



EMPLOYMENT TRIBUNALS

Claimant: X

First Respondent: Y

Second Respondent: Z

Heard at: Leeds **On:** 2 June 2020
5 June 2020 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:

Claimant: Mr Kerfoot, counsel
First Respondent: His father
Second Respondent: Mr Hutchison, solicitor

RESERVED JUDGMENT

The Second Respondent has not shown that it took all reasonable steps to prevent the First Respondent from contravening the Equality Act 2010 as alleged or from doing anything of that description.

REASONS

1. X and Y are employees of Z, a local authority. An Order has been made under Rule 50 to protect the identities of X and Y, which involves also anonymising the name of their employer.
2. X presented a claim to the Tribunal alleging that Y had subjected her to harassment and victimisation, contrary to Sections 39(4)(2)(d) and 40(1) read with Sections 26 and 27 of the Equality Act 2010 (EqA). She alleged that all

these acts were done in the course of Y's employment and the council was therefore liable for them under Section 109(1) EqA. She further alleged that the council was separately liable for victimising her because she complained about Y's conduct.

The legal issue

3. A Preliminary Hearing was held to decide whether the council was not liable for Y's acts because it could show that it "took all reasonable steps to prevent [Y] from doing the alleged acts or from doing anything of that description" (Section 109(4)). Both Respondents contended that the council had taken all such reasonable steps; the Claimant said that it had not.
4. In considering this issue, the Tribunal was required to take into account any provision in the Equality and Human Rights Commission's Code of Practice on Employment that it considered relevant to the case (Section 15(4) Equality Act 2006). The Tribunal had due regard to the Code in reaching its decision, and identified the following provisions in particular as relevant:

Para. 10.24: "It could be a reasonable step for an employer to have an equality policy in place and to ensure it is put into practice. It might also be a reasonable step for an employer to provide training on the Act to employees."

Para. 10.51: "An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable."

Para. 10.52: "Reasonable steps might include:

- implementing an equality policy;
- ensuring workers are aware of the policy;
- providing equal opportunities training;
- Reviewing the equality policy as appropriate; and
- Dealing effectively with employee complaints."

Preliminary matters

5. Because of the measures taken by the Tribunal in response to the COVID-19 pandemic, the Hearing was conducted by video conference, with the parties' consent. The Tribunal was grateful to the parties for their patience during interruptions to the Hearing caused by technical problems with the Tribunal's video conferencing facility.
6. Considerable time was spent at the beginning of the Hearing clarifying the exact nature of the Claimant's allegations with her representative. The Tribunal adjourned the Hearing to enable him to take instructions. He

obtained further clarification from the Claimant during the course of the Hearing. The allegations and the main issues they raise are now set out in an Annex to these Reasons in a chronological and numbered list, as a reference point in these Reasons and to assist the Tribunal and the parties as the claim progresses.

7. During the course of clarifying her allegations, the Claimant made an application to amend her claim to include a further act of victimisation by Z. The Tribunal refused that application for reasons given at the Hearing.

Findings of fact

8. The Tribunal heard oral evidence from the Claimant and from Mrs Robinson, who works in the council's human resources function. Although Y's position was that the council had taken all reasonable steps to prevent him acting as he did, he gave no evidence. The Tribunal also took into the account the pages to which it was referred by the witnesses in the two bundles of documents produced for the Hearing.
9. On the basis of the evidence it heard and read, the Tribunal makes the following findings. These have been broadly grouped to reflect the matters covered in para. 10.52 of the Code of Practice.

Background

10. At the relevant time, X and Y worked in the same office but in different jobs and different teams. [Two sentences redacted.]
11. Whilst not directly involved in managing or training either X or Y, Mrs Robinson provides human resources advice and support to managers and employees in the area in which they work, including advice on equality, harassment and disciplinary and grievance matters.

