

Neutral Citation Number: [2022] EAT 32

Case No: EA-2020-000950-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 February 2022

Before :

HIS HONOUR JUDGE SHANKS

Between :

(1) SUN MARK LTD
(2) LORD RAMI RANGER
(3) SEA AIR LAND FORWARDING LTD
(4) HARMEET AHUJA
- and -
MS RAMANDEEP KAUR

Appellants

Respondent

Ms S McKie QC (instructed by Keystone Law) **for Appellants**
Ms S Aly (instructed by Equal Justice Solicitors) **for the Respondent**

Hearing date: 16 December 2021

JUDGMENT

SUMMARY

SEX DISCRIMINATION, HARASSMENT AND VICTIMISATION

The claimant was sexually harassed by Mr Sharma over a period of 3 months. She raised the matter with Mr Ahuja and alleged that Mr Ahuja said at their meeting that if she pursued the matter “maybe she would lose her job, visa and honour”. She then raised the matter in a telephone conversation with Lord Rami Ranger who became angry and insulting to her. The tribunal found that many of the associated allegations she made about the sexual harassment were not true and that she had exaggerated and distorted matters. They upheld her claims of victimisation against Mr Ahuja and of victimisation, harassment and discrimination against Lord Rami Ranger

The EAT allowed the appeals of Mr Ahuja and Lord Rami Ranger in part and found as follows:

- (1) the ET’s finding that the allegations as a whole were made in good faith could not be reconciled with the finding that she had exaggerated and distorted matters and that the findings of victimisation therefore had to be reconsidered;
- (2) the ET had wrongly relied on section 136 of the Equality Act 2010 in finding that Mr Ahuja had made the alleged comments in their meeting and this finding had to be reconsidered;
- (3) the ET had also failed to properly consider Lord Rami Ranger’s submission that he had not victimised the claimant because it was the manner in which she had raised the allegations against Mr Sharma rather than the fact she had done so which had caused his conduct on the phone; but
- (4) the ET’s findings that he had discriminated against her and harassed her by virtue of that conduct were not perverse and were adequately reasoned.

HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal against a judgment of the employment tribunal sitting in Watford (Employment Judge (EJ)Smail, Mr Hough and Mr Surrey) promulgated on 27 November 2020. By their judgment the employment tribunal allowed certain claims made by Ms Kaur against Kapil Sharma, Lord Ranger and Harmeet Ahuja and found that Sun Mark Ltd and Sea Air and Land Forwarding Ltd (SALF) were also liable in respect of the liabilities of Mr Sharma and Mr Ahuja. In summary, the tribunal found that Mr Sharma had sexually harassed Ms Kaur by subjecting her to unwanted sexual attention between July and September 2018, that Mr Ahuja had victimised her on 1 October 2018 when she complained about the sexual harassment by Mr Sharma and that Lord Ranger had himself also victimised, harassed and discriminated against her in a telephone call on 5 October 2018.

2. Messrs Sharma and Ahuja, Lord Ranger and the two companies appealed and Choudhury P ordered a preliminary hearing. At that hearing His Honour Judge (HHJ) Auerbach dismissed Mr Sharma's appeal but allowed the appeals of Mr Ahuja and Lord Ranger and the associated appeals of the companies to proceed to this full hearing.

3. There was an application to adjourn the hearing of the appeal on the basis that Mr Sharma has an outstanding application for permission to appeal to the Court of Appeal against HHJ Auerbach's decision and that the outcome of his proposed appeal may impact on the cases of Mr Ahuja and Lord Ranger. I dismissed that application (on appeal from the Registrar) on paper on 26 November 2021 for the reasons set out in the order of that date.

Relevant facts

4. Ms Kaur is from the Punjab. Her parents live there and are dependent on her income. At the relevant time she was working in this country on a three year work permit which was to expire in October 2018. She had finished a previous job on 30 April 2017 and in October 2017 the Home Office had written to her saying that if she did not obtain another job she would be deported.

5. Ms Kaur started work as an accounts manager for SALF on 2 January 2018. SALF along with Lord Ranger and his wife owned Sun Mark Ltd. Mr Ahuja was the CEO of SALF and Sun Mark Ltd and he was Lord Ranger's son-in-law. Mr Sharma was head of finance at Sun Mark Ltd.

6. Ms Kaur's case was that she was subjected to sexual harassment by Mr Sharma from early July 2018. She presented detailed evidence of a series of incidents up till early October 2018. The employment tribunal found that neither she nor Mr Sharma told the whole truth and that they would have had difficulty making findings to the criminal standard but that they could do so on the balance of probabilities.

