EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123430/2018

Final Hearing Held at Edinburgh on 15 February 2019

Employment Judge A Kemp

Mrs A Diop	**Claimant** **In person**
Standard Care Recruitment Limited	**Respondent** **No appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The respondent discriminated against the claimant on grounds of her sex, and harassed her on grounds of her sex, contrary to sections 13 and 26 of the Equality Act 2010.**

2. **The respondent dismissed the claimant under section 39(7)(b) of the Equality Act 2010.**

3. **The respondent made an unlawful deduction from her wages in respect of unpaid holiday pay under section 13 of the Employment Rights Act 1996.**

4. **The claimant is awarded the following sums:**

(i) compensation of Nineteen Thousand, One Hundred and Fifty One Pounds (£19,151) comprising (a) Eight Thousand Pounds (£8,000) in respect of injury to feelings and (b) Eleven Thousand, One Hundred and Fifty One Pounds (£11,151) in respect of loss of earnings.

(ii) Eight Hundred and Forty Pounds (£840) in respect of unpaid holiday pay.

REASONS

Introduction

1. The claimant made a claim of sex discrimination, harassment and for unpaid holiday pay. The respondent did not enter an appearance initially and a hearing took place on 15 February 2019 on that basis. Following upon that hearing, and before the present Judgment had been finalised, the respondent sought to lodge a Response Form late.

2. The application to consider that Response Form was finally determined by Employment Judge Meiklejohn on 8 August 2019. It was rejected. On that basis I have been able to finalise this Judgment.

Issues

3. The Tribunal identified the following issues:

(i) Had the respondent directly discriminated against the claimant on ground of her sex under section 13 of the Equality Act 2010 ("the Act")?

(ii) Had the respondent harassed the claimant under section 26 of the Act?

(iii) Had the respondent dismissed the claimant under section 39 of the Act?

(iv) If so, what remedy ought to be afforded to the claimant?

(v) Had the respondent made unlawful deductions from wages in respect of holiday pay?

(vi) If so, in what amount?

Evidence

4. The Tribunal heard from the claimant. There was no appearance at the hearing by or on behalf of the respondent, who had, as stated above, not at that point sought to lodge a Response Form. Documents were spoken to as referred to below, including text messages on the claimant's mobile phone which she produced before me, and read out in her evidence.

Facts

5. The Tribunal found the following facts to have been established:

6. The claimant is Mrs Awa Diop.

7. The respondent is Standard Care Recruitment Limited. They provide personal care services.

8. The claimant was employed by the respondent from 2 June 2018 to 4 September 2018.

9. For about the first two weeks of the employment Mr Casey Aigbie, who is the claimant understood the principal shareholder of the respondent, a director of the respondent and its principal manager, acted properly towards the claimant. From then onwards however his behaviour changed. He asked the claimant to

commence a relationship with him. It was clear to the claimant that he meant a sexual relationship. She indicated that she did not wish to do so, and that she simply wished to work. He did not accept that, and continued to send her messages and speak to her with a view to commencing a relationship with her. He made reference to marrying her.

10. The text messages he sent her included the following:

(i) On 23 June 2018 referring to the claimant as a "special someone like you" and also on that date referring to marriage.

(ii) On 24 June 2018 "I love you and miss you too much, Awa my love"

(iii) On 27 June 2018 asking who he could speak to "about your dowry so I can save".

(iv) On 5 July 2018 he referred to taking her to Glasgow, and stated that he wished to hug her and have a relationship.

(v) On 6 July 2018 he commenced a message "Morning honey".

(vi) On 14 August 2018 he referred to "my dear Awa".

(vii) On 15 August 2018 he referred to her as "my love".

11. The attempts by him to initiate a relationship continued. She made it clear that they were unwelcome. They continued nevertheless.

12. He sought to have her working increasingly long hours. She had started by working about 20 hours per week in a role providing personal care to elderly persons. As the number of those persons increased, he asked her to work increasing numbers of hours, initially to about 50 per week, and latterly to about 80 per week. He did not allow her time off work for leave, or appropriate rest breaks.

