



EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: B

Heard at: Cardiff **On:** 16, 17,18,19 August 2021

Before: Employment Judge Ward, Mr Vine and Mrs Humphries

Representation:

Claimant: Mr Blitz (counsel)

Respondent: Mr Chehal (consultant)

JUDGMENT

The claim succeeds as follows;

1. The claimant was constructively dismissed.
2. The claimant was subject to direct discrimination and harassment on the grounds of race.
3. The claimant was subject to sexual harassment.

REASONS

The issues and applicable law

1. The claimant contends that she was constructively dismissed and forced to resign on 22 May 2019. She also claims that she was discriminated against on grounds of race and sex. The respondent denies all the allegations.
2. In accordance with s95(1) (c) of the Employment Rights Act 1996 a person is dismissed if the employee terminates the contract under which she is employed (without or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

3. In accordance with s 13 of the Equality Act 2010 a person (A) discriminates against another (B) if, because of the protected characteristic, A treats B less favourably than A treats or would treat others.
4. In accordance with s26 of the Equality Act 2021 a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. A also harasses B if A engages in unwanted conduct of a sexual nature and the purpose or effect is violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
5. The time limit for bringing these claims is three months from the date of resignation and or act of discrimination.
6. The following issues were agreed by the parties at the start of the hearing (with "being forced to work whilst in hospital in 2018" being confirmed as withdrawn by the claimant's representative during the hearing) to be the issues for the Tribunal to determine:

Time limits

7. Given the date the claim form was presented on 16 October 2019 and the dates of early conciliation, of 16 August until 16 September 2019 any complaint about something that happened before 17 May 2019 may not have been brought in time.
8. Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - If not, was there conduct extending over a period?
 - If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - Why were the complaints not made to the Tribunal in time?
 - In any event, is it just and equitable in all the circumstances to extend time?

Constructive dismissal

9. Was the Claimant dismissed?

10. Did the Respondent do the following things (as set out in paragraph 6 of the claim form):
 - No support or a lack of support
 - Shifts being taken off rota with no explanation and no replacement shifts
 - Discrimination by Director C
 - Sexual Harassment by Director C
 - Bullying by Director C Rachel co ordinator and Keith.
11. Did that breach the implied term of trust and confidence?
12. Did the Claimant resign in response to the breach?
13. Did the Claimant affirm the contract before resigning?
14. If the Claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?
15. Was it a potentially fair reason?
16. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

Direct race discrimination (Equality Act 2010 section 13)

17. The Claimant is British Somali and she compares herself with a white employee.
18. Did the Respondent do the following things (as set out in the further and better particulars):
 - She was being accused of being a member of ISIS and of being a terrorist by C in front of colleagues in office 1 May 2019
 - C had commented that her Facebook page supported terrorism 1 May 2019
 - C asked her to watch a film about a woman called Layla who was a member of ISIS. This was in front of colleagues in the office February 2019
 - C commented that Somalis were aggressive people and that she should know them very well 1 May 2019
 - Shifts being taken off rota with no explanation, no replacement shifts, no telephone call to inform her that she was no longer working her regular shifts, 6 and 8 April 2019
 - No support or a lack of support April 2019
19. Was that less favourable treatment?

20. If so, was it because of race?

Direct sex discrimination (Equality Act 2010 section 13)

21. The Claimant compares herself with a male employee.

22. Did the Respondent do the following things as set out in the further and better particulars):

- On 17 May 2019 C began to blow kisses at her, which made her feel uncomfortable
- C touched her inappropriately when she was in the office with him. He slapped her bottom which was witnessed by a colleague 2018
- Shifts being taken off rota with no explanation, no replacement shifts, no telephone call to inform her that she was no longer working her regular shifts. 6 and 18 April 2019
- No support or lack of support April 2019

23. Was that less favourable treatment?

24. If so, was it because of sex?

Harassment related to race (Equality Act 2010 section 26)

25. Did the Respondent do the following things as set out in the further and better particulars):

- She was accused of being a member of ISIS and of being a terrorist by C in front of colleagues on 1 May 2019
- C had commented that her Facebook page supported terrorism 1 May 2019
- C asked her to watch a film about a woman called Layla who was a member of ISIS. This was in front of colleagues February 2019
- C commented that Somalis were aggressive people and that she should know them very well 1 May 2019

