



EMPLOYMENT TRIBUNALS

Claimant: Miss J Ihekwoaba

Respondent: Aston Services Group Limited (1)
Mr M Ahmed (2)

Heard at: Bristol

On: 11 to 14 March 2019

Before: Employment Judge O'Rourke
Mr Launder
Ms Luscombe-Watts

Representation

Claimant: In person/Miss Sowa (friend)

Respondent: Mr Morton – solicitor

REASONS

**(Having been requested subject to Rule 62(3) of the
Employment Tribunal's Rules of Procedure 2013)**

Background and Issues

1. The Claimant was employed as a cleaner by the First Respondent for approximately five months, until her summary dismissal, on 19 March 2018, for alleged gross misconduct. The Second Respondent was her line manager at the relevant time.
2. As a consequence, the Claimant brings claims of race and sexual harassment and victimisation on grounds of sex and race. She is of Polish nationality and is white. She initially brought a claim of unfair dismissal, but that was dismissed, at the outset, for want of jurisdiction.
3. The issues in this claim were set out in the Case Management Summary of EJ O'Rourke, of 14 September 2018 and are set out at paragraph 3 and 4 of that Summary.

The Law

4. We reminded ourselves of ss.26, 27 and 109(4) of the Equality Act 2010.

The Facts

5. We heard evidence from the Claimant and on her behalf from Mrs Monika Ciemieja-Kopacz, a friend and former colleague and we also read a statement from a Miss Julia Majorczyk, the Claimant's sister and another former colleague. We heard evidence from the Second Respondent and on behalf of the First Respondent, we heard from Miss Ann-Marie Thompson, at the time the Second Respondent's line manager; Mrs Cath Mangan, who heard the Claimant's appeal against dismissal and Mr Barry Holmes, an area manager who had had some dealings with the Claimant. We also read a statement from a Miss Hannah Print, the dismissing officer.
6. Chronology: We set out the following undisputed chronology:
 - a. 16 October 2017 – the Claimant is promoted to cover supervisor by Ms Thompson.
 - b. 6 December 2017 – the Claimant was notified of R2's appointment [213] (although there is some dispute as to whether this was as supervisor, or site manager).
 - c. 14 December 2017 – R2 starts work. That is stated to be as site manager. The Claimant considered however that she remained as supervisor, working to R2. R1 however denies this. It is agreed evidence that the Claimant was asked to assist R2 in his role.
 - d. 3 January 2018 – the Claimant texts Ms Thompson [125], stating '*.... Mustafa (R2) he came to close to my personal space and it wasn't first time. if you will be able please check on cameras: fourth floor side on the first lady's Ms Thompson replied the next day, 'I will see if Will can look'.*
 - e. 5 January 2018 – the Claimant again texts Ms Thompson '*again yesterday he used opportunitie (sic) (when he was showing me something on stairs), and was touching my hand. Kadra made me double-worried as she said in them religion and culture man cannot touch in any way woman if she is not his wife. Horrible man. Have a good day and safe journey.*' Ms Thompson replied '*you will have to tell him straight if he does it again. He clearly doesn't see anything wrong*'. The Claimant replied '*I will not allow him to do that again (smiley emoji)*'. Ms Thompson again wrote '*if he gets too close tell him to get out of your personal space*'.
 - f. In either mid-or later January Ms Thompson and the Claimant met. The Claimant reiterated her concerns about R2 and Ms Thompson said that she told the Claimant to make a formal written complaint. The Claimant denies being told this. Ms Thompson also states that during this meeting she told the Claimant that she had never been offered the position of permanent supervisor, which the Claimant disputes.
 - g. 15 January – the Claimant texted Ms Thompson [202] saying '*another thing on Friday Mustafa asked me to clean lifts using his old toothbrush. sorry but I couldn't do that, I used normal brush* (attaching a photograph of a toothbrush).
 - h. 27 January – Miss Print, the new area manager, having taken over from Ms Thompson, wrote to the Claimant to introduce herself and

simultaneously to warn her that she would be subject to disciplinary procedures and then suspended her [82].

