EMPLOYMENT TRIBUNALS

Between:

Miss M Mendes	**and**	Clinigen Group Ltd
Claimant		**Respondent**

At an Open Attended Preliminary Hearing

Held at: Nottingham

On: Thursday 20 December 2018

Before: Employment Judge P Britton (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Miss S Murphy, Solicitor, Peninsula

JUDGMENT

1.The claims as identified, namely s26 harassment and s27 victimisation both pursuant to the Equality Act 2010 will not be struck out and a deposit order will not be made. They will proceed to the hearing before a tribunal as already listed at Nottingham for 15-17 July 2019.

2. The Response will not be struck out.

REASONS

Introduction

1. This is the third preliminary hearing in this matter. Today was listed to inter alia consider the Respondent's application to strike out the claim as having no reasonable prospect of success pursuant to rule 37 of the 2013 Tribunal Rules of procedure. There is also an application for strike out of

the Response from the Claimant primarily based on its non compliance with preceding directions. In that sense it has been overtaken by events.

2. The Claimant has provided further and better particularisation of her claim as ordered by Employment Judge Hutchinson at the last telephone case management discussion on 1 November and the Respondent has replied to it.

3. I wish to now cut to the chase so to speak: from my reading of the claim and the further and better particularisation, this is a claim of section 26 Equality Act 2010 harassment and flowing from that a claim of section 27 victimisation.

4. The Claimant has agreed with me. What it means is that there is no need to get bogged down in looking for further and better particularisation of other heads of claim under the Equality Act, ie direct discrimination (section 13) or indirect discrimination (section 19) or cross-referencing to the Employment Rights Act 1996 a potential reliance on whistleblowing. It is clear that none of that is what the Claimant is claiming .

5. Therefore, for the avoidance of doubt, the claims that proceed are:
   5.1 harassment;
   5.2 victimisation.

The scenario

6. The Claimant is black Zambian who has lived in this country for about 4 years. She is not trans gender and she is heterosexual. I record this because in the ET1 she inter alia ticked the boxes for sexual orientation and trans gender discrimination. She has a history of working in the UK in customer service. She joined the Respondent working in what I would loosely describe as a customer service role on 11 November 2017. She was dismissed during the probationary period on 6 February 2018 for performance failures by the Respondent. She was paid one week's pay in lieu of notice.The dismissal letter is penned by Mr Sundeep Randhawa, an account lead and her direct line manager. He is at the heart of the Claimant's claims.

7. What the Claimant has pleaded in her originating claim, thence further and better particularised and made even clearer today, is that from not long into the employment and in the context of sitting next to Sundeep Randhawa for the purposes of on the job training, he began to show her pornographic photographs and videos on his mobile. She also says that he would make explicit sexual remarks including with racist innuendo; in particular she has told me how he referred to and showed pictures of black dildos, which he called "moby dicks".

8. Furthermore, on at least one occasion in the presence of the small team that he managed and with the Claimant sitting there, he used the 'N' word. The only black person in the team was the Claimant. She has told me that the rest of the team seemed to not find Sandeep's behaviour upsetting. She suggests this was because they had grown used to it in the context of what some of them in the grievance investigation refer to as "banter" albeit they denied there was any sexual or racial connotation.

9. But, it is also to be noted that one of them in that investigation (namely Dolly) said that Sundeep had used the 'N' word on at least one occasion. I understand that the Respondent did find the use of the 'N' word to be proven and it did discipline him. In that context I do note that despite that finding, in the original Response prepared by Peninsula that Sandeep had behaved in any way whatsoever as alleged by the Claimant was "vehemently denied".

10. As to the rest of it in terms of the grievance investigation, the Respondent did not find any evidence to support the Claimant. The grievance was made in writing by the Claimant shortly after she was dismissed. Whilst in the employment the Claimant did not raise her concerns to the line management but instead decided that the best approach was to not show any signs of interest or encouragement in Sundeep's behaviour and second distance herself from the banter. But if she is to believed, and she was credible today, so concerned and unnerved was she that when finding herself alone with him whilst leaving the area she tripped and hurt herself. In the bundle that Peninsula put before me this morning the grievance which as I have already said she submitted, is missing. Obviously, Peninsula will need to chase this with the Respondent. In any event, the Claimant has kept a copy of the grievance and is going to send it straightaway to Peninsula.

11. The final point I make is that in terms of the grievance investigation minutes that I have before me today in the Respondent's bundle, there is no record of any interview with the Claimant. I observe that even if she had left the employ, if the Respondent decided to investigate the grievance, and which it obviously did, then as an experienced employment tribunal judge I would normally expect to see the complainant interviewed as part of the grievance process .

12. The other point to make is that Dolly in her interview made reference to the 'N' remark and that it seemed to be directed in particular at Fernando, who I understand is Italian, but I cannot see from the minutes before me that he was ever interviewed. Obviously, Peninsula will make further enquiries. However, if it was so directed it does not mean that the use of the word is therefore not harassment of the Claimant as to which see the wide definition at s26 and the jurisprudence ie **Dhaliwel**l.

13. What the Claimant then says put simply is that although she realised she was making some mistakes in the role, this had to be seen in the context that she had very little time to get up to speed before she was dismissed as she had taken over a week off as pre-planned annual leave. Furthermore she was performing the role without having received sufficient training. Thus she believes that the dismissal was because she had made plain by her attitude her disapproval and unwillingness to condone, encourage or go along with the behaviour of Sundeep: Thus he masterminded her dismissal.

14. Potentially, and no more than that, this could engage section 27 because if she had done something that could be construed as being indicative of her unhappiness of the behaviour and inter alia for instance the use of the 'N' word, then it might fit within section 27. However, to me the clear real

focus of this case is section 26. Even if it was "just" (as inferred in the further particulars of the Response) the use of the 'N' word, and even if it was only said at most on two occasions, the Respondent has to understand that this does not mean it cannot constitute harassment within section 26. I have in that sense reminded the parties of the seminal authority on the subject, which is ***Richmond Pharmacology Ltd -v- Dhaliwal [2009] IRLR 336 EAT***. I explained to the Claimant that this case can also be found on Bailli by scrolling onto the EAT and then to the year 2009.

15. Of course there is the second issue which would make the behaviour more serious in the context, and which is whether Sundeep also behaved in the other ways that the Claimant describes. I have already referred to the interviews of members of the team managed by Sundeep and which in itself does not corroborate the Claimant. But the issue then perhaps would become as to whether the rest have kept quiet as the Claimant suggest because they have become imbued into the behaviour and thus don't want to divulge what has been happening. That in turn will come within the context of the thoroughness and robustness of the grievance investigation. Of course, Sundeep may in fact may be innocent of those allegations and so it is a matter for a tribunal to make findings of fact upon.

16. The Respondent is not pleading that it is not vicariously liable for Sundeep.

Conclusion

17. Those are the clear issues; they are triable and it follows that I do not find in this case that the claim has no reasonable prospect of success or indeed that it has only little reasonable prospect of success. Thus, I am not striking it out and I am not ordering a deposit.

18. As to the Claimant's counter strike, so to speak, the Respondent has complied with the direction of EJ Hutchinson to file an amended Response following the further particularisation of the claim. There is clearly a potentially viable defence subject to the caveat relating to the use of the 'N' word.

Observations

19. Finally, that brings me to the following. The Claimant was paid off with a week's wages in lieu of notice. She started a new job paying the same within about 2 weeks. It follows that her loss of earnings[1] will be confined to 2 weeks loss of wages, which I estimate to be £750.

20. Otherwise, this is primarily about an award for injury to feelings should the Claimant succeed. The core issue in that sense is if a tribunal found that the other behaviour did occur, then that would more than likely take any award into ***Vento***[2] band 2. If it did not extend past the use of the 'N' word

[11] Not awardable for the harassment: only engaged if the dismissal was an act of victimisation within s27.

[2] As updated: see **PRESIDENTIAL GUIDANCE** 5 September 2018. I have explained to the Claimant how to access this via the internet.

then it is likely that it would stay within ***Vento*** band 1, but again that is really a matter for an assessment by the tribunal at the main hearing.

Judicial Mediation

21. For reasons which I hope are now self-evident, this Judge is of the firm opinion that this case would be suitable for Judicial Mediation. I have explained ,the process and I would like both parties to confirm to the tribunal their willingness to enter into the process by Friday 7 January 2019 at the latest. To assist the Respondent the Claimant will by that date supply her schedule of loss.

The current listed hearing

22. I am going to give directions for the main hearing in the sense that we will start again because of slippage. Finally, I observe that if the parties do agree to Judicial Mediation, then a case management discussion, which will not last more than 15 minutes, will be listed as a matter of priority to confirm the JM.

23. The last thing to say on that topic is that the Judicial Mediation Hearing would of course be accelerated as a matter of priority so that it comes well ahead of the current scheduled hearing and can thus hopefully avoid some of the pretrial preparation work.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant will provide her schedule of loss by at the latest **7 January 2019**.

2. By **the same date**, the parties will confirm as to whether they are willing to enter into Judicial Mediation.

3. Mainstream directions for the 3 day hearing already listed at Nottingham before a full tribunal panel commencing 15 July 2019.

   3.1 The bundling process.

      3.1.1 The Respondent by way of first stage discovery will send to the Claimant by **Friday 18 January 2019**, a proposed draft chronological trial bundle index and it will be double spaced.
      3.1.2 By **Friday 1 February 2019**, the Claimant will reply adding by brief description at the appropriate place any other document she wants in the trial bundle. If she has the same, she will send a copy with the completed trial bundle index back to the Respondent for inclusion in the trial bundle. If she does not have the document but believes the Respondent has it or can get it, she will make that plain.
      3.1.3 By not later than **Friday 22 February 2019**, a single bundle of documents is to be agreed. The Respondent will have conduct of the preparation of the bundle. The bundle is to be

bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the tribunal and the parties, notices of hearing, location maps for the tribunal and other documents which do not form part of either party's case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

4. By not later than **Friday 22 March 2019**, there is to be mutual exchange of witness statements. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the tribunal to draw from the document as a whole.

5. **The tribunal is to note that the Claimant has changed address. This must be recorded on the front of the file.** As there has been difficulties in her receiving communication from the tribunal, the clerks <u>must</u> ensure that everything that is sent to her goes not just by email but by post. Her address is:

   40 Tucker's Road, Loughborough, LE11 2PJ.

Employment Judge Britton

Date: 20/12/18

Notes

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so".* If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Order sent to Parties on

21 December 2018