



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MARTIN  
Members Mr G Anderson  
Mr D Clay

**BETWEEN:** Miss Amy Georgina Simkins Claimant  
and  
Mr and Mrs Khanna t/a Elm Lea Residential Care Home Respondent

**ON:** 18-20 June 2018

**APPEARANCES:**

For the Claimant: Mr F McCombie - Counsel

For the Respondent: Mr P Strelitz - Counsel

**RESERVED JUDGMENT**

The unanimous decision of the Tribunal is that the Claimant's claim succeeds and the Respondent is ordered to pay £5,000 compensation to the Claimant.

**RESERVED REASONS**

**The hearing**

1. The Tribunal heard from the Claimant and on her behalf from Amy Louise Bostock and Ms Penelope Jane Mead Topley. For the Respondent the Tribunal heard from Mr Arvin Rajenda Khanna, Mrs Aneeta Khanna, Miss Joyce Lilian Nay and Mrs Julie Ann Frith.

2. There was a bundle and supplemental bundle of agreed documents.

**The issues**

3. The issues were agreed by the parties as follows:

**Harassment claim – s 26 Equality Act 2010**

4. Did Mr Khanna act as alleged by the Claimant on 27 April 2016, 7 September and/or 15 September 2016;
5. If so, was that conduct unwanted and did it relate to the Claimant's sex;
6. If so, did that the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect;

**Unfavourable treatment claim – s18 Equality Act 2010**

7. Did Mr Khanna act as alleged by the Claimant on 27 April 2016, 7 September 2016 and/or 15 September 2016;
8. If so, did all or any of the incidents amount to unfavourable treatment because of pregnancy and/or because the Claimant was seeking to exercise her right to maternity leave?

**Time limits – s123 Equality Act 2010**

9. Was any EqA claim presented to the Tribunal outside the time limit;
10. If so, is there evidence of conduct extending over a period that would bring the claim in time; or would it be just and equitable to extend the time limit;

**Detriment claim s47c Employment Rights Act 1996**

11. Did Mr Khanna act as alleged by the Claimant on 27 April 2016, 7 September 2016 and/or 15 September 2016

**Time limits – s 48 Employment Rights Act 1996**

12. Was the detriment claim presented to the Tribunal outside the time limit;
13. If so, was it reasonably practicable to present the claim within the time limit'
14. If not, was it presented within a reasonable period thereafter.

**Remedy**

15. If any of the claims are successful, what is the appropriate remedy.
16. At the end of the hearing the Claimant said she was not continuing with her claims relating to 7 April 2017 and 7 September 2017 and therefore the Tribunal did not reach a conclusion on these matters. These reasons set out the facts in relation to these two dates by way of narrative and context.

**The law as relevant to the agreed issues**

**17. S26 Equality Act 2010**

Harassment

- (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 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.

## 18. S18 Equality Act 2010

18 Pregnancy and maternity discrimination: work cases

(1 )This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a )because of the pregnancy, or

(b )because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4 )A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5 )For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b )if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b )it is for a reason mentioned in subsection (3) or (4)

**19. S47c Employment Rights Act 1996**

***47C Leave for family and domestic reasons.***

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—

(a) pregnancy, childbirth or maternity,

(b) .....

**Preliminary issue**

20. There was a preliminary issue relating to legal professional privilege. This related to a document sent by the Respondents to the Claimant during the discovery process. The Claimant's application was to allow the document on the basis that privilege has been waived by the Respondents. The Respondents resisted the application. The document related to a file note from the Respondents previous solicitors from their initial advice on this matter. The document is eight pages long and on the front page in the top right-hand corner, in manuscript are the words "*Legal meeting + Legal Advice*".

21. The initial list of documents (including the disputed document) was sent on 27 July 2017 by the Respondents to the Claimant by email. There was inspection on 15 August 2017 also by email, which included the disputed document. The trial bundle, including the disputed document, was prepared by the Respondents and the document was resent to the Claimant by the Respondents on 7 September 2017. The bundle was finalised by the Respondents on 1 November 2017 and agreed with the Claimant on 7 November 2017, with the disputed document included, and sent to the Claimant. On 10 November the question of legal professional privilege was first raised leading to this application being made on 24 March 2018 and it being dealt with at the outset of this hearing.

22. It was agreed that the relevant law is *Al Fayed & Ors v Commissioner for Police for the Metropolis & Ors* [2002] EWCA Civ 780 (at paragraph 16):

*"(iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived....*

*(v)...., the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.*

*(vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.*

*(vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:*

*(a) the solicitor appreciates that a mistake has been made before making some use of the documents; or*

*(b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;*

*and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.*

*(viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.*

*(ix) In both the cases identified in (vii) (a) and (b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.*

*(x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."*

23. There is no suggestion of fraud so the question for the Tribunal is whether it was obvious that the document was privileged and was it obvious that it was sent by mistake. The document in question is marked 'Legal Meeting + Legal Advice'. The Tribunal heard from the Claimant's solicitor about his thought process when he received the document (on many occasions) from the Respondent. Mr Doswell said that it was not obvious to him that this was privileged and that he did think carefully about this question. His view was that the Respondent had waived privilege and the Claimant wanted to rely on this document and he had prepared the Claimant's case on the papers disclosed that included this document.
24. The Respondent's argument is that it was clear from the marking of 'Legal Advice' that this was a privileged document, this was an 8-page record of the first meeting the Respondent had with its solicitor and clearly sent by mistake. The document was disclosed by the Respondents first solicitor in these proceedings who are not representing him now. The Respondents position is that it was sent in error and that they are not relying on this document.
25. The Tribunal has considered the submissions from both parties and the Al Fayed case. The Tribunal notes that this is a substantial document comprising and not something that could easily be overlooked as to its significance especially given the manuscript annotation 'Legal Advice'. Significantly, the Respondents did not just send it once; as set out above, it sent it several times. On each occasion the Respondent had the opportunity to review the documents

sent but did not or decided that this document was to be disclosed thus waiving privilege. Mr Doswell considered this document and concluded that it had been deliberately sent on many occasions and that the Respondent had, by sending it repeatedly, waived privilege. The Tribunal found that Mr Doswell honestly concluded it had not been sent by mistake. The Tribunal found that the Respondent waived privilege and allowed the document to be produced in evidence.

### **The Tribunal's findings**

26. The Tribunal has made the following findings of fact on the balance of probabilities having heard the evidence, considered those documents taken to and considered the submissions from both parties. These findings are limited to those matters that are relevant to the issues and necessary to explain the decision reached. Even if not referred to below, all evidence has been considered. The Tribunal has focussed on the matters pertaining to 27 April 2016, 7 September 2016 and 15 September 2016 as set out in the list of issues. In writing these reasons and being mindful that they will be in the public domain, the Tribunal has as far as possible sought to preserve confidentiality in relation to sensitive personal information.
27. The Claimant was employed by the Respondent from 1 April 2015 as Health Care Assistant. Her role involved providing personal care to the residents, assisting at meal times and handling medication. The Claimant describes herself as having a *'solid background in health and social care having studied in this area and worked for a large care company'*. The Respondent disputes this statement on the basis that the Claimant had previously done some work for the Respondent but that due to her age (she was eighteen years old when she started her employment with the Respondent) her experience was limited. She had done two weeks work experience at Elm Lea while at school and did a limited amount of work for another company. The Tribunal accepts the Respondent's evidence that she was an inexperienced care worker who had shown potential during her work experience.
28. The Respondent are a partnership that owns and operate two residential care homes. The Claimant worked at the Elm Lea Residential Care Home ('Elm Lea') the other is Cornerways Residential Home. Elm Lea provides care to 15 residents. The premises are a detached house and the service users are located on two floors. There is typically one care assistant on each floor. The Respondent described the residents as having varying conditions related to old age and that some can become violent on occasion.
29. The Respondent operates a rotating shift pattern, with two carers working either 12 hour or 6-hour day shifts from 8 am to 8 pm or 8 am to 2 pm and 2 pm to 8 pm. There are two carers working night shifts from 8 pm to 12 am and 6 am to 8 am. On these shifts there is one carer awake and one asleep.
30. The Claimant has a physical medical condition which the Respondent was aware of and its risk assessment was that the personal care she gave the

residents did not pose a risk for her. She also had mental impairments which she had had for several years. From November 2015 at the Claimant's request, she predominately worked night shifts. The Respondent appointed the Claimant as Activities Co-ordinator however this was removed following a dispute with another carer and the Claimant was given more monitoring and assistance.

