Appeal No. UKEAT/0182/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 31 January 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

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(1) EXEC CATERING LTD T/A KAFFECCINOS COFFEE HOUSE
(2) MR B CRONEY APPELLANTS

MS H KACZYNSKA RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR B CRONEY (The Second Respondent in Person)
For the Respondent	MR J ANDERSON (of Counsel) Instructed by: Northumbria University Student Law Office Room 114 School of Law Newcastle-upon-Tyne NE1 8ST

SUMMARY

HARASSMENT

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The Employment Tribunal failed to consider the Respondent's time point taken in the claim of racial harassment. The Respondent's appeal is allowed.

There was a misdirection as to the test for harassment in the sexual harassment claim. The Claimant's cross-appeal is allowed.

The case is remitted to the same Employment Tribunal for re-consideration

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Newcastle Employment Tribunal between Ms Kaczynska, Claimant, and (1) Executive Catering Ltd trading as Kaffeccinos Coffee House and (2) Mr Bill Croney, Respondents. I have before me for full hearing an appeal by the Respondents and a cross-appeal by the Claimant against parts of the reserved Judgment of an Employment Tribunal chaired by Employment Judge Hunter, promulgated with Reasons on 21 May 2012.

Background

2. Kaffeccinos is a cafe located in Grainger Street, Newcastle. At the relevant time it was run and operated by Mr Croney through a limited company, the First Respondent. The Claimant was employed in the cafe from January to March 2009 and, following a break, from 26 September 2009 until her resignation on 27 August 2011.

3. On 7 November 2011 she lodged a form ET1 at the Tribunal. Her live claims, which were resisted by the Respondents, were of constructive unfair dismissal and racial and sexual harassment. She is of Polish origin.

4. The Tribunal upheld her complaints of unfair dismissal and racial harassment, but dismissed her complaint of sexual harassment on the ground that it was statute-barred. The Respondent's appeal lies against the finding of racial harassment on the basis that it too was time-barred. The Claimant's cross-appeal concerns the claim of sexual harassment. I am not here concerned with the findings of unfair dismissal.

Racial harassment

5. Both parties appeared in person below. It seems that the Respondent raised the limitation question in relation to both the sex and racial harassment claims in his form ET3. Although the point was expressly considered by the Tribunal in relation to sex, it is not mentioned at paragraph 4.5 of the Reasons, where the complaint of racial harassment was upheld on the basis that the Claimant was instructed not to speak to other staff in the Polish language.

6. The only question in the Respondent's appeal permitted to proceed to this full hearing by HH Jeffrey Burke QC at a rule 3(10) hearing held on 8 February 2013 is whether the Tribunal failed to consider if the claim for racial harassment was lodged out of time and, if so, whether it would be just and equitable to extend time.

7. Mr Croney submits that since the only other Polish employees left on 16 November 2010 and 6 March 2011 the effect of any such ban was spent after 6 March. The Claimant remained in employment until 27 August and lodged her form ET3 on 7 November. Thus the claims were lodged out of time. Since no extension was granted by the Tribunal in relation to the claim of sexual harassment (see paragraph 4.6) there was no reason to extend time for the race claim.

8. Mr Anderson, now appearing pro bono on behalf of the Claimant, argues that the departure of the Claimant's co-workers is immaterial. The ban on speaking Polish was never lifted and thus there was a continuing state of affairs until the Claimant's resignation on 27 August which rendered the claim within time when it was lodged on 7 November.

Sexual harassment

9. The Tribunal directed themselves to the definition of harassment at section 26 of the **Equality Act 2010** (see paragraph 3.5). As Underhill P, as he then was, made clear in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 337, there are three elements within the statutory tort of harassment:

(i) Whether the employer engaged in unwanted conduct;

(ii) Whether the conduct had (a) the purpose or (b) the effect of either violating the Claimant's dignity or creating an adverse environment for her; and

(iii) Whether the conduct was, on the grounds here, of her sex.

Underhill P emphasised the formal breakdown of element (ii) into two alternative bases of liability, "purpose" and "effect". An employer may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose. However, the fact that the conduct was not directed at the Claimant might be a relevant factor when determining whether a degrading or adverse environment was created: see **Weeks v Newham College of Further Education** (UKEAT/0630/11, 4 May 2012, Langstaff P and members) at paragraph 20.

10. Before turning to the limitation provision in section 123 of the **Equality Act 2010**, to which the Tribunal refer at paragraph 3.9 of their Reasons, I should set out the Tribunal's conclusions on sexual harassment at paragraph 4.6.

> **"Sex Harassment**
>
> **4.6 Did Mr Croney engage in unwanted conduct of a sexual nature which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?**
>
> **We are not satisfied that the claimant was present at the cucumber incident. By Mr Croney's own admission he does, from time to time, engage in risqué behaviour. We consider that the incidents relating to the baguette and the 'builder's bum' to fall into this category. We are satisfied that Mr Croney never intended that staff should see any adult material that he was**

watching on his computer. We are not satisfied that the claimant was subjected to a series of incidents that together could amount to a continuous state of affairs. Rather there were a few isolated incidents. We are not satisfied that the claimant had brought a claim for sex harassment in time. We have had regard to the guidance in *British Coal Corporation v Keeble* [1997] IRLR 336 that the factors listed in section 33 Limitation Act 1980 can assist the tribunal in the exercise of the its [sic] discretion to extend time. The claimant has given no reason for bringing the claim out of time. There is no obvious reason why she could not have brought it in time. By delaying she has made it very difficult for Mr Croney to recall events and to defend himself. None of the other matters set out in section 33 of the Limitation Act 1980 seem to us to be relevant to this case. In these circumstances we do think it is just and equitable to extend the time limit."

