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EMPLOYMENT TRIBUNALS

Claimant: Miss H Sudra

Respondents: (1) Kash PH Limited
(2) Kashif Jaffer

Heard at: East London Hearing Centre

On: 24 & 25 May and 16 July 2018

Before: Employment Judge Lewis

Members: Mr G Tomey
Mrs GA Everett

Representation

Claimant: Mrs D Sudra
Respondent: Ms P Hall (Consultant)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant's claim for unlawful harassment related to sex contrary to Section 26 of the Equality Act 2010 succeeds.

Remedy

2. The Claimant is entitled to a declaration that she has been unlawfully harassed contrary to s 26 and 40 of the Equality Act 2010.
3. The Respondent is ordered to pay the following compensation under s124(2)(b) of the Equality Act 2010 :
 - (i) Loss of income, 16 weeks x £40 = £640.00
 - (ii) Injury to feelings in the sum of £13,000.00
 - (iii) Uplift of 15% for failing to follow the Acas Code
 - (a) On loss of income = £96.00

(b) On injury to feelings = £1,950.00

(c) Total of uplift= £2,046.00

(iv) Interest on award for loss of income

From the mid point, the total period being 393 days from 18 June to 16 July

£736.00 x 0.5% = 0.01 per day x 196.5 days = £1.96.

(v) Interest on award for injury to feelings :-

£14,950 x 0.5% = £74.75 per annum = 0.20 per day,

For 426 days (from 16 May 2017 to date of judgment 16 July 2018) = £85.20

(vi) The total award payable by the Respondent to the Claimant forthwith is £15,686.00, plus interest of £87.16 = £15,773.16

REASONS

These are Written reasons for the judgment delivered orally, and are provided at the request of the Respondent

1 The Claimant brought claims of sexual harassment contrary to Section 26 subsections (1),(2) and/or (3). She worked for the Respondent as a receptionist at Pizza Hut Delivery, Hornchurch Essex from 1 August 2016 until 18 June 2017. Her date of birth is 16 March 2000.

2 A Preliminary Hearing was held on 5 March 2018 at which the Claimant was represented by Mrs Sudra, her mother and Ms Hall represented the Respondent. At that hearing the issues to be determined were identified only in so far as the type of claim was clarified as being a claim of harassment related to the protected characteristic of sex. The Claimant was required to send in further particulars of her complaint following that hearing, which she did and those are set out at page 22A of the bundle. In her further particulars the Claimant referred to complaints of unjustified threats, humiliating behaviour and unwelcome sexual advances. At paragraph 8 of the Claimant's witness statement she makes reference to feeling threatened following an incident described as sexual harassment and we are satisfied that the complaints before us are in respect of harassment related to sex, unwelcome sexual conduct, and retaliation for rejection of the same and they fall within Section 26 (1)(2) and/or (3) of the Equality Act 2010.

Findings of Fact

3 The Claimant started work on 1 August 2016 she was 16 years old at the time and

worked ten hours per week. Her older sister Reesha had worked for the Respondent and introduced her to the employer. Reesha left their employment during the time that the Claimant was there. Neither the Claimant nor Reesha had any problems in the workplace when the Claimant started; when she started work the Claimant was under the supervision of somebody called William but he left the Respondent in February 2017. At that time Sultan Tanha replaced William as the supervisor on shifts when the Claimant worked. He was not her sole supervisor, but she worked with him on a number of shifts. Previously she had not had to answer to him as a supervisor. From that time the Claimant started to experience problems with Sultan Tanha (Sultan) and also Heshmat Gholampour (Hesh). They would regularly speak to her rudely, start arguments with her and blame for things that either she had not done or were not her fault. We accept the Claimant's evidence that is how she was treated. We found the Claimant to be credible and where there is conflict with the Respondent's evidence we prefer that of the Claimant. The Respondent's witnesses were inconsistent in their own evidence between what they said in chief and in their cross-examination and on the balance of probability we prefer the account given by the Claimant. We accept the evidence set out in her witness statement which is consistent with her complaints made in her grievance to the Respondent and also supported by contemporaneous documents including text messages between the Claimant and her mother sent at the time that she complains the harassment took place.

