



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Tina Houlihan

**Respondents:** (R1) Sainsbury's Supermarkets Limited  
(R2) Mr DM

**Heard at:** Leicester

**On:** 24 April 2018, 26 & 27 April 2018, 1 May 2018

**Before:** Employment Judge Ahmed

**Members:** Mrs B Tidd  
Mr M Alibhai

## Representation

**Claimant:** In person

**Respondents:** (R1) Ms Dee Masters of Counsel  
(R2) Ms NM

# JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant's complaint of sexual harassment against both the First and second Respondents succeed.
2. The complaint of direct sex discrimination against the First Respondent is dismissed.
3. The issue of remedy is adjourned.

# REASONS

1. By a claim form submitted to the Tribunal on 25 January 2017 Ms Tina Houlihan brings complaints of sexual harassment and direct sex discrimination against her former employer, Sainsbury's Supermarkets Limited (hereinafter 'Sainsbury's') as the first Respondent and Mr DM as a named second Respondent.

2. Those giving evidence at this hearing were the Claimant, the Second Respondent, Mr Dean Smith (Store Manager at Hinckley Road), Mr Ian Partridge (Store Manager at Swadlincote, South Derbyshire) Miss Selina Morgan (Store Manager at Derby) and Ms Renae Hayes, a former Customer Service Assistant based at Hinckley. In coming to our decision we take into account the contents of their witness statements, their oral evidence, the documents in the agreed bundle and closing submissions. In addition, written representations were submitted on behalf of Mr DM prepared by Mr Lewis, a solicitor, who did not appear at the hearing. The Claimant represented herself. Mr Masters of Counsel represented Sainsbury's. Miss NM represented her father. This decision represents the views of all the members of the Tribunal.

3. The facts of the case are relatively straightforward though strongly disputed. They centre largely on the events of what happened at the store on 20 October 2016 (the "October incident"). Ms Houlihan began her employment with Sainsbury's on 26 June 1996 as a Customer Sales Assistant which has been her role throughout all material times. Mr DM was also employed in the same or similar role at the Hinckley store and had been employed for approximately 8 years prior to the events of this case. Ms Houlihan and Mr DM worked different shifts but their paths often crossed usually at a time when their respective shifts were about to start or end.

4. It is necessary to mention an incident prior to the so-called October incident. It has been referred to as the "wet dreams" incident. The Claimant and Mr DM both agree that at some point prior to October 2016, Mr DM approached the Claimant and said he had had been having wet dreams about her. Mr DM says it was 'many months' prior to October 2016 without actually specifying an approximate date. The Claimant believes it was made some three months or so before the October 2016 incident. It is agreed between the Claimant and Mr DM that the comment was made in the store canteen in the presence of others though there is no clear evidence as to whether other staff overheard it. Ms Houlihan says she reported the remark to Sainsbury's supervisors who did nothing about it. She chose not to take the matter any further at that stage not wanting the inevitable aggravation associated with such a complaint. Sainsbury's denies the remark was reported to them until after the October incident.

5. The Claimant's version of events as to the October incident is that on that day both she and Mr DM were in the locker room when it happened. Mr DM approached her and said her hair was 'looking nice today'. Ms Houlihan did not reply and walked away but Mr DM followed her through the warehouse. When they were alone and he was in close proximity he said to her: "I feel like raping you. I have an erection". The Claimant was very shocked and walked away immediately to the shop floor where she told a couple of her colleagues, Mrs Sylvia Worth and Miss Tracey Forrest what had happened. She then reported it to the Store Manager, Mr Smith. It is agreed between them that there was a discussion but there is some disagreement as to what Ms Houlihan said. Mr Smith agrees that Ms Houlihan told him that Mr DM had said he had an erection but Mr Smith does not accept that there was any reference to the word 'rape'.

6. Mr DM's account is that he did speak to the Claimant that day but denies making any comment about rape or having an erection. He says that he complimented Ms Houlihan on her hair and what he actually said was "you woke me up" which he meant as a compliment. He agrees that Mr Smith spoke to him on the same day and Mr Smith told him he had upset Ms Houlihan but did not know precisely what it was that had caused her to be upset. He agreed to apologise though he was not quite sure what he was apologising for.

7. Mr DM was then off work immediately after 20 October on annual leave and returned on 3 November when he met the Claimant to apologise. The contents of that discussion are in dispute. Mr DM says that he apologised if he had offended her. Ms Houlihan's account is that Mr DM was not apologetic at all but rather he was indignant that the Claimant had escalated the incident to the Store Manager. We accept that it was a somewhat acrimonious discussion and ended with Mr DM saying that he would be 'more formal with her in future'. Ms Houlihan accepts that at the end of it Mr DM may have muttered the word 'sorry' but his demeanour was far from remorseful and rather than accepting fault he blamed the Claimant for the situation.

8. Later that evening Mr Smith telephoned Ms Houlihan to ask how the meeting had gone. Mr Smith's recollection is that nothing was mentioned about taking the matter further by Ms Houlihan.

9. On 5 November, whilst Mr Smith was on annual leave, Ms Houlihan approached Ms Nikki Staniforth, a Store Supervisor and then acting Store Manager, to make a formal complaint about the incident. Ms Staniforth made a note of the discussion which the Claimant signed as an accurate record. There is no written note of the discussions between Mr Smith and the Claimant of either 20 October or his discussion following the 'apology' discussion.

10. On 7 November during his annual leave Mr Smith received a Whatsapp message from Mr Shahid Bhimani, a Store Supervisor, informing him that the Claimant had spoken to Ms Staniforth about the incident and the Claimant now wished to take the matter further. Mr Smith spoke to Mr Bhimani and advised him to consult employee relations.

11. On 10 November 2016, upon his return from leave Ms Staniforth told Mr Smith of her discussion with Ms Houlihan. There was no doubt that the Claimant was saying that Mr DM had not only spoken of an erection but had also said, according to the Claimant, that he felt like raping her. Mr DM was invited to a formal investigation meeting on 10 November 2016 with Mr Smith. Mr Jamie Irvine, a Trainee Store Manager, took notes. Mr Smith took Mr DM through Ms Staniforth's notes and in particular the erection and rape comments. Mr DM denied saying either. Instead he insisted that what he had said to the Claimant was 'you wake me up'. The following day Mr Smith suspended Mr DM and the Claimant was informed. It is now clear that Ms Houlihan's expectation was that Mr DM would be dismissed shortly thereafter.

12. Ms Tracey Banks, a Store Manager in Newhall was appointed to deal with the disciplinary process. Ms Banks spoke to Mr Smith about the incident. She was informed that there was a conflict of versions and that the Store Manager believed the complainant had appeared to change her version of events. Ms Banks took advice from HR and it was decided that there would be no disciplinary action against Mr DM as it was simply one person's word against another and the Claimant's version had appeared to change. On 15 November Mr Smith relayed the information to Mr DM. The Claimant does not appear to have been at work that day and the following day Mr Smith was on leave. He arranged for one of his assistants to inform the Claimant.

13. On 16 November 2016 Ms Houlihan was informed that Mr DM would be returning to work. Her reaction was one of anger. She accused Mr Smith of not following proper procedures and only bringing Mr DM back because Mr Smith did not want 'the hassle of dismissing him'.

14. Ms Houlihan signed off sick on 17 November 2016. The following day she lodged a formal grievance. She was off work again from 1 December 2016 and, as it transpired, did not ever return to work. She was dismissed on 21 August 2017 for absence from work and a failure to inform Sainsbury's of her reasons for absence.

15. On 18 November, the Claimant made a formal fair treatment complaint (the 'grievance') which was investigated by Ms Selina Morgan who is normally based at a Derby store. In what was clearly a very comprehensive investigation, Ms Morgan interviewed a number of the Claimant's colleagues. She also had the benefit of Ms Bank's investigation and witness statements obtained by Ms Veronica Walker, an Area HR Manager. She revisited the suspension of Mr DM and on 20 December 2016 decided that Mr DM ought to be suspended for a second time. The Claimant alleges that Ms Morgan asked the Claimant far more questions than were necessary for the purposes of the investigation, that she was placed under undue pressure and was reluctant to recommend dismissal. It is alleged that she asked Ms Houlihan did she want Mr DM to lose his livelihood. These allegations form the basis of the complaint of direct sex discrimination.

16. Ms Morgan delivered her decision on the grievance (in what is described as the "fair treatment outcome" letter) on 25 January 2017. Ms Morgan found that Mr DM *did* make the comments about wet dreams (which of course Mr DM has never disputed save in relation to their timing). She also concluded that Mr DM did say to the Claimant that he had an erection. Although her outcome letter regrettably fails to make any direct reference to the rape comment in her evidence and in her witness statement she confirms that she believed Mr DM had indeed made a comment to the Claimant about wanting to rape her.

