



EMPLOYMENT TRIBUNALS

Claimant

Ms N Neate

v

Respondent

Peterborough Regional College

Heard at: Bury St Edmunds

On: 8 and 9 October 2018
19 November 2018 (in chambers)

Before: Employment Judge K J Palmer

Members: Ms J Nicholas
Mr D Sutton

Appearances:

For the Claimant: Professor J Kippin (Lay Representative)
For the Respondent: Ms J Coyne (Counsel)

RESERVED JUDGMENT

Judgment

It is the Tribunal's unanimous Judgment of this Tribunal that the Claimant's claim under section 26 of the Equality Act 2010 for sexual harassment fails and is dismissed.

REASONS

1. This case was held over two days in a live hearing and discussed for a further day in chambers.
2. The Claimant was employed as a lecturer in art, design and media by the Respondent from 24 August 2015 until 31 August 2017 when the Claimant resigned.

3. The Claimant presented a claim to the Employment Tribunal on 27 April 2017 alleging sexual harassment and then presented a further claim for unfair dismissal on 3 October 2017 pursuant to her resignation.
4. On 30 November 2017 by order by Regional Employment Judge Byrne both cases were consolidated and an order was given that they be heard together.
5. At an open preliminary hearing on 23 May 2018 before Employment Judge Laidler the Claimant's unfair dismissal claim was struck out on the basis that it had no reasonable prospect of success. This left the Claimant with only her sexual harassment claim to pursue. Very helpfully in Judge Laidler's Judgment she set out very clearly the issues arising from that sexual harassment claim as follows:

"The claim is of sexual harassment contrary to the provisions of s.26(1) of the Equality Act 2010. The following are the matters relied upon:-

- 1.1 Was the claimant looked up and down by Mr Sieling and Mr Mee at the meeting on 20 January 2017?
- 1.2 Did Mr Mee adopt a posture when opening the door which displayed his crotch in the claimant's direction at the meeting on 20 January 2017?
- 1.3 If so, did Mr Mee, by this conduct, have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 1.4 Alternatively, if so, did Mr Mee's conduct have the effect (taking into account (1) the claimant's perception, (2) all the circumstances of the case, and (3) whether it is reasonable for the conduct to have such an effect) of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 1.5 Considering all the circumstances of the case will require the Tribunal to consider whether:
 - (a) As the respondent avers, Mr Mee was present at the meeting because the claimant had previously been aggressive towards Mr Sieling, and Mr Sieling considered it useful to have his acting line manager there to support the meeting, or as is the claimant's position, that Mr Mee was only at the meeting in order to reinforce a desire by Mr Sieling to undermine and intimidate the claimant; and
 - (b) The conduct of the meeting."

6. Accordingly before this Tribunal in this hearing we are only concerned with the relatively narrow issues set out above.
7. It is further clear from those issues that the Claimant's claim is confined to section 26(1) of the Equality Act 2010 more specifically 26(1)(b)(ii). This was accepted by both parties.
8. Harassment is defined in section 26(1) of the Equality Act 2010 as follows:

"(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"
9. Sex is a protected characteristic pursuant to section 11 Equal Act 2010.
10. The Tribunal heard evidence for the Respondent from Mr Adam Mee, Faculty Manager at the Respondent. Also giving evidence for the Respondent was Sandra Jane Windskill, HR Business Partner at the Respondent. For the Claimant we heard evidence from the Claimant and from her daughter, Abigail Neate Wilson. We had a witness statement from the Claimant's other daughter Hannah Neate but Hannah Neate was not present in the Tribunal to give evidence.
11. The hearing lasted for two days. The Tribunal then reserved Judgment and met again on 19 November 2018. Both parties were represented, the Claimant by a Lay Representative, Professor Kippin and the Respondent by Counsel, Ms J Coyne.

12. The Claimant's case therefore revolves around a meeting which took place on 20 January 2017 at which she was present a Mr Sieling and Mr Mee. Mr Sieling was not in Tribunal to give evidence and had given no witness statement.

