



EMPLOYMENT TRIBUNALS

Claimant: Ms M Usai
Respondent: G4S Secure Solutions (UK) Ltd
Heard at: Croydon **On:** 7-8/10/2019 and 10/10/2019
In chambers on 24/2/2020
Before: Employment Judge Wright
Mr G Henderson
Ms E Whitlam
Representation:
Claimant: Mr M Temme – legal representative
Respondent: Mr D Jones – counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the claimant's claim of sexual harassment under s.26(2) Equality Act 2010 is well-founded and succeeds in respect of the incident on 21/10/2017. The claims of sexual harassment on the 28/10/2017 and of direct discrimination are not well-founded and are therefore dismissed.

REASONS

1. At a preliminary hearing on 21/9/2018, this case was listed for a hearing of liability and remedy for five days to commence on 7/10/2019.
2. The claimant presented two claim forms on 11/3/2018 and 7/10/2018. She made various claims, some of which were withdrawn. The only claims which the claimant pursued by this hearing, were under the Equality Act 2010 (EQA):

Sexual harassment:

The claimant alleged that on 21/10/2017 Mr Bandel 'made inappropriate and unwelcome touching trying to hug and kiss' her.

On 28/10/2017 Mr Bandel gave the claimant a suggestive look, stared at her and 'started shouting and jumping into a cabin'.

Direct discrimination based upon the protective characteristic of sex or race. The claimant relies upon her Italian nationality. There is one remaining factual allegation:

Being passed over for promotion.

The claimant's comparators are Messrs Baker, Price and Appiah.

The claimant says the race of these comparators is British.

3. The claimant is a Security Officer, working at the respondent, who provides security/surveillance to a variety of client premises on a nationwide and global basis. The claimant's claims are linked to her working at a particular site (Number One Court) at the All England Lawn Tennis Club (AELTC) in Wimbledon. At the relevant time, Number One court was undergoing reconstruction works. The site contractor was Sir Robert McAlpine (SRM), however the ultimate client was the AELTC.
4. The Tribunal was referred to the bundle where there was a list of 41 job applications which she says she was passed over for promotion. The claimant then narrowed down the list, to the following:
 - a. October 2017 informal appointment to the role of Site Supervisor of Mr Baker;
 - b. December 2017 informal appointment to the role of Site Manager of Mr Baker;
 - c. December 2017 informal appointment to the role of Site Supervisor of Mr Price (that vacancy became free after Mr Baker was appointed as Site Manager);
 - d. November/December 2017 informal appointment to the role of Site Supervisor – Saturdays of Mr Appiah;
 - e. January 2018 formal appointment to the role of Site Manager of Mr Baker; and

- f. March 2018 formal appointment to the role of Site Supervisor of Mr Price.
5. At the commencement of the hearing, when dealing with preliminaries, there was a lengthy discussion regarding the claimant's application for specific disclosure. This took up most of the first morning of the hearing. Eventually, the Tribunal proceeded with an unwieldy bundle of over 550-pages. The Tribunal took account of the documents to which it was referred.
6. The Tribunal hearing evidence from the claimant. For the respondent, it heard from Mr Liam Topham – Security Manger and Mr Johan Zaayman – Events Operations Manager.
7. Judgment was reserved on the third day of the hearing. The Tribunal panel resumed on 24/2/2020.
8. The claimant says her complaint is a detriment under s. 39(2)(b) EQA.

Incident on 21/10/2017 and 28/10/2017

9. The claimant says the prohibited conduct was harassment under s. 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).

(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.

(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.

(5) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

10. The claimant's claim of harassment is pleaded under s. 26 (2) EQA, so is one of unwanted conduct of a sexual nature.

11. The claimant says the 'passing over' for promotion is direct discrimination contrary to s.13 EQA, which provides:

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.

12. The claimant's protected characteristics are race (Italian nationality s. 9 EQA) and sex (female s. 11 EQA). Combined discrimination: dual characteristics under s.14 EQA is not in force, therefore she cannot claim that any direct discrimination is as a result of her being an Italian female, or that her comparators are British males.

13. The burden of proof is found in s. 136(2) of the EQA which provides:

- (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.

