# EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondents:** 1 The Department for Environment Food and Rural Affairs
2 B

**Heard at:** Bristol **On:** 5 December 2019

**Before:** Employment Judge Mulvaney

**Representation**
**Claimant:** In Person
**First Respondent:** Mr T Poole of Counsel
**Second Respondent:** Ms C Lord of Counsel

# JUDGMENT

## ON A PRELIMINARY HEARING

1. The first respondent's application that the claim against the second respondent be struck out is refused.

2. The claimant's application for an Order under Rule 50 is granted. A Restricted Reporting Order and Anonymisation Order are made and have been drawn up separately.

# REASONS

1. This was a Preliminary Hearing listed by Regional Employment Judge Pirani on 28 October 2019 to determine whether, for claim 2200417/2019, the Tribunal has jurisdiction to hear the claim against the second respondent. Claim number 2200417/2019 was issued on the 6 February 2019, and is the first claim in two linked claims submitted by the claimant.

2. In addition, there was an application made by the claimant for an order under Rule 50, which it was agreed should be determined at this hearing. I have

considered that issue second because it was possible that consideration of the first issue might have some bearing on how I dealt with the Rule 50 application.

3. The jurisdictional issue is that identified by the solicitors for the first respondent in their letter dated 16th August 2019. It is that: "*the claimant's allegations against the second respondent do not amount to any act allegedly done by the second respondent in the course of employment.*" The first respondent's representative's letter asserted that dealing with this issue at a Preliminary Hearing would bring savings in time and costs as: "*this is a jurisdictional issue turning on a point of law on which no evidence would need to be heard; the Tribunal decision is to be based on legal submissions regarding the pleadings and the amended response.*"

4. In a letter dated 11 October 2019, the claimant objected to the jurisdictional issue being determined as a preliminary point, because the Employment Tribunal would need to consider documentation and evidence which, he asserted, was at odds with the second respondent's arguments as to the potential time and cost savings in dealing with it as a preliminary issue.

5. The claimant attached to his 11 October 2019 letter the grounds for his objection; a document in which he outlined the facts that he relied on for his contention that the events that he complained of did take place in the course of employment and also outlined his objections to the respondents' preliminary hearing application.

6. The respondents' application for a preliminary hearing came before Regional Employment Judge Pirani who decided that the preliminary hearing on jurisdiction should be listed to be heard today. The claimant accepted when I asked him this morning that I should deal with the issue based on the papers before me and on the parties' submissions.

7. The claim that is made against the second respondent was set out in paragraph 32(i) of the rider to the ET1 and was that the claimant had been subjected to less favourable treatment by the second respondent for rejecting sexual harassment pursuant to Section 26(3) of the Equality Act 2010.

8. In response to a request for further information the claimant clarified that the acts that he relied on as unwanted conduct of a sexual nature by the second respondent were those set out at paragraphs 10 – 12 and 15 of the rider to the ET1 only. These were:

    a. an incident on 4th July 2018 when it was alleged that the second respondent arranged with the claimant to go to the claimant's hotel room after a work social event for the Grade 7 team whereupon the second respondent made sexual advances towards him; and
    b. an incident on 1st August 2018, when it was alleged that the second respondent suggested meeting up with the claimant after work on 1st August 2018 when she made it evident through her behaviour that she was keen for there to be sexual activity between them, before the claimant said that he was happy in his relationship with his partner.

9. In his skeleton argument prepared for this hearing the claimant also reiterated his contention that when, subsequent to the incidents referred to above, the second respondent raised a complaint of sexual harassment against him, this action amounted to an act of harassment which he wished included in his claim.

10. It was submitted on behalf of the first respondent that the action pleaded by the claimant as an allegation under Section 26(3)(c) EqA (the complaint of harassment made against him) could not form a stand-alone claim for harassment under s26(3)(c) EqA and could only be claimed if the claimant were able to establish unwanted conduct of the type set out in s26(3)(a) and (b)EqA. The relevant statutory wording of s26 EqA is as follows:

*(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.*

11. I considered the wording in Section 26 of the Equality Act and I concluded that the respondents' legal interpretation of the s26(3) is correct. The claimant must first establish an act or acts of harassment under s26(3)(a) and (b) before he can then contend that because of his reaction to that harassment the second respondent then acted in contravention of s26(3)(c). The claimant's complaints of harassment under s26(2)(a) and (b), and/or s26(3)(a) and (b) based on the incidents of 4th July 2018 and 1st August 2018 are subject to the issue of jurisdiction set out above. Thus the complaint under s26(3)(c) can only proceed if the jurisdictional issue is determined in the claimant's favour.

## Employer's Liability for unlawful act of employee

12. The legal framework for the jurisdictional issue in this case is set out at s109(1) EqA which provides:

*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
*(2) …………..*
*(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

13. If it can be established that the second respondent's alleged actions were not carried out in the course of her employment, then Section 109(1) will not apply and the Tribunal will not have jurisdiction to hear the claims against the second respondent. There would then be no liability for either the first or second respondent for those complaints as pleaded by the claimant.

14. The case of ***Jones v Tower Boat Co Ltd [1997] ICR 254*** established that determination of whether acts were done in the course of employment is a question of fact for Tribunals and it approved a broad, common sense interpretation of the words. Actions taken whilst at the workplace will in most cases be covered. Questions have arisen in subsequent cases whether acts committed outside of the workplace can be considered to be done in the course of employment. The respondent referred me to the cases of ***Waters v Metropolitan Police Commmissioner [1997] IRLR 589 CA***, ***Sidhu v Aerospace Compsite Technology Ltd [2000] IRLR 602, CA*** and ***HM Prison Service v Davis (UKEAT/1294/98)***, cases where acts committed away from the workplace were held to have not been in the course of employment.

15. In the case of ***Chief Constable of Lincolnshire v Stubbs [1999] IRLR 81 (EAT)***, a case which concerned inappropriate sexual behaviour at social gatherings taking place immediately after work, it was held that the acts were within the course of employment and that although occurring away from the workplace the location of the social events amounted to extensions of the workplace. In considering acts which take place away from work premises Morison J suggested that whether the individual is on duty, whether on or away from the employer's premises are two of the factors for the Tribunal to consider. Morison J that the question will depend on the evidence heard, the Tribunal being '*in the best possible position to judge whether, despite the fact that the first incident occurred "in a pub" it was none the less to be regarded as part of the employment relationship; as also the question of whether the applicant's presence at the leaving party was similarly so to be described.'*

16. The EHRC Code of Practice on Employment 2011 provides that the phrase 'in the course of employment' has a wide meaning that includes acts in the workplace but may extend to circumstances outside such as work-related functions or business trips abroad. The claimant referred to the case of ***Lister v Hesley Hall Ltd [2001] UKHL 22*** and a line of authorities on vicarious liability in civil claims, which although they appear to involve some of the same considerations, are not the basis for determination of the 'course of employment' issue in discrimination cases under the statutory framework applied in the Employment Tribunal.

17. I concluded, based on consideration of the authorities that the following factors are relevant to the determination of the course of employment question, remembering always that the Tribunal should adopt a broad approach to the question and determine the case on its own facts.

18. The factors include:

    - Where the incident took place,

- Whether it was in work related premises or otherwise,
- Whether those involved in the incident were on duty at the time which includes consideration of the work functions of the individuals involved,
- Whether if the event took place at a social gathering it included employees' partners and customers or unrelated third parties,
- Whether the event took place immediately after work.

19. There is no settled list of factors to be considered when addressing this issue but these are relevant factors taken from the cases that have considered this question. Consideration of those factors will assist in determining whether the alleged actions took place within the course of employment and therefore whether the employer should be liable.

20. The second respondent made the application that is being determined today and asked for the application to be heard on the basis of legal argument on the papers before me today. No evidence was presented to me by either the claimant or the second respondent, although the claimant has presented information relevant to the issue in the pleadings and correspondence provided to the respondents prior to this hearing. The first and second respondent submit that the issue can be determined without hearing oral evidence from the claimant or from the second respondent. The first respondent submits that the claimant's allegations against the second respondent have to be assumed to be capable of proof and accepted as correct; and furthermore, that the facts set out in the claimant's objection and supporting information have to be assumed capable of proof and therefore accepted as correct. I found this position somewhat surprising given the fact sensitive nature of the issue under consideration. Nevertheless, as all parties were in agreement that I should proceed without any evidence, I did so.

21. In the absence of any information to the contrary, I have for the purposes of this Preliminary Hearing and the determination of this issue accepted the information presented by the claimant as fact. I accept that at the time these events occurred the second respondent and the claimant were involved in work related to Brexit. Their work was by its nature often time pressured and urgent. It involved working after hours in order to meet deadlines. There was an expectation by management that individuals involved in that work would undertake their duties outside of working hours if necessary. The claimant was on occasion contacted by his managers in the evenings and asked to carry out urgent work.

22. The second respondent was managed by the claimant and she asked for his input and assistance with her work on occasion. The meetings between the claimant and the second respondent at the claimant's hotel room on 4th July 2019 and 1st August 2019 took place at the second respondent's request ostensibly for work related purposes. There is some external evidence of this in the paperwork at pages 165 – 167 provided by the claimant. These showed text messages sent to the claimant from the second respondent

dealing with work issues which requested a meeting with the claimant and suggested a time after work. Although the meetings took place outside of work premises I find that they were convened ostensibly for work purposes and I conclude that the claimant and the second respondent were therefore on duty at the relevant time, having set up the meetings for the purposes of carrying out work for the first respondent, necessary to meet deadlines imposed by it.

23. I conclude that notwithstanding the fact that these meetings took place outside of work premises and outside of normal working hours this was not unusual in the circumstances of heightened work pressures and that the meetings set up by the second respondent with the claimant were overtly proposed in order to discuss work issues. The claimant although he was in a senior position to the second respondent was under pressure to comply with work demands and to ensure that those who reported to him did so too. I accept that there would have been an expectation that he accede to the second respondent's request for assistance even if that meant meeting after normal work hours and away from work premises. The claimant was not based in London. He visited when necessary for his work duties. When he did so he was booked into a hotel by the first respondent for the period of his visit. The claimant's place of work could be said to extend to include his hotel room which was paid for by the respondent to enable him to carry out work in London when necessary.

24. From the claimant's information this was a period of time when in working for the respondent there was no clear distinction between what constituted working and non-working hours and that therefore it was not possible to say whether the events took place outside of working hours. It is not possible to say whether they took place immediately after work.

25. On the occasion of 4 July 2019 the second respondent attended a work's drink outside of work premises, at which the claimant was present. On the information supplied by the claimant, the second respondent did so in order to secure a meeting with the claimant to discuss work matters immediately after it. The second respondent had not been invited to the work's drink, but her purpose in attending it, according to the claimant, was to secure a meeting ostensibly to discuss work with the claimant.

26. On the 1st August 2019 the claimant travelled to London specifically to meet with the second respondent at her request when there was additional work pressure due to his forthcoming annual leave at a critical time. I am satisfied that their meeting at the hotel on that date was requested by the second respondent again ostensibly to discuss work matters. In these circumstances the hotel room can be seen as an extension of work premises, being used by employees to discuss pressing work matters.

27. The representative of the second respondent asked me to consider inconsistencies in the claimant's description of the facts but I have no other descriptions of the events to put against those provided by the claimant, and I do not consider that inconsistencies in the claimant's account are sufficient to undermine the information he provides about the circumstances in which the alleged actions took place. The second respondent has not made reference to those incidents in her response to the claim and has not put

forward any information following the claimant's further and better particulars or indeed for this hearing. I have reached my conclusions based on the information before me and the parties' submissions.

28. This case can be distinguished from the cases I was referred to by the first respondent. In the case of ***Sidhu*** (ref above), the acts took place on a family day out arranged by the employers at a theme park. There was no suggestion that the employees were working and the event involved the employees' families. Although the Court of Appeal upheld the Tribunal decision, it noted 'that another tribunal could properly have reached the conclusion that the incident on the day out was in the course of employment', so reinforcing the Employment Tribunal's fact finding role in the determination of this question. In the case of ***Waters*** (ref above), the circumstances on their face appear similar to this case, a police officer visiting another police officer in a section house, however in that case there was no suggestion that the meeting was set up by the alleged harasser for work purposes and that the event took place in circumstances of heightened work pressure where there was an expectation that employees would work outside of work premises and outside of normal work hours where necessary. In ***HM Prison Service*** (ref above), the EAT rejected an argument that because the employer subsequently took action in relation to the events complained of even though they took place away from work premises, this meant that it had accepted that they occurred in the course of employment. The claimant put forward that argument based on the first respondent's actions in this case but I have not accepted it.

29. For the reasons set out above and based on the information before me I have concluded that in the particular circumstances of this case the second respondent was acting in the course of her employment when the events of 4th July and 1st August 2019 occurred at the claimant's hotel room. The Employment Tribunal therefore has jurisdiction to hear the claimant's claim against the second respondent together with the claim under Section 26(3)(c) EqA relating to the second respondent raising a complaint of harassment against the claimant.

30. That concludes my decision on the jurisdiction point. I wish to make clear that the findings of fact made in determining the jurisdictional issue that I have addressed today, which I did without oral evidence, will not bind a further Tribunal in its determination of the substantive claim at subsequent hearings when evidence will be heard from relevant parties.

**Rule 50 application**

31. I turn briefly to consider the claimant's application under Rule 50. The application was not opposed by the second respondent as it is an application which encompasses her as well as the claimant. It was only opposed by the first respondent insofar as it might have affected the second claim brought by the claimant against the first respondent for unfair dismissal and disability discrimination.

32. The harassment and discrimination claim, the first claim, is a claim where there are allegations of sexual misconduct which affect both the claimant and the second respondent and I concluded, notwithstanding the overriding

principle of open justice that it is appropriate in this case to protect the rights to privacy of the claimant and of the second respondent and to make a restricted reporting order to the date of promulgation and also an anonymisation order. The anonymisation order will omit from the public record any identifying matter in respect of the claimant and the second respondent. The restricted reporting order will extend the protection afforded in the anonymisation order such that it will prohibit the publication of any identifying matter which includes any matter likely to lead members of the public to identify the claimant or the second respondent as persons affected by or making the allegations. These two orders are made respect of the first claim only for the time being.

33. It may be necessary to extend those orders to the second claim and any new claim depending upon how those cases are listed to progress but I conclude that that is not a necessary order to make today and can be considered if necessary, at a subsequent hearing.

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Employment Judge Mulvaney

Date 14 January 2020