



EMPLOYMENT TRIBUNALS

Heard at: London South (by video) **On:** 15 May 2023

Claimant: Miss M Saint-Andre

Respondent: Pickle and Jam Limited, trading as Lupo Bros (in creditors' voluntary liquidation)

Before: Employment Judge Ramsden

Representation:

Claimant: In Person

Respondent: Did not attend

JUDGMENT

1. The Claimant's claim of unlawful harassment related to sex and unlawful harassment of a sexual nature is made out. The Respondent is ordered to pay the sum of £5,402.19 to the Claimant by way of remedy for that harassment for injury to feelings.
2. The Claimant's claims for redundancy payment and unlawful deduction from wages are dismissed upon withdrawal.

REASONS

3. These written reasons are provided following an oral hearing on 15 May 2023, attended by the Claimant but not attended by or on behalf of the Respondent.

Background

4. The Claimant was employed by the Respondent as a waitress from 15 March to 22 May 2023. The Claimant made complaints against the Respondent on 13 June 2022:
 - a) of discrimination on the grounds of her sex;
 - b) for a redundancy payment; and
 - c) for other payments. The free text boxes in her claim form suggested that this was a claim for unpaid wages.

5. The Claimant's discrimination claim concerns an incident that occurred during a shift she worked on 15 May 2023, involving the Respondent's General Manager. The Claimant was instructed by the General Manager to take some drinks to one of the tables in the restaurant, with the General Manager noting that he would follow behind her with some water. The Claimant didn't quite hear what he had said, and so she asked something like "You're going to follow behind me?" The General Manager replied with something like "I will follow behind you like a rapist." The Claimant left her employment with the Respondent a week later.
6. There was, prior to the hearing, some confusion as to the correct name of the Respondent. The Claimant identified Mr James Drago-Ferrante on the claim form as the person against whom she was claiming, although her contract of employment was later provided to the Tribunal by Mr Drago-Ferrante, confirming that her employer was the Respondent. The Claimant's claim form was re-served, correctly on the Respondent, and the Claimant took no issue with that.
7. Before the deadline for responding to the re-served claim form had passed, the Tribunal received a letter from Sale Smith & Co. Ltd., for and on behalf of the Respondent, stating that the Respondent was in creditors' voluntary liquidation, with Sale Smith & Co. Ltd. acting as liquidator. The letter noted that, as the Liquidator had no involvement with any of the Respondent's affairs prior to the commencement of liquidation proceedings, it would make no submissions in relation to the matter, nor would it attend the hearing.
8. The question then arose as to whether a judgment in accordance with Rule 21 of the Employment Tribunals Rules of Procedure should be made. A letter to the parties on 24 January 2023 informed them that Employment Judge Dyal had decided it was not appropriate to issue a Rule 21 judgment, as there was a discrimination claim which needs to be assessed. The matter was accordingly scheduled for a hearing, which proceeded on 15 May 2023.

Evidence presented

9. While none of the Respondent, Mr Drago-Ferrante or the Liquidator attended the hearing, Mr Drago-Ferrante had provided the Tribunal with various documents in advance of the hearing, the key ones for these purposes being:
 - a) The Claimant's contract of employment with the Respondent, dated 21 March 2022;
 - b) An email, dated 27 September 2022, from Mr Drago-Ferrante, in which he sets out his understanding of the events the claims are concerned with;
 - c) Various bank statements for the Respondent, which include one for the period 6 June to 1 July 2022;
 - d) Some payslips for the Claimant, covering the month of April 2022, and the middle two weeks of May 2022;

- e) Copies of WhatsApp messages exchanged between Mr Drago-Ferrante and the Claimant; and
- f) Copies of text messages exchanged between Mr Drago-Ferrante and the Claimant.

The hearing

10. The Claimant had not prepared a witness statement, but gave evidence following affirmation. She came across as a person of integrity – volunteering relevant information readily, including when it would act to depress any compensatory award made to her (e.g., that she not incurred any financial loss as a result of her final wage payment being late).
11. It became clear that there is no factual dispute between the parties.
 - a) Mr Drago-Ferrante’s email to the Tribunal (referred to at paragraph 9.b) above) agreed with the Claimant’s account of the occurrence on 15 May 2022, though he characterised it as “a very silly and extremely inappropriate ‘joke’”.
 - b) The Claimant agreed that she was not eligible for a redundancy payment, as she did not have two years’ service when her employment terminated.
 - c) The Claimant said that her final wage payment had, in fact, been paid to her by the Respondent, though 15 days’ late. This is supported by the relevant bank statement supplied by Mr Drago-Ferrante. The Claimant confirmed that no further sums are owed to her by the Respondent.
 - d) The Claimant left the Respondent’s employment and commenced employment with a different restaurant the following day, on a higher rate of pay.
12. The relevant oral evidence from the Claimant about the impact of the events complained of upon her may be summarised as follows:
 - a) In relation to the late wage payment: she suffered no financial loss. The Claimant was living with her parents at the time, and contributed to the household bills. She incurred no additional costs by reason of the delay, as her parents waited for her late contribution.
 - b) In relation to her reaction to the comment of the General Manager on 15 May:
 - The Claimant said that he apologised straight after he said it, and her instinctive reaction was to say that it was fine but that he should not say anything like that again.
 - However, when her shift had finished and she had the space and time to process what had happened, it started to impact her more.

It made her really scared about the job, and really scared that the General Manager was going to harm her.

- Two days afterwards, she spoke to Mr Drago-Ferrante, and she understands that he spoke to the General Manager and that he was given a warning. This caused the Claimant further distress, as she believed that the General Manager should have been dismissed.
- She considered that she had to leave her job because she felt unsafe. This was particularly so given that the restaurant's practice was to have two members of staff lock up the restaurant at the end of a shift. The Claimant was worried about being alone with the General Manager at night, especially as her home is near the restaurant, and so she walks there. She did not want him to know where she lived, and was concerned he might follow her.
- The Claimant confirmed that the other reason she left the Respondent's employ was because she had secured a higher-paid job.
- As for the impact the event has had on the Claimant since, her evidence was that it has made her more cautious and wary of gestures and physical actions by colleagues and other people around her – this continues still. The Claimant said that she can over-react to them, and she has to think those actions/gestures through to process them in a way that, with reflection, she regards as appropriate.
- The Claimant said that she makes a conscious effort to speak up more about what behaviour is, and what is not, acceptable to her, so she can try to ensure that nothing like the events of 15 May ever happen to her again.
- She says that the event of 15 May has not had a medically-diagnosable impact on her, but the impact it has had on her has been exacerbated by her youth (she was 18 years old at the time), and because she had a pre-existing anxiety disorder, which she has always had. The incident with the Respondent's General Manager does still make her anxious, but she said there were no serious issues coming out of it.

Law

13. Section 26 of the Equality Act 2010 provides:

“(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

- (b) the conduct has the purpose or effect of—*
- (i) violating B's dignity, or*
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2) A also harasses B if—*
- (a) A engages in unwanted conduct of a sexual nature, and*
- (b) the conduct has the purpose or effect referred to in subsection (1)(b)."*
14. "Protected characteristics" are listed in section 4, and include "sex".
15. Section 124(2) describes the remedies that are applicable if the Tribunal finds that there has been a contravention such as that in section 26 in the context of employment:
- "(2) The tribunal may—*
- (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
- (b) order the respondent to pay compensation to the complainant;*
- (c) make an appropriate recommendation."*
16. Section 119(4) reads:
- "An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)."*
17. Awards of compensation for unlawful discrimination may comprise sums under any of a number of "heads". One of those is to compensate the victim of the discrimination for any financial loss suffered, another is to make an award to reflect any injury to their feelings. Where personal injury has resulted from the discrimination, an award may be made to reflect the position that the claimant would have been in but for the discrimination and the resultant injury. In particularly serious cases of discrimination, an award may be made for aggravated and/or exemplary damages.
18. The principles emerging from the case law on awards of damages for injury to feelings are that they are compensatory - designed to compensate the injured party rather than punish the paying party. The focus is on the effect, not the gravity, of the discriminatory act (*Komeng v Creative Support Ltd* EAT 0275/18) that is caused by the act of discrimination (*Essa v Laing Ltd* 2004 ICR 746).
19. While the assessment of an appropriate award for injury to feelings involves a broadbrush approach, the Court of Appeal decision in the case of *Vento v Chief Constable of West Yorkshire Police (No.2)* 2003 ICR 318 established three categories of seriousness for injury to feelings awards. Those categories have been used by the Presidents of the Employment Tribunals to provide guidelines to tribunals when determining the value of damages to award under this head:

- a) The top band is applicable to only the most serious of cases, such as where the claimant has been subjected to a lengthy campaign of discriminatory harassment.
 - b) The middle band is for serious cases that do not merit an award in the highest band.
 - c) The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.
20. The rates of compensation applicable to each band are reviewed periodically by the President of the Employment Tribunals, and the applicable Presidential Guidance depends on when the claim was filed. In this case, the applicable values for each band are as follows:
- a) The top band: £29,600 - £49,300, with only the most exceptional cases capable of exceeding the upper limit of this band;
 - b) The middle band: £9,900 - £29,600; and
 - c) The lower band: £990 to £9,900.
21. Regulation 2(1) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 obliges the Tribunal, when making an award of damages for sex discrimination (among other kinds of awards) to consider whether to include interest on the sums awarded, without the need for any application by a party to the proceedings. The methodology for calculating any such interest awarded is set out in those Regulations.

Application of the law to the facts here

22. The undisputed facts make it plain that:
- a) On 15 May 2022, the incident described in paragraph 5 above resulted in the Claimant being subjected to harassment by the Respondent's General Manager. His actions both:
 - Amounted to unwanted conduct related to her sex which had the purpose or effect of creating an intimidating, degrading and offensive environment for the Claimant; and
 - Amounted to unwanted conduct of a sexual nature, which had the purpose or effect of creating an intimidating, degrading and offensive environment for the Claimant.
 - b) The incident occurred during working hours, while the General Manager performed his role of employment for the Respondent, and so the Responsible was responsible for his behaviour.

The Respondent is therefore liable to the Claimant for both unlawful harassment related to sex and unlawful harassment of a sexual nature.

23. The Claimant seeks a compensatory award. She has suffered no financial loss given she started a higher paying job the day after her employment with the Respondent terminated, but she has suffered injury to feelings which was caused by the actions of the General Manager. According to her own evidence, the Claimant has not suffered personal injury and does not consider the incident engages consideration of either aggravated or exemplary damages.
24. As regards injury to feelings, I have considered the “Vento bands” referred to above. As the complaint relates to a one-off incident, the award to the Claimant appropriately sits in the lower band. The incident has had an effect that is still being felt by her, a year later. The impact and energy involved in constantly assessing the actions and gestures of those around her is far from trivial. I consider it appropriate to award her damages for injury to feelings of £5,000, being just higher than midway through the band.
25. I have considered whether it is appropriate to award interest on the injury to feelings damages, and I find that it is. Calculating that simple interest, at the statutory rate of 8%, from the date of the discriminatory act to the date of this calculation (as per Regulation 6(1)(a) of the applicable Regulations), the period for which interest has accrued is one year and two days, so that interest amount is $(367/365) \times 0.08 \times £5,000$, so £402.19.
26. In total, therefore, the total award to the Claimant is £5,402.19.

Conclusions

27. The Claimant’s claims for redundancy pay and unpaid wages were dismissed upon withdrawal.
28. The Claimant’s claim of harassment related to sex and harassment of a sexual nature is upheld, and an award of compensation in the sum of £5,402.19 is made in her favour.

Employment Judge Ramsden
Date: 17 May 2023