17. In addition, Mr Morgan's investigation concluded that Mr DM had in the past referred to Ms Staniforth as either "sexy baby" or "Nicky baby". Mr DM admits to calling Ms Staniforth "Nicky baby" whilst Ms Staniforth believes it was "sexy baby". Ms Morgan noted that Mr DM admitted to flirtatious behaviour but he believed it to be friendly banter. She upheld Ms Houlihan's complaint that Mr Smith did not initially handle the complaint as Sainsbury's would have liked and made various recommendations as to how matters such as this should be handled in the future.

18. Mr DM was invited to a disciplinary hearing on 30 December 2016 and following such a hearing chaired by Mr Partridge, he was dismissed on 19 January 2017. The reason for the dismissal was gross misconduct, in particular a breach of the company's fair treatment, equality, diversity and inclusion policies and use of inappropriate language when speaking to Ms Houlihan. The dismissal letter however makes no references to which particular words which were found to have been used.

## **THE LAW**

19. The relevant statutory provisions from The Equality Act 2010 ("EA 2010") are set out below. There is no dispute as to the applicable law save as to the interpretation of section 109(4) EA 2010. In respect of that we referred to the decision or the EAT in **Canniffe v East Riding of Yorkshire Council** [2000] IRLR 555.

### **Section 13 - Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

### **Section 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).

(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.

### **Section 109 - Liability of employers and principals**

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A:-

(a) from doing that thing, or

(b) from doing anything of that description.

## **THE ISSUES**

### **Sexual Harassment.**

20. The issues are agreed as follows:

20.1 Did the second Respondent make comments to the Claimant on 20 October 2016 that he felt like raping her and had an erection?

20.2 If so, was this unwanted conduct of a sexual nature and did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

20.3 Did the first Respondent take all reasonable steps to prevent the second Respondent from making the alleged comments or doing anything of that description.

Direct sex discrimination.

21 Did the first Respondent fail to properly address the Claimant's complaints against the second Respondent concerning the incident on 20 October 2016? In particular has the first Respondent discriminated against the Claimant by reason of:-

21.1 Failing to ensure that Mr DM was dismissed (earlier than he eventually was);

21.2 Was it an act of sex discrimination for Mr Smith denying that the Claimant had used the word rape in the initial complaint to him?

21.3 In Ms Morgan asking the Claimant additional questions?

21.4 In Ms Morgan placing pressure or additional pressure on the Claimant.

21.5 In Ms Morgan allegedly saying to the Claimant during her investigation "do you want DM to lose his livelihood"?

21.5 Were the first Respondent or its employees consciously or subconsciously motivated by the Claimant's sex in relation to the above matters?

The position of the parties

22. Sainsbury's do not dispute that Mr DM made comments to the Claimant on 20 October 2016 that he "felt like raping [the Claimant] and had an erection".

23. Mr DM disputes that either the rape or the erection comments were ever made.

24. Sainsbury's accepts that the comments referred to in paragraph 22 were unwanted conduct of a sexual nature and would have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her within the meaning of section 26(1)(b) EA 2010.

25. Mr DM does not accept that the comments in paragraph 22 (even if found to be made) had the relevant effect within the meaning of section 26(1)(b) EA 2010.

26. Sainsbury's accepts that it is vicariously liable for any acts of sexual harassment undertaken by Mr DM subject to the reasonable steps defence under section 109(4) EA 2010.

27. Mr DM disputes that Sainsbury's took reasonable steps under section 109(4) EA.

28. Both Sainsbury's and Mr DM accept that the wet dreams comments were made but Sainsbury's denies that it was aware of them until after 20 October

2016. Mr DM accepts that he made the wet dreams comment but it was “many months” prior to October 2016. The wet dreams comments of themselves are not the basis of the sexual harassment complaint in these proceedings. The complaint of sexual harassment is founded on the October incident alone.

## **CONCLUSIONS**

### **Sexual harassment**

29. The principle issue of fact is whether on 20 October 2016 Mr DM said to the Claimant that he ‘felt like raping her’ and that he ‘had an erection’. In support of his case Mr DM relies not only on his own evidence but also that of Mr Smith namely that on the first occasion he interviewed Ms Houlihan she made no reference to the word ‘rape’.

