



EMPLOYMENT TRIBUNALS

Claimant: Miss Sharon Morris

Respondents Dija Ltd

Heard at: Cardiff **On:** 8 - 10 February 2017

Before: Employment Judge P Cadney

Members: Mr W Davies

Ms P Palmer

Representation:

Claimant: Mr R Vernon (Counsel)

Respondent: Mr A Roberts (Counsel)

JUDGMENT

This is the unanimous decision of the Employment Tribunal:-

The claimant's claims of :-

- i) Unfair dismissal;
- ii) Sexual harassment

are dismissed .

REASONS

1. By this claim the Claimant brings claims of constructive unfair dismissal and sex discrimination; the allegation of sex discrimination being that of harassment contrary to Section 26 of the Equality Act 2010.
2. In summary the Claimant's case is that she held a meeting with the owner of the Respondent Mr Shayban Al-Ibrahim on 31 March 2016. At that meeting she conveyed to him a number of complaints about a fellow employee, the Respondents Human Resources Manager, Alex Meek that had been made to her by other members of staff. She further discovered on or about 8 April that a meeting Ms Meek had allegedly attended with a work colleague had in fact been attended with a friend and she notified Mr Al-Ibrahim of this fact and provided some notes to him on Monday 11 April. On 14 April she had a meeting with Mr Al-Ibrahim at which she alleges the sexual harassment took place. As will be referred to in greater detail later comments he made about the action she should take in respect of the menopause are alleged to amount to sexual harassment. She resigned on 18 April lodging a grievance against Mr Al-Ibrahim and Ms Meek. The constructive unfair dismissal consists in the breach of the implied term of trust and confidence firstly on the basis of the sexual harassment and secondly as it is put in paragraph 24 of the Claimant's pleaded case, "*The Claimant contends that the Respondent breached the implied term of mutual trust and confidence and relies on the harassment undertaken by Mr Al-Ibrahim and Mr Al-Ibrahim's refusal to intervene in the workplace issues she had identified.*"
3. The Respondents case in summary is that there is a dispute of fact as to what precisely was said by Mr Al-Ibrahim, but in any event and on any analysis the comments taken in context cannot amount to a breach of Section 26 of the Equality Act 2010; and that it is not factually true that Mr Al – Ibrahim refused to intervene in the workplace dispute. Accordingly they submit that neither factually or legally can the events between 31 March and 14 April in respect of the Claimant's complaints about her colleague Ms Meek amount to a breach of the implied term of mutual trust and confidence.

Facts

4. As set out above the events with which we are concerned occurred in a very narrow time frame, between 31st March 2016 and 18th April 2016 at which point the claimant resigned. The claimant had been employed by the respondent as Office Manager from 4th June 2012 and, as she states at paragraph 3 of her witness statement, she had a good working relationship with Mr Al-Ibrahim until the events following the meeting on 31st March 2016.