Incident on 21/10/2017

14. There was an incident on 21/10/2017 where the claimant had failed to lock a gate on Number One court.
15. Also, on 21/10/2017 the claimant said she was sexually harassed.
16. The respondent appointed Mr Young to investigate the unlocked gate and he spoke to the claimant on 23/10/2017. The claimant did not during this conversation mention the incident with Mr Bandel, although she told Mr Young she had something she wanted to speak to him about.
17. On 27/10/2017 claimant raised an allegation against Mr Bandel to Mr Young (pages 122 and 201). She said that he sexually harassed her as he was leaving work on 21/10/2017.
18. There was CCTV footage of the incident and Mr Young viewed it. Mr Young recorded he found that the footage did not support the claimant's allegation against Mr Bandel, but he noted that CCTV footage seemed to show Mr Bandel 'hugging you in a friendly way as he stated in his statement... you did not seem to be distressed when [Mr Bandel] hugged you and in fact you were laughing and joking with [Mr Bandel] for a few minutes after the hug' (page 234b).
19. The claimant criticised the respondent for not retaining the CCTV footage. Mr Topham explained that the footage is retained for 30 days and is then wiped. By the time he became formally involved, the relevant CCTV footage was no longer available. Mr Topham said Mr Young had viewed the footage and said it showed an embrace of some sort and that the claimant had not seemed to mind it.
20. The respondent's position is that even if the event on 21/10/2017 occurred, it was not of a sexual nature and in the alternative, it did not have the purpose of effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The respondent also takes issue that the claimant did not mention this incident until after she was informed that she was being investigated for a failure to lock the gate on Number One Court.
21. The respondent agrees the CCTV footage shows a 'hug'. When Mr Young spoke to Mr Appiah on 30/10/2017 he reported Mr Appiah had said Mr

Bandel had tried to hug the claimant, but not to kiss her. Mr Young reported Mr Bandel said 'the same' and said he had been trying to make an effort with the claimant (page 201). Mr Young informed Mr Bandel not to do anything similar in future and that matters would be monitored going forward.

22. The Tribunal was told there had been complaints from female members of the public regarding security guards commenting upon their appearance and physicality, from inside the site when they were outside, by a gate. Specific examples were given of female joggers receiving unwanted comments.
23. The claimant referenced Mr Bandel 'saying things' to women walking past in the street by gate 2 and referred to Mr Forde being a witness to that. Mr Forde was interviewed on 21/2/2017. It was put to Mr Forde that the claimant had said he had overheard Mr Bandel making comments of a sexual nature about women passing gate 2. Mr Forde said that he had heard on odd occasions, Mr Bandel commenting upon the looks of women passing by the gate (page 241).
24. Against the background, the Tribunal makes the following findings. The 'hug' was recorded on the CCTV footage, it was noted and it happened. There were issues with security guards commenting upon female members of the public about their looks or appearance. Mr Forde gave direct evidence that he had overheard Mr Bandel making comments about females. Mr Appiah said when spoken to on 30/10/2017 that Mr Bandel had 'hugged' the claimant and Mr Bandel said much 'the same' (page 201).
25. The Tribunal finds that the conduct was unwanted as stated by the claimant. This was irrespective of her not seeming to 'mind' at the time; the hug could still violate the claimant's dignity. It then considered whether the conduct was of a 'sexual nature' as opposed to being related to the protected characteristic of sex. The guidance from the EAT in Driskal v Peninsula Business Services Ltd [2000] IRLR 151 is that sexual harassment should be defined on a common-sense basis by reference to the facts of each particular case.
26. The claimant had said that when Mr Bandel hugged her, he also referred to her national origins and said that women of those origins were used to this type of behaviour (page 204). That was never put to Mr Bandel when he was interviewed by either Mr Young or Mr Topham and there is no evidence to contradict it. The claimant has however been consistent in maintaining Mr Bandel made that comment since she raised her formal grievance.
27. The Tribunal finds on the balance of probabilities that Mr Bandel did make those comments to the claimant and as such, the result is that the conduct was of a sexual nature by reference to the claimant's origins and that a women of those origins should not 'mind' that behaviour. Essentially, Mr

Bandel was saying an Italian or European female should appreciate being embraced.

28. The fact the claimant did not appear to be upset at the time, does not mean that she was not distressed. The fact that on the respondent's case, she carried on laughing and joking with Mr Bandel does not, mean that she was not offended by his action or that it did not have the purpose or effect violating her dignity. Mr Bandel may not have intended to harass the claimant, but that does not mean that his actions did not have that effect.
29. It may be that the claimant and Mr Bandel had previously had a good relationship; that does not preclude her dignity from being violated. It is true that the chronology is that Mr Young first spoke to the claimant about the unlocked gate; however, the claimant informed Mr Young that she had something to speak to him about during the same conversation. It is noted the claimant was not at work on the 23/10/2017 and indeed she complained about being contacted on her day off. It is therefore consistent for her not to have raised the allegation until she was next at work and when she reported it to Mr Young on 27/10/2017 (page 201).
30. The Tribunal finds that it was reasonable for the conduct to have the effect on this particular claimant. Noting the comments of the EAT in Richmond Pharmacology v Dhaliwal [2009] ICR 724, the claimant is not hypersensitive and this was not a trivial incident or one which the claimant sought to make more of; this is not a case of this claimant unreasonably taking offence.
31. The Tribunal therefore finds that the claim of sexual harassment succeeds.