30. In coming to our conclusions we therefore have a direct conflict of evidence between the Claimant on the one hand and Mr DM on the other, the latter to some extent supported by Mr Smith.

31. We will deal firstly with our assessment of the relative credibility of the witnesses. We did not find Mr DM’s explanation that instead of the offending words he said to the Claimant ‘you woke me up’. It is not credible that the whole chain of events was triggered by a compliment as to the Claimant’s hair and a comment as obscure as ‘you wake me up’. It is an odd thing to say. It seems meaningless. Mr DM does not give any satisfactory explanation in either his witness statement or evidence as to what he meant by it. It is not something that might conceivably be lost in translation given that English is not Mr DM’s first language. In any event Mr Smith supports the Claimant’s version so far as the erection comment is concerned.

32. Mr DM accepts that he made the wet dreams comment but says it was many months prior to October 2016. Whenever it was made (and if it was necessary to decide the point we would prefer the Claimant’s version) we find the admission to be significant as it demonstrates a pattern of escalating sexual behaviour. Mr DM’s actions went from an unacceptable comment, which went unchecked, to something much worse.

33. Ms Houlihan has been consistent throughout. At every stage where there has been a written record of her version of events she has maintained that both the erection and rape comments were made. We recognise that Mr DM has been consistent in his denial too and Mr Smith’s evidence is against her on the rape issue but we prefer Ms Houlihan’s account over that of Mr Smith. The incident was of much more significance to the Claimant and she is likely to have a better recollection. It is not suggested that Ms Houlihan is prone to fabricating comments. Her honesty has never been in doubt. Mr Smith made no contemporaneous note of the meeting on 20 October 2016 nor did he (unlike the meeting on 10 November 2016) have a note-taker present. His primary focus appears to have been in resolving the matter by attempting to get Mr DM to apologise. Whilst we have no reason to doubt Mr Smith’s honesty the incident meant much more to the Claimant and her recollection is therefore likely to be stronger. From the very first written statement or note of the incident to the very last, Ms Houlihan has been consistent in her allegation that Mr DM used the word rape. At no point has the Claimant signed any written record or confirmed any written record which did not contain a reference to that word.

34. Ms Houlihan’s remarks are corroborated by the accounts of both Mrs Sylvia

Worth and Ms Tracey Forest to whom the Claimant related the incident shortly after it happened. Neither of them have any reason to lie. Mrs Worth produced a written statement for these proceedings but did not in the end attend to give evidence. We therefore attach less weight to it but she gave broadly the same account when she was interviewed in the internal investigation. When interviewed by Ms Banks in November 2016, Mrs Worth confirmed that Ms Houlihan approached her on the day in question and said that Mr DM had used the both the words 'erection' and 'rape'. Ms Tracey, who was interviewed around the same time as Mrs Worth in the internal process, confirmed that Ms Houlihan had told her that Mr DM said he wanted to rape her. Although Ms Forest does not report the word erection in her interview she did say that Mr DM had told the Claimant he 'had got a hard on'.

35. Mr DM has at this hearing sought to rely upon a medical report from Dr Martin Pearson, a Clinical Psychologist. The report is dated 26 February 2018 which is of course some time after the events in question. Dr Pearson suggests that there are indications of Mr DM having symptoms of Asperger's Syndrome. Dr Pearson says that in his clinical opinion Mr DM presents with difficulties that provide "good grounds for suspecting that he [Mr DM] may well have Asperger's Syndrome". He goes on to say that those who suffer from such a condition demonstrate a number of traits which include issues as to understanding social rules and a strong tendency to focus on one's own thoughts, interests and pre-occupations rather than those of others. Dr Pearson's report, if anything, seems to us to suggest that the Claimant was more likely to have made the remarks than not.

36. There can be no doubt that the remarks constituted unwanted conduct and that they were of a sexual nature. They would clearly have the purpose or effect of violating the Claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment. It would be reasonable for the conduct to be seen to have that effect.

