



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Laetitia Ponde Nkot

Respondent

Greene King Retail Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 23-24 September 2019
Chambers 1 November 2019

EMPLOYMENT JUDGE: Mr J Tayler

MEMBERS: Mrs D Olulode
Ms L Moreton

Appearances

For the Claimant: In person

For the Respondents: Mr J Bryan, Counsel

JUDGMENT

1. The claims fail and are dismissed.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 20 December 2018 the Claimant brought complaints of unfair dismissal, sex discrimination and race discrimination.
2. The Claimant gave the following particulars of her complaint:

I started to work for this company on Thursday 1 November 2018 from 5pm until 10pm. I had a trial of 3 hours before on Tuesday 30 October 2018. I worked on Friday 2 November 2018 from 12pm until 4pm, instead 12pm to close or 10am, indeed, I have been dismissed at 4pm at this date because of the manager has estimated that the work was bad done and the head chef said me that I don't listen him. But this dismissal is unjustified, my job was perfect, I sent the orders properly, each time the head chef or the second chef asked me for anything, I did it, the head chef didn't stop to be on my back and was harassing me for stories of labels and spoons in pots, no sooner had I finished using my spoon than he was already on my back asking me to put it away. Concerning the labels, he said that I refused to put the labels as soon as the pots are opened, but that's wrong, the labels are on the other side of the kitchen, I'm not going to give up my preparation to go get a label. Apart from me, no one in the kitchen put the labels on the pots, the chef said nothing and it was always me who was passing behind to put them and keep the kitchen tidy. The manager said me that I failed my probationary period because I put too much of times to send the orders but it's wrong. Nobody in the kitchen was perfect, everybody made some errors, the manager didn't stop to come make complaints against the team about their dishes because they did not send the orders correctly, each day I worked for the company.

I have been dismissal while my job was good the second day of my probationary period.

From the day of my hiring, the manager seemed odd, when he saw me, I seemed uncomfortable, he asked me for a card for my NIN, I answered him that I had only a letter with a number, and I say to him that I think that card are only for specific people, he seems annoyed. Later he said to the head chef no black here.

Concerning the head chef, which one has employed me, he don't cease to put his hands on me as soon as it was possible. For example, I came with a legging, he wanted to put his hands on my thighs to say me I can't work with that, I need a trousers, I answered him, I know you said me that you will provide it to me. after he went get it, during the training on my computer, he always stay stuck to me, behind me, close to me. wanting to touch my bottom, he hang my elbow once. He hired me only because he wanted to harass me.

3. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Wade on 28 March 2019. The claim of unfair dismissal was dismissed on withdrawal as the Claimant accepted that she did not have qualifying service.

Issues

4. The issues for determination were:
 - 4.1 Was the dismissal of the Claimant an act of direct race discrimination
 - 4.2 Was the Claimant subject to sexual harassment as alleged in the Claim Form

Evidence

5. The Claimant gave evidence.
6. The Respondents called:
 - 6.1 Graeme Lancaster-Smith, General Manager
 - 6.2 Mariusz Krzyzanowski, Kitchen Manager
7. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.
8. We were provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents.

The Law

9. Race and sex are protected characteristics for the purposes of the Equality Act 2010 (“EqA”).
10. Direct discrimination is defined by Section 13 EQA:

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.

11. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

12. Harassment is precluded by Section 26 EqA:

(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.”

13. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision is now made by Section 136 EQA:

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.

But subsection (2) does not apply if A shows that A did not contravene the provision.

14. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must establish on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal ‘could conclude in the absence of an adequate explanation’ that the Respondent had discriminated against her. This means that there must be a ‘prima facie case’ of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant’s, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.
15. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

16. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on section 136 EqA: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.
17. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must “see both the wood and the trees”: **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.
18. If the Employment Tribunal finds as a fact that the detrimental treatment did not occur the claim will fail.
Findings of fact
19. In Autumn 2018 the Respondent advertised online a position as a chef at the Silver Cross pub. The Claimant indicated interest and was contacted by the Kitchen Manager, Mr Krzyzanowski, and an arrangement was made for her to join the Respondent and undergo online training.
20. On 24 October 2018, the Claimant attended for an interview with Mr Krzyzanowski. He proposed to Mr Lancaster-Smith that she should be employed. The Claimant alleges that Mr Lancaster-Smith asked for a National Insurance Card. Mr Lancaster-Smith accepts that he asked for the Claimant’s National Insurance number but states the he did not require her to provide a card.
21. The Claimant was provided with a contract of employment that gave her start date as 26 October 2018.
22. On 29 October 2018, the Claimant attended for initial training. The Claimant brought her laptop computer. Mr Krzyzanowski sought to help her logon to the Respondent’s WiFi. The Claimant was adamant that she knew how to logon. It is common ground that Mr Krzyzanowski sat next to the Claimant on a bench while he tried to help her to logon. The Claimant suggests that he deliberately placed his hands close to her “bottom” and that this was an act of sexual harassment.
23. On 30 October 2018 the Claimant attended a trial day. She was wearing leggings. Mr Krzyzanowski told her that leggings were not safe because if hot liquid was poured on her legs she could be badly burned so should wear trousers. The Claimant alleges that while saying this Mr Krzyzanowski tried to grab her thighs. It is common ground that Mr Krzyzanowski provided her with trousers.

