment Judge James
Mr P C Langman
Mr G Wareing

Representation

For the Claimant: In person

For the Respondent: Mr K Hutchinson, LLP Designated Member

JUDGMENT

(1) The claims for direct sex discrimination (s.123 Equality Act 2010) are upheld.

(2) The claim for wrongful dismissal (Article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) is upheld.

(3) The respondent must pay to the claimant the total sum of £4,593.61. This is made up of compensation for loss of wages of 3 weeks, injury to feelings of £2500, a 15% uplift for failure to follow the Acas Code of Practice in relation to the dismissal and 8% interest on that total, for one year. That figure should be paid to the claimant tax free, since it is compensation relating to loss of employment and the tax free amount of £30,000 applies.

REASONS

The issues

1. The agreed issues which the tribunal had to determine are:

Direct sex discrimination

1.1. Did the respondent do the following things:

1.1.1. Miss G Bowes creating a hostile environment between 20 January 2023 and 15 February 2023 by bringing previous employees in and making comments about the Claimant to them and to the Claimant's partner.

1.1.2. Dismiss the Claimant. The dismissal is admitted by the Respondent.

1.2. Was that less favourable treatment? The claimant relies on a hypothetical comparator.

1.3. If so, was it because of sex?

1.4. Did the treatment set out at 1.1.1 amount to a detriment?

Wrongful dismissal (notice pay)

1.5. What was the claimant's notice period?

1.6. Was the claimant paid for that notice period? The Respondent accepts that it dismissed the Claimant with immediate effect.

1.7. Was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

The proceedings

2. Acas Early Conciliation took place between 4 April and 16 May 2023. The claim form was issued on 22 May 2023. The claimant made claims for sex discrimination, wrongful dismissal and whistle-blowing. The whistle-blowing claim has since been withdrawn.

3. A preliminary hearing for case management purposes took place on 15 August 2023. Employment Judge Knowles identified the issues, listed a final hearing and made related Case Management Orders.

The hearing

4. The hearing took place over two days. Evidence and submissions on liability were dealt with on the afternoon of the first and the beginning of the second day. After a brief adjournment, the tribunal heard brief verbal submissions, and it was arranged that later that day, the tribunal would give its decision and reasons and, if the claimant was successful, would go on to deal with remedy.

5. The tribunal heard evidence from the claimant, Mrs Natalie Holmes and Shaun Sunderland. For the respondent, the tribunal heard from Gail Bowes, joint owner of the business, driver and operator; Kevin Hutchinson, also a joint owner of the business, driver and operator; Briony Clegg, customer; and Mark Hopkins, employee. The tribunal also considered statements from Lana Wardle and Beverley Deighton, who were not able to attend the hearing because it hearing had been rearranged. The tribunal has considered the content of the statements, although the evidence in them has less weight because they were not available for cross examination. There was a hearing bundle of 37 pages. The tribunal was provided with another bundle of documents containing a number of text messages, a total of 62 pages. Neither party referred to the contents of that further bundle in evidence and the tribunal has not considered the content of it.

Findings of fact

6. The claimant started work for the respondent taxi firm on 11 November 2022 in the role of Taxi Operator. The claimant was not provided with a contract of employment, or a statement of particulars of employment, before or during her employment.

7. The claimant appears to have had a difficult working relationship with Gail Bowes, one of the joint owners of the business, who worked from the same office. After the claimant was appointed to her role, Miss Bowes did not attend the office for a period of about two months. Miss Bowes told the tribunal that she was considering whether to come back to work at all. In the event, she started attending the office again on 20 January 2023.

8. Mr Sunderland was in a long-term relationship with Miss Bowes, from April 2013. That relationship ended in January 2023. The claimant started a relationship with Mr Sunderland. Understandably, this put a further strain on the working relationship with Miss Bowes.

9. After he started a relationship with the claimant, Miss Bowes made comments to Mr Sunderland about the claimant including: "*you know she sells her body for sex*"; and "*she had a child but got it taken away from her*". For the record, the claimant has not had a child, so could not have had any child taken away from her. Miss Bowes accepted in evidence that she used such language about the claimant; it was, she said, what she had heard from other people in Filey.

10. The tribunal finds that the quality of the claimant's work started to deteriorate during the Christmas/New Year period. The claimant accepted that her mind was not fully on the job at this time, as she had some pressing and difficult personal issues to deal with. The performance issues were not brought to the claimant's attention, by either Mr Hutchinson or Miss Bowes.

11. Around this time, the claimant entered a booking for customers travelling from and returning to Liverpool docks. The pick up time was entered for the evening, not the morning, leaving the customers waiting at the port for 3 hours. Miss Bowes had to drive across to Liverpool, leaving the office unstaffed whilst she did so as no other drivers were available. The tribunal finds that this mistake did happen and that the customers were, understandably, unhappy. There is no evidence that the mistake was brought to the claimant's attention however; and nor is there any evidence that the claimant's mistake was deliberate.

12. The first allegation of direct sex discrimination is that Miss Bowes brought ex-employees into the business and made comments about the claimant to the ex-employees, and to Mr Sunderland. We have made findings above in relation to the comments to Mr Sunderland. In relation to ex-employees, the sole evidence before the tribunal is that on one occasion Miss Bowes came into the office with a former driver there, Bev Deighton. The virtually unchallenged evidence of the claimant is that on that day:

> *They sat behind me for most of the day making comments about me, laughing at me. One thing I remember the most was they were talking about going on holiday together and skydiving Gail said "oh no I might throw up, although there's a perfect place to throw up in there" she was referring directly to my bag that I had placed at my side like I always did.*

> *After this it just progressed, she would randomly start screaming at Shaun for no reason. at the end of a shift, she flew into the office and said "you can go now I'm here" to myself, I went out of the office and was talking to Jake the airport driver and she came outside to get something from her car, went back in and said to Shaun " your skanks outside waiting for you".*

13. The only evidence to the contrary is from Ms Deighton, from whom we have a written witness statement only. Ms Deighton denies witnessing any such treatment, and similarly denies that Miss Bowes used language such as skank and slut to describe the claimant, in her presence.

14. On the balance of probabilities, the tribunal finds that the incident did happen as the claimant recollects; and that Miss Bowes did refer to the claimant as 'a skank'. Miss Bowes admitted making other similar derogatory comments about the claimant to Mr Sunderland.

15. The claimant took a week's leave between 8 and 14 February 2024. By this time, the claimant was unhappy in her role, because of the conflict with Miss Bowes. Whilst on leave she found another job and verbally gave a month's notice to Mr Hutchinson, whilst still on leave.

16. During the hearing, the tribunal has heard evidence about the claimant not booking taxis on a regular basis for two individuals, who were witnesses for the respondent, Lana Wardle and Briony Clegg, despite drivers being available. It is clear from the evidence the tribunal has heard, that this allegation did not form any part of the basis for the claimant's subsequent dismissal. Therefore, save for the tribunal finding that there is no material evidence of any animosity by the claimant towards those two individuals, no further findings of fact are necessary in relation to this allegation.

17. When the claimant returned from leave on 15 February 2023, she was met by Miss Bowes and Mr Hutchinson. Miss Bowes told the claimant she was sacked and handed her a letter confirming she was being dismissed with immediate effect. The decision to dismiss the claimant was taken by Miss Bowes; she ran it past Mr Hutchinson, before they both met with the claimant.

18. Miss Bowes' witness statement refers to a number of allegations against the claimant. Most however turned out, when Miss Bowes was questioned about them, to have had nothing to do with the claimant's dismissal – the matters referred to in paragraph 16 above are an example. In live evidence for the tribunal, Miss Bowes referred to the claimant making six mistakes in one evening and that another member of staff was threatening to leave. She had a list of the jobs in front of her when giving evidence, but that document was not put before the tribunal. Mr Hutchinson referred to there being eight incidents in one night. The tribunal has not been provided with any details about what those incidents were, why the problems were said to be the claimant's mistakes, rather than others, or why they were alleged to be deliberate.

19. Miss Bowes' witness statement does say:

> *It was when Abigails mistakes created much bigger issues for the company eg leaving customers stranded, refusing work etc, was then backed by the threatening behaviour that resulted in terminating Abigails employment at Lazer Taxis with immediate effect.*

20. When asked to explain what the threatening behaviour was, Miss Bowes told the tribunal it was '*her attitude when [Miss Bowes] talked to her, belittling Miss Bowes all the time. The claimant thought Kevin was her boss, Miss Bowes did not matter*'.

21. None of the issues relating to the claimant's performance were discussed with the claimant by Miss Bowes before the dismissal. In relation to those issues which occurred prior to her returning to the office on 20 January 2023, Miss Bowes did not ask Mr Hutchinson to raise them. The claimant was not aware, from Mr Hutchinson or Miss Bowes, about any of the alleged issues about her performance, prior to her dismissal.

Relevant law

Wrongful dismissal

22. An employer is entitled to dismiss an employee, on giving them the contractual or statutory notice they are entitled to. If however the employee commits an act of gross misconduct, the employee is not entitled to notice.

Direct discrimination

23. Section 13 (1)-(2) of the Equality Act 2010 provides that 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. Sex is a protected characteristic.

24. A claimant must show that she was treated less favourably than a real or hypothetical comparator. Other than the protected characteristic, there must be no material difference between the circumstances of a claimant and the comparator (s.23(1)). Where there is an actual comparator who shares some, but not all, of a claimant's relevant characteristics, the tribunal can consider the comparator's treatment as evidence as to how a hypothetical comparator would have been treated – see *Watt (formerly Cater) v Ahsan [2007] UKHL 51*.

25. If less favourable treatment is established, the tribunal must consider the reason why. If the protected characteristic had a '*significant influence on the less favourable treatment, discrimination would be made out* - see *Nagarajan v London Regional Transport [1999] IRLR 572*. An equally crucial question is *why* a claimant received the less favourable treatment – what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously, was their reason - see *Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830*.

Burden of proof

26. Under s136 Equality Act 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

27. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258*. The tribunal can consider the respondents' explanation for the alleged discrimination in

determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others [2006] IRLR 748*; *Madarassy v Nomura International plc [2007] IRLR 246, CA*.)

28. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

> *Those bare facts 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.'*

29. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

> *They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*

Conclusions

30. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

31. In reaching our conclusions, we have applied the burden of proof under the Equality Act 2010, where relevant.

Direct sex discrimination

Issue 1.1 Did the respondent do the following things

Issue 1.1.1 - Miss G Bowes creating a hostile environment between 20 January 2023 and 15 February 2023 by Miss Gail Bowes bringing previous employees in and making comments about the Claimant to them and to the Claimant's partner

32. The tribunal has found as a fact, that in relation to the one allegation of Miss Bowes bringing a previous employee into the workplace, that this did happen. Further, the tribunal has found that Miss Bowes said to Mr Sunderland, referring to the claimant: "you know she sells her body for sex"; and "she had a child but got it taken away from her". To that extent therefore, this allegation is made out.

Issue 1.1.2 - dismiss the Claimant.

33. The dismissal is admitted by the Respondent.

Issue 1.2 - was that less favourable treatment? The claimant relies on a hypothetical comparator

34. The tribunal has concluded that the relevant hypothetical comparator is a male operator who started a relationship with Mr Sunderland, after his relationship with Miss Bowes had ended. The tribunal has concluded that

such a hypothetical comparator would not have been subjected to the same treatment.

35. In arriving at that conclusion, the tribunal notes that Miss Bowes' witness statement at paragraph 4 states:

> *[Shaun Sunderland often called the claimant] a slag, a slut, tart, head case, the Filey bike – every name you could think of. He would pass comment on her going up to get the train in her own time but hanging around the office "tarted up and wearing next to nothing", which rung true as she has a very flirty personality.*

36. Miss Bowes was asked by the tribunal whether she considered this language to be sexist? She answered: *It was in her home, never at work. [She then said that] She agrees with the language being used to describe the claimant.*

37. Miss Bowes was asked if she had ever heard similar language used about men who 'sleep around' with a number of women? She replied: *'Yes'.* Miss Bowes was asked if men were called slags and sluts if they 'slept around'; she said yes, but different wording was used. Miss Bowes was however unable to give an example of such a term.

