

2. We heard evidence over four days and reserved our judgment with reasons. We met in Chambers on 15 March 2019 and considered the most appropriate way of dealing with the claims are first to deal with those under the Equality Act 2010, making appropriate findings of fact and second, findings of fact in relation to the unlawful deduction from wages.
3. As far as the claims under the Equality Act 2010 are concerned, they are provided for under s.26 which deals with harassment and s.27 which deals with victimisation.

S.26 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.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (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.

S.27 Victimisation:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.

- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

4. Relevant in these proceedings is section 136 of the Equality Act 2010:

S.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.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) the Asylum and Immigration Tribunal;
 - (c) the Special Immigration Appeals Commission;
 - (d) the First-tier Tribunal;
 - (e) the Special Educational Needs Tribunal for Wales;
 - (f) **[F1**the First-tier Tribunal for Scotland Health and Education Chamber]

5. We heard evidence from the claimant, Mrs E Groman, who preferred to be addressed by her maiden name Miss E Woolf, Adrian Kitching and David Scott for the claimant. We had statements provided for Cheryl Calderwood and Karen Thompson (née Hames). From the respondents we heard evidence from James Stratford the second respondent, Nicholas Blockley, Technical Manager, Rachel Campbell, Management Consultant, Ms Jackie Langridge, Human Resource and Quality Manager and Johnny Bone, Production Manager. We also had a statement from Jill Stratford.

6. We had produced to us a bundle of documents comprising approximately 424 pages, a joint neutral chronology and helpful written submissions from Mr Heard.

Findings of Fact ~ in relation to the claims under the Equality Act 2010

7. We make the following findings of fact based on the balance of probabilities having considered those documents to which our attention was drawn.
 - 7.1 The first respondent, Universal Science (UK) Ltd., provide thermal cooling materials for electronic assemblies and LED lighting. At the relevant time there were approximately 10 employees.
 - 7.2 The second respondent is the Managing Director of the first respondent and a substantial share holder.
 - 7.3 The claimant had many years' experience in the lighting industry and attended an interview on 1 June 2016 for the position of Sales Manager for LED products. An offer of employment was made on 9 June 2016.
 - 7.4 On 24 June 2016, the claimant was provided with her contract in which details of her salary and commission payments were made.
 - 7.5 The contract was signed by her on 22 July 2016 and she commenced employment on 31 August 2016.
 - 7.6 On 7 October 2016, the claimant booked a two bedroomed apartment at Rojen Apartment which was accommodation needed for an annual trade event referred to as Lux Live. The second respondent subsequently confirmed that he would attend sharing the same apartment. We were told, and we accept, that accommodation was scarce and the claimant booked it either for use of the second respondent or, if he were unable to attend, a colleague.
 - 7.7 From 23 November 2016 until 24 November 2016, the Lux Live event took place at Excel in London. The evening of 23 November was the occasion for a corporate dinner. We heard evidence from Adrian Kitching and David Scott, both of whom gave evidence that the second respondent's behaviour towards the claimant was inappropriate. The claimant gave similar evidence. The second respondent denied that anything untoward had happened. Mr Kitching described the second respondent as having said that he had not drunk alcohol for some months and had appeared to have consumed a considerable amount of alcohol. He was animated and Mr Kitching saw him leaning his body into the claimant's whilst talking and sitting at the table. Mr Kitching noticed how uncomfortable the claimant looked and he considered that the

second respondent behaved in an inappropriate manner. David Scott described the second respondent as “*all over*” the claimant who was sitting next to him. He considered that by the look on her face that she was embarrassed about her new boss and looked very uncomfortable. In giving evidence, the second respondent denied having had too much to drink, denied leaning into her space and being animated and behaving in a harassing manner. He added that anybody sitting next to him would have had the same experience. He stated that he was not overly familiar and they were basically enjoying each other’s company. We preferred the evidence of the two witnesses called by the claimant for the following reasons. The incident during the dinner did not form part of the complaint made by the claimant although it was referred to by her in evidence before us. The two witnesses that were called gave compelling, consistent and credible evidence. We find that the second respondent acted inappropriately in a sexually harassing manner during the dinner.

- 7.8 That evening, the claimant and the second respondent returned to their accommodation. The second respondent sat on the sofa and asked the claimant for a shoulder massage. He then asked her to sleep with him which she declined and told him that this was totally inappropriate. The second respondent then went to lie on his bed and proceeded again to ask her for a massage. He was wearing blue boxer shorts and lay on his bed. The claimant went to her room and locked the door. There was a dispute in evidence and the second respondent denied the allegation. We prefer the evidence of the claimant. We have found that the second respondent had acted inappropriately during the dinner and were satisfied that he had consumed a considerable amount of alcohol and this behaviour was not inconsistent with the behaviour exhibited during the dinner. The claimant’s account of events throughout was consistent.
- 7.9 The following day, 24 November 2016, the second respondent walked around the apartment with nothing more than a small towel. There was a dispute in evidence. The second respondent stated that there was only one bathroom and he was on the way to the bathroom using the towel. We make no findings as to the physical layout of the apartment, but the behaviour, in our judgment, was inappropriate particularly in view of the behaviour exhibited by the second respondent on the previous night.
- 7.10 The claimant told us, and we accept, that having been the subject of such inappropriate behaviour she soon commenced seeking alternative employment.
- 7.11 On 12 May 2017, while in their office, the second respondent asked the claimant for a shoulder massage which she declined to give him and told him that it was inappropriate. He repeated the

request on several occasions and on one of the occasions the claimant gave him some 'deep freeze gel' from her hand bag.

