



EMPLOYMENT TRIBUNALS

Claimant: Ms Damilola Falusi

Respondents: (1) London Borough of Newham
(2) The Governing Body of Eastlea Community School

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: Wednesday 17, Thursday 18 and Friday 19 March 2021

Before: Employment Judge Speker OBE DL

Members: Mrs G McLaughlin
Ms J Isherwood

Representation

Claimant: Mr Tom Wilding (Counsel)
Respondent: Mr Daniel Moher (Solicitor)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant did not suffer sexual harassment contrary to Section 26 Equality Act 2010 during an incident at the school on 27 June 2019 and her claim is dismissed.

REASONS

1. This claim of sexual harassment is brought by Ms Damilola Falusi against the two Respondents, the London Borough of Newham and The Governing Body of Eastlea

Community School. The alleged incident occurred during the time that the Claimant was employed as a Teaching Assistant at the school. A complaint of direct discrimination under Section 13 of the Equality Act 2010 was dismissed on withdrawal by the Claimant on 21 May 2020. This hearing took place by video using the Cloud Video Platform due to the restrictions resulting from the Covid 19 Pandemic. I am sitting at East London Tribunal Centre, the two members, the parties' legal representatives and witnesses have all participated remotely.

2. A preliminary hearing by telephone took place before Employment Judge Lewis on 21 February 2020 when the case was timetabled to this hearing for three days on 17, 18 and 19 March 2021. The Judge also outlined the issues to be decided at this hearing as set out in paragraph 7.1 and 7.2 of her summary.

3. The Claimant gave evidence to us on her own account. Four witnesses gave evidence for the Respondent namely Emma Lane (Assistant Head Teacher), Sharam Khamenei (Teaching Assistant), Melvina Sutton (Teaching Assistant) and Sonia Jackman (Teaching Assistant).

4. We were also provided with a bundle of documents running to 108 pages. We found the following facts:

4.1 Eastlea Community School in Canning Town, London serves a diverse community. It has above average proportions of students where the first language is not English or who are disabled or have special educational needs. It has an above average number of students eligible for additional pupil premium and has special resourced provision for students with profound and multiple learning difficulties.

4.2 The Claimant commenced employment at the school on 1 May 2017 initially as a casual exam invigilator and ultimately as a Teaching Assistant, on a temporary basis from 22 January 2018 to 31 July 2018 and then on a permanent basis from 1 August 2018. The Claimant appears to have performed her duties satisfactorily. There were no conduct or capability issues until December 2018. That month the school (SENCO) Special Education Needs Coordinator met with the Claimant to discuss her punctuality. In January 2019 there were concerns as to her absence record and by June 2019 she had been taken to a Stage 2 sickness/absence meeting. The Claimant also had some health issues which she disclosed in her statement as to chronic headaches. She requested some adjustments to be made such as not going to the pool area. She had met with her manager on 16 January 2019 suggesting that her condition was exacerbated by work related stress and she asked to change her work pattern. On 22 January 2019 she submitted a request for flexible working to reduce her week from five to four days. The request was not granted based upon operational and cover issues. She did not appeal this. She made other requests including to have a later start time, but this was not agreed for the same reasons. She also asked for time off for hospital appointments and this was agreed. The Claimant had also agreed to be referred to Occupational Health and an appointment was arranged for her on 26 June 2019, the day before the relevant incident in this case, but the Claimant did not keep the appointment saying she forgot about it.

4.3 The Claimant had also applied for other jobs from November 2018 through into 2019.

4.4 The above details were set out by the Claimant in her statement because the Claimant considered that the Respondent was seeking to suggest and represent her as a discontented employee who was already seeking to leave the school and that these affected her motivation to make her complaint and claim or were relevant to it. The Claimant suggest that these issues were not in fact relevant in this case. The Tribunal noted that there was no significant dispute as to the chronology of these matters relating to the Claimant's employment before 27 June.

4.5. On 27 June 2019 an incident occurred at approximately 13:45 in the staff room known as "the staff mess". The Claimant was in the room sitting by herself kneeling with one knee on a chair and the other leg stretched out and she was looking out of the window. There were approximately ten other members of staff in the room including Melvina Sutton and Sonia Jackman who are also Teaching Assistants. They were sitting together but away from the table in the centre of the room. Another Teaching Assistant Mr Sharam Khamenei entered the room in order to get a drink from the fridge. He had seen Melvina Sutton and Sonia Jackman through the glass and was on friendly terms with them. As he came in, he began dancing past them and then behind the Claimant until he reached the fridge. Melvina Sutton and Sonia Jackman were laughing at the antics of Mr Khamenei. The Claimant had not seen him pass but she heard the laughing, looked up and asked Mr Khamenei what he was doing and on getting no satisfactory response she looked over at Melvina Sutton and Sonia Jackman and asked in a loud voice what Mr Khamenei was doing. Melvina Sutton and Sonia Jackman had been laughing. Melvina Sutton then endeavoured to make a gesture to show to the Claimant what it was had made them laugh in relation to Mr Khamenei. The Claimant took what she saw to indicate that Mr Khamenei had made motions of a sexual nature towards her described by the claimant as a 'shagging gesture' and this made her upset and annoyed. She said that she was intending to report Mr Khamenei. There was an exchange which included reference to the fact that it was believed the Claimant was intending to leave the school and it was suggested to the Claimant that Mr Khamenei's actions were only joking. Within a few minutes, the Claimant left the mess room and went to the Enterprise Café where she sent an email to her Line Manager Ana Grigore stating that she was upset and disgusted by what Mr Khamenei, known as "Shak", had done. She referred also to comments made by Shak previously regarding her clothing. She stated that the incident which had occurred amounted to sexual harassment and that Mr Khamenei had crossed the line, that she did not want an apology but that she could not bear to be in the same room as him.

4.6. Subsequently, Mr Khamenei tried to approach the Claimant that day and the next day to either apologise or to 'make things right' between them if that was necessary. The Claimant did not wish to engage with him at all. The Claimant left work early on 27 June. She came to work on 28 June but felt she could not stay at the school and left. This occurred again on Monday 1 July.

4.7. The Claimant went on the sick and did not return to work at the school at all. In response to her email on 27 June, she received a supportive response from Mr Jabir Ahmed who was covering that day. He asked that Rebecca Gooby and Ana Grigore investigate the matter raised. The Claimant saw Mr Ahmed on 1 July, and she had also spoken to Frantz Titor who was covering for the Vice Head. Having been requested by the Head to investigate the matter, Emma Lane interviewed the Claimant on 16 July. She was nominated and appointed to carry out the investigation

on 1 July but did not contact the Claimant before 16 July because of previous HR advice she had received which was not to contact people when they were on the sick.

4.8. During the interview with the Claimant, she stated that she had not seen what Shak had done but she had received an indication from Melvina that he had made a thrusting movement behind her. She also mentioned at the interview that on a previous occasion Mr Khamenei had commented on her clothes. Emma Lane interviewed Mr Khamenei the same day and he denied making the suggested gesture. Melvina Sutton and Sonia were interviewed and both of them said that he did not make the gesture. They gave other descriptions with regard to his dancing including that it had been like Mr. Bean.

4.9. Emma Lane concluded her investigation and prepared a report dated 24 July with advice from HR. Her conclusion was that she “did not feel that on a balance of probabilities that the allegation against Sharam Khamenei substantiated a disciplinary hearing”. Those were the words used. The result was only communicated to the Claimant after she chased the matter up early in September. The reason given for the delay in communicating with her was a practice of not contacting staff during school holidays.

4.10. Having been informed that the school was taking no further action, the Claimant was upset. She felt that she had had no apology and that concerns were not shown towards her. She resigned from the school on 17 September 2019 giving lack of action about the sexual harassment complaint as the reason. She reported the matter to the Metropolitan Police, but no action was taken.

Submissions

5. We received detailed submissions from both representatives. On behalf of the Respondent Mr Moher submitted that the act complained of did not occur as perceived by the Claimant and that the dance was not of a sexual nature. He said the Claimant’s complaint was based on what she thought had been conveyed by Miss Sutton. He alleged that she had misinterpreted what was indicated. Also, she was already experiencing low mood, upset with the school, planning to leave and that she tended to misconstrue situations. He referred to various cases including *Dhaliwal* and the comments made by the Judge in that case, that it was important not to adopt a culture of hypersensitivity and the implication of legal liability for every unfortunate phrase or action. He argued that the acts which were actually established did not cross the threshold.

6. Mr Wilding on behalf of the Claimant suggested that the evidence of the Respondent’s witnesses was wholly unreliable, that the three other Teaching Assistants were friends and had produced and altered their evidence in order to back each other up and in particular to prevent Mr Khamenei getting into trouble. Mr Wilding pointed to the ‘flawed’ investigation by the school, the significant delays which had occurred and the failure to see all of the potential witnesses. On the balance of probabilities and based upon the Claimant’s clear evidence of what Melvina Sutton gestured, he suggested that Mr Khamenei had made a shagging gesture, that she believed this had occurred, that it was of a sexual nature and amounted to sexual harassment. Her reaction was that she was upset and offended, and she immediately protested and complained.

The Law

7. The law in this case, is that set out in *Section 26(2)* of the *Equality Act 2010* and we have considered the various cases which have been referred to by the advocates.

Insitu Cleaning Co Ltd v Heads 1995 IRLR 4, EAT

Driskel v Peninsula Business Services Ltd 2000 IRLR 151, EAT

Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT

Findings

8. We heard much evidence of an extraneous nature as to the Claimant's record at the school. We noted that attitudes towards her performance varied as to what were described as frequent absences and according to Mr Khamenei, instances where the Claimant had not fulfilled all of her duties and he had covered for her. Also, the evidence as to her requests to change her working pattern and applications for other employment. All of this was to present a picture of a person not fully committed to the school or her job. It also presented a picture of a person suffering stress, illness and general unhappiness. The Tribunal noted all of this and the surrounding evidence but did not find it of particular assistance or relevance in relation to the issues before us, namely the complaint of sexual harassment on 27 June 2019.

9. The evidence regarding Mr Khamenei commenting on the Claimant's clothing on earlier occasions was also considered in that it was suggested by the Claimant as being relevant as to the question of whether it made Mr Khamenei more likely to have committed the type of action complained of. It was taken into account that the Claimant had commented that she took her interest in her clothing previously as a compliment.

10. We have analysed the various descriptions of the events in the mess room on 27 June, the different versions given in the statements, interviews, emails and the evidence before us and the cross-examination. We found numerous inconsistencies in the accounts given. Whilst the Claimant's own account was generally consistent although of course she did not see the alleged offensive conduct, we found various inconsistencies with regard to the Respondent's witnesses. It is certainly unfortunate that the Respondent's investigation was delayed and incomplete including a failure to follow up on potential witnesses, namely others who were in the mess room that day. The interviews of the witnesses when they were seen were very superficial. Delays tend to allow memories to fade.

11. However, central to the incident was the behaviour of Mr Khamenei and how it was perceived. We do accept that he entered the room in good spirits and that he danced across the room in front of his two colleagues in order to amuse them. We accept that this may have been an allusion to the fact that all were to attend the school prom the next night.

12. The allegation is that in passing the Claimant, Mr Khamenei made a thrusting or shagging gesture. In order to understand and explore references made to the dancing having been like the television entertainer Mr Bean, an internet link of Mr Bean dancing was shown, to see if draw inferences or assistance could be drawn from it. Mr Khamenei said that his dancing was more like he would expect to be described as disco dancing. In evidence Miss Sutton and Miss Jackman identified it as 'Dad dancing', a similar type of comic performance. They continued to deny that there was any shagging motion. Miss Sutton was asked to demonstrate to the Tribunal the gesture which she had performed for the Claimant on the day and she did so from a seated position which she said was how she

had shown the Claimant on 27 June and this suggested to us that there was nothing in that gesture which was consistent with indicating a shagging motion and that this would in fact be difficult to portray from a seated position. It is necessary for us to reach a conclusion as to whether, on a balance of probabilities, Mr Khamenei did make this type of motion. What was clear was that the Claimant did not see that at all and could not testify to the Tribunal as to what Mr Khamenei did. All she experienced was hearing laughter and then an indication by way of a gesture from Melvina Sutton.

13. The evidence which we have heard does not persuade us on a balance of possibilities that Mr Khamenei did make the thrusting or shagging movement behind the Claimant. All of the Respondent's witnesses continue to deny that it happened. The Claimant reached a conclusion on the basis of a gesture. The evidence as to the gesture does not persuade us that this could reliably be interpreted as a shagging type movement.

14. Accordingly, the evidence does not persuade us to the appropriate standard that the act occurred, namely as described in the issues that Mr Khamenei stood behind the Claimant with his arms out stretched making thrusting motions and that his conduct was of a sexual nature. Therefore, we do not find that the Claimant has established that sexual harassment occurred within the definition of Section 26(2) of the Equality Act 2010. We have not found that the act occurred as described and in these circumstances the claim does not succeed and is dismissed.

15. We do express sympathy to the Claimant and acknowledge that she clearly experienced significant distress on the basis of what she perceived had occurred.

16. However, on legal grounds, we do not find that the legal claim has been established.

Employment Judge Speker OBE DL
Date: 22 March 2021