



EMPLOYMENT TRIBUNALS

Claimant: X

First Respondent: YJR Bridgford Ltd

Second Respondent: Y

On: 11 -18 February 2022

Before: Employment Judge Ahmed

Members: Mrs C Hatcliffe
Mr C Tansley

At: Nottingham (hybrid)

Representation

Claimant: Claimant's spouse
Respondent: Miss Abigail Scott of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's complaints of sexual harassment against both the First and Second Respondents are dismissed;
2. The Claimant is ordered to pay to the First Respondent's costs assessed at £6,000.00 net.

REASONS

1. In these proceedings the Claimant brings a complaint of sexual harassment. During the course of the hearing an order was made for anonymity in relation to the Claimant and the Second Respondent. There is no application in respect of the First Respondent or the Claimant's husband but to avoid the Claimant being identified we will refer to him as the Claimant's husband. No disrespect is intended by such reference but merely to protect the identity of the Claimant. All references in this decision be to the 'Respondent' shall be to the First Respondent unless otherwise indicated.

2. In coming to our decision we have taken into account the oral evidence of the witnesses, the contents of their statements (we say more on the Claimant's statement below) and the documents in the agreed bundle. The Claimant gave oral

evidence herself and by her husband. Her evidence was translated via a Thai interpreter who joined remotely through the Cloud Video Platform. During the hearing when the Claimant was not giving evidence herself translation was provided by means of a direct phone link. The Respondent gave evidence from Y via a Cantonese Interpreter who was present at the hearing throughout. The Respondent also called the following witnesses: Ms Jada Vong (Manager), Ms Jennifer Wong (General Manager), Mr Courtney James Kimuyu (former Kitchen Assistant, no longer employed by the First Respondent) and Mr Bobby Johnson (Sushi Chef). This decision represents the views of all three members of the Tribunal.

CCTV footage

3. Reference is made in this decision to CCTV footage. The Tribunal has not viewed the whole of the CCTV recordings although it was invited to do so but we felt that it would not have been productive use of our time given that there are several hours of recording but some small relevant excerpts were replayed to us. The full recording was disclosed to the Claimant prior to the hearing. There is no issue that any part of the recordings have not been disclosed or that any footage has been doctored in any way.

Preliminary Issue

3. At an earlier preliminary hearing the Claimant was granted leave to amend her claim to add the present complaint of sexual harassment. Leave to amend was granted subject to any time limitation point being determined at the full hearing. In our view this is not necessary. The original claim form clearly made reference to 'inappropriate touching' which was obviously a reference to a complaint of sexual harassment. Thus no amendment was ever required. The leave to amend was therefore superfluous – what it required was further information which was subsequently provided. The period to which the relevant acts are alleged is 21 May to 24 July 2020. The whole of the sexual harassment complaint is therefore in time.

The Claimant's witness statement

4. Before we deal with the facts and the allegations we feel we should say a word about the Claimant's witness statement. She is reality a litigant in person. She has been represented throughout by her husband who though not legally qualified is an intelligent man who has held a number of senior and responsible roles in society and has a reasonable grasp of procedure. He also represented the Claimant at a previous merits hearing on the 'money claims' that is for anything other than the present claim. He was present at the first Preliminary Hearing before Employment Judge Brewer on 8 December 2020, when case management orders were made. These included an order that the parties prepare full witness statements of all witnesses containing all of the evidence they and their witnesses intended to give at the final hearing. What was therefore expected prior to this hearing was a detailed statement from the Claimant setting out the facts on which she intended to rely. The Claimant's husband has produced a witness statement for himself (although he was never employed by the business and cannot therefore give any first-hand account of what happened) but his witness statement contains the sort of information that one would expect. However, there is no specific witness statement on the allegations from the Claimant herself. What we have is firstly, a witness statement that was relied upon principally for the money claims – which says very little of relevance to

the sexual harassment allegations - and secondly a statement that the Claimant gave to the police when she reported allegations of criminal behaviour. The latter is clearly intended and written for a different purpose (and not even by the Claimant herself) although the Claimant agrees with it as an accurate statement it is nevertheless wholly inadequate. No effort has been made to produce a statement for this hearing or to particularise the information in the brief Claim Form and the further and better particulars.