Incident on 28/10/2017

32. The claimant has led no evidence on this this. She says there was 'shouting of a sexual nature', she has never particularised, until she was asked in cross-examination what was said and how it was of a sexual nature. The claimant replied that it was a shout of 'wow, wow, wow' and hand gestures. When asked to cross-refer the allegation to the witness statement, the claimant confirmed this incident was not included.
33. This is a serious allegation made by the claimant and one which she has not withdrawn, however, she has not advanced it.
34. The Tribunal finds that the claimant has not discharged the burden of proof and there are no facts presented by the claimant so that the respondent is required to provide an explanation. This claim is dismissed.

'Passed over' for promotion

35. The claimant's employment commenced on 24/4/2016 on a zero hours contract (pages 88-105). She was put on a permanent contract from 1/2/2017 (page 133-161).
36. In respect of being 'passed over' for promotion, the claimant relies upon the protected characteristic of race (Italian nationality) or sex (female). She cannot rely upon the combined characteristic of being a female of Italian nationality as s. 14 EQA has not been brought into force.
37. The Site Supervisor (Mr Richie) of the Court One left in November 2017. Mr Young (Site Manager and the line manager) appointed Mr Baker to the role on a temporary basis. Mr Young felt that Mr Baker was the most experienced employee who could 'act up' into this role. He also had covered a Remote Vehicle Search role, had had managerial duties in the past at the Wimbledon Championships and had worked on the Court One project on a casual basis.
38. Mr Richie's departure was a massive concern for the AELTC. The Number One Court was its second biggest asset. Any delay to the Wimbledon Championships was unacceptable. The AELTC's biggest concern was to have the right person in place. It (the AELTC) wanted a Duty Manager to transfer from the main site. Mr Baker was a Duty Manager. Mr Young appointed Mr Baker as he felt he was the best candidate.
39. The claimant was not a Duty Manager. She had only been in the permanent role since February 2017. She did not have as much experience as Mr Baker had.
40. The Tribunal accepts the respondent's non-discriminatory explanation that the reason Mr Baker was appointed was his greater experience and the claimant was not treated less favourably on account of her race or sex.
41. Mr Baker's line manager the Site Manager (Mr Young) then left in December 2017 just as the respondent was going to formally advertise the Site Supervisor role. The Site Supervisor recruitment was put on hold and Mr Topham spoke to his client SRM and explained there were now vacancies for the Site Supervisor and Site Manger. Again, the AELTC was extremely concerned about this situation, SRM, approved by the AELTC, requested Mr Baker be appointed to the Site Manager role due to his experience. Mr Baker covered the Site Manager role from December 2017.
42. The role the claimant contended that she had been passed over for, was Site Manager. If Mr Baker had more experience which resulted in his appointment to Site Supervisor, then that applied equally to his appointment to Site Manager. Again, this was an interim appointment and it was also at the request of the client. Mr Baker had greater experience and by now had

the benefit of the experience in acting up as Site Supervisor. That was the reason he was appointed and it was not due to the fact of the claimant's race or sex.

43. As Mr Baker had moved up to the Site Manager role, that left the temporary Site Supervisor role vacant again. The AELTC were concerned that there were two interim positions being covered. The AELTC requested that a Duty Manager be appointed into the interim Supervisor role. Mr Topham spoke to four experienced Duty Managers to ask if they wished to cover the Site Supervisor role. Of those four, two indicated an interest. Mr Topham felt Mr Price was the most appropriate candidate as he had 3-4 years' managerial experience. He recommended him to the AELTC and with its approval Mr Price was appointed on an interim basis.
44. The claimant was a Security Officer, she was not a Duty Manager. The AELTC specifically requested that a Duty Manager be appointed. The reason Mr Price was appointed was he had significantly more experience and had experience as a manager.
45. Mr Price's appointment was not less favourable treatment because of the claimant's race or sex.
46. The next position the claimant says she was 'passed over' for was the informal role of a Site Supervisor on Saturdays in November/December 2017. Mr Topham was not the decision maker for this position, however Mark Appiah was appointed to the role. Mr Appiah had worked on Saturdays where he had been a Team Leader for two Championships and had worked full-time on the main AELTC site for two to three years. Mr Topham believed Mr Appiah was appointed on the basis of his previous experience.
47. This role appears to have been created as a result of Mr Price not wishing to work on Saturdays. This claimant had by this point been a full-time Security Officer since February 2017. She did not have the level of experience which Mr Appiah had. Mr Appiah said he was the claimant's supervisor and had been a Team Leader (pages 208 and 230). The explanation was simply that he had more experience than the claimant. Mr Appiah's appointment was not less favourable treatment because of the claimant's race or sex.
48. In January 2018 there was the formal recruitment to Site Manager. Although the vacancy of Site Supervisor predated this vacancy, the respondent wanted a permanent employee in the role, before it recruited to the subordinate role (so the Site Manager could then have a say in the appointment of the deputy). Mr Baker applied for this role, as did the claimant. Mr Baker was appointed, Mr Topham says he was the outstanding candidate, he had been a manager for a number of Championships, he had excelled in those

positions, he was extremely well-liked by the AELTC and was the 'number one' candidate of SRM.

49. By virtue of his acting-up into the role of Site Supervisor and then Site Manager, Mr Baker not only had greater general experience but he also had specific experience in the role which was being recruited to. Although by now the claimant had also increased her experience, it was not at the same level as Mr Baker. The reason he was appointed and the claimant was not was due to his expertise and it was not less favourable treatment because of the claimant's race or sex.
50. The last vacancy for which the claimant was 'passed over' and which she says amounts to unlawful direct discrimination because of her race or her sex was the formal recruitment to the role of Site Supervisor in March 2018.
51. Once Mr Baker had been appointed as the permanent Site Manager Mr Price made his interest in the permanent role known, along with three other candidates.
52. The claimant applied for the respondent's 'Step Up Programme' on 19/4/2017 and this was approved by her then line manager Mr Young on 21/4/2017 (page 550). Mr Young commented that the security industry was new to the claimant, but that she was passionate about progressing through the company. He said that he would provide her with opportunities to be a supervisor on site to solidify her learning. The Tribunal was told the claimant had also 'acted up' on several occasions. Even so and as the claimant's experience increased, so did that of her colleagues who had been in post for longer than the claimant. They will therefore always have greater experience than the claimant and equally, she will have more experience than new starters who joined after she did.
53. The claimant applied for this role and received an automated acknowledgment. It seems the incorrect interview date was given in the auto-response and Mr Topham wrote to confirm the correct date on 10/7/2017 (page 296). On 14/7/2017 Mr Topham wrote to the claimant to ask: 'are you still interested in applying for the Court 1 Supervisor role?'
54. The claimant was aware of this advertisement, had applied for the role and Mr Topham had further drawn her attention to it on 10/7/2017.
55. Mr Price stood out as being the most appropriate candidate due to his experience working for AELTC for 10 years and working as Duty Manager for one year. In contrast to the other candidates who had no or limited security experience or at the Championships. Mr Price was appointed due to his extensive experience.

56. The claimant was not treated less favourably because of her race or sex, the non-discriminatory explanation was that the claimant did not pursue her application and therefore, as she was no longer a candidate, she was not considered for the vacancy.
57. In cross-examination of Mr Topham, it was put to him that Mr Baker and Mr Price were friends. He agreed they were friends and colleagues. In closing submissions, it appears that the claimant was seeking to argue that the male British staff were a 'clique' of which she was not a part. It seemed that the claimant was seeking to argue a claim of indirect discrimination under s. 19 EQA. This was not however how the claimant's case had been put and the Tribunal is tasked with deciding the issues as put by the claimant; that the less favourable treatment (the 'passing over') was because of her sex or her nationality under s. 13 EQA. The claimant will be in difficulties if she advances her claim as one form of prohibited conduct (s. 13 EQA direct discrimination) and then at the hearing runs a claim based upon a different form of prohibited conduct (s.19 indirect discrimination).
58. Even if the claimant had presented a *prima facie* case under s.136 EQA and after hearing the respondent's explanation, the Tribunal accepted the failure to appoint the claimant to the various roles was not 'because of' her race or her nationality, but was for another credible reason, which was on the whole, her lack of experience and that other candidates were more suitable for the role. The claim of direct discrimination therefore fails.
59. The Tribunal sincerely apologises for the delay in promulgating this Judgment. This was due to one of the members of the panel being taken ill, was then indisposed and due to the difficulties in the panel reconvening.
60. A remedy hearing has been listed for 22/6/2020 to start at 10am, should the parties not be able to reach agreement. Directions will follow.

26/2/2020

Employment Judge Wright