26. If so, was that unwanted conduct?

27. Did it relate to race?

28. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

29. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Harassment related to sex (Equality Act 2010 section 26)

30. Did the Respondent do the following things as set out in the further and better particulars):
- On 17 May 2019 C began to blow kisses as her, which made her feel uncomfortable 17 May 2019
 - C touched her inappropriately when she was in the office with him. He slapped her bottom which was witnesses by a colleague 2018
31. If so, was that unwanted conduct?
32. Did it relate to sex?
33. Alternatively, was it of a sexual nature?
34. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
35. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The evidence

36. The Tribunal heard evidence from the claimant and her witness Ms Ah Mun her former line manager. The Respondent submitted 6 witness statements and the Tribunal heard evidence from C the Managing Director of the Respondent, Mr Chris Nickless Administrator, Recruitment and Compliance Manager, Ms Jacqueline Griffiths Care CoOrdinator, Ms Laxmi Kafle Nurse Agency Manager, Ms Abigail Herlihy Davies Finance Officer and Ms Angela John the former Registered Manager.
37. A bundle of 277 pages was submitted and following discussion in evidence an audio file was disclosed to the tribunal consisting in total of some 30 minutes of conversations on 22 May 2019.

The relevant facts

38. The claimant was employed as a care assistant on a zero hours contract from 2014 until her resignation on 22 May 2019.

39. Although strictly there were no guaranteed hours of work she worked regular shifts on a two week rota throughout her employment. Some anecdotal reference was given to the claimant handing back shifts but there was no actual evidence before the Tribunal as to the specific occurrences.
40. The claimant was supervised and line managed by Ms Ah Mun until she left the respondents employment in the first week of January 2019. Ms Ah Mun's manager was C and Mr Hughes. C is a director of the company. The claimant was field based and worked directly with clients in their homes. She only attended the respondent's office, where Ms Ah Mun and C worked, when necessary.
41. It seems that Ms Ah Mun was able to resolve issues that the claimant had during her employment and support her. But when she left the claimant did not feel as supported. Training, supervision and appraisals all continued and when the removal of shifts on 6 and 18 April were referred to Kayleigh in supervision this was resolved. No reason was given for why these shifts had been removed.
42. Although new line management by Ms Johns was in place in February 2019 the claimant found matters escalating and involving Mr Hughes and C. The evidence of Ms Johns was that there was a change to the claimant's rota's in April 2019, though no cogent reason was given as to why this happened. It was clear that the claimant had been complaining about this change because in the meeting of 22 May Mr Hughes is heard saying "lets sort this out once and for all" implying that this was not the first time he had been aware or involved in a conversation about the claimants shifts.
43. On 1 May the claimant is asked to attend the office for a meeting. This request is sent via a Whats app message (B175). Although the respondent said it was not a message for the claimant specifically, they do accept that a meeting that day took place. The issue is what was said. In the meeting was C, Mr Hughes and the claimant. It was in an office with a closed door. No one else in the office that day overheard the conversation. There was no evidence from Mr Hughes, a file note was produced, but that doesn't really assist (B182 and B184). Though it does make mention that the claimant was challenging. The claimant was consistent in what she said happened at this meeting. C less so. As there is a total factual dispute the Tribunal has had to consider what happened prior to this meeting to consider what is likely to have been said. The Tribunal considered these in chronological order.
44. The claimant alleges that C slapped her bottom in 2018. C emphatically denies this. Ms Ah Mun gave evidence that the claimant was in the office and reported it to her straight after it happened. Although she did not record the conversation at the time, she did recall it in a handwritten note on 28 May 2019 (B196/7). As

she had left the respondents employment at this time it is possible that the claimant had asked her to write this note at this particular time. The tribunal found no problem with this. When cross examined Ms Ah Hun was very clear that the claimant had reported it to her and that she advised the claimant how to raise a complaint. The claimant explained that she didn't at the time make a complaint as she wanted to keep her job, that she wasn't in the office regularly and didn't normally have contact with C. Though she says that every time she saw C he was nasty and said something bad.

