



EMPLOYMENT TRIBUNALS
London Central Region
Heard CVP on: 10, 11 and 12 March 2021

Claimant: Algirdas Balciunas

Respondents: H &M Hennes & Mauritz UK Ltd
Daniela Sabbadin

Before: Tribunal Judge Mr J S Burns, and Members Ms P Breslin and Mr J Carroll

Representation

Claimant: Ms L Mankau (Counsel)

Respondent: Mr M Humphreys (Counsel)

JUDGMENT
(Unanimous)

1. The claims are dismissed.

REASONS

2. The Claimant claimed, against both Respondents, harassment of a sexual nature and related to sexual orientation and, against the First Respondent only, direct discrimination on the grounds of sexual orientation, as set out in the schedule to a case management order dated 10/6/2020.
3. In summary, the Claimant who is gay, claimed that he was mistreated by being pinched, called names and mimicked by the Second Respondent (for whose actions the First Respondent is vicariously liable) on 13/5/2019, and then shouted at and threatened by her on 27/6/2019, and that the First Respondent then failed to deal adequately with his grievance and grievance appeal, causing the Claimant to resign by way of a discriminatory constructive dismissal on 24/9/19.
4. We heard evidence from the Claimant, and then from the Second Respondent (from Italy) and then from Amelia Franklin (an employee relations supporter) and then from Mark Stott (Area HR manager). The documents were in a bundle of 330 pages. The hearing was by CVP. There were no technical problems.

Findings of fact

5. The Claimant who is a male gay man originally from Lithuania, started work at the Respondent's Oxford Street store on 28/3/2019. The Respondent sells clothes through large stores in Italy and the UK.

6. The Claimant worked as a sales advisor and was put on a three month's probation period.
7. The Claimant is a shy, quiet, reserved, and sensitive person who nevertheless was open about his sexuality amongst his colleagues in the store. He was and is self-conscious about his voice, which he describes as "*gay and campy*" and which has been alternatively described in the course of the evidence as "*a soft voice*". In giving evidence to us the Claimant spoke fluent English. He was sensitive about his voice because he had suffered from teasing about it during his school days in Lithuania. He had also suffered some minor mental ill-health caused by stress and anxiety when he "*came out*" as a gay man in Lithuania many years ago.
8. On 18/3/2019 the Second Respondent, who is an Italian woman and who had previously been working for the First Respondent in Italy for 9 years, started working for the First Respondent in the UK. She moved to the Oxford Street Store on 15/4/2019 as assistant store manager. There were 150 people working in the store which was a large one spread over three floors. The Second Respondent was not the Claimant's line manager and she had not met and did not know anything about the Claimant before 13/5/2019.
9. The Second Respondent described herself as having been in 2019 a loud and demonstrative person who used lots of hand-gestures and body-language when she communicated. Since the events described, which culminated in her being disciplined and given a first written warning by the First Respondent, she lost confidence in herself and her management abilities, resigned from her employment with the First Respondent, and went back to Italy, where she now works in a small boutique in her home town, and she has herself suffered some mental distress and a psychological set-back.
10. However, in May and April 2019 when working in the Respondent's Oxford Street Store, she was an assertive and confident person, - and in this way the very opposite to the Claimant. Part of the Second Respondent's manner at the time reflected or was a response to the fact that she was a newcomer in the UK, and in new London employment, where she had taken on a challenging job trying to support the manager of a large store staffed with many new recruits, and she was keen to establish a friendly environment.
11. The Second Respondent, as a result of her own cultural and social background was tactile – ie had a well-established habit of touching people as a means of enhancing verbal communication, and she also frequently when speaking with friends and colleagues adopted what she referred to as "*funny voice*". She would put on an unusual tone or accent to moderate her normal loud voice. She did this as a way of trying to be friendly and informal.
12. She also tried to adopt the approach of treating work colleagues as part of a team or "*big family*" and to break down barriers to communication.
13. After she arrived in the UK, (which she had done only a short time before her first encounter with the Claimant) she was not aware of the cultural differences and sensitivities in her new environment.
14. On 13 May 2019 the Claimant was working in a stockroom with another colleague namely Ms Aissatu Balde. The Claimant had noticed the Second Respondent and noted with disapproval her manner with other colleagues, but they had not previously met. He was

already pre-disposed against her.

15. The Second Respondent entered the stockroom with the purpose of meeting and talking to the workers there, and she had an encounter with the Claimant (witnessed by Ms Balde) in which (i) the Second Respondent pinched the Claimant's side twice (approximately in the region of his ribs) (ii) called him "babes" and (iii) when speaking to him used an altered manner from her normal speech.
16. This was unwanted by the Claimant, it upset him and he moved away from the Second Respondent and did not engage with her. The Claimant made no complaint about this at the time, but did so for the first time over two months later on 19/7/19, by which time he had become disgruntled by the fact that his probation period had been extended for one month from 27 June (as a result of inadequate reviews), and by negative feedback he had received about his work, and also by the fact that the Claimant was worried about which shop he would be sent to, when the pending closure of the Oxford Street store took effect.
17. At that juncture (19/7/19) he sent in a grievance which complained mainly about the extension of his probation and the negative feedback, but which also included one paragraph of complaints about the events of 13 May, which he then related to his sexual orientation. He made no express link at that stage between the events of 13 May and the issues around his probationary review.
18. In making findings about the specific complaints regarding the events on 13/5 we have had regard to the evidence of the Claimant and the Second Respondent, and also to previous records of what both and other witnesses (notably Ms Balde) stated when they had been questioned in 2019 during the course of the First Respondent's investigation into the Claimant's grievance and grievance appeal.
19. The Second Respondent did not notice or think anything had gone wrong on 13/5/2019 and she did not have any reason to remember the events of that day in particular until she was first questioned about them over 2 months later by Ms Franklin on 30/7/2019. The Second Respondent then frankly stated that she could not remember anything about the incident and did not remember the situation at all. She gave answers about what she might have done rather than what she could remember having done.
20. The Second Respondent was interviewed again on 17/9/2019 on the telephone by Mr Stott for purposes of the grievance outcome appeal. The record of that conversation (301) indicates that by then, rather than saying simply that she could not recall anything, she gave more specific answers. However, this was in response to Mr Stott having put leading questions to her using terminology based on the Claimant's complaints, which the Second Respondent then partially adopted in her answers.
21. The fact that the Second Respondent was not questioned about these matters (which related to a short interaction on 13/5, amongst the hundreds of interactions she must have had over several months with many different staff, and which she had no reason to notice when they occurred), until over two months later and was then questioned in her second language, clearly affected the way she was able to respond to them, both during the internal investigation and when she gave her evidence before us.
22. The Second Respondent's explanations about what had happened on the 13/5 evolved

over time but we find that she did not have any independent recollection of the events at any stage, and when challenged about the events later was anxious to respond to suggestions made to her and was also reluctant to deny details about events she could not remember herself.

23. Despite these factors, we were impressed by the Second Respondent as an obviously genuine and honest person.
24. We find that on 13/5/19 the Claimant and Second Respondent had been working in the same store for less than a month, they had never met before 13/5 and the Second Respondent did not know that the Claimant was gay. We also find that had she known she would not have cared either way, and that the incident under discussion took place when she was making a genuine, albeit misunderstood, attempt to be friendly in a non-sexual way and to engage with the Claimant about work matters.

The pinching/physical contact between the Claimant and the Second Respondent

25. In the Claimant's grievance he referred to the Second Respondent as having pinched him twice on the right side of his body. (169)
26. Ms Balde was asked on 30 July 2019 during the internal investigation whether she thought this was of a sexual nature. Her answer was "*For me if you know someone long, no it is not..but for him it might be...I do not think it was sexual...but he was very uncomfortable and it could be for him*". (223) When she was asked again on 16/9/2019 she stated "*Alex was uncomfortable. Daniella was just trying to fit in hence her behavior. Not OK for a manager to do this we should keep our hands to ourselves. In my opinion the contact was not sexual harassment*" (296).
27. When the Claimant was asked about this in July 2019 he had stated "*I think it was her trying to get a response from me as I wasn't talking anything*" (193) – ie he did not attribute a sexual motive to the Second Respondent either.
28. In July 2019 when asked by Ms Franklin the Second Respondent agreed that she was a "*touchy person generally*" – ie someone who often touched people "*to get in contact and make the person feeling I am talking to you in a friendly way*".
29. When questioned in September 2019 by Mr Stott the Second Respondent vehemently denied having had any sexual feelings for the Claimant.
30. Ms Balde suggested in 2019 that she had seen the Second Respondent touching or rubbing the Claimant's back on 13/5. However, the Claimant himself made no reference to this in his grievance, his ET1, in the agreed list of issues or in his witness statement. He gave no oral evidence about it at the tribunal. We do not find this touching or rubbing of the back proved.
31. We find that the Second Respondent had come into the storeroom on 13/5 to meet the Claimant for the first time and talk to him about work matters. The suggestion that she would then suddenly and in front of Ms Balde try to engage sexually with the Claimant is implausible.
32. We find that the Second Respondent pinched the Claimant's side twice because he was

remaining silent or quiet while she wanted to gain his attention and prompt him to engage in a conversation with her.

33. The physical contact was the result of and reflected the way in which the Second Respondent related to many people at the time, of whatever gender and sexual orientation, as part of her tactile physical style of enhancing ordinary communication.

The use of an altered voice on 13/5

34. The Claimant in his written grievance had stated "*when I was asked a question by her, she repeated my reply by impersonating my voice*". (170). In his grievance interview he stated "*She was impersonating me – talking in a gay way*". In the grievance appeal interview (281) he stated "*...she asked for Sellotape. I said it in a gay/campy way...Sometimes can be a bit more "that way". She mimicked me. I didn't understand why she did that or repeated*".
35. Ms Balde stated during the internal investigations (224) "*Yes He has a soft way of speaking and she was trying to mimic him*". In the grievance appeal interview she stated "*Daniela mimicked Alex's voicequestions about values. Alex responded and Daniela mimicked his response and copied his speaking style*"
36. In July 2019 the Second Respondent agreed that she might have "*said a funny voice to find a friendly way to say things*" (211)
37. Mr Stott during the appeal investigation asked the following leading question of the Second Respondent: "*Alex also alleges that you mimicked his voice. You asked for some Sellotape, he responded in a gay/campy way and you then mimicked his way of speaking*".
38. The Second Respondent's recorded answer was "*I only did this voice in gay style. I use this voice amongst my friends. I was trying to have fun with him, it was only after Alex had used that voice that I answered back, as I felt this would break the silence and involve Alex in the conversation. It certainly was not an insult towards Alex's sexuality...I did not know if he was gay or not*"
39. This answer shows the Second Respondent adopting Mr Stott's suggestion that she had spoken in a gay style, which was not a phrase she had used before. The Second Respondent was also here adopting Mr Stott's suggestion that when she had spoken in an affected manner on 13 May, she had done so only in response to the Claimant himself having first spoken in an exaggerated campy style, which suggestion we find had been based on a misunderstanding by Mr Stott of the Claimant's words which we have recorded above.
40. The Claimant has in the Tribunal proceedings made much of this purported admission by the Second Respondent that she had "*mimicked the Claimant in a gay style*" but for the reasons given we do not regard this as cogent evidence.
41. The Second Respondent could not in fact remember the details of what she had said and done on 13 May and, that being the case, an admission by her that she spoke in a gay style is of little assistance.
42. We find that the Second Respondent did put on an altered voice when she spoke to the

Claimant on 13 May. She did not do so because she thought he was gay – as stated she did not know this at the time.

43. She was not copying an exaggerated especially camp or gay voice put on by the Claimant. We do not find that the Claimant had put on such a voice – Mr Stott had misunderstood the Claimant's own evidence about this. The Claimant was being reticent and was mainly silent in the stockroom and the very opposite of exaggerating his speech. For the same reason, before the Second Respondent spoke in the altered voice, she had had little opportunity to find out what the Claimant's speech was like.
44. On a balance of probabilities, what the Claimant and Ms Balde thought was the Second Respondent mimicking the Claimant was in fact the Second Respondent putting on her "funny voice" (to use her phrase) which was a matter quite independent of the Claimant's speech style.
45. As already stated, the Second Respondent deployed this unusual behavior of funny speech because she had got into the established habit in Italy of using altered voices with her friends as a way of trying to be informal and friendly and fit in with people, friends and work colleagues of all types. The altered voice was not used by her to refer to or mock sexual orientation in any way, and the same was true on 13 May. She used it to try to be friendly with the people she was with. She was trying to be friendly to the Claimant and not mock or mimic him. Her friendly approach is also shown by the fact that she called him "babes" at the same time.
46. The Second Respondent used an altered funny voice not as a means of copying gay speech or to suggest that the Claimant was gay. It had nothing to do with his sexual orientation, which she knew nothing about.

Use of the name "babes".

47. The Second Respondent did call the Claimant "babes" several times on 13 May. This was a term of endearment which she had learnt recently from English colleagues and which it is agreed she used with various persons, in addition to the Claimant.
48. The Claimant himself did not object or complain at the time to the Respondent's managers about any of these matters which occurred on 13/5/19, nor is there any evidence that he made any written communication about this for example by text or email, even privately. Had he been seriously offended and outraged by the matters at the time, as he has suggested in the tribunal proceedings, we think there would be some contemporary outward and visible evidence of this. Even on 19/7/19 when he later sent in a grievance, this complained mainly about the extension of his probation and the negative feedback which he had received about his work performance, and in contrast the events of 13 May filled one paragraph of the letter.

Probation review

49. On 27 June 2019 the Claimant had a probation review meeting with the Second Respondent. The Second Respondent managed the meeting because the Claimant's line manager, Ciro, was absent and unavailable. The Store manager Cristina had given to the Second Respondent negative feedback about the Claimant to pass on him, and Cristina had also told the Second Respondent to extend the Claimant's probationary period. The Second Respondent did so.

50. There were about 5 or 6 people in the Claimant's position – ie at the end of their 3 month probationary periods. Of these, three were dismissed at the end of June without the benefit of a probationary extension, while the Claimant and at least one other were given probationary extensions of one month from 28 June.
51. We do not find that the Second Respondent spoke aggressively to the Claimant, although when he refused to sign the feedback forms she became cross and louder. She did refer to the fact that others were being dismissed but that the Claimant was not, but simply as a way of trying to explain the beneficial position to him.
52. The Second Respondent had discovered by 27/6/2019 that the Claimant was gay but this issue was not raised at the meeting nor did the Second Respondent by then know that the Claimant felt aggrieved by the events of 13 May.
53. We find that there was no link between the events of 13 May and what happened on 27 June; and in his grievance submitted on 19/7 the Claimant himself made no reference to such a link – this line of argument has emerged later in the tribunal proceedings only.

Subsequent events

54. The Claimant's grievance was dealt with by Ms Franklin. She carefully interviewed all relevant parties and then partially upheld the grievance but rejected those of discrimination. Ms Franklin agreed that the negative feedback which the Claimant had received was not balanced and lacked detail; that it had been inappropriate and unprofessional for the Second Respondent to have touched the Claimant, but it had not been of a sexual nature; and that, what was then accepted as the Second Respondent having mimicked the Claimant's voice, had also been completely unacceptable, although not related to the Claimant's sexual orientation.
55. Ms Franklin apologised for these matters to the Claimant, and confirmed that he would be transferred to the 660 Regent Street Store, which transfer the Claimant had previously described as something he would have regarded as a suitable outcome to his grievance; and she informed the Claimant of his rights of appeal.
56. The Claimant appealed this outcome and the appeal was determined by Mr Stott. He re-interviewed all the witnesses and after holding a hearing with the Claimant, came to a full, careful, and timely decision which he reached independently but in which he broadly agreed with Ms Franklin. He also dismissed the discrimination allegations.
57. Both Ms Franklin and Mr Stott came to the sensible and obvious conclusion that the Second Respondent's conduct, as a senior manager, in touching and altering her voice when speaking to the Claimant, who was in a junior position, and whom she had not known at the time, had been inappropriate. They took this seriously, and the Second Respondent was referred for and later received, formal disciplinary action. During the grievance investigation and appeal the Claimant had ample opportunity to articulate his complaints. In evidence both Ms Franklin and Mr Stott agreed that they could perhaps have asked further questions, but that would probably be true of most investigations, and we find that they both did a thorough job. The decision letters are careful and well-reasoned.

58. Without waiting for the grievance appeal outcome the Claimant issued his ET1 claim on 12/9/2019.
59. Having received the grievance appeal outcome on 20/9/2019, he then resigned by email with immediate effect on 24/9/2019. His resignation letter referred to sexual harassment, breach of safeguarding and duty of care, and loss of mutual trust and confidence.
60. He then amended his ET1 to include the claim of discriminatory constructive dismissal.

Relevant law

61. Section 4 Equality Act 2010 (EA) provides that sexual orientation is a protected characteristic. Sexual orientation can include homo, hetero or bisexuality (section 12(1))

Direct Discrimination

62. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.
63. The requirement is on the Claimant to show less-favourable treatment by comparison with an actual or hypothetical comparator whose relevant circumstances must be the same or not materially different.

Harassment

64. Section 26 provides that a person harasses another where the harasser engages in unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating the others dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. A person also harasses another if he engages in unwanted conduct of a sexual nature which has the same effect. In deciding whether conduct has this effect the following must be taken into account: the perception of the other, the other circumstances of the case and whether it is reasonable for conduct to have that effect.
65. The term “related to” in this context has a wide meaning.

Onus of proof

66. Section 136 provides that if there are facts from which a court could decide, in the absence of any other explanation, that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.
67. We were referred to and have considered the EHRC Code of Practice on Employment 2011 and in particular paragraphs: 7.7, 7.13 and 7.18

Conclusions

68. The Claimant has not adduced facts which pass the onus of proof to the Respondents. If we are wrong in this and should have concluded that the onus of proof passes to the Respondents, we would be satisfied by their non-discriminatory explanations.

Harrasment Claims against both Respondents

69. The Second Respondent's pinching of the Claimant's side was not of a sexual nature. It had nothing to do with sex.
70. The Second Respondent's pinching of the Claimant's side, her use of an altered voice and her use of the name "babes" when speaking to the Claimant on 13/5/2019 were not related to the Claimant's sexual orientation.
71. These matters were not done by her with a harassing purpose. While the conduct was unwanted and inappropriate and made the Claimant somewhat uncomfortable, we do not find that it was, singly or in combination, sufficiently serious in all the relevant circumstances to regard it as having the prescribed effect in section 26.
72. We do not find that the Second Respondent's actions on 27 June 2019 were related to the Claimant's sexual orientation. In all the relevant circumstances they did not have the purpose or effect described in section 26.

Direct Discrimination/Discriminatory Constructive Dismissal claim against First Respondent

73. The events of 13/5/2019 and 27/6/2019 and the First Respondent's handling of the Claimant's grievance and appeal, grievance outcome and appeal outcome individually or cumulatively were (i) not because of sex or the Claimant's sexual orientation and (ii) not a repudiatory breach of contract.
74. We are satisfied that had the appropriate comparator, (which was agreed by both Counsel during the hearing to be a male hetero-sexual) been in the same circumstances, he would have received the same treatment from both Respondents.
75. We are not satisfied that the Claimant resigned because of the events of 13/5/2019 or 27/6/2019 in any event. He appears to have resigned because he disagreed with the outcome of the grievance appeal but we find this puzzling. He had obtained the transfer to the Regent Street Store, away from the Second Respondent. He had obtained a fulsome apology for the inappropriate behaviour on 13/5. Mr Stott told us that the Claimant was reported to be settling in and happy at the Regent Street store before he resigned. His reaction in resigning appears to us to have been disproportionate and inappropriate.
76. For these reasons the claims are dismissed against both Respondents.

J S Burns Employment Judge
London Central
12/3/2021
For Secretary of the Tribunals
Date sent to parties – 15th March 2021
