



EMPLOYMENT TRIBUNALS

Claimant: Mr M Golden

Respondent: Premier Recruitment Derby Limited

Heard at: Nottingham on: 10, 11 and 12 February 2020

Before: Employment Judge Brewer
Mrs. C Hatcliff
Mr. J D Hill

Representation

Claimant: In person
Respondent: Mr. G Barnes, Operations Director

JUDGMENT

1. The claims for direct age discrimination fail and are dismissed.
2. The claim for age related harassment fails and is dismissed.
3. The claim for unpaid expenses fails and is dismissed.
4. The claim for wrongful dismissal fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 18 October 2018, following a period of early conciliation between 2 October 2018 and 18 October 2018, the claimant sought to bring claims of direct age discrimination, harassment, wrongful dismissal, and a claim for unpaid expenses.
2. The claimant initially brought an unfair dismissal claim but he lacked the necessary qualifying period and subsequently withdrew that claim.
3. The above claims were identified at an attended case management hearing which took place on 13 August 2019. The claimant and Mr Barnes both

attended that hearing. At paragraph 4 of the Case Management Order the judge stated that if either party wished to challenge the accuracy of the issues they should write to the tribunal to that effect. In the event neither party did so.

The hearing

4. At the hearing there was a bundle running to some 164 pages which had been agreed in early January. We had witness statement from the claimant and on his behalf from KW. For the respondent we had a number of witness statements. We heard oral evidence from the claimant and for the respondent from Danielle Rogers, Director, Ian Rogers, Managing Director at the material time, Garry Barnes, Operations Director, Kornelia Lewandowska, Finance Team, Sophie Sawford, Branch Manager and Carmen Tavares Sales Representative. Although KW did not attend to give evidence, we read and gave appropriate weight to her written evidence.
5. We note here that the claimant did not bring a witness statement to the tribunal, nor was there a statement from him in the bundle of witness statements which the respondent had copied (although they did include KW's statement). On questioning him about this the claimant said that he had sent his witness statement to the tribunal 'as an attachment', although he could not recall when. Both the tribunal and our clerk searched the paper and electronic files. No email with an attached witness statement from the claimant could be found. We enquired of the claimant whether he had meant the 'additional information' in the ET1. He was shown this and agreed that this was the document he was referring to as his statement. He expressly agreed that this should stand as his evidence in chief.
6. The claimant gave evidence throughout the first day. He was cross examined by Mr Barnes and was asked a number of questions by the tribunal members. The case was due to recommence at 10.00 am on day 2. In the event, at around 9.14 am on day 2 the claimant emailed the tribunal with an application to postpone the hearing. That application was made on 3 grounds. First, he said in effect that he was unhappy with how the tribunal had handled day one of the hearing and wanted a more 'professional' panel. He set out a number of concerns and comments. Second, he wanted to give the tribunal time to determine which documents should be in the bundle. Third, the claimant said he had been unwell throughout day 1 of the hearing, that he was on strong painkillers and that he was seeking an urgent doctor's appointment.
7. We considered the application. The request for a postponement on the first two grounds was refused. In short, he may have been unhappy with how day one unfolded, but he had misrepresented or mis-remembered much of what transpired, it was not for the tribunal to determine what should be in the bundle, and in any event there was an agreed bundle which the claimant had not objected to until he was being cross examined.
8. As to the medical application, we reminded the claimant of the Presidential Guidance and the need for medical evidence. We determined that the case would not go ahead on day two. We said that if the claimant provided the required evidence, we would consider his application to postpone for medical

reasons. We were clear that if he did not provide medical evidence, or if he did and the application was refused, the case would resume at the start of day three even if the claimant failed to attend. In the event no further communication was received from the claimant and he failed to attend on day three. The case proceeded in his absence. We heard from and questioned the respondent's witnesses, adjourned, considered and delivered an oral judgment but agreed, in the circumstances, to also provide full written reasons.

