



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Gwen Olivia Haigh

**Respondent:** Department for Work & Pensions

## REASONS OF THE EMPLOYMENT TRIBUNAL

**Held at:** North Shields Hearing Centre

**On:** Monday 25<sup>th</sup> March to  
Tuesday 2<sup>nd</sup> April 2019

**Before:** Employment Judge Johnson

**Members:** Mr R Dobson Mr D Cartwright

### *Appearances*

**For the Claimant:**

**For the Respondent:**

## REASONS

1. This is the unanimous judgment of the Employment Tribunal in respect of the claimant's complaint of harassment, contrary to Section 26 of the Equality Act 2010, all of the other complaints having been dismissed upon withdrawal by the claimant.
2. The claimant was represented by Mr McHugh of Counsel, who called the claimant to give evidence. The respondent was represented by Ms Hodgetts of Counsel, who called to give evidence Mr S Martin, Mr S Bell and Mr A Kelsall. The claimant and the three witnesses for the respondent had all prepared typed signed witness statements which were taken "as read" by the Tribunal, subject to supplemental questions, questions in cross-examination and questions from the Employment Tribunal. There was an agreed bundle of documents comprising three A4 ring binders containing a total of 1,163 pages of documents. The Tribunal is grateful to the parties representatives for the careful and efficient preparation of the bundles, and to both counsel for their skilful navigation of those

bundles. The Tribunal also had the benefit of Mr McHugh's closing submissions which were marked C1 and Ms Hodgetts closing submissions for the respondent which were marked R4.

3. By a claim form presented on 4<sup>th</sup> December 2017, the claimant brought complaints of unlawful disability discrimination, equal pay and unlawful deduction from wages. The allegations of unlawful disability discrimination included allegations of direct discrimination, indirect discrimination, failure to make reasonable adjustments, harassment and victimisation. At the end of the claimant's case, following cross-examination of the claimant by Ms Hodgetts, the claimant formally withdrew all the allegations relating to unauthorised deduction from wages and unlawful disability discrimination, save for one allegation of harassment related to disability, contrary to Section 26 of the Equality Act 2010. Mr McHugh on behalf of the claimant consented to those other claims being dismissed upon withdrawal by the claimant.
4. The remaining allegation of harassment is set out in paragraphs 23 – 26 of the document "further and better particulars of claim" submitted by the claimant on 14<sup>th</sup> September 2018, following case management hearings before Employment Judge Garnon and Employment Judge Johnson. The specific allegation states as follows:-

23. The claimant claims the respondent harassed her contrary to Section 26 of the Equality Act 2010.

24. The claimant relies on the following conduct to amount to harassment which violated her dignity and created an intimidating hostile and degrading, humiliating or offensive environment for her.

25. The comments contained within the transcripts of her SAR request, alluding to the fact that she is likely to submit a grievance and/or seek a promotion on the basis of her disability namely:-

- i) Simon Bell in discussion with a HR case worker on 13 November 17, "erm, I will guarantee that this lady will put a grievance in, erm basically anything that happens with this lady she puts a grievance in, and, and trust me, this lady erm you know and everybody has a right, but this lady will erm pick up on."
- ii) the comments contained within the transcripts of her SAR alluded to her falsely claiming she is disabled in order to obtain one of the CSJM job roles – Simon Bell to a HR case worker on 13/11/17:-

.1 think that erm her and her TU rep were basically looking at words like positive action and basically,

.2 because this was, this would set a horrendous precedent,

.3 just put in for a job and say well actually I'll go to the doctors and say you know a b or c

.4 so give me the job

.5 but I think that what she's doing, she's, she's picking out the protected characteristics,

.6 latching and basically stating,

.7 she's using the word positive action and thinking right, I'll erm steer (steal) a march here."

iii) Simon Bell was aware that the calls were recorded and that the claimant could obtain a copy of the contents of the call.