45. In March 2018 C watched a film called Layla M on Netflix with Ms Kafle at her home. He watched the film because staff in the office had been talking about it. The film is a drama about radical Islam. C said the film was of interest to staff because the claimant was called A, she worked for the respondent and was from the same environment, it was a topic of conversation, but no one criticised or said that the claimant herself was ISIS. C said he couldn't understand her taking offence by the conversation.
46. C admits that there were several conversations about this film in the office. Ms Kafle was sure based on her return to work date following sick leave, when one conversation took place, but all other witnesses, including the claimant, couldn't be specific about the dates of the conversations. Ms Ah Mun said comments about the film were made numerous times. C did admit that he had asked the claimant specifically in the office "to watch the film" this was directed to her as her name is A. This conversation happened more than once based on the evidence of all witnesses.
47. The claimant's Facebook page was also discussed with her in 2018. C admits and gave the reason because staff were concerned about what was being posted about ISIS. Ms Ah Mun also recalls such conversation and said it was raised every now and again. The explanation given was that there was a lot of talk in the office about ISIS in Cardiff and staff were worried about retaliation. This C took as a genuine concern from staff, yet no investigation was undertaken, he simply asked the claimant to tone it down. But the Tribunal does not believe that that was the end of it and only one conversation took place. It was clearly a live issue in the office as C said there was a lot of talk in the office about ISIS.
48. There was also a conversation in the office about Somalians as a race as the claimant and C refer to in their witness statements. However, C evidence about the claimant raising this with him is not plausible. They had no relationship and no reason to have the conversation. C does not deny that he spoke of her race but in a different conversation. This the Tribunal found was not credible. It just did not make sense.
49. It is on these findings of fact that the Tribunal believes that it is more likely than not that on 1 May when shifts, leaving to work for Ms Ah Mun and additional

cleaning work was being discussed that C did raise again as he had in other conversations; ISIS, the claimants face book page and her race. What was clear was that the claimant was assertive as she was frustrated about her shifts. Mr Hughes refers to her as challenging in his note of the meeting (B177) and that the claimant was being demanding when C turned up. C walked into a meeting that had started and was already heated. The term aggressive in these circumstances is likely to have been used and in reference to her race.

50. On 17 May 2019 the claimant alleges that C blew kisses at her whilst leaving the office. No other of the respondent's witnesses saw this, though they were in the office and not outside. Mr Haynes was with C but did not give evidence. C was extremely distressed that such an allegation was made and emphatically denied it saying "don't be silly." As the Tribunal has found on other occasions for the claimant to be more credible we believe it is more likely than not that this did happen. The relationship, if they had any, had totally broken down following the meeting on 1 May. C did not admit that he had even walked past her on the way to the office entrance. His evidence was not clear on many subjects and on one occasion he made a threat from the witness box to Ms Ah Mun. He was obviously upset about the claim being made against him.
51. The only motive put forward throughout the case was that the claimant was making all the allegations up to receive compensation. The fact that she never raised these complaints during supervision sessions or using the respondents' policies meant that they had not occurred and were not true. The Tribunal was not persuaded by the argument. The claimant explained that she liked her job and did not feel confident to move to a new employer. She did not have to see C every day and had Ms Ah Mun as a manager who she clearly had a lot of respect for. The evidence of Ms Ah Mun who corroborated the claimant's evidence, the Tribunal found to be a credible, and a fair manager, who did not favour the claimant as an employee, (she had in fact disciplined the claimant whilst line manager), had no reason not to be truthful.
52. On 22 May the claimant attends the office to resolve her ongoing rota issues. She sees C who admits he said to her if you don't like B don't come back. She tries to explain to Mr Hughes but doesn't feel like she is being listened too.
53. The claimant sent an email on 22 May resigning with immediate effect (B183) due to being treated differently and taking her calls away with no replacement hours. She then sent a formal letter a week later (B198) with further explanation.

Conclusions

Constructive dismissal

54. The respondent from April 2019 took shifts off the claimant's rota with no explanation and no replacement shifts. Each time this happened she had a conversation to rectify the situation. This continued until her last day of employment.
55. The claimant was subjected to discrimination and harassment by Director C (see findings below).
56. There was no evidence of bullying.
57. It was never suggested that the breaches asserted by the claimant were breaches of any express term in her contract of employment.
58. The Tribunal therefore had to consider whether there had been a breach of the implied term of trust and confidence.
59. The claimant as a zero hours worker had worked regular shifts during her employment on a 2 week rota. The fact her shifts all of sudden started to be taken off the rota without any explanation, together with the discrimination that was occurring did destroy the trust and confidence that should exist between and employee and employer.
60. The claimant resigned because of the way the respondent treated her. She did not leave because she had another job with Ms Ah Hun, though she did secure that employment shortly thereafter. Her emailed resignation on the day of the 22 May meeting is clear, her reasons for resigning are due to being treated differently and having her shifts taken off her with no replacement hours. There was no delay to her resignation, she had had enough and felt unsupported.
61. The Respondent did not believe the claimant had been entitled to resign and did not defend the unfair dismissal. It gave no potentially fair reason for her dismissal or reasonableness of that decision.

Direct race discrimination (Equality Act 2010 section 13)

62. On 1 May the claimant was accused of being a member of ISIS and of being a terrorist by C. This may not have been explicit but it was certainly implied. He commented that her Facebook page supported terrorism and made reference to the somali race being aggressive.
63. Shifts were being taken off rota with no explanation, no replacement shifts, no telephone call to inform her that she was no longer working her regular shifts. This started in April 2019 and continued until her last day of employment.

64. The claimant's inability to resolve the shifts caused her to feel unsupported though there was no evidence that Ms Johns didn't assist and Kayliegh, the claimant admits did resolve the shifts on 6 and 18 April. What the claimant struggled with was not having Ms Ah Mun who would have resolved this for her without the claimant having to come into the office and speak with the Directors.
65. The tribunal finds that the comments made on 1 May was less favourable treatment because of race. A white employee would not receive such comments.
66. The removal of shifts had no explanation other than the claimant's own actions in handing them back but there was no direct evidence on this and Ms Johns agreed in cross examination that there was a change in April. Although this may have been due to the concerns about the claimant leaving and going to work with Ms Ah Mun that was not suggested by the respondent and so the inference in the context of what else was being said is that removing shifts was also because of race.
67. The claimant was asked to watch the Layla M film and this was because of her race.

Direct sex discrimination (Equality Act 2010 section 13)

68. In 2018 C slapped the claimants bottom and on 17 May 2019 blew kisses at her. This is less favourable treatment because of sex and or of a sexual nature. A male employee would not receive such attention.
69. As for the shifts and lack of support please see paragraphs 63, 64, and 66 above. There was a change in April 2019 and given the totality of the tribunal's findings there is a sufficient basis to be able to draw an inference that the respondent treated the claimant less favourably by removing shifts on the grounds of sex.

Harassment related to race (Equality Act 2010 section 26)

70. The conduct described in paragraphs 62 and 67 above was unwanted conduct related to the claimant's race.
71. The claimant was upset by the comments, it had the effect of violating the Claimant's dignity and creating an intimidating environment for the Claimant.

Harassment related to sex (Equality Act 2010 section 26)

72. The conduct described in paragraph 68 above was unwanted conduct related to the claimant's sex.

73. The claimant was upset by the comments, it had the effect of violating the Claimant's dignity and creating an intimidating environment for the Claimant.

Time limits (Equality Act 2010 section 123)

74. Any complaint about something that happened before 17 May 2019 may not have been brought in time.
75. Although the comments and actions of the direct race discrimination and harassment claims may have ended on 1 May 2019 there is a continuing state of affairs given the numerous conversations that C had had in the office with regard to the claimant's association to the Layla M film and ISIS. This hadn't gone away and was a live issue, it was being discussed at the same time as the rota and shifts. The removal of shifts continues until she resigns. These are not unconnected or isolated events and involves the same individuals. The claim was made within three months (plus early conciliation extension) of the end of that period.
76. The sex discrimination and harassment complaint of the slapped bottom is however an isolated event and did not reoccur. The claimants representative advanced that the course of conduct of discrimination could include this act, but in the Tribunals view it is not connected and seemed to be an isolated event.
77. Consideration was given to whether the claims were made within a further period that the Tribunal thinks is just and equitable considering the length of the delay and reason the claim was not made sooner. This was difficult as an exact date was not given for this incident and that does cause prejudice to the respondent as they cannot be specific as to any defence as to what happened or any witnesses. The claimant explained cogent reasons why she did not pursue the complaint at the time, but the Tribunal is unable to find that it is just and equitable to extend time if it does not know the month when the event happened to assess the delay. Given the obvious prejudice to the respondent to properly defend a claim without a specific date an extension is not possible, and this claim is presented out of time.

Employment Judge Ward
Dated:13 September 2021

REASONS SENT TO THE PARTIES ON 17 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche