



EMPLOYMENT TRIBUNALS

Claimant: Ms. D. James

Respondent: London Borough of Islington

London Central in public by CV

8, 9 February 2023

Employment Judge Goodman

Ms S. Brazier

Mr P . Madelin

Representation:

Claimant: in person

Respondent: John Small, counsel

JUDGMENT

1. The age discrimination claim is dismissed.
2. The race discrimination claim is dismissed.

REASONS

1. The claimant is a local government officer, aged 63 at the relevant time. She has brought claims that her employer discriminated against her on grounds of age and on grounds of sex in the handling of a grievance she had lodged in December 2022 about the conduct towards her of a male colleague. His name is anonymised in the written reasons as P. This is because he has not been a party to or witness in these proceedings and his mental health is discussed in them. That discussion took place in the context of a confidential grievance process. Anonymisation is a reasonable balance between his Convention right to privacy and the requirement of open justice. The parties to these proceedings know who he is.

Issues for this Tribunal

2. At a case management hearing in October 2023 the issues were clarified and listed as

(1) The claimant's age group is over 60 and she compares herself with people in the age group -under 60.

(2) Did the respondent do the following things:

2.1 On 4 April 2023, made the decision by grievance investigator (Sam Walker) not to investigate the allegations made against the Claimant by P in the course of the Claimant's grievance process against P;

2.2 On 4 April 2023, made the decision by grievance investigator (Sam Walker) to recommend mediation between Claimant and P to assist them to work together;

2.3 On 22 June 2023, made the decision by appeal officer (Nathaniel Baker) not to investigate the allegations made against the Claimant by P in the course of the Claimant's grievance process against P;

2.4 On 22 June 2023, made the decision by appeal officer (Nathaniel Baker) to recommend the agreement of a Working Protocol to assist them to work together.

(3) Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. 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 has not named anyone in particular who she says was treated better than she was.

(4) If so, was it because of age?

(5) If so, was it because of sex?

3. Asked about remedy, the claimant clarified that she did not seek financial award of compensation, but a recommendation. In this hearing she has clarified that as being that she must be consulted before anyone accesses the respondent's archived file on her grievance proceedings.

Evidence

4. The tribunal heard evidence from

Diana James, claimant

Samuel Walker, senior facilities manager, who investigated the grievance.

Nathaniel Baker, head of development management, he managed the claimants appeal against Samuel Walker's decision.

5. There was file of documents of 273 p.ages. We read those to which we were directed.

Findings of fact

6. This is a case where almost all the relevant facts are to be found in the documents bundle which contains not only relevant emails, the grievance, the appeal, and the decisions there on, but also transcripts of the investigation meetings.
7. The claimant has worked for the respondent since September 2004 as a School Liaison Officer. Half of her working week is allocated as facility time for her trade union duties as Assistant Secretary of the Unison branch of the council. For the council she works Monday Tuesday and Wednesday morning. On Tuesdays she works in the office, the rest from home, and from time to time she will attend a meeting at a school.
8. She works in the Respondents “World of Work” project, which aims to provide children in the borough with 100 hours of work experience by the time they are 16. The manager of this project is P, whose substantive grade is the same as the claimant. Both reported to Darshna Dhokia, although at the relevant time she was on maternity leave, and her manager, Siobhan Scantlebury, line managed the claimant, while P acted up in Darshna Dhokia’s grade, and managed others, but he did not line manage the claimant, and they did not share an office.
9. The claimant’s relations with P were not easy. In 2020 or 2021 she had lodged a grievance about his behaviour, but she withdrew it before it was investigated. In August 2020 and September 2021 meetings were scheduled for mediation between the two, at least one of which was at his request, but she withdrew from each. She gave evidence that over the 18 months before she launched her grievance in December 2022 she had had conversations with Siobhan Scantlebury about P and how difficult she found him.
10. The claimant’s grievance arose from a catch-u meeting at which she, P and Siobhan Scantlebury were present. The claimant had not attended a school meeting which had asked her to attend. She explained she did not know about it. said: “that’s not true, you did”, according to the claimant. P’s position was that he had told her about it in a Teams meeting, he had recorded the details in the chat function on Teams, and he had also sent her a Microsoft Outlook calendar invitation for it. The claimant replied that she had difficulty with Teams, and wanted information to come by e-mail. P said, according to the claimant, contemptuously, that he was not going to send her an e-mail. The claimant says he also accused her of negatively affecting her colleague Rochelle (the project officer) at the weekly meeting on 18th October. There had been numerous microaggressions. After the meeting the claimant explained to Siobhan Scantlebury how difficult she found this. Miss Scantlebury said that she would talk to P about sending her information by e-mail. In her grievance she said this was the last straw and that she had had 18 months of distress, She referred two incidents, on the 10th October when resented the fact that she was not going to come to an away day he had arranged in Essex, and an 11th October meeting when she had transferred a meeting to another school because they were short of volunteers from employers and P had said that was because she was not promoting the project. In the grievance she complained that when she asked him to send her a briefing about the project he said: “surprised after 3 1/2 years you

don't know where to find the link"; she commented she sometimes found it difficult to find information on the system. It was age discrimination that he was so dismissive. She should not be expected to work with a colleague who made accusations at her, and she wanted the project reconfigured so that to be belittled by him.

11. Sam Walker was asked on 11th January to investigate the grievance. He met the claimant with her trade union representative on 22nd February 2023. He met P on the 21st March 2023, and Siobhan Scantlebury on the 22nd 2023. He was asked by the claimant not to investigate with Maura and Rochelle.

12. Both the claimant and P sent emails to Sam Walker after their meetings and included among these an extensively annotated version of the claimants grievance setting out his view of their relationship.

13. At her meeting with Sam Walker the claimant said of his behaviour: "I do wonder if it is an age-related thing. I can only talk about my experience with P and what I call his outbursts. I feel undermined by him and from what I see he doesn't have that kind of interactions with other people". Her trade union representative contributed: "women of our age, younger men either treat us like they treat their mums, or they treat us with contempt and are dismissive". Ask what the relationship was like before, she said that if he had any issues with her he had never spoken to her about them, and she didn't know what they would be anyway.

14. P, at his meeting with Sam Walker described his relationship with the claimant as "challenging". He had been working with two different line managers to try and fix it. The breakdown went back to 2020 or even 2019. She was hostile, not receptive to any ideas or plans. He said the meeting on the 1st November was where he hoped to clear the air after a "particularly challenging catch up meeting", which is why he was happy to have Siobhan Scantlebury there. In the past, when he had asked for help with the relationship with the claimant he had been told to try going through the project officer (Moura, then Rochelle), as the claimant would take a request better from them than him. He said the line manager Dharshna Dhokia said to him of the claimant that he would not get anywhere as she did not have empathy, "she will not change her behaviour, so ignore it, compartmentalise it and don't worry about the emails from her". He said how in the last one to two years he had started having counselling because of his anxiety about "aggression from Diana". Some of his frustration was that she could or would not use the database to show what activities were taking place. He denied her age had anything to do with it. As for the remark about not sending her emails, he said that he had already told her about the meeting in three different ways and "what I said was I feel I shouldn't have to follow up a fourth time, giving the information to the fourth time to get this in her diary". It was difficult that he was not her line manager, so he did not have a mechanism to deal with the communications issues. It was "incredibly frustrating, championing her and then having things like this grievance or the passive aggressive emails... the accusations are frankly disgusting levelled at me over this. It has been a nightmare and a real drain on my mental health but I do not see an end in

sight". The meeting concluded with a discussion whether the Employee Assistance programme had been helpful with getting counselling.

15. In the annotations on the grievance that he sent on after the meeting he made detailed comments on articular allegations. Of the discrimination allegation he said: "this feels like a spurious malicious complaint designed to get me in trouble". It was true that Rochelle had asked to meet him after a "tough" team meeting over why the claimant would not participate with the briefing (intended to draw information together for schools to read instead of numerous different emails about events). On undermining her with microaggressions, he commented: "Diana does not like me and for years has refused to engage with me or the changes I make to the programme as a project manager. any request from me, suggestions or feedback she does not like results in angry pushback, multiple passive aggressive emails or talking over me followed by withdrawing from engaging with me altogether".

16. Siobhan Scantlebury explained the history of aborted mediations. Of the incident on 1st November she had spoken to P after the meeting to say that if the claimant wanted information to be given by e-mail he should respect that.

17. Mr. Walker produced his investigation report on the 4th of Aril 2023. It was extensive, and included as appendices the underlying documents and interview notes. He sent it to the claimant and her representative. The claimant had some technical difficulty opening it, and then could not see the appendices. She now agrees they were there and could be accessed. However, at the time she had not noted this and she asked for the underlying documents.

18. Mr. Walker found that P had not said on 1st November that the claimant was lying. He had said he would not send her an e-mail, which was a micro aggression, but he had apologised when Siobhan Scantlebury spoke to him about that. He noted that both felt undervalued by the other. The claimant was genuinely upset but, after hearing Ms Scantlebury's account of the meeting, he did not believe P had breached council guidelines on respect for colleagues. He did think he had acted negatively about her not promoting the project, but he had tried to resolve tension by raising concerns with management. On the allegation of discrimination, he had not had any real example of where P had discriminated against the claimant on the basis of age. The claimant was uncomfortable using new technology, particularly MS Teams, which might have made her think this. had however demonstrated that he was willing to train her on it. He concluded that there had been a breakdown of the working relationship which had come to a head on the 1st of November. He proposed that the respondent organise an external mediator to conduct workshops to help them work through their differences. The respondent should also consider training for them on equality diversity and inclusion, and crucial conversations workshops.

19. The claimant appealed against Mr Walker's decision on the 6th Aril 2023. She said there was new evidence, in the form of the annotations P had made on her grievance, adding: "had I not requested the interview notes I would not have known", and she was being expected to enter mediation when she had not seen them and not knowing that he had spoken about her to manage his behind her

back. Mediation would be “unsafe”: she would not know what he was going to say about her.

20. In a further e-mail on the 13th May she said that denial of her “right to respond” to what said about her was “gender-based unconscious bias”.

21. Nathaniel Baker was asked to decide the appeal. He met the claimant and Sam Walker on the 13th May 2023. She said that the comment P had reported that “actually she won't change” was ageism, as it suggested that you cannot teach an old dog new tricks. She went on that she had fallen off the radar with IT training, agreed that she would run for the hills if asked to chair an MS Teams meeting, and also that she had not always sent spreadsheets updating progress. She did not feel that mediation was the way forward, but she would work alongside him professionally. Sam Walker explained that he had not investigated 's annotations as if they were a “counter-grievance”. He had to investigate what she said about P, not what P said about her. In his finding, both parties had been upset, and it needed mediation. He was not clear what else he could do.

22. Mr. Baker produced a document setting out his outcome on the appeal on 22nd June 2023. On the claimant wanting her “right of rely”, the council's grievance policy said that the object of the grievance was allowed to see the grievance and rely to it, and is followed the ACAS Code on grievance, and neither specified that the reply should be investigated, but in his view it would have been “prudent and good practice” to show her the annotated document. That might have avoided the appeal, and might have better informed the recommendation for resolution. As for what should happen, he concluded that mediation would not work, because both sides have to volunteer to enter into mediation. Instead, he proposed that management draft a Working Protocol on which the claimant and P would be consulted, to enable them to work better together. On the suggestion of age discrimination, age played no part in what had happened.

23. On 23rd June, the claimant commented to Mr. Baker that recommending a working protocol was an attempt to “implement mediation in the guise of recommendation” and suppressing her right not to go to a mediation. Signing up to an agreement with P would imply that she had done something wrong and that his claims against her were valid.

24. On 30th June she approached ACAS for early conciliation. On the 10th July 2023 Siobhan Scantlebury invited her to a meeting to discuss a draft Working Protocol, but she did not attend.

25. Meanwhile the Human Resources department treated the claimant's letter of 23rd June about the appeal outcome as a grievance, and Donna Labor responded to it that no findings would be made about what said because he had not launched a grievance. She reassured the claimant that the grievance documents were kept on separate case files, to which only HR had access, not on her personnel file. She urged her to work with management to draw up a Working Practice protocol. They did not want to impose an approach that she had not fed into, saying: “I appreciate that colleagues do not have to like each

other, however in this case, you and work on the same project and so you do need to, for example, attend the same meetings”.

26. On 14th August the claimant resented this claim to the employment tribunal that there had been age and sex discrimination in the handling of her grievance.

Relevant law

27. The Equality Act 2010 states at section 13:

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.

This wording envisages an actual comparator in the same circumstances, and if none, a hypothetical comparator.

28. By section 23 the circumstances of a comparator must be the same as those of the claimant, or not materially different.

29. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

“(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.”

30. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is “in no sense whatsoever” because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

31. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: “the totality of those facts (including the respondent’s explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were” because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not “a mere intuitive hunch”. **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal

can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not “without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent” committed an act of unlawful discrimination”. There must be “something more”.

Discussion and Conclusion

32. The tribunal explored with the claimant in closing submission the reasons for her belief that the actions of Mr Walker and Mr. Baker were discriminatory, meaning that they would not have made the same findings or recommendations had she been, say, a middle-aged man. The claimant found this difficult to explain.

33. Turning to each issue, we discussed what facts the claimant had proved in respect of each of the three remaining instances of less favourable treatment.

34. The first issue, as modified, is that Sam Walker should have gone back to her so she could respond to P's comments before concluding his report on the grievance. Sam Walker explained his reason for doing this was because he was not required to investigate anything other than the incidents complained of by the claimant. Mr. Baker thought it would be good practice, and helpful, to allow the claimant to see what he said. When the tribunal probed the reasons for the claimant's underlying belief that unconscious bias for age or sex was the reason why Mr Baker did *not* go back to her, the claimant could only say: “it's what I feel”.

35. Following discussion, the panel tends to agree that it would have been helpful to allow her to see what P said. We did not however agree with the claimant that declining to investigate what he said gave credence to his assertions about her behaviour – as she put it, that this gave them status. However, other than the difference in sex between the claimant and Sam Walker and the claimant being older than Sam Walker, we could find nothing to show that he would have treated a man, or younger man, or a younger woman any differently on the same facts. His reason for not going back to the claimant may have been a shortcut to save stirring up further trouble, but we could not see it had anything to do with age or sex. He would have done the same regardless of the age or sex of the complainant.

36. On the recommendation, it was not necessary for Sam Walker to accept the truth of what P said about the claimant's conduct. It was enough to apprehend that P's perception was that the claimant was a difficult person to work with. Given the claimant found P difficult, and he found her difficult, then regardless of the truth of their perceptions of each other, mediation was an entirely reasonable and indeed normal management solution to difficulties of this

kind. Mr Walker pointed out that it is suggested in the ACAS Guidance on Grievances. Nor was it, in our finding, requiring her to be “unsafe”. She was not required to undergo mediation. It would not involve accepting that his accusations were true, and the mediation may have enabled them to discuss their differences of perception. It would only happen if both sides volunteered. Others would be in the room to support the claimant. No facts are proved from which we could conclude that the claimant’s age or sex played any part in the reason for this recommendation. The claimant, asked about the mediation and working protocol recommendations agreed that *perhaps* the same recommendations would have been made if she had been a middle-aged man.

37. The claimant has abandoned the allegation that failure on Mr Baker’s part to investigate P’s comments was discriminatory. What remains is Mr Baker’s recommendation that they agree a Working Protocol. The tribunal view is that this is a reasonable next best step to mediation where colleagues whatever reason find it difficult to work with each other. Nor was it being imposed, although they tried to get her to discuss it. There is nothing from which we can conclude that a younger person or a man would have been treated differently in the circumstances of a difficult working relationship between colleagues where mediation was not accepted by one of them.

38. Some of the evidence suggested the claimant believed that P had discriminated against her because of age or sex, but this was never alleged in this claim. The claim form does suggest their manager discriminated when she suggested to P that the claimant would never change, but this is stated in the context of Mr Walker not putting these remarks to her and not (at that stage) investigating this. The explicit allegations in the claim form were against Sam Walker and Nathaniel Baker.

39. The claimant has said in the evidence that Mr Baker and Mr Walker discriminated because she was an older woman and they were white males. She confirmed there was no race discrimination claim (she too is white) so it may be simply that “white male” has become code for an unlawful discriminator.

39. We could also see that she had not grasped that making a finding that someone has discriminated does not just mean accepting the feelings of the object of the treatment (however genuine they may be, and regardless of whether from time to time she may have been slighted because she is an older woman), but some objective evidence from which the tribunal could infer that discrimination could have occurred. She could not understand that the tribunal had to consider what her age or sex had to do with their treatment of her, as compared with how someone else would have been treated. At times it seemed that she saw the tribunal proceedings as a further level of appeal against her grievance about P’s conduct. It may have been unfair not to show her P’s views before writing the grievance report and recommending mediation, but not all unfairness is because of a protected characteristic and so entitled to the protection of law.

40. In conclusion the discrimination claims because of age and sex do not succeed.

Employment Judge Goodman
Date: 9 February 2024

JUDGMENT SENT TO THE ARTIES ON

20 February 2024

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FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless a written request is resented by either party within 14 days of the sending of this written record of the decision.

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