



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs K Belle

v

Al Shira'aa Farms Limited

Heard at: Watford

On: 1 & 2 February 2018

Before: Employment Judge AB Clarke QC

Members: Mrs S Goldthorpe and Mr C Surrey

Appearances

For the Claimant: Ms S Jenkins, Friend.

For the Respondent: Mr S Brittenden, Counsel.

JUDGMENT

1. The claims for direct disability discrimination and harassment are dismissed.

REASONS

Background

1. The respondent is a farming business, the controller of which is Sheikha Fatima Bint Hazza' Bin Zayed Al Nahyan. It is principally concerned with equestrian sports and cares for and trains sporting horse from foals to fully grown stallions.
2. The claimant was employed as a groom in June 2016, she had previously worked for the respondent as a cleaner providing her services via a business run by her sister. Having some previous experience of working with horses when a teenager learning to ride the claimant wanted to move to being a groom. The respondent's manager (Mr O'Brien) knew this, had a vacancy and took her on.

3. The claimant was inexperienced where stallions and competition or sporting horse were concerned. Nevertheless she was a willing and generally able worker, although Mr O'Brien had some concerns about her common sense and judgement as a result of some minor incidents. We illustrate by reference only to one. She had appeared to think it appropriate to give a reference on behalf of the business concerning a casual worker of her acquaintance, but Mr O'Brien found out about this and gave the reference himself.
4. The claimant's employment was terminated on 7 January 2017 on the instructions of the Sheikha when the claimant raised criticisms (by letter or text message) of Mr O'Brien's conduct towards staff and animals. The claimant considered him a bully towards both and told us of episodes of extreme violence towards animals (both horses and dogs) and of a regime of verbal aggression and threats towards all members of staff including herself.
5. The evidence before us regarding Mr O'Brien's conduct was necessarily limited having regard to the very limited scope of the case. The claim form in this case made allegations of breach of contract, unlawful deductions from wages and breaches of the working time Regulations. All those claims were withdrawn at a preliminary hearing before Employment Judge Milner-Moore on 27 June 2017. The claimant also made claims of unfair dismissal and detrimental treatment contrary to s.47(b) of the Employment Rights Act 1996 and of disability discrimination.
6. The claims which were live before Employment Judge Milner-Moore were all presented outside the primary limitation period. Applications to extend time in respect of all except the disability discrimination claims were refused. That claim (for harassment and direct discrimination) was noted to be one based upon allegations falling within a very narrow compass of fact.
7. Given the disputes of fact between the parties and the evidence we have heard it is necessary for us to set out a little background to the orders made by the Employment Judge.
8. The unfair dismissal and the public interest detriment claims focussed on alleged incidents of animal cruelty taking place in the summer of 2016, and said to have been reported (indirectly) to the Sheikha. It was said that as a consequence Mr O'Brien's attitude towards the claimant changed, that he bullied her and eventually dismissed her on 7 January 2017. The Judge was told that at some time between 1 and 6 January 2017 (that is just prior to the claimant's dismissal) the incident relied upon as an act of disability discrimination took place.
9. The claimant suffers from right sided hearing loss consequent upon problems (leading to an operation) in her childhood. At the time in question (in late 2016 and early 2017) she was in the process of being assessed to see if a hearing aid would help. She had not got one at the time. The respondents accept that at the material time she was disabled within the meaning of that term in s.6 of the Equality Act 2010.

10. The Judge recorded the timing of the incident, the subject of the disability discrimination claims in her notes of what was said to her by the claimant, in her judgment and in the case management summary. The claimant alleged at this time that Mr O'Brien had said to her "When are you getting your fucking hearing aid?"
11. We heard evidence from both the claimant and Mr O'Brien. It was clear from what the claimant told us and from her manner of giving evidence that she suffered from and still suffers from severe anxiety: she described herself as "broken" by the end of her employment. She was unable to come to work after making her complaints in January, but was (of course) dismissed very shortly thereafter.

The incident

12. There is a very considerable measure of agreement between the parties about the incident itself. Mr O'Brien accepts that he asked her about getting a hearing aid, knowing (from her sister) that a hospital appointment which she had asked for an extended lunch in order to attend was to consider her having one. The hospital appointment was in early December 2016. The claimant's sister had told Mr O'Brien of the claimant's hearing problems (of which he was previously unaware) when she saw the claimant leaving the premises and on asking where the claimant was going was told that she was attending a hospital appointment. She also told Mr O'Brien that the claimant was a little embarrassed about talking about the problem.
13. Mr O'Brien says that in late December 2016 or early January 2017 he and the claimant were working on the farm moving foals between fields and that he called out to her on a couple of occasions when her back was to him and she did not appear to hear. He was not unduly concerned because it was a wet and windy day, but he thought that she should have heard him. Hence, as they went back from the field he asked about the hearing aid.
14. Mr O'Brien denies that he swore. The claimant accepts that using the "f" word is common in casual speech at the farm and we saw an example of her using it in an amicable exchange of texts with Mr O'Brien in October 2016. She says that its use did not concern her, either generally or in this context. Hence it is arguably not material for us to decide who is correct. However, on balance we prefer the claimant's evidence on this point. We think it more likely than not that Mr O'Brien did say "fucking hearing aid". He did not intend to be offensive, any more than the claimant did when referring to a "fucking fence" in the text referred to. Equally no offence was taken by the claimant.
15. The key issue of dispute between the parties is whether Mr O'Brien asked the question in an aggressive manner and is part of a campaign of bullying against the claimant. Of course, it is the claimant's evidence that he did not single her out, but was equally appalling in his behaviour towards all other employees (some nine employees) all of whom were junior to himself. The claimant told us that for her this episode was the straw that broke the camel's back and was what finally "broke" her.

16. In order to resolve what is clear conflict of oral evidence, we have looked at a number of matters which we consider below.
17. We first consider the background allegations of mistreating animals and of whistle blowing in respect of that alleged mistreatment. We heard very limited evidence in this regard. Had the unfair dismissal and public interest disclosure issues been before us, it is clear that a great deal more evidence would have been required. In the absence of such additional evidence it is impossible for us to reach conclusions as to who is telling the truth. The respondent contends that all that the claimant actually witnessed was the kind of firm and robust handling of large excitable animals which is necessary in this environment, and inexperienced as she was she misunderstood it. The claimant, on the other hand, says that Mr O'Brien's actions went much, much further than that.
18. The claimant certainly complained about him in writing in January 2017 and, having done so, she was almost instantly dismissed. It is clear that prior to the complaint being made the claimant was regarded as someone who was going to continue in her employment because she had just been offered a new contract of employment. We also note that no procedure was followed in respect of her dismissal, although she was of course someone with less than two years continuous service.
19. These background matters do not assist us in deciding what happened during the key conversation. That the complaint of bullying and so on lead to dismissal does not necessarily mean that the allegations were accepted as true, either in whole or in part. It might just as well have been the case that the Sheikha was reacting to their repetition she had, of course, been told of them in mid 2016. We do consider however that the claimant (for good reason or not) did consider that Mr O'Brien had behaved badly in relation to staff and animals: she found her working environment both challenging and hostile.
20. Next we consider the claimant's evidence on the timing of the incident. As we have already noted, the claimant told the Judge in June 2017 that the incident happened in the period 1 – 6 January 2017, immediately before the end of her employment. She told us that it was the last straw which broke her. Yet, her witness statement placed the incident in October 2016. We accept that she had spent some time and care preparing that statement and carefully considering its contents. Indeed, she told us that when she wrote it she believed the incident to have taken place in October 2016. She corrected that immediately upon going into the witness box and suggested that the incident took place "during December 2016". In cross examination she was taken to what she had told the previous Employment Judge and said that the real position was that she knew that it was after she had returned to work on 28 December 2016 after the Christmas break.
21. That confusion concerned us, especially given that this was, according to the claimant, such an important event in the sequence and that her statement

goes on to deal with events in November and December 2016 and January 2017 in sequence. We were also concerned in the context of this confusion by two other matters. Firstly, the fact that this incident was not raised with the respondent at all until 23 March 2017. Secondly, the way the claimant gave evidence on this issue of changes in date.

22. In cross examination the claimant initially maintained that she did not discuss even a year with the Judge. Her account of why she had confused the date of the incident was itself a little confused and contradictory. We do not consider that the claimant was seeking to deceive us. However, we do conclude that her current recollection of the events towards the end of her employment is far from clear and most probably clouded by that measure of hindsight that many deploy when going back over traumatic events (especially in the course of litigation) coupled, in her case, by her highly anxious state and by the need to concentrate upon this one incident as being the only aspect of her allegations with which the employment tribunal was to be directly concerned and to rule upon.
23. In all the circumstances we conclude that Mr O'Brien's version of events is to be preferred in this regard. We consider that he asked a perfectly reasonable question in a calm and considerate way. The claimant was probably a little surprised that he knew of her hearing problems. As her sister had told Mr O'Brien, "she was a little embarrassed about this and did not generally talk about it". She was not otherwise concerned about this conversation. However, her more general concerns about Mr O'Brien and the ending of her employment have lead her, with hindsight, to attribute to this conversation a significance which it did not have at the time and to see what was an entirely innocent question on Mr O'Brien's part as having a place in what she sees as a catalogue of unacceptable behaviour.

Applying the law to the facts

24. Against that background of fact, we turn to consider the various aspects of the disability discrimination claims relied upon.
25. We turn first to the claim of harassment on the grounds of disability and deal with the various parts of the tests set out in s.26 of the Equality Act 2010.
- 25.1 Turning first to unwanted conduct. We think that this was unwanted in the sense that the claimant did not find discussion of her condition other than a little embarrassing, but she was content to discuss the matter it having been raised.
- 25.2 The conduct (the asking of the question) clearly related to her disability.
- 25.3 We do not consider that the conduct did have any of the forbidden purposes. The purpose was to learn whether the claimant was going to get a hearing aid.

25.4 We do not consider that the conduct had any of the forbidden effects. We do not consider that the very mild embarrassment experienced by the claimant equates to a violation of the claimant's dignity, nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In that regard we bear in mind the claimant's own evidence that she was unconcerned about people knowing of, or discussing, her hearing problems. We do not think that that is quite right, but it supports our view that this was, to her, a matter of little consequence. We also bear in mind that we should consider, in relation to whether the conduct had any of the forbidden effects, whether it was reasonable for it to have such an effect. We do not consider that it would be reasonable for an understandable enquiry made in those circumstances to have one of those forbidden effects.

26. Secondly, we turn to the claim for direct discrimination. Undoubtedly the claimant was subjected to the treatment in question, but was it less favourable treatment than that which would have been given to hypothetical comparator? We do not consider that it was. We consider that a non-disabled person who, for example, had a knee sprain and whose doctor was considering whether or not they should be given a knee brace would have been treated the same if seen to be limping or in pain after work in the field.

27. In those circumstances, and for those reasons both of the claims of disability discrimination must fail and are dismissed.

Employment Judge AB Clarke QC

Date: 26 February 2018

Sent to the parties on:

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For the Tribunal Office