

parts of section 26 of the Equality Act 2010, which is the legal definition of harassment, and section 109 (4), which provides the employer with a possible defence to the claim in respect of what Mr Swierkowski allegedly did.

3. In this hearing the Claimant has accepted that whatever happened on 16th March 2017 it had nothing to do with sex. This incident involved Mr Michal Swierkowski allegedly banging on a window. The claim that this is somehow sexual harassment is therefore dismissed. The tribunal has not, in fact heard any specific evidence of anything which Mr Kubas may be alleged to have done. Even if he had done something this too, because it is linked to Mr Swierkowski's action at around this time, 2017, does not have anything to do with sex. Any complaint of sexual harassment in respect of the alleged threats by Mr Kubas is also therefore dismissed.
4. The only remaining allegation of sexual harassment is therefore in relation to the incident on Saturday 21st July 2018. There is therefore no issue still as to whether any of this claim was presented late: it is in time.
5. There are two parts to this allegation, even though Judge Bright's list of issues only appears to identify the first part. Firstly, it is said that Mr Swierkowski made a vulgar gesture with his hand in front of his mouth simulating oral sex. Secondly it is alleged that he shouted (in Polish): "Wait 'til 11" (that is 11 o'clock).
6. If the rude gesture was made it is, rightly, not disputed that it is "unwanted conduct of a sexual nature" within the meaning of section 26 (2) of the Equality Act 2010. The main issue in this case is whether or not that gesture was in fact made.
7. As to the second allegation, the shouting, this is not, taken in isolation, "unwanted conduct related to a relevant protected characteristic" (in this case sex) , within the meaning of section 26 (1) (a) of the Equality Act. After some 2 ½ years the event is too remote for there to be a possibility that it could properly be said to be "related to sex" merely by reason of the past relationship between the people involved.
8. It will only, therefore be sexual harassment if it is in fact part and parcel with the making of the vulgar gesture. If the vulgar gesture was not made then it does not matter if Mr Swierkowski shouted; that will not be sexual harassment even if it did constitute some form of threat. There is of course also a factual dispute as to whether he did or did not shout as alleged.

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- (iv) Did Mr Swierkowski's actions have the purpose or effect of violating Miss Dymowska's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
 - (v) Were Mr Swierkowski's actions done in the course of his employment?
 - (vi) Can the Company show that it took all reasonable steps to prevent Mr Swierkowski from acting as alleged to Miss Dymowska, or from doing anything amounting to sexual harassment or harassment related to sex?
 - (vii) If the Tribunal finds that the incidents in 2017 and in 2018 both happened and were sexual harassment, was that harassment extending over the whole period, or has the claim only been presented in time in relation to the 18 July 2018 incident?
 - (viii) If Miss Dymowska wins her claim, how much compensation should be awarded for a) loss of wages, and/or b) injury to her feelings/personal injury?

9. The burden of proof is on the Claimant to show that the alleged conduct on the part of Mr Swiekowski did in fact take place. That means that it is for her to prove, on the balance of probabilities, that he did make the vulgar gesture.

The background

10. The Claimant and Mr Swierkowski, who are both Polish, are work colleagues at the Respondent's bacon factory in Cleckheaton. He is a production supervisor and she is a line operative; he, therefore, is the more senior of the two. In 2014 they began a relationship. It ended in December 2015. It is disputed, and it does not matter for our purposes, who ended that relationship.
11. Throughout all that time Mr Swierkowski was living with Malgorzata (also known as Gosia) Tama who also works for the Respondent. The Claimant says that at the time although she knew that they were living together she did not in fact know that Ms Tama was Mr Swierkowski's girlfriend. He says that she was and that the Claimant did know. They are still together and are now engaged to be married. The Claimant too has a long-standing boyfriend.
12. It is clear that the break up in December 2015 led to tensions between the three people involved, both inside and outside of the workplace. This drew friends and family into the dispute and sides were clearly taken. We do not consider that either the Claimant or Mr Swierkowski is in fact telling the full story about what has been going on and why there are still conflicts between these factions of the Polish community working for the Respondent in the aftermath of this relationship breakdown even so long after the event. We cannot even decide whether this is a potentially serious area of conflict or not. Although the Claimant says that she feels threatened and fears that she will be hurt, there is no evidence at all of any actual violence towards her. On the other hand a colleague, Adam Czerwec, in a statement, describes the situation as "pathetic" and observes that "they need to stop and start acting like adults."
13. It is accepted that both the Claimant and Mr Swierkowski are in possession of intimate naked photographs of each other from the time of their relationship. Although she disputes this we accept Mr Swierkowski's evidence that the Claimant has on occasions shown those pictures on her phone to other people with the intention of taunting or embarrassing him. Mr Czerwec, who says he has also witnessed the Claimant showing images on her phone to other people, is apparently of the view that it is "because of these photos all that is going on until now."
14. Both parties it seems took steps to avoid or minimise contact at work. The Claimant says that she needed to produce a doctor's note to support her move to what she describes as a "safe shift", away from Mr Swierkowski. There are a series of fit notes from 16th February 2016 recording that the Claimant is suffering from stress and low mood, although she did not in fact take time of work as a consequence. She says in her witness statement that in this period she in fact felt safe and secure.