38. As noted in the fact finding section, Shaun Sunderland says that Miss Bowes said to him: *things to me about Abigail herself such as "you know she sells her body for sex" and "she had a child but got it taken away from her"*? Miss Bowes accepted she made such remarks, it was hearsay from other people in Filey.

39. The tribunal concludes from all of this that Miss Bowes held stereotypical sexist views about the claimant, including that because it appears to have been thought that the claimant was sexually active (the tribunal makes no such finding that the claimant was, just that this appeared to be the perception of some), she was 'a slag'; and in relation to the allegation that her child had been taken away (which has no basis in fact), Miss Bowes appears to have been applying a stereotype of 'the bad mother'. Whilst the tribunal understands that Miss Bowes would understandably have been upset about the ending of her relationship with Mr Sunderland, and him commencing a relationship with the claimant, it appears to be the claimant who was blamed for that, because of her alleged 'flirtatiousness', rather than Mr Sunderland being equally responsible for terminating his relationship with Miss Bowes and commencing a relationship with the claimant.

40. Bearing in mind this evidence, the tribunal concludes that the hypothetical comparator would not have been treated in the same way by Miss Bowes, nor would similar language had been used about her; and nor would they have been dismissed.

Issue 1.3 - if so, was it because of sex?

41. In relation to the first allegation, the tribunal concludes that the reason, or at least a significant reason, for the less favourable treatment was the claimant's sex. Bearing in mind the evidence referred to above, the tribunal concludes that the burden of proof has shifted and that the respondent has not discharged that burden. Miss Bowes denied part of the first allegation but we have found that it happened, to the extent set out above.

42. In relation to the dismissal, the tribunal concludes, on the basis of the evidence before the tribunal, that there were issues with the claimant's performance, and errors were being made by her. The respondent was entitled to be concerned about those errors and to discuss them with the claimant. The tribunal has concluded however that Miss Bowes was looking for an opportunity to dismiss the claimant, because of her animosity towards the claimant which itself was based on sexist, stereotypical assumptions. Miss Bowes was the primary decision-maker, and we conclude that the decision was tainted by her sexist attitudes towards the claimant. Had Miss Bowes not held those views towards the claimant, we conclude that her and Mr Hutchinson would have brought the errors to the claimant's attention, and made it clear that her performance needed to improve. The failure to do so was because of sex.

Issue 1.4 - did the treatment set out at 1.1.1 amount to a detriment.

43. The tribunal concludes that it was.

Wrongful dismissal (notice pay)

Issue 3.1 - what was the claimant's notice period?

44. It is not in dispute that the notice period was one week.

Issue 3.2 - was the claimant paid for that notice period?

45. No - the Respondent accepts that it dismissed the Claimant with immediate effect.

Issue 3.3 - was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

46. The tribunal has found that a significant factor in the decision by Miss Bowes to dismiss the claimant was sex discrimination. The tribunal has found that there were issues with the claimant's performance and concludes that the respondent was entitled to be concerned about those performance issues. There is no evidence before the tribunal that the claimant was deliberately trying to sabotage the claimant's business however, as alleged by Miss Bowes and Mr Hutchinson. The performance issues were not in the tribunal's judgement, serious enough to amount to gross misconduct. The claimant was therefore entitled to a week's notice.

Remedy issues

47. Having decided in the claimant's favour in relation to the claims before the tribunal, the tribunal went on to consider the remedy issues. A limited amount of further evidence was given, and there was a discussion about the claimant's average weekly wage.

48. The claimant alleges that her health has suffered as a result of the dismissal, but there was no expert medical evidence before the tribunal in relation to that; nor were there any GP records. The Judge explained to the claimant that she could ask for the remedy issues to be adjourned to another hearing, so that she could obtain some expert evidence; but that was likely to delay the final resolution of the claim by a number of months. The claimant was content in the circumstances to continue, and for the tribunal to make a decision on the basis of the information available.