- i. 14 February – following several re-arranged hearings, the disciplinary hearing took place on this date. At the outset, the Claimant challenged the fact that R2 was the notetaker, but he continued to be so.
 - j. 15 February – the Claimant complained about the conduct of the disciplinary hearing and separately raised a grievance against Miss Thompson and also mentioned that R2 had touched her [123 & 124].
 - k. 22 February – Miss Print suspends the disciplinary process and invites the Claimant to a grievance hearing, on 26 February [129].
 - l. 23 February – R2 resigns.
 - m. 26 February – the grievance hearing takes place [131].
 - n. 7 March – the grievance outcome is sent [135], dismissing the grievance.
 - o. 19 March – the disciplinary hearing outcome is sent, dismissing the Claimant with immediate effect.
 - p. 17 April – R2 texts the Claimant, following a telephone call from her [204]
 - q. 24 March - the Claimant appeals against both decisions.
 - r. 24 April – Mrs Mangan hears the appeals.
 - s. 24 April – Claimant makes complaint to police about R2’s behaviour [279].
 - t. 11 June – Appeals outcome [175-177], dismissing both appeals.
7. The Supervisor Role. It is clear from the evidence that the Claimant considered that from 16 October she was the effective supervisor and that that role became permanent subsequently. This is vigorously disputed by R1, whose witnesses state that her role was always temporary, pending recruitment of a site manager, which they said had been offered to her, but she was unable to consider it, due to the long hours and her family commitments. It is clear that the appointment of R2, resulting in her losing her supervisor role, was a cause of much animosity on her part towards both Respondents. Throughout these proceedings, she seemed to be under the misunderstanding that the loss of this role was a central plank of her case, when, based as it was on sexual and race harassment by R2, it cannot have been. This resentment at the ‘loss’ of the role was, unfortunately, exacerbated by Ms Thompson’s informal reliance on the Claimant, continuing to communicate with her, in which communications Miss Thompson frequently made disparaging statements about R2, which Ms Thompson accepted in retrospect was unprofessional of her. The Claimant did not however assist her case, either with her employer at the time, or with this Tribunal, by her obsession with this point, potentially clouding the real issues of sex and racial harassment.
8. The Text Messages of 3 and 5 January. The Claimant said that these messages reflected her real concerns at the time, as to sexual harassment by R2. As was clear from her grievance, she expected Ms Thompson to take action and was disappointed that she did not do so. R2 utterly denied any knowledge, of either the alleged actions of his, or of the text messages, until that is, he was notified of these proceedings. Ms Thompson claimed that she met with the Claimant

sometime around mid-January and advised her to bring a formal written complaint. She said that she was *'not alarmed by the text message, because it was raised in an informal manner'*. She said in cross-examination that she *'thought the Claimant had a problem with Mustafa ... didn't consider a text message to be in writing ... couldn't access the CCTV without a formal investigation and I told the Claimant that.'* In her statement, she said that as the Claimant did not raise the issue again, *'I assumed that she didn't believe it to be serious or of significance.'* Ms Thompson said that she did not inform anybody else of the allegations, to include Miss Print, who confirmed this in her statement. She agreed that R1 had access to external HR advice, but she didn't seek such advice.

9. Sexual Harassment. We find that R2 did sexually harass the Claimant on or about the dates of the two text messages and we do so for the following reasons:
 - a. Generally, we found the Claimant to be a credible witness, whereas we did not find R2 to be so. In respect of the Claimant, we note Mr Morton's submissions as to her credibility. Firstly, he stated that the Claimant's allegations had grown exponentially over time. It is true that the initial allegations are relatively limited and then later expanded, firstly, in the grievance. However, that expansion is merely to mention that R2 *'asked for a hug'*, so therefore not a significant expansion from the original texts. Her grievance mirrored the original complaint and Ms Print's findings reflect that. Likewise, her appeal sticks to the same account. It is only in the police report that she expands substantively on the original allegations. We consider that to be because, for the first time, she had somebody (the police officer) who was receptive to what she was saying and by the nature of such interviews, the police officer will have been interrogative, inevitably bringing out further information. That was absolutely not the case with either Ms Thompson, who didn't even give the Claimant the benefit of the doubt, or Ms Print, who simply dismissed the allegations, for lack of evidence, despite not having viewed the CCTV. Another submission by Mr Morton is that the Claimant is the type of person, who having suffered harassment, would pursue the issue with tenacity. This is, we find, to place an undue burden on an employee. She had made a specific and we consider, clear allegation to Ms Thompson, who she thought was her friend (as accepted by Ms Thompson) and therefore *'would have her back'*. That was clearly a misplaced hope on her part, as Ms Thompson dismissed the allegations out of hand and did nothing about them. Nor do we believe that Ms Thompson told her to put the allegations in writing, formally, because, firstly, apart from Ms Thompson's oral evidence, denied by the Claimant, there is no corroborative evidence of her doing so, particularly strange when these women communicated so frequently by text. Also, on the Claimant's evidence, when told by Ms Print to put the matter in writing, she does so early the next day. We are confident that had the Claimant been told to do so by Ms Thompson, she would have done so. We do not therefore consider her evidence to lack credibility, particularly her oral evidence on the specific incidents related to the texts.
 - b. Turning to R2, however, we found his evidence less credible, because of the conflict between his witness statement and both his oral evidence and documentary evidence. In his statement, he stated that *'I am from Somalia and in my religion, it is prohibited to touch another woman who is not my wife.'* He confirmed this in oral evidence. However, the Claimant provided a text message exchange from her sister, Ms Majorczyk [207] with R2, dated 27 January 2018. In it he says *'you are so beautiful,* (Ms

Majorczyk replied *'thank you'* he went on, *you are georgus (sic), type of my girl and I was think what would be suitable to make joy coz it's not good enough just to see you at work, but to talk to you somewhere comfy, so what I would like to take you out somewhere cool and spend with you quality time.'* In a text shortly afterwards *'you can have day off .. that is not problem at all ... meeting with you will be dream .. I never felt this before.'* She replied *'But I cannot have day off. I need this job and this money.'* He said *'I'll pay you from my pocket ... you deserve more than that ... bb I would keeping with myself, but you told me to share with you. I can't deny to say no to you Julie'*. R2 did not deny the content of this message. He was challenged as to the apparent hypocrisy of relying on the teachings of his religion, as evidence that he could not have sexually harassed the Claimant, when evidence as above suggests that his religion was not a bar to 'touching another woman who was not his wife', or at least certainly wishing to. He said that the relationship never got to the point of touching, but agreed that he wanted it to develop to a love affair. At this point Ms Majorczyk was one of his staff. We consider therefore that R2 was quite capable, despite his protestations as to his religion, of seeking sexual contact with female members of his staff.

- c. At the outset of the Hearing, the Claimant provided the above-referred to police incident disclosure report [279]. It was agreed evidence that she had been advised by Mrs Mangan to report the matter to the police and did so. That report contains considerably expanded and more detailed allegations against R2. Of significance, from our view, is that in that report she refers to R2 as stating to her *'if you are sick, I'll pay you anyway. If you're good to me I'll be good to you. I can have anyone I want, I'm the boss.'* We find that the first sentence, as to offering to pay the Claimant while she takes time off, is remarkably similar to that used by him in the text to Ms Majorczyk and strengthens our view therefore as to the Claimant's overall account of the incidents.
- d. There are the two contemporaneous text messages, crucially requesting that CCTV be viewed, thus indicating to us that the Claimant was confident that had the CCTV been viewed, it would have corroborated her account.
- e. In respect of whether or not the acts complained of constituted sexual harassment, we consider the following. Mr Morton submitted that even if the incidents had happened as described, they did not constitute sexual harassment, under the definition of s.26. He said that there was only one incident, relating to hand-touching, for which there could be an innocent explanation and R2 and the Claimant had limited opportunities to be together. We should therefore take all the evidence in the round. We have done so, but conclude otherwise, for the following reasons:
 - i. We accepted the Claimant's evidence as to the behaviour having the effect on her of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. That behaviour was clearly based on her sex. Her oral evidence on this point was persuasive.
 - ii. She was sufficiently affected to text Miss Thompson the same day.
 - iii. R2 invaded her personal space and she said *'it was not the first time'*. Mr Morton queried what such invasion really meant, but we

are satisfied that when a much larger man, a site manager, stands too close to a diminutive woman, when there was nobody else present that it would create such an environment.

