



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS:

Ms J Forecast
Mr S Goodden

BETWEEN:

MISS N WOOD

Claimant

AND

THE CUPBOARD DOOR COMPANY LIMITED

Respondent

ON: 1, 2, 5, 6 & 7 June 2017

Appearances:

For the Claimant: In person

For the Respondent: Mr J Troup, Counsel

RESERVED JUDGMENT

1. The claim of sexual harassment relating to the incident on 12 May 2016 succeeds. All other allegations of sexual harassment fail and are dismissed.
2. The claim of direct sex discrimination succeeds.
3. The matter will be listed for a 1 day remedy hearing on a date to be advised.

REASONS

1. By a claim form presented on 22 August 2016, the Claimant complained of constructive unfair dismissal and sexual harassment. As the Claimant did not have 2 years' continuous service the constructive dismissal claim was struck out. However the Claimant requested that the tribunal treat the facts pleaded in relation to constructive dismissal as a claim of direct sex discrimination claim. [43]. In the absence of any objection from the Respondent, this was accepted as an amendment to the claim.
2. We heard evidence from Craig Warren, Director; David Charlesworth, ex colleague; Sam Sparkes, ex-colleague; Leon Jebb, Sales Advisor; Chris Warren, Managing Director and Stephen Middleton, Head of Sales. Written statements were provided by the Claimant and Respondent in respect of other witnesses who, in the end, failed to attend the hearing to give evidence. The tribunal has therefore attached no weight at all to their written statements. The parties presented a joint bundle of documents and references in square brackets in the judgment are to pages within the bundle.

Issues

3. Despite the parties being ordered by Employment Judge Baron to agree a list of legal and factual issues, they did not do so. Such a list would have been helpful in this case given the multiple allegations and the fact that the Claimant was, by the time of the hearing, a litigant in person.
4. The tribunal's understanding of the issues is as follows:
 - a. Did the Respondent, through its employees, sexually harass the Claimant by the unwanted conduct set out at paragraphs 6, 7,10 & 11 of the claim form [9G-9I]
 - b. Did the Respondent sexually harass the Claimant and/or directly discriminate against her by the manner in which it investigated the incident of 12 May 2016.
 - c. Did all or any of the matters at a - b amount to a repudiatory breach of the Claimant's contract and if so;
 - d. Did the Claimant resign in response to the breach
 - e. Did the claimant's resignation amount to a discriminatory dismissal.

The Law

5. Section 26 Equality Act 2010 (EqA) provides that a person (A) harasses another (B) if –
A engages in unwanted conduct related to a relevant protected characteristic, or engages in conduct of a sexual nature, and the conduct has the purpose or effect of –
 - (i) violating B's dignity, or

- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- 6. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.
- 7. Section 13 EqA provides that 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.
- 8. Section 39(2)(c) EqA provides that an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.
- 9. Section 39(7)(b) EqA provides that dismissal includes a termination by the employee in circumstances where they are entitled to terminate because of the employer's conduct.

Submissions

- 10. The respondent presented written submissions which were spoken to. The claimant presented her submissions orally. These have been taken into account.

Findings of Fact and conclusions

- 11. The Respondent is a small company whose business is the manufacture of cupboard doors and bespoke kitchens. The Claimant was employed by the Respondent from 1 December 2014 until her resignation as a receptionist.
- 12. At the relevant time, the Claimant was the only full time female member of staff. The only other female was Suzanne Grala, (SG) Marketing & PR Manager, who only worked 1 day a week.
- 13. In April 2015, the Claimant commenced a relationship with a Mr Jeremy Harman (JH) a personal friend of the Respondent's Managing Director, Chris Warren (CW) and his son and fellow Director, Craig Warren (CRW). Both CW and CRW were aware of the relationship as were a number of the Claimant's colleagues, including Leon Jebb (LJ) a Sales Advisor, who told us that the Claimant constantly spoke about her relationship and was either crying about it or arguing with JH on the phone.
- 14. The Claimant's relationship with JH came to an end in February 2016. She claims that the split was not amicable and that JH proceeded to harass her by bombarding her with telephone calls and by occasionally appearing at the Respondent's offices. The Claimant makes no legal claims in these proceedings relating to the conduct of JH but the relationship and its termination is the springboard for the allegations referred to in the issues identified above.

15. The Claimant says that during her relationship with JH, they exchanged a number of text messages of a sexual nature and she allowed him to take and retain intimate photos of her naked, including of her genital area. She said she also took photos of herself and sent them to him. The Claimant has not retained any of the texts but has set out at paragraph 13 of her statement the exchanges, as far as she can recall them. There is no need for them to be repeated here.