The issues

9. The issues in the case are as follows:
 - a. Did the respondent directly discriminate against the claimant because of his age (33 at the material time) in:
 - i. Subjecting him to sexualized and/or other comments about an alleged relationship with a 16-year-old?
 - ii. Dismissing him on 1 October 2018?
 - b. Did the respondent harass the claimant for a reason related to his age (33 at the material time)? The harassment comprised unspecified comments.
10. In relation to the wrongful dismissal claim, it was accepted prior to the hearing that the claimant had been paid in lieu of notice and that claim did not proceed.
11. In relation to the claim for expenses, there was no claim for breach of contract and expenses are expressly excluded from the definition of 'wages' for the purposes of an unlawful deduction claim. In the event, the claimant failed to provide further particulars of the alleged unpaid expenses, he brought no evidence of them to the tribunal and provided no evidence of any breach of contract in relation to them.

Law

12. The relevant law is set out in the Equality Act 2010 as follows.

5 Age

(1) In relation to the protected characteristic of age—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

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 or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

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.

Evidence

13. The claimant's evidence in chief was short. He relies on his age, 33 years, at the material times. In relation to the allegation of sexual or other comments the claimant said that, save for a specific WhatsApp message (which we return to below), "I don't have any evidence". He said that his witness, KW, would give that evidence. KW did not attend to give evidence, but we do note that in her three-page witness statement she gives no evidence about any unwanted sexual or other comments about her, the claimant or their relationship. The claimant said that on 1 October 2018 he was suspended by Danielle Rogers (DR) and that later that evening he was dismissed by Ian Rogers (IR) (we should note here that DR is the daughter of IR and Garry Barnes (GB) is DR's

partner). The claimant's case is in effect that DR believed that the claimant was in a sexual relationship with KW, then 16 years old, that DR disapproved of this, and that the respondent disapproved of this and that is why IR dismissed him. The claimant invited the tribunal to infer from the circumstances (which we set out more fully below) that the reason for the disapproval, and thus for the dismissal was the age gap between the claimant and KW and thus the dismissal, if for that reason, is implicitly related to the claimant's age. Of course, the claimant denies that there was such a sexual relationship but that is not material as he says the respondent believed there was one and acted accordingly.

14. The respondent denies that the reason for the claimant's dismissal was related to his age or indeed the age difference between him and KW. The respondent says it had a number of work-related and trust issues with the claimant which came to a head on 1 October 2018 and which caused IR to dismiss him.

Findings of fact

15. From the oral and documentary evidence we make the following findings of fact (number refer to pages in the bundle).
16. The respondent is a small recruitment business. At the material time it employed between 8 and 10 people and had an annual turnover of between £2m and £3m. The business was run by a combination of DR, IR and GB. All three were statutory directors.
17. The claimant was employed from 16 April 2018 until 1 October 2018. He was dismissed with a payment in lieu of notice.
18. The claimant was employed under a contract which contained a 3 months' probation period with the option for the respondent to extend that by a further 3 months (clause 3 of the employment contract). In July 2018 the respondent did extend the probation period by 3 months.
19. In July 2018 a review of the respondent's business was posted on Google which included accusations against the claimant and labelled his a 'pervert'.
20. On 24 July 2018 the claimant was the subject of a complaint from a candidate's mother who accused the claimant of calling the candidate a prostitute.
21. On 25 July 2018 the claimant undertook or proposed to undertake a candidate interview at a local coffee shop against the express policy of the respondent.
22. On 2 September 2018 the claimant and KW were involved in a road accident. The claimant and KW were knocked off the claimant's motorbike by a motorist. The accident occurred near to the house shared by DR and GB. GB attended the scene and decided that it would be quicker for him to take the claimant and KW to hospital than to wait for an ambulance, and he did so. Both the claimant and KW had minor injuries and having been seen in A&E, were released. However, in a newspaper report published on 3 September 2018 [19/20], the claimant said in his interview with the journalist that both he and KW were "badly injured", that the driver deliberately reversed his car into the head of KW,

that KW was left unconscious and that KW remained in hospital receiving treatment. Mr Barnes was so concerned about the inaccuracies in this account he felt he had to make a statement to the police which he did.

23. On 10 September 2018 number of social media threads regarding the claimant were brought to DR's attention. Included in these was the allegation that the claimant had groomed KW [22 – 44] and that he had fabricated a military career. DR forwarded these to the claimant for comment and he said that "it's all rubbish". During an exchange of messages DR asked the claimant how he knew KW. The claimant had told the respondent that KW was vulnerable because of her father's violence and that he, the claimant had been instructed by the police and social services to look after KW [49/50].
24. Prior to 10 September, DR had been inclined to give the claimant the benefit of the doubt. She said that he always had an explanation for what had happened. However, her faith in him was shaken by the posts on 10 September and it was decided to delve further into his past. One of the reasons IR employed the claimant, without taking up references, was that the claimant said on his CV that he had an 8-year military career in the Parachute Regiment. The respondent searched the web site referred to in the social media posts and found that the claimant had undergone some military training but did not have a military record. We note the claimant's explanation about this. He said that he enlisted as Michael Golden, but that he had changed his name to Michael Brown and his latest birth certificate had that name on it. Thus, he was required to leave the military and re-join in the name of 'Brown' hence the respondent's failed search. He did not provide any evidence of this and it does not explain a) how he was able to join the army in the first place, b) how it was discovered that he had changed his name and c) why, if what he says about his names are true, there was not simply an administrative alteration to his existing record. We did not find the claimant credible on this point and prefer the evidence of the respondent.
25. The claimant's CV also said that he had partially completed personnel training and used the letters 'MIRP CertRP' after his name. The awarding body had no record of the claimant.
26. The claimant's CV also says that the claimant was "European Jujitsu winner 2004" (sic). A search of European Jiu Jitsu winners from 2004 was made and the claimant does not appear as a medalist.
27. Finally, the claimant's CV says that he is registered with the Security Industry Association as a 'door steward'. The SIA web site was searched and there is no record of the claimant being so registered.
28. Alongside the above concerns, Ian Rogers had been having issues with the claimant's performance. The claimant failed to reach sales targets, he failed to provide the required daily sales figures which IR relied on to give him an ongoing picture of how the business was performing and he undertook work which was not cost effective. The claimant also placed staff with employers without getting the respondent's standard terms and conditions signed which led to a number of issues with clients. The provision of information was

particularly important to IR as he was living abroad and so had to rely on the information sent to him rather than being on hand to gather it himself. IR's concerns can be seen in a chain of text messages between him and the claimant [105 – 109].

29. In late September 2018 KW met the claimant at the respondent's place of business. DR had not met her, and she asked the claimant who she was. He informed her that this was KW, that she was his cousin and that he was her legal guardian.
30. On the evening of 1 October 2018, the claimant rang DR and asked her to send him the telephone number of a client. DR agreed. She rang off and went to look for the number. Before she found the number, her mobile phone rang again, and she saw that it was another call from the claimant. However, upon answering the call she realized that her number must have been called inadvertently as she could overhear a conversation. DR said that the claimant could be heard talking in a sexual way to a person he referred to as 'Katie' which she took to be KW. DR said that she was not concerned about any age gap. She was concerned that it seemed to her that the claimant was having a sexual relationship with a vulnerable child who he said was his guardian. She decided to confront the claimant about this and called him. There was a heated exchange. The claimant said that he was not KW's guardian but had applied to be so. After the call, which was inconclusive, the claimant messaged DR with a photo of the person he says he was talking to. We saw this message on the claimant's phone. The person can only be seen from the back. The claimant said that this was his girlfriend although he had earlier said he and his girlfriend had split up. He said it was his girlfriend with whom he was having the conversation and not KW. However, we note [88]. That is an email the claimant sent to DR, GB and IR on 1 October 2018 at 20:21. In this he says he was having a conversation with KW, there is no mention of his girlfriend and he says the conversation was him "winding up" KW. Given the inconsistencies in the claimant's evidence, we prefer the evidence of DR. In the event DR suspended the claimant and as we saw in the chain of messages on the claimant's mobile, DR states expressly that she was suspending him for "work-related" reasons.
31. Subsequent to suspending the claimant, DR contacted GB and IR and asked them to meet her. They did so and in the ensuing discussion IR decided that he would call the claimant, ask to meet him a few days later and discuss the ongoing issues. IR called the claimant's mobile a number of times, but the claimant cut off the calls. This led IR to send the text we see at [110]. This confirms that the claimant had been suspended, and that he was now being dismissed "with immediate effect".

Discussion and conclusions

32. The key issue in this case is what was the reason for dismissal. Before we deal with that, we turn to the first allegation of direct age discrimination – that the claimant was subjected to sexualized and/or other comments about an alleged relationship with a 16-year-old, and then to the harassment claim.

33. The claimant gave no evidence of specific comments attributed to particular persons at particular times. To say his evidence was vague is an understatement. He said that KW would give the relevant evidence, but she did not.
34. There is a two-stage test for the burden of proof in discrimination claims. First, the burden is on the claimant to establish facts from which a tribunal could conclude, on the balance of probabilities, absent any explanation from the respondent, that the alleged discrimination had occurred. If the claimant does establish these facts the burden then shifts to the employer to explain the treatment, and to try to satisfy the tribunal that the treatment was not tainted by discrimination.
35. In our judgment in relation to the first allegation of direct discrimination the claimant has not satisfied the initial burden on him and this claim falls at this first hurdle.
36. As to the harassment claim, the claimant said during his evidence that he did not intend to bring a claim that he was harassed for any reason related to his age. Indeed, he said that he felt harassed but not for any reasons related to any protected characteristic. It seems to the tribunal members that the claimant was using the term harassment in the non-technical sense (perhaps bullying might have been a better term). Again, it seems to us that in relation to the allegation of harassment related to age, the claimant has not satisfied the initial burden on him and this claim also falls at this first hurdle.
37. That leaves us with the key claim related to the dismissal. Before discussing that we wish to refer to the credibility of the witness evidence. The evidence of the respondent's witnesses was clear, internally consistent and consistent with the contemporaneous documentation. We found them to be credible witnesses and accept their evidence. In contrast the claimant frequently failed to answer the question put to him, he seemed to object to having to answer questions on occasion even though he was the person bringing the claim. He spoke over the person asking the question often starting to answer before the question was completed. The claimant also manifestly failed to accept what on occasion was plain on the face of the documents. For example, I took him through the chain of text messages between him and IR in which IR is clearly complaining about the claimant's failures – some of the placements, not providing sales figures, his availability, not reading his emails – but the claimant insisted that he had not been the subject of criticism. We found him not to be a credible witness and in resolving evidential conflicts we have preferred the evidence of the respondent's witnesses.
38. As we have set out above, the nub of the claimant's case is as follows: that DR wrongly assumed that the claimant was in a sexual relationship with KW; that she disapproved of that because of the age gap between them, that she spoke to IR who equally disapproved and that for this reason IR dismissed the claimant. The claimant says that this is age discrimination on the basis that had he not been 33, or perhaps had he been much closer to KW's age, the respondent would not have formed this adverse view of the claimant and he would not have been dismissed.

39. Given the evidence we have set out above, it seems clear to us that DR's concern was not the ages of the claimant and KW. Her concern was that there was a sexual relationship between a vulnerable 16-year-old and her guardian, or at least a person who claimed to be in a position of trust. She was so concerned about this that she informed both the police and the social services. This gave rise to concerns about the claimant which had hitherto not crystalized for DR. Her suspension of the claimant is expressly for work-related issues, there is no mention of the relationship or age and we see no reason to infer it from the circumstances. For his part, IR was very clear, and the contemporaneous document entirely support his evidence. He had work-related concerns about the claimant which led initially to the extension of the probation and then to a series of text messages articulating a number of concerns. IR was not aware of the KW issue. When he, DR and GB met on the evening of 1 October 2018, IR's attitude was one of exasperation. He felt that the claimant had already taken up too much time. He resolved to meet him with a view to ending the relationship. The claimant's refusal to take R's call caused IR to send the message terminating the employment on the evening of 1 October 2018.
40. We find that in relation to the allegation of direct discrimination arising from the dismissal, the claimant has not satisfied the initial burden on him and this claim falls at this first hurdle. However, even if we are wrong about that and the burden has shifted, we entirely accept the respondent's case that the claimant was dismissed for work-related reasons, not his relationship with KW and nor was the dismissal because of age, whether KW's or the claimant's.
41. For the above reasons the claims of direct age discrimination fail.
42. We have dealt above with the expenses claim.
43. The tribunal would add one point which may assist the respondent going forward. We noted the lack of documentation in two respects which may have assisted in this case. First there was nothing clear as to why the probation was extended and it would have been preferable, not least for the claimant, to have had that. Second, although we have the dismissing text message, it would also seem to us to be good practice to have set this out more formally in a letter or email to the claimant.

Employment Judge Brewer

Date 13 February 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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