THE FACTS

5. The Respondent runs a small restaurant in the environs of Nottingham. The Claimant was employed initially as a Kitchen Porter from August 2019 (the exact date is unclear) and then subsequently as a Chef. The latter is probably more of a grand title than is warranted. In reality she was a cook or kitchen assistant along with several others. The Claimant resigned on 14 August 2020 because of alleged sexual harassment at the hands of the Second Respondent. The claim form (ET1) was presented on 15 September 2020 following a period of early conciliation from 31 July 2020 to 17 August 2020. The complaint of unfair dismissal was struck out as the Claimant did not have the two-year qualifying period to bring such a claim. The other claims were dealt with in at a separate hearing in April 2021.

6. The Second Respondent was employed originally as a Chef and then later as Head Chef. The General Manager of the business is Miss Jennifer Wong. The manager of the restaurant where the Claimant was employed is Ms Jada Vong. The business employs a multicultural workforce. The Second Respondent's wife and daughter also work in the kitchen as does the Claimant's daughter.

7. The relevant paragraph from the police witness statement given by the Claimant (when an interpreter was supplied) and in essence a summary of the Claimant's evidence-in-chief, says this:

"I am providing a statement to the police in relation to an issue I have been having for the past two months with the chef at my current place of work ...I had been working as a chef for approximately one year with no previous issues. For the past two months of working I had been experiencing problems with the chef whom I only know as Y. Y and I work closely in the kitchen together. He is Chinese and doesn't speak English. I am from Thailand but I have good English however my English isn't 100%. Due to this we don't communicate verbally much at all. Y appears to be under a lot of pressure and stress and I have noticed he has begun smoking something from a large pipe whilst working at the restaurant. I am not sure what he is smoking but it is some sort of herb. Y often leaves the kitchen to go outside and smoke this herb from his pipe especially when he is stressed and under pressure.

When Y has smoked the herb from the pipe he has started to show a different attitude towards me. Before smoking this herb Y and I never had any issues. Y will wait until he and I are alone in the kitchen before walking past me very closely and manoeuvring himself close to me. The kitchen is big enough for Y and I both to work without physically coming into contact with each other. However on multiple occasions Y will walk past me very closely and use his hands to touch me on areas such as my buttocks. When this first started happening two months ago I ignored it as if this was something he was doing accidentally and didn't think much to it but I have noticed this is happening far too regularly to be accidental. It is not only my buttocks that Y touches as he walks past me but he has also started using his hands to grab and touch my hips and other parts of my body including my shoulders.

On Tuesday 21 July 2020 whilst I was at work that finally made me speak about my concerns. This was during my shift where Y had smoked from his pipe many times throughout the shift and he had been walking past me touching me multiple times once again. On one occasion that he returned from

smoking he seemed very happy. He came into the kitchen laughed out loud and said to me I LOVE YOU. I then left and told my Thai friend Yaya about what just happened.

From 21 July 2020 to 24 July 2020 I continued my shifts and work and Y still continued his behaviour smoking his pipe and touching me when he walked close to me. It was on Friday 24 July 2020 when my husband collected me from work that I finally decided to tell him what happened with Y."

8. On the evening of 24 July 2020 the Claimant's husband sent a text message to Ms Vong in which he set alleged that his wife had been sexually harassed by Y. This was the first time that Ms Vong had become aware of any such allegations, the issue not having been raised by the Claimant herself.

9. Ms Vong agreed to have a meeting with the Claimant and her husband the following day so that the allegations could be properly understood and to start an investigation. Miss Wong was also present. The meeting was conducted in the English language. The Claimant did not ask for an interpreter. The discussion was also audio recorded. We have read the transcript of the discussions which is in the bundle and which both parties accept as an accurate record.

