



# EMPLOYMENT TRIBUNALS

**Claimant:** Agnieszka Nartowska

**Respondent:** Fluid Options UK Limited

**Heard at:** Liverpool (by CVP)      **On:** 14, 15, 16 and 17 December 2020  
22 January 2021  
(in Chambers)

**Before:** Employment Judge Robinson  
Mr A Murphy  
Ms D Kelly

## REPRESENTATION:

**Claimant:** Miss Godwins of Counsel  
**Respondent:** Mr Susak of Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claim for harassment contrary to Section 26 Equality Act 2010 succeeds;
2. The claimant's claim for victimisation contrary to Section 27 of the 2010 Act also succeeds;
3. The claimant's claim for breach of contract succeeds.
4. The remedy hearing will take place by CVP remotely before the same Tribunal on 22 February 2021. Orders and directions have already been made for that hearing.

# REASONS

## The Issues

1. The complaints of the claimant relate to harassment, victimisation and breach of contract.

2. The issues for the Tribunal to decide were whether the claimant suffered unwanted treatment of a sexual nature from the respondent's employee at the hands of Andrzej Korzenioski contrary to section 26 (2) of the Act and if she did, did it have the purpose or effect of violating her dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant in accordance with section 26 (1) of the Act?
3. We also had to establish when the respondent became aware of the allegations of harassment.
4. With regard to the victimisation claim, did the claimant do a protected act under the 2010 Act "doing anything for the purpose of or in connection with" this Act and or making an allegation against Mr Korzenioski that he contravened this Act, and did the claimant suffer a detriment as a result of making those protected act or acts, and if the detriment is dismissal was the sole or principal reason for the claimant's dismissal related to the protected act?
5. With regard to the breach of contract claim should the claimant have received notice pay or was she dismissed properly on the grounds of gross misconduct and therefore no notice pay was payable? That is the only claim for breach of contract.
6. The claimant's protected characteristic is sex.

### **The Applicable Law**

7. Employees of the respondent must not engage in unwanted conduct related to a relevant protected characteristic. If one of the respondent's employees engages in that unwanted conduct of a sexual nature, and the conduct has the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment, then the employer is responsible for preventing that harassment. If it does not, then the claimant's claim for harassment will succeed.
8. If the Tribunal finds that the claimant has done a protected act and the claimant establishes that the detrimental action relied upon (in this case the dismissal) was done to her because the claimant did a protected act or that the respondent believed that the claimant had done or may do a protected act, then the claimant's claim for victimisation will succeed. The making of the protected act, in this case, must be the main or principal reason for the dismissal. It does not have to be the sole reason.
9. A protected act is either the bringing of proceedings under the Equality Act 2010, giving evidence or information in connection with proceedings under that Act, doing any other thing for the purpose of or in connection with that Act, or making an allegation that a person has contravened that Act. The Tribunal has to identify the protected act.
10. With regard to the facts, the Tribunal must decide the relevant facts from which either a claim for harassment or victimisation could succeed. The burden is initially upon the claimant to establish facts from which a Tribunal could conclude, on the balance of probabilities, absent any explanation, that the alleged discrimination has occurred. If the employee has established those facts then the burden shifts to the employer to explain the treatment and to try to satisfy the Tribunal that the

treatment was not tainted by discrimination. If the employer does not manage to do so the Tribunal will make a finding of discrimination (**Royal Mail v Efobi [2019] CA** and S.136 of the Act).

11. With regard to the contract claim the Tribunal has to establish whether the claimant was an employee, had the contract of employment ended, did the claim arise out of the contract and was it outstanding on the termination of the contract of employment. The breach must be identified and if there is a breach of contract by the employer, for example a failure to pay money in lieu of notice, we must consider whether the employee suffered a loss as a result.

### **The Facts**

12. We took evidence from the following claimant witnesses. The claimant herself, Mr and Mrs Chudzicki and Mrs Chudecka, who were former work colleagues of the claimant, and Mrs Glinkowska, who was the claimant's supervisor.

13. For the respondent, we took evidence from Mr Ciesielski, the Regional Manager; Ms Szmit, the Office Manager; Mr Sloka, the claimant's Contract Manager; and Sam Gregson, the HR administrator for the respondent based in Surrey.

14. The Polish witnesses gave their evidence through an interpreter.

15. The claimant started work for the respondent as a cleaner in April 2019 and on 9 August 2019 she was dismissed with immediate effect and her dismissal letter was sent to her on 12 August 2019.

### Harassment

16. Previously, the claimant had made allegations of sexual harassment on her shift of 3 and 4 May, and further allegations on 24 May and 23 June 2019. All the allegations were made against Mr Korzenioski, who was also a cleaner with the respondent. All the cleaners worked at a restaurant in Liverpool known as Five Guys. It was clear that Mr Korzenioski and the claimant did not get on. Mr Korzenioski was accused by the claimant of firstly touching her breasts on 4 May in the early hours of the morning and secondly, putting his hand round her waist which the claimant did not want and then abusing her verbally on 24 May. On 23 June the claimant had complained about the way Mr Korzenioski was carrying out his work and he told her to "shut the fuck up or I'll hit you" and "I'll destroy your car after work". He also called her a "fucking whore". When the claimant had told him not to touch her breasts on 4 May he turned on her and said, "shut your mouth you fucking bitch". The claimant informed Mr Sloka of all the incidents at the time they occurred. We accepted those incidents had occurred in the way the claimant described them. Mr Sloka assured the claimant on 7 May, after the first incident, that it would not happen again and in a text dated the same day apologised to the claimant for the situation and Mr Korzenioski's "behaviour". He did nothing more than that and Mr Korzenioski was not reprimanded despite the seriousness of the allegation. Mr Sloka had known Mr Korzenioski when they lived near each other in Poland. The claimant said that Mr Sloka was Mr Korzenioski's friend as did Ms Glinkowska when she gave her evidence. We accepted they were friends.

17. It is clear that the claimant and Mr Korzenioski did not get on generally, but the situation became so bad after the third incident that the claimant felt she had to take sick leave from 26 June to 16 of July 2019. The respondent's managers, in particular Mr Sloka, were slow to react to the complaints by the claimant, consequently the claimant reported the matter to the police because she was scared as to what Mr Korzenioski might do and was scared of his threatening behaviour in the workplace. She also elicited the aid of Mr Brennan, a solicitor, who emailed the respondent setting out the claimant's complaint.

18. Mr Brennan sent his complaint on 17 July 2019 both to Ms Szmit and Mr Sloka and set out the unwanted treatment that the claimant said she was being subjected to by Mr Korzenioski and asked for the claimant to be protected from the "wholly unacceptable behaviour" of Mr Korzenioski. It was Mr Gregson, from the respondent's HR Department, who replied saying that the issue was being looked into and he confirmed the next day that Mr Korzenioski had been removed from working at Five Guys. Mr Gregson informed Mr Brennan that Mr Korzenioski had denied all accusations but as he had resigned and was no longer an employee he could confirm that the claimant could return to work when she was fit and ready. The claimant did return to work. She did not know, however, that, although Mr Korzenioski had terminated his contract with the respondent, he had done so, he told the respondent, for personal and family reasons. On 22 July he asked to be reinstated. He suggested that he was innocent of all the allegations, that he was nervous and emotionally irritated by the accusations, confirmed that the family situation back in Poland had resolved itself and wanted to cancel his resignation from work as it was done under emotional circumstances. He went on to say that he was prepared to work at another restaurant in order to avoid any conflict with the claimant. The claimant knew none of that either. We do not know how the respondent's managers dealt with that request, but Mr Sloka knew that was Mr Korzenioski's position as of 22 July.

19. The investigation into the claimant's allegations was peremptory and only Mr Glinkowska and Mr Korzenioski were interviewed. Miss Glinkowska suggested that there were tensions between the claimant and Mr Korzenioski but that she had never seen any sexual harassment at work. Mr Korzenioski denied the allegations but resigned anyway. However, neither the claimant nor any other employee was interviewed by Mr Sloka. More importantly, Mr Sloka had not dealt with the issue at the outset after the claimant's first serious allegation at the beginning of May when Mr Korzenioski had sexually assaulted her. He did not view the CCTV footage which the claimant said was available to management. We concluded that he did not take those basic steps because of his friendship with Mr Korzenioski.

20. The claimant was told she could now return to work and she did so once she was satisfied Mr Korzenioski had gone.. Mr Sloka did not like the claimant's reaction towards him during this period and said that he was scared of her and that she would do anything to get him fired. Where that belief came from was never made clear to us. We saw nothing wrong in the claimant's actions and we do not believe that the claimant's intention was to have Mr Sloka dismissed. All she wanted was to feel safe in her workplace. Mr Sloka was annoyed that the claimant had reported the matter to a lawyer, but it was only when the lawyer intervened that the respondent's managers acted appropriately and dealt with the claimant's complaint.

Victimisation

21. On the evening shift of 8 and 9 August 2019, a complaint was made by Jamie and Jodie, who were duty managers working directly for Five Guys, and were not employed by the respondent, about an incident which had apparently taken place in the toilets of the Five Guys restaurant involving two cleaners. The complaint was made by email and was timed at 12:18 am on 9 August, which was a Friday. The email went to a number of people including Mr Sloka and Mr Ciesielski. The email does not identify the two cleaners but simply says that they were male and female who had been seen kissing beforehand. They entered the toilets together and then the female cleaner walked out of the toilets leaving the male inside the toilets. The male cleaner had a bag of suspected cocaine sitting on the sink. Jamie said that he had difficulty getting the bag off the male, who was named as Petr, and said that he had been told by the two cleaners that they were using cocaine "in order to stay awake". He went on to say that both cleaners were aggressive towards him. Jamie and Jodie had spoken to the supervisor, Mrs Glinkowska and Mr Sloka was informed. Jamie and Jodie wanted the two cleaners removed from the building. Ms Glinkowska and Ms Chudecka, who were in attendance on the evening in question, did not see the claimant with the drugs. Ms Chudecka said the claimant was with her smoking outside when the incident occurred with Petr. Both women felt that the claimant was dismissed because either Jamie or Jodie thought she was the girlfriend of the claimant. The claimant denied that to us but, in any event, was never given the chance to put her side of the story to Mr Sloka.

22. What happened thereafter is confusing and the chronology unclear. Mr Sloka and Mr Ciesielski were in touch with each other in the early hours of the morning. They discussed Jamie and Jodie's email. The Managing Director of the respondent company, Mariusz Drab, who did not come to give evidence, was also involved in the discussions. Petr, apparently, was not, at that point, an employee of the respondent but had come in at short notice to carry out some work. It seemed that he was employed on an ad hoc basis that night by Ms Glinkowska. The impression we were given by the respondent witnesses was that it was the claimant who had brought him in to work. The claimant denied that and denied that she took drugs that night and said that she was outside having a smoke with her colleagues when the incident occurred and Ms Chudecka confirmed that.

23. Mr Sloka was of the view that Petr was the claimant's partner although he did not tell us why he thought that. He also assumed that the female with Petr was the claimant. The evidence did not set out a clear picture of what transpired during that shift and that is why a detailed investigation should have taken place.

24. Mr Ciesielski decided, after he had heard about the situation at 4:00am or thereabouts that morning, that it was to be Mr Sloka who should investigate the matter. Mr Sloka did another peremptory investigation, spoke to the managers at Five Guys, told Mr Ciesielski that the claimant was involved and the decision was taken to dismiss her without investigating the matter fully and taking statements from all those on shift that night. He did not take time to find out the full facts. It was clear that Petr had acted improperly. It is not certain whether the management of Five Guys wanted the claimant to continue working there, but Mr Sloka's evidence was that those managers wanted the claimant dismissed. Mr Ciesielski knew that Petr had not been interviewed either. The respondent's managers did not establish whether Petr was the boyfriend of the claimant or how deeply, if at all, the claimant

was involved in the incident. There was no consideration as to whether the claimant should be moved to another site if Five Guys' managers did not want her at their premises. It was decided that both the male employee, Petr, and the claimant should be dismissed. The respondent's disciplinary policy was not followed and the claimant was summarily dismissed. It seems that the Managing Director, Mr Drab, told Mr Sloka to dismiss the claimant after Mr Sloka reported back to senior managers. Mr Ciesielski sent an email at 8.44am to Jamie and copied in Mr Drab, Mr Gregson, at HR, as well as Andrew Phillips, who worked for Five Guys, to say this: "thank you for letting us know just in time, male cleaner was supposed to be our new employee, just started last night; he won't be employed by us. We investigated and the person in question was our cleaner's Agnieszka's boyfriend, we will replace her as well. Please accept my apologies for the inconvenience". That suggests that the claimant was dismissed because it was assumed she was Petr's boyfriend.

25. The claimant was not given the right of appeal despite that being part of the respondent's disciplinary process. There was no attempt by the respondent's officers to establish whether the claimant had been taking drugs on the premises.

26. The claimant was dismissed without notice for gross misconduct and dismissal was given to her over the phone by Mr Sloka and confirmed in writing on 12 August by Sam Gregson from the HR Department. There was little, if any, input from the respondent's HR officers that morning. The reason given for the dismissal was because of a very serious customer complaint and that the respondent had a zero tolerance policy with regard to taking drugs on a customer's premises. The claimant was not clear about whether she had been sacked and even days after 9 August was enquiring of the respondent's managers what her position was.

27. Mr Korzenioski was then re-employed by the respondent company on 15 August 2019. There was some suggestion by the claimant's witnesses that he was actually employed earlier than that on a couple of shifts. But what is clear, is that, within three working days of the claimant's dismissal the claimant's harasser was re-employed by the respondent company.

## **Decision**

28. Applying the law to the facts of the case, we concluded that all three of the claimant's claims should be successful. We decided that the claimant had overcome the burden placed upon her to prove the relevant facts but we were not convinced by the respondent's witnesses explanations.

29. Firstly, with regard to the harassment issue the claimant has proved facts from which we could decide that there had been a breach of section 26 of the 2010 act. Mr Korzenioski sexually harassed her on three occasions. Mr Sloka did not take the issue seriously. We were not impressed with his evidence. We concluded that he did not get on with the claimant and was more than happy, ultimately, to have Mr Korzenioski re-employed as soon as the claimant lost her job. The allegations against Mr Korzenioski were extremely serious yet no proper investigation was set up by Mr Sloka. Indeed, the claimant was not even interviewed about what happened. The claimant was so upset about the way she was treated that she had to go off sick and was only able to return when the perpetrator of the harassment had left her workplace. If Mr Sloka, or any of the senior managers, had acted promptly and nipped the matter in the bud, then the claimant might have stayed in work and

not gone off sick. If the respondent company wanted to retain Mr Korzenioski it is a large enough organisation to have moved him to another site if they felt he was the type of person who they wanted to employ or if they felt he could be trusted not to harass other employees in the future. The claimant's working conditions were not safe for her. She was subjected to the respondent's employee violating her dignity and creating for her a hostile degrading humiliating and intimidating environment. A female employee was threatened with physical violence and criminal damage of her motor vehicle by Mr Korzenioski and the respondent's officers did not act swiftly, appropriately, and properly in dealing with the issue. The respondent company is vicariously liable for Mr Korzenioski's treatment of the claimant and its officers failures in dealing with her complaint appropriately.

30. With regard to the victimisation claim, we find the claimant has done a protected act by objecting to the harassment she received at the hands of Mr Korzenioski and she has proved facts from which we could decide that there has been a breach of section 27 of the Act. Again we were not happy with the explanations we were given. Much of the evidence of Mr Sloka was vague and unconvincing. The respondent company did not help themselves by the officers of the company not investigating the incident that occurred in the early hours of 9 August fully. There was a kneejerk reaction to the allegation made by Jamie and Jodie. They may have wanted Petr gone from the restaurant but it was not clear whether they wanted the claimant removed. We found that Mr Sloka saw this as the perfect opportunity to have the claimant dismissed. He did not, as asked by his superiors, carry out a full investigation. He did not speak to the claimant after the events of 9 August and simply reported that Five Guy's managers wanted rid of Petr and, because of that, the claimant also had to be dismissed. He did not deem it necessary to protect his employee's position by completing a full investigation and by considering other options. It suited his purpose to tell the senior managers that the claimant was involved in the misdemeanours with Petr. Senior managers, like Mr Ciesielski, and Mr Drab, were not properly informed of the full facts. Even now the events of that evening are confusing and the reason for that is that Mr Sloka did not put into place a full investigation. He knew he had let her down previously and he had let her down because he wanted to protect his friend, Mr Korzenioski, as much as he could. Once she was gone he immediately brought Mr Korzenioski back into the respondent's fold. We concluded that, although not necessarily the only reason for the respondent's decision to dismiss, Mr Sloka's dislike and concern about what the claimant might do, emanating from his botched investigation of her sexual harassment complaint, was the primary reason for the claimant losing her job and there is causal link between the harassment complaint and Mr Sloka's omissions with regard to the August allegations.

31. With regard to the breach of contract allegation, we find that the claimant was dismissed without notice. That is a breach of her contract because no procedures were followed by the respondent officers. We accepted that the written disciplinary procedures are not part of the respondent's employees' contracts. But some sort of process needed to be followed in order to establish the level of the claimant's culpability, if any on 9 August. Mr Sloka could not be certain of the claimant's blameworthiness and he rushed to judgment for the reasons we have set out above. Her dismissal was based on an assumption that she was connected in some way to Petr. The witnesses for the claimant, we heard, said she was not involved in the incident with Petr. We did not hear from Jamie and Jodie. The claimant was not paid

her notice pay because she was dismissed summarily. It is not clear what might have happened if a proper investigation had been undertaken. In those circumstances the claimant should have been given her contractual notice by the respondent.

32. We need to mention one further issue that arose during this CVP hearing. The claimant and Ms Glinkowska were in the same room when they gave evidence. We had to recall Ms Glinkowska to deal with issues that arose later after other witnesses had given their evidence. There was a point where Mr Sloka, listening in to the Polish being spoken, felt that the claimant was prompting Ms Glinkowska to say that she, the claimant, was not in the toilet on the night of 9 August. No one else picked up on that but we did take that accusation into account when making our findings of facts. We decided that Ms Glinkowska was an honest and reliable witness and we were content to accept her testimony on the relevant issues. In the end, we concluded that our fact finding was untainted and are happy with those findings.

33. In all the circumstances of this case, therefore, her claims under the Equality Act 2010 for breaches of section 26 and 27 of the Act and her claim for breach of contract succeed and she must receive the appropriate remedy at the next hearing.

Employment Judge Robinson

Date: 27 January 2021

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

5 February 2021

FOR THE TRIBUNAL OFFICE

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