5. In the days leading up to that meeting the claimant had spoken two other employees, Ms Mafalda Curral and Ms Hannah Lewis and all three were of the view that the conduct of Ms Alex Meek, the HR Manager, was "inappropriate". Both the others had complaints about Ms Meek's conduct towards themselves; and made allegations concerning the claimant which were that Ms Meek had been making derogatory comments about her. The claimant agreed to take these complaints to Mr Al-Ibrahim together with her own concerns as to aspects of Ms Meek's conduct.
6. She made notes of the meeting and in the notes she sets out the concerns she wished to raise with Mr Al – Ibrahim and goes on to record him saying, "*However Shay did say he would speak to Alex about these issues and he agreed that she should not have made such comments about me to other colleagues. He was also very disappointed to learn that Alex had made a topic of conversation within the office about a matter that had occurred during the DPG awards night in Birmingham on 21 March 2016*". On or about 1 or 2 April Mr Al-Ibrahim spoke to both Hannah Lewis and Mafalda Curral about the allegations.
7. The next event is that Ms Meek on 7 April attended a meeting at Social Services. According to the Claimant she had said that she was attending with another employee when in fact the following morning she discovered some notes on a photocopier from which it became apparent that the person whom the Claimant was accompanying was not an employee of the Respondent. She took the notes to Mr Al-Ibrahim and informed him of what she had discovered.
8. On 8 April 2016 Mr Al-Ibrahim had a meeting with Ms Meek the outcome of which is recorded in a letter dated 11 April 2016. The main conclusion was that she was advised "*To take a step back from general conversation within the office. I understand as your role as the HR Manager it forms part of your role to look after the wellbeing of employees. It is your job to ensure if you see employees in the office unhappy to speak to them in order to minimise any further incidents. I would like you to communicate all information to me first and take my lead on what action or support I would like you to take.*" Ms Meek's evidence and that of the others, and indeed one of the Claimant's complaints, is that Ms Meek acted upon this and withdrew from general social interaction in the office.
9. The Claimant's primary complaints are of events on Thursday 14 April. In her notes of the meeting she describes feeling extremely fatigued due to the menopause and generally feeling unwell. At approximately 10.40am she went into Mr Al-Ibrahim's office and said, "*My intention was asking if I could take a days unpaid leave so I could go home and rest and also speak to him about the atmosphere in the office that was being given off by Alex which I believed to be as a result of Shay having spoken to Alex about the concerns I and others in the office had brought to his attention about Alex. The conversation went as follows: Me: Shay I'm feeling extremely exhausted and unwell. Shay: Yes I can see that. Me: It's the menopause, I'm not sleeping well and I wondered if I could take the rest of the day as unpaid leave. Shay: You need to sort it out. Me: What do*

you mean? Shay: You need to sort out your menopause. I've noticed this has been happening at least once a fortnight. You know we do keep records of sickness. At this point I became emotional. I was playing with a miniature plastic slinky with my hands. Me: Yes I know, and I also keep a record of my sickness so I am well aware of how often this is happening although sometimes it's a migraine and I suspect it's the menopause causing them at the moment. Shay: Well I've said to you before, why don't you go part time? I know you have said that you can't afford to, but do it for six months or so. I'm not trying to get rid of you, but if you work a few days a week you can sleep on your rest days. What will you do when you go home today? Me: Sleep. Shay: Exactly. So like I said you can sleep on your rest days. Me: I don't think it works like that Shay and I don't know how you think I can just sort my menopause out. Do you want me to contact my doctor and ask them to prepare a report for you? Shay: No I'm not saying that I don't believe you. Me: Would you like me to see a private doctor of your choice so that they can prepare a report for you? Shay: You can see a private doctor if you like, I will pay for it, but I don't want a report. I'm not saying I don't believe you, I think you should go part time."

In respect of the investigation into Alex Meek the notes read as follows:
"Me: I think you need to sort out what's going on in the office with the atmosphere. Shay: Well that's what I mean. People in the office have complained, no not complained, spoken to me about your mood swings. They don't know how to approach you and they can tell by your body language that you are not well. They are too afraid to speak to you. Me: I was actually talking about the issues with Alex. You have clearly spoken to her because she is being very off with people who also spoke to you and making them feel uncomfortable. Shay: Yes, I have spoken to Alex. To be honest she is saying she didn't say these things. Me: And what about the three hours she spent out of the office claiming to be supporting an employee when she wasn't? Shay: She was with a colleague. Me: You read the notes I handed to you from the printer. Shay: Yes, I read them. Me: Then you know she wasn't with a colleague, but the people she was with don't work for Dominos. Shay: It was a colleague who didn't want anyone in the office to know. I've told her that in future regardless of whether the employee wants anyone to know or not, she has to put it in the calendar and say who she is with. Me: I'm sorry I don't believe Alex was with a colleague and the notes indicate otherwise. Shay: Well what do you want me to do? I investigated it and Alex denies it. To be honest I think there is too much of this (he gestured with talking with his hands going on). Me: It wasn't a formal investigation. Shay: No grievance was raised. Me: I came to you informally so it was an informal chat. Shay: So what do you want me to do? I have spoken to her and she said she was with a colleague. Me: Maybe you should conduct a formal investigation, but you would need to get guidance from outside the office. Shay: What do you mean? Me: Get HR advice from an external source as the issue is raised about the HR Manager here. Shay: There is no point. I'm not doing that."

10. There is a dispute as to the exact order of events and the words used, but in general terms the contents of that meeting are not disputed. There is a dispute as to how the meeting ended. Mr Al-Ibrahim states that she threw a slinky toy at him, hitting him on the chest and subsequently went out slamming the door. The Claimant states that she did not throw the slinky at him, but threw it down on the desk from where it bounced striking him in the chest and that purely coincidentally he had the window open causing there to be a draft so that when she left the room the door slammed behind her, although she did not herself slam it. However, for our purposes nothing turns on the resolution of this dispute.
11. On 18 April the Claimant wrote resigning and lodging a grievance saying, *“Please accept this letter as my written notice to terminate my position as Executive Assistant PA Office Manager on the basis I feel I have been discriminated against due to my sex and age following your comments to me on Thursday 14 April 2016 and the context of all the previous problems that I need to sort my menopause out. It has also come to my attention that on or around 2015 you questioned colleagues about my menopausal state by asking them “how are you coping with Sharon’s menopause and her mood swings?” As a result of your comments and the context of all previous problems I now feel that my position has become untenable and that there has been a fundamental breach of my contract of employment.”* She then sets out her grievances which are those which she raised in the meeting of 31 March and she asks that those grievances be addressed by outsourced HR resources. As the Claimant accepted in evidence the resignation letter appears to indicate that the only matter which caused her to resign was the alleged discriminatory comment on 14 April, and (as the Claimant suggests in the letter, but about which we have no evidence at all) a comment in October 2015.

Sex Discrimination

12. The Claimant’s case of sex discrimination is that she suffered an act of harassment within the meaning of Section 26 of the Equality Act 2010 which provides:
 - (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.
.....
 - (4) In deciding whether the conduct has the effect referred to in sub section (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.

13. In considering this allegation we have to bear in mind the background which is not essentially in dispute. As set out in the Claimant's witness statement until the events with which we are concerned she believed she had a good relationship with Mr Al-Ibrahim and, on the basis of the evidence before us, there is no complaint about anything he had done prior to 31 March 2016. Equally there is no dispute that the Claimant had suffered the symptoms of the menopause for some years and that she had been entirely open about this with colleagues and Mr Al-Ibrahim. There had been a number of discussions with other colleagues about this and in particular discussions on a relatively regular basis with Mr Al-Ibrahim during which he had made suggestions which he effectively repeated in the conversation of 14 April, and which he states and we accept, were intended to be helpful and supportive. He fully accepts that in previous conversations he had suggested that the Claimant consider part time working given the levels of exhaustion and fatigue caused by the menopause, that in particular he had little faith in general practitioners and had told the Claimant that he would pay for her to see a private consultant to see whether there was any treatment or means of managing the menopausal symptoms which her GP had not considered. The Claimant was in fact perfectly happy with the advice she was receiving from her GP and did not take him up on that offer.
14. In our judgement the conversation on 14 April has to be seen in the context that it was one of a number of very many conversations about this issue and one in which effectively Mr Al-Ibrahim was repeating things he had said a number of times before. There is no suggestion that on any earlier occasion that the Claimant had objected to or regarded his comments as harassment. However, on this last occasion the Claimant did object to his comments and therefore in our judgment Section 26(1)(a) is satisfied that it was subjectively unwanted conduct from the claimant's perspective.. In addition given that it relates to a condition which can only affect women, it is related to a relevant protected characteristic.
15. In our judgment the real issue is in relation to Section 1(b) whether the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. It has never been suggested that the purpose of Mr Al-Ibrahim's comments was to have the prohibited effect and indeed had any such suggestion been made we would not have accepted it given that all that Mr Al-Ibrahim was doing was repeating comments which he had made many times before and to which there had been no objection.
16. As is set out above in sub section (4) in determining whether it has the effect we had to 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. Clearly on this occasion in the perception of B, Mr Al-Ibrahim's conduct did have that effect. However, in our

judgement the other circumstances of the case, in particular, include the fact of the long background of discussions about the Claimant's menopause, about the symptoms which it caused and about the prognosis and treatment about which the Claimant had been entirely open and about which Mr Al-Ibrahim had made a number of suggestions. In those circumstances it appears to us impossible to say that it was reasonable for the conduct to have had the prohibited effect, given that in reality it was no more than the repetition or continuation of conversations which had gone on many times and for many years. It is not at all clear why the Claimant on this occasion took exception to comments which she had perfectly happily discussed with Mr Al-Ibrahim before but in our Judgment in those circumstances the claim for sexual harassment is not made out.

