



Case Number: 2302333/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs C Garrod

and

Respondents
Dr S Grover
The Partners of Summerhill
Surgery

PRELIMINARY HEARING

Preliminary Hearing (Case Management)
held at Croydon on 7 February 2017

Representation

Claimant:
Respondents:

Mr Coulter, Counsel
Mrs Asharu, Counsel

Employment Judge Harrington

JUDGMENT

1. The claim of harassment on the ground of sex arising from conduct alleged to have happened in 2015, was presented outside the primary limitation period and it is not just and equitable to extend time.
2. The claim of harassment on the ground of sex arising from conduct alleged to have happened in a meeting on 21 June 2016, brought against Dr Grover, was presented outside the primary limitation period and it is not just and equitable to extend time.
3. The claims which presently continue to hearing are the claim of unfair constructive dismissal and the claim of harassment on the ground of sex arising from conduct alleged to have happened in a meeting on 21 June 2016; both claims proceeding against The Partners of Summerhill Surgery only.

REASONS

- 1 The Claimant, Mrs Garrod, brings claims of unfair constructive dismissal and harassment on the ground of sex arising from her employment with the

Second Respondent as a head receptionist from January 2014 until her resignation by a letter from her Solicitor dated 20 July 2016.

- 2 At the start of this hearing, the issues to be determined were defined with the assistance of the parties. Those issues are as follows:
 - 2.1 Whether the Claimant's claim of harassment was presented in time?
 - 2.2 If it is out of time, whether it is just and equitable to extend time?
 - 2.3 Should the claim of sexual harassment be struck out because it has no reasonable prospects of success?
 - 2.4 Should a deposit order be made because the Claimant's claims have little reasonable prospects of success?
- 3 I have heard evidence from three witnesses: the Claimant, Mrs Nicole Nitschke and Mrs Lisa Hardaker; each of the witnesses provided a written witness statement. I have also been referred to a bundle paginated 1 – 104 and transcripts of grievance investigation meetings held with the Claimant and Mrs Nitschke. The Claimant is represented by Mr Coulter, of Counsel and the Respondents by Mrs Asharu, of Counsel. I am grateful to them both for their assistance during this hearing. Both Counsel made submissions following the witness evidence. Mr Coulter produced an excerpt from Harvey on Industrial Relations and Employment Law on the 'Just and equitable extension of time'. During the course of her submissions, Mrs Asharu also referred me to the cases of Grant v HM Land Registry and the Equality and Human Rights Commission [2011] IRLR 748 and Tullett Prebon PLC and others v BGC Brokers LP and others [2011] IRLR 420.
- 4 In considering the matters before me today, I have taken into account the entirety of the evidence and submissions I have heard. I have also read both case reports.

The Complaint of Sexual Harassment

- 5 The Claimant complains of receiving pictures from Dr Grover during the course of 2015. In broad terms these pictures were of male body builders and were with reference to a particular patient of the Practice who had produced a photograph of himself in a body builder pose. The Claimant describes how these pictures were put amongst the prescriptions signed by Dr Grover and given to her. The last occasion upon which the Claimant received such pictures was in December 2015. She cannot identify which date in December but she says it was before Christmas.

- 6 The Respondents dispute that Dr Grover passed pictures to the Claimant in 2015. It is accepted that this happened but it is said to have happened in December 2014. Mrs Hardaker gave evidence on this matter. She was not particularly involved with the pictures incident although she recalls seeing a picture, very much in passing, in December 2014. She tells me that Dr Grover disputes passing pictures to the Claimant in 2015. On this matter, I also heard evidence from Mrs Nitschke and detailed submissions from both parties. These included points being taken by the Respondents as to the unreliability of the Claimant and Mrs Nitschke, particularly on the basis that their evidence to me today differed from accounts given during the investigation of the Claimant's grievance. On the Claimant's behalf, Mr Coulter made submissions in respect of the absence of Dr Grover from today's hearing.
- 7 Having given this matter careful consideration, I am satisfied on the balance of probabilities that Dr Grover did continue to pass pictures to the Claimant during 2015 with the last incident occurring in December 2015 (sometime before 25 December 2015). I accept the Claimant's evidence on this matter. I considered the Claimant's account on the issue to be straightforward and credible even during robust cross-examination. I also noted that whilst Mrs Hardaker was doing her best to assist me, her knowledge of this matter was necessarily limited to what she had been told by Dr Grover.
- 8 Having accepted that an incident occurred in December 2015, which the Claimant alleges amounted to harassment, I have proceeded to consider whether the Claimant's claim of harassment is out of time. The Claimant's submission is that the incidents which occurred through 2015, are part of acts extending over a period which ended on 19 September 2016. On this basis the Claimant submits that her complaint of harassment has been brought in time. The matters which are said to constitute conduct extending over a period are the 2015 incidents, the grievance outcome meeting which took place on 21 June 2016 and the Claimant's reading of the investigation report which she received following a data subject access request on 19 September 2016.
- 9 I must assess whether these individual allegations together constitute an act extending over a period or whether they are to be treated as a series of discrete events. I am not satisfied that the Claimant has an arguable basis for asserting that the complaints are so linked as to be a continuing act. There is no evidence of a policy, rule or practice in this case which might itself constitute a continuing act. Rather the complaint is put in terms of Dr Grover carrying out a number of acts in 2015 and then, months later, there being an omission by him at the meeting on 21 June 2016 to discuss the harassment complaint and unfair conclusions being drawn by an independent investigator in a report produced to the Claimant in September 2016. Taking account of the nature and content of the discriminatory conduct of which complaint is

made, in my judgment these three complaints are properly to be categorised as discrete, single acts.

- 10 It follows from this that the complaint of sexual harassment with regards to the 2015 conduct of Dr Grover was brought out of time to this Tribunal.
- 11 In respect of the other two complaints, namely the meeting on 21 June 2016 and the receipt and reading of the investigation report on 19 September 2016, I have considered the Claimant's ET1 to identify the complaints pleaded by the Claimant. I accept that the language included in paragraph 24 of the Claimant's claim is sufficient to establish a claim of discrimination made in respect of the meeting on 21 June 2016. However I do not accept that the Claimant has pleaded a claim of harassment arising out of the investigation report she read on 19 September 2016 and, accordingly, no such complaint proceeds for consideration by the Tribunal at a full merits hearing. When the entirety of the Claimant's ET1 and attached details of claim are read, it is clear that she has not made such a complaint to the Tribunal. In fact, as is noted in paragraph 24 of the attachment to the ET1, her complaint is against Dr Grover rather than Lisa Graham, the investigator. It is pleaded,

'Although I see that Lisa Graham addressed the issue in her report, the report was not released to me until after my dismissal and apparently ignored by Dr Grover in the outcome letter sent to me.'

- 12 In respect of the remaining complaint of harassment which arises from the meeting on 21 June 2016, Mrs Asharu submits that it is still out of time as ACAS early conciliation did not commence against Dr Grover until 22 September 2016, at which point the three month time limit to bring this complaint had already expired. It is correct that the time limit had expired prior to the Claimant commencing early conciliation. Accordingly the Claimant may only proceed with this claim against Dr Grover and in respect of the 2015 matters if I exercise my discretion to extend the time limit. This I may do where I consider it just and equitable to do so. The broad nature of the discretion allows me to take into consideration all of the relevant circumstances. These might include the presence or absence of prejudice to the Respondent if the claim is allowed to proceed, the conduct of the Claimant over the relevant period, the length of time by which the application is out of time and any reason why the Claimant was prevented or inhibited in making her claim. I have reminded myself that there is no presumption that a tribunal should exercise its discretion to extend time and the burden is on a claimant to persuade the tribunal to exercise its discretion in their favour.
- 13 I listened carefully to the Claimant and I am extremely sympathetic to the fact that she felt that a job she had enjoyed and felt comfortable working in was, in her eyes, slowly taken away from her until she felt her position was untenable. However I must begin with the fact there is a three month time

limit for bringing a claim of discrimination. The Claimant's evidence, with respect to the delay in bringing her claim, largely focused upon her pursuance of her internal grievance and the following of the internal complaints process. I do not consider that in the circumstances of this case, that explanation can be used to explain away the Claimant's failure to make a relevant complaint to the Tribunal such that I should exercise my discretion to extend the time limit. I do not consider it just and equitable to extend time in respect of the Claimant's complaint of sexual harassment arising from the alleged conduct during 2015. Nor do I consider it just and equitable to extend time in respect of the complaint of sexual harassment arising from the meeting on 21 June 2016 as against Dr Grover.

- 14 Accordingly the Claimant has a single claim of harassment on the ground of sex which remains, namely the conduct of Dr Grover in the meeting on 21 June 2016 in omitting to discuss the Claimant's harassment complaint. However due to the matters set out in paragraphs 12-13 above, this complaint proceeds only as against The Partners of Summerhill Surgery. For the avoidance of doubt, I do not consider that this remaining complaint of harassment should be struck out on the ground that it has no reasonable prospects of success.
- 15 Further, I do not consider a deposit order is appropriate either in respect of claim of harassment or the claim of unfair constructive dismissal. I am satisfied that it is entirely appropriate for the Claimant's remaining claims to proceed to a full hearing. As identified in the Draft List of Issues, the Claimant's complaint of unfair constructive dismissal is based upon a number of factual allegations concerning other members of the support staff, Dr Kamal and Dr Grover. The allegations are varied and span a number of weeks. On the limited information I have before me at this Preliminary Hearing, I do not consider that the claim has little reasonable prospects of success such that a deposit order would be appropriate.

CASE MANAGEMENT SUMMARY

- 16 The following claims and issues will be considered by the Tribunal at the hearing. No other claims or issues will be considered without the permission of the Tribunal:
- 17 Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996
- 17.1 The Claimant relies upon the following alleged repudiatory breaches:
 - 17.1.1 On 6 October 2015, Lisa Hardaker failed to support the Claimant following the announcement of her promotion on 1 October 2015;

- 17.1.2 On a date to be identified by the Claimant, Sharon Cairns shouted at the Claimant;
- 17.1.3 On a date to be identified by the Claimant, Sharon Cairns sent the Claimant a screen message to keep the noise down;
- 17.1.4 On a date to be identified by the Claimant, Sharon Cairns told the Claimant to 'shut-up' because she was speaking too loudly;
- 17.1.5 On a date to be identified by the Claimant Sharon Cairns imitated the Claimant's accent and mimicked the way the Claimant pronounced words in a way intended to intimidate the Claimant;
- 17.1.6 Sharon Cairns took over the EMIS training on 27 October 2015 and emailed staff in relation to it;
- 17.1.7 On a date to be identified by the Claimant, Sharon Cairns talked over the Claimant when she was speaking with clients and doctors;
- 17.1.8 On 5 November 2015, a person unknown altered the Claimant's timesheet without her knowledge and Lisa Hardaker failed to take the matter seriously when the Claimant told her about it;
- 17.1.9 On 9 November 2015 Lisa Hardaker unreasonably:
 - i. refused Dr Kamal's attendance at the meeting;
 - ii. failed to formally document the meeting;
 - iii. failed to carry out any investigations.
- 17.1.10 The Respondent unreasonably delayed the investigation of the Claimant's grievance between 11 November 2015 and January 2016;
- 17.1.11 Dr Kamal unreasonably failed to respond to the Claimant's email of 20 December 2015;
- 17.1.12 On 23 December 2015 Dr Grover shouted at the Claimant and accused her of pointing at him;
- 17.1.13 On 24 December 2015 the Claimant was not invited to the Christmas party and the staff excluded her for 20 minutes before asking if she was going to join in;
- 17.1.14 On 4 January 2016 Elaine Supple was at the Claimant's workstation and logged onto the Claimant's computer and was hostile towards her;

- 17.1.15 Dr Grover left, among the prescriptions handed to the Claimant to sort out, a series of photographs of muscle men dressed in small underpants;
- 17.1.16 Lisa Graham unreasonably delayed the outcome of the Claimant's grievance dated 21 March 2016 until 21 June 2016;
- 17.1.17 Lisa Graham unreasonably failed to deal with the following grievance issues:
- i. Lisa Hardaker's delay in responding to the Claimant's initial grievance;
 - ii. Lisa Hardaker's behaviour towards the Claimant after 9 November 2015 meeting;
 - iii. Dr Grover's behaviour in 'tossing an envelope' to the Claimant containing the meeting notes of 11 November 2015;
 - iv. The Claimant's exclusion from the Christmas lunch event;
 - v. Sharon Cairns talking over the Claimant;
 - vi. Dr Grover leaving pictures of muscle men in the prescriptions to be sorted by the Claimant.
- 17.1.18 The grievance investigation notes were unreasonably withheld from the Claimant.
- 17.2 Do any of the above allegations, if made out on the facts, amount to a repudiatory breach of contract? In particular,
- i. Was the treatment without reasonable and proper cause?
 - ii. Was the treatment, when objectively viewed, calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Second Respondent and the Claimant?
 - iii. Did the Respondent, by its actions, indicate an intention to abandon and altogether refuse to perform the contract?
 - iv. Does the grievance outcome of 21 June 2016 have the essential quality of a 'last straw'?
- 17.3 If so, did the Claimant resign in response to the Respondent's repudiatory breach of contract?
- 17.4 Did the Claimant expressly or impliedly affirm the contract by actions and / or material delay, indicating an intention to continue to be bound by it

subsequent to the breach such that she 'waived' the breach and treated the contract as continuing?

- 17.5 If the Claimant was dismissed, was the dismissal fair in all the circumstances?
- 17.6 If not, would the Claimant's employment have been fairly terminated in any event and if so, when(Polkey)?
- 17.7 Did the Claimant cause or contribute to her dismissal by reason of her conduct? If so, what reductions should be made to any award to which the Claimant may be entitled?
- 17.8 If the Claimant is found to have been unfairly constructively dismissed, what compensation is she entitled to? Has the Claimant adequately mitigated her loss and what, if any, reductions should be made for the Claimant's alleged failure to comply with the ACAS Code by failing to pursue a grievance appeal before her resignation?

18 Harassment – section 26 Equality Act 2010

- 18.1 Did the Respondent engage in unwanted conduct as follows:

The Claimant asserts that, during the meeting of 21 June 2016, Dr Grover failed entirely to refer to the part of her grievance where she complained of harassment; that complaint being that Dr Grover gave her prescriptions to be sorted out, amongst which he had placed a series of photographs of muscle men dressed in small underpants.

- 18.2 Was the conduct related to the Claimant's protected characteristic of sex?
- 18.3 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 18.4 Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 18.5 In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- 18.6 If the Claimant is found to have been harassed, is it just and equitable to make any award for injury to feelings? If so, in what amount?

CASE MANAGEMENT ORDER

Additional Information

- 1 No later than 4 p.m. on **28 February 2017** the Claimant shall send to the Respondent and the Tribunal further and better particulars of her claim as requested in paragraphs 3.2.2.1, 3.2.2.2, 3.2.2.3, 3.2.2.4 and 3.2.2.6 of the Draft List of Issues prepared by the Respondents for this Preliminary Hearing.

Statement of Loss

- 2 No later than **28 February 2017** the Claimant shall send to the Respondent and the Tribunal a Statement of Loss that:
 - 2.1 sets out the money the Claimant seeks as compensation;
 - 2.2 calculates compensation separately for each claim and shows the calculations that have been used.

Judicial Mediation

- 3 I raised the possibility of this case being considered for judicial mediation. The parties wished to consider this possibility and agreed to notify the Tribunal no later than **14 March 2017** whether they are interested in pursuing judicial mediation in respect of the Claimant's claim.

Disclosure of documents

- 4 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive no later than **17 July 2017**.
- 5 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 6 The parties shall comply with the date for disclosure given above but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

Document Guidance

- 7 "Documents" includes letters, notes, emails, memos, diary entries, audio or visual recordings, text messages and any other legible records.

- 8 If hand written documents are being relied on a typescript must be provided by the party relying on them and inserted in the bundle of documents immediately after the hand written document.
- 9 If a recording is being relied on a transcript must be prepared by the party relying on it. That typescript must be included in the bundle of documents and sent to any other party, together with a copy of the recording.
- 10 **No documents or copy correspondence should be sent to the Tribunal unless a party is required to do so.**

Trial Bundles of Documents

- 11 The Respondent shall prepare a consolidated bundle of copy documents.
 - 11.1 The bundle shall not, without the consent of an Employment Judge, exceed 200 pages (400 sides). Two-sided copying is encouraged.
 - 11.2 The bundle shall only contain copies of relevant pages of documents a party intends to use at the Tribunal hearing.
 - 11.3 All the documents, except any pleadings and Orders, must be in date order, with the oldest at the front.
 - 11.4 Each page must be numbered.
 - 11.5 The bundle must have an index showing the date, description and page number of each document.
 - 11.6 The bundle must be held together so it opens flat.
 - 11.7 Witness statements must not be included in the bundle.
- 12 No later than **7 August 2017** the Respondent shall supply one copy of the bundle to the Claimant.
- 13 The Respondent shall bring four identical bundles of the copy documents to the Tribunal hearing.

Witness Statements

- 14 The parties shall prepare a written statement for each witness (including the Claimant who will give evidence personally) that it is intended will be called to give evidence at the Tribunal hearing. Each witness statement must:
 - 14.1 have page numbers, be typed single-sided with double line spacing with at least 2.5cm page margins;
 - 14.2 use a "standard" (e.g. Arial, Times New Roman or similar) size 12 font;
 - 14.3 contain all the evidence of the witness;
 - 14.4 be laid out in short consecutively numbered paragraphs;

- 14.5 set out in chronological order, with dates, the facts which the witness can state;
 - 14.6 not contain matters irrelevant to the issues;
 - 14.7 refer by page number in the bundle of documents to any document mentioned in the statement;
 - 14.8 be signed and dated;
 - 14.9 not be contained in a bundle.
- 15 Each party shall ensure that there are four copies of each statement of their own witnesses available at the Tribunal hearing for the use of witnesses and the tribunal.

Evidence without a Witness Statement

- 16 No evidence-in-chief may be given by a witness, in addition to that contained in the written statement of that witness, without the permission of the Tribunal.
- 17 No witness may be called by a party to give evidence at the Tribunal hearing, without the permission of the Tribunal, unless their written witness statement has been prepared and exchanged.

Simultaneous Exchange of Witness Statements

- 18 On **4 September 2017** there shall be a simultaneous exchange of witness statements by each party providing to the others one copy of each witness statement for each of the witnesses that party intends to call to give evidence at the Tribunal hearing.

Hearing Date

- 19 The case is listed with the agreement of the parties for hearing of liability and remedy, if appropriate, before a full Tribunal for eight consecutive days starting on **25 September 2017** commencing at 10.00am on the first day at the Employment Tribunal, **Ashford House, County Square Shopping Centre, Ashford, Kent TN23 1YB**.
- 20 This allocation is based upon 3 witnesses for the Claimant (including the Claimant herself) and 6 witnesses for the Respondent.
- 21 No postponement of the hearing date will be granted unless there are exceptional and unforeseen circumstances.

Non-compliance

- 22 Each party is required to inform the Tribunal forthwith following any of the above directions not being complied with, in full, on the due date and provide its explanation in respect of any non-compliance.

NOTE:

1. *Failure to comply with an Order may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.*
2. *If a person does not comply with Orders made under the Employment Tribunals Rules of Procedure, rule 8 of the Employment Tribunals (Levy Appeals) Rules of Procedure or rule 7 of the Employment Tribunals (Health and Safety - Appeals against Improvement and Prohibition Notices) Rules of Procedure an Employment Judge or Tribunal may:*
 - (a) *make an order in respect of costs or preparation time (if applicable); or*
 - (b) *make an order to strike out the whole or part of the claim or, as the case may be, the response and, where appropriate, order that a respondent be debarred from responding to the claim altogether.*
3. *The Tribunal may also make a further Order (an "Unless Order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a Hearing.*
4. *An Order may be varied or revoked upon application by a person affected by the Order or by an Employment Judge on his own initiative.*
5. *This Order confirms orders made/directions given at a hearing on 7 February 2017.*

Employment Judge Harrington
20 February 2017