10. At the 25 July meeting Ms Vong asked a number of questions to clarify what had happened and when. The details given were often vague but what the Claimant did say was that harassment had taken place on Tuesday 21 July 2020 when she and the Second Respondent were working together in the kitchen. The Claimant said that Y had been behaving oddly after smoking from his pipe. She believed that the substance was marijuana. Ms Vong was aware for some time that Y smoked from a pipe but never had cause to be suspicious of anything inappropriate done by Y. During the course of the meeting Ms Vong asked one of the staff to go to the kitchen and discreetly check the tobacco tin but nothing untoward was discovered.

11. During the discussions the Claimant's husband wanted Y to be suspended immediately. Ms Vong felt it was premature and unfair to do until she had a better idea of the allegations. She felt that the Claimant had been very vague as to detail and it was difficult to pin her down on dates and times. She also wondered if there was some other reason for the sudden turn of events as both of them had worked seemingly happily for some time without incident. She asked a colleague, Fer, if she had come across anything. Fer said that she could not think of anything other than the fact that there had been an incident on Friday 24 July in the kitchen when the Claimant was upset and left in a hurry. This had arisen after Y had criticised the way in which the Claimant was doing her work and, through Fer (so that the Claimant could understand), had asked X to speed up her work and to undertake her role more efficiently.

12. There was also reference in the discussion to the fact that there is a CCTV camera in the kitchen which is likely to have recorded any incident. Ms Vong decided to view all of the recordings on the relevant dates. She agreed to supply a copy of the recordings to the Claimant and her husband. She also decided to interview all the staff to see if they had witnessed anything. She asked the Claimant and her husband whether they were happy for her daughter to continue working. The Respondent's account is that they were content for her to do so. The Claimant disputes this saying they were unhappy about it but that it was difficult to impose their will. We prefer the Respondent's version that they were content with their daughter continuing to work there.

13. The Claimant had already booked a few days off and it was agreed she would not come into work during the course of the investigation which was to be undertaken by Ms Vong.

14. In the first instance Ms Vong arranged to have two drugs tests carried out which Y readily consented to. The tests were taken fairly quickly after the meeting. One of them was conducted by a retired Chief Inspector known to the business. Both were negative. Ms Vong did not find any evidence of inappropriate touching on the CCTV recordings.

15. Ms Vong interviewed all of the staff members. No written statements were taken but Ms Vong's evidence was that all of them expressed surprised at the allegations not having seen anything inappropriate themselves. All of the staff were aware of Y smoking tobacco which had a distinctive smell though none identified it specifically. Ms Vong spoke to Yaya of whom the Claimant had said that she had mentioned the inappropriate touching. Yaya, who was not called to give evidence, said that X had told her that she (X) believed Y was taking drugs and had also said Y had touched her but she had not seen anything herself. Yaya said she just nodded and listened to what X said and did not respond. She was aware Y smoked a pipe but that was all.

16. Ms Vong concluded that the investigation had not revealed anything inappropriate and texted the Claimant with the outcome that there were no grounds to suspend Y or to take disciplinary action. The Claimant did not lodge any formal grievance. Instead she reported the matter to the police. Y was also interviewed in connection with the allegations of sexual harassment and drug taking. The police ended the investigations without any criminal proceedings.

17. On 14 August the Claimant sent a text message to say that she was not prepared to work with [Y] and her employment would cease. She resigned on that date, which is the effective date of termination.

The allegations

18. The allegations of sexual harassment are set out in the order of Employment Judge Brewer Of 8 December 2020 and are as follows:

18.1 That the Second Respondent walked past the Claimant 'closely';

18.2 That the Second Respondent physically touched the Claimant on areas such as her buttocks, hips and shoulders;

18.3 That the Second Respondent 'flirted' with the Claimant;

18.4 That the Second Respondent on one occasion he said to her: "*I love you*".

THE LAW

19. There is no dispute as to the law. The relevant statutory provisions in this case are sections 26, and 136 of the Equality Act 2010 ("EA 2010")

20. Section 26(1) EA 2010, so far as is material, states:

“(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.”

21. Section 26(2) EA 2010 deals specifically with sexual harassment and states:

“(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).”

22. Section 136 of the 2010 Act deals with the burden of proof in such cases and provides that:

“(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.”