31. There was no dispute about the fact that the Respondent has had many staff become pregnant and return to work after having their baby.

**27 April 2016**

32. On 27 April 2016 the Claimant notified the Respondent that she was pregnant. The evidence in relation to this notification is in substantial dispute. The Respondent's case is that Ms Nay was alerted to the Claimant being upset at work and went to speak to her. Her evidence was that the Claimant said she was pregnant and that she was very upset. Ms Nay said that the Claimant said she was disappointed she had fallen pregnant and that her pregnancy was considered high risk because of her medical condition. Ms Nay told her she should speak to Mr Khanna.
33. The Respondents evidence was that during the meeting with Mr Khanna she said she was disappointed about her pregnancy because of her age and was uncertain about what her next steps would be. Their evidence is that they reassured the Claimant, asked her how far along her pregnancy was and when she was thinking of starting her statutory maternity leave. The Respondents evidence was that their standard risk assessment did not show that the work of a carer would place a pregnant woman at risk.
34. The Claimant's evidence in relation to this meeting is markedly different. Her witness statement states that she told Mr Khanna that she was excited albeit nervous about the pregnancy. The Claimant says that she asked for a risk assessment (which is denied by the Respondent), and that Mr Khanna told her he was disappointed as he had high hopes for her at Elm Lea. She said he asked her if she was going through with the pregnancy and that Mrs Khanna told Mr Khanna he could not ask such questions. She says she left the meeting distressed. The Respondent denied her version of events.
35. There was no evidence of the Claimant making any complaint about this meeting at the time. The Claimant's solicitor wrote a detailed letter to the Respondent on 14 November 2016 setting out various matters. There was no mention of these matters in this letter. The only reference to this meeting is "*On 27 April 2016 our client informed Mr Khanna that she was pregnant. She requested that Mr Khanna carry out a risk assessment to identify any protective measures that might be required.*" The first reference to complaints about this meeting was in the Claimant's claim to the Tribunal.

**27 July 2016**

36. There was one service user, who will be referred to as DA, who could be difficult



- and who, for some reason took against the Claimant. The Claimant says that on 27 July 2016 she was subjected to verbal abuse by DA who pushed in her stomach. Her case is that DA's behaviour was well known and that the Respondent took no steps to avert this incident which she says in all likelihood led to complications in her pregnancy. Her case is that there had been previous incidents between them and that she had told the Respondent that DA needed to be monitored for her behaviour around the Claimant. It is the Respondent's case that it told the Claimant before she became pregnant not to undertake personal care for DA because of DA's animosity towards her.
37. In cross examination the Claimant accepted that there had been an incident between her and DA in March and that Ms Nay had told her not to do DA's personal care. The Claimant said this was not formal advice and maintained she had to attend to DA's personal care.
38. The Respondent's case is that Ms Nay was told by Ms Ballard (Care Assistant) the next day at 8 am that there had been an incident between the Claimant and DA at about 10.30 the previous evening. Their case is that the Claimant had not reported it to them and had not noted the incident in the accident book which was normal practice and a requirement. Later on 28 July 2017 the Claimant's partner told Ms Nay that the Claimant had been pushed in the stomach. The Claimant accepts that she did not report the incident to the Respondents.
39. Having been told of the incident Ms Nay did a risk assessment for the Claimant and measures were recorded to reduce risks as the Claimant's pregnancy had progressed. These were that she must not lift anyone or bend down to change beds. The Claimant was to wear protective clothing when doing personal care and not use the hoist. The Claimant was to use the lift and the trolley to put the resident's clothes away and not get over tired and rest when she needed to. The assessment said that the Respondent would look at the Claimant's hours and make any adjustments needed and finally that the Claimant was not to have any contact with DA as DA did not like the Claimant and got irritated when she was around. The Claimant gave written notification of her pregnancy by giving her MATB1 to the Respondent during the first week of August 2017.
40. The Claimant was on sick leave from 25 August 2017 to 1 September 2017.

### **7 September 2017**

41. The Claimant confirmed that the reason for her absence was for a pregnancy related reason. She asked for a return to work interview before she came back. She referred to the risk assessment and asked to work mornings and afternoons but not night shifts and said she needed frequent breaks. This led to the meeting on 7 September 2017 about which the Claimant complains.
42. At this meeting the Respondent responded to the Claimant's requests. The Respondents said that their day shifts were fully staffed and they could not permit frequent breaks as service users needed to be supported on shift. The Respondent offered the Claimant alternative work which was to carry out

- activities for service users including doing manicures or she could work alongside the cook preparing tea for the service users. These were extra numerary positions created for the Claimant. The Respondents view was that it could not remove all risks in the care home environment. The Respondents position is that the Claimant could not take regular breaks as they had an obligation to the Care Quality Commission to have a certain number of staff available to assist residents at any one time.
43. The Claimant did not accept the alternative work offered and raised a grievance saying that effectively she was being told to take sick leave. This was in response to the Respondent's suggestion that the Claimant should speak to her GP and get advice as to whether it was safe for her to continue working given the complications in her pregnancy. The Respondent wrote to the Claimant on 15 September 2017 refuting that it was requiring the Claimant to take sick leave and confirming that the earliest date when her statutory maternity leave could start, and she could retain the maternity pay was 16 October 2017. The Respondent also offered other roles (subject to her GP saying she was fit to work) including a new temporary post of Care Assistant working the floor; a new shift pattern 2 – 6 pm which could accommodate her need for breaks (as the other care assistants could care for the residents). The Respondent would have funded this position personally as it did not have funding for this post. The Claimant refused the offer of alternative work and remained absent on sick leave raising a grievance the same day against the Respondents position saying that she believed she was being forced to take sick leave due to her pregnancy and that the Respondents were not willing to put in place measures needed to ensure that she could continue to work.
- 15 September 2017**
44. The Respondent convened a meeting on 15 September 2017 at Elm Lea. Present were Mr and Mrs Khanna and the Claimant. Mrs Mead Topley went with the Claimant but was not allowed to attend the meeting and sat in another room.
45. The Claimant's case is that Mr Khanna was overbearing and intimidating in this meeting and she describes him standing over her while she was sitting down. Her evidence is that Mr Khanna said he was very unhappy that she had made a grievance and said that he had had a generous offer to make her but now he had changed it. Ms Nay, on the Claimant's account, joined the meeting just after this comment. The Claimant said that Mr Khanna told her that she did not have a valid grievance and he would not look into it.
46. These matters were disputed by Mr Khanna who says he sat behind his desk across the room from the Claimant and did not say what the Claimant alleges. The Claimant says that she became very distressed in the meeting and suffered pregnancy related complications as a result.
47. Ms Nay also attended that meeting however she joined later and did not see how Mr Khanna was standing at the start of the meeting. She produced a note

of the meeting which she said was contemporaneous. The Tribunal does not accept this given the language used in the note and the fact that she did not produce this to the Respondents solicitor. The disputed file note (which was subject to the preliminary matter in this case, said that there were no notes of the meeting. On balance the Tribunal find that this note was created later.

### **The Tribunal's conclusions**

#### **27 April 2016 and 7 September 2016**

48. The Tribunal does not accept the Claimant's evidence of how the meeting on 27 April 2016 happened. The Tribunal found Ms Nay's evidence to be credible. Her evidence is supported by Mr and Mrs Khanna that the Claimant expressed her disappointment she had fallen pregnant and not the Respondents expressing their disappointment in her. Of note is that no complaint was made at the time and the solicitors letter written to the Respondent on 14 November 2016 makes no reference to what is now complained of. On balance the Tribunal prefers the evidence of the Respondent despite the evidence of Ms Mead-Topley. Ms Mead-Topley was not at this meeting and the Tribunal prefer to rely on the evidence of those who were.