March 2017

15. On 16th March 2017, 15 months after the end of the affair, there were however two incidents. Firstly, the Claimant was witnessed by a line manager, on line 11, that is away from her own place of work, pushing into Ms Tama. That was not reported immediately but when it was it led to a disciplinary investigation which resulted in the Claimant receiving a Final Written Warning, which lasted for a year until April 2018.

16. Approximately an hour later the Claimant reported that Mr Swierkowski had banged on the window in the wall separating the slicing area where he was, from the labelling area where she was working. It is accepted that it is the usual way of attracting attention to knock on this window or to shout through the adjacent stainless-steel hatch ("the letterbox") because the factory area is noisy. The immediate investigation into the Claimant's allegation did however produce two statements from witnesses who described the banging on this occasion as unusually forceful. They did not however see or hear Mr Swierkowski say or do anything.
17. The Claimant's statement made at the time is vague. She reports Mr Swierkowski coming to the window and banging on it and pointing his finger as if she had done something wrong, but she could not hear anything said and does not know if he was shouting or not.
18. The Claimant reported this incident to the police but that is in our view a wholly unnecessary overreaction to what she actually witnessed. The police not surprisingly took no action other than to tell the Claimant that they had informally warned Mr Swierkowski.
19. The Claimant now says that she can clearly remember in fact hearing Mr Swierkowski shout "I'm going to fucking finish you" and that this was what she told the investigator and the police at the time. We do not believe her. Not only does the contemporaneous statement of 16th March 2017 not record these words, nor does she say it in her further statement of 20th March 2017. Also on 23rd July 2018 and again on 1st August 2018 she expressly says that he cannot remember what had happened at the time of the March 2017 incident, and specifically on the later occasion that she does not remember what Michal said.
20. We also find that the Claimant was not being entirely honest when she told the initial investigation on 16th March 2017 that she did not know what she might have done wrong such that Mr Swierkowski would wave his finger at her. She did know that there had been an incident between her and Ms Tama shortly before.
21. When the Claimant came to be questioned specifically about that earlier incident, which she was on 20th March 2017, she did not initially tell the truth about her having even been on line 11. Although she has always maintained that she did not make any contact at all with Ms Tama the allegation was found proved and we are satisfied that the Respondent did have good evidence that she has indeed committed this act of misconduct. Of particular concern to us in respect of the Claimant's general credibility is her assertion on 20th March that -to counteract the eye witnesses who said she had been on line 11 and had made contact with Ms Tama – "I can find so many witnesses around myself". This suggests that far from maintaining her false position that she had not even been on line 11 at the time she would now "find" witnesses to support her account that nothing happened when she was there.
22. We find it to be perfectly reasonable in these circumstances that no further action was taken by the Respondent against Mr Swierkowski for what the Claimant said at the time was, at worst, him banging on the window and pointing his finger.

21st July 2018

23. On the central issue, that is whether or not, Mr Swierkowski did or did not make the vulgar gesture, there are completely contradictory accounts. We have therefore had to weigh up the competing factors which point to either of those accounts being the correct version of events.
24. The Claimant did, though her sister, report the matter to the police at the time. We do not, however, have any confirmation of what exactly she said had happened. It appears that when the police attended it was understood to have been because the Claimant had alleged that Mr Swierkowski wanted to beat her. Also in her letter of 8th October 2018 the Claimant specifically recalls the police attending on 21st July to speak to Mr Swierkowski “about him threatening me by saying that he was going to wait for me after work and beat me up.”
25. The Claimant did at the time express immediate fears for her safety. In particular she told Stanislaw Kulinski, who appears to be a wholly impartial witness, that she did not want to leave the line to go to the toilet on her own because she did not want to be alone in a situation where she might come across Mr Swierkowski. Something, therefore, had clearly happened.
26. We are satisfied that Mr Swierkowski did say through the “letterbox”: “Wait ‘til 11”. That is what both the Claimant and her friend and witness, Anna Czerkawska say happened. Most significantly to our minds Mr Kulinski had also stated that these words or words very like them were spoken. Although Mr Kulinski did not say that Mr Swierkowski was shouting and nor did he at the time think that these words were at all sinister – he says that although he did not understand what was meant he initially thought it was a joke – it is clear that this phrase could reasonably have been interpreted as some sort of a threat that something was going to happen after the end of the shift.
27. Whether or not it was in fact intended as a threat (and no alternative interpretation of these words has ever been put forward) it is quite clear that that is how the Claimant has always understood it. Apart from her initial concerns expressed to workmates and to the police at the time she has consistently told the Respondents that she was afraid.
28. Also, when Stanislaw Gawronski, who is Mr Swierkowski’s friend, says that he grabbed him and told him “let’s go for a break” that is consistent with Ms Czerkawska’s account that he “was pulling Michal back and telling him to calm down”. It is not necessary to “grab” someone to invite them for a drink. That type of language is indeed suggestive of somebody having to be pulled away from a situation.
29. When Mr Swierkowski denies that he said anything at all through the “letterbox” we do not, therefore, believe him. He also appears, even allowing for possible language difficulties, to have changed his account from his witness statement. He now says that he had no interaction at all with the Claimant on that shift but, in his statement, he says that he did have a short conversation to ask her to do a specific task. This obviously goes to affect the credibility of Mr Swierkowski. The fact that we find him to have been dishonest in his account of whether or not anything was said through the “letterbox” does not, however, necessarily mean that he is also lying when he says that he did not make a vulgar gesture as alleged.

30. There are however, also factors which, on the contrary, point to Mr Swierkowski's denials of any wrong doing being credible. The Claimant did not ordinarily work Saturdays alongside Mr Swierkowski. When he learned that she had volunteered to work this shift he immediately asked either that he be given leave for that day or that her overtime request be refused. That may suggest that he was worried that he himself might do something he later regretted, but it is more likely to be to protect him from being subjected to possible provocations from her.
31. Mr Swierkowski was subject to a police warning from March 2017 in respect of his behaviour towards the Claimant. And, as he said when interviewed, he was also evidently constrained by a fear of disciplinary sanctions at work should he in fact have done anything untoward. He also understood at the time that the area was covered by CCTV – though in the event it was not working on that day. All these are things that make it unlikely that he would in fact have done something that would subject him to the risk of potentially serious repercussions.
32. The Claimant did shortly afterwards also report that Mr Swierkowski had “using his body language asked her to do a blow job”. This report by text is timed 16.10: it can therefore be dated to 4.10 pm on the following day, Sunday 22nd July 2018. The incident itself was at about 6.25 the previous evening. She has since that time been consistent in her account of this vulgar gesture having occurred.
33. In his statement Mr Kulinski does not corroborate the Claimant's account of observing this gesture. As he was standing to the right-hand side of her at the time he might have been expected to have seen it if it happened.
34. Mr Gawronski says that there was no gesture made at all. Because we consider that he, like Mr Swierkowski, is not being honest when he says that nothing was said through the “letterbox” prior to him grabbing his friend there are, however, also issues as to his reliability as a witness.
35. Most significantly Ms Czerkawska when she was first interviewed about this matter on 23rd July 2018 did not corroborate the Claimant's description of the gesture. Although this is an unsigned statement which was not sent to Ms Czerkawska for her approval, and although she now claims that it completely misrepresents when she in fact said to the investigating officer we can see no good reason to think that it is anything other than an accurate reflection of what she said at the time, even if not exactly word-for-word. Even allowing for the fact that this is an interview conducted through an interpreter the description of what she allegedly saw is so detailed that it cannot possibly be any confirmation of the Claimant's account. Ms Czerkawska says: “He gave a sarcastic smile and then showing some gestures with his hand, thumbs up suggesting ok. I think Michal wants to start an affair.”
36. It is only on 17th October 2018 when she signed her witness statement (written by somebody in English) that Ms Czerkawska says that she saw, amongst some gestures with his hands one that was specifically a “blow job sign”. By this stage she accepts that she had seen her original statement from the investigation interview. The witness statement does not explain why this important matter was missed out from her earlier account. And she offers no explanation now. Rather she says that the earlier statement is simply wrongly recorded and that this is what she had always claimed she

had seen. In fact we are satisfied that her witness statement to this tribunal reads as if it is an attempt to add a detail to her account that was not there before.

