



EMPLOYMENT TRIBUNALS

Claimant: Ms Debbie Mace

Respondent: ASDA Stores Ltd

Record of an Open Preliminary Hearing by CVP at the Employment Tribunal

Heard at: Nottingham

Heard on: 21 November 2024

Before: Employment Judge Hutchinson (sitting alone)

Appearances:

Claimant: In person

Respondents: Mr F Mortin, Counsel

JUDGMENT

The Employment Judge gave Judgment as follows:

1. The claims of sex discrimination are struck out as having no reasonable prospect of success.
2. The hearing of the claim listed on 8,9, and 10 December 2025 is hereby cancelled.

REASONS

Background to this Hearing

1. The Claimant presented her claim to the Tribunal on 12 November 2023. She is still employed by the Respondent as a Section Leader and has been since 1 June 2007.
2. Her claims are of sexual discrimination relating to her being on sick leave, her referral by her Manager to Occupational Health and her subsequent grievance hearing.
3. Her case was listed for hearing on 8 – 10 December 2025.
4. At a Preliminary Hearing on 15 February 2024 my colleague Employment Judge Brewer identified 4 claims of direct sex discrimination. They were:
 - 4.1. An Occupational Health referral in March 2023 (which the Claimant only saw in October 2023). The Claimant's Manager, Jenny Bowen (mistakenly referred to as Bower) stated that the Claimant "has a large family with 10 children".
 - 4.2. As part of the Claimant's grievance, during the investigation, Jenny Bowen lied to the Grievance Officer stating that she did not write the above comment.
 - 4.3. The Grievance Officer accepted the word of Jenny Bowen and failed to access the referral himself thus failing to properly investigate the Claimant's grievance.
 - 4.4. The rejection of the grievance about the Occupational Health referral in October 2023.
5. As Employment Judge Brewer said the full Tribunal would have to determine:
 - 5.1. That those incidents occurred.
 - 5.2. That it amounted to less favourable treatment, i.e. that she was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimants.

If there was nobody in the same circumstances as the Claimant, the Tribunal would have to decide whether she was treated worse than someone else would have been treated.

The Claimant has never named anyone who she says was treated better than she was.
 - 5.3 If she suffered the less favourable treatment, was it because of her sex?
 - 5.4 Did the Respondents treatment amount to a detriment?
6. After the hearing on 4 April 2024 the Respondents provided their amended grounds of resistance and sought to pursue an application for strike out or a deposit order. They said that the claims had no reasonable prospect of success. In particular:

"There is no evidence to support the Claimant's allegations of discrimination. At the Preliminary Hearing on 15 February 2024 Employment Judge Brewer asked the Claimant, why she alleged that the allegation at paragraph 6a of the amended grounds of resistance

was direct sex discrimination? The Claimant said that Miss Bowen would not have made this comment about a man. When asked why by Employment Judge Brewer the Claimant said that women had more responsibility for childcare than men. Employment Judge Brewer pointed out that this is not the case anymore according to statistics. The Claimant has not been able to articulate that her sex was a factor in relation to the allegations there is therefore no basis for a direct sex discrimination claim”.

7. There was unfortunately a delay in dealing with the application but eventually it was listed for a hearing today.

The Hearing Today

8. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle. I also had the benefit of submissions in writing from Mr Mortin and I heard oral submissions both from Mr Mortin and Ms Mace.

The Allegations

- 1. The allegation that in the Occupational Health referral Miss Bowen stated that the Claimant “has a large family with 10 children”.**

I note that in their amended response the Respondents admit that this was contained in the Occupational Health referral.

I was referred to the Health and Welfare meeting that took place on 20 February 2023 (pages 96-101). Miss Bowen met with the Claimant to discuss her absence. It is noted that her status as a mother was not discussed, and it was not identified as one of the reasons for the referral.

The Occupational Health referral (page 102-103) states that the reason for the referral was so that:

“We can better understand how this condition is affecting Debbie on a day-to-day basis, timescales for when a return to work may be anticipated and what support and adjustments Debbie may need to facilitate her return”.

The comment about the Claimant’s children is made in the next paragraph which gives some background information. It explains that the Claimant had been off for over a year and the request is relating to how the condition impacts Debbie on day-to-day basis. It referred to the previous OH report and the Claimant was receiving specialist support and that Debbie had been suffering from pain and fatigue. It is only then that the comment is made about her having a large family with 10 children living at home.

The referral mainly concentrates on the Claimant’s medical history and potential adjustments that could be made to facilitate a return to work.

All this is reflected in the Occupational Health Report itself dated 28 March 2023 which is at pages 104-105. That makes no reference to the Claimant’s family at all only her medical condition and advice relating to it.

2. The allegation that Miss Bowen lied during the grievance investigation.

This is denied by the Respondents.

