



EMPLOYMENT TRIBUNALS

Claimant: Mr M Gleave

Respondents: 1. Rochdale Training Association Limited
2. Mr John Huxley

HELD AT: Manchester

ON: 25 August 2017
11 October 2017
(in Chambers)

BEFORE: Employment Judge Sherratt
Mrs L A Buxton
Dr H Vahramian

REPRESENTATION:

Claimant: Mr K Grogan – Friend
Respondents: Ms J Gould, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims against both respondents are dismissed.

REASONS

Introduction

1. The first respondent is a further education training provider. The second respondent is an employee of the first. The claimant was a tutor/assessor. He had an associate contract for services and was a contract worker for the purposes of section 41 of the Equality Act 2010.

2. In his claim form, which was received on 2 January 2017, the claimant brought claims of constructive unfair dismissal, direct discrimination by reason of sex and unlawful harassment.

3. The claims for constructive unfair dismissal, direct discrimination by reason of sex and various allegations of unlawful harassment were struck out by an order

dated 3 August 2017 when the claimant failed to pay the deposits that had been ordered by Employment Judge Tom Ryan on 5 July 2017.

4. The only claim remaining was an allegation of harassment, referred to as allegation 7A, on the same factual basis as pleaded at allegation 7. The claimant alleged that he was subject to harassment contrary to section 26(3) of the Equality Act 2010.

The Relevant Law

5. Section 26 of the Equality Act 2010 deals with harassment and provides that:

- (1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) 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.
- (2) A also harasses B if –
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if –
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are –

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

The Evidence

6. The claimant gave evidence on his own behalf. Mr John Huxley and Mrs Gill Nagy gave evidence for the respondents. There was a bundle containing in the region of 270 pages although the claimant added some further pages at the start of the hearing.

The Facts

7. According to the claimant's witness statement, he says that he reported serious concerns regarding unwanted conduct of a sexual nature by an adult female learner aged 50 (hereafter referred to as "CD") to John Huxley on 20 September 2016, with Gill Nagy present in the room for approximately five minutes.

8. From the evidence of John Huxley, he was in his office when the claimant asked if he could have a word. He thought it strange because he was not the claimant's line manager but he invited him in. The claimant informed him "in his usual colourful way" that there was a learner (CD) who had begun to make him uncomfortable. When giving the information the claimant did not appear to him to be distressed. Initially he spoke in general terms about CD stating she acted inappropriately towards him. He said she was more vocal than other learners and that she expected more attention than other learners. She had asked about his sex life and this surprised Mr Huxley. As the claimant continued to tell him about CD Mr Huxley observed that he smiled as he spoke and laughed occasionally. At best during certain points of the conversation the claimant's appearance was, in the view of Mr Huxley, of mild concern about her behaviour.

9. As the claimant continued to speak Mr Huxley formed the impression that the claimant flourished on her early attention; however by 20 September the claimant wondered whether she had gone too far and that it may have been time to take some advice.

10. Gill Nagy, the first respondent's CEO, came in and said the allegations were to be treated as serious and a permanent record of the allegation should be made and investigations needed to be carried out.

11. On 21 September 2016 Mr Huxley prepared a note of the meeting and this note was subsequently signed by the claimant and Mr Huxley on 29 September 2016.

12. According to the note:

“Approached by Mark who felt the need to report what he considered to be inappropriate behaviour by a woman on the teaching assistants’ course he is delivering.

He has been made to feel uncomfortable by her persistent direct questions regarding his marital status, intimate behaviours and relationship matters.

He has minimised any contact outside the classroom but has faced further comments like ‘I can tell I’m not one of your favourites’ and further questions about eating establishments in his locality (some 20+ miles from her locality) during class time.

I suggested to Mark:

- (1) He should record comments/approaches with dates where possible.
- (2) He should take advice from Michelle Greenwood, safeguarding officer, on her return from holiday on 22 September 2016.”