49. Similarly the Tribunal prefer the evidence of the Respondent in relation to the meeting on 7 September 2016.

#### **15 September 2016**

50. The issues to be determined are whether the Claimant was harassed by Mr Khanna at this meeting pursuant to s26 Equality Act 2010 and whether she was subjected to unfavourable treatment pursuant to s18 Equality Act 2010. The parties disagreed on the law in relation to the s26 harassment claim and the ambit of the Claimant's claim in relation to the s18 claim.

51. The Respondent's position is that the issues in relation to the s26 claim state: "*if so, was that conduct unwanted and did it relate to the Claimant's sex*". The Respondent does not agree with the Claimant's position that as the harassment relates to her pregnancy it must relate to her sex. The Respondent submitted that the list of protected characteristics set out in s4 of the Act, includes pregnancy and maternity as stand along protected characteristics whereas s26(5) which sets out the relevant protected characteristics for harassment do not include pregnancy and maternity.

52. The Claimant submitted that it was hard to see how conduct relating to pregnancy would not relate to the Claimant's sex but conceded there was no case law on this.

53. The Tribunal finds that the list of protected characteristics in s 26(5) does not mention the protected characteristic of pregnancy and maternity although it is included in s4. However as only women can become pregnant the Tribunal finds that harassment on the grounds of pregnancy and maternity must fall within harassment on the grounds of sex. The Tribunal finds that although Mr Khanna denied standing over the Claimant as she alleges, that he did intimidate her by

standing over her in an overbearing manner and did engage in unwanted conduct which had the effect of leaving the Claimant upset and distressed. The Tribunal found Mr Khanna's evidence about this meeting to be unconvincing whereas the Tribunal found the Claimant's evidence about this meeting to be more likely to be what happened.

54. The Tribunal then considered the s18 claim of unfavourable treatment because of pregnancy or illness relating to the pregnancy. The Tribunal noted the agreed issues limit the Claimant's claim to pregnancy and/or exercising the right to maternity leave. The legislation at s18(2) gives two limbs to this provision which includes because of illness suffered as a result of pregnancy; however, the agreed issues do not reflect this.
55. The Tribunal notes that the Claimant was legally represented when the issues were agreed at a preliminary hearing on 27 June 2017 and there has been no application to amend the issues. Accordingly, the Tribunal considers itself bound by the issues.
56. The Tribunal notes the correspondence in which it was denied that there was any intention on the part of the Respondents to force the claimant to take sick leave due to her pregnancy and that they did not recognise the matter as a grievance as they felt they were remaking every effort to accommodate the Claimant's wishes to return to work. In this letter the Respondents sets out a suggestion that the Claimant start her statutory maternity leave on 16 October 2016 and until then they create a temporary position for her as a Care Assistant on afternoon shifts from 2 pm to 6 pm two or three times a week. On 16 September the Claimant rejected the offer made.
57. The Tribunal does not find this to be unfavourable treatment but because of the way that the issues have been formulated: *"If so, did all or any of the incidents amount to unfavourable treatment because of pregnancy and/or because the Claimant was seeking to exercise her right to maternity leave?"* the Tribunal does not find that the reason for the unfavourable treatment was that the Claimant was pregnant and intending to go on maternity leave. The evidence was that there have been many female employees who have become pregnant and taken maternity leave, and who have returned to work after their baby was born. The reason for the unfavourable treatment was because of the Claimant's sick leave and the effect this had on her ability to work in the period leading to her taking her maternity leave. The problem for the Claimant is that this is not how her claim has been formulated. Therefore, with some reluctance, this part of the Claimant's claim is dismissed.
58. The Tribunal considered what remedy should be awarded for this harassment. The Tribunal does not find that this incident was the reason for the Claimant's actions after she had her baby (which for reasons of confidentiality are not set out here). There was no medical evidence to link the two events and given the Claimant's medical history it is unlikely that the reason for the later events was because of the behaviour of the Respondent. The Tribunal awards £5,000 for this harassment.

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Employment Judge Martin  
Date: 10 September 2018

Judgment sent to the parties and entered in the Register on: 4 October 2018