26. The claimant claims that this is unwanted conduct related to her disability which had the purpose or effect of violating her dignity or creating an intimidating hostile degrading humiliating or offensive environment for her."

5. The claimant's claims about those pleaded allegations is set out in paragraphs 111 – 113 of her witness statement. Those paragraphs state:-

111 In December 17 I received HR call transcripts of calls between HR case workers and Simon Bell (257 – 270 and 298 – 307). SB makes discriminatory and slanderous statements about me which cause distress and detriment to my mental health:-

a 1/11/17 Laura to HR case worker Mo "this member of staff is known for erm, grievances"

b Laura "so she's now trying to say that they're going against their disability (this was before I was aware of the TDA – EOI outcome)

c SB "this individual erm, she puts, she puts grievances in."

d 13/11/17 SB "erm I, I will guarantee that this lady will put a grievance in"

e SB "probably against me or the system but"

f SB "erm, basically anything that happens with this lady she puts a grievance in."

g SB "doesn't matter what it is so....."

h SB "on obtaining the answer he wanted stated "I'll sleep soundly tonight"

i SB "think that erm, her and her TU rep were basically looking at words by positive action and basically, because this was, this would set a horrendous precedent"

j SB "just put in for a job and say well I'll actually I'll go to the doctors and say you know, a b or c"

k “so give me the job”

l “but I think that’s what she’s doing, she’s, she’s picking out the protected characteristics”

m latching and basically stating....

n yeah and trust me, this lady erm, you know and everybody has a right”

o “but this lady will erm, pick up on the slightest slightest change or erm, anomaly, or anything at all.”

111 Simon Bell in his calls to HR demonstrated bias and had made defamatory remarks without any evidence to substantiate his accusations.

113 Simon Bell in these calls accused me of colluding with my TU rep and committing fraud by pretending I had a disability in order to get a promotion. This was extremely distressing and sensitive as I had not had a disability when I started working for the respondent and it was their failure and duty of care which resulted in this disability. For a member of the senior management team to accuse me and a TU rep of trying to commit fraud is both shocking and appalling.”

6. In the list of issues agreed by both representatives, those which the Tribunal would have to decide in respect of the allegation of disability – related harassment are as follows:-
  - a) Did Simon Bell make the comments alleged of him on 1<sup>st</sup> November 2017 and 13<sup>th</sup> November 2017?
  - b) Did these amount to harassment within section 26 of the Equality Act 2010, in that it was:-
    - i) unwanted conduct in relation to the claimant’s disability, which
    - ii) had the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment taking in to account,
    - iii) the claimant’s perception
    - iv) the other circumstances of the case
    - v) whether it is reasonable for the conduct to have that effect
7. The respondent has throughout these proceedings conceded that the claimant is and was at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010, namely stress and anxiety. The claimant attributes her

stress and anxiety to the conduct of the respondent, although this Employment Tribunal is not charged with any making particular finding in that regard.