In the Claimant's grievance dated 25 June 2023 (page 106-107) she said that the Occupational Health Clinician had asked her about her home life. She claims that some of the questions asked by the Occupational Health Clinician on behalf of the Store Manager were disrespectful and caused anguish. She said that they knew about her illnesses caused by a complicated pregnancy and the loss of her daughter. It appears at best that the Claimant misunderstood what was being put in the Occupational Health referral and did not appreciate that no specific question had been put to the OH in respect of her family life.

In the grievance investigation meeting that took place on 28 July 2023 the Claimant told Mr Higton:

"I think it was Alison that asked me how many children I had".

Mr Higton at that point stopped the meeting and confirmed:

"There is nothing in the notes that mention anything about the amount of children, there is nothing in the Occupational Health Report".

In his outcome Mr Higton said in his letter dated 8 October 2023 at page 121:

"I believe that the meeting conducted was to understand your illness and what help you would require, as part of this you were referred to Occupational Health (OH10) which was the first request in a long period of time. I cannot see anything when reading the wellbeing meeting notes that alludes this meeting not being carried out as a health and wellbeing meeting. I do not believe at this time you had more questions to ask and as such a grievance meeting was possibility the right meeting to conduct to capture your concerns and follow up with outcome at this time" and

"I have looked back through the notes of the wellbeing meeting conducted on 20/02/23 and cannot see any content that would relate to your complicated pregnancy or the number of children you have. I have also reviewed the question that was requested to me asked as part of the Occupational Health referral and again there are no questions present that relates to these topics. I have spoken to Jennie that created the Occupational Health referral and she has stated to me that this was not mentioned as part of the referral. Therefore, I cannot ascertain with confidence why these questions were asked and I cannot find any evidence that these questions were requested to be asked".

In this case Ms Mace's allegation is that Miss Bowen lied in that she did not include the statement on the referral. This is not contained anywhere within the findings of the grievance outcome.

When Miss Bowen was questioned about this, she said that she did not lie. She confirmed that no questions were asked specifically about the complicated pregnancy or the number of children the Claimant had.

3. The allegation that the Grievance Officer failed to access the referral himself and did not investigate the matter properly.

The Respondent does not accept this allegation.

It can be seen in this case that the Claimant's grievance letter dated 25 June 2023 at page 106-107 was discussed in detail with the Claimant on 28 July 2023 at pages 108-118. The meeting lasted more than 1½ hours and the minutes are not in dispute.

Similarly, there was a lengthy meeting with Miss Bowen on 23 January 2024 (pages 136-139) and a grievance appeal meeting that took place on the same date at page 126-135.

Mr Higton took the trouble to go through with the Claimant each of her allegations and he did consider the issue about the Claimant being asked about her children.

In his findings Mr Higton referred to the referral and that he had investigated the same. He said that he had reviewed questions that were asked as part of the Occupational Health referral and that the issue of the Claimant's children was not part of the Occupational Health referral.

I note that in his outcome letter he did uphold several of the Claimant's complaints and although he failed to access the specific referral, he considered all the matters that were in the referral in his grievance meeting.

4. The Rejection of the Grievance in October 2023.

This allegation is limited to the rejection of the grievance in respect of the Occupational Health referral.

It is the Claimant's claim that this in some way amounts to sex discrimination although I have received no adequate explanation as to how the finding by Mr Higton could amount itself to less favourable treatment on the grounds of her sex.

The Relevant Law

9. A claim of direct sex discrimination is made under section 13 Equality Act 2010. That provides:

"(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."

10. The burden of proof in a discrimination case is dealt with at section 136 EqA which 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."

11. Mr Mortin has referred me to a number of cases and in particular:

- ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL11***
- ***Adebayo v Dresdner Kleinwort Wasserstein Ltd [2005] IRLR 514***
- ***Chief Constable of West Yorkshire v Vento [2001] IRLR 124***
- ***Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288***
- ***Schmidt v Austicks Bookshops Limited [1977] IRLR 360***
- ***Igen v Wong [2005] IRLR 258***
- ***Hewage v Grampian Health Board [2012] UKSC 37***
- ***Efobi v Royal Mail Group Limited [2021] UKSC 33***

12. The cases establish that it is for the Claimant to prove on the balance of probability facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant. If the Claimant does not prove such facts she will fail.

13. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. The outcome at this stage of the analysis by the Employment Tribunal would usually depend on what inferences it is proper to draw from the primary facts found by the Employment Tribunal. The Employment Tribunal does not yet have to reach a definite determination that such facts would lead it to the conclusion there was an act of unlawful discrimination, the Employment Tribunal is looking at the primary facts to see what secondary facts could be drawn from them.

14. In considering the inferences or conclusions can be drawn from the primary facts the Employment Tribunal must assume that there is no adequate explanation for those facts.

15. If the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated her less favourably on the grounds of protected characteristic, she advances a reason for the treatment then the burden of proof moves to the Respondent, and it is then for the Respondent to prove that it did not commit or is not to be treated as having committed that act.

16. To discharge that burden, it is necessary for the Respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic in question.