13. By 4 September 2018 his behaviour had left the claimant very stressed. She consulted her General Practitioner.

14. The respondent did not pay the claimant for all of the work she was doing. By 4 September 2018 three weeks' pay or thereby was outstanding. The respondent made promises of payment which they did not keep.

15. The claimant decided that she was not able to continue in the employment of the respondent as a result of the behaviours of Mr Aigbie, including the failure to pay wages, and on 4 September 2018 she resigned with immediate effect.

16. She continued to attend her General Practitioner. She was referred for counselling. She was very anxious and upset. She was tearful. Her mental health was detrimentally affected to a material extent.

17. Shortly after her resignation she spoke to Mr Aigbie in a car park near his office to seek payment of wages. He sought repayment of shopping he had claimed he had given her earlier which he said was to be repaid before wages would be paid. He pushed the claimant into her own car. She sustained a shoulder injury when he did so.

18. In due course the outstanding wages were paid.

19. The claimant has not worked since the termination of her employment. She has been fearful of working with males. She has been greatly upset by the events that led to her resignation.

20. When working about 50 hours per week her normal net pay was £413 per week.

21. The claimant had not taken any leave. She had worked a total of 697 hours when employed by the respondent. She was paid at the rate of £10 per hour.

22. The accrued entitlement to annual leave is 84.1 hours. No payment for annual leave was made to the claimant.

23. The claim for holiday pay was set out in a letter to Mr Aigbie of the respondent on 24 September 2018, together with a claim for unpaid wages. The wages have since been settled.

24. The claimant had an operation on her feet on 28 January 2019, and would in any event have been absent from work for a period of about two months thereafter.

Law

(i) Statute

25. Section 4 of the Equality Act 2010 ("the Act") provides that sex is a protected characteristic.

26. Section13(1) of the Act provides that:

> **"13 Direct Discrimination**
>
> 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."

27. Section 26(1) of the Act provides as follows:

> **"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."

28. Section 26(4) of the Act provides that:

> "(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."

29. Section 39 of the Act provides:

"39 Employees and applicants

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

…….

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

30. Section 136 of the Act provides:

"136 Burden of proof

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

31. The nature of the remedy is set out in sections 119 and 124 of the Act.

Case law

(i) Direct discrimination

32. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

33. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377***.

34. In ***Glasgow City Council v Zafar [1998] IRLR 36,*** also a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

35. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was

it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

(ii) Harassment

36. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) 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 other circumstances (subsection 4(b))."

(iii) Burden of proof

37. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing a difference in status (here her disability) and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the tribunal "could conclude" that on a balance of

probabilities the respondent had committed an unlawful act of discrimination. The tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council [2006] IRLR 748,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

38. More recently, in ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and that the onus did remain with the claimant at the first stage. As the Court of Appeal very recently confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated ***in Ayodele***. Lord Justice Elias also explained the nature of the onus as follows, at paragraph 44:

> "The onus of proof at stage one was upon the claimant so it was for the claimant to adduce the information which he was alleging supported his case. In so far as this was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal."

Dismissal

39. The test for a constructive dismissal as it is generally known under section 39(7)(b) of the Act is the same as that under section 95(1)(c) of the Employment Rights Act 1996. There must be a fundamental breach of contract by the respondent, repudiatory in nature, that the claimant accepts to terminate

the contract either with or without notice. She must do so because of the breach, and not delay otherwise that delay may lead to the principle of acquiescence applying, known as affirmation in English law.

Discussion

40. I accepted that the claimant gave honest and reliable evidence. She was distressed when giving the evidence. The effect of what occurred was clear.

41. I was left in no doubt but that the respondent, through Mr Aigbie, had directly discriminated against her by the actions to seek a relationship, referring to marriage, and using terms of endearment when the claimant did not wish any of the same to occur. Such behaviour arose because of her sex. I held that it was inherent in the acts alleged and the behaviours alleged, supported by text messages I was referred to, such that I was able to conclude that it was direct discrimination under section 13 without reference to a comparator. In any event, I was satisfied that a male employee would not have been treated in this manner. There was of course no evidence to the contrary. The claimant had established a clear and convincing prima facie case, at the very least.

