EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss C Newby **v** Functional Training Company Limited

Heard: by Cloud Video Platform

On: 11 and 12 January 2021

Before: Employment Judge Finlay
Mr R Allan
Ms J Nicholas

Appearances

For the Claimant: In person

For the Respondent: Mr J Grindrod, Company Director

JUDGMENT having been sent to the parties on 12 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction

1. This is a claim by Ms Charlotte Newby. She brings two complaints to the Employment Tribunal. The first is a complaint under the Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000. She alleges that her dismissal by the respondent was less favourable treatment on the grounds of her part time status. Secondly, she brings a complaint of discrimination under the Equality Act, specifically section 26 – harassment related to her sex.

2. The claim was presented on 15 November 2018 after a period of early conciliation between 21 August and 21 September 2018. Both complaints were disputed by the respondent.

3. We heard evidence over two days from the claimant herself and from a Ms L Stewart on her behalf and then for the respondent from Mr J Grindrod, Mr D Sanders, Mr D Bell, Ms S Elliott and Miss S Mowsley.

4. This was a hearing undertaken by cloud video platform and the tribunal is grateful to all for the way in which they participated in the hearing. It was important that this 2018 case was heard without further delay. There were technical issues with Mr Sanders. He was suffering from symptoms of Covid, his wife had had Covid in the past and he lives in an area where he has very limited internet connection. He wasn't able to give his evidence by video but was able to give evidence by telephone. That meant that we were unable to see him and he was unable to see us. We had to make a decision whether to hear his evidence by telephone or postpone to a time when he could attend a tribunal hearing in person or alternatively get himself in a position where he could have sufficient internet connectivity to participate in a CVP hearing. We were influenced particularly by the urging of both parties for us not to postpone further and whilst all accepted it wasn't the ideal scenario, it was in the interests of justice and the overriding objective to hear the evidence of Mr Sanders by telephone and we did so.

5. We also had various documents, albeit no agreed bundle despite two case management orders at previous hearings. We attach no blame for that to the claimant who seems to have done her best to comply with the orders made by the tribunal. Unfortunately we cannot say the same for the respondent. However, the volume of documents was limited and we were able to proceed using the documents supplied to us.

6. The issues to be determined had been identified at a preliminary hearing in October 2019. In relation to the part time worker complaint we had to decide whether the claimant had been subjected to less favourable treatment on grounds of her part time status and the treatment she relied on was her dismissal. She relied on Mr Luke Reinman as her comparator. We were required to determine the reason for her dismissal. In relation to the complaint of sexual harassment, we had to determine firstly whether the complaint should proceed at all, because it had been lodged outside of the primary time limit. If we were to proceed to determine this complaint, we had to determine whether the remark by Mr Sanders which founded the complaint happened as a matter of fact and if so, whether it constituted harassment and if so, what the remedy would be.

Facts

7. We have made the following findings of fact.

8. The respondent is a company which set up a gym at the beginning of 2018. It is led by Mr Grindrod and is his vision for a fitness, rehabilitation and education business. The claimant was an undergraduate student and also a single mother, recruited by the respondent to work 'front of house' for 20 hours per week. The gym opened on 1 March 2018, but she worked with colleagues before that from 26 February to get everything ready for the opening. She was dismissed in a meeting on 23 July 2018 and her last day of service was 31 July 2018.

9. On a date in April, the claimant was a few minutes late for work, having had problems with her car. She had warned the respondent that she was going to be late. On the following Monday she was called into a meeting with Mr Grindrod and Mr Sanders which she described as a disciplinary meeting although this is disputed by the respondent and there was no formal disciplinary sanction. We find that in that meeting that the respondent did criticise the claimant for being late and that she was upset during that meeting.

10. Mr Sanders is a consultant who helped Mr Grindrod to set up the business and get it going. He was at various times an employee and at other times a self-employed consultant. We find on the evidence we have heard and Mr Grindrod confirmed that he was an employee at the material times in 2018. He was a senior member of staff and was described as 'commercial director' although he was not a statutory director.

11. During her five months of employment, the claimant attended some courses which were run and financed by the respondent which would enable her to work as a fitness trainer. The claimant was then thrust into leading some courses event though she didn't feel comfortable in doing so without further experience or assistance from colleagues. The respondent then received some negative feedback from people who had been on her courses and there was a drop in numbers such that some courses were then cancelled. Mr Grindrod and other managers also became aware of criticism of the claimant's attitude towards members on reception, a lack of focus on her duties and what they felt was poor punctuality on numerous occasions.

12. In July 2018 the claimant enrolled on a personal training course run by Mr Grindrod and Mr Sanders. She was not, however, allowed to complete that course by the respondent and they told her they were unwilling to continue to pay for her to do so. Mr Grindrod explained that this was because a member on the course had told him that the claimant had told her that she was not going to carry on working for the respondent after she had become fully qualified. This was the last straw as far as Mr Grindrod was concerned. Following that incident Mr Grindrod took the decision to terminate the claimant's employment. However, he did not do so himself, but delegated the task to Mr Sanders and to Lindsey Jarvis who was his general manager at the time. They spoke to the claimant on 23 July, without any prior warning, and effectively 'ambushed' her in a meeting in the kitchen to tell her that she was being dismissed.

13. We accept the claimant's evidence that Mr Sanders told the claimant that she was being dismissed because she was part time. Mr Sanders didn't appear to recollect very much about the conversation at all, but we have also taken into account the evidence of Ms Stewart to whom a similar thing had happened whilst she was still in her probationary period. We accept her evidence that she was told by Mr Sanders that she was not being kept on beyond her probationary period because the respondent no longer had a need for her as a part time employee. That is what we find to be the reason given to the claimant for her dismissal.

14. The other relevant factual issue relates to a discussion on a Wednesday evening in April 2018 between 9:30pm and 10:00pm. Mr Sanders was chatting with two male colleagues, Mr Butler and Mr Caplin, and the claimant was also present. The respondent did not call Mr Butler nor Mr Caplin to give evidence and Mr Sanders said he had no recollection of any such conversation. He denied that he would have made any of the comments that he was alleged to have made. Those comments are serious. They are described by the claimant in her evidence as follows: "David Sanders was having a conversation with the male personal trainer Oliver Butler and Mr Sanders stated I used to get loads of women when I was younger before I met Katy and you wouldn't believe what I used to do with them, but our sex is good. Don't you think Oliver that a woman should always swallow. Me and Katy go for it every night of the week. I wouldn't take any less." The claimant also said that during these comments Mr Butler looked a little uncomfortable and didn't respond and that Mr Caplin who was standing by her at the time reassured her that in her words that 'not all men are like that' as he knew that the comments had made the claimant feel uncomfortable.

15. We have had to decide whether those comments were in fact made. We have taken into account that there is no corroborating evidence, that it is essentially the claimant's word against that of Mr Sanders. We have also taken into account that the claimant did not complain at the time and doesn't seem to have mentioned the comments again to anyone at the respondent, only confiding in a female friend outside of the business. She did not actually make the complaint until she consulted ACAS about her dismissal and when asked if there was anything else she wished to raise, she then spoke about the comments by Mr Sanders.

16. Despite the lack of corroboration and despite the fact that the claimant did not mention it again at work, we find on the balance of probabilities that Mr Sanders did make a statement in those terms relayed by the claimant or at least in very similar terms. We consider that the evidence given by the claimant was compelling and credible, both as to what happened and the effect of it upon her. We note also that when terminating the employment of both the claimant and Ms Stewart, Mr Sanders was prepared not to give the true reason for dismissal to them.

17. We do not criticise the claimant for failing to raise it with anyone at the respondent. That is not to say that we consider that Mr Grindrod would have dealt with it improperly, but the claimant was well aware that Ms Stewart had recently been dismissed and she had reason to fear for her own job if she 'rocked the boat' as she put it.

The law

18. The Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 give a part time worker the right not to be treated less favourably than a comparable full time worker by being subjected to a detriment. A claimant is required to identify an actual comparator employed

by the same employer on the same type of contract in the same or broadly similar type of work and at the same establishment. There are four key issues identified by the Employment Appeal Tribunal in the case of *Hendrickson Europe Limited v Pipe EAT 0272/02* which are:

14.1. What is the treatment complained of;
14.2. Is that treatment less favourable than the treatment of a comparable full time worker;
14.3. If so, is the less favourable treatment on account of the fact that the claimant is a part time worker; and
14.4. If so, is it justified on objective grounds?

If we find there was less favourable treatment, the burden is on the respondent to establish the reason for that treatment.

15. Section 26 of the Equality Act 2010 provides that sexual harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic, one of which is sex, or unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In deciding whether the conduct had that effect we have to take into account her perception, other circumstances and also whether it is reasonable for the conduct to have that effect.

16. The case of *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102* set guidelines for the amount of compensation to be given for injured feelings and set out three bands of potential awards, which for claims presented between 6 April 2018 and 5 April 2019 were:

16.1. The lower band: £900 – £8,600, for "less serious cases, such as where the act of discrimination is an isolated or one-off occurrence".
16.2. The middle band: £8,600 - £25,700, for "serious cases, which do not merit an award in the highest band".
16.3. The top band: £25,700 - £42,900, for "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race". Only in "the most exceptional case" should an award for injury to feelings exceed the top of this band.

17. The claim must not be brought after three months have elapsed from the incident relied on, subject to any extension by virtue of the Early Conciliation process. If the claim hasn't been brought within that period of time, we have to consider whether it is just and equitable to extend time to allow the claim to proceeed.

18. The tribunal has a wide discretion but there is no presumption in favour of extending time. There are various factors which may fall to be considered, including:

18.1. The length of and reasons for the delay;

18.2. The exent to which the cogency of the evidence is likely to be affected by the delay;
18.3. The extent to which any party had complied with requests for information;
18.4. The promptness with which the claimant acted once she knew of the possibility of taking action; and
18.5. Steps taken by the claimant to take professional advice.

Conclusions

19. In applying that law to the facts we have found, we set out our conclusions.

20. Looking firstly at the part time worker claim, the claimant was dismissed and this was a detriment and less favourable treatment. The claimant identified Luke Reinman as her comparator and he fulfils those four criteria referred to above. He was a full time employee of the respondent engaged in similar front of house work at the same gym. He was not dismissed and the issue for us was whether the treatment was on the ground that the claimant was a part time worker.

21. We obviously take into account that the claimant was told that the dismissal was on that ground. Nevertheless, we find that it was not actually the true reason. The decision to dismiss was made by Mr Grindrod because of his perception, rightly or wrongly, that the claimant's performance was not up to standard because of the issues identified by him in the evidence and in the documentation. He concluded that the continued employment of the claimant was having a detrimental impact on the business and that is why he decided to dismiss her. The final straw for him was that he had heard that the claimant was going to leave anyway once she had become a fully qualified personal trainer. Rather than dealing with the dismissal himself, he left it to Mr Sanders and to Ms Jarvis to communicate it and for whatever reason, Mr Sanders chose to tell the claimant that she was being dismissed because she was a part time worker. We find this was not the first time he had done that. We suspect he was not prepared to have the more difficult conversation either with Ms Stewart or the claimant and go through criticism of their performance with them. Instead he chose the easy way out. Notwithstanding Mr Sanders' manner of communicating the decision, what was impacting on Mr Grindrod's mind was the performance issues as presented to him. We would add that it is also difficult to believe that the claimant was being dismissed for being a part time worker when she was actually replaced by someone who was part time and the respondent has carried on employing part time workers in its business.

22. We fully understand why the claimant was aggrieved by her dismissal. Had she accrued two years' service, she would have been in a position to bring a claim for unfair dismissal which would have had some force. She was not given any warnings and was not aware of all of the performance issues which led Mr Grindrod to decide to dismiss her. There was no proper process followed and we consider that she was not well treated in her

dismissal by the respondent. However, within the legal framework which we have to apply, there was no breach of the part time worker regulations.

23. Turning to the discrimination complaint, we do not have an exact date when the comments were made but it must have been in the last week of April, because by that point Ms Stewart had been told that she would be leaving. Her last day of service was the last day of April. That means that the latest date on which the claimant should have started the process of early conciliation would have been 31 July. It might have been a few days earlier than that. In fact the claimant did not contact ACAS until 21 August. She doesn't get the benefit of the extension of time which the early conciliation regime provides. She was three and a half weeks out of time in consulting ACAS but in fact was more like three months out of time in presenting her claim in November.

24. In deciding whether to exercise our discretion we have looked at all the circumstances including the factors listed above. We do have concerns. The claimant did not seek professional advice, but as an undergraduate student who was a single mother who had just lost her source of income, it is unlikely that she could afford to pay for a solicitor to advise her.

25. A real concern to us was that although she was told by ACAS in August that there were time limits, she did not actually present the complaint until November. On the other hand we do not consider that the cogency of the evidence was affected by the delay. Mr Sanders was the one other person who gave evidence about the remark. There is no suggestion from him that his lack of recollection was due to that delay. The respondent chose not to call either Mr Butler or Mr Caplin to give evidence but Mr Grindrod has not suggested that the reason why he did not call either of them to counter the evidence of the claimant was that delay. Looking at the balance of prejudice and in particular the prejudice to the claimant in not being able to bring her complaint, we have weighed up the relevant factors and concluded that it is just and equitable for us to extend time so that we can hear the complaint of sexual harassment.

26. Having made the finding of fact that Mr Sanders made the comments which are the subject of this complaint, and having heard and accepted the evidence of the claimant on the impact of the comments on her, we find that they did violate her dignity and created a hostile and offensive environment for her. These were comments made when the claimant was the only female present amongst a number of male comments. They were made by a senior member of staff with the title of 'commercial director'. We consider that it was reasonable for the comments to have had a significant impact upon her. The comments were clearly related to the claimant's sex and also of a sexual nature. We find the complaint of harassment under section 26 of the Equality Act to be well founded and that it succeeds.

27. We have then gone on to look at remedy and compensation. The claimant submitted a thorough schedule of loss setting out her loss of earnings. However, we find that her loss of earnings arises not from the incident of

harassment but from her subsequent and unrelated dismissal. Even if Mr Grindrod knew about the comments, they did not play any part in his decision to dismiss.

28. Although the claimant has referred to damages under the principle of the case of *Smith v Manchester*, we have no evidence of any personal injury. We are therefore considering compensation for injury to feelings and we have looked at that compensation in the context of the three Vento bands. This was a one off incident, but it did have a significant impact upon her. We accept that it considerably knocked her confidence and also affected her working relationships with men for a period of time. We accept her evidence that she was unable to work for a period of time, although those effects appear to have ceased and the claimant is now able to work and run her own business. The claimant did not seek medical advice from her GP but she sought the assistance of Suffolk Wellbeing with whom she had weekly counselling sessions for a period of time.

29. We do not think it is unreasonable for the comments to have had a significant impact upon her taking into account the findings of fact we have made, including the nature of the comments, her relatively junior position in the respondent's business compared to Mr Sanders and that she was the only female present.

30. Reviewing all these factors, we consider that the lower Vento band should apply but that the award should be towards the higher level of that band. We are avoiding a total of £6,000 to the claimant, which includes the 10% increase pursuant to the case of *Simmonds v Castle [2012] EWCA Civ 1039*.

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Employment Judge Finlay

Date: 28 March 2021

Sent to the parties on:
29.03 2021
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THY
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For the Tribunal Office