Offensive remarks/conduct of colleagues – Mid-March 16' onwards

16. The Claimant says that she developed the distinct impression that CW, CRW and other male members of staff in the office had either seen the photos and messages or been made aware of them. She claims that from about mid-March 2016, her colleagues used this information to sexually harass her by making offensive comments, remarks and jokes at her expense. At paragraph 17 of her statement, the Claimant makes specific allegations against a number of individuals. All of them gave evidence, apart from Mark Woodley (MW), and they denied having seen or been aware of the messages or photos in question until the Claimant referred to them herself. Further, they denied making the remarks attributed to them.
17. In order to challenge the Claimant's credibility, the Respondent alleged that she had made a false complaint of harassment in the past against male colleagues at her former employer, Eurovan. The Claimant denies making any allegations, false or otherwise. The Respondent called David Charlesworth (DC) and Sam Sparkes (SS), ex-Eurovan colleagues of the Claimant, to give evidence about this.
18. The alleged complaint was said to have been made April/May 2012 by the submission of a 5 or 6 page letter alleging sexual harassment against 5 individuals, including DC and SS. The complaint letter has not been produced. We were also told that there was an investigation into the allegations but we have not been shown any documentation relating to it. The Claimant says at paragraph 39 of her statement that not only is JH a customer of Eurovans, he is also a friend or acquaintance of DC and SS and knows the daughter of the owner of Eurovans as well as one of its salesman. None of that evidence was challenged by the Respondent. In light of this, we have treated the Respondent's evidence relating to events at Eurovan with extreme caution. In any event, we consider the evidence insufficient for us to make any clear findings or draw any inferences of credibility in relation to the current matters.
19. Returning to the allegations at hand, none of the tangible evidence i.e. photo or texts was before us. Not only did the Claimant not have copies of these, she admitted that she had never seen hard or electronic copies in the possession of her colleagues. The Claimant said that her suspicions were confirmed in early May 2016 when she asked her colleague Leon Jebb (LJ) outright whether he had seen intimate photos of her and he confirmed that CW had seen them and copied them to male members of staff. She said that another member of staff, Steve Middleton (SM), had been present at the time and had remarked *well done mate she knows now*. Both LJ and SM deny this account. LJ accepts that the Claimant confronted him and said something like; *come on Leon, you've seen the pictures* but he told her that he did not have a clue what she was talking about.
20. The Claimant alleges that she witnessed SM showing the offending photos on his phone to SG while at the same time making derogatory comments. SM denies this. He claims

that he was showing SG pictures of cakes baked by his wife and any comments he made related to those and have been taken out of context by the Claimant. Given that, on both accounts, SG was a witness to what occurred, it is surprising that neither side called her to give evidence. Also, as the only other female in the workplace, it may have assisted the tribunal to hear what she had to say about the workplace culture generally.

21. Whilst we are satisfied that the Claimant was genuinely concerned about the photos and texts and believed that JH had disclosed them, there was insufficient evidence before us to support a finding that the Claimant's colleagues were in possession of or had viewed them.
22. The allegations of harassment are set out in the particulars of claim at paragraph 6 a-e [9G-H] and expanded upon in the Claimant's further particulars. [21-33]. The Claimant deals with them further at pages 9-10 of her witness statement. Having read these documents, and having heard the Claimant's oral evidence, the difficulty we have with these allegation is that they are lacking in precise detail. The Claimant was unable to provide basic information such as when the events occurred; the circumstances or context; who was present; how she responded to the conduct at the time or how others responded. All we have are her bald assertions.
23. Further, there was no written complaint about these matters which, although understandable given that a number of the allegations are against CRW and CR, compounds the evidential difficulties. The Claimant said that she complained about these matters verbally to CRW from March onwards, which he denies. Again, the Claimant was unable to provide specific details of when the verbal complaints were made, what she specifically reported or how CRW responded. The Claimant did not make or retain a diary record of any of these matters. The only reference we have seen to these complaints is much later in the notes of the meetings on 13 and 16 May 2016. [132-134 & 136-137]. For reasons set out below, they were not investigated.
24. We find that the Claimant has not discharged the burden upon her of proving, on balance of probabilities, that the unwanted conduct took place. The sexual harassment claim in relation to these matters is therefore not made out.

Mug, Post it note and Nut incident

25. On 11 May 2016, the Claimant had a day's leave from work. At some point during the working day, her colleague, MW wrote on a label in capital letters "I WANT YOU TO LICK MY....."S". This was followed by an arrow pointing towards a metal nut. [165-166]. On the same day MW altered the wording on a promotional mug from a company called Essex Recruitment so that instead of "Essex Recruitment" it read: "sex recruitment". Another phrase had been changed to: "anal people blow jobs". [167]
26. The Claimant claims that when she resumed work the following day, the mug was on her desk and the post-it note was stuck to her computer keyboard with the arrow pointing to a nut.
27. The Respondent contends that the Claimant did not have her own desk because the firm operated a hot-desking system. The Claimant denies this and her case was that she worked at the same desk, which was positioned so that she could see people as they

came through the door, a necessary feature of her role as receptionist. It was convenient for the Respondent to argue that there was a company-wide hot-desking system because by doing so it strengthened their argument that the items were not directed at the Claimant because they were on a random desk. However, it is clear from the notes of LJ's appeal hearing against his final written warning that he considered the desk in question to be the receptionist's desk and he did not argue on that occasion that he had no idea that the Claimant would be sitting there. [156-157] We have also seen the notes of MW's appeal against his warning and he does not raise this as an argument either. [158-159] Even if there was an element of hot-desking operating in the business, we consider it unlikely that it applied to a receptionist's role and we therefore prefer the Claimant's evidence on this.

28. MW did not give evidence before us but LJ said that the items were a joke between him and MW and not directed at the Claimant. He said that they had been placed on his desk by MW and that as far as he was aware, the mug remained on his desk. He said that he had put the note on a desk behind the Claimant's desk for disposal as there were no bins in the office. He does not say what he did with the metal nut. It seems implausible that there were no dustbins at all in the whole of the open plan office and that despite LJ disposing of the note, it found its way along with the metal nut on the Claimant's desk along with the mug, which, on his account, remained on his desk.
29. Although LJ denies placing the items on the Claimant's desk, that does not discount the possibility of them being placed on the desk by someone else, i.e. MW. Although LJ says at paragraph 11 of his statement that he is certain that MW did not place these items on the Claimant's desk, there is no basis for that certainty. The most he can say is that he did not see him do so. We did not hear from MW and the only evidence we have of him being interviewed formally about this matter is the record of the appeal meeting, referred to below. MW's position at the appeal was that he had done nothing wrong. [158].
30. When the Claimant reported the incident to CW, he did not believe the items were on her desk and accused her of making the allegation up. We on the other hand note that there is no direct evidence before us challenging this. MW who created the items did not attend to give evidence despite the fact that he produced a witness statement and remains employed by the Respondent. No explanation was given for his absence. We accept the Claimant's evidence that the items were on her desk when she arrived at work on 12 May 2016.
31. As the only female on the shop floor, it was foreseeable that she would be offended by the sexual innuendo portrayed by these items, particularly as colleagues were aware of her concerns about the disclosure of her intimate photos and texts. We are satisfied that the Claimant was humiliated and upset by her treatment and understandably so. We find that her sexual harassment claim in respect of this matter is made out.

Investigation

32. Although the Claimant did not raise a formal complaint about the mug incident, the Respondent became aware of the matter through the police who had contacted the

Respondent about JH's conduct, which the Claimant had reported to the police. The Claimant was called into a meeting with CRW when she resumed work on 13 May. At the meeting the Claimant raised the issue of the items she had found on her desk, the harassment from JH as well as her accusations about the photos. This was also the first occasion, as far as we can see, that the Claimant complaining about sexual comments from colleagues. Bizarrely, CRW told the Claimant that he had issued written warnings to LJ and MW that day, even before knowing the full details of her complaint. In fact, he ends the meeting by telling the Claimant to go home while he investigates the matter. [132-134]. We do not believe that written warnings were issued, not least because LJ told us that he was given a verbal warning. The only written warnings we have seen are final written warnings for LJ and MW dated 17 and 23 June 2016 respectively. [148 & 150]. We have also seen, what purport to be records of interviews with LJ and MW appealing against these warnings. We do not consider any part of this process to be genuine. There is no documentation showing a disciplinary process leading up to this point. Indeed, none of the Respondent's witnesses describe the disciplinary process in their evidence. Further, the timing is suspect because it comes long after the Claimant's resignation and after the Respondent has received a letter before action from her solicitor alleging sexual harassment [143-144]. What also makes it suspect is the fact that the Respondent was at the same time making separate enquiries of the Claimant's previous employers in order to discredit her as a serial litigant. [146-147]

33. The Respondent's anti-harassment policy provides that all allegations of harassment will be taken seriously and will be promptly investigated. It also provides that the complainant should be interviewed and a written statement taken. The policy envisages that the alleged perpetrators will be interviewed as well. [113] This did not occur. CRW told us that after the meeting he spoke to LJ and MW about the items on the Claimant's desk. Nobody else was interviewed. When asked about the Claimant's other allegations of harassment against her colleagues, he said that he knew the allegation were not true so did not investigate further. The basis for his belief was that he was one of the people that the Claimant had accused of having images of her, which was untrue. However he acknowledged that just because it was not true about him, it did not mean it was not true about others. The notes of the meeting record CRW as making the following statement:

"You should have said to me "what the Fxxx is all this on my desk" I could then have investigated and sorted it, but since you just moved it without my knowledge it becomes circumstantial evidence, for all we know you could have picked up the cup from anywhere"(my emphasis).

34. These are not statements of someone approaching matters with an open mind and we question how impartial and objective CRW's investigation was.
35. The Claimant returned to work on Monday, 16 May and, without notice, was asked to attend a further meeting, this time with CW and CRW. She was accompanied by David Cole, a factory worker and Tony Hewson attended (as he had done at the previous meeting) to take the notes. [135-137]
36. At that meeting, the Respondent sought to resolve the matter by getting LJ and MW to apologise to the Claimant. Although there then followed a meeting at which LJ and MW offered their apologies, the Claimant did not consider them genuine as they continued to

maintain that the items were not intended for her. That view seems to have been supported by the Respondent judging from the notes. They record CW saying: "*What was on your desk was not intended for you, it is in your head*" [135].

37. From the evidence we heard, it was apparent that the Respondent had preconceived ideas about the Claimant based on her behaviour in private. CW knew more than most employers would normally about the Claimant's personal relationship because of his friendship with JH. He clearly disapproved of her as he told us that he had advised JH to get out of the relationship because she was a nightmare. When the Claimant put to him in cross examination that she had complained about being harassed he retorted: "*If you were harassed, why did you have a boob job*" as if the two things were mutually exclusive. Another of his retorts was: "*why would a 38 year old be taking pictures of her genitals on the phone*". It was apparent to the tribunal that CW believed that because of the claimant's behaviour, as he saw it, she could not possibly be offended by sexual "banter" and must therefore her allegations of sexual harassment must be made up. Not only that, the Respondent has gone out of its way to hunt for evidence that the Claimant is lying. CW places great store on the claimant having made allegations of harassment in previous employment. Whether she did or not, CW has decided that such allegations must be untrue and we believe he has done so based on his perception of the Claimant's sexual behaviour. We also believe that this attitude infected the way in which the Claimant's allegations were dealt with on 13 and 16 May 2016. There was no meaningful investigation of the complaints as they were treated as false from the outset and therefore not taken seriously.
38. After leaving the office on the 16 May, the Claimant did not return and was signed off sick by her doctor with work related stress. [138]
39. On 25 May 16 the Claimant tendered her written resignation with immediate effect. Her stated reason for resignation was the appalling behaviour from the directors and employees of the company. She makes reference to harassment and the fact that the directors did not prevent and colluded in the behaviour. [140]
40. We are satisfied that the manner in which the Respondent dealt with the Claimant's complaints amounted to direct sex discrimination. CW would not have held the same pre-conceived ideas about her had she been a man and would have treated her complaint seriously. Although JH was complicit in the production of the intimate photos of the Claimant, CW did not judge him in the same way. Indeed, he refers to JH at paragraph 4 of his statement as: "*a very nice guy and respectful person.*" A case of double standards along gender lines.

Did the respondent's conduct amount to a repudiatory breach of contract

41. We are satisfied that the discriminatory manner in which the respondent dealt with the Claimant's complaints breached the implied term of mutual trust and confidence and amounted to a repudiation of the Claimant's contract, entitling her to resign.

Did the Claimant resign in response to the Respondent's repudiatory conduct

42. It was submitted on behalf of the Respondent that the Claimant resigned in response to the conduct alleged at paragraphs 6a-e of the particulars of claim and nothing else. In other words, as a result of matters which we have not found to be harassment. We don't

accept that this was the only reason for resignation. The particulars of claim need to be read in their totality. At paragraphs 14 and 16, the Claimant refers to the manner in which the Respondent dealt with her allegations. [9 I-J]. Also, her resignation letter refers to the Respondent's failure to follow the handbook and their failure to take action against the perpetrators. This is a clear reference to its failure to follow a proper procedure in dealing with her complaint. [140].

43. We are satisfied that the repudiatory conduct of the respondent was the effective cause of resignation and that the resignation amounted to a dismissal pursuant to section 39(7)(b) EqA.

Judgment

44. The unanimous judgment of the tribunal is that:

- a. The claim of sexual harassment relating to the incident on 12 May 2016 succeeds. All other allegations of sexual harassment fail and are dismissed.
- b. The claim of direct sex discrimination succeeds.

45. The matter will be listed for a 1 day remedy hearing on a date to be advised.

Employment Judge Balogun
Date: 5 July 2017

