CASE NO: 2205736/2019

EMPLOYMENT TRIBUNALS

BETWEEN

SUMMARY AND ORDERS ON OPEN PRELIMINARY HEARING (OPH)

HELD AT: London Central (Zoom video audio call) **ON: 5 October 2020**

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:
Claimant: Sue Sleeman, Counsel
First Respondent: Alex Shellum, Counsel
Second Respondent: In Person

BETWEEN

MS E HALL — **Claimant**

-and-

VICTORIA AND ALBERT MUSEUM — **First Respondent**

-and

MR G AHEARN — **Second Respondent**

Judgment

The Respondents' applications to have the Claimant's claims struck out, or otherwise a deposit ordered for her to pay if she wished to continue, are refused.

Reasons

Summary Factual Background

1. The Claimant was employed from October 2017 as a Gallery Assistant as was the Second Respondent. From around late April 2019 the Second Respondent's conduct towards the Claimant became a source of distress for her and included a confession that he had "developed feelings and emotions" towards her. The conduct continued in various forms including the sending of messages with content that Claimant says she made clear was unwelcome and embarrassing for her. She received abusive voicemails on the evening of 18 June.

2. The Claimant reported the Second Respondent's behaviour to her employer in June 2019 and was informed on 28 August 2019 that the Second Respondent had been given a warning following an investigation and disciplinary hearing. The Claimant says she was also informed that the Second Respondent would be returning to work in the same building as her.

3. The Claimant lodged a formal grievance on 27 September 2019 concerning the First Respondent's expectation that she and the Second Respondent should continue to work in the same building, and an internal hearing was held on 14 November 2019. By letter dated 19 November 2019, the Claimant was advised that the First Respondent had not yet decided whether the Second Respondent would be returning to work in the same building, and that, if it were to be so decided, there would be discussion with the Claimant prior to it being effected. At the time of lodging her claim on 13 December 2019, under s.13 EqA 2010 for direct sex discrimination and under s.26 for harassment related to sex or sexual harassment, the Claimant says she had received no further updates about the matter.

The Preliminary Hearing today

4. The hearing on 5 October was to be the first day of a 3-day full hearing (later listed for 5 days). It was instead an Open Preliminary hearing to consider the Respondents' application to have the Claimant's claim struck out or otherwise a deposit ordered for her to pay if she wished to continue. This was the First Respondent's application.

5. The Claimant alleges that the First Respondent is vicariously liable for the alleged conduct of the Second Respondent between April and August 2019 and in respect of which the First Respondent says it had no knowledge until 21 June 2019.

6. The First Respondent contends that the claim arises out of a private dispute between two of its employees and that the Claimant has no or little reasonable prospect of success of establishing that the First Respondent is vicariously liable for the alleged conduct of the Second Respondent

for, *inter alia,* the following reasons. The material events occurred:

- Away from the First Respondent's premises.
- Outside of working hours – often late at night or in the early hours of the morning.
- Using the employees' personal mobile telephones.
- Absent any connection whatsoever with the Second Respondent's duties under his contract of employment; and
- Without the First Respondent's knowledge.

7. The Claimant alleges that the very act of being told by the First Respondent on 28 August 2019 grievance meeting that the Second Respondent would be returning to work in the same building as her, following a full and thorough investigation conducted by the First Respondent into her complaint and during which the Second Respondent was suspended, constitutes discrete acts of s.13 EqA 2010 direct sex discrimination and s.26 harassment related to sex or sexual harassment.

8. The First Respondent submits that these claims have no or little reasonable prospect of success for, *inter alia,* the following reasons

a. Regarding s.13 EqA 2010, the facts relied upon disclose no basis for claiming that the very act of being told that the Second Respondent would return to work in the same building as her was because of her sex. The Claimant faces considerable difficulties establishing that the alleged treatment was because of a protected characteristic.

b. Regarding s.13 EqA 2010, the Claimant must show that she was treated less favourably than a notional comparator in the same circumstances. The Claimant's allegation is, in effect, that the First Respondent would not have updated a man as to the status of his complaint of sexual harassment. There is no evidence to suggest that a man would have been treated any differently – the Claimant faces considerable difficulties establishing less favourable treatment.

c. Regarding s.26 EqA 2010, the impugned conduct of the First Respondent is clearly not of a sexual nature. Moreover, it is not clear on what basis the Claimant alleges that the First Respondent's conduct was related to her sex – the simple fact that the grievance to which the allegation relates is about discrimination does not, without more, establish that the response to that grievance per se is related to the Claimant's protected characteristic; and

d. Regarding s.26 EqA 2010, taking the Claimant's case at its highest, assuming that conduct complained of had the effect of creating a s.26(1)(b) EqA 2010 adverse environment, it was nevertheless not reasonable for the conduct to have had that effect. The Claimant was informed in the same conversation on 28 August 2019 of the extensive measures the First Respondent would introduce to ensure that the Claimant and Second Respondent did not come into contact at any stage and moreover the Second Respondent did not in fact return to work. It is an ambitious claim to state that the very act of being told something which swiftly never came to pass reasonably created an adverse environment.

9. The Claimant also alleges that the very act of being advised by the First Respondent at her 14 November 2019 grievance meeting that a decision had not yet been reached as to whether the Second Respondent would be returning to work in the same building as her, as disciplinary investigations were ongoing, constitute discrete acts of s.13 EqA 2010 direct sex discrimination and s.26 EqA 2010 harassment related to sex or sexual harassment.

10. The First Respondent submits that these claims have no or little reasonable prospect of success for,*inter alia*, the following reasons:

a)Regarding s.13 EqA 2010, there is no evidence for the proposition that it was because of the Claimant's sex that no decision had been reached by 14 November 2019 as to the Second Respondent's outstanding disciplinary investigation. The Claimant faces considerable difficulties in establishing that the alleged treatment was because of a protected characteristic.

b)Regarding s.13 EqA 2010, the basis on which the Claimant alleges that a man would have been treated more favourably than her in the same circumstances is unclear and without evidential support. It is moreover unclear how an omission to reach a decision in a timeframe which was agreeable to the Claimant, due to the First Respondent conducting a thorough investigation into the Claimant's complaint, could reach the threshold of detriment. The Claimant faces considerable difficulties establishing less favourable treatment.

c)Regarding s.26 EqA 2010, the Claimant's allegation is tantamount to claiming that the First Respondent, by its thorough and ongoing investigation of the Claimant's complaint, committed an act of unlawful harassment. The Claimant therefore faces considerable difficulties in simply establishing unwanted conduct, let alone proving that the conduct was of a sexual nature or related to her sex, in respect of which the same causation issues arise as in relation to the 28 August 2019 claim above;

d)Regarding s.26 EqA 2010, taking the Claimant's case at its highest, assuming that the conduct complained of had the effect of creating a s.26(1)(b) EqA 2010 adverse environment, it was nevertheless not reasonable for the conduct to have had that effect. The Second Respondent was not at work. No decision on the Second Respondent's return to work had been made – the Claimant was informed that it was necessary to investigate her allegations fully. Ultimately, the claim in respect of this matter is premature. The Claimant has no or little reasonable prospect of showing that it was reasonable for the impugned conduct to have had the effect of creating an adverse environment.

11. The Second Respondent (acting in person) made his own application on 5 June (updated on 11 June) entitled Notification of Applications with a similar objective. He also raised issues of jurisdiction and claimed that a fair trial was impossible due to the effluxion of time before a likely hearing. However much of his application repeats his defence and relates to evidential matters.

12. As mentioned above it was determined that the limitation arguments would be considered at the full Employment Tribunal hearing whilst noting that although the Claimant accepts that acts occurring prior to 18 July 2019 are prima facie out of time she will argue that they form part of a continuing act. The First Respondent reserves the right to rely on the statutory defence in section 109(4) of the Equality Act 2010 as well as to make comments at any full hearing as to which if any of the acts or omissions complained of by the Claimant were out of time.

13. The issues raised were considered by me (with the assistance of Counsel representing the Claimant and First Respondent respectively with helpful submissions) based on Employment Judge Snelsdon's Order of 14 May 2020.

Findings of Fact

14. The most serious alleged acts of harassment by the Second Respondent (including allegations that the Second Respondent was abusive on the way to having drinks one evening after work with Hannah LeGood on 28th of April 2019 and leaving unwanted messages on the Claimant's voicemail on 18 June 2019) seem to have taken place out of office hours and/or when the Claimant was not working .Whilst recognising that she sometimes worked in the evenings and/or weekends) this is not true of any of the most serious allegations.

15. Some of the Claimant's allegations relate to texts and comments made during working hours which the Claimant's representative described as an escalation of events towards the end of May 2019. I agree with the Claimant's representative when she said the Claimant could not be expected to be more robust in telling the Second Respondent to stop what she regarded as unwanted conduct. What she did do was to make it clear to him that she found the comments made unwelcome and it is natural, particularly when she initially liked the Second Respondent, that she should avoid confronting him. It is also natural when e.g. asked to send the Second Respondent a picture of the CN tower during her holiday to Canada that she should do so .This is not incompatible with the fact that she felt uncomfortable as to the sequence of messages , nor does her own conduct undermine her claim.

16. The Second Respondent describes his conduct as innocuous certainly in respect of some of the messages the Claimant said she was offended by. One of the examples given refers to her getting down and dirty with the bugs which simply reflected ,he says, the behaviour of the insects and the placing of (in effect) their litter tray and the difficult job both had at the First Respondent's workplace of looking after these insects. The Claimant suggests that this text exchange along with another where he compliments the Claimant on her appearance was not innocuous but unnerving and unwanted attention.

17. The First Respondent's Representative is correct to state that this strikeout and/or deposit application through an open preliminary hearing should not deal (certainly in detail) with the evidence but it is nevertheless clear from my findings that at least some of the evidence is relevant and should be considered where I can do so. It is also contradictory.

18. Whilst it seems that at least some of the texts and/or calls and/or events that the Claimant is relying upon (and it will be for the full tribunal to decide this) were not in the course of employment I accept the Claimant's contention that there was a natural human interaction between the Claimant and the Second Respondent which does, or may, blur the normally clear line between what happened in the course of employment and what happened outside. If the inappropriate calls in the middle of the night on 18 June 2019 were all the Claimant was complaining about then the authority which the First Respondent relies on of *HM Prison Service v Davis* might be more persuasive. But this is not the case. The Second Respondent admits that he got to know the Claimant at work and that is where he developed feelings for her and that had a knock-on effect to other events

19. The delay in dealing with the Claimant's grievance exacerbated her distress and whilst I am mindful that this delay does not give the Claimant any legal cause of action against the Respondent , as this is not an unfair dismissal complaint, I also find that this may be a factor . And on 28 August the Claimant was given the impression that the Second Respondent would be returning to work in the same building as her and after being warned as to his conduct. And this led to a further grievance on 27 September because of the Claimant's expectation that she and the Second Respondent would, or at least may, have to work together in the same building.

20. Whether (and if so , how) the Claimant was first told by the First Respondent that the Second Respondent would be returning to work in the same building as her and then that he might be is a matter for detailed evidence. It cannot be said for the purposes of this hearing that these exchanges cannot found a claim of discriminatory treatment or such claims have little prospect of success.

21. Although the First Respondent may have assured her that this was not their intention, they could not on 19 November give a final decision as to whether the Second Respondent would be returning to work in the same building which clearly caused her further distress. The parties have not explored with me whether or not redeployment was realistic or possible and it may be that the Second Respondent could have returned to work in the First Respondent's main museum building without coming into contact with the Claimant all .But this remains uncertain as is the reason as to why that decision had not been made some months after the principal allegations against the Second Respondent had been made and heard by the First Respondent , albeit accepting that the Second Respondent seemed to have been suffering illness during the latter part of the summer which would inevitably delay that process. And finally it is not certain the Second Respondent would not have been authorised to work with the Claimant and or come into contact with her at work.

Applying the Law

Strike Out and Deposit Order

22. The purpose of such an order is "to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails" and "is emphatically not … to make it difficult to access justice or to effect a strike out through the back door". *Hemdan v Ishmail [2017] IRLR 228*

23. In considering an application under Rule 39 the Tribunal is not restricted to purely legal issues but is entitled to have regard to the likelihood of a Claimant being able to establish the facts essential to her case and reaching a provisional view as to the credibility of the assertions put forward. The Tribunal must have a proper basis for doubting that essential facts could be established before making an order: *Van Rensburg v Royal Borough of Kingston-upon- Thames UKEAT/0095/07.*

24. A deposit order is not made lightly and a strikeout order even less so and, in a discrimination, claim the case authorities make it clear that discrimination claims will normally have to be determined on the evidence. In *Javed v Blackpool Teaching Hospitals NHS Foundation Trust EAT/0135/17/DA* the EAT confirmed what is clear from other case authorities too , that ETs should not strike out claims where there are central facts in dispute which can only be decided after hearing and evaluating evidence and this guidance applies with even greater force in discrimination cases .The Respondents suggests that there are limited facts in dispute here, but I disagree. In particular, whilst accepting that the Claimant cannot legitimately complain that the grievance outcome was not to her liking , she can complain legitimately about the grievance process especially if (and this may be the case or may not) the First Respondent acted towards the Claimant in a way that they would not have acted if she had been a man.

25. And in this context on the main areas of dispute (e.g. as to exactly what was said to the Claimant on 28 August as to the measures that would , or might , be taken to ensure no contact between the Claimant and the Second Respondent) I am asked to push into the detail of this .And the more this is the case the more inappropriate it must be to make a determination at this stage without full evidence as to the Claimant's complaints. The fact the Claimant says that certain complaints were excluded from the grievance process, and this was discriminatory, is another example. These are fact sensitive matters requiring evidence.

26. The power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances: Tayside Public Transport Co Ltd [2012] IRLR 755. Examples of where strike out might be merited are where it is "instantly demonstrable that the central facts in the claim are untrue", where the facts sought to be established by the claimant were "totally and inexplicably inconsistent with the undisputed contemporaneous documentation" (Ezsias v North Glamorgan NHS Trust [2007] IRLR 603).

27. In Ezsias v North Glamorgan NHS Trust [2007] IRLR 603 it was held that in claims of discrimination strike out should only be effected in the "most obvious and plainest cases. This is not such a case nor one where a deposit order should be made either. The disputed facts I have referred to , and the findings I have made , means even the less onerous test of whether the

Claimant has little prospect of success is not passed .

28. The First Respondent's representative goes into a significant amount of detail as part of his 13 page skeleton argument to justify the Respondent's application but given my findings above I cannot conclude, effectively on the pleadings as the First Respondent wishes me to, that the Claimant has little prospects of success , still less no reasonable prospect of success, in respect of her claims.

Vicarious liability and course of employment

29. Section 109 of the Equality Act 2010 makes it appear that anything done by the Second Respondent in the course of his employment must be treated as also done by the First Respondent as his employer. An employer can be vicariously liable for the actions of its employee even when it has done nothing wrong itself and subject to the statutory defence under section 109 (4).

30. Applying the close connection test by reference to my findings above it may well be that the First Respondent should not be held to be vicariously liable for the actions of the Second Respondent. *Leicester Lister v Hesley* [2001]UKHL 22. That as the Second Respondent argues the claim arises out of a private dispute between two of its employees. However I have found that not all the Second Respondent's actions which the Claimant complains about took place outside working hours and I have found that there was an escalation of events , all of which initiated from their close working relationship. Without that working relationship, which is not the slender connection that the First Respondent's representative suggests, the Second Respondent would not have (and he admits this himself) found himself so attracted to the Claimant given the fact that they worked together doing the same job with matching union interests and shared work environment .

31. There is insufficient evidence of this being a private dispute in the way described by the First Respondent. I am sure that the First Respondent were, and remain, disappointed by the conduct of the Second Respondent but this is not the point. The Second Respondent's acts can be treated as also being done by the First Respondent. Some of these acts complained of did take place in the course of the Second Respondent's and Claimant's employment .I cannot as a result say that the Claimant has little prospects of showing that the First Respondent is vicariously liable for the Second Respondent's actions.

32. The employment code paragraph 10.46 and 17.65 has a wide meaning to "in the course of employment". It includes acts in the workplace which may of course may extend to work-related functions or business trips abroad and may extend discrimination and harassment occurring the work premises and outside normal working hours where there is a sufficient connection with work .And although I know that the First respondent and Second Respondent deny that there was such a connection it must be up to a full employment tribunal to rule out (if it chooses to do so) the Claimant's argument to the contrary

33. In Jones v Tower Boot Co Ltd [1997] IRLR 168, brought under the equivalent provisions of section 32 RRA 1976, CA held that the phrase "in the course of employment" should be interpreted in the sense in which they are employed in everyday speech and not restrictively by reference to the principles laid down by case law for establishing an employer's vicarious liability for torts committed by an employee. A purposive construction requires these sections to be given a broad

interpretation.

34. Behaviour which takes place away from the working environment and outside working hours may give rise to liability on the part of the employer, but whether this is so in any particular case depends on the facts (see Chief Constable of Lincolnshire Police v Stubbs [1999] IRLR 81). In that case the EAT concluded that the Respondent was liable for the acts of an officer which occurred away from its premises and outside working time.

35. The First Respondent refers me to the EAT decision of channel look *Chandhok v Tirkey (UKEAT/0190/14/KN)* in support of his contention the Tribunal should have regard to the essential case to which the Respondents are required to respond which is the one contained only in the ET1 .In this respect he objected to the evidence contained within the Claimant's witness statement provided today albeit that the Claimant did not give evidence on oath. However, the findings of Mr Justice Langstaff then President of the EAT do not wholly support the First Respondent's contentions. Clearly it is inappropriate to rely on assertions as to facts not set out in the claim form but in this case the Claimant has provided detailed particulars and whilst there was some confusion as to the claim she was making the *Chandhok v Tirkey* authority confirms that where a claim is one of discrimination such a claim will essentially require a tribunal to establish why an employer acted as it did this. And that this will usually require an evaluation of the reasons which the relevant decision makers or alleged discriminator had for acting as they did .Which is why it was stated in that case that strikeout applications were unlikely to succeed in discrimination claims with a further reference to the EHRC code of practice on employment. And it is clear the both Respondents need to answer the claims made at a full hearing and determined by the ET full panel at that time.

Second Respondent's Application

36. The Second Respondent's application is refused for the reasons given above by reference to the First Respondent's application and these further points are made relevant principally to the Second Respondent's application.

37. The Second Respondent's application ,only recently been submitted to the parties, is focused primarily on denying fault (denying that the Claimant was discriminated against and harassed at all and claiming that , as the last claimed act of harassment by the Second Respondent was on 18 June , her claim was out of time. I make no comment on that assertion other than a) the hearing today was not to determine fault which will be a matter for the full tribunal and b) the issue in respect of the limitation period was , by agreement , left over to the full hearing given the intertwined facts . The full tribunal will say what, if any of , the Claimant's complaints were out of time.

38. Though I do note the Claimant's submission that the fact the Second Respondent is responsible for the alleged discriminatory treatment may be relevant to establishing a course of action here. In Aziz v FDA [2010] EWCA Civ 304, the Court of Appeal held that a single person being responsible for discriminatory acts is a relevant but not conclusive factor in deciding whether it amounted to an act extending over a period.

39. In addition, the Second Respondent argues as to the impossibility of a fair hearing due to the time delay, but this argument has no merit. It is usual for discrimination cases to take some time between the events complained of and the final hearing and even more so during the pandemic .And through the preparation for the first preliminary hearing and this one and the directions to follow, but also because of the significance of the complaints to both the Claimant and the Second Respondent , neither should not find any impairment in their memory even over time.

40. The Second Respondent was concerned that the First Respondent's interest and his own may conflict and that is clearly correct bearing in mind that the First Respondent wish to avoid being vicariously liable for any actions of the Second Respondent to the extent he is culpable of e.g. any unlawful harassment under section 26 Equality Act 2010 .It is obviously up to the Second Respondent whether he obtains his own independent advice although I confirmed that he may proceed as he wishes either in person or through a representative at the full employment tribunal hearing.

41. Separate case management orders were given and in anticipation of a full hearing .

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EMPLOYMENT JUDGE - Russell

30 October 2020
Order sent to the parties on

02/11/2020

for Office of the Tribunals