THE ISSUES

23. The issues in this case are as follows:

23.1 Did the Second Respondent at various times engage in unwanted conduct as follows: walking past the Claimant closely, touching the Claimant on areas such as her buttocks, hips and shoulders, flirting with her and stating: “*I love you*”?

23.2 Was the conduct in relation to the Claimant’s protected characteristic of her sex or gender?

CONCLUSIONS

24. Both parties are agreed that the determination of this case depends on our findings of facts there being no dispute as to the law or the applicable statutory provisions.

25. In coming to our decision we have considered the burden of proof provisions under section 136 EA 2010. In particular we note that it is for the Claimant to prove a prima facie case, or put another way it is for her to prove facts from which an inference of harassment may be drawn and if she does the burden falls on the Respondent to prove there was no harassment or discrimination whatsoever. It is accepted realistically that if the alleged acts are found to have occurred then they would be unwanted and would create the relevant prohibited effect under section 26(1)(b) EA 2010.

26. The First Respondent also accepts that if the acts occurred then the principle of vicarious liability shall apply and it shall be liable for all the acts of the Second

Respondent. It does not raise any defence that it took all reasonable steps to prevent harassment.

27. We will begin with the third allegation in that the Second Respondent engaged in 'flirting' with the Claimant.

28. It is somewhat remarkable that the word 'flirting' has never been mentioned during the entirety of this hearing. There are no facts either of what might be considered or fairly described as flirting in the either the Claimant's evidence. Nothing was put to the Second Respondent during cross examination could amount to an allegation of flirting as opposed to touching. Flirting is not referred to in the closing submissions. We therefore conclude that either this allegation is not pursued or that it has no substance. It is therefore dismissed

29. The next allegation of sexual harassment is that of the Second Respondent walking past the Claimant 'closely'. It is accepted that walking closely occurred, but it is denied there was any sexual intent.

30. We viewed some of the CCTV footage during the hearing and submissions. We noticed that due to the size and layout of the kitchen, and contrary to what the Claimant says about there being plenty of room, there is in fact a large working table across the kitchen which leaves only a narrow space to pass from one side of the kitchen to the next. The table traverses the middle or close to the middle of the room so passing through it is likely to be a frequent occurrence. The Claimant is indeed seen on the short video clips that has been shown to the tribunal to be walking closely past others and on one occasion to touch them to ask them to give way.

31. Despite the several hours of CCTV evidence provided the Claimant has failed to identify a single instance of the Second Respondent walking unnecessarily or seen to be making any contact with the Claimant. The Second Respondent accepts that there might be accidental touching when walking past but we have seen nothing which might be considered as walking closely without reason.

32. Again, this allegation has not been seriously pursued nor has it been the subject of any cross examination. There is no real discussion of it in the Claimant's witness statements nor is it covered in her husband's submissions. There is nothing in any of the evidence to suggest that there was any close walking for non-work-related purposes. This allegation is therefore also dismissed.

33. We then turn to the allegation that the Second Respondent said 'I love you' to the Claimant. The Claimant's evidence is that this was an isolated comment made by Y to her on Tuesday 21 July 2020.

34. There are in fact three versions of this particular incident from the Claimant. The first version was in the Claimant's oral evidence at this hearing when she said that after the Second Respondent said these words she simply froze said nothing but merely 'meditated'.

35. The second version in the further and better particulars is when these words were said the Claimant was so angry and upset that she felt she had to leave the kitchen.

36. The third version appears in the notes of the meeting on 25 July where (at page 188 of the bundle) the Claimant says this:

'Yeah I think he stand the sink he just says I love you. I say what! I say what! It is not right, make me feel on and off he says I love you. A few days ago.'

37. On the day in question Mr Kimuyu was also working in the kitchen. It is clear from the rota that he was scheduled to work that day. Mr Kimuyu gave sworn evidence on this point. He explained that he would often ask Y if he wanted a cup of coffee. When he did the Second Respondent would say sometimes 'I love you' as a thank you gesture. It was part of their banter. He says that the words were used but they were directed at him not the Claimant.

38. Mr Kimuyu struck us as an honest and reliable witness not least because he is no longer employed by the First Respondent and has no axe to grind. In contrast the Claimant brings no witness in support of the version. She says that she told someone called Yaya but has not called that person to give evidence nor has she made any effort to get Yaya to give evidence. What interviewed by Ms Vong Yaya said nothing about Y telling X that he loved her or that X alleged Y had said this to him.

39. We have also looked at the context and the surrounding circumstances in which the allegation is made. It is in a workplace where Y's wife and daughter also work. The Claimant says that Y said this to her across the kitchen when he was at least a couple of feet away. She says nothing about who else was there. In those circumstances it seems to us highly unlikely that in a work environment where the Second Respondent's wife and daughter could also potentially hear what was said that Y would have said these words across the kitchen floor. If he was going to say them it is much more likely that he would so when the two were working in close proximity or perhaps alone. Saying it across the kitchen floor is more consistent with the explanation given by Mr Kimuyu. It is quite possible, and indeed likely, that X thought Y was saying this to her. Her evidence on her reaction is inconsistent and contradictory.

40. On a balance of probabilities we conclude that the Second Respondent's version is to be preferred to that of the Claimant for the following reasons:

40.1 The Claimant's account has been inconsistent;

40.2 The Second Respondent's version is supported by an independent witness;

40.3 There is no independent evidence in support of the Claimant. She has not called the one witness to whom she allegedly mentioned the incident and she has failed to identify a point when the comment was made.

40.3 The Respondent's explanation seems inherently plausible;

41. We now turn to the central allegations in this case which are of inappropriate touching.

42. In a case where the versions of the parties are diametrically opposed it is necessary to consider all of the surrounding circumstances. That includes examining

any independent evidence that *does* exist and what inferences can be drawn from it. It also involves a consideration of the relative credibility of the parties.

43. The only independent evidence available is the CCTV evidence. The Claimant has failed to identify any footage which suggests inappropriate touching or anything which supports her version of events.

44. The Claimant's husband said that there are blind spots which the camera does not pick up. That is not in fact the case. There are no blind spots other than close to the wall and it is not the Claimant's case that any of the incidents happened near a wall. What emerged as the Claimant's definition of 'blind spots' was that because the touching happened when the Second Respondent was behind her it would not be seen. That is not a case of blind spots.

45. We found serious inconsistencies in the Claimant's evidence:

45.1 The Claimant is inconsistent as to how long the alleged touching had been going on for. In the police statement she says that the conduct had been ongoing for a 'couple of months'. At the 25 July meeting she said: 'I think one month'.

45.2 In the further and better particulars (which the Claimant confirmed in her evidence to be true) she says that the sexual harassment took place 'on several occasions and often on a daily basis for two months'. Leaving aside the inherent contradiction that it could not be on several occasions and also on a daily basis, it is inconsistent with the Claimant's statement both at the 25 July meeting and also with the statement given to the police.

45.3 There is an inconsistency between the version of events in the further and better particulars and the 25 July meeting notes. On the latter occasion the Claimant says that the incidents occurred on '*Tuesday and Thursday*' having acknowledged that she was not working on Wednesday. The further and better particulars include Wednesday as one of the days when touching did occur. The rota makes it quite clear that the Claimant was not working on Wednesday 22 July.

45.4 The Claimant does not make any allegation of inappropriate touching on Friday at the 25 July meeting but in her oral evidence to this tribunal she explained that she had been touched twice on Friday 24 July. She said that this effectively amounted to 'the last straw' causing her to decide that she was not going to return to work.

45.5 The Claimant has also been inconsistent in relation to the circumstances as to *when* the touching occurred. At one point she alleges that the touching occurred whenever she and the Second Respondent were working alone together but at a different point in her evidence she said that it was whenever the two were booked to work on the same shifts.

45.6 A further inconsistency arises in relation to the account that the Claimant gives to the police in her statement about *where* she was touched. In the police statement she says that the touching consisted of Y using 'both his hands to grab her and touch her hips'. At the 25 July meeting the description of the touching is that 'when [Y] walks past her his hand swipes her bottom'. The allegations of being touched on her head, her shoulders and on her back (as set out in the list of

allegations) are not repeated in either the police witness statement or at the 25 July meeting.