Findings of fact

13. The Claimant commenced her employment with the Respondent on 24 August 2015. She was employed in the position of lecturer in art and media. The Claimant signed a contract of employment on 28 August 2015.
14. The Claimant's line manager was Mr Sieling. He held the position of Academic Manager Art and Media. Mr Sieling is no longer employed by the Respondent.
15. It is common knowledge that the Claimant was an inexperienced teacher.
16. It is accepted by both parties that some students at the Respondent can often be disruptive. Teaching some of the student classes at the Respondent is undoubtedly challenging.
17. The Claimant was a trainee teacher. She was required during employment to undertake a period of training leading up to final qualification as a teacher. In the Claimant's case her training was a two year process. However, teachers have up to three years to complete the two year programme. This means that any one year of the two year period can be delayed into another to give the teacher an opportunity of passing.
18. It is not disputed that the Claimant found the job more challenging teaching the level 2 group photography of students. The Claimant was subject to professional assessment and observation and it was clear the Claimant was struggling in certain respects to perform her role due partially to lack of experience but also in particular she was finding one difficult and challenging class very troublesome and difficult to manage.
19. There is a dispute between the parties as to the level of support provided for the Claimant but certainly there were meetings between the Claimant and her immediate line manager Mr Sieling.
20. However in October 2016 the Claimant ran into considerable difficulties with the disruptive class. The Claimant was also signed off sick with work related stress during 2016 on several occasions.
21. There were a number of complaints raised by students about the Claimant. It is worth mentioning that whilst the Claimant's initial probation had been extended she ultimately had passed it. Throughout this period the Claimant suffered several periods of ill-health.

22. It was clear that the Claimant was very much of the view that Mr Sieling was unsupportive of her and that this belief and the difficulty in managing the disruptive class was having a significant effect on the Claimant.
23. The Tribunal heard evidence from the Claimant and Mr Mee but of course we heard no evidence from Mr Sieling. The Claimant catalogues a series of unfortunate instances with the disruptive class right through to January 2017. It is her view that insufficient support was given to her in dealing with this class and whilst Mr Mee suggests otherwise we have not heard from Mr Sieling. The Claimant was clearly in a very unenviable situation and had clearly lost control of the disruptive class. A number of further complaints had emerged from students and even from a parent of a student. Accordingly in a two line email Mr Sieling invited the Claimant to a meeting at 4.00 p.m. on 20 January 2017.
24. It is this meeting in respect of which the Claimant's claim is all about.
25. What is clear is that the invitation to the meeting was perfunctory and the Claimant was given very little notice.
26. The purpose of the meeting was indicated as a discussion with respect to the level 2 photography group which were the disruptive class and DTLS (the Claimant's training responsibilities). The meeting was detailed to take place in room 3.1. The Tribunal had a plan in front of it of the room and we also had photographs of the room albeit that they were not photographs of the exact furniture configuration in the room at the time of the meeting.
27. The Claimant's case is based entirely upon what took place at this meeting.
28. There is some considerable dispute in the evidence which we have heard between the parties as to what took place.
29. What is not disputed is that the room is small. At the time there was a round table at one end. It was at this table that Mr Sieling sat. There was another desk.
30. The Claimant sat in the middle between Mr Sieling and Mr Mee who sat at the other end of the room with his back towards the cupboard. The Claimant sat with her back against the wall. There is a small window.
31. The room is small but not tiny. It is described as Staff Room C although Mr Sieling often used it as an office. The room was 15' 6" long and 7' 2" wide. The height of the point where the Claimant sat is 8' 6". Whilst the room is small the Tribunal does not consider it an unusually small room to have a meeting between three people.