37. There are also matters within her account which cast doubt on its accuracy. In both the interview and in the later witness statement Ms Czerkawska says that Mr Swierkowski could not see her through the window. If he could not see her it is not logical that she would in fact have been able to see a hand gesture immediately in front of his face. If she could see him he must have also been able to see her. When asked to explain this apparent contradiction Ms Czerkawska said in evidence that she was in fact observing Mr Swierkowski, not through the window at all, but through the "letterbox" which she had opened so that she could see through onto the factory side. She says that she often did this. We do not consider that that is a plausible explanation. It therefore casts doubt on whether this witness in fact saw anything at all.
38. We have already set out some reasons why we are concerned that the Claimant may not be an entirely credible witness. She has, long after the event, changed her account of the incident in March 2017 to add a fresh accusation that makes things look worse for Mr Swierkowski, by now alleging that he uttered a threat to kill her. She also initially lied about her having any involvement with Ms Tama at the time of the alleged "shoving" incident and expressed a willingness to get witnesses to support her account, with the possible implication that these may not necessarily be truthful witnesses. This does not necessarily mean that she is also telling lies about this incident or that she has in fact persuaded Ms Czerkawska to give a false testimony but it does raise some real doubt as to whether her version of events is, indeed, reliable.
39. We are also concerned by the fact that in her initial report of Sunday 22nd July, where she already specifically describes the incident as one of "sexual harassment", but more particularly in her grievance letter of 26th July, the Claimant is positioning her complaint in language that prepares for a substantial monetary claim. In the schedule of loss the Claimant believes that her claim is worth about £25,000. The grievance letter says: "On a many occasion I have been sexually abused by a site manager, Mr Michal Swierkowski". It continues: "I want compensation from my employer...This compensation should be enough to cover my personal, mental damage, stress, lack of income, feeling of discrimination". An immediate demand for money at the very start of a grievance process is somewhat unusual. It appears therefore that the Claimant is already aware of a financial incentive to her framing her complaint in terms of sexual harassment, rather than simply alleging that she had felt threatened.

Conclusion

40. Taking all these matters together we are not satisfied that the Claimant has in fact proved that the gesture was made as she alleges.
41. That does not necessarily mean that we are saying that the Claimant is lying. On the evidence before us, however, she has not been able to persuade us on the balance of probabilities that we should accept her account as against that of Mr Swierkowski. The almost inevitable conclusion is that one of these two people is lying, but we are not able to say with sufficient certainty which one of them it is. In those circumstances because it is up to the Claimant to prove her case, it fails. There is an alternative possibility – which the Respondent expressly invites us not to rule out – which is that the Claimant may have mistaken the gesture. Either way the claim of sexual harassment must be dismissed.

The Statutory Defence

42. In any event in this case we consider that the Respondent would have done enough to make out the statutory defence under section 109 (4) of the Equality Act 2010.
43. The Respondent has an equal opportunities policy which clearly prohibits harassment. All the indications are that this was robustly applied. In this particular case the Respondent promptly instigated an investigation into the Claimant's allegation of sexual harassment. That investigation was thorough. The alleged harasser was clearly told that there would be severe consequences if he were found to be lying about the incident and he knew that he was at risk of losing his job if this misconduct were proved against him. Although the accusation was not upheld there is a clearly reasoned decision on the evidence as to why that conclusion was reached.
44. There is no evidence generally of toleration of sexually explicit language or gestures.
45. This was a single allegation against Mr Swierkowski. He is not said to have made any sexually offensive gestures on an earlier occasion.
46. In those circumstances the prohibition on objectionable actions within the policy is enough to constitute a reasonable step to prevent Mr Swierkowski from doing what it is alleged he did or from doing anything of that description.
47. The Claimant has not yet returned to work. If and when she does so it ought still to be possible to ensure that there is no, or minimal, contact between her and Mr Swierkowski. It would also, in our view, be sensible for any intimate photographs that they have of each other now to be deleted from their mobile phones. If the pictures are not removed then it may be a reasonable step for the Respondent to require the mobile phones to be confiscated during working hours to ensure that they are not viewed. Any showing of those images in the workplace (by either of them) will almost certainly amount to sexual harassment.

EMPLOYMENT JUDGE LANCASTER

DATE 1st February 2019

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