Issue 2.1: Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend? The Claimant is seeking a recommendation that the Respondent apologises.

49. The claimant did not ask for the tribunal to make a recommendation at the hearing. The tribunal notes that the tribunal has power under s.124(3) Equality Act 2010 to '*order a respondent to take specified steps for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate'*. We note that in the issues as set out this hearing, the claimant is asking for an apology. It is not immediately clear to the tribunal, clear findings having been made in her favour in relation to the discrimination claims, that an apology would obviate or reduce the effect of the discrimination. No recommendation is therefore made.

Issue 2.2: What financial losses has the discrimination caused the claimant?

50. The tribunal concludes that had the claimant not been dismissed on 15 February, her employment would have continued for a further three weeks, to the end of her notice period. The claimant says in the claim form that the gross wage was £500, but the tribunal did not have any payslips from her. Mr Hutchinson said that the gross figure he had put into the response form of £399.52 was based on her average gross earnings. The tribunal is content to accept those figures and therefore awards 3 weeks pay x £399.52 = **£1198.56.**

Issue 2.3: Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

51. Since the claimant was only out of work three weeks, the tribunal does not consider this to be unreasonable. No reduction is therefore applicable for failure to replace lost earnings.

Issue 2.4: If not, for what period of loss should the claimant be compensated?

52. Not applicable, see above.

Issue 2.5: What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

53. There was very limited evidence in the claimant's witness statement about the effect of the discrimination on her, and a limited amount of evidence was given about it in relation to the remedy part of the hearing. The claimant told the tribunal that her confidence has been hit really badly, and she was really upset her to hear someone talking about her as Miss Bowes did. She had been in deep therapy but has had to start again. She has stopped talking to everybody and is taking Propranolol as a beta-blocker, to calm her anxiety.

54. The Presidential Guidance on the Vento bands dated 24 March 2023 states:

> *In respect of claims presented on or after 6 April 2023, the "Vento bands" shall be as follows: a lower band of £1,100 to £11,200 (less serious cases); a middle band of £11,200 to £33,700 (cases that do not merit an award in the upper band); and an upper band of £33,700 to £56,200 (the most serious cases), with the most exceptional cases capable of exceeding £56,200.*

55. On the basis of the evidence before the tribunal, our decision is that the compensation awarded should be at the lower end of the lower *Vento* band.

The tribunal concludes, on the basis of the evidence available, that the appropriate award is **£2,500**.

Issue 2.6: Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

56. As noted above, there is no expert evidence in relation to personal injury and no award is made under this head of compensation.

Issue 2.7: Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

57. The tribunal concludes that had the respondent gone through a fair and proper process in relation to the concerns that it did have about the claimant's performance, the claimant would have remained in employment during the whole of her notice period of three weeks. Therefore the claimant's compensation should not be reduced.

Issue 2.8: Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

58. Yes, the procedures applied to the dismissal.

Issue 2.9: Did the respondent or the claimant unreasonably fail to comply with it?

59. Yes, the respondent followed no process at all, the claimant was just handed a letter on 15 February 2023 and told she was dismissed. She was not told why.

Issue 2.10 If so is it just and equitable to increase any award payable to the claimant?

60. We conclude that it is.

Issue 2.11: By what proportion, up to 25%?

61. The claimant asked for an increase of 15%, and the tribunal considers that is reasonable in all the circumstances. Dismissing an employee without any formal process being followed is a serious matter.

Issue 2.12: Should interest be awarded? How much?

62. The tribunal concludes that interest should be awarded, at the rate of 8%.

63. The total compensation prior to the **Acas uplift** is £3698.56. A 15% uplift gives **£554.78**, a total of £4253.34. The first act of discrimination took place in around January 2023, the dismissal on 15 February. The tribunal concludes that **interest** should be awarded, taking a broad brush approach and keeping the calculation simple, for one year at 8%, which equals **£340.27.**

64. The total award including the Acas uplift and interest is £4593.61.

65. No additional compensation is payable for the wrongful dismissal claim.

Employment Judge James

Employment Judge James
North East Region

Dated 23 February 2024

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