The Claimant's Evidence

32. In her witness statement the Claimant said that she arrived at the meeting and Mr Mee arrived shortly afterwards. She said he unlocked the door and indicated to her where to sit. She said she sat down and Mr Mee sat to the right of her which accords with Mr Mee's evidence. She said Mr Sieling then came and joined the meeting and stepped over her legs to get to the position on the left of her by the round table. She said the door was shut and she immediately felt claustrophobic and very stressed and was strategically situated between the two big men, Mr Sieling and Mr Mee of the Respondent. She said from the start they were aggressive and confrontational.
33. In examination in chief she confirmed that Mr Mee had looked her up and down albeit in her claim set out in the Preliminary Hearing it is stated that her claim is that she was looked up and down by both Mr Sieling and Mr Mee.
34. It is common to both parties that the Claimant was presented with a typed list of suggested actions to remedy the difficulties she was experiencing in teaching the L2 photography class. The document ran to some three pages which she had not had notice of in advance of the meeting. Ultimately the meeting was quite short in that it was decided that she would need to consider the contents of that document and it is at the end of the meeting that the Claimant makes her most significant complaint.
35. She said that when she went to leave the meeting Mr Mee opened the door without getting off his chair, holding the door open with his knee with his legs open and his crotch displayed in her direction. In her witness statement she refers to this gesture as "manspreading". She said she had to walk sideways in front of him to exit the room. It is the Claimant's case that there was no purpose for Mr Mee to be at the meeting and that his presence only supported and reinforced Mr Sieling's intention to undermine and intimidate her. She made it clear that she felt the whole meeting was deliberately intimidating and undermining and that subsequently she was traumatised by it. She said the act of manspreading by Mr Mee was clearly intended to sexually humiliate her.
36. The Tribunal however finds that the Claimant's evidence as to what took place at the meeting was not clear and unequivocal.
37. Under cross-examination without being put under any undue pressure by Ms Coyne, when referring to the cramped nature of the meeting room and the lack of personal space, the Claimant said that Mr Sieling had had to step over her feet which is very different from straddling her legs as she had earlier suggested.
38. She was also very confused about the sequence of events that took place before the meeting. She initially said that she had gone to the room and Mr Mee arrived shortly afterwards and that she went into the room with Mr Mee and Mr Sieling then arrived.

When questioned however she became very confused. She accepted that in fact Mr Mee might well have been in the room when she went in and she said he got up to greet her. She was also confused about who she alleged looked her up and down. She maintained that both men had looked her up and down but resiled from that when questioned. In a previous statement she had given she did not mention Mr Mee looking her up and down but she did so in a witness statement before this Tribunal. Under questioning she was confused about which had looked her up and down. She accepted that Mr Mee was in the room and that Mr Sieling came in afterward. When under cross-examination the Claimant's story about the detail about what happened in that room was very uncertain.

39. She once again asserted that Mr Sieling had looked her up and down when he handed her the document but when pushed that she would have been sitting at this point she said that he looked up and down the top half of her. She also conceded and accepted that she had not made any assertions about Mr Sieling looking her up and down in her original claim. She accepts that there was no reference to gender or sex by either men at the meeting. When closely questioned about the allegations against Mr Mee at the end of the meeting and the manspreading she accepted that he did not touch her or spread into her personal space. She said he came within two feet of her. She said the way he held the door open was a provocative gesture designed to humiliate her.
40. After the meeting the Claimant wrote to complain however she did not raise any of the three key issues upon which she now relies in support of her claim. There was no mention of harassment.
41. Moreover the Claimant instructed legal advisers Knight Webb to act for her and they issued a formal grievance letter on 6 February 2017. In this grievance letter the Claimant addressed the meeting and once again failed to raise any allegation whatsoever of sexual harassment or any of the allegations she now relies upon. The same can be said of the grievance record form on 22 February save that she did indicate she was positioned between the two men. The very first time she raised allegations that she was looked up and down was in her note submitted for the grievance process in late February 2017.
42. The manspreading allegation was raised for the first time in April 2017. None of the allegations are repeated in the second ET1 which addressed the meeting. Further documents which set out the Claimant's narrative of the meeting provided for the preliminary hearing in this case also failed to mention the key aspects of her claim.
43. For these reasons the Tribunal has great difficulty in accepting the Claimant's account. The Tribunal does not accept that the Claimant was looked up and down by either Mr Sieling or Mr Mee. She changed her evidence during the course of the

hearing and only accused Mr Mee of looking her up and down. We do not accept that this happened either.

44. There is no dispute between the parties that the Claimant was positioned between the two men in the room.
45. Whilst the room was clearly small there appears to have been no contact or serious invasion of space by either man. The Claimant's assertion that she was straddled by Mr Sieling fell away under cross-examination.
46. We do not accept that when leaving Mr Mee indulged in manspreading or thrusting his crotch towards the Claimant whilst holding open the door.

Mr Mee's evidence

47. It is unfortunate that the Respondent was not able to produce Mr Sieling to give evidence. Mr Mee had had little contact with the Claimant prior to the meeting and we accept that he asked along to the meeting simply to support Mr Sieling as Mr Sieling imagined quite properly that the meeting was liable to be difficult in light of the nature of the complaints which had been raised about the Claimant. We accept that Mr Mee was not appraised of the background and saw the notes that were to be handed to the Claimant very shortly before the meeting took place. We also do not accept that Mr Mee's presence was specifically designed to intimidate and undermine the Claimant. There is no evidence of that.
48. However we are bound to say that we were unimpressed by Mr Mee's evidence generally. He was very evasive and sought to avoid most questions put to him. We found him unhelpful.
49. We accept that he was not as aware of the Claimant's situation as Mr Sieling but he was the witness which the Respondent put forward in this Tribunal. His attempts to distance himself from everything were unattractive and unhelpful. We also have difficulty in accepting his version of the door opening.
50. We consider it likely that in holding the door open with his knee his legs would have spread to some extent not that we consider that is of itself particularly helpful to the Claimant. We do find his explanation that he kept his knees tightly together to be unlikely. On balance and having sifted carefully the evidence we have heard between both the Claimant and Mr Mee we cannot accept the Claimant's version of events as to what took place at the meeting for the reasons we have set out above. Her evidence was simply too uncertain.
51. Therefore we find that neither Mr Sieling nor Mr Mee looked the Claimant up and down. We find that Mr Mee did not adopt a posture displaying his crotch in the Claimant's direction when opening the door. It was perhaps unfortunate that he did

not stand up in the way in which he had when greeting the Claimant into the room but we think nothing significant turns on the fact that he remained seated and held the door open with his knee. That does not constitute manspreading or displaying of his crotch.

52. We do find that the Claimant was positioned between the two men at the moment that that of itself is of little importance. We further find that the reason for Mr Mee's presence was not specifically to undermine or intimidate the Claimant but simply to provide support to Mr Sieling in what was likely to be a difficult meeting.
53. There was no doubt however that the Claimant was in a very fragile state concerning her position at the college. She had been off sick a number of times and had experienced great difficulties with the troublesome class. It was clear that she lost control of that class. It was only reasonable for the college to investigate complaints against her. However the way in which it was done could have been better. She was invited to a meeting a very short notice with no real detail as to what was to take place at the meeting. At that meeting she was presented with a three page document detailing ways in which she could improve and tackle the matter. That of itself was not an issue but it was launched upon her without warning. Mr Sieling perhaps should have known as a result of the history of the Claimant's employment and the difficulties she was experiencing that she would be in a heightened state of anxiety at that meeting and maybe it could have been handled better. After the meeting the Claimant raised a series of complaints as previously discussed and ultimately the two claims which were consolidated.

Submissions

54. The Tribunal heard submissions from both advocates. We had written submissions from Ms Coyne and I do not propose to repeat those here. The Tribunal also heard submissions from Mr Kippin who argued that the background leading up to the meeting and the meeting itself created a situation where sexual harassment was inevitable. He disputed the size of the room and said it was not big enough to have a meeting of the nature which took place. He said there was evidence that the college had not undertaken sufficient diversity training and that to pursue a meeting in the room in which it took place was more Victorian than contemporary. He drew attention to the fact that he was very surprised that a senior manager such as Mr Mee did not understand the meaning of the word misogyny and he goes on to say that it is the duty of the management to protect its staff. He said it was clear that the Claimant was distressed after the meeting and that the events which took place at the college and her subsequent resignation had changed her life significantly.