7. On that basis they found that Mr Sharma pursued Ms Kaur persistently for a sexual relationship which she did not want. In the course of this, he invited her to a hotel room (para 5.11); he told her he would die if she would not have sex with him (para 5.12); and he told her he could not concentrate or control himself when she was in front of him in his office (para 5.17).

8. However, they rejected a number of allegations she made at the hearing: that he threatened her with dismissal or that he would act in such a way as to remove her visa (see: paras 5.8, 5.9 and 5.20); that he sexually assaulted her and threatened to break her arms and legs and reduce her to beggar status on 7 August 2018 (see: paras 5.13 – 5.15); that he had called her a bitch on a particular occasion in late August/early September 2018 (see: para 5.19); that on 28 September 2018 he called

her a prostitute (as opposed to a prima donna) in Punjabi, threatened to rape her by placing his hand on his penis through his trousers and saying he would put it inside her and said he would make her handicapped (see: para 5.21). In relation to many of these findings the tribunal stated that the evidence was not “sufficiently cogent” to make a finding in favour of Ms Kaur (see, eg, paras 5.8, 5.13 – 5.15, 5.20). In relation to the events of 28 September 2018 which were partly recorded on CCTV, however, they simply stated that they rejected, on balance of probability, that there was sexual harassment on that occasion and in particular rejected the allegations that he threatened to rape her and make her handicapped (see paras 4.78, 5.21 and 5.22); they accepted at paras 4.74 and 4.75 that the CCTV showed that there was a heated disagreement between Ms Kaur and Mr Sharma and that he was “physically in the way” but said that Ms Kaur looked as if she was holding her own in the argument.

9. Ms Kaur went to see Mr Ahuja on 10 September 2018. The tribunal found that this was the first time she had raised the matter with him and that she told him only that Mr Sharma liked her and she did not like him in the same way. The tribunal found that he dealt with the matter in a skilful way by ensuring that someone other than Mr Sharma would have supervisory responsibility for her.

10. Following the incident on 28 September 2018 to which I refer above Ms Kaur consulted a solicitor who advised her to speak to her manager. She spoke to a female colleague, Gauri Narang, who wrote an email to Mr Ahuja setting out what Ms Kaur had told her and stating that she was considering going to court against Mr Sharma (see judgment paras 4.16 - 4.21).

11. On 30 September 2018, Ms Kaur wrote an email to Mr Ahuja. She stated as follows:

“Further to our phone conversation I would like to tell you that I am being assaulted by Kapil on several occasions.

On Friday [28 September], he was forcing me to go to the hotel with him and when I refused him then he stopped me to going out for on the building and he stand in front of the door and started abusing me.

Initially I begged him to leave me alone but then he became so angry that he said the following lines to me:

[words in Punjabi]

And so many other things which I am feeling embarrassed to write and speak in front of you and other people that's why I am writing this email.

After this incident on Friday I told everything to Gauri and the Wrong words he used for me as I found it comfortable to speak with a woman about this.

He is Blakmailing me because of my Job and Visa as he was telling me continuesly from three months that he is my Manager and he has the power to through me out form the company, if I take this matter to Directors. And now I am feeling very scared as because of all these there was a incident where I was about to slap him and he hold my hand.

As I said I am not feeling good to speak this in front of you, I haven't seen anything like this in my life.

I know that you have stopped him to stay away from me but after a week he started bullying me again.

After all this I am very depressed and now I am becoming a patient. It is affecting my everyday life and I couldn't constrate on my work and day to day activities.

**I am requesting you to please resolve this matter”
(sic)**

12. There was a meeting between Ms Kaur and Mr Ahuja on 1 October 2018. There was a conflict of evidence between them as to what was said at the meeting. Ms Kaur's case was that he told her that she would lose her job, visa and honour if she pursued the matter and that this amounted to victimisation; Mr Ahuja denied ever saying these words.

13. On 4 October 2018 Ms Kaur emailed Mr Ahuja saying:

“I write further to my email of 30.09.2018 and our subsequent meeting.

You will recall that I meet you on 10.09.2018 in relation to continued sexual harassment I have received from Mr Kapil Sharma. You assured me you would deal with the matter and asked me not to bring the company into disrepute by taking any further action.

Despite this, Kapil once again harassed me on Friday 28th September 2018 in View of CCTV ...

I reported to you that on Friday Kapil stopped me from leaving the office, he threatened and intimidated me and stated that if I did not go to a hotel with him he would ensure I would be ruined, lose my job and visa.

...

When we met on Monday you told me that if I pursued this matter may be I would lose my job, visa and honour. I told you the situation was intolerable and having a negative effect on my health and work.”

...

Mr Ahuja did not answer that email. The tribunal found at para 5.28 that Ms Kaur’s version of what was said at the meeting on 1 October 2018 was made out.

14. There was then a heated telephone conversation in Punjabi (though the English word “girl” was used to refer to Ms Kaur on occasion) between Ms Kaur and Lord Ranger on 5 October 2018. Ms Kaur started to record the conversation a few minutes into the call and the tribunal were able to listen to the tone of it. They also had a largely agreed translation and evidence from a jointly instructed expert in the Punjabi language. At paras 4.35 to 4.60 of the judgment the tribunal set out extracts from the translation of the conversation, taking, where there was more than one suggested meaning, the one most favourable to Lord Ranger. They found at para 5.31 that Lord Ranger lost his temper during the call and insulted Ms Kaur in a way which related to her gender and the fact that she was raising an allegation of sexual harassment and (at para 5.34) that he would not have treated a man in the same way. At para 5.33 the tribunal set out nine particular statements made by Lord Ranger which they relied on; but at para 5.35 they found that when he said he would “not spare her” he did not mean, as she suggested, that he was threatening to kill her and that he did not call her a prostitute.

The legal context and the issues on the appeal

15. The relevant provisions of the **Equality Act 2010** are as follows:

13. Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others.

...

26. Harassment

(1) A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic and**
- (b) the conduct has the purpose or effect of –**
 - (i) violating B’s dignity, or**

- (ii) **creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
 - (2) **A also harasses B if –**
 - (a) **A engages in unwanted conduct of a sexual nature, and**
 - (b) **the conduct has the purpose or effect referred to in subsection (1)(b)**
- ...

27. Victimisation

- (1) **A person (A) victimises another person (B) if A subjects B to a detriment because –**
 - (a) **B does a protected act ...**
 - (2) **Each of the following is a protected act –**
 - (d) **making an allegation ... that A or another person has contravened this Act.**
 - (3) **Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given... or the allegation is made, in bad faith.**
- ...

16. In very summary form the grounds of appeal were that:

- (1) the tribunal wrongly approached the issue of bad faith in relation to the protected act(s) relied on in support of the victimisation claims against Mr Ahuja and Lord Ranger;
- (2) the tribunal reached a perverse conclusion of fact that Mr Ahuja had victimised Ms Kaur in the meeting of 1 October 2018;
- (3) the tribunal failed to properly consider the submission made on behalf of Lord Ranger that his reaction in the telephone conversation on 5 October 2018 was caused not by the fact that Ms Kaur made allegations of sexual harassment but by the manner in which she did so (the so-called “severance” point);
- (4) the tribunal reached perverse conclusions that he had victimised, harassed and discriminated against Ms Kaur in that telephone call.

There was a general complaint that the reasons given by the tribunal were insufficient (or, as the jargon has it, not **Meek** compliant).

Bad faith and victimisation

17. The first point argued by Ms McKie QC relates to the findings of victimisation against both Mr Ahuja and Lord Ranger. She submitted that the tribunal was wrong to find that all the allegations made by Ms Kaur against Mr Sharma amounted to “protected acts”; they should have found that at least some of them were false and made in bad faith and were thus not protected acts by virtue of section 27(3) of the Equality Act 2020. It is not disputed that in deciding whether a false allegation has been made in bad faith the primary question for the tribunal is whether the maker acted honestly in making the allegation, i.e. whether she honestly believed it to be true.

18. The tribunal dealt with this issue in paras 5.4 to 5.6 of the judgment. They referred to the fact that there were several allegations made by Ms Kaur that could amount to protected acts and referred in particular to those made in the email of 30 September 2018. They recorded that Ms Kaur had made a series of true allegations relating to Mr Sharma’s persistent sexual interest in her but that she had exaggerated them by including references to threats of physical harm and to her visa and job status. The tribunal then stated that they did not find that these further allegations were made maliciously. At para 5.5 they state that there was “sufficient truth and sufficient belief in truth for these matters to amount to protected acts”. They go on to point out that their difficulty has been that the “ ... allegations are not sufficiently cogent in terms of supporting evidence ...” to find that they happened but that it is nevertheless clear to them that Ms Kaur believed what she asserted.

19. That reasoning on its own may have passed muster. The problem is that in the preceding section of the judgment at para 5.2 and 5.3 when dealing with the evidence of Ms Kaur and Mr Sharma the tribunal had stated:

“The Claimant exaggerates considerably ... what happened. She seeks to put a far more sinister interpretation on what happened which is not credible. It is not credible because if the allegations happened as she said she would have raised the problem much earlier ...

If there was no amorous pursuit ... that would mean the Claimant invented the whole story from start to finish. We do not think that is likely ... She has however exaggerated matters considerably – exaggerated and distorted matters ...”

It is difficult to see how one can be said to be “not credible” and to have “distorted matters” while having an honest belief in what is being alleged. Also, as I have indicated, the tribunal expressly rejected her account of what happened on 28 September 2018, including the alleged threats to rape her and to make her handicapped, rather than saying that the evidence was not sufficiently cogent. And the reasons suggested by the tribunal for her exaggeration and distortion were that she may have felt vulnerable as an Indian person in this country with only a visa (para 5.3) and that the statements were made in an emotional state (para 5.4): those reasons may provide excuses for distorting and exaggerating allegations but cannot support the proposition of an honest belief in them. I accept Ms McKie’s submission that it is really impossible to reconcile all these observations with the finding that the allegations as a whole were made in good faith.

20. It follows that that finding cannot stand and must be reconsidered. It remains the case, of course, that the basic allegation that Mr Sharma had sexually harassed Ms Kaur over a period of three or four months was, on the tribunal’s findings, true and therefore a protected act regardless of any bad faith. However, the tribunal has not really analysed the causation of the detrimental conduct found against Mr Ahuja and Lord Ranger (though I note in the case of Mr Ahuja that his account of the meeting of 1 October 2018 was simply that she had alleged that she had been sexually harassed for three to four months and that she did not give any specific examples on that occasion). It seems to me in the circumstances that the issues of whether and to what extent there was bad faith, the scope of the protected act(s) and the question whether they caused detriment will unfortunately all have to be remitted to the tribunal.

The finding of fact about what Mr Ahuja said

21. The tribunal considered the victimisation allegation against Mr Ahuja at paras 5.26 – 5.28 of

the judgment. The tribunal was faced with a direct conflict of evidence between Ms Kaur and Mr Ahuja as to what he had said in the course of the meeting on 1 October 2018. At para 5.26 they record what Ms Kaur said at the end of her email of 4 October 2018 (“ ... you told me that if I pursued this matter maybe I would lose my job, visa and honour ...”) and at para 5.27 record their surprise that Mr Ahuja did not contradict it on receipt. Then, at para 5.28, they state:

We are assisted by the burden of proof here. There is prima facie evidence contained in the Claimant’s email that there was an act of discrimination here Sunny did not contradict it at the time. The Respondents fail to discharge their burden to show that this act of discrimination did not take place. We find, as we must pursuant to the burden of proof rules, that it did.

22. Although they do not refer to it in terms it is clear that the tribunal are purporting in para 5.28 to apply sections 136(2) and (3) of the **Equality Act 2010** which provide:

- (2) **If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
- (3) **But subsection (2) does not apply if A shows that A did not contravene the provision ...**

I am afraid that they have clearly misapplied this provision. It is concerned with drawing inferences from *facts* which have been established (generally inferences as to the state of mind of alleged discriminators) by *requiring* an inference to be drawn where there are facts from which such an inference can properly be drawn unless the contrary is shown by the alleged contravener. It does not purport somehow to reverse the burden of proof in relation to all elements of a claim under the Equality Act 2010. In this case, there was an issue of fact as to what Mr Ahuja said at the meeting. The only relevant *facts* which were established were that Ms Kaur had written an email stating he had said certain things in the meeting and that he had not responded to that email. It could not possibly be properly inferred from those facts on their own that he had said what she alleged in the letter.

23. Rather than resorting to section 136, the tribunal ought to have considered all the relevant evidence and decided on the balance of probabilities whether as a matter of fact Mr Ahuja had said

what Ms Kaur alleged. Relevant considerations would have included what the two parties said about the meeting in their evidence to the tribunal, the impression the tribunal formed of their evidence on the point, general conclusions on their respective credibility, the fact that within a few days Ms Kaur had recorded her account in writing in an email to Mr Ahuja, the fact that he did not respond to it and the reasons he gave for that. It is clear that the tribunal found this decision, like other decisions of fact in the case, difficult, but they should have “grasped the nettle” and given brief reasons for their conclusion one way or the other.

24. Although this point on section 136 was not expressly and directly raised in the Notice of Appeal in my view it represents a clear error of law which was sufficiently within the purview of the appeal. I will therefore allow the appeal on this point and remit the question of what Mr Ahuja said at the meeting to the tribunal to consider again in the light of this judgment.

The findings against Lord Ranger arising from the phone call on 5 October 2018

25. Ms McKie challenges the tribunal’s findings that Lord Ranger victimised, harassed and discriminated against Ms Kaur in the course of their telephone conversation on 5 October 2018.

26. The challenge in relation to victimisation is based on the bad faith issue which I have already considered at paras [17]–[20] above: I need say no more about that. It is also based on the proposition that the tribunal failed properly to consider Lord Ranger’s case that the reason for his conduct during the call was the *manner* in which Ms Kaur raised her complaints about Mr Sharma with him rather than the fact that she raised them (the so-called “severability” point) and that they failed to refer to the case law, in particular **Martin v Devonshire Solicitors** [2011] ICR 352, where the concept is exemplified. In this context Ms McKie relied on evidence that Ms Kaur had telephoned Lord Ranger “out of the blue”, had shouted and argued with him and (as she apparently accepted in cross-examination) had made statements at the outset of the call before she started to record it which were

false and inflammatory (in particular that Mr Sharma had sexually assaulted her, that Mr Ahuja had lied and failed to protect her and that no woman was safe in Sun Mark Ltd). It is right to say that the tribunal do not refer to the relevant case law and that they do not in terms address this point; all they do is to say at para 5.32 that, when faced with the way Ms Kaur was addressing him, Lord Ranger should have ended the call and told her the matter was subject to an internal inquiry rather than losing his composure and insulting her: that does not really address the point. Although I do not consider the point a very promising one, I think the tribunal ought to have addressed it and for that reason also the finding of victimisation by Lord Ranger needs to be reconsidered.

27. In relation to the findings of harassment and discrimination by Lord Ranger in the course of the telephone call, Ms McKie submitted that the tribunal failed to give adequate reasons and failed to take account of relevant evidence from the translator and Lord Ranger about the meaning to be ascribed to certain words he had used and the significance of their use. Bearing in mind (a) the whole context, (b) the fact that the tribunal had the benefit of hearing the tape and (c) the statements made by Lord Ranger which are set out at paras 4.35 – 4.60 and 5.33, it seems to me there was more than enough to justify the findings of fact made by the tribunal on harassment and discrimination by Lord Ranger and that the reasons given by the tribunal were quite sufficient. With respect, it seems to me that Ms McKie was here simply attempting to re-argue the case on the facts. I reject the appeal on this point.

Conclusions

28. For the reasons set out above I therefore allow the appeal in relation to the findings of victimisation against both Mr Ahuja and Lord Ranger. I remit the following issues to the employment tribunal to resolve:

- (1) which allegation(s) made by Ms Kaur to Mr Ahuja and Lord Ranger respectively about Mr Sharma were protected act(s);

- (2) whether Mr Ahuja said the words alleged during the meeting of 1 October 2018;
- (3) whether he said those words because Ms Kaur made allegation(s) to him about Mr Sharma which were protected act(s);
- (4) whether Lord Ranger's conduct towards Ms Kaur during the telephone call on 5 October 2018 was because Ms Kaur made allegation(s) to him about Mr Sharma which were protected act(s).

Save in relation to finding as to bad faith at paras 5.4 – 5.6 and other matters which are to be remitted the findings of fact in the judgment shall stand. It will be a matter for the employment tribunal to decide what (if any) further evidence they require.

29. I invited representations from the parties as to whether, if I allowed the appeal, the matter should be remitted to the same or a fresh employment tribunal. Ms McKie submitted that the tribunal would not be able to keep an open mind and would inevitably seek to justify the decisions they had already reached; she also said that they had not kept full notes and that over a year later there would be no advantage in them (as opposed to another tribunal) reconsidering the case. Ms Aly points out that Ms Kaur was not successful on all the complaints she made and the tribunal clearly had an open mind and that it would be far more convenient for the same tribunal to reconsider matters (albeit I am told EJ Smail has moved to Exeter). In general, it would plainly be more efficient and proportionate if the same tribunal deals with the remittal. It is clear to me that this tribunal found it particularly difficult to resolve the factual issues in this case and this has caused me to hesitate in remitting the matter to them. But I have come to the view that with a clear agenda and guidance they will be able to stand back and reach conclusions on the issues I have identified. I accept Ms Aly's submission that there is no danger of them having closed minds. I have therefore decided that the case should be remitted to the original tribunal.