- 7.12 Later the same day, the claimant emailed the second respondent with a brochure of a local massage company which she believed was a professional massage which would help with his apparent neck pain. He replied by email using the following terms,

"Nice one... is she Swedish?"

The claimant considered that to be inappropriate.

- 7.13 The next significant event occurred on 29 September 2017. The claimant and the respondent attended the Lighting Industry Association Charity Dinner. We did not hear from Karen Thompson and placed little weight on her statement in evidence. However, we accept the account of the claimant preferring her evidence to the second respondent. We found her evidence credible and consistent and that the second respondent answered a question as to whether they were a couple responding in terms that *"he had tried at least 20 times but had been rejected by me (the claimant)"*.
- 7.14 On 12 November 2017 the claimant resigned and later the same day she submitted a formal grievance letter in respect of the non-payment of commission and allegations of sexual harassment. No details of the sexual harassment were provided although she did state that they would be provided in due course.
- 7.15 Miss Jacky Langridge, who had worked for the first respondent since 2008 and was given the role of HR Manager just a few months earlier, wrote to the claimant requesting details. She subsequently sent a log with details of those allegations that were before us.
- 7.16 On 24 November 2017, there was a formal grievance meeting and notes of that meeting are produced at pages 211 to 213. The tribunal notes that the claimant's account of the events bore a high degree of consistency with the evidence that she gave to us.
- 7.17 On 24 November 2017, there was an email sent to the respondent from the claimant's work email. We accept the claimant's evidence that the email was sent by her estranged husband. There followed correspondence and a request by the claimant to reset her password and on 25 November 2017 she reported the incident of her estranged husband hacking her phone.
- 7.18 On 28 November 2017, there was confirmation sent to the claimant that her password had been reset. On 1 December 2017, the claimant believed in her claim that her email account had been blocked which denied her the chance to earn commission. On this

issue we accept the second respondent's evidence that the password had been reset at the claimant's request and the first respondent were not at fault in the claimant's apparent inability to access her email account.

- 7.19 Rachel Campbell was appointed to undertake a grievance inquiry and her report is produced at pages 230 – 238. She reached the conclusion,

"I could find no evidence to support Emma's allegations of sexual harassment"

and she recommended that the grievance be dismissed due to lack of evidence. In our judgment the investigation was not a fair or reasonable one. In giving evidence Ms Campbell told us that,

"(she) made a valued judgment as it was a social function and (she) had enough witnesses within the organisation to get the context without jeopardising any future customer relationships" and "I thought of the embarrassment and the value added" by such a witness statement.

- 7.20 In our judgment, the approach taken by Ms Campbell was not dissimilar to that taken by Ms Langridge in not following good industrial practice. The difference of course is that Ms Campbell was said to be acting in a professional capacity as a paid consultant specialising in HR issues and Ms Langridge enjoyed most of her experience with the respondent and, indeed in her working life, in other areas of expertise enjoying only a few weeks of HR involvement. Neither witness really looked fairly and objectively into the allegations and were quick to reach conclusions that there was nothing to support allegations made by the claimant. It was apparent to us that any reasonable investigation would have uncovered those matters which were expressed in evidence so convincingly before us.

Conclusions

8. We were in little doubt that the claimant's allegations of sexual harassment were well founded. There was a consistency in her evidence throughout. She was extensively cross examined and did not deviate materially in the account that she gave. There was a consistency in her account compared with the log that she provided in the grievance and her subsequent complaint.
9. As far as victimisation is concerned, the protected act that she relies on was the raising of the grievance. The evidence, however, points to a complaint emanating from her as to the misuse of her email account and a

reasonable and speedy response from both respondents, bearing in mind annual leave arrangements, and we could see no element of victimisation in their response.

Unpaid Wages

10. We make the following findings of fact based on the balance of probabilities having considered those documents to which our attention was drawn:

10.1 Both the claimant and second respondent gave brief evidence as to the job interview that took place on 1 June 2016. We have had produced email correspondence from the second respondent to Mr J Sandys which in part provides a record of the second respondent's thought process in offering employment to the claimant. In an email to the claimant of 2 June, he referred briefly to commission in the following terms,

"We have calculated your overall expected income based on you bringing £500k plus over the next 12 months (period from the start of your employment), I would like to offer you £45k, basic plus 10% of the GP on all new business you bring to the company... New business (supported by POS / Visit / Trip Reports) in a first year that equates to £500,000 sales (invoice) at min. of 40% GP i.e. £200,000 GP income".