Implementing an equality policy

12. The Tribunal accepts that the council has adopted several policies on the standards of behaviour expected of its employees, including in the area of equality and diversity generally and harassment and the use of electronic communications more specifically. These documents are all available to employees on the council's intranet. (The Tribunal considers below whether the policies have been implemented, by reference to the further matters listed in para. 10.52 of the Code.)
13. The council's employee handbook, the last revision of which was issued in October 2015, has a section on standards of behaviour. This opens with the statement: "The public expects and is entitled to demand the highest ethical

- standards of conduct of any local government employee.” Later in the same section it states: “You must follow these standards of behaviour and must understand that they are incorporated into your contract of employment. If you fail to follow these standards you will face formal action.” A list headed “You must” includes the following: “act in accordance with the council’s policies”; “maintain the highest level of courtesy and respect when dealing with colleagues both inside and outside the council”; and “avoid the use of language or images – whether written, printed or electronic – that could cause offence to an individual or others nearby”.
14. In a later section on policies and procedures, the Handbook refers to equality and diversity and includes these statements: “all employees will be made aware of the council’s equality and diversity strategy and the policy statement during induction which covers all aspects of discrimination and encouraged to refresh awareness through training sessions, team briefing and one-to-one discussions”; “employees are expected to maintain the highest standards of behaviour when dealing with areas of diversity both inside and outside [the workplace]. Failure to do so will result in formal action.” This section of the Handbook also refers employees to the council’s policy on the use of electronic communications in the workplace.
 15. The council’s policy on dignity and respect at work, last reviewed in November 2016, states that the council opposes all forms of discrimination and aims to create a working environment where harassment is not tolerated. The policy defines harassment in a way that includes written communications, visual images including pictures of a sexual nature, emails, and “phone and automatic supervision methods”. Unacceptable behaviour is stated to include engaging in banter which is degrading, unwelcome sexual advances, and “display of offensive materials, asking for sexual favours, making decisions on the basis of sexual advances being accepted or rejected”.
 16. The council’s disciplinary procedure, updated in February 2019, lists circumstances that could warrant disciplinary action. These include harassment of another employee, failing to comply with the council’s expectations for conduct or behaviour, discrimination or victimisation of other employees, and failing to comply with the council’s procedure on the use of electronic communications. Circumstances that could warrant dismissal are stated to include serious harassment of another employee or failure to comply with the council’s expectations for conduct or behaviour which seriously undermine the council’s trust and confidence in the employee.
 17. The council’s policy on the use of electronic communications, revised in January 2017, states that employees are expected to meet certain standards of conduct in using electronic communications and states that if employees do not comply with those standards it could lead to disciplinary action. The policy provides a link to an employee guide to the policy, dated January 2017.

18. The guide explains that the phrase electronic communications covers “anything that has been created, sent, received, stores or has been produced where any form of electronic medium has been used. This extends to any form of electronic communications used anywhere; not just council property”. The equipment that might be covered includes computers, laptops, tablets and mobile ‘phones. Examples of unacceptable use of electronic communications are given and include viewing or distributing material that is obscene or offensive, using council equipment excessively for non-work matters, sending text messages, voice messages and pictures unless express consent to do so has been given and conducting private and intimate relationships via email. Under a heading “key expectations”, the policy states that the council’s guidelines on dignity and respect are relevant to electronic communications. It also states: “When you use equipment at work we expect any communications that you send, whatever format you use, to still be written in a professional tone and text, and not breach conduct or behaviours expectations.” In using the council’s instant messaging service, employees will be expected to ensure that they “use a professional tone and text, and not breach conduct or behaviours expectations”. Any personal use of the council’s equipment should not include any obscene language or offensive material. Misuse of the policy is stated to be a serious disciplinary offence.
19. The Tribunal accepts the point put by the Claimant’s representative to Mrs Robinson in cross-examination at the Hearing that the council’s guidelines on the use of social media are not directly relevant to this claim. That policy deals with employees’ behaviour in relation to communications they post online and that are potentially available to an audience outside the council. In this claim, all the allegations are of communications directed privately from Y to the Claimant and both are council employees. Nevertheless, the guidelines on use of social media are consistent with the policy on the use of electronic communications in that they make clear that the council expects employees to be respectful in their communications online. They also ask employees to bear in mind that the way in which they behave in their own time and on their own social media accounts could affect their employment by bringing the council into disrepute. This includes using images that could be seen as discriminatory or offensive to others.

