EMPLOYMENT TRIBUNALS

Claimant: E Cockayne

Respondent: Obre Ltd

Heard at: London Central **On:** 12, 13 & 14 July 2022

Before: Employment Judge H Grewal
Mr T Ashby and Ms S Went

Representation

Claimant: Mr F Clarke, United Voices of the World

Respondent: Mr O Alonge, Office Manager

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unauthorised deductions from wages is well-founded and the Respondent is to pay the Claimant the sum of £123.

2 The Tribunal does not have jurisdiction to consider complaints of sex discrimination/harassment about any acts that occurred before 13 November 2020.

3 The complaints of direct sex discrimination and sexual harassment about acts that occurred after on or after 13 November 2020 are not well-founded;

REASONS

1 In a claim form presented on 22 April 2021 the Claimant complained of unfair dismissal, sex discrimination, unauthorised deductions from wages and failure to provide written employment particulars. In an email dated 19 May 2021 the Claimant's representative confirmed that she was not pursuing a complaint of unfair dismissal under the Employment Rights Act 1996, but was complaining that her dismissal was an act of sex discrimination under the Equality Act 2010. The Claimant submitted amended particulars of claim on 27 July 2021 in which that was made clear and the Claimant changed the basis of her indirect sex discrimination claim. Early Conciliation ("EC") was commenced on 12 February 2021 and the EC certificate was granted on 26 March 2021. At the start of the hearing the Claimant said that she was not pursuing her complaint of failure to give written particulars of employment. We also queried whether the Claimant's complaint of indirect sex discrimination on the basis that the Respondent adopted a practice of making jokes about women in the office was properly characterised as a complaint of indirect sex discrimination. It appeared to be us to be a complaint of direct sex discrimination, which the Claimant had also made. It was pursued solely as a complaint of direct sex discrimination.

The Issues

2 It was agreed at the outset of the hearing that the issues that we had to determine were as follows:

Direct sex discrimination

2.1 Whether the Respondent did any of the following acts:

(a) Mr Smith asked the Claimant at her interview on 2 November 2020 whether she had any children;
(b) Mr Smith inappropriately and/or sexually touched the claimant on 4 and/or 20 November 2020;
(c) Mr Smith made inappropriate jokes on the basis of gender from 5 to 20 November 2020;
(d) Mr Smith harassed and bullied the Claimant between 4 and 25 November 2020;
(e) Between 4 and 25 November 2020 Mr Smith unreasonably caused the Claimant to feel that her performance was poor compared to male colleagues.

2.2 If it did, whether by doing the act it:

(a) Subjected her to a detriment; and
(b) Because of sex treated her less favourably than it treated or would have treated others.

2.3 Whether the Claimant was constructively dismissed and the dismissal was an act of direct sex discrimination.

Harassment

2.4 Whether Mr Smith behaved in the way described in paragraphs 3 – 13 of the Particulars of claim.

2.5 If he did, whether the conduct amounted to harassment related to sex as defined in section 26 of the Equality Act 2010.

Jurisdiction

2.6 Whether the Tribunal has jurisdiction to determine complaints of direct sex discrimination or sex-related harassment in respect of any acts that occurred before 13 November 2020.

Unauthorised deductions from wages

2.7 What wages were properly payable to the Claimant on the termination of her employment;

2.8 Whether she was paid less than what was properly payable to her and, if so, bt how much.

The Law

3 Section 13(1) of the Equality Act 2010 ("EA 2010") provides,

> "*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."*

Section 23(1) EA 2010 provides,

> "*On a comparison of cases for the purpose of section 13 … there must be no material difference between the circumstances relating to each case."*

4 Section 26 EA 2010 provides,

> "*(1) A person (A) harasses another (B) if –*
>
> *(a) A engages in unwanted conduct related to* [sex], *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.*
>
> *…*
>
> *(4) In deciding whether the conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect."*

5 Section 136(2) and (3) EA 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the Equality Act, the tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision.

