EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss L Arnold	**v**	Brand Windows Limited (1) Ricky Pearce (2)

Heard at: Reading (by CVP) **On:** 19 - 22 July 2021

Before: Employment Judge Anstis
Ms C Anderson
Mr J Appleton

Appearances
For the Claimant: In person
For the Respondent: Mr B Uduje (counsel)

JUDGMENT

The claimant's claims are dismissed.

REASONS

A. INTRODUCTION

1. The claimant was employed by the first respondent as a window beader. The start date of her employment is in dispute between the parties, but it is agreed that her effective date of termination was 4 March 2019 (by virtue of the extension of time granted by s97(2) of the Employment Rights Act 1996).

2. The claimant was the only window beader employed by the first respondent. The claimant worked at the first respondent's factory along with a dozen or so other employees. The second respondent was her supervisor or manager during her employment.

3. While the claimant, and to some extent the respondents, spent time referring to wider issues around the claimant's employment, the claims brought by the claimant are clear and limited. They are described the case management order of Employment Judge Vowles dated 20 February 2020.

4. First, they are allegations of sexual harassment, brought against the second respondent. These are said to have occurred on May 2017, July 2017 and 26 September 2017.

5. There are then allegations of unfair dismissal - both "ordinary" unfair dismissal and automatic unfair dismissal on the basis that the principal reason for her dismissal was one or more of three alleged protected disclosures she made. The protected disclosures are said to be reports to the second respondent about exhaust fumes accumulating in the workshop on 8 January 2019 and 12 February 2019, and a text message about fumes to one of the first respondent's directors, Mark Brandwood, on 12 February 2019.

6. The respondents' response is that the claimant does not have two years' service so cannot bring an ordinary unfair dismissal claim (in fact it is part of the first respondent's case that the reason they dismissed her when they did was to avoid the difficulties with dismissal that may arise once she had two years' service), her remarks about the fumes were not protected disclosures and she was dismissed because of issues with her performance and attendance, not because of any protected disclosures. Various points are made against the allegations of sexual harassment, including that they are out of time and (to the extent they occurred) were not unwanted.

7. The issues for us to determine are:

   - What was the start date of the claimant's employment for the purposes of s211(1)(a) of the Employment Rights Act 1996 (this will answer the question of whether she has two years' service)?

   - If she has two years' service, was her dismissal unfair under s98 of the Employment Rights Act 1996?

   - Did she make any protected disclosures?

   - If she did, were they the reason or principal reason for the termination of her employment?

   - Did the acts of alleged sexual harassment occur (and if so, in what form)?

   - Were they unwanted and did they otherwise qualify as sexual harassment?

   - Are any or all of the acts of sexual harassment within the jurisdiction of the employment tribunal, given the dates they occurred and the provisions in relation to extension of time in the Equality Act 2010.

8. During the course of the hearing a number of case management decisions were made. Reasons for those decisions were given orally at the time and

will not be given in writing unless requested within 14 days of this written record of the decision being sent to the parties. They were:

a. To admit late documents submitted by the claimant by email on 21 July 2021 at 09:31 under the subject "factory layout".

b. To refuse to admit a further complaints log submitted by the respondents on 21 July 2021.

c. To refuse to admit documents submitted by the claimant by email on 21 July 2021 at 17:31 under the subject "fumes".

9. At the conclusion of the hearing we gave an oral judgment with reasons. The claimant requested written reasons, hence these written reasons are being included with the judgment.

B. UNFAIR DISMISSAL

10. The claimant was interviewed for the role of beader by Phil Brandwood on Monday 27 February 2017. We accept, because it was verified by her Facebook messages to her boyfriend, that she went back the following day (Tuesday 28 February 2017) for some sort of practical trial or test to see if she could actually do the work.

11. It is the claimant's case that following this trial she was asked by Mark Brandwood to stay on and work for another couple of hours, for which she was promised (but never received) pay. She said she did stay on and do this work, and that at the end of the day when she was getting ready to go home Mark Brandwood told her that she had got the job.

12. This account was denied by Jacqui Whiddett in her evidence, but was not challenged by Mark Brandwood. In those circumstances we accept that this happened – the claimant worked for two hours on Tuesday 28 February 2017.

13. It is then agreed that the claimant's contract formally started on Monday 6 March 2017. There is in the tribunal bundle a new starter form where the claimant herself identifies Monday 6 March 2017 as her start date. It is not in dispute that Monday 6 March 2017 was her official start date. It is only after starting these proceedings that the claimant has suggested she actually started work on Tuesday 28 February 2017. If she did, then it makes the difference between her being able to bring an "ordinary" unfair dismissal claim and not being able to bring that claim.

14. The authorities are clear that the start date has to be the start date of employment under the contract in question, not under some other employment contract. The question is whether the proper start date for the claimant's contract of employment is Tuesday 28 February rather than

Monday 6 March 2017. Notwithstanding that she did some work on Tuesday 28 February 2017 we find in these circumstances that the relevant contract started on 6 March 2017, not 28 February 2017.

15. This is because:

    (a) No-one at the time regarded 28 February 2017 as being the start date of her contract – it was always said to be 6 March 2017.

    (b) At the time of carrying out the work on 28 February 2017 there was no offer of or acceptance of the contract of employment the claimant subsequently took on – that came only after she had carried out the work.

    (c) The work on 28 February 2017 can be regarded as causal work and does not intrinsically lead to an implication that this was the start of her formal contract.

    (d) If her contract did start on 28 February 2017 the dates 1-3 March 2017 are completely unaccounted for. It has always been the case that her contract was a full-time, Monday to Friday contract. If it started on 28 February 2017 we would then expect there to have been some arrangements discussed for what happened on 1-3 March 2017, when, if 28 February 2017 was employment under her formal contract of employment, she should have been working. There is no suggestion that any arrangements were made to account for those days (which she did not work) as, for example, holidays or unpaid leave.

16. The claimant does not have two years' service so her ordinary unfair dismissal claim has to be dismissed (however meritorious it might be).

17. For her automatically unfair dismissal claim to succeed, the claimant must prove on the balance of probabilities that (i) she made protected disclosures, and (ii) they were the reason or principal reason for her dismissal.

18. In this case the claimant is not able to point to any direct link between her alleged protected disclosures and her dismissal. Instead, she relies on the proximity in time between the alleged protected disclosure on 12 February 2019 and her receipt of the disciplinary letter dated 18 February 2019, taken together a reason for dismissal that she says is not credible.

19. The reason given for her dismissal in her dismissal letter is poor performance – there were too many errors in her work. The first respondent has since added to that difficulties with her attendance.

20. In support of this the first respondent has provided a "complaints log" showing a substantial rise in beading complaints from 2015/16 (when the

previous beader was working) to 2017/18 (when the claimant was working). There does appear to be a striking increase in complaints. Mark Brandwood also gave an account of further complaints that he had in mind that had arisen between the disciplinary letter being sent and the disciplinary hearing. We also note from the claimant's text exchanges with the second respondent that she was frequently late to work or did not attend for various reasons.

21. The claimant secretly recorded the disciplinary hearing, and has provided us with a transcript of that recording. The disciplinary hearing took place with Mark Brandwood, the second respondent and Jacqui Whiddett. It is not in dispute that it was Mark Brandwood who made the decision to dismiss the claimant.

22. The first thing we note from that transcript is that despite none of the managers participating knowing that they were being recorded, there is no hint in that transcript that the reason for the claimant's dismissal was any protected disclosures or anything other than what the respondents say it was.

23. It is clear that the claimant was confronted with and shown a copy of the complaints log. She says that this was not provided to her at all after her initial months with the first respondent, but also accepts that in December 2018 Mark Brandwood had cautioned her about her work quality.

24. The essence of the claimant's response to these complaints in that disciplinary meeting is to refuse to take any personal responsibility for the problems. She suggests that everyone makes mistakes, which is no doubt true but does not address why her record as a beader was so much worse than her predecessor's. She complains about numbers on windows not matching the paperwork, and gives various other reasons why these errors would not be her fault (although without addressing any specific complaints). At one point she breaks the meeting to take a telephone call.

25. Given the claimant's apparent refusal to address these points in any way that may involve her being at fault, we can see why Mark Brandwood then decided that she should be dismissed. We are not saying that that is a correct decision or one that we ourselves would have made, but we are saying that it points in favour of Mr Brandwood's assertion that he made the decision to dismiss in the knowledge that the claimant was coming up to two years' service but did not appear to be willing to change her ways, rather than the claimant's assertion that this was to do with any protected disclosures.

26. We further note that both the second respondent and Mr Brandwood appear to have given a full account of how they dealt with the complaints about fumes. In the second respondent's case it appears to be accepted by the claimant that he took up her complaint with the van drivers, but was himself

rebuffed by the van drivers. When the claimant escalated this to Mr Brandwood he gave an account of how he had dealt with the van drivers, which was not challenged by the claimant. There is no suggestion that her complaints had been particularly badly received by either respondent. In those circumstances we find that the claimant has not shown that the reason or principal reason for her dismissal was her complaints about exhaust fumes.

27. Given that, it is not necessary for us to assess whether those complaints actually amounted to protected disclosures, but there would appear to be force in Mr Uduje's submission that it is difficult to see how the claimant in making these complaints could be said to have a reasonable belief that they were being made in the public interest, given the very limited scope of the disclosure(s).

28. The claimant's claim of automatically unfair dismissal is dismissed.

C. SEX HARASSMENT

29. The claimant faced considerable difficulty in proving that the May 2017 incident occurred and amount to sex harassment as she did not directly refer to it or give any details of it in her witness evidence. She later pointed to the particulars she had given of this element of her claim in response to a tribunal order, but it is difficult to see this as part of her evidence. For the reasons which follow it is ultimately not necessary for us to determine whether this amounted to sex harassment or not.

30. The incident in June or July 2017 was accepted by the claimant as occurring entirely outside work, so we do not consider that this can be considered under the employment provisions of the Equality Act 2010. There was nothing in this that was anything to do with work other than that the claimant and the second respondent were work colleagues.

31. The incident on 26 September 2017 was videoed by the claimant. She created an accurate transcript of the video recording as follows:

> *"Ricky Pearce: you'd probably get on your knees and start sucking dick*
>
> *Lyndsey Arnold: (laughing) you fucking prick (faintly)"*

32. No-one else appears or is heard on the video recording.

33. Faced with what appears to be a clear example of sex harassment, the second respondent resorted to somewhat desperate attempts to explain it away, suggesting that he could not remember the incident, and he may have been referring to someone other than the claimant (although he could not explain or remember who that person was). It is not clear how such an

explanation would have made things any better, or would have meant that it was not sex harassment, but we reject this suggestion from the second respondent. He was referring to the claimant and was addressing himself to her.

34. Mr Uduje submitted that in the context of the relationship between the claimant and the second respondent this was not unwanted behaviour. He was able to draw some support for this from a long string of text messages from this time period and beyond, demonstrating that the claimant and the second respondent were on friendly terms. While Mr Uduje's characterisations of their exchanges as "*flirtatious*" goes too far, they did include occasional sexual references and innuendos from both sides.

35. We also heard evidence about "*banter*" in the factory, and the extent to which the claimant did or did not participate in this.

36. It is clear to us that friendliness and "*banter*" do not give rise to a licence to carry out sex or other forms of harassment. The best that can be said is that the claimant's recorded laughter may suggest that this offensive comment was not unwanted, but we accept the claimant's comment that her laughter is "*one of disbelief*", not of appreciating a joke.

37. The difficulty with "*banter*" (and the reason why many employers refuse to tolerate "*banter*" as an excuse for poor behaviour) is that it can be used as an excuse for comments that are truly offensive and hurtful. It can be very difficult for the recipient of such banter to object to it or make their true feelings known. During the course of closing submissions it was accepted by Mr Uduje that the claimant had complained to Mr Brandwood about the second respondent's banter around this time. Mr Brandwood gave evidence that he had then spoken to the second respondent and a colleague. This indicates to us that this comment was, as may very well be expected, unwelcome and unwanted. But for the question of time limits (referred to below) we would have found that it amounted to unlawful sex harassment and awarded compensation for injury to feelings against both the first and second respondent.

38. The claimant faced a difficult task in persuading us (as she has to) that it was just and equitable for us to extend time in respect of her complaints of sex harassment. The last of the complaints occurred in September 2017. Her claim was submitted in April 2019, so the claim is brought around 18 months after the events occurred and, as Mr Uduje put it, at least 14 months after they should have been brought.

39. Whether to extend time requires us to consider a number of factors, but primarily the extent and reason for the delay and the prejudice that would arise to each party on any decision to extend or to not extend time.

40. The claimant put forward no explanation for the delay in her witness statement. We invited her to set out in oral evidence what it was she would be relying on when we came to consider whether we should extend time. She said that she was unaware of any time limit that may apply, and also that she had not wanted to bring a claim while still employed, for fear of losing her job.

41. We note that it was the claimant's case that at the time she had approach the directors with an allegation that the second respondent had committed an illegal or unlawful act. That can only have been a reference to sexual harassment, so from the start of the process the claimant was aware that the second respondent's actions had given rise to a possible claim that she could make. It is, of course, not unusual for people to be unaware that there are time limits, nor to be reluctant to bring claims while still employed – but these are not particularly good reasons for extending time, and would apply in many cases. A particular feature of this is that the claimant had videoed the unlawful act (although precisely how that had come about was a matter of dispute between the parties) but had not shown that video to the directors (she says she was never asked – but it is not clear to us why that would stop her telling them that she had video of the incident), so from the start she had good evidence of the sexual harassment. The fact that she had it on video only emerged after her dismissal, in the context of a demand from her for compensation of £100,000.

42. As for the question of prejudice, if we refuse to extend time the claimant will be denied a judgment on what would otherwise be a good claim of sex harassment. The respondents have suggested that in the time since the video was recorded the second respondent's memory of the incident and therefore his ability to give an explanation of it had deteriorated. There may be something to that but we do not regard this as a major factor in circumstances where it is very difficult to imagine what innocent explanation he could have given for what he said.

43. We are conscious that any decision to refuse to extend time will deny the claimant the opportunity of a judgment in respect of what would otherwise be a good claim of sex harassment, but in this case we cannot overlook the substantial delay that there had been in bringing the claim. There are sound policy reasons for requiring employment claims to be brought close to when the act occurred, even if that may make it difficult for those still employed. Litigants should be encouraged to bring their claims within the time limits, rather than, as appears to be the case in this case, holding on to evidence which only then emerges following a contentious dismissal. In this case, the length of the delay and the inadequate reasons given for that delay mean that we do not extend time, and the sex harassment claims are dismissed. This analysis would, of course, apply with equal or greater force to the May 2017 incident, which is why we have not felt it necessary to address the

point of whether the claimant has actually given evidence showing that this incident occurred.

D. CONCLUSIONS

44. The claimant's claims are dismissed, but we would certainly not want this judgment to be taken as an endorsement of the respondents' actions in this case.

45. During the course of this hearing we have heard much that was not relevant to the claims brought about the prevailing culture in the first respondent's factory, which appears to be at best childish and unprofessional and at worst cruel and unlawful. The claimant herself participated in this culture. It appears to us that the directors of the first respondent were complacent about the toxic atmosphere in the factory. We hope they have already taken steps to ensure that the matters we have heard of are not repeated. If not, they must do so immediately or it will only be a matter of time before further damage to their employees and business arises out of relationships on the factory floor.

46. If the claimant had brought her sex harassment claim earlier, or had started work earlier, then the outcome of this case would have been very different and it is likely the respondents would be facing substantial awards of compensation for both unfair dismissal and sex harassment.

Employment Judge Anstis

Date: 22 July 2021

Judgment and Reasons

Sent to the parties on: 19/8/2021

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For the Tribunal Office