- iv. That is compounded by the hand-touching incident, where she described him as *'using the opportunity'* to do so, resulting in her describing him as a *'horrible man'*. We are in no doubt that his behaviour created in her the effect of creating an intimidating, or offensive environment for her. The fact that she may have been able to stand up for herself and reject his advances, does not lessen the effect.

10. The Toothbrush Incident. We don't consider that the Claimant has adduced any evidence that any alleged requirement that she use a toothbrush to clean lift grills constituted sexual or racial harassment. R2 denied imposing this requirement, but in any event, we fail to see how it could constitute either sexual or racial harassment. Miss Thompson said that it would not be unusual to use small brushes, like a bottle brush, to access hard to reach areas and there was no suggestion that the Claimant was being asked to clean large areas with a toothbrush, by way of some form of punishment.

11. Racial Harassment. We don't consider that the Claimant has proved her case in respect of racial harassment. There is a reference in the police incident report to *'the victim feels that the suspect behaved in this way because she was one of the only white females in the office. Victim states she is Polish, and all the other women in the office are Somali, apart from one other female'*. There is also the fact that R2 made advances on the Claimant's sister, also a white Polish woman, but in his texts there's no reference to her skin colour, or her nationality. In the absence therefore of any other evidence to support this allegation, we conclude that it is not made out.

12. Protected Disclosure and Victimisation. It is clear to us that the text messages constitute a protected disclosure. They make allegations of sexual harassment, which clearly potentially engages the Equality Act. However, we do not find that any such protected disclosures were the reason for the Claimant being disciplined or dismissed. As an aside, we dismiss outright the allegations about pay, as being completely unrelated to the acts of harassment, but instead entirely related to the Claimant's misunderstandings as to her role. Our reasons for finding that the protected disclosure did not lead to victimisation, are as follows:

- a. There is clear evidence that the Respondent genuinely believed, on reasonable grounds that the Claimant had breached their disciplinary procedure, focused, in the end, entirely on her alleged falsification of time sheets. Mrs Mangan gave good evidence as to why such acts were taken seriously.
- b. Crucially, we don't believe that at the point that Miss Print decided to embark on the disciplinary process that she was aware of the sexual harassment allegations, confirmed by Ms Thompson in evidence that she hadn't told her of them. Ms Print says in her statement that she was unaware of the allegations until she received the grievance, but we suspect that she actually first became aware at the disciplinary hearing, the day before. Those allegations, therefore, cannot have been the motivation for Ms Print's decision to discipline the Claimant.
- c. We accepted the evidence of Mrs Mangan that the sole focus of any allegation of victimisation by the Claimant was in respect of her role as

supervisor, as set out in the appeal decision letter [177] and earlier, by the director originally appointed to hear the appeal, Mr Clews, in his letter [149], neither assertion of which was corrected at the time by the Claimant and nor did she make the link to the acts of sexual harassment in her letter of appeal. This is also borne out by her single-minded focus on the supervisor issue in this Hearing.