#### The reasonable steps defence

37. We accept the Claimant's evidence that the wet dreams comment was made prior to 20 October 2016 and that it was a few months before then. We also find that the Claimant reported that incident to both Mr Mithalan Rajaratnam and Mr Shane Blankley of the Respondents. In an investigation interview on 29 December 2016 with Ms Morgan, Ms Houlihan made it clear that the wet dreams comment was made '3 months earlier than October' and that she spoke to Mith (Mr Rajaratnam) and Mr Blankley about it. She described their reaction as one of shock. The Claimant would not have understood the significance of saying that at the time. Mr Rajaratnam was then employed as a Store Supervisor and Mr Blankley as a Trainee Store Supervisor. Both of them were therefore in supervisory roles in Sainsbury's management. Neither of them took any steps to escalate the matter to more senior management or to refer it to HR. Sainsbury's have not called Mr Rajaratnam or Mr Blankley to give evidence at a time when they would no doubt have appreciated this was an issue in these proceedings. Mr Blankley has since left Sainsbury's but Mr Rajaratnam is still believed to be employed by them. The Claimant has given sworn evidence which we find credible and therefore it carries more weight. There is no independent evidence to contradict her position.

38. In **Canniffe v East Riding of Yorkshire Council** [2000] IRLR 555, the Employment Appeal Tribunal held that the proper approach in relation to the reasonable steps defence is to firstly identify whether the Respondent took any



steps at all to prevent the employee from doing the act or acts complained of in the course of his employment and secondly, having identified what steps if any they took to consider whether there were any further acts that they could have taken which were reasonably practicable

39. We are satisfied that if Mr DM had been warned as to his behaviour and advised of his responsibilities in relation to the wet dreams comment when it was reported he would not in all probability have said what he did on 20 October. Sainsbury's failed to take reasonable steps in that regard.

40. Mr DM is clearly someone who was known by local management to have something of a flirtatious nature. He had made remarks to Ms Staniforth which were clearly inappropriate, whether they were 'sexy baby' or 'Nicky baby'. It was known that he once described Ms Staniforth as a 'poster girl'. No action appears to have been taken when those remarks were made. Sainsbury's failed to take reasonable steps at that point too.

41. The Respondent failed to take any steps in relation to Mr DM's training on equality and harassment issues. The induction process for Mr DM was approximately 8 years ago and Mr DM has not been provided with proper training since then. Indeed it is more than arguable that the induction process itself did not specifically cover any equality issues but even if it did it was only on the fringes.

42. More importantly perhaps there is no evidence of any relevant equality training for managers organised by Sainsbury's. It is clear that those in managerial positions do not recognise the importance of referring inappropriate comments and behaviour through the correct channels where necessary. The fact that Mr Smith was recommended for refresher training on equality, diversity and inclusion by Ms Morgan following her investigation is telling. It is also telling that Sainsbury's have made recommendations in terms of how matters such as this are to be handled in the future.

43. For the above reasons, we do not find that the section 109(4) EA 2010 defence is made out and that Sainsbury's are also liable for the acts of sexual harassment.

#### Direct sex discrimination complaint

44. There appear to be four allegations in relation to the direct sex discrimination complaint though none of them are explained or set out in the Claimant's own witness statement. The first is that Mr Smith failed to ensure that Mr DM was dismissed. Whilst Ms Houlihan unrealistically expected an immediate dismissal after she reported the matter, or after Mr DM had offered an insincere apology, a dismissal at that point would clearly have exposed Sainsbury's to a claim of unfair dismissal from Mr DM. We accept that Mr Smith responded sympathetically to the Claimant. His failure to record the word rape in the initial meeting had nothing to do with the Claimant's gender. Ms Morgan carried out a thorough and detailed investigation. Asking the Claimant additional questions could not possibly amount to less favourable treatment because of the Claimant's sex. It would have been the same for any individual when undertaking a detailed investigation. There is no evidence of Ms Morgan placing any undue pressure on the Claimant nor do we find she asked Ms Houlihan whether she wanted Mr DM to lose his livelihood. If Ms Morgan had been unduly sympathetic to Mr DM she would not have found against him.

45. There is nothing to suggest that Ms Morgan demonstrated sympathy for Mr DM and hostility for the Claimant. Mr Partridge who dealt with the disciplinary decision in relation to Mr DM concluded that although there were no witnesses to the October incident, his admitted conduct was sufficient to dismiss for gross misconduct. Those are not the actions of an employer consciously or unconsciously motivated by gender. Accordingly, the complaint of direct sex discrimination is dismissed.

46. The issue of remedy is adjourned. Orders in relation to the remedy hearing are given separately.

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Employment Judge Ahmed

Date: 12 June 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE