



EMPLOYMENT TRIBUNALS

Claimant: Miss S Bielskiene

Respondent: KSA Management Services Limited

HELD AT: Manchester (by CVP)

ON: 23 February 2021

BEFORE: Employment Judge Holbrook

REPRESENTATION:

Claimant: In person

Respondent: Mr D Jones, Counsel

JUDGMENT having been sent to the parties on 26 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:

REASONS

INTRODUCTION AND ISSUES

1. The claimant in this case, Simona Bielskiene, was formerly employed as Operations Manager at a pub in Preston owned by the respondent company. Following the end of her employment in January 2020, Miss Bielskiene presented a claim for unpaid holiday pay, notice pay, and an award for the respondent's alleged failure to provide her with written particulars of employment. The ET1 claim form also indicated that Miss Bielskiene sought an award of compensation for unlawful discrimination: she had ticked the box to make a claim for discrimination on the ground of 'marriage or civil partnership', but no particulars of such a claim were provided.
2. Following two case management hearings, the matter was listed for a preliminary hearing to determine the following issues:
 - a. Whether the ET1, as presented, included a claim for harassment on the grounds of sex.

- b. If not, whether Miss Bielskiene should be permitted to amend her ET1 to include such a claim.
- c. Whether Miss Bielskiene should also be permitted to amend her ET1 to include a claim for unpaid wages.
- d. Whether the holiday pay claim is out of time.

3. The preliminary hearing took place on 23 February 2021, when I heard oral evidence from Miss Bielskiene. I also heard evidence from Keith Griesdale, the respondent's managing director. In addition, I was referred to various documents in an agreed 150-page hearing bundle. The hearing was conducted remotely, using the CVP video hearings platform.

FACTS

4. The principal facts which give rise to these proceedings may be summarised as follows. However, for ease of presentation, some additional facts are referred to elsewhere in these reasons.

5. Miss Bielskiene's employment with the respondent commenced on 9 August 2018. She had previously started a relationship with the pub's licensee ("PL") and, together with her three children, had moved in to a flat above the pub to live with PL on or around 5 August 2018.

6. In addition to being the pub's licensee, PL is a director of the respondent company and he was Miss Bielskiene's manager/supervisor for the purposes of her employment with the respondent.

7. The work undertaken by Miss Bielskiene included cleaning the pub, organising live events and bar shifts, ordering stock, counting the takings and banking. The work was performed in the pub itself, although one of the bedrooms in the flat upstairs was also used as an office. Nevertheless, the flat was separate from the pub and was clearly a private dwelling which was not Miss Bielskiene's workplace. Nor was Miss Bielskiene required to live in the flat for the purposes of her employment: she lived there because she was in a personal relationship with PL.

8. Miss Bielskiene alleges that PL was both emotionally and physically abusive towards her throughout the period of her employment. She says that matters came to a head on the evening of 5 January 2020. Following a short absence, Miss Bielskiene and PL had returned home to the flat that evening. Neither of them were due to work a shift in the pub, but Miss Bielskiene decided to go down to the bar to work on her CV with the assistance of the barman. This seems to have infuriated PL (who had apparently been drinking and who suspected that Miss Bielskiene was having an affair with the barman). When Miss Bielskiene went back upstairs to the flat, PL allegedly assaulted her. A heated argument ensued – this initially took place in the flat, but then continued downstairs in the pub, at which point the barman and two of the pub's regular customers became involved. The pub was closed for a short period and the police were called. PL was apparently arrested and Miss Bielskiene vacated the flat with her children before he returned the next day. She never returned to her job at the pub.

9. Having sought advice about her employment rights, Miss Bielskiene contacted ACAS to begin the mandatory pre-claim early conciliation process on 25 March 2020. ACAS issued an early conciliation certificate on 3 April and, on 6 April 2020, Miss Bielskiene presented her ET1 claim form to the Tribunal.

10. The ET1 contained detailed particulars of the notice pay and holiday pay claims, but it did not mention a claim for unpaid wages. Nor was any mention made of a possible claim for harassment on the grounds of sex, although the particulars of claim did mention the alleged events of 5 January 2020 and stated that “I have had to leave my job, because my ex-partner was violent with me and my children”.

11. The harassment claim was first mentioned at a case management hearing on 13 August 2020 when Miss Bielskiene was asked why she had ticked the box to make a claim for discrimination on the grounds of marriage or civil partnership. Miss Bielskiene stated her understanding that she could bring a claim in respect of the violence she had suffered as a sexual harassment claim. However, she said that she was unsure whether she wished to do so.

12. Having reflected on the matter, Miss Bielskiene evidently concluded that she did wish to pursue such a claim. She confirmed that in a written statement submitted to the Tribunal on 29 September 2020 in which she stated that the incident relied on as harassment was the alleged assault by PL which had taken place between 22:00 on 5 January and 02:00 on 6 January 2020.

13. On 30 September 2020, Miss Bielskiene submitted additional particulars of her money claims, including the claims for notice pay and holiday pay. However, she also mentioned (for the first time) that she wished to claim arrears of wages for various periods – amounting to about 15 weeks in total – for which the respondent had allegedly not paid her. The last of these periods concerned her wages for the week ending 17 November 2019.

LAW

14. Section 40 of the Equality Act 2010 makes it unlawful for an employer to harass a person who is its employee. The circumstances in which harassment occurs are defined in section 26. A person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature, or unwanted conduct related to a relevant protected characteristic (including sex), and in either case that conduct has the purpose or effect of violating B’s dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B. For these purposes, anything done by a person in the course of their employment must be treated as also having been done by the employer. The words ‘in the course of... employment’ are to be construed in the sense in which every layperson would understand them. The question whether an employee’s discriminatory acts were done in the course of his or her employment, thereby rendering the employer liable for them, should be treated as a question of fact and the Tribunal should consider whether the employee’s wrongful acts were so closely connected with his or her employment that it would be fair and just to hold the employer vicariously liable.

15. The Tribunal has a discretion to permit a claimant to amend his or her claim at any time following presentation of the ET1. Possible amendments range from minor

corrections or additions to the introduction of entirely new claims. The key principle to be observed in the exercise of this discretion is that the Tribunal must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it. Relevant factors for the Tribunal to have regard to include the nature of the amendment, the applicability of any time limits and the timing and manner of the application. But this is neither an exhaustive list of relevant factors, nor a checklist to be ticked off: the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

DISCUSSION AND CONCLUSIONS

The sexual harassment claim

16. It is quite clear that, as originally presented by Miss Bielskiene on 6 April 2020, the ET1 did not include a claim for harassment on the grounds of sex. She did not tick the box to indicate that she wished to make a claim for discrimination on the grounds of sex and nothing she said in her original particulars of claim could reasonably be interpreted as a claim for sexual harassment. Nor was it possible to discern such a claim from the fact that Miss Bielskiene had ticked the 'marriage or civil partnership' box (and it is clear, incidentally, that the ET1 did not disclose the substance of any discrimination claim based on relationship status either).

17. The question, therefore, is whether Miss Bielskiene should now be permitted to amend her ET1 in order to introduce a claim for sexual harassment. In my judgment, she should not be permitted to do so because the claim she wishes to pursue stands no reasonable prospect of success. There are two reasons why this is so: First, I am not persuaded that the conduct of PL she complains about (the alleged assault on 5 January) can properly be characterised as harassment for the purposes of section 26 of the 2010 Act. Whilst that conduct was plainly unwanted, it was not conduct of a sexual nature. Nor was it conduct related to the protected characteristic of sex.

18. The second reason why I consider that the claim stands no reasonable prospect of success is that the conduct complained about was not, in my view, done by PL in the course of his employment. It follows that the respondent is not liable for that conduct under the 2010 Act. I do not consider there to be a sufficiently close connection between the alleged assault on Miss Bielskiene and the functions of PL's own employment by the respondent. In coming to this conclusion, I have taken account of the fact that the incident occurred when neither Miss Bielskiene nor PL were working and that it occurred in their home. Whilst the ensuing argument spilled over into the pub below their flat, this was purely incidental and did not make it a work-related incident. Indeed, it is apparent that the whole unfortunate incident concerned Miss Bielskiene's personal relationship with PL and, as such, it is not a matter for which her employer can be held liable under the provisions of the Equality Act.

19. Given that the claim stands no reasonable prospect of success, it is obvious that the balance of injustice and hardship favours refusing the application to amend the ET1 in this regard: it would be unreasonable to require the respondent to defend such a claim, and pursuing it would ultimately not benefit Miss Bielskiene either.

The unpaid wages claim

20. It is even more clear that the ET1 did not include a claim for unpaid wages. Miss Bielskiene accepts that this was not a feature of her original claim and that she did not bring it up until she submitted her additional statement on 30 September 2020. During the hearing Miss Bielskiene told me that she had always been aware that she had been underpaid but that, when submitting the ET1 in April, she had decided not to claim the arrears, mainly because of her regard for the respondent's owner, Keith Griesdale. It was only later that she decided to maximise her claim.

21. A claim for unpaid wages may be made under section 23 of the Employment Rights Act 1996, but such a claim must normally be made before the end of the period of three months beginning with the date on which the wages in question should have been paid (or the last such date in a case where there has been a series of underpayments). Whilst the Tribunal has power to extend the period for making such a claim, it may only do so if it is satisfied that it was not reasonably practicable for the complaint to have been presented within the ordinary three-month period.

22. When determining a request to amend a claim, the application of time limits is a relevant factor to consider, but not necessarily a conclusive one. In the present circumstances, however, it is a factor which leads me to the conclusion that the amendment request should be refused. Given that the claim was only first mentioned on 30 September 2020, it was clearly out of time at that point. However, given that the latest period for which Miss Bielskiene claims to have been underpaid ended on 17 November 2019, the claim would have been out of time even if it had been included in the original ET1. There is nothing to indicate that it was not reasonably practicable for Miss Bielskiene to make the claim in time, or at least as part of the claim she presented on 6 April. Indeed, it is apparent that she chose not to do so. I therefore conclude that the balance of injustice and hardship again favours refusing permission to amend the ET1, notwithstanding the resulting loss of opportunity for Miss Bielskiene to pursue the claim.

The holiday pay claim

23. The ET1 clearly *did* include a claim for holiday pay. Although this aspect was not the focus of the discussion at the preliminary hearing, the respondent argued that the holiday pay claim is either wholly or partially out of time. Given that Miss Bielskiene argues that she is owed holiday pay for the year in which her employment ended, my provisional view is that the claim must be in time to some extent at least. However, as that there was insufficient time to consider the matter in greater detail, I am of the view that all aspects of the holiday pay claim should be determined at the final hearing.

DISPOSAL

24. The issues which remain to be determined in this case (which relate to claims for holiday pay, notice pay, and for a failure to provide written particulars of employment) will be determined at a final hearing on Monday, 13 September 2021. Case management orders have been issued separately in that regard.

Employment Judge Holbrook

Date: 25 March 2021

REASONS SENT TO THE PARTIES ON

29 March 2021

FOR THE TRIBUNAL OFFICE

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