The Law

55. The relevant section has already been set out earlier in this Judgment. The Tribunal was directed to certain authorities by Ms Coyne namely **Henderson v The General Municipal and Boilermakers Union [2015] IRLR 451 EAT** and **Richmond Pharmacology v Dhaliwal [2009] ICR 724**
56. The Claimant's case is based upon section 26(1)(b)(ii) of the Equality Act 2010. It is important to consider that the alleged harasser A has to engage in unwanted conduct related to a relevant protected characteristic. In this case that protected characteristic is the Claimant's sex. The conduct then has to have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Complainant B.
57. If the Tribunal finds that the conduct did take place then in deciding whether that conduct has the effect referred to in (1)(b) they must take into account the perception of the Complainant B other circumstances of the case and whether it is reasonable for the conduct to have had that effect.
58. The usual burden of proof set out in section 136 of the Equality Act 2010 is relevant. Section 136 says as follows:
- " 136 Burden of proof
- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
59. Dealing with that it is important to realise that in a sexual harassment case if the Tribunal finds that the alleged conduct did not take place then the Claimant cannot have proven facts which would reverse the burden of proof under section 136(2).
60. It is often stated that the Claimant must show a prima facie case on the facts that harassment did take place and that if he or she is able to do so the burden then falls on the Respondent to provide an explanation as to why that was not the case.
61. The Tribunal is cognisant of the authorities handed up and accepts that the conduct envisaged under section 26 of the Equality Act has to be sufficiently serious conduct. It cannot just be any unwanted conduct.
62. The conduct must also be related to sex so there must be a connection between the conduct and sex.

63. The conduct must be serious in order to be intimidating, hostile, degrading, humiliating or offensive. Not every adverse comment may constitute the violation of a person's dignity.
64. The relevant section talks about the conduct having the purpose or effect in (b)(ii). The purpose connotes intention. Therefore Mr Mee and/or Mr Sieling would have to had intended to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
65. If the conduct simply has the effect of doing so then the Tribunal must consider whether it is reasonable for the conduct to have that effect.

Conclusions

66. After very careful consideration and for the reasons set out in the findings of fact the Tribunal cannot conclude that the allegations ventured by the Claimant are proven.
67. In all such cases it is difficult for a Tribunal when faced with conflicting evidence. Here we have no evidence from Mr Sieling and only evidence from Mr Mee. Therefore much of our conclusions must be drawn in making findings of fact as to on the balance of probabilities what is the most likely to have actually happened during the course of the meeting. It should be borne in mind that a Tribunal only has to consider that it is 51% likely that one version of events took place as against 49% of the other version.
68. In this case the uncertainty in the Claimant's evidence and her failure to raise allegations of sexual harassment during many layers of complaint pursuant to the meeting has counted against her. As set out in our findings of fact the Claimant's evidence was uncertain and was subject to fluctuation. She did not raise allegations of sexual harassment even though she complained specifically about the meeting on several occasions. She even instructed lawyers to write on her behalf in a letter which raised a plethora of allegations none of which ultimately were the allegations pursued in this claim.
69. Whilst the evidence of Mr Mee can at best be described as anodyne he was certain as to the sequence of events which took place before and during the meeting and on the Claimant's own evidence manspreading could not possibly have taken place which involved invasion of the Claimant's space or touching of the Claimant.
70. We accept that the Claimant was concerned about her work. That is not surprising in light of what had happened. We have also raised criticisms of the way in which she was given short notice of the meeting and not given any advance warning as to what she was to be handed at the meeting. It is possible that the college could have supported her better in her difficult times.

71. That throws up questions about the college's processes or in fact the putting into practice of the processes but does not of itself get a sexual harassment claim off the ground.
72. We have made findings of fact that the Claimant was not looked up and down by either Mr Seiling or Mr Mee. We consider it likely that Mr Mee did hold the door open with his knee and his legs may have been slightly open. We do not consider that of itself to be conduct which would in any way satisfy the definition set out in section 26. The Claimant herself said that she was two feet away from Mr Mee when this happened.
73. The fact that she was positioned between the two men at the meeting in a small room does not assist her case. We do not consider that Mr Mee, by his conduct of opening the door with his knee indulged in conduct which had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
74. We do not find that his conduct had the effect on the Claimant of creating an intimidating, hostile, degrading, humiliating or offensive environment. We rather conclude that this was something the Claimant considered to be a possibility as a much later stage.
75. Mr Mee's presence at the meeting was not designed to undermine or intimidate the Claimant.
76. The run up to the meeting and the meeting itself might have been conducted better in the best traditions of employee relations but in all the circumstances the Claimant has not convinced us that the conduct alleged took place other than as detailed and that the conduct itself was not in any way sufficient to trigger the reversal of the burden of proof under section 136 of the Equality Act 2010.
77. For the reasons set out above the Claimant's claim must fail and is dismissed.

Employment Judge K J Palmer

Date:

17 December 2018

Sent to the parties on:

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For the Tribunal Office