4 We are satisfied that the Claimant was being truthful in her evidence and was not seeking to exaggerate what happened. We find that on one occasion sometime between February and July 2017 when Sultan had leftover cheese sauce and toppings on his hands after making pizza, he came over to where the Claimant was working and shook his hands in front of her face so that everything on his hands went on her face and clothes.

5 We also find that Sultan would seek out excuses or ways to have physical contact with the Claimant. This started with high fives and escalated to trying to hold her hand. When the Claimant tried to move away Sultan would still attempt, or make efforts, to try to have physical contact with her. He would come up behind her and whisper in her ear as an excuse to get too close to her. We find that the Claimant did challenge him and ask him why he was standing so close and she would try to move away; in response to this Sultan would try to deflect attention from himself and say to the Claimant that she should move away and that she was crowding him.

6 We also find Sultan's response when the Claimant moved away from him was to shout at her and find fault with her work; that he would then go to complain to Hesh that the Claimant had left her work station and was not doing her work and this led to her being unjustifiably criticised on a number of occasions for not doing work when in fact she was simply trying to avoid the unwanted contact with Sultan.

7 We accept the Claimant's evidence in respect of what took place on 16 May 2017. We find that Sultan found an excuse or an opportunity to hug the Claimant and then took hold of her by the waist, in the region of her hips, and looked her up and down and then walked off. We also find that from the Claimant's response it should have been clear to Sultan that she did not like what he did and it made her feel uncomfortable. We accept the Claimant found this upsetting and that she felt uncomfortable and dirty as a result.

8 We find that the Claimant was singled out by Sultan for this treatment. She was also told not to talk to people at work when others were allowed to chat and she was

criticised for work issues that were not of her making and that this then led to her being criticised also by Hesh in turn.

9 We also accept the Claimant's evidence (in paragraph 10 of her statement) that she found that she was having her shift cuts without warning or at short notice and we find that this contributed to her feeling of anxiety at work and her feelings that she was unable to raise her concerns or complaints with the Respondent.

10 We find that the incident which caused the Claimant to leave work on 18 June and not return took place as described by the Claimant in her witness statement. For the avoidance of doubt we accept the Claimant's evidence as to each the incidents upon which she relies as the basis of her complaint of sexual harassment.

The Law

11 The relevant section of the Equality Act 2010 are subsections (1), (2) and (3). We were referred to a number of cases by Mrs Sudra and Ms Hall including the case of **Igen v Wong** in respect of the reverse burden of proof.

Conclusions

12 Having found the facts that we have and accepted the Claimant's account of what took place we find that the conduct of Sultan was unwanted conduct of a sexual nature. He made numerous attempts to have physical contact with the Claimant, in his high-fiving her, holding her hand, hugging her and taking her by the waist and also in his conduct in going up to her and shaking the cheese and toppings over her and coming up behind her and whispering in her ear. We are satisfied that this had the effect of creating an intimidating, hostile and humiliating environment for the Claimant at work and in the circumstances we are satisfied that it was reasonable for it to have that effect: those circumstances including the fact that the Claimant was 17 years old at the time, still at school and in her first job.

13 We are satisfied that Sultan in criticising the Claimant without justification and blaming her for things that she had not done, singling her out for criticism or criticising for her not being at her work station and reporting her to Heshmat when in fact it was his conduct which caused her to leave her work station was less favourable treatment of the Claimant because of her rejection of his unwanted conduct of a sexual nature. We are satisfied that he singled her out and did not do this to others and it was because she made it clear that she did not welcome the conduct that he exhibited towards her which was of a sexual nature.

14 We have found that Heshmat joined in with the unjustified criticism of the Claimant but the evidence before us suggests that he was also prepared to criticise other members of staff without any real basis, or evidence; that was certainly the view of a group of staff who had their own shared group on chat. We are satisfied that in the group there were men and women and they also referred to Heshmat blaming them for things that they had not done. We are not able to find that his conduct towards the Claimant was either related to her sex or retaliation for her rejection of Sultan's advances (his unwanted conduct). However we are satisfied that he did not do anything to prevent the conduct to which the

Claimant was subjected.

15 We have found that the events on 18 June were also part of the course of conduct that amounted to harassment of the Claimant. We find that the hostile, humiliating and intimidating environment was what then caused the Claimant to leave her job. We are satisfied that she would not have been treated in the way that she was on 18 June if she was a man and that treatment was related to her sex and her rejection of Sultan's unwanted conduct.

16 We were not specifically referred to the statutory defence but we were referred to training that the Respondent's witnesses were alleged to have had. We do not find that there is sufficient evidence of any clear policy or procedure at all dealing with sexual harassment and conduct in the workplace and there is no basis for maintaining the statutory defence to have been made out. We therefore find for the Claimant and go on to deal with remedy.

Decision on Remedy

17 Having given our judgment on liability orally on 16 July we heard further evidence on remedy. This consisted of evidence about the effect of the harassment on the Claimant from the Claimant's father, Mr Kiran Sudra who was cross-examined by Ms Hall. We then heard submissions from Mrs Sudra and Ms Hall.

18 Having considered the evidence on injury to feelings and on loss of earnings and submissions on the uplift for failing to follow the ACAS Code we have come to the following conclusions and our award is as follows: -

Loss of income

19 It took the Claimant 16 weeks to find another job and replace her income from the job with the Respondent. The Claimant's loss of income for those 16 weeks is £40 per week, which brings the loss of income to £640.00.

Injury to feelings

20 In respect of injury to feelings both parties addressed us on the basis that the correct band was the mid band of **Vento**. Ms Hall arguing for the award to be at the lower quartile of that band. We have taken into account the manner in which the Respondent defended these proceedings as being an aggravating feature: in calling the Claimant's honesty into question and attempting to discredit her work record, together with some of the hostile questioning to which she was subjected, causing the Employment Judge to have to intervene on more than one occasion. We accept that this conduct increased overall the Claimant's injury to feelings and caused her further distress and upset. As a result and we have concluded that the appropriate award for injury to feelings is £13,000.

Uplift for failing to follow the ACAS Code

21 We then considered the Acas code and whether to award an uplift to the award. Ms Hall's submission was that any uplift should be limited to 10% of the award.

22 The Claimant sent a detailed grievance letter to the Respondent following the incident on 18 June setting out her complaints of sexual harassment. We found that the investigation was entirely defective it did not in fact address the points raised by the Claimant nor did it provide any response to her complaints, there was some considerable delay over 7 weeks in dealing with the grievance and a complete failure to acknowledge her appeal. We are satisfied that there has been an unreasonable to follow the provisions of the ACAS code in respect of thoroughly investigating a grievance, dealing with the grievance in a reasonable time and providing an appeal. We took into account the fact that the Respondent is a small organisation but are satisfied that it did have access to legal advice throughout and we considered that the appropriate level of uplift in the circumstances is 15%.

23 We applied that to the award which prior to the uplift was £640.00 for loss of earnings and £13,000 for injury to feelings. After the uplift the award for loss of income is £736 and the award for injury to feelings is £14,950.00.

Interest on the award -correction

24 The Tribunal was not addressed by either party on the subject of interest on the award, however after having given oral judgment on 16 July 2018 it occurred to the Tribunal that it is required by Reg 2(1) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 to consider whether to award interest. The applicable rate of interest is 0.5% (Court Funds Rules 2011). The Tribunal sees no reason why interest ought not be awarded in this case. If either party disagrees with this decision then they may write to the Tribunal within 14 days of receiving this Written Judgment stating their reasons for objecting to the same.

25 Interest on the award for loss of income is payable from the mid point, the total period being 393 days from 18 June to 16 July, the mid point is at 196.5 days. The calculation of interest on £736.00 x 0.5% = 0.01 per day x 196.5 days = £1.96.

26 Interest on the award for injury to feelings is calculated as follows: £14,950 x 0.5% = £74.75 per annum = 0.20 per day, for 426 days (from 16 May 2017 to date of judgment 16 July 2018) = £85.20

27 The grand total award including the interest is therefore £15,773.16 and that is the amount which is payable to the Claimant by the Respondent forthwith.

Employment Judge Lewis

24 July 2018