10.2 That email was copied to Mr Sandys on 3 June with the following comment,

"I sent this to Emma and she says she wants £51k basic. It worries me that she is not confident to make to £500k, what do you think?"

Mr Sandys responded later that day,

"How about saying you will pay the £52.5k (or £51k if you wish) for three months to get her started earning uncapped commission".

10.3 Having thought matters over, Mr Stratford sent the following offer letter to the claimant on 9 June and referred to pay, and more particularly commission in the following terms,

"Your remuneration for this position is as follows:

Starting salary £51k for three months, then £45k. This will give you enough time to generate the business to build up your commission payments. The commission being calculated at 10% of the gross profit generated in new business. The commission is contingent on the margin being maintained at an average 40% or above. Your

commission calculation is open ended and reviewed and recalculated annually.”

- 10.4 The terms relating to the calculation of commission payments were provided for in the written terms and conditions of employment than which are at pages 73 and 76. At para 2.2 is the following,

“You are entitled to commission payments which are based on your prediction of an increase of new business of £500,000 turnover from which the company will achieve a minimum 40% gross margin. You will be entitled to 10% of the gross margin earned on the new business you have generated, payable monthly. Commission payments are subject to the companies you have won business with paying their bills. Any bad debtors will have an impact on the commission paid to you and the company reserves the right to recover any commission prepaid to you which has not been paid for by its clients. New business is described as business that you have personally generated / developed. It will be demonstrated by the activities within your trip reports supplied to the Managing Director on a weekly basis. Trip reports and Sales reporting is essential weekly and will impact on the payment of commission should they not be produced in a timely manner. Commission schemes are reviewed annually at the beginning of each fiscal year, details of each annual scheme will be supplied separately to this contract.”

- 10.5 In giving evidence, the second respondent clarified that in respect of the three accounts, which are the subject of this litigation, Zetas Specialist Lighting (“Zetas”), Holophane Europe Limited (“Holophane”) and Venture Lighting Europe Limited (“Venture”), there were four relevant requirements:

10.5.1 that the business had to be new business in that it could not be ‘tinkering’ with existing accounts;

10.5.2 trip details, which essentially was an account of activity, had to be recorded;

10.5.3 there had to be a gross profit margin met; and

10.5.4 that bills had to be paid.

- 10.6 We had difficulty in understanding precisely what the parties understood by “*new business*”. There was a conflict of evidence. The claimant’s view was that she was engaged to ensure that business accounts were serviced in a way that there was increased sales activity. She maintains that in attracting business from a semi-dormant account, that of Venture, she was in fact generating new business. In a nut shell she maintains that “*new business was new business created by me*”.

- 10.7 The dispute really can be summarised as follows: the claimant's position is that new business from existing clients, or new clients' business following appointments, qualified for a commission payment. The respondents' position is that the commission was only generated if from existing clients, new products were ordered or new clients were found who generated new business.
- 10.8 Even if we are prepared to accept the interpretation put on "*new business*" by the claimant, in order for her to succeed in this claim we have to be satisfied that the other conditions, which both parties agree were relevant, were met.
- 10.9 As far as trip recording, the claimant's position simply put is that she reported her activity on the respondent's stationary. The second respondent avers that simply recording mileage was not sufficient for the first respondent's business purposes. We bear in mind that only until late on in her employment was this issue raised and on the balance of probabilities we accept the claimant's account that she had done all that was required of her.
- 10.10 As far as unpaid debt was concerned, both parties appeared to agree that this was not an issue in contention and for the sake of this claim we are prepared to accept that this was not a matter which on its own, or in combination with others, debarred her from any entitlement to a contractual payment.
- 10.11 The issue on which we had the greatest difficulty was in the calculation of gross profit. Although we had difficulty in accepting much of the second respondent's evidence in regard to other matters, he did provide a very convincing explanation as to the steps that he had taken to calculate gross profit and he provided documentation and calculations based on what we consider to be sound business arguments. For example, he calculated that the hourly cost of the overheads was based on two production workers to run production lines, each being paid £25,000 per year and amounting to £50,000 annually. The building rent and rates are totalled to include electrical usage, was £21,000 per annum. Based on a calculation of seven working hours for five days a week he demonstrated the hourly costs could reasonably be assessed at £40 per hour.
- 10.12 We also bear in mind that a failure to meet gross profit margin was not raised as a reason for non-payment during the grievance meeting and that the claimant had made efforts and undertaken calculations which she believed tended to show that the gross profit margin was over 45%.
- 10.13 However, we simply do not have enough evidence to satisfy us on the balance of probabilities that the claimant is entitled to succeed in any one of these three accounts. It is clear from the evidence

before us that on the Zeta account the profit margin had not been met, nor had it on the Hollophane account. On the Venture account we simply cannot be sure to the required standard and therefore the claim must fail.

11. The hearing has been adjourned until 6 September 2019 for remedy when we will hear argument and evidence as to remedy sought on the claim of sexual harassment.

Employment Judge Cassel

Date: 22 April 2019

Sent to the parties on:

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For the Tribunal Office