8. On or about October 2017 the claimant, who was then working as an executive officer at band D, applied for a position as a higher executive officer at band C. Those employees interested in that position were to complete an Expression Of Interest form, which amounted to an application for the position. Selection for the position was based upon a “sift”, carried out by Mr Kelsall and Mr Bell. Each application form was allocated a number of marks under a scoring system based upon the manner in which the application form was completed and the examples which each applicant provided. The claimant was unsuccessful in her application, her form being marked towards the bottom end of those who had applied for the position.
9. The claimant at that stage was of the opinion that, as a disabled person, she was entitled under the respondent’s policies and procedures to be guaranteed an interview for this position. The claimant made her feelings known to Mr Bell and Mr Kelsall, both before and after the sift procedure. Because of the claimant’s insistence that she was entitled to an interview as an “equality move” or as “positive action”, Mr Kelsall and Mr Bell decided that contact should be made with the respondent’s specialist HR advisors so that the position should be clarified. Mr Bell spoke to the HR advisors on the 1<sup>st</sup> November 2017 and the 13<sup>th</sup> November 2017. As a matter of policy, such telephone calls are recorded. Mr Bell knew that the telephone calls were recorded. Mr Bell was also aware that the claimant was likely to make a Subject Access Request for a transcript of the recording.
10. It is what was said by Mr Bell during the course of these discussions, which forms the subject matter of the claimant’s allegations of harassment.
11. Mr Bell and the respondent concede that the transcript that appears is a true and accurate record of what was said by Mr Bell on both occasions. Mr McHugh on behalf of the claimant conceded that the claimant agrees that it was never Mr Bell’s intention to violate the claimant’s dignity nor create an intimidating, hostile, degrading or offensive environment for her. Mr Bell’s position, as confirmed in his evidence, was that he felt obliged to check with the respondent’s specialist HR advisors as to whether the process which was being followed in terms of the selection for the NCHEO post were in accordance with the respondent’s policies and procedures and in particular whether the claimant was correct in her assertion that she was automatically entitled to an interview (if not be allocated the post) as either a reasonable adjustment, positive action or an equality move. Mr Bell’s evidence was that he was explaining all of the facts to the HR advisor that those facts included reference to Mr Bell being aware that the claimant had formal grievances in the past. Mr Bell’s evidence was, because of those grievances, that he wanted to make sure that everything was being done properly and in accordance with appropriate policies, because if he did not then the claimant was likely to raise a grievance.
12. The claimant’s evidence, as set out in her witness statement, is recited in paragraph 5 above. The claimant describes Mr Bell’s questions and comments as

“discriminatory and slanderous statements about me which cause distress and detriment to my mental health”. She says that Mr Bell “demonstrated bias and made defamatory remarks without any evidence to substantiate his accusation”. She goes on to state that Mr Bell “accused me of colluding with my TU rep and committing fraud by pretending that I had a disability in order to get promotion. This was extremely distressing.”

13. The respondent concedes the words used by Mr Bell amounted to “unwanted conduct”. The claimant concedes that Mr Bell when using those words did not have the “purpose” of causing that distress or detriment to the claimant’s mental health. The issues for the Tribunal to decide therefore are whether the words used had that effect upon the claimant and if so whether it was reasonable for those words to have that effect.
14. The Tribunal found the claimant to be an unreliable witness. The claimant was evasive in her answers to most of the questions put to her in cross-examination by Ms Hodgetts. The Tribunal found the claimant to be someone who was willingly capable of exaggerating the impact upon herself of those comments about which she complains, yet have little, if any, regard of the impact upon her colleagues of the claimant’s serious allegations and hurtful allegations and comments. The claimant was fully aware at all times of the obligations imposed upon the respondent’s witnesses by the Civil Service code of conduct, yet had little hesitation in accusing those colleagues of behaviour which would undoubtedly constitute a breach of that code. In answering questions in cross-examination from Ms Hodgetts, the claimant reluctantly accepted that Mr Bell was fully entitled to seek advice from the respondent’s specialist HR advisors and in so doing was required to provide that advisor with all the known facts. Those facts included Mr Bell’s genuine concern that, because the claimant had raised grievances in the past, she may be likely to raise a grievance in respect of this matter if the outcome was not to her satisfaction. When asked by Ms Hodgetts if she took offence at being referred to as someone who raised grievances the claimant replied, “I did not take particular offence as I have put in grievances, yes”. The claimant on more than one occasion described Mr Bell as referring to her as a “serial griever”. At no time did Mr Bell use that phrase. He simply, accurately, informed the HR advisor that the claimant had raised grievances in the past and was likely to do so again. The claimant described Mr Bell’s use of the words “horrendous precedent” something which “appalled me”. The claimant then conceded under cross-examination that it would indeed be quite wrong for someone to go to their doctor, obtain a sicknote and then use that as a means to obtain promotion to a senior position. The claimant was quick to categorise Mr Bell’s hypothetical description of that situation to the HR advisor as “my trade union rep and me committing fraud”. The Tribunal found that this was exaggerated and distorted in terms of what was said by Mr Bell, particularly in the context of the entire conversation in which those words were used.
15. The claimant has failed, in her pleaded case and witness statement, to provide any meaningful description as to the alleged impact of these words upon her. She simply states that it caused her “distress and detriment to my mental health”. There was no medical evidence whatsoever to describe any impact upon the claimant’s mental health. The claimant does not describe what that impact was.