13. S.109(4) - Respondent's Statutory Defence. This sub-section requires the First Respondent to show that they took all reasonable steps to prevent R2 from, in this case, sexually harassing the Claimant. All the evidence indicates that R1 took no steps whatsoever to prevent such behaviour by R2. Ms Thompson, by her own evidence, dismissed the allegations out of hand, as not being serious ones, subsequently believing them to be motivated by an animosity from the Claimant towards R2. She made no effort to examine the CCTV and did not report the matter to anybody else at the time, to include Miss Print, to whom she handed over her management responsibilities. Despite having access to external HR, she took no advice on the matter and was unable to draw our attention to any specific procedural Equal Opportunities training, or references to procedures that had been given by R1 to R2. When asked at the conclusion of her evidence as to whether she had taken all reasonable steps to prevent such harassment, she said 'no'. On that basis, therefore, we find that R1 cannot rely on s.109(4) and is accordingly liable for the acts of R2.
14. Conclusion. Therefore, we find that R2 sexually harassed the Claimant, for which R1 is also liable. The Claimant's claims of racial harassment, and victimisation fail and are dismissed.

REMEDY REASONS

1. We heard evidence from the Claimant and considered the following factors to be relevant to our decision.
2. Our finding as to there being two distinct incidents of sexual harassment.
3. The fact that the harasser was the Claimant's line manager.
4. The fact that she is, in comparison to the Second Respondent, diminutive and by the nature of her role, she generally was isolated at work, therefore potentially feeling more vulnerable.
5. The fact that despite the Claimant reporting the matter to the Second Respondent's line manager, a person she thought her friend, Miss Thompson took no action whatsoever, instead placing the onus on the Claimant to manage the situation. We consider that will have led her to feel isolated and unsupported.
6. We note Mr Morton's submission that as the Claimant did not make any further complaints, prior to her suspension and continued at work, she cannot have been so adversely affected. However, she said she didn't feel she needed to expand on the first text, as she had specifically referred to CCTV footage to provide more detail as to the full extent of the incident. She was asked about the 'smiley face' emoji and said that it was '*to indicate that I was strong enough person to stand up to him*'. We think it unreasonable to suggest that the Claimant could only really signify the extent of her injury to feelings by staying off work. She is a lone-parent, on the National Living Wage, working part-time, with three children and therefore we accept she had no option but to stay at work. This is also in the context of Miss

Thompson telling her by text [221], around that time that she didn't trust the Second Respondent and she was '*just waiting for it to go bang!!*'. She directly states that the Claimant would replace the Second Respondent and therefore the Claimant's lack of further action can be explained by the possibility of the Second Respondent being no longer employed. Also, the timeframe within which these events took place is short – between the first incident and her suspension is only about three weeks.

7. While the Claimant undoubtedly suffered mental health problems [medical evidence 263-272] in the months after these matters, there is no evidence of a specific link to the acts of harassment. We have no doubt instead that the prolonged disciplinary and grievance procedure and her dismissal (which we found not to be linked to the harassment) and which she considered grossly unfair and an unfair reflection on her undoubted work ethic, is much more likely to be the cause of her condition, combined with the stress of single-motherhood, with minimal support.
8. As stated in our Judgment on liability, it is clear that her concerns about the supervisor role were predominant in both the disciplinary and grievance procedure and indeed in these proceedings. This must be factored in to her overall injury to feelings.

Conclusion

9. We consider that this case, taking into account the above factors, in particular the Claimant's focus on the supervisor role, the relatively short-term nature of the acts of harassment and also the traumatic nature for her of the disciplinary procedure (unrelated to the acts of harassment), rule against this being a case in the middle **Vento** band.
10. Turning therefore to the lower band, we find that it falls in the upper mid-range of that band, at £6,000, for the following reasons:
 - a. The isolated nature of her role. We are satisfied that the Claimant will have felt vulnerable when at work, for the following three weeks or so.
 - b. The Second Respondent was her direct line manager and in relation to her, physically imposing.
 - c. As a lone mother, with limited support, she will not have had the emotional support a partner might have provided, making her more vulnerable.
 - d. The sense of betrayal she felt by the complete lack of support from Miss Thompson.
11. For these reasons therefore the Respondents are ordered, on a joint and several liability basis, to pay the Claimant the sum of £6,000 plus interest. Interest is calculated at £480 per annum and therefore at £1.32 per day. 217 days have passed since the mid-point between the acts of harassment and today's hearing and therefore the interest calculation is £286.44.

Employment Judge O'Rourke

Date: 26 March 2019