Ensuring workers are aware of the policy

20. All of the council’s policies and procedures, including those highlighted above, and its employee handbook are readily accessible to all employees on the council’s intranet.
21. The Tribunal accepts Mrs Robinson’s evidence on what the council expects managers to cover when inducting new employees. Her evidence was

consistent with the council's standard induction checklist, an example of which relating to the Claimant's induction was included in the hearing bundle. Managers are expected to give employees information about the council's policies on harassment, use of electronic information and equality matters. Specifically, they are expected to explain the council's expectations of employees' behaviour, including the dignity and respect at work guidelines. They should "signpost" employees to the council's inclusion and diversity policy statement and strategy, which all employees should read, and they should discuss employees' responsibilities and the council's expectations around valuing diversity and inclusion at work. Employees should be provided with the council's electronic communications policy, which all employees should read, and discuss employees' responsibilities with them.

22. The Tribunal also accepts Mrs Robinson's evidence that, during the probationary monitoring period that follows induction, managers are expected to discuss with employees the council's expectations in relation to their behaviour. After that, managers are expected to pick up with employees during their supervision session any behaviours they are exhibiting that fall below the standard required.
23. There was no evidence before the Tribunal of what information Y in particular was given when he was first recruited in November 2013. The Tribunal does accept, however, from a copy of the document that appeared in the hearing bundle, that when Y moved role in 2016 he was issued with a "welcome pack" (a written record of his team's version of the council's induction programme) and a copy of the Employee Handbook. The welcome pack also records that Y was issued with the electronic communication policy on 19 September 2016. The contract of employment signed by Y when he moved role in 2018 states that his contract is "subject to the terms of the current Employee Handbook and related employee policies". The letter offering him the new post reminded him that the Employee Handbook was available on the council's intranet.

Providing equal opportunities training

24. The only evidence that the Tribunal had on the training that Y had received on the behaviours relevant to this claim was his welcome pack. A checklist in the pack indicates that he completed an e-learning course on "equality essentials" at some stage. This is annotated with the words "in learning record". The Tribunal accepts this as sufficient to establish that Y had completed this training by the time he took up his new post in 2016, even though Y's learning record was not disclosed by the council and did not appear in the hearing bundle. The Tribunal also accepts Mrs Robinson's evidence that the equality essentials course covered what harassment is and how to identify inappropriate behaviour in the workplace.

25. Mrs Robinson confirmed in her evidence that it is not mandatory for employees to complete any of the e-learning courses on equality matters that the council offers, although it is recommended that they do so.

Reviewing the equality policy as appropriate

26. The Tribunal accepts Mrs Robinson's evidence that the council keeps all its policies, including those relevant in this case, under continuous review and amends them, in consultation with its recognised unions, as and when there are any incidents or other developments that make it necessary to do so.

Dealing effectively with employee complaints

27. The council has a workforce of around 15,000 employees. The Tribunal was provided with a summary in tabular form of the 14 complaints the council has received about harassment in the past five years and their outcomes. The table did not indicate whether any of these were allegations of the type of harassment alleged in this claim. In six cases the grievance was not upheld or upheld only in part. Three cases resulted in disciplinary sanctions. In two cases the employee resigned, although whether this was the complainant or the person alleged to have harassed is not stated. It appears that two complaints were withdrawn and one complaint was dealt with informally. The number of days from complaint to outcome varied between 0 and 355.
28. The Claimant argued that this was a large number of complaints and that the Tribunal should therefore infer that the council was not dealing effectively with employee complaints of harassment. The Tribunal does not accept that 14 complaints of harassment of some description from a workforce of 15,000 employees over five years is a large number. The Tribunal is not satisfied that this scant data, which give no detail on the subject matter of the complaints or their surrounding circumstances, can provide any secure basis for drawing an inference, whether positive or negative, about the effectiveness of the council's handling of complaints about the type of behaviour at issue in this claim.
29. The Tribunal had documentary evidence on the council's general approach to dealing with the type of behaviour alleged in this claim. The council's policy on dignity and respect at work has a section on employee support that indicates how employees should report any inappropriate behaviour. The employee handbook states: "the council has a grievance and disputes procedure that explains how the process will operate. The aim is to create a working environment in which harassment and bullying are known to be unacceptable, where individuals can feel secure and trusted and where they treat each other with dignity and respect". Employees are referred to the council's intranet for the full grievance procedure.

30. The Tribunal accepts Mrs Robinson's evidence that employees who become managers complete an introduction to management programme consisting of four workshops. One of these includes a case study on how to deal with bullying. Managers can access support and advice on dealing with complaints of harassment from the council's human resources staff.

Analysis and conclusion

31. In analysing whether the council took "all reasonable steps" to prevent Y behaving in the way alleged or doing anything of that description, the Tribunal has borne in mind that it is for the council to establish that it took all reasonable steps. It is not sufficient that it took many reasonable steps: if there was a step that it did not take but that it would have been reasonable for it to take, it cannot establish a defence under Section 109(4).

32. Whilst the Tribunal has taken into account the contents of the Code of Practice, it has also borne in mind that a failure to follow the Code does not in and of itself mean that the council has failed to establish a defence under Section 109(4). Further, whilst the Code makes general recommendations on the practices that employers should adopt to avoid discrimination occurring in their workplace, the issue for the Tribunal is whether this particular employer took all reasonable steps to prevent this particular employee from behaving in the particular way alleged in the claim.

33. Turning first to the Code's recommendation that employers should implement an equality policy, from the extracts of the relevant documents set out above, the Tribunal is satisfied that the council has adopted policies and procedures that make clear that the type of behaviour covered by the Claimant's allegations is unacceptable and is likely to result in disciplinary action. In her submissions, the Claimant did not argue otherwise.

34. In relation to the Code's recommendation that employers should ensure workers are aware of the policy, the Claimant submitted that the council had not taken all reasonable steps to ensure that Y was aware of the relevant policies because it had not expressly required him to access and read them. The council has a significant number of policies that were relevant to Y's employment and reading all of them would take an employee a significant amount of time. It was unlikely Y would read them unless instructed to do so and there was no evidence that he had been. The council, on the other hand, submitted that Y could be expected to take responsibility for reading the policies and procedures relevant to his work. His contract of employment made clear that his employment was subject to those policies and he had ready access to them on the council's intranet.

35. The Tribunal notes that Y was issued with personal copies of two of the documents most relevant to the behaviour upon which the allegations in this

claim are based: the employee handbook, which establishes the council's expectations of employee behaviour, and the electronic communications policy, which gives guidance to employees on its appropriate use. The Tribunal had no evidence, however, that Y had read these documents or any of the other relevant policies, particularly the one on dignity and respect at work, which defines what harassment is. Whilst the Tribunal accepts from Mrs Robinson's evidence that the council has a general expectation that managers will discuss the relevant policies with employees at induction, there was no evidence, even in Y's welcome pack, that this had happened in his case. The Tribunal accepts that the council could reasonably expect Y to read the policies that he had been told were relevant to his employment, even if he was not expressly instructed to do so. It would also be reasonable, however, for the council to check that he had done so. Specifically, it would have been a simple and reasonable step to require Y to confirm in some way that he had read and understood the two documents with which he had been issued and the dignity and respect policy.

36. In relation to the Code's recommendation that employers provide equal opportunities training, the Tribunal considered whether the training provided for Y was sufficient to show that the council had taken all reasonable steps to prevent him committing the alleged behaviour. The Tribunal notes that the council does not make training on equality matters mandatory. At some point before he changed role in 2016, however, Y had completed an e-learning module that covered harassment which the council had made available to him. Because he had done so, the Tribunal accepts that the council took all reasonable steps in this area.
37. Turning to the Code's recommendation that employers review their policies as appropriate, the Claimant argued that the council had not taken all reasonable steps to prevent Y acting as he did because it had not reviewed the relevant policies sufficiently frequently. From the Tribunal's findings above, it is apparent that some of the relevant documents had not been revised for some years before the conduct at issue in this case is alleged to have happened. The Tribunal is nevertheless satisfied from Mrs Robinson's evidence that the council reviews the relevant policies on an ongoing basis and makes revisions as and when necessary. That amounts to reviewing the policies "as appropriate", as recommended by the Code of Practice.
38. In relation to the Code's recommendation that employers should deal effectively with employee complaints, the Tribunal is satisfied on the basis of the documentary evidence it has seen that the council has appropriate procedures in place to deal effectively with complaints about the type of behaviour at issue in this claim and that employees are made aware of what they can do if they believe that someone has behaved inappropriately. The Claimant, who was the object of Y's behaviour, was able to access that information and procedure. In this regard, therefore, the Tribunal accepts that

the council took all reasonable steps to prevent Y behaving as he is alleged to have done.

Conclusion

39. As the Tribunal has found that it would have been a reasonable step to require Y to confirm in some way that he had read and understood the two documents with which he had been issued and the dignity and respect policy, as a means of ensuring that he was aware of their contents, the council has not shown that it took all reasonable steps to prevent Y from behaving in the way he is alleged to have behaved. The Tribunal concludes, therefore, that the council will be liable for Y's conduct, if it amounted to unlawful harassment and victimisation as alleged. Whether Y did in fact behave in a way that amounted to unlawful conduct in breach of the EqA remains to be decided at a further Hearing.

Employment Judge Cox
Date: 5 June 2020

ANNEX: ALLEGATIONS

Allegations against Y

1. At 10.04 on 25 March 2019 Y sent the Claimant a message by the council's internal instant messaging service: "Short tight dresses"
2. At 10.15 on 25 March 2019 Y sent the Claimant a message by the council's internal instant messaging service: "I love stuffing things"
3. At 11.15 on 10 May 2019, in response to a message sent by the Claimant to Y "Coffee? In kitchen?", Y replied: "Only if I can bend you over the table lol". Both messages sent by the council's internal instant messaging service.
4. During the course of one day and in working hours, on a date unknown but before 27 June 2019, Y sent the Claimant the following text messages from his mobile 'phone to hers:
 - a. At 14.15: "Suck my dick"
 - b. "Not talking now?"
 - c. "Stop changing the subject and suck my dick please"
 - d. "Naked then huh"
 - e. "Haha, I want pie, different type"
5. At 22.00 on 27 June 2019 Y sent the Claimant a photograph of his penis by Snapchat.
6. On a date and time unknown but after allegation 5, Y sent the Claimant a text by Snapchat messenger: "Did you like my cock?"
7. At some time on the morning of 7 July 2019 before 08.16 Y sent the Claimant a video of himself masturbating by Snapchat.
8. At 16.11 on 10 July 2019 Y sent the Claimant a message by the council's internal instant messaging service: "Please don't hate me"
9. At 16.20 on 17 July 2019 Y sent the Claimant a message by the council's internal instant messaging service: "I'm sorry :/ Can I be forgiven yet? im really sorry :("
10. At 11.15 on 25 July 2019 Y sent the Claimant a message by the council's internal instant messaging service: "Look if you hate me, you hate me. I get that. But please just tell me you don't want to ever speak to me again if that's what you want. I will fuck off and leave you alone then"

Acts 1 to 10 are alleged to be harassment contrary to Sections 26 and 40 EqA.

Act 10 is alleged also to be victimisation. The protected act for the purposes of Section 27 is the Claimant's complaint to a manager on 24 July 2019 that Y was sexually harassing her.

The main issues raised by these allegations are:

1. Did these acts happen?
2. If they did, were they committed in the course of Y's employment? Allegations 5, 6 and 7 relate to communications involving personal electronic devices and outside working hours. Allegation 4 relates to communications involving personal electronic devices but during working hours.
3. If they were committed in the course of employment, was the conduct unwanted by the Claimant?
4. Did the conduct have the purpose of creating an offensive environment for the Claimant?
5. Did the conduct have the effect of creating an offensive environment for the Claimant?

Y's case is that all communications were in the context of a consensual flirtatious relationship between himself and the Claimant.

6. Was allegation 10 done because the Claimant had done the protected act? Y's case is that he did not know about the Claimant's complaint until after he had sent that communication.
7. If it was, did it amount to a detriment?

Allegation against Z

The Claimant alleges that, because of the protected act (that is, her complaint to a manager on 24 July 2019 that Y was harassing her), the council delayed from 24 July 2019 until at least 8 November 2019 (the date of presentation of her claim) in resolving her grievance about Y's conduct.

The main issues in relation to this allegation are:

1. Did the council in fact delay in resolving the Claimant's grievance, either by act or omission?
2. If it did, was that because of the protected act?