Constructive Dismissal

17. In our judgment, just as the comments made by Mr Al- Ibrahim did not amount to sexual harassment, they cannot whether individually or cumulatively amount to or form part of a breach of the implied term of mutual trust and confidence, and for essentially the same reason. Mr Al - Ibrahim's comments were in reality a continuation and repetition of earlier conversations couched in very similar terms. The fact that the claimant on this occasion objected to them whereas previously she had cannot convert them looked at objectively to such a breach.
18. As set out above the other element of the alleged breach of the implied term of trust and confidence on which the constructive dismissal claim is founded is the alleged refusal to intervene in the workplace issues. It was effectively accepted in cross examination by the Claimant that the pleaded claim that she relies on as a breach of implied trust and confidence that Mr Al-Ibrahim had refused to intervene in the work place issues was not factually correct. That is self evident from the Claimant's own notes of the meetings as set out above. Indeed the claimant's contemporary complaint is precisely the opposite, that Mr Al – Ibrahim had intervened but that she was unhappy at the outcome of his having done so. Whilst it is clear that the Claimant did not know the specifics of the meeting and did not know the contents of the letter of 11 April it is clear from her own notes that the Claimant was aware that Mr Al-Ibrahim had spoken to Ms Meek and that as a result she had withdrawn from social interaction in the office, which is what she had been advised to do. Indeed it is one of the Claimant's complaints. It is therefore very difficult to see where the allegation of refusal to intervene in the workplace issues comes from, or how it can be maintained.
19. Thus taken simply on her pleaded case the claim would be bound to fail as it is simply factually incorrect. However, in the course of the hearing the Claimant's case has been put rather more widely, in that it is not now alleged that Mr Al-Ibrahim refused to intervene but rather that he failed adequately to do so; and in particular that he failed to heed the Claimant's suggestion that he should appoint an outside investigator to investigate

the allegations against Ms Meek because the Claimant was not satisfied that he had investigated them adequately or drawn appropriate conclusions.

20. It appears to us that even if true none of these matters are capable of amounting to a breach of the implied term of mutual trust and confidence. The Claimant had taken complaints about Ms Meek from other colleagues to Mr Al-Ibrahim. How Mr Al-Ibrahim dealt with those matters was entirely a matter for him and Ms Meek. If Ms Meek had been behaving unacceptably and if that unacceptable behaviour had continued towards the colleagues who had gone to the Claimant to complain then clearly further action would have needed to have been taken, but in and of itself to fail, in the opinion of the claimant to deal sufficiently severely with Ms Meek on this occasion cannot in our view be a breach of any duty owed to the Claimant. Put simply disciplinary sanctions are confidential between that employee and the employer.
21. Similarly in our judgment the Claimant's complaint is effectively that it was apparent from the meeting that Mr Al-Ibrahim had accepted what Ms Meek had said, when Ms Morris took the view that he should not have accepted it and formed the view that she was lying. Self evidently Mr Al – Ibrahim was entitled to form his own view, and we cannot see how failing to share the claimant's can individually or cumulatively amount to or contribute to a breach of the implied term. Similar considerations apply to the claimant's contention that her allegations should be subject to external investigation. Once again this not in our view capable of amounting to a breach of the implied term of Ms Morris's contract of employment. Put simply the question of what, if anything, Ms Meek had done wrong and what penalty, if any, she should suffer were entirely matters between Ms Meek and Mr Al-Ibrahim and did not concern the Claimant at all. In those circumstances whether the Claimant believed Mr Al-Ibrahim should or should not have accepted Ms Meek's explanation and whether the Claimant believes there should have been some further investigation with some different outcome in our view cannot be a breach of any implied term.
22. It follows given the narrow way that the case was put before us, that as we have rejected all of the bases upon which the Claimant asserts that she was constructively dismissed the Claimant's claim for constructive dismissal must also be dismissed and accordingly all of the Claimant's claims are dismissed.

Employment Judge P Cadney
Dated: 16 May 2017

JUDGMENT SENT TO THE PARTIES ON

17 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.