46. The Claimant alleges that the shifts were somehow manipulated by the Second Respondent in order to give himself the opportunity to harass her so that they were alone together but there is no evidence in support of that contention. We are satisfied that the staff rotas were prepared by the Managers and the Second Respondent had no control over them, which would be what one would expect in a relationship between managers and staff.

47. The Claimant says that the Second Respondent knew which areas the CCTV cameras covered so he was able to ensure that he only conducted his acts in areas not covered by the cameras. We find that until this incident the Second Respondent (whilst obviously aware of the existence of a camera) did not know its range or the areas it covered. There is no reason why he should.

48. Throughout her evidence the Claimant has been extremely vague as to the details of the allegations. She gives no specific dates, she does not say what she was doing at any particular point when any of the alleged touching happened, what the time of day was or anything which would put flesh on the bare bones of the allegations.

49. We contrast that with the consistency of Y who accepts that there was touching but only for work purposes and sometimes accidental brushing happened in narrow spaces in a busy kitchen. He has consistently denied the allegations. He has given full accounts both in his witness statement as well as in his oral evidence.

50. The Claimant's explanation as to the inconsistencies is that she was not feeling very well at the time of the 25 July meeting and that there were also language difficulties given that there was no interpreter provided.

51. We do not find the Claimant's explanation for the inconsistencies persuasive or convincing. There is nothing in any of the documentation prior to this hearing which indicates that the Claimant was not well on 25 July. If she was, she could undoubtedly have asked to postpone the meeting. Her husband was also present so he could have pointed out that his wife was not well.

52. So far as the language issue is concerned the Claimant told the police her English was "good" though "not 100%". It is true there was no interpreter on 25 July but she did not ask for one and it is clear from the answers given that she has an adequate understanding of what the discussions. She clarifies matters where appropriate. She corrects them where wrong and she confirms her answers where they have been properly understood. There is nothing to suggest that language formed a barrier. Even if we were to assume that something has been lost in translation that would not account for the inconsistencies between the further and better particulars and the police witness statement.

53. In all of the circumstances we conclude that the alleged acts did not occur and that the complaint of sexual harassment is unfounded.

54. We also add this as a footnote because both the Claimant and her husband have spent a considerable amount of time on the issue at this hearing and it is right that we deal with it. It is the Claimant's belief is that the reason why Y behaved as he

did was because he was smoking an illegal substance and that until he started to do so his behaviour was acceptable. She says that added levels of stress caused him to smoke more of this substance and caused changes in Y's behaviour.

55. Y's explanation is that he smokes a particular type of tobacco which is imported from China and this has a different smell to the usual tobacco and therefore noticeable, It is however perfectly legal and has no adverse effect on his behaviour. He has smoked this type of tobacco for some time and not just in the days leading to the allegations.

56. Firstly, the fact that Y has been smoking this tobacco for some time suggest that any change in his pattern of behaviour is unlikely. Secondly, Y was subjected to two unannounced drugs tests both of which were negative. Thirdly, if there had been any illegal activity it is unlikely the police would not have taken any action. It is quite possible they may have decided that on the sexual harassment allegations it was one person's word against another but that is unlikely to be their view on any inappropriate drug activity which could be independently verified.

57. We conclude there is no basis in the Claimant's unfounded and scurrilous accusations of illegal drug use. The Second Respondent has been vindicated by two independent drug tests and effectively by the Police by them not taking any action in criminal proceedings. There is absolutely no independent evidence of drug taking. She produces a photograph of a black substance in a dish which frankly could well be the tobacco but is not proof of anything. The Claimant believes herself to be an expert on the subject based on a day or so of Teacher Training about drugs awareness in her native Thailand. Quite apart from the fact that she is not actually an expert, despite what she may think, the two tests carried out by independent individuals are strong evidence against her views. She contends that Y gave up smoking the substance for three days when he knew that a drugs test was imminent so no trace would be left. Again, the Claimant simply makes unsupported assumptions without any factual basis. The documentary evidence shows the tests were undertaken without prior notice or warning.

58. Following the announcement of our decision in open Tribunal the Respondent made an application for costs.

The costs issue

59. Rule 76 of the Employment Tribunal Rule of Procedure 2013 (as amended), so far as is relevant, states:

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success;

60. The application is based on the Claimant having acted "unreasonably" and "vexatiously". Miss Scott also relies on the manner in which the proceedings have been conducted under Rule 76(1)(a), particularly in relation to the wholly unfounded

allegations of drug taking. In relation to the application generally she refers to the glaring internal inconsistencies in the Claimant's evidence, the offer by the Respondent not to pursue costs if the claim was withdrawn as suggested in a without prejudice letter of 28 January 2022 and the fact that some of the reasons given for the dismissal of the claim by the Tribunal are reflected in the letter of 28 January. Miss Scott recognises that to establish the vexatious threshold is a high evidential hurdle.

61. In determining whether a costs order should be made the Tribunal must consider the matter in two stages: the first is whether the threshold under Rule 76 is met. If so, at the second stage the Tribunal must decide whether to actually exercise the discretion to make a costs order.

62. In coming to our decision we note that the Claimant and her husband had the opportunity to view all the relevant CCTV recordings, none of which supported their case. Despite having viewed those recordings they persisted in bringing and continuing these proceedings.

63. The Claimant made allegations of flirting which have either not been pursued or even argued.

64. The inconsistencies between the Claimant's various accounts must have been obvious to her once she had seen the Respondent's statements and assessed the evidence.

65. Both the Claimant and her husband have pursued wholly unreasonable and unsustainable arguments in relation to matters such as the blind spot on the CCTV and allegations of drug taking.

66. There has been no attempt at an objective assessment of the evidence but instead the Claimant has doggedly pursued her allegations even when the independent evidence was against her. It ought to have been reasonably apparent that the inconsistencies were stark and obvious. At no point has the Claimant or her husband stepped back to take an overall view or seek independent advice as to whether there was any merit in the claim. The First Respondent runs a relatively small undertaking but this matter was of critical importance to their reputation and thus they have had no option but to engage lawyers. For the Second Respondent it had the potential to be career-ending.

67. We are satisfied that the threshold of Rule 76(1) is met as to unreasonableness in the bringing of the proceedings. The claim was one which had no reasonable prospect of success from the outset.

68. The Claimant has also acted unreasonably in the manner in which proceedings have been conducted both in relation to pursuing unfounded allegations of drug taking and in failing to set out her claim properly by exchanging a proper and detailed witness statement.

69. We have gone on to consider whether the discretion to order costs should be exercised in this case. We recognise that the tribunals are generally a cost-free forum (see: *Gee v Shell* [2003] IRLR 82). We also recognise that in sexual harassment cases a tribunal should be reluctant to make an order for costs particularly where the Claimant is a Litigant in Person.

70. This is however a case where the Claimant has failed, even at the hearing to properly particularise her allegations, where the CCTV evidence is against her and where there are serious inconsistencies in her evidence. She has failed to make any effort to call the one witness who could have corroborated her allegations. She has failed to offer any evidence in relation to some of the allegation. She failed to conscientiously consider the reasonable offer of a withdrawal without costs or was wrong to press on. In all of the circumstances we consider it appropriate to exercise our discretion to make an order for costs in this case.

71. Turning to quantum, the total amount of the costs is substantial (around £40,000 we are told) but the Respondent seeks only a proportion of them. It has submitted a costs schedule seeking the costs incurred after the offer to withdraw of 28 January 2022. The costs sought are in the region of £12,000.00.

72. We heard evidence in relation to the Claimant's means. She does not have any savings and is currently undertaking work through recruitment agencies. She is not in receipt of any State Benefits. She lives in rented accommodation with her husband. She was highly evasive as to how much she earns in her present employment and we were unable to ascertain any figure at all. She does however earn sufficient to make contributions to her dependants abroad and also make payments to a religious charity. Her husband says that half of her income goes to charity. She certainly has the capacity to earn going forward.

73. Having regard to her means and all of the circumstances, including her present means as well as her future earning capacity, we consider that a reasonable sum in respect of the contribution towards Respondent's costs should be £6000.00.

Employment Judge Ahmed

Date: 14 March 2022

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