13. Gill Nagy in her witness statement said she heard the claimant tell Mr Huxley that a female was behaving inappropriately towards him in class and it appeared that the claimant was the subject of the learner’s attention. She did not remain in the room to overhear the entire conversation but she told them that she had concerns for both Mark and the learner and that the contents of the conversation should be recorded and the allegations may need to be investigated.

14. It struck her that his report of CD’s attention was not made in a serious manner. According to her the claimant smiled and laughed as he repeated her actions but she did not consider it a laughing matter.

15. Michelle Greenwood, safeguarding officer, was on annual leave until 22 September 2016. Shortly after her return Ms Nagy asked whether she was aware of the claimant’s issue with CD and she was told that the claimant had mentioned CD in passing but had declined to make a formal complaint. Ms Nagy asked Michelle Greenwood to have a quiet word with CD.

16. Although we did not hear from Michelle Greenwood there were in the bundle various documents that she had prepared. Some involved her discussions with CD and one was prepared in relation to a grievance investigation that will be referred to below.

17. There was no formal complaint from the claimant but on 11 October 2016 Michelle Greenwood had a meeting with CD in relation to what were described as the issues the claimant had spoken publicly about in the Business Department Office to claim CD was demonstrating inappropriate behaviour in class. According to CD she had never been asked in class by the claimant to stop any inappropriate behaviour. Nothing at all had been said about it.

18. As to visiting a particular pub, CD denied she had stalked him by following him to his local pub/restaurant. She did not remember crying in class. She did wear makeup in class to celebrate losing some weight. She did not ask the claimant for a contact number, nor did she ask to look at his phone, but he had shown her a picture

of his girlfriend. Whilst she had taken numerous photographs of the board during lessons, the pictures were of the board not of the claimant. She said that the claimant had said in class to her that he felt “guilty for sinning with his new woman”. CD had asked him on a Christian basis if he was doing something against God and sleeping outside of marriage. CD said she asked this out of genuine concern as the claimant appeared “tortured” with guilt over his relationship and his drinking. CD said this happened on more than one occasion – his guilt and the fact he was a Jehovah Witness.

19. After recording these comments Michelle Greenwood noted that:

“As senior safeguarding officer for Rochdale Training I have spoken to both parties – Mark Gleave and CD – and do not believe the facts constitute sexual harassment. My recommendation for the safety of both parties is to remove CD from the class and to offer her 1-2-1 teaching with a different tutor. I told Mark Gleave on Monday 10 October about 2.00pm that CD will no longer be attending his class and I have arranged for another tutor to contact her to arrange 1-2-1 support.”

20. On 5 October 2016 the claimant sent an email to CD saying that he had a number of safeguarding concerns regarding her in the Maths class. He had sought and taken advice from the safeguarding officer and from the Senior Executive and the Chief Executive at Rochdale Training and he removed from the course with immediate effect. He was to arrange to meet with Michelle Greenwood, safeguarding officer, to discuss his concerns.

21. A copy of the claimant's email to CD went to Gill Nagy and she was concerned because in her view the tone and language was unnecessarily harsh and a number of staff members were copied in or referred to in the email in a matter that was sensitive and therefore confidential. She was concerned there may have been a breach of policy in withdrawing a learner from a class without due process being followed.

22. On 10 October 2016 the claimant emailed Gill Nagy to give two months' notice of termination of his contract. He wished the respondent all the best for the future. He had enjoyed himself immensely and it had been a creative and exciting time for him with the Association. Gill Nagy responded saying she was sorry to hear that, she thanked him for his hard work and for letting her know of his resignation.

23. On 11 October 2016 the claimant sent an email to Gill Nagy and copied in his manager and Michelle Greenwood. He said that he was off sick as his stomach/intestinal complaint had flared up again and he was mentally drained, mainly “as a result of this situation and your off the record beratings regarding ‘that poor woman’ who has been sexually harassing me! I returned to work yesterday and told you I was recovering from diverticulitis and was not 100% (I still had my hospital bracelet on) yet that did not matter”. The claimant went on to say he had given in his notice as a result of her behaviour. She had tried to belittle him and publicly challenge the advice of the safeguarding officer in the corridor in front of learners who were passing by. If she could not support her staff over something this serious how could he continue to work there? The claimant then asked for a meeting with her but before the meeting he would like certain information and/or documentation. He had been advised that the actions of the learner constituted sexual harassment.

He felt he had been discriminated against on the basis of his gender. He felt like screaming as loud as he could because he was so upset. He was in tears writing it because he was so upset. If it had been one of the female members of staff she would have acted very differently and this was not acceptable.

24. On 20 October 2016 Jeremy Roberts, the first respondent's Marketing Manager, wrote to the claimant saying that they had accepted his 11 October email as a formal grievance in accordance with the company's grievance procedure. He was invited to attend a meeting on Wednesday 2 November 2016 when he would be given full opportunity to explain his case.

25. It is apparent from the grievance outcome letter that the claimant did not meet with Mr Roberts and that his grievance was rejected.

26. It was in the course of Mr Roberts investigating the claimant's grievance that he spoke to John Huxley on 19 October 2016 and in the bundle there is a note of their discussion.

27. From the note Mr Huxley said he met with the claimant on one occasion only on 20 September 2016 when the claimant reported what he considered inappropriate behaviour by CD. He had been made to feel uncomfortable by her persistent direct questions on personal matters.

28. The overall impression of John Huxley concerning the claimant was that he:

- “Felt CD was expecting more of MGL [claimant] than other learners in the class.
- Considered CD to be one of the more vocal characters in the group, to not be reserved or quiet like some of the others.
- Was not stressed or upset by the attention from CD – rather more uncomfortable.
- Was unsure if he was personally pleased or concerned that he was receiving this attention – given that MGL is a larger than life extrovert who naturally draws people's attention.
- Was possibly proud of the attention.
- Had not been made to feel threatened by CD's attention.
- Appeared more than happy and not uneasy to wait for further advice from Michelle Greenwood (safeguarding officer) upon her return from holiday on 22 September.”

29. Mr Huxley said he was aware that the claimant had taken steps to ensure there would be no 1-1 contact in class with CD. When the claimant signed the note he thanked Mr Huxley and did not appear stressed.

30. Mr Huxley's next contact with the claimant was in a corridor on 5 October 2016 when there was some discussion about the claimant's email of 5 October referred to above.

31. Mr Huxley was not involved in the course of action regarding the removal of CD from the class or any emails.

32. It would appear that Mr Roberts sent the claimant copies of the various statements that he had taken in the course of his investigation.

33. Returning to the claimant's witness statement, he says that after reporting serious concerns to John Huxley on 20 September 2016 regarding unwanted conduct of a sexual nature by an adult female aged 50 (CD) he was completely "surprised, shocked, hurt and disgusted by JH's statement in which he claims I was –

- Possibly proud of the attention I had received off CD.
- I may have been pleased and unconcerned by her actions.
- That I suffered no stress and was not upset."

34. The claimant notes that Mr Huxley further states that concerning this serious matter "I naturally draw people's attention".

35. According to the claimant he thought these statements were terrible as he had gone to report a serious matter which had been ongoing for months. He could not believe what had been written and said about him. He felt humiliation and that his dignity had been violated. The words used by Mr Roberts degraded him. They were very offensive and not true. He felt Mr Roberts was blaming and shaming him. He was deeply upset over his actions, thinking this was part of the way they worked at Rochdale Training, turning victims into culprits. He thought the safeguarding officers had abandoned their responsibilities.

36. When he received a copy of the statement given by John Huxley to Mr Roberts he was off work with stress and stress induced diverticulitis. The comments made by Mr Huxley added to the claimant's distress.

37. On the day of the hearing the claimant produced a note dealing with safeguarding concerns regarding CD which was not in the original bundle. According to him he had provided it to his manager, Mr Beck, and to Michelle Greenwood and he showed a copy of the list to Mr Huxley who said that he had better keep hold of it.

38. Mr Huxley told us that he had not seen this note until the day of the Tribunal.

39. In the document, which is not dated, the claimant describes the behaviours of CD some of which appear in the Greenwood discussion described at paragraph 18 above. He records feeling extremely uncomfortable being near CD and that he cannot cope with her behaviour in class. He is constantly on edge and it is affecting his sleep.

40. In his witness statement the claimant described how he had started arriving a couple of minutes before the lesson was due to begin and leaving as soon as he could at the end so that he would not be alone with CD. Learners, he stated, stayed

behind with him so that he would not be alone with CD who tended to arrive first and leave last.

41. Mr Huxley described in his statement how his first impression of the claimant was of a confident extrovert and an attention seeker with a high opinion of his own worldliness, abilities and appearance. Someone who believed himself to be talented and who regularly touted for recognition of his talent by others. He dressed to impress sometimes wearing unusual items but he was always neat and tidy.

Submissions

42. The respondents produced a written skeleton argument set out over 11 pages and 62 paragraphs.

43. The claimant's representative made oral submissions.

44. For the respondents reference was made to section 26(3) of the Equality Act 2010, submitting that the claimant was under an obligation to show that CD had engaged in unwanted conduct related to sex that had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, and that Mr John Huxley treated him less favourably because of it. The burden of proof lies with the claimant.

45. As to the facts, it was accepted that on 20 September 2016 the claimant spoke to John Huxley concerning CD behaving inappropriately. During the conversation the claimant smiled and at stages laughed when describing what occurred. Mr Huxley correctly advised the claimant to log the actions and make a report to the safeguarding officer, Michelle Greenwood. This was in accordance with the respondent's policies on harassment and safeguarding. Notwithstanding this the claimant spoke with Ms Greenwood but did not make a formal complaint. He wrote to the learner, expelling her from the class. She was required to meet with Michelle Greenwood to discuss his concerns.

46. After Ms Nagy told the claimant that he should not have done what he did in terms of expelling the learner. The claimant resigned then raised a grievance.

47. CD was interviewed by Ms Greenwood and Ms Greenwood took the view that there was no sexual harassment involved.

48. Mr Roberts then interviewed Mr Huxley on 19 October 2016 as set out in the meeting note.

49. The respondents assert there are no issues of fact on which the claimant can successfully rely to prove that Mr Huxley is liable for the discriminatory conduct complained of. The claimant must establish that CD's comments were unwanted and had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. As to that conduct CD made enquiries about the claimant's wellbeing out of concern for him. They engaged in conversations about his religion and his intimate and social life. This could not be unwanted conduct. The claimant has not proved that harassment occurred.

50. Any question about his sex life was on a Christian basis therefore was not related to the claimant's sex. After further discussion concerning the actions of CD it was submitted that if the claimant perceived her actions amounted to harassment then under section 26(4) the claimant's perceptions were unreasonably held.

51. There was reference to Lord Justice Underhill at paragraph 22 of **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**:

“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

52. The submission is that there is no objective evidence to prove the claimant perceived the actions of CD as harassment given the way he smiled and laughed when raising the issue with Mr Huxley, and thereafter failed to raise a formal complaint.

53. Turning to the comments of Mr Huxley recorded on 19 October 2016, the observation of Mr Huxley that the claimant may have been proud of CD's attention was not evidence of less favourable treatment by reason of sex on the grounds that if a female assessor acted in the same manner as the claimant Mr Huxley would have had the same feeling of uncertainty regarding her motivation. In determining whether Mr Huxley's conduct amounted to less favourable treatment the Tribunal is guided to consider what prevailed in his mind at the time he made the comment. He commented as he did because of the claimant's own conduct, smiling and laughing, when reporting CD's behaviour and failed to make a formal report. The comments were based on the claimant's smiling and laughing conduct. It is therefore denied Mr Huxley treated the claimant less favourably than he would have treated a woman who responded similarly to the claimant.

54. In the submission of the respondents the claimant's only evidence of discrimination is his strong feeling that he was discriminated against. Such a feeling does not of itself show discrimination and the Tribunal ought not to infer it where there is insufficient evidence from the claimant.

55. The brief submission for the claimant was that the Tribunal should take the claimant's evidence of the harassment at face value. There was nothing to suggest anything had been fabricated.

Discussion and Conclusions

56. The wording of section 26 has been set out above. We are concerned here with subsection (3) with the first question: has A (respondent) or another person (the learner, CD) engaged in unwanted conduct of a sexual nature or that is related to sex?

57. We conclude that the learner had engaged in unwanted conduct on the basis that the claimant specifically went to see Mr Huxley, who was not his line manager, to inform him of this conduct. Had it been wanted conduct then in our judgment there would have been no report

58. Was the conduct of a sexual nature? Mr Huxley's note of his meeting with the claimant on 20 September 2016, signed by both of them, says that:

“He has been made to feel uncomfortable by her persistent direct questions regarding his marital status, intimate behaviours and relationship matters.”

59. We take the view that these words are referring to conduct of a sexual nature, looking particularly at the words “intimate behaviours and relationship matters” which were chosen by Mr Huxley to describe what was reported to him by the claimant.

60. Did the conduct have the purpose of effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? We have not received evidence from the learner but on the basis of what she is reported to have said to Michelle Greenwood we cannot find that her conduct had the purpose of harassing the claimant.

61. However, did it have the effect of harassing him? When considering whether the conduct has the effect referred to we must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

62. The claimant's evidence in chief deals with his feelings after becoming aware of the comments made by John Huxley rather than his feelings consequent upon the actions of the learner. Thus there is no direct evidence as to how the conduct of CD affected him with reference to his dignity or the creation of an intimidating, hostile, degrading, humiliating or offensive environment for him.

63. The claimant does refer in his witness statement to stress induced diverticulitis induced by how badly the respondent had treated him and the learner's unwanted conduct, but this does not in our judgment go so far as to give evidence as to how the conduct affected him in terms of the matters set out in section 26(1)(b)(i) and (ii).

64. As to the claimant's perception we know that he felt sufficiently strongly to report matters to Mr Huxley. As to other circumstances, the claimant did not make a formal complaint to the safeguarding officer although he did speak to her informally. He started arriving at school only a couple of minutes prior to teaching and leaving as soon as he could thereafter with other learners staying behind so he would not be alone with CD. The claimant excluded CD from the class.

65. Looking at these circumstances we conclude that it is more likely than not that an intimidating atmosphere was created and that it was reasonable for the learner's conduct to have had that effect upon the claimant.

66. Subsection (3)(c) refers to A harassing B if, because of B's rejection of the conduct, A treats B less favourably than A would treat B if B had not rejected the conduct.

67. The less favourable treatment relied upon by the claimant is represented by the statement of Mr Huxley to Mr Roberts, when Mr Roberts was enquiring into the claimant's grievance.

68. There is no doubt that the words used by Mr Huxley can amount to "treatment" of the claimant, but is the treatment less favourable than it would have been had the claimant not rejected the conduct?

69. Looking again at the notes of the meeting when Mr Huxley expressed his views as to his overall impression of the claimant and how he presented himself on 20 September 2016, we find that Mr Huxley's comments were neither more nor less favourable because the claimant had or had not rejected the conduct of the learner. In our judgment Mr Huxley's comments were only made because he was asked questions by Mr Roberts and he took the opportunity to voice his opinions on the claimant.

70. Mr Huxley had got to know the claimant over the two years when the claimant was involved with the first respondent and had formed an adverse opinion of him. The behaviour of the claimant when he came to report matters on 20 September 2016 was consistent with how Mr Huxley had perceived the claimant to be over the preceding two years with regard to his character.

71. In conclusion we cannot find any causal link between the less favourable treatment and the conduct complained of and so the claimant's claims fall to be dismissed at the final stage of our examination of section 26(3) of the Equality Act.

Employment Judge Sherratt

30 October 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

03 November 2017

FOR THE TRIBUNAL OFFICE