24. The Claimant undertook her first full day of work on 1 November 2018. Mr Krzyzanowski was not at work that day.
25. The Claimant worked on 2 November 2018. She argued with Mr Krzyzanowski about labelling of jars that she had opened. Mr Krzyzanowski stated that the Claimant was refusing to label jars with the date on which they were opened immediately after opening them. The Claimant argued that she should not have to go from one side of the kitchen to the other to get labels while she was preparing food. Mr Krzyzanowski also alleges that the Claimant had used the same spoon to scoop out both sour cream and guacamole which was contrary to food hygiene regulations as it could result in cross contamination. Mr Krzyzanowski complained that the Claimant was failing to plate dishes precisely as shown in photographs of the dishes. Mr Krzyzanowski states that when he raised these issues with the Claimant she would not listen to him and kept stating that she was a professional chef.
26. She alleges that at one point she was sitting in the restaurant on her break and that Mr Lancaster-Smith walked past her and said “no black here”.
27. Mr Lancaster-Smith states that he had to come into the kitchen repeatedly because a pudding order had not been completed. Mr Krzyzanowski said that the Claimant had been asked to prepare the order. She denied this and argued with Mr Krzyzanowski that she did not need to prepare the pudding. In the end Mr Krzyzanowski prepared the dish.
28. Mr Lancaster-Smith alleges that the Claimant was consistently arguing with Mr Krzyzanowski and that he advised Mr Krzyzanowski that the relationship seemed unworkable and that the Claimant’s probation should be terminated.
29. The Claimant was told by Mr Lancaster-Smith that her employment was to be terminated. Mr Lancaster-Smith states the following in his witness statement about the conduct of the Claimant after she was told that her employment was to be terminated:

15. Myself and Mariusz asked the Claimant to sit down and told her “sorry we have decided not to employ you”. Initially she asked why and I told her that it was due to her failure to follow direction and being argumentative with the Head Chef. At this point she ran into the kitchen and started taking items out of the fridge and slammed them on the counter while shouting “is my work not good enough for you?”. The Claimant took photos of the items that she had removed from the fridge continuing to shout “is my work not good enough for you?”. The Claimant ran round and round the kitchen a number of times pulling items out of the fridges, slamming them down and shouting. It took twenty minutes to get her out of the kitchen.

16. In the bar we asked her to sit down and attempted to calm her down. Eventually she went to the staff room to get changed. Once the Claimant was in the bathroom she refused to leave and was there for an hour. I asked multiple members of the team to go down to check on her as I was worried my presence would make her more angry. I was told later that throughout this the Claimant continued shouting including “fuck you, fuck this job” and even called Mariusz a “white prick” and a “racist”. Eventually the Claimant calmed down and left after about an hour.

30. The Claimant accepts that she took jars out of the fridges and photographed them but denies that she was angry or swore.

31. On 3 November 2018 the Claimant sent an email complaining about the termination of her employment:

Hi,

I'm contacting you about a problem which I encounter with the workplace where I have been employed: Silver cross [33 Whitehall, Whitehall, London SW1A 2BX](#).

Yesterday was my first day of work, I had a trial 3 hours on Tuesday 30 October, I have had my first day of work on Thursday 1 November 2018 from 5pm until 10pm, and I worked yesterday on Friday 2 November from 12pm until 4pm, instead 12pm to close or 10am, indeed, I have been dismissed at 4pm yesterday because of the manager estimated that the work was bad done and the head chef said me that I don't listen him.

But this dismissal is unjustified, my job was perfect, I sent the orders properly, each time the head chef or the second chef asked me for anything, I did it, the head chef didn't stop to be on my back and was harassing me for stories of labels and spoons in pots, no sooner had I finished using my spoon than he was already on my back asking me to put it away. Concerning the labels, he said that I refused to put the labels as soon as the pots are opened, but that's wrong, the labels are on the other side of the kitchen, I'm not going to give up my preparation to go get a label. Apart from me, no one in the kitchen put the labels on the pots, the chef said nothing and it was always me who was passing behind to put them and keep the kitchen tidy. The manager said me after that I failed my probationary period because I put too much of times to send the orders but it's wrong. Nobody in the kitchen was perfect, everybody made some errors, did not stop coming to complain in the kitchen to the head chef because they did not send the commands correctly on Tuesday, the day of my trial.

I have been dismissal while my job was good and in add the second day of my probationary period, I think that it's not normal.

Greene king being a big company, are you able to reseat me in another restaurant?

In the meantime.

Best regards

Miss PONDE NKOT Laetitia

32. The Claimant did not complain of sexual harassment or race discrimination. The Claimant stated that this was because she wished to obtain employment at another of the Respondent's pubs.