17. This requires the Employment Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn but further that it is adequate to discharge the burden of proof on the

balance of probabilities that the protected characteristic was not a ground for the treatment in question. The explanation for the less favourable treatment does not have to be a reasonable one it maybe the Respondent has treated the Claimant unreasonably.

18. As Mr Mortin says for a claim to be made of direct discrimination the Claimant must have been subject to a detriment capable of being objectively regarded as such. It is to be considered from the point of whether a reasonable employee would in all the circumstances consider the act to be to their detriment.
19. There is then a requirement to show the Claimant was treated less favourably than an actual or hypothetical comparator.
20. If the Claimant establishes that she has suffered less favourable treatment than others we must go on to consider whether it was because of her sex that she received the treatment she complains of.

Strike Out

21. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides:

“At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds;

(a) That it is scandalous or vexatious or has no reasonable prospect of success...”

22. In a strike out application I must:

1. Decide whether the specific ground for striking out has been established.
2. Whether I should exercise my discretion and strike out the claim.

23. Mr Mortin referred me to a number of cases:

- ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126***
- ***Anyanwu & another v Southbank Student Union & another [2001] ICR 391***
- ***Ahir v British Airways Plc [2017] EWCA Civ 1392***
- ***Mechkarov v City Bank NA [2016] ICR 1121***
- ***Cox v Adecco Group UK and Ireland & others [2021] ICR 1307***

My Conclusion

24. I am satisfied that none of these claims of sex discrimination have any reasonable prospects of success. Bearing in mind that the Claimant has the burden of establishing primary facts from which a Tribunal could determine that she had been subjected to a detriment and that that detriment amounted to less favourable treatment than an actual or hypothetical comparator and that the reason for the

treatment was the Claimant's sex. In particular:

- 24.1. The allegation that the reference in the occupational health referral to the Claimant's large family with 10 children I am satisfied will not amount to detrimental treatment. The health and wellbeing meeting shows that Miss Bowen was concerned about the reasons for the Claimant's absence and that her status as a mother was not discussed at that meeting.

I am satisfied that the reason for the referral is clearly stated as wanting to know how her condition was affecting the Claimant on a day-to-day basis and in particular needed information about when the Claimant was likely to be able to return to work and what support and adjustments would be needed. I am satisfied that the comment about the Claimant's family and children could not amount to detrimental action let alone less favourable treatment. There is nothing to suggest in the circumstances that a man in similar circumstances would have been treated differently and there is no reason why a Tribunal could find that the reason for her treatment related to her sex.

- 24.2 In respect of the allegation that Miss Bowen lied during the grievance investigation I am satisfied that the allegation has no reasonable prospect of success. I am satisfied that there is a clear distinction between the allegation made in the Claimant's grievance as opposed to an allegation that Miss Bowen stated that the Claimant had a large family with 10 children in the referral. There was no reference in the meeting to her family and children at any stage and I am satisfied that the Claimant is unlikely to establish that the claim that Miss Bowen lied about what she said during the grievance investigation.

I am satisfied that although the issue of an individual lying to secure a positive outcome for themselves as opposed to an individual bringing a complaint may normally be considered to amount to adverse treatment that it is not so in this case. It is clear to me that this matter was only raised in the grievance appeal meeting and the allegation has no reasonable prospect of success.

I agree with Mr Motrin that even if the Claimant succeeded in establishing that Miss Bowen lied, I am not satisfied that she could establish that it amounted to less favourable treatment on the grounds of her sex.

- 24.3 In respect of the allegation that the Grievance Officer failed to access the referral himself and did not investigate the case properly I am satisfied having seen the documentation and heard representations from both parties that the Claimant has no reasonable prospect of establishing this fact. It can be seen from the documents provided, that there was a very extensive investigation meeting between Mr Higton and the Claimant and that in his response to the grievance he dealt with each of the allegations that the Claimant made. Whilst he did not access the referral itself, he didn't need to, and it did not amount to less favourable treatment on the grounds of the Claimant's sex. In this case there is no connection between any treatment and the Claimant's sex.

- 24.4 In respect of the rejection of the grievance in October 2023. The reason for the rejection was that Mr Higton was satisfied that there was no evidence to substantiate the allegations made against Miss Bowen. He was perfectly

entitled in the circumstances to come to that decision. His decision could not amount to less favourable treatment on the grounds of the Claimant's sex.

25. Having satisfied myself that all the claims have no reasonable prospects of success I then must decide whether to exercise my discretion and strike out the claims.
26. I am satisfied that it is appropriate for me to exercise that discretion.
27. A claim such as this which has no reasonable prospects of success would involve the Respondent in expending considerable costs both legally and in management time and attending a 3-day Tribunal hearing which has no merit.
28. It would also involve the Employment Tribunal itself in spending 3 days on a claim that does not have any merit, not to mention the Claimant wasting her time pursuing a claim which is hopeless. In all the circumstances I am satisfied that I should strike out the claims.

Employment Judge Hutchinson

Date: 6 February 2025

JUDGMENT SENT TO THE PARTIES ON

.....07 February 2025.....

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