6 Section 39(2) EA 2010 provides,

> "*An employer (A) must not discriminate against an employee of A's (B) –*
> *…*
> (c) *By dismissing B;*
> (d) *By subjecting B to any other detriment."*

Section 39(7) EA 2010 provides,

> "*In subsections (2)(c) and … the reference to dismissing B includes a reference to the termination of B's employment -*
> *…*
> *(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A;'s conduct, to terminate the contract without notice."*

7 Section 123 EA 2010 provides that subject to section 140B (which provides for extension of time limits in order to facilitate Early Conciliation) proceedings on a complaint to a Tribunal may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)).

8 Section 13 of the Employment Rights Act 1996 ("ERA 1996") provides,

> "*(1) An employer shall not make a deduction from wages of a worker employer by him unless –*
> *(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.*
> *…*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

The Evidence

9 The Claimant and Adam Nash (former employee of the Respondent) gave evidence in support of the claim. Donald Smith (director and CEO), Jessica Lingard (Maintenance Manager) and Buddy Jackson (Bid Manager, British Builders) gave evidence for the Respondent. We ruled that evidence of certain What's App messages between the team in which the Claimant worked and between Ms Lingard and a former employee of the Respondent was admissible. Having considered all the oral and documentary evidence the Tribunal made the following findings of fact.

Findings of fact

10 The Respondent is in the business of property maintenance. At the relevant time it had twelve employees. It is part of a group of companies run by Donald Smith. Mr Smith is the CEO and a director of the Respondent. The Respondent has its office in Sheffield on the same floor as another company in the Group – British Builders Ltd. The Respondent's office was an open plan office. There was one row of desks along one wall, which was occupied by maintenance staff. There were another two rows parallel to that, facing each other, which were occupied by the Sales team. Mr Smith's desk was in the Respondent's office but he divided his working day between that office and the British Builders' office.

11 Mr Smith was directly involved in running the business and managing the staff. He was regarded by many of the employees as a difficult manager. He was disorganised, demanding, often got angry with and shouted at employees, made fun of them or jokes that were not always appreciated and sent the employees work-related messages outside working hours. Other than the Claimant's evidence, there was no evidence of him physically harassing female employees. There was quite a high turnover of junior staff.

12 In October 2020 the Respondent advertised for a Maintenance Co-Ordinator and the Claimant applied for the role and enclosed her CV. The Claimant was 24 years old. According to her CV the only experience that she had of working in property maintenance was between June and October 2015 when she had been a Temporary Maintenance Advisor providing cover for someone on maternity leave. Thereafter she had been a sole trader in a ceramics business and from August 2017 until March 2020 had worked on a freelance basis as a "Performer and Hostess" (dancer). That work had dried up during the lockdown that followed as a result of the Coronavirus pandemic.

13 Mr Smith interviewed the Claimant on 2 November 2020 at 2.30 p.m. in the Respondent's open plan office. In the interview the Claimant was asked about previous experience in similar roles and she said that she had worked for various property maintenance companies and letting agencies and that she had two references form them. She said that she had been made redundant in her last role. That was inconsistent with her CV, which presumably Mr Smith had seen. However, in light of the low wages that the Respondent paid it was probably quite difficult to find employees with the right experience. In the course of the interview Mr Smith asked the Claimant whether she had any children and she replied that she did not. Mr Smith's reaction to that was to say something like, "*So you will be able to fully commit to the role."* Mr Smith offered the Claimant the job and told her that she would be paid £8.20 per hour. and would be expected to work 7.5 hours a day and would have a 30 minute lunch break. The Claimant accepted the job. She was told that she would be supervised by Jessica Lingard.

14 The Claimant started working on 3 November 2020 and she and Mr Smith signed a contract of employment on that date. The contract provided that her normal hours of work were 37.5 hours per week with a 30 minute unpaid lunch break to be worked from Monday to Friday from 9 a.m. to 5 p.m. Her wage was £8.20 per hour. In respect of sick pay it provides as follows,

> "*If you are unable to work due to illness or injury, you will receive Statutory Sick Pay (SSP), providing you qualify for such payment. Upon completion of 12 months' service, you will be eligible for one weeks' of Company sick pay in any rolling 12 months' period."*

The Employee Handbook made it clear that the Respondent would not pay any sick pay (including SSP) for the first three days of any sickness absence.

15 The Claimant was provided with very limited training. On 4 November 2020 Mr Smith sat next to the Claimant at her desk and quickly went through the eWorks system with her. As he did the training on her computer he was physically very close to her but he did not touch her inappropriately. We found the evidence of all the witnesses in this case to be lacking credibility on different issues for different reasons. Mr Smith rather misguidedly believed that the best way to defend the allegations of physical harassment was to deny every having been anywhere near the Claimant. His evidence was that he had virtually no contact with the Claimant in person and that he communicated with her by telephone and that he was not involved in managing or training her and that any training was done remotely. We did not find that evidence to be credible. We had before us WhatsApp messages between Mr Smith and the Claimant, but these were all sent before the start of or after the end of the working day. There were no such messages during the working day which rather suggested that communication during the working day was done in person in the office.

16 The Claimant's evidence about what happened on 4 November was not credible for a number of reasons. The Claimant was a trade union member during her employment with the Respondent and after it terminated on 25 November 2020. Nether she nor anyone else on her behalf said anything about inappropriate physical contact by Mr Smith until she presented her claim to the Tribunal on 21 April 2021. In her particulars of claim she said that on 4 November during the training Mr Smith had sat to the right hand side of the Claimant and "*kept leaning across her to use the mouse, thereby brushing her chest with his left arm."* That account was repeated in her amended particulars of claim dated 27 July 21. In her witness statement she said that Mr Smith sat to the left of her and that when he leaned across her to use the mouse, he brushed his arm over her chest. In her oral evidence to the Tribunal on 12 July 2022 she amended her witness statement to say that he was sitting to her right and that he had leaned across her to use the keyboard and not the mouse. We also had before us WhatsApp chats that took place between a group of the Respondent's employees (which included the Claimant, Mr Nash and Ms Lingard) from about 12 November 2020 onwards. In those chats the employees were critical of Mr Smith and aired their views about how he treated them. The Claimant did not say anything in those chats about inappropriate physical contact by Mr Smith. Her explanation for that was that she is a very private person and she was also worried that it might back to him and she did not want to antagonize him. That is not consistent with the Claimant saying in the Group chat that she is going to put in a claim against Mr Smith for various things and will include them all not being paid properly in her claim. Nor is it consistent with Mr Nash's evidence that the Claimant told him and others over lunch and cigarette breaks that Mr Smith had touched her leg. Mr Nash left the Respondent's employment on 13 November. The Claimant has not alleged that Mr Smith touched her on the leg before that. Finally the Claimant's complaints about physical sexual harassment are not consistent with what she said in her resignation (see paragraph 27 below).

17 On or around 5 November 2020 Mr Smith made a comment about women having small brains (he thought it was a funny joke). He also said that he would not be hiring any more blonde girls. The latter was said in reference to the Claimant although we did not have any evidence of what led to it. Mr Smith also said that he surprised that the Claimant did not have any children as "*all norther girls have kids".*

18 Mr Smith would often send his employees messages relating to work after 7 p.m. He sent the Claimant such messages. For example, he sent her a message on 9 November at 7.30 p.m. saying,

> "*remind me tomorrow to train you on carrying out AYTHORIZATIONS after every job. It's important."*

19 On 11 November Mr Smith shouted at the Claimant because he thought that she had given a contractor the name of the agency although he had specifically told her not to. The Claimant explained that she had not done that.

20 On 12 November Mr Smith called the Claimant and an employee called Danny into a meeting and told them about another employee who had been disciplined and warned them that the same would happen to them if they did not "*take ownership and responsibility "* over their jobs. Later that evening the Claimant asked other in the WhatsApp group chat whether anyone else got calls and texts from "*Sir Smith"* until 10 p.m. at night. One of her colleagues told her to ignore it and said "*He tries it with everyone"*. Another one responded, "*Tell him fuck off, don't reply cos he then takes it for granted."*

21 On 13 November at 8.10 a.m. the Claimant sent Mr Smith a text message. She said that she was logged out of EWorks and asked him whether he would be able to show her how to set up a new password that morning. Mr Smith did not respond to that but at 8.17 sent her the following message,

> "*I'm pissed off with you. I asked you to call Michael yesterday and you didn't."*

The Claimant responded that she had called him when Mr Smith had asked to at 12 and had left a voice mail and a text message for him.

22 At the start of the working day on 13 November (Friday) Mr Smith called Adam Nash into a separate office. He told him that he was not meeting expectations and dismissed him. Mr Nash had been in his role for about seven weeks. Mr Nash challenged what Mr Smith said about his performance and there was a heated exchange between them. Mr Smith told him that he would not be allowed back in the office and that if he tried it, he would throw him down the stairs. Mr Smith then went back to the open plan office and shouted to Jessica Lingard that he had planned to fire the Claimant that day and had taken all the jobs off her planner. However, he had decided not to fire her and he asked Ms Lingard to move some jobs back into her planner.

23 On 19 November Mr Smith sent the Claimant a text message at 7.25 a.m. in which he said,

> "*Evie, I found too many errors on your jobs yesterday. I need to notify you of then and I want you to make notes. Please try get here before 9am as early as possible. That I can't let you continue like this."* [sic]

The Claimant responded,

> "*OK, yes please let me know. I always aim to get in for 20 to 9."*

Mr Smith's reply to that was,

> "*Okay. I will give you training (again) and I want you to make notes. I hope this time you will remember please try get her as early as possible"* [sic]

24 We did not accept Mr Smith's evidence that those messages related to training which he intended to provide remotely and which was provided remotely. The intention was to provide the training in the office when the Claimant arrived there and that is what happened. As we said earlier, Mr Smith misguidedly believed that the best defence to the allegations was to pretend that he had not been in the office with the Claimant. That having been said, we did not find the Claimant's account of there having been inappropriate physical contact on that day credible either. In her particulars of claim, when the complaint was first made, it said that on 20 November 2021 Mr Smith had touched the Claimant's leg and had then put his hand over hers when she had moved the computer mouse. In its response of 3 June 2021 the Respondent said that what the Claimant had alleged was impossible as she had not been at work on 20 December and it provided WhatsApp messages and a statement from Ms Lingard to confirm that. Notwithstanding that the Claimant maintained at the preliminary hearing and in her amended particulars of claim that the incident had occurred on 20 December 2021. It was only in her witness statement that she said for the first time that it had happened don 19 November 2021. Many of the other reasons which we gave for questioning the Claimant's credibility in respect of the alleged incident on 4 November apply equally in respect of this issue. Having carefully considered all the evidence, we found that Ms Smith provided the Claimant with some training on 19 November at her desk and using her computer, and that in order to do so he sat next to her and was physically very close to her but that he did not touch her leg or put his hand over her while she moved the mouse.

25 On 20 November (Friday) the Claimant sent Mr Smith a message at 5.12 a.m. that she had been up all night with a "*water infection"* and would not be attending work that day. He responded "*ok".* The Claimant did not attend work on 20 November.

26 The following week, commencing on 23 November, Mr Smith was in London for a surgical operation. On 23 November at 7.51 pm he sent the Claimant a text message saying, "*You didn't do bad today"* with a thumbs up emoji. He explained that he referring to a job in Hull and said "*well done for taking information from contractor over the phone. It helps me to make a quote."* The Claimant replied "*Good to hear."*

27 On 25 November 2021 at 6.35 p.m. the Claimant sent Mr Smith an email resigning form her post. In her email she said,

> "*Dear Donald,*

Please accept this email as a formal notification that I am resigning from my position of Maintenance Co-Ordinator from Obre. As I am still within my probation period, I will not be returning to Obre for any period of notice.
I want to thank you for giving me the opportunity to work for your company, the experiences I have had have allowed me to develop a tremendous amount of professional growth.
I wish you a speedy recovery and wish you ant the entire team at Obre continued success.
Best wishes,
Evie Cockayne."

28 Mr Smith asked the Claimant what had happened to make her resign and said that it was a shame as she had been trained on the Respondent's systems and there were jobs on her planner for the following day. He said that she was required to give one month's notice but that he would settle for two days' notice. The Claimant responded that she was sorry if it put him in a difficult position but she could not because she had been offered "*a very desirable role"* starting the following week.

29 In the WhatsApp group the Claimant said that she had decided to accept a role that had been offered to her by another company and had, therefore, notified Donald that she would not be returning to Obre. At that time all the employees were unhappy because there had been issues with processing their pay and they had not been paid what they were owed. The Claimant told that she was part of a union (United Voices of the World) and that she would be putting in a claim for various things. She said that she would include them all not being paid properly in her claim against Donald.

30 The Claimant was paid £814.42 when her employment terminated and a further £46.58 later. That comes to a total of £861.

Conclusions

Unauthorised deductions from wages

31 The Claimant was entitled to be paid £61.50 gross (before any deductions) – 7.5 hours x £8.20. The Claimant was not entitled to any sick pay for the first three days of any sickness absence and was only entitled to Statutory Sick Pay after that. Hence, the Claimant was not entitled to any pay for 20 November when she was absent sick. The Claimant worked for 16 days (3-6, 9-13, 16-19 and 23-25 November). She should have been paid £984 gross. She was paid £861. She has been paid £123 less than is properly payable to her.

Direct sex discrimination/harassment

32 We have not found that Mr Smith inappropriately and/or sexually touched the Claimant on either 4 or 20 November. We have found that he asked the Claimant whether she had children on 2 November and that on or around 5 November he made an inappropriate joke about women having small brains and said that he would not be hiring any more blonde girls and a comment all northern girls having children.

33 We have found that Mr Smith shouted at both male and female employees, that he criticised the performance of both male and female employees and that he contacted both male and female employees outside working hours in relation to work.

He did not single out women, or the Claimant, for that treatment. He shouted at the Claimant, criticised her performance and contacted her on work issues outside working hours, but he did not do that because she was a woman. He treated Danny and Adam Nash in the same way. Hence, that treatment of the Claimant did not amount to acts of direct sex discrimination or sex-related harassment.

34 The Claimant's evidence was that she resigned in response to Mr Smith's bullying, harassment and inappropriate touching. We have not found there to have been any inappropriate touching and, if there, was bullying and harassment, in respect of the matters listed at paragraph 33 (above) it was not because of or related to gender. It was not the Claimant's case that she resigned solely because of the comments made by Mr Smith of 2 and 5 November 2021. The Claimant did not resign on 25 November because of the comments made by Mr Smith on 2 and 5 November. The termination of the Claimant's employment was not an act of direct sex discrimination.

Jurisdiction

35 We considered whether we had jurisdiction to consider the complaints about what Mr Smith said on 2 and around 5 November 2020. Those claims were not presented in time. The Claimant was a member of a trade union while she worked for the Respondent and after her employment ended She had access to advice on all matters, including time limits. The Claimant had already decided on 25 November that she would bring a claim. There was no medical evidence that the Claimant was not well enough to present a claim after her employment terminated. The Claimant started a new job on 1 December 2020 and worked in that role until 31 March 2021. There was no good reason for the Claimant not contacting ACAS before 12 February 2021 and not stating proceedings earlier. We did not consider it just and equitable in all the circumstances of this case to consider the claims that had not been presented in time.

36 In case we are wrong in that conclusion, we set out briefly what we would have concluded had we considered them. We would not have concluded that the question about having children on 2 November or the comment about Northern girls having children amounted to acts of direct sex discrimination or sex-related harassment. They did not amount to a "detriment" and did not have the proscribed effect set out in section 26 of the Equality Act 2010. The comments about women having small brains and not hiring any more blondes could have amounted to an act of direct sex discrimination or sex-related harassment.

Employment Judge – Grewal

Date: 22/08/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/08/2022

FOR THE TRIBUNAL OFFICE