33. After the Claimant had submitted the Claim Form Mr Lancaster-Smith sent a letter seeking to explain the reason for the termination of her employment:

28/11/2018

Dear Laetita,

I write to confirm the outcome of the probationary review meeting held on 02/11/18, at the Silver Cross, conducted by myself, and Mariuzs Krzyzanowski who acted as note taker.

Following our discussions, I am writing to confirm that the decision that was taken to terminate your employment at The Silver Cross with effect from 02/11/2018.

The reason for this decision is we found you to be unsuitable for the position, as you had not met the required standards required for employees in your position during your Probationary period. There is no right of appeal against this decision.

As your employment is under four weeks there is no contractual obligation to give notice. Your final pay will include monies owed up to your final date of employment, along with accrued holiday pay.

Your P45 will be forwarded to the above address as soon as possible.

I would like to take this opportunity to wish you success in the future.

Analysis

34. The key to this case is deciding what factually occurred. We have taken account of all the evidence, in forming our view as to the credibility of the witnesses and determining, on balance of probability, what occurred. We have taken into account the fact that the Claimant's first language is not English. She gave her evidence to the Tribunal through an interpreter. However, where there are significant inconsistencies in the Claimant's evidence we were satisfied that this was not because of a misunderstanding of language, but were actually different accounts of the events.
35. We first considered the claim of race discrimination. The Claimant placed considerable emphasis on her contention that when she was interviewed Mr Lancaster-Smith had asked for her National Insurance card. It was not entirely clear why she thought that was of such significance. There is a possible inference that he was seeking to make it difficult for the Claimant to be employed and/or was excessively sceptical about her right to work because of her race. On balance, we conclude that Mr Lancaster-Smith simply asked for the Claimant's National Insurance number as he was required to do. Had he any animus against the Claimant because of her race he could have decided not to employ her. He did the opposite.
36. The most significant factual allegation against Mr Lancaster-Smith is that he said "no black here". We note that the Claimant did not allege this in her original email complaining about the termination of her employment. The Claimant contended that she did not do so because she was hoping to obtain work at another of the Respondent's pubs. We consider that had Mr Lancaster-Smith made such an explicitly racist comment it is more likely than not that the Claimant would have raised it in her initial email of complaint, as it was such a significant event and would explain why he had decided to terminate her probation for a reason that was not her poor attitude that would be likely prevent her being given a job at another pub. We also note that there is a significant inconsistency between the way in which the Claimant explained

the incident to us; stating that Mr Lancaster-Smith walked past her while she was sitting in the restaurant on her break and said “no black here” to no one in particular, while walking into the kitchen: and the way in which it is put in the Claim Form in which the Claimant alleged that the comment was made to Mr Krzyzanowski. The Claimant was asked about this inconsistency, but was unable to explain it. She said “I don’t know why I wrote he said to Head Chef, it is very odd, it is not what I would like to write”. We also consider that it is inherently implausible that Mr Lancaster-Smith would say this out loud to the person that he was proposing to discriminate against. Finally, had Mr Lancaster-Smith held such views he could simply have chosen not to employ the Claimant at the outset. On balance of probabilities we find that the comment was not made.

37. That finding is of significance because the alleged comment would have provided the most significant evidence that the decision to dismiss the Claimant was because of her race. We are entirely satisfied that the real reason for the dismissal of the Claimant was the fact that Mr Lancaster-Smith had observed that the Claimant was arguing with Mr Krzyzanowski and would not accept instruction from him. Even when Mr Krzyzanowski told the Claimant to prepare the pudding, she refused to do so. Mr Lancaster-Smith considered that this was unacceptable and so agreed with Mr Krzyzanowski that the Claimant’s employment should be terminated. We accept the evidence that Mr Krzyzanowski and Mr Lancaster-Smith gave about the Claimant’s poor attitude. They were having considerable difficulty in recruiting staff for the kitchen and had no reason to terminate the Claimant’s employment had she been more co-operative and prepared to take instruction from Mr Krzyzanowski.
38. We next deal with the allegations of sexual harassment. We consider that it is more likely than not that had these incidents occurred, the Claimant would have raised them in the email she sent complaining about the termination of her employment. Furthermore, we consider that there is a significant inconsistency between what the Claimant stated in her Claim Form where she said that “he don’t cease to put his hands on me as soon as it was possible”, suggesting that Mr Krzyzanowski had touched her, and her evidence to us that on both occasions (when he sat next to her while she was seeking to log onto the Wi-Fi system during her training and when he suggested that she should not wear leggings) that he had wanted to touch her, but had not. We fully accept that harassment may occur without any physical contact. A person can invade personal space without actually touching. However, we consider that there is a significant issue as to the credibility of the Claimant’s evidence because of the different versions she has given of the events. On balance, we do not accept that these two alleged events of harassment occurred.

39. Accordingly, the claims fail and are dismissed.

Employment Judge Tayler

4 November 2019

Judgment and Reasons sent to the parties on
5th Nov 2019

For the Tribunal Office