She provides no further details about how she was actually feeling and how that amounted to “distress”. The Tribunal found that the claimant may well have felt annoyed and irritated by the reference to her earlier grievances, but not to the extent that the impact was such that it would fall within the definition of Section 26 of the Equality Act 2010.

16. The Tribunal found that Mr Bell was also a rather hesitant and evasive witness, who was frequently reluctant to answer the straight questions which were skilfully put to him by Mr McHugh in cross-examination. Mr Bell was also somewhat reluctant in conceding to Mr McHugh that some of the words he had used in his telephone discussion with the HR advisor could have been phrased better and may in isolation be seen as unreasonable. Mr McHugh did concede to Mr Bell that the claimant did not allege that his behaviour intended to cause her any offence nor was there any allegation that Mr Bell was prone to bigotry or discriminatory conduct towards persons with disability.

17. The Law

The relevant statutory provision is contained in section 26 of the Equality Act 2010 which states:-

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.
- (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.

18. In their closing submission, Mr McHugh and Ms Hodgetts made reference to the decisions of the employment appeal tribunal and court of appeal in the following cases:-

- i) Pemberton v Inwood (2018 IRLR542)
- ii) Richmond Pharmacology v Dhaliwal (2009 ICR724)

- iii) Land Registry v Grant (2011 ICR1390)
- iv) Heafield v Times Newspaper Limited (UKEAT/TPA/1305/12/BA)

19. It is common ground that in order to decide whether any conduct falls within Section 26, the Tribunal must consider both whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the circumstances of the case. Tribunals must not cheapen the significance of the words used in Section 26, since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant's assertion that certain conduct has violated his or her dignity, should not necessarily be taken at face value, if the facts demonstrate otherwise. After all, not everyone who claims to be "offended" by something, genuinely feels offended. There are those for example who simply relish an argument or have a grudge against the alleged perpetrator and therefore will be willing to find anything which he or she says in a negative light. An example would be where someone is to a certain degree motivated by his or her desire to retaliate against what he or she perceives to be unfavourable treatment by the person now accused or harassment.
20. The objective aspect of the test is primarily intended to exclude liability where the victim is hypersensitive and unreasonably takes offence. It is important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. If for example the Tribunal believes that the claimant was unreasonably prone to take offence, then even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of Section 26.
21. The Tribunal was not persuaded by the claimant's evidence as to the impact Mr Bell's words had upon her. The Tribunal found that the claimant at the very least exaggerated any such impact. The Tribunal was not satisfied that the effect of Mr Bell's words, in the claimant's case, fell within the language of Section 26. Furthermore, the Tribunal found that it was not reasonable for the words used by Mr Bell in all the circumstances of the case to have had any such effect which would have brought the claimant's case within the language of Section 26. Mr Bell may well have been able to be more selective in the language he used, but was quite entitled to raise his enquiry of the HR advisor and in so doing was required to place before the HR advisor all the facts of the case. That included the fact that the claimant had raised grievances in the past and may be likely to do so again if she was dissatisfied with the outcome of the current recruitment process.
22. For those reasons the claimant's complaint of harassment contrary to Section 26 of the Equality Act 2010 is not well-founded and is dismissed.

**EMPLOYMENT JUDGE JOHNSON**

**REASONS SIGNED BY EMPLOYMENT  
JUDGE ON 24 May 2019**