



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 26 - 29 April 2022

Claimant: Ms H Zitha

Respondent: (1) Wilson James Ltd
(2) Mr Julian Ortiz

Before: Employment Judge Mr J S Burns
Members Ms J Marshall and Mr N Brockmann

Representation

Claimant: Mr R Downey (Counsel)

Respondent: Mr P Chadwick (KLC Consultant)

JUDGMENT

1. The Claimant's application made by email dated 5/4/22 to amend the Particulars of Claim is refused.
2. The claims of harassment succeed against both Respondents who must pay the Claimant £11218.20 for injury to her feelings, jointly and severally, the one paying the other to be absolved.
3. The victimisation claim is dismissed
4. The claims of unfair dismissal and wrongful dismissal succeed against the First Respondent only which must pay the Claimant the sum of £15441.80 compensation in relation to those claims
5. The above sums are payable by 13/5/22.

REASONS

For paragraph 1 of the Judgment.

1. The Claimant wished to add to the Victimisation claim and as a further alleged breach of contract the following complaint- "*On March 2020 the claimant was threatened with disciplinary action if she continued to raise issues relating to her grievance directly with the Respondents client (Google).*" This would significantly expand the scope of the relevant evidence. The issues in this case were agreed at a preliminary hearing held on 24/8/21 at which the Claimant was represented by a solicitor. The Claimant was fully aware of the Respondent's concerns about her raising matters directly with the client in March 2020 as a letter was sent to her at the time. We do accept that this matter became known to her only when the bundle was finalised. The new allegation is now considerably out of time and no good reason has been shown why the matter could not have been raised in the ET claim form. Having to deal with the matter at short notice would cause forensic prejudice to the Respondent - as the allegation involves a person namely P Moran not called as a witness.

For the other paragraphs of the Judgment

2. The claims were Harassment related to Disability, Victimisation, Unfair Constructive Dismissal, and Wrongful Dismissal. The issues were set out in an agreed list appended to a case management order issued after a PH on 24/8/21.

3. The list of issues (LOI) was produced for the PH by the Claimant's solicitors but contained a number of anomalies and at least one error - for example the date of one allegation of harassment reads 23/10/20 instead of 28/10/20. We have allowed the Claimant to in effect amend that date as so doing does not cause any forensic prejudice to the Respondent, but beyond that have adhered to the list as defining the boundaries of our decision making.
4. In the light of Regulation 7 of the EA 2010 Disability Regulations 2010, and the fact that on 22/5/20 a Consultant Ophthalmologist had confirmed in writing that the Claimant was blind in one eye, the Respondent conceded shortly after the trial had commenced that at all material times she was disabled.
5. We heard evidence from the Claimant and then from the Respondents' witnesses Mr C Dooner (- a senior security manager - and the Claimants manager while she was employed by R1) and then from Mr J Ortiz (- the Second Respondent and who is a security officer employed by the First Respondent). The documents were in a bundle of 327 pages.

Assessment of witnesses.

6. The main dispute of fact we had to resolve was whether or not the Claimant was harassed by Mr Ortiz.
7. The manner in which the Claimant presented her case and gave evidence was unsatisfactory. The list of issues was deficient and a mismatch in comparison with her case as presented. The Claimant's witness statement appeared to not have had the benefit of much professional guidance from the Claimant's solicitors, and was rambling, confused, covering new and irrelevant ground and failing to deal clearly with the essential points. The dates on which the alleged harassment occurred were in at least one case incorrectly stated. Under cross-examination the Claimant struggled to focus on and answer simple questions.
8. Similar difficulties were seen in the manner in which the Claimant wrote her grievances to the Respondent and to Google in 2020 - these are long, incoherent and difficult to follow, showing a stream of consciousness and referring to multiple different points not in chronological order and often without identifying names or dates.
9. Another notable feature is that the emails the Claimant wrote in response to those she received from Mr Dooner and other managers after meetings show polite acceptance and receipt often coupled with words such as "*many thanks for your help and support*" or similar, which wording suggests at face value that the Claimant was happy at the time with the situation described by the manager, and which is at variance with the case she now presents.
10. In so far as we can see, she did not complain about Mr Ortiz to the author of the Occupational health report commissioned in mid 2020.
11. She also told us during oral evidence that she has a diary of relevant harassment events which she had told her solicitors about but which had not been disclosed in her list of documents and which was not adduced in evidence.
12. Mr Chadwick made many of these points about the Claimant in final submissions in which he urged us to prefer the evidence of the Respondents' witnesses.
13. Mr Ortiz gave clear straightforward oral evidence which reflected the contents of his short witness statement. His oral evidence was a bare and often repeated denial. Not only did he deny having deliberately harassed the Claimant, but he also was clear that he had done nothing which the Claimant could have mistaken as harassment even though he did not intend it as such. He was not really shaken in cross-examination.
14. However, he did tell the Tribunal judge in answer to a question from him that he was always joking and socialising with his work colleagues with whom he had a good relationship but that

he had only a medium relationship with the Claimant. To some extent that answer was consistent with the picture painted by the Claimant of herself as an isolated figure at the 6PS building excluded from the joviality amongst other workers in her immediate vicinity initiated and encouraged by Mr Ortiz.

15. The Claimant presents as a vulnerable and sensitive person who suffers from a number of debilitating health issues in addition to her partial blindness. The fact that she cannot write coherent emails or witness statements and gets muddled about dates and fails to check pleadings and lists of issues drafted by her solicitor, does not mean that she is dishonest and unreliable in her evidence. Despite the presentational problems, she has been consistent that first in March 2020 and then on several occasions in October and November 2020 she was subjected to deliberate acts of harassment by Mr Ortiz. No reason has been suggested by anyone as to why she should make it up. Mr Ortiz has not suggested that he did something which was misinterpreted.
16. Furthermore, although she was happy initially to move to the 6PS building, after only one day there on 16/3/2020 where she met Mr Ortiz and complains she was harassed, the very next day on 17/3/20 she went on long term sick leave caused at least partially by work-related stress and anxiety and was unable to return there until 21/10/20.
17. We have also noted that in her complaint to Mr Dooner about Mr Ortiz which she made in November 2020, she gave a specific account of how one of the incidents of harassment was witnessed by a colleague called Aston who appears to have expressed sympathy and concern to the Claimant in the immediate aftermath of an exchange between the Claimant and Mr Ortiz which the Claimant complained about. It seems likely that Aston, who is still employed by the Respondent could have been able to give useful evidence, but without explanation he has not been called by either Respondent. The same applies to numerous other staff members whom the Claimant referred to as witnessing the harassment on other occasions.
18. We also note that in her complaint in November 2020 she referred to Mr Ortiz accusing her of "*coming here to do fokol*" which are abusive and aggressive words that the Claimant is unlikely to have invented. This aspect of her case was not challenged in cross-examination or dealt with by Mr Ortiz in his witness statement.
19. We also note that when complaining in November to Mr Dooner about the treatment she was getting at the 6PS building where she was working with Mr Ortiz on Wednesdays, she stated that she did not have similar problems when doing similar work at another building called CSG on Fridays where Mr Ortiz was absent.
20. Furthermore, the fact that she complained about harassment by another employee ("L") in 2019 was not dismissed as a delusion but was rather upheld when it was considered by way of a formal grievance in April 2020.
21. Therefore, this does not appear to be a case in which the Claimant was suffering from delusions about her work colleagues generally.
22. We also note that in the immediate aftermath of her meeting with Mr Dooner on 27/11/20 during which we find that Mr Dooner made it clear that he was unwilling to take up and deal with the Claimant's complaints, leaving the Claimant in a situation in which she would have to carry on working alongside Mr Ortiz, she decided not to and instead left her work and resigned from her employment which she had previously held since 2009. She must have been acting under significant compulsion in so doing.
23. Having taken all these matters into account and having applied the provisions of section 106 Equality Act 2010 we prefer and accept the evidence of the Claimant where it differs from that of Mr Ortiz.

24. In considering the Claimant's version of her dealings with Mr Dooner, we do not place much significance on the polite acknowledgements and thanks which the Claimant wrote in the aftermath of their meetings. In our view the Claimant is not someone who is skilled in engaging forensically with documents to see, for example, whether what the manager has written is complete or accurate. Despite her reference to writing children's books (which we refer to in the remedy section below), she appears not to be a literary person at all. Her acknowledgements were simply her being polite and friendly to a manager who she basically had a good relationship with.

Findings of fact

25. The Claimant was employed from 6/8/2009 as a security officer by the First Respondent, which is a provider of security and logistic services. The Claimant was employed in 2019 to work in the reception of a building in London called "123 Victoria" occupied by Google.
26. While there she complained about being bullied by employees of a third company called CBRE which also provided services to Google. The complaints included the allegation that one of the employees L mocked and making fun of the Claimant's eye problems, and another stalked her.
27. The Claimant raised a grievance about this on 7/2/20 which was finally determined in her favour by Mr Brussee on 15/4/2020.
28. Mr Dooner discussed the grievance with the Claimant on 11/2/20 and agreed with her that her work location would be moved from Building 123 to a new Google site called 2PS. This move took effect in February 2020 with the purpose of protecting her from the possibility of further bullying and harassment by the employees of CBRE at 123, which employees were not subject to the discipline or control of the First Respondent. We do not find that Mr Dooner agreed that this would be a temporary move only - he stated in his email of 13/2/2020 that the move would be for an indefinite period and in response the Claimant wrote - "Morning Cliff noted many thanks."
29. The Claimant was unable to continue working at 2PS for long because it closed in March due to the Covid pandemic. The Claimant was therefore sent to work at another Google building namely 6PS, her first day there being 16/3/20. While there that day she encountered Mr Ortiz - he was aware of the Claimant's eye problems which caused the Claimant's left eye to move unusually. The Claimant noted Mr Ortiz squinting at another employee, namely Jordan, while they were near her in the reception area. This was deliberate mockery of her blind eye similar to that she had experienced from some of the CBRE employees at the 123 building.
30. The Claimant was very upset by this and went on long term sick leave on 17/3/20.
31. She met Mr Dooner on 4 August 2020 with a counsellor Julia Ford to discuss an Occupational Health report and to review her ongoing absence from work. There was also a discussion of the bullying of the Claimant by the CBRE employees which had been the subject of the February grievance. Mr Dooner told the Claimant that, in order to protect her welfare, she would not be moved back to 123 because it was a single officer site and therefore inappropriate for the Claimant in the light of her health conditions and in any event this would be impossible because the building was closed until June 2021. Mr Dooner mooted the idea that the Claimant when she returned to work would do so at two sites namely 6PS (where Mr Ortiz worked) and at a new site namely CSG.
32. The Claimant also mentioned during this meeting to Mr Dooner that she had experienced further mockery from Mr Ortiz on 16/3/20. Mr Dooner was unwilling to deal with the complaint about Mr Ortiz - and told the Claimant during the meeting that it was too late to do so because the CCTV recordings at 6PS of 16/3/20 would be long since deleted.

33. Mr Dooner sent an email after the meeting on 4/8/20 summarising the arrangements for the Claimants forthcoming return to work. The Claimant replied the same day "Many thanks for all your support and time - I really appreciate it".
34. The Claimant returned to work on 21/10/2020, a Wednesday, at the 6PS building. Mr Ortiz questioned the Claimant about her South African origin in a manner which made the Claimant feel uncomfortable. He also accused her saying she had "come here to do fokol" which was abusive. The Claimant saw him squinting again this time at a colleague called Aston. Aston commented to the Claimant that she shouldn't let what people say get to her because words don't matter. Aston was evidently expressing sympathy to the Claimant about the encounter she had just had with Mr Ortiz.
35. The Claimant was upset but did not complain then because she wanted to try to make a success of the new posting.
36. On 28/10/2010 the Claimant returned to 6PS and once again Mr Ortiz was there making funny eyes with reference to the Claimant, in front of other staff and making them laugh at her.
37. There was similar behaviour on 4/11/2020 and in fact on every occasion when the Claimant had to work in the 6PS building as Mr Ortiz.
38. On 16/11/2020 the Claimant wrote a long complaint about this to Mr Dooner. In effect this was a grievance about further bullying and harassment, this time from a fellow employee of the First Respondent's. She ended the message with the following "I need somebody to be held accountable for my pain. I hope and pray this gets sorted out".
39. After receiving it, Mr Dooner mentioned it in passing to Mr Ortiz, who denied the allegation. Mr Dooner did not interview the witnesses which the Claimant had identified in her grievance, nor did he try to inspect the CCTV footage of the reception area at 6PS which at that point would have still been extant covering the Claimant's work days.
40. Mr Dooner discussed the matter with the Claimant on 27/11/20. It is plain that he did not want the matter to go further. He had run out of ideas about where to send the Claimant next. He told the Claimant that if she pursued the matter, the First Respondent's staff wouldn't want to work with her anymore, and again he referred again to the CCTV footage being deleted. He did not believe the Claimant's account or did not want to believe it. The Claimant felt a loss of trust. Mr Dooner said that he wasn't going to take the matter further and the Claimant acknowledged this, feeling that in the circumstances it would be pointless to continue. The Claimant left the meeting.
41. After the meeting Mr Dooner sent the Claimant an email in which he discounted the complaints and then wrote "I assured you that there are multiple cameras in 6PS reception that could disprove these concerns you raised and you confirmed that you did not want to raise a formal complaint." These words indicate clearly Mr Dooner's negative attitude to the matter.
42. The Claimant acknowledged the email by writing back on 29/11/20 "All noted. Many thanks for all the support and help. I really appreciate it..."
43. This was plainly not a true reflection of the Claimants feelings. She did not return to work at all after the meeting on 27/11/20 and on 5/12/20 she wrote an email to Google setting out a long complaint about the bullying and harassment she had suffered at the hands of L in 2019 but also referring to the fact that Mr Ortiz was doing the same thing that L had been doing.
44. The Claimant instructed her solicitors who on her behalf sent a message to the First Respondent on 21/12/20 resigning from her employment with immediate effect.

Relevant law

Under the Equality Act 2010

Harassment

45. Section 26 provides that a person harasses another where the harasser engages in unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating the others dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. In deciding whether conduct has this effect the following must be taken into account : the perception of the other, the other circumstances of the case and whether it is reasonable for conduct to have that effect.
46. Victimisation is defined in section 27 of the EA and it occurs where the victimiser subjects another to detriment because the other has done a protected act or the victimiser believes the other has done or may do a protected act. A protected act is defined to include bringing proceedings under the EA or giving evidence in such proceedings or doing anything in relation to the Act or alleging a breach of the Act.
47. The concept of detriment is determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to her detriment; but an unjustified sense of grievance cannot amount to a detriment.

Onus of proof

48. Section 136 provides that if there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.
49. Under section 109 an employer is liable for the acts of his employees and it is irrelevant that the employer did not know or approve of the act committed

In relation to unfair constructive dismissal

50. In order for an applicant to establish constructive dismissal he must establish a breach of contract by the employer.
51. The breach must be fundamental and repudiatory and going to the heart of the contract – ie sufficiently serious to have justified the employee resigning immediately. The test is whether the employers conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and can walk out of his job without prior notice.
52. It is necessary that the employee left his employment with the employer in response to the breach and not for some other unconnected reason. It is sufficient for this purpose if the breach is one of the reasons amongst others for the resignation.
53. The employee must also not wait too long and so affirm the contract before resigning, but there is no fixed time limit in which the employee must make up his mind.
54. The breach of contract can be of an express or an implied term.
55. There is a term implied by law in all employment contracts that an employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
56. The implied term will be breached only where there is no reasonable or proper cause for the employers conduct.
57. The test as to whether there has been a breach of the implied term is an objective one. The motives of the employer are not determinative or relevant. If conduct, objectively considered,

is calculated or likely to cause serious damage to the relationship between employer and employee, a breach of the implied term may arise.

58. The range of reasonable responses test does not apply in establishing whether a breach has taken place.
59. The breach can be by means of a single act or by a series of acts which cumulatively amount to a repudiatory breach, though each individual incident may not do so. In such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract – the question is – “does the cumulative series of acts taken together amount to a breach of the implied term?” This is the last straw situation.
60. Once an employer is guilty of repudiatory breach he cannot make amends so as to preclude legal acceptance. All the cards are then in the employee’s hands and the employer can only make amends so as to try to secure affirmation

Conclusions

Harassment

61. We find that Mr Ortiz mocked and made fun of the Claimant on at least three occasions in October and November 2020 which was unwanted conduct related to her disability which had both the purpose and effect referred to in section 26 and was therefore harassment as prohibited by the Equality Act 2010.
62. The Second Respondent is personally and the First Respondent is vicariously liable for this unlawful harassment of the Claimant.

Victimisation

63. It is agreed that the Claimant’s communications on the 7/2/2020, 4/8/2020 and 16/11/2020 were each protected acts.
64. The decision by Mr Dooner to move the Claimant to work at 2PS in February and to 6PS in March was to protect her welfare as she was exposed to harassing CBRE employees at 123, and 2PS then closed. The move was with her agreement. The decision made by Mr Dooner in the period August - October that the Claimant on return to work in October would work at the split sites 6PS and at CSG had the same motivation and was also made in conjunction with the Claimant’s counsellor Ms Ford. This was not because of the Claimant’s grievance but because of the presence at building 123 of harassing third party employees that the First Respondent could not deal with, and the need to try to find a happier work place for the Claimant where her welfare would be protected. This was not a detriment.
65. While Mr Dooner appears to have acted as a caring and good manager in most of his dealings with the Claimant, which was recognised by the Claimant herself, he appears to have fallen short in relation to the complaints about Mr Ortiz.
66. Despite the difficulties which we recognise he would have experienced in trying to engage with the Claimant and her problems, which she did not mention in writing at all until November 2020, and then did so in a long, rambling and confusing document, nevertheless he should have spent time finding out from the Claimant the specific allegations clearly, recording them and properly investigating them or causing them to be properly investigated under the First Respondent’s grievance policy. The CCTV should have been examined and the witnesses cited by the Claimant should have been interviewed.
67. Harassment and bullying are serious matters and made the more serious because here Mr Dooner was dealing with the Claimant who it had been found in an earlier grievance outcome in April 2020, had already suffered from workplace bullying in 2019 at the hands of others, with

serious adverse consequences for the Claimant. This made it even more important that the allegations against Mr Ortiz were dealt with promptly and fully.

68. Instead, first in August and especially in November 2020 Mr Dooner adopted a dismissive attitude and indicated that that he did not believe and was unwilling to pursue the Claimant's complaints about Mr Ortiz. While the Claimant acknowledged orally at the end of the November meeting that her grievance would not be taken further, that was only because Mr Dooner had already shown, without investigating, that it was likely that it would be rejected.
69. This was a legitimate cause for a feeling of injustice on the Claimant's part and amounted to a detriment.
70. However, it was not victimisation because the requisite motivation on Mr Dooner's part was missing. He did not deal with the complaint because he did not believe the Claimant and had in any event run out of ideas about what he could do with her to separate her from Mr Ortiz. The Claimant had already moved buildings twice earlier in the year and no doubt the First Respondent had only a limited number of suitable buildings where she could be deployed.
71. The detriment was therefore caused not because the Claimant had made protected acts but because Mr Dooner did not want to engage with the complaints for other reasons.
72. Hence the victimisation claims fail.

Unfair constructive dismissal

73. The Claimant's pleaded case as reflected in the POC and LOI relies on the harassment and victimisation only as alleged breaches of contract. Mr Dooner's response to the Claimant's complaints (other than as acts of victimisation) are not relied on as breaches of contract so we do not consider them as such.
74. However, it can be seen that through Mr Dooner failing to respond properly to the Claimant's complaints, the First Respondent lost an opportunity to make amends to try to persuade the Claimant to stay in her employment despite the fundamental breach constituted by the harassment she had received.
75. The harassment was a fundamental breach of the implied term by the First Respondent and the Claimant left her employment and resigned in response. Hence the Unfair Constructive Dismissal claim succeeds.

Remedy

76. A schedule of loss had been produced which we considered.
77. We heard evidence from the Claimant and were referred to some medical documents in the bundle. As confirmed by this evidence, the Claimant suffered a deterioration of her heart condition in October 2020 so she could only walk very slowly. This was unrelated to her problems with Mr Ortiz and she experienced it at both sites where she worked.
78. She stated in her witness statement that she has not been well enough to look for other work since her resignation because of her heart condition. She told us however that she has been working for herself at home writing children's books and studying for a masters degree.
79. In the light of these serious health issues, we find that it is unlikely that she could have continued working as a security officer for the Respondent in any event, certainly in the role she was filling when she resigned.
80. If the Claimant has been well enough to do sedentary work from home, then she has completely failed to mitigate her losses but not searching for any work at all since resignation.

81. In the circumstances we do not find it just and equitable to award loss of earnings compensation.
82. We award £10000 for injury to feelings for harassment, this being the sum claimed in the Schedule. This is at the lower end of the middle Vento band. The harassment pleaded in the POC and as found in our judgment were a few isolated incidents. We do not accept Mr Chadwick's submission that the matter should be in the lower band or Mr Downey's submission that the £10000 claimed in the schedule should be increased. However, the sum of £10000 attracts statutory interest of 8% pa from 21/10/20 to 29/4/22 in the sum of £1218.20.
83. We accept the Claimant's evidence that until March 2020 when she went off sick she was working 60 hours a week at £11.20 per hour earning £672 per week and we find that that this is the proper basis for her notice pay award. The gross amount is £7392 and, as it is not shown what if any tax/NI would have been deducted, we discount that sum by a notional 10% for tax and NI which may have been deducted had she been paid notice pay in December 2020. The net amount payable is £6652.80
84. The basic award for unfair dismissal is calculated on the basis of a week's pay capped at £538 and, having regard to the Claimant's age and length of service, the amount due is £8339. We award £450 for loss of statutory rights.
85. We do not make any uplift in relation to compliance with ACAS Codes because the "matter claimed" was that the treatment of the grievance was victimisation, and we have dismissed that claim.

Summary

Payable by the First Respondent only

Unfair dismissal

Basic award	£8339
LOSR	£450

Wrongful dismissal	<u>£6652.80</u>
Total	£15441.80

Payable by both Respondents

Injury to feelings	£10000
Interest thereon	<u>£1218.20</u>
Total	£11218.20

J S Burns Employment Judge
London Central
29/4/2022
For Secretary of the Tribunals
Date sent to parties- 03/05/2022