42. The behaviour met the definition of harassment under section 26. It created in fact an intimidating, hostile, degrading, humiliating or offensive environment. The claimant was reasonable in having that reaction. That arose because of her sex.

43. I concluded that the circumstances were such as did amount to a dismissal under the Act. Whilst there were factors that were not necessarily of themselves discriminatory such as the failure to make payment of wages when due, that was I found linked to the claimant's reaction to the unwanted attention from Mr Aigbie, which was for example referred to by him latterly in a meeting in a car park when he asked for return of what were alleged to have been gifts of shopping, or the cash equivalent of them, for the payment of wages to be made. That was I considered a link to the earlier behaviours. There had been

a fundamental breach of contract, the claimant accepted that and terminated the contract without notice. She did so because of the discriminatory behaviour and harassment and she did not unduly delay.

44. Her entitlement to annual leave pay arose from the Regulations and no such pay had been paid to her.

45. Whilst payment for the wages was initially sought I was informed that that had been settled after the Claim was made, but before the present Hearing.

Remedy

46. Compensation is considered under section 124, which refers to section 119, of the Act. The first issue is injury to feelings. I was satisfied that this was a case at the top of the lower band of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA Civ 1871, [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. Three bands were referred to in that authority being lower, middle and upper.

47. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award needed to be increased to reflect inflation. The lower band would go up to £6,000; the middle to £18,000; and the upper band to £30,000.

48. In ***De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, [2017] IRLR 844,*** the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the ***Vento*** bands for awards for injury to feelings. In respect of claims presented on or after 6 April 2018, the ***Vento*** bands include a lower band up to £8,600.

49. Whilst there was no GP report or similar evidence, it was clear to me that the claimant had suffered greatly by what occurred. She was distressed when giving evidence recalling the messages, and her reaction to them at the time. The conduct of Mr Aigbie was unwanted over a material length of time. He was in a position of authority at work. She was dependent on the job to support her two children.

50. I decided that the appropriate award for injury to feelings was at the top end of the lower band of ***Vento***, as subsequently varied, and was appropriately quantified in the sum of £8,000.

51. The claimant had earned previously an average of £413 per week being that given in the Claim Form and which was spoken to in evidence. The actual hours had latterly been higher than that, but it was not clear whether they would have continued at that level, and it appeared to me that the level spoken of, which was 80 hours per week, was not sustainable quite apart from it being in breach of the Working Time Regulations 1998. It appeared to me that it was appropriate to award her losses for the period to 28 January 2019 when an unrelated issue arose and would in any event have caused an absence. That is a period of 27 weeks. The loss for that period is £11,151.

52. The position for future losses is uncertain, and the evidence was very limited. The claimant was off work at the time of the hearing before me in any event for unrelated reasons. I concluded that I did not have sufficient evidence to make an award for future losses beyond the date of the hearing before me in light of that.

53. In so far as holiday pay is concerned, the hours worked were spoken to in evidence and set out in a letter to the respondent dated 24 September 2018 to which there was no reply to challenge it. I am prepared to accept the figure set out there, as spoken to in evidence, and the sum awarded reflects that.

Order

54. On the application of the claimant I also considered whether to make an Order under Rule 50. I was initially minded to do so, but having considered the case law, and in particular the principle of open justice, as explained in the helpful analysis of Judge Eady QC in ***Ameyaw v PriceWaterhouseCoopers Services Ltd UKEAT/0244/18/LA,*** 4 January 2019., which has very recently been approved in the Court of Appeal in ***L v Q Ltd, [2019] EWCA Civ 14919***. I also took account of the overriding objective. It appeared to me having regard to the circumstances, and authorities, that there was insufficient to warrant granting the order. No order is therefore made.

Date of Judgement: 14th August 2019
Employment Judge: A Kemp
Date Entered in Register: 15th August 2019
And Copied to Parties