11. By way of context, the Tribunal's reference to Mr Croney's admission that he did, from time to time, engage in risqué behaviour, relates back to their finding at paragraph 2.20, where they deal with the "cucumber incident" involving a female member of staff, Rebecca, when the Claimant was not present. The "builder's bum" incident, when the Claimant was present is set out at paragraph 2.19. The baguette incident (paragraph 2.21) occurred in June 2011. The Claimant alleged that she asked Mr Croney whether he wanted a baguette for his lunch; he said it looked like the baguette had an erection. Mr Croney denied making that remark but the ET found that he did. The Claimant said it left her feeling humiliated, upset and disgusted.

12. As to Mr Croney watching pornography on the computer in his office, this is dealt with at paragraph 2.22 as subsequently corrected. Again, Mr Croney denied that he so acted but the Tribunal did not believe him. The Claimant said she had seen this through the office window and that it occurred a few times per week including the week leading up to her resignation.

Discussion

13. Dealing first with the Claimant's cross-appeal, Mr Anderson submits, by reference to the Tribunal's approach at paragraph 4.6, that the Tribunal fell into error in disregarding the pornography complaint on the basis that Mr Croney did not intend that staff should see the pornography in his office (which, I remind myself, he denied watching). I return to step (ii) in the **Dhaliwal** approach, endorsed by Langstaff P in **Weeks**: did that conduct have either the purpose or the effect of creating a sexualised work environment adverse to the Claimant? Lack

of intention is not, of itself, an answer to the complaint that the conduct in question had that effect, although it may be a relevant consideration, as was pointed out by Langstaff P in **Weeks** at paragraph 20. More generally, the question is whether the Claimant was, subjectively, offended by her exposure to pornography and, if so, whether that was a reasonable reaction on her part. It is certainly not limited to Mr Croney's intentions, as the Tribunal appear to have considered: see Equality Act, section 26(4).

14. In support of his submission that this was plainly sexual harassment continuing right up until the Claimant's resignation, Mr Anderson has prayed in aid the decision of the EAT in **Moonsar v Fiveways Express Transport Ltd** [2005] IRLR 9, particularly at paragraphs 12 and 13 of the Judgment of HHJ Ansell, delivered on behalf of the EAT in that case. Like the President in **Weeks**, I do not find **Moonsar** of particular assistance in the present case. There are factual similarities save that the viewing of pornography by male members of staff in **Moonsar** took place to their knowledge in the presence of the claimant. That is not the finding of fact in the present case. If the finding had been that, properly directing itself, the Tribunal answers the **Dhaliwal** questions in favour of the Claimant, then it seems inevitable that the complaint of sexual harassment is in time provided that the Tribunal accepted the Claimant's evidence that her viewing of pornography continued up until the last week of her employment. On the Claimant's case, there was a continuing state of affairs up to that time and thus her claim was lodged within the three-month primary limitation period.

15. Alternatively, I agree with Mr Anderson that, bearing mind the "builder's bum" and baguette incidents, the Tribunal failed to consider whether, on the facts as found by them, there was a sexualised work environment which persisted, giving rise to a continuing state of affairs for limitation purposes rather than treating them as isolated incidents. See the approach of the

Court of Appeal in the leading case of **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96.

16. In answer to the cross-appeal Mr Croney has sought to draw me into his version of the facts. I resist that invitation. The facts are as found by the Employment Tribunal; it is not for me to interfere with those findings of fact. He advanced no useful submission on the legal misdirection point which Mr Anderson advanced and which I accept. Where I differ from Mr Anderson is in relation to disposal of the cross-appeal, to which I shall return.

17. Turning then to the Respondent's appeal, Mr Anderson accepts that limitation was raised as an issue by the Respondent in relation to both the sex and race claims. He further accepts that there is no reference as such by the Tribunal to limitation in connection with the racial harassment claim. He suggests that it is implicit in the findings at paragraph 4.5 that the Tribunal regarded the race complaint as being one of a continuing act. I am unable to draw that inference.

18. On the facts, Mr Anderson accepts that the last of the Claimant's fellow Polish employees left on about 6 March 2011, leaving her as the only Polish-speaking member of staff up until her resignation on 27 August 2011. He submits to me that the offending ban continued up until the date of the Claimant's resignation and this was a continuing state of affairs, so that no limitation point could succeed. I reject that submission, and again deal with that matter when I come to deal with disposal.

Disposal

19. Both the appeal and the cross-appeal are allowed. I reject the Respondent's argument that I should find that the race claim was out of time and that time should not be extended and I

reject the Claimant's case that this was plainly a case of sexual harassment, which was in time so as to set aside the finding of sexual harassment and replace it with a finding that that complaint was made out. It seems to me that the proper course is to remit both the sex and race harassment claims back to the same Employment Tribunal for re-consideration in the light of this Judgment. For the avoidance of doubt, no further evidence will be required on the issue of liability in relation to either claim. The Tribunal will apply the guidance to which I have referred in this Judgment in answering the questions: first, whether in relation to the race claim there was a continuing act of harassment and, if so, whether it continued up until resignation or ended at some earlier date. If at some earlier date outside the three-month primary limitation period, then the question is whether it is just and equitable to extend time for that claim. In relation to sexual harassment, it should take the structured three-step approach advocated by the former President in **Dhaliwal** to determine whether or not the viewing of pornography amounted to sexual harassment and, if so, whether that state of affairs, coupled with the two earlier incidents to which reference is made in paragraph 4.6, amounted to a continuing act and, if so, when that continuing act terminated in order to decide, first, whether or not there was here actionable sexual harassment and, secondly, whether or not that claim was in time and, if not, to reconsider the question of whether it is just and equitable to extend time in the light of their further findings on the harassment complaint.