



EMPLOYMENT TRIBUNALS

Claimant: Ms C

Respondent: R Ltd

At: London South Employment Tribunal, Croydon

On: 18 July 2023 (in chambers to consider the parties' written submissions)

Before: Employment Judge Abbott, Ms L Gledhill and Ms E Thompson

Representation

Claimant: Mr A Shepherd, lay representative

Respondent: Mr N Bidnell-Edwards, barrister, instructed by direct access

UPON APPLICATION made by the Respondent on 16 June 2023 to reconsider the judgment sent to the parties on 5 June 2023 ("**the Liability Judgment**") under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT ON RECONSIDERATION

The unanimous judgment of the Tribunal is that:

1. The substantive part of the Liability Judgment is confirmed, save to add by way of clarification the following wording: "The unanimous judgment of the Tribunal is that:".
2. The Reasons for the Liability Judgment are varied as follows:
 - a. Paragraph 40.3 shall now read:

"On balance, we found that, in his drunken state, Mr G did try to dance with Ms C and, in doing so, touched her bottom inappropriately and made inappropriate comments as to her attractiveness. This conduct was not welcomed or wanted by Ms C and was, we found, of a sexual nature. Ms C rejected Mr G's advances. We found Ms C's account of

this in paragraphs 45 and 46 of her witness statement and in oral evidence to be credible, albeit a little exaggerated. It was supported, at least in part, by evidence from Miss D and Miss E. Because of his inebriated state, we did not consider Mr G to be a reliable witness as to his actions that evening. The Respondent submitted that we should not believe Ms C's account because it was not one that she raised contemporaneously in any recorded meetings (where she was instead fixated on the interactions of Mr G and Miss Y, as is evident from reading the covertly-recorded transcripts in the bundle, e.g. that of Ms C's disciplinary meeting at [381-442]), and only first came to be described at the hearing before EJ Dyal in September 2021. Indeed, it was said that aspects of her conduct in the aftermath of the event undermined her account – we considered and rejected these arguments as part of our overall consideration of the evidence, as detailed in the paragraphs below. We considered that the lack of evidence of the allegations being raised by Ms C earlier does not undermine a finding that the events happened. This was a small employer and Ms C was, as recognised in her appraisals, doing a good job. There is every reason to think that she preferred not to rock the boat. The Respondent also sought to paint the allegations as part of a revenge campaign against Mr G orchestrated by Ms C with Miss D and Miss E, and pointed to the unreliability of the evidence of Ms C, Miss D and Miss E on other matters. Our factual findings in this section reflect that we did reject the evidence of each of those individuals on certain other issues, and we took account of this as part of our overall consideration of the evidence. However, it is well recognized that the fact that a witness had lied about one matter does not necessarily mean that he or she has lied about another. We did not accept the submission that this was part of a revenge campaign – in our judgement, it is unlikely that Miss D and Miss E would have agreed to give false evidence, under oath, in a Tribunal hearing purely for the benefit of Ms C, notwithstanding any bad feeling they have for Mr G as a result of the ways in which their employment with the Respondent ended (Miss D resigned whilst under disciplinary investigation; Miss E was dismissed for misconduct (including a finding by the Respondent that she had pressurized another member of staff to write a false statement) and there was unchallenged evidence from Mr G that Miss E had made malicious and abusive threats towards the Respondent and Mr G soon after her dismissal). Their accounts of the evening in question were also credible on their face: they did not claim they saw and heard everything that happened, but what they did claim to have seen was consistent with Ms C's account. Overall, we did not consider it likely that Ms C fabricated her account.”

- b. Paragraph 40.4 shall now read:

“Mr G did not try to kiss Ms C. Although this was included in the List of Issues, it was not supported in any of the Claimant's evidence. It was submitted by the Respondent that this undermined Ms C's whole case as to what happened at the Christmas party. We rejected that submission. In our judgement, whilst it demonstrates a propensity for exaggeration, it does not support a finding that Ms C has fabricated her account of events at the Christmas party.”

- c. Paragraph 42.2 shall now read:

“When Ms C spoke to Mr G, she focused on his inappropriate behaviour with Miss Y. We find she did not allege, in terms, that Mr G has sexually harassed / assaulted her (consistent with Mr G’s evidence), but it is more likely than not that she did mention his inappropriate behaviour towards her as part of her wider criticism of Mr G’s conduct at the party. Like Miss I, Mr G did not appreciate the seriousness of what he was being told about his conduct towards Ms C amidst the wider picture of his conduct at the party but was plainly embarrassed by his overall behaviour. In that context, and in particular because Mr G raised concerns about his wife finding out about his affair, Ms C offered him ‘advice’ as to how to conduct an affair (see [497] where she recounted this during her disciplinary meeting). It was submitted by the Respondent that this undermined Ms C’s case as to what happened at the Christmas party. We rejected that submission and see no obvious reason why Ms C having made these comments necessarily undermines her evidence as to what happened at the Christmas party. Mr G went along with Ms C’s proposal that she go round the nursery apologising on Mr G’s behalf for his behaviour at the party. Ms C conceded in oral evidence that this was her idea rather than Mr G’s, contrary to her written evidence. Like Miss I, Mr G considered there was no need to take any further steps in respect of what Ms C had reported to him.”

- d. Paragraph 50 shall now read:

“The meeting took place on 28 September 2020. Present were Miss D, Ms C, Mr H (from N Ltd as investigating officer) and Mr J as note taker. Ms C covertly recorded this meeting. The purpose of the meeting was to discuss a breach of confidentiality by Miss D, in respect of certain Facebook posts and comments made by Miss D with another staff member (at the time of the posts) Miss E and Miss E’s daughter, who was a former parent of the nursery [827-834]. It was the suspicion of the Respondent that these posts were a reference to Mr G and Miss Y’s relationship and that, accordingly, because the posts involved an ex-parent, this amounted to a breach of confidentiality on Miss D’s part. Miss D denied that the posts were a reference to Mr G and Miss Y at the meeting, and both Miss D and Miss E maintained that position in their oral evidence to the Tribunal. We find that, on the balance of probabilities the posts were a reference to Mr G and Miss Y. Whether they were or not was a topic discussed at the meeting. We rejected Ms C’s evidence that this topic was not raised in the meeting, which is contrary to the written record and to the very nature of the allegations against Miss D. Ms C cannot have failed to appreciate the subject matter of this meeting, and her evidence was coloured by a refusal to accept this basic point simply because Miss D had presented a different explanation for the Facebook posts. This was not credible.”

3. By way of correction under Rule 69, the representation of the Respondent as recorded in the Liability Judgment is amended to read “Mr N Bidnell-Edwards,

barrister, instructed by direct access”.

REASONS

Introduction

1. This is the unanimous judgment of the Tribunal in respect of the Respondent’s application for reconsideration of the Liability Judgment made in writing on 16 June 2023. The Claimant resists the application and relies on written submissions provided on 22 June 2023.
2. Neither party objected to the application being determined without a hearing, and the Tribunal was satisfied that a hearing is not necessary in the interests of justice. The panel met in chambers on 18 July 2023 to consider the application.
3. As with the Liability Judgment, this Reconsideration Judgment has been prepared in fully anonymised form pending final determination of the Respondent’s application for a permanent anonymity order under Rule 50.

Relevant law

4. Rule 70 of the Employment Tribunals Rules of Procedure 2013 provides that:

“A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”
5. The process is as set out in Rule 72. In this instance, the Judge considered that there was reasonable prospect of the original decision being varied or revoked (Rule 72(1)) and therefore the application was referred to the full panel. As noted above, both parties have had the opportunity to, and have, provided written representations.

The scope of the application

6. The Respondent invites the Tribunal to:
 - a. vary paragraph 2 of the Liability Judgment to change “The claim for sexual harassment is dismissed as the Tribunal does not have jurisdiction to hear it” to instead read “The claim for sexual harassment is not well-founded and is dismissed”; and
 - b. vary the finding in paragraph 40.3 of the Reasons for the Liability Judgment (“the Reasons”) that Mr G did “try to dance with Ms C and in doing so, touched her bottom inappropriately and made inappropriate comments as to her attractiveness”.
7. The Respondent argues that there are a number of factual matters which do

not appear to have been taken into consideration in the Liability Judgment which, once they are taken into account, undermine the original conclusions. The Respondent's position is that the Tribunal should not have accepted the evidence of Miss D, Miss E and Ms C in respect of the events on the night of 30 November 2019. It is said that the Tribunal did not fully consider the submissions made by the Respondent at the Final Hearing in respect of the credibility of these witnesses. Rather than set out the specific points here, we address them in the discussion below.

8. The Claimant supports the Tribunal's original findings in this regard.

Discussion

9. As is recorded in the final sentence of paragraph 40 of the Reasons, the Tribunal carefully considered the various accounts of what happened on the night of 30 November 2019 when making its findings. That included assessing the reliability of those accounts considering all relevant factors such as the inherent plausibility of the accounts, consistency with other evidence, motivation and any other demonstrated propensity to give false evidence.
10. In terms of evidence from those present at the afterparty on 30 November 2019, we heard from:
 - a. Mr G. As recorded in paragraph 40.1 of the Liability Judgment, we rejected Mr G's evidence that he was not drunk as inconsistent with the evidence of other witnesses, including in particular that of the Respondent's own witness Miss I. Specifically, Miss I gave oral evidence that at the end of the evening Mr G walked in a drunken manner to the taxis and that he was ushered by some people that it was time to go home. It was also inherently implausible in the light of his admitted openly sexual behaviour with Miss Y in front of everyone at the party. Accordingly, we found at paragraph 40.3 that Mr G was not a reliable witness as to his actions that evening.
 - b. Ms C. As recorded in paragraph 40.3 of the Liability Judgment, we found Ms C's account to be credible. That paragraph specifically addresses, and rejects, various arguments that were raised by the Respondent against that evidence. This evidence was the core basis for the Tribunal's findings.
 - c. Miss I. As noted above, we took account of Miss I's oral evidence as to Mr G's inebriation. Miss I denied seeing any inappropriate behaviour from Mr G directed toward Ms C but fairly accepted she was not constantly watching the two of them all evening, so could not definitively say it did not happen.
 - d. Miss D. She gave evidence that she observed Mr G lingering around Ms C trying to get her to dance with him, but did not witness him actually touching her. We found this evidence believable, and it provided some degree of background support for Ms C's account, albeit of a circumstantial nature since she did not actually see any

touching.

- e. Miss E. She gave evidence that she did see Mr G grope at Ms C's bottom. We found this evidence believable, and it provided some support for Ms C's account.

The evidence of Ms C

11. The Respondent challenges the credibility of Ms C's account at paragraph 46 of her witness statement. It argues that, had things happened as described by Ms C, then it would have been seen by others and there would have been gossip in the nursery about what happened between Mr G and Ms C, but there was not – rather all gossip was focused on Mr G and Miss Y.
12. We have reconsidered Ms C's evidence on this point. It is right to record that we did not accept all of Ms C's evidence as to what happened on the night of 30 November 2019, in part because of the low likelihood that things happened in precisely the way Ms C described without it being witnessed by others (other than Miss E). However, in our judgement, we considered there to be a degree of exaggeration rather than fabrication. We vary paragraph 40.3 of the Reasons to deal more expressly with this aspect.
13. The Respondent also highlights that the Claimant had pursued in the List of Issues an allegation that Mr G tried to kiss her, but did not maintain this in her evidence. We dealt with the point in paragraph 40.4 of the Reasons. The Respondent argues this shows a propensity to cast false allegations. Again, we considered this to amount to exaggeration rather than fabrication of the entirety of what happened on 30 November 2019. We vary paragraph 40.4 of the Reasons to expressly deal with this argument.
14. Finally, the Respondent points to Ms C's actions in giving tips to Mr G about how to have an affair on 2 December 2019. We vary paragraph 42.2 of the Reasons to add findings in this regard.

The evidence of Miss D and Miss E

15. The Respondent's application does not challenge the inherent plausibility of the accounts of Miss D and Miss E regarding the events of 30 November 2019. Instead, it invites the Tribunal to make findings as to their evidence in relation to other matters.
16. As regards both Miss D and Miss E, it is said that findings should be made as to what certain Facebook posts referred to, because (it is said by the Respondent) that their evidence on this topic was obviously false and this therefore goes to the overall credibility of their evidence. The Facebook posts are those discussed in paragraph 50 of the Reasons.
17. In the Tribunal's judgement, we consider it more likely than not that the Facebook posts in question were about Mr G and Miss Y. Miss D and Miss E's accounts of what these posts were about were inherently implausible. Although we had not made a definitive finding, our doubts as to the veracity of Miss D and Miss E's evidence on this topic already formed part of our

consideration. We now vary paragraph 50 of the Reasons to include this express finding.

18. As regards Miss E, the Respondent further points to the unchallenged evidence from Mr G concerning the circumstances of her dismissal. Paragraph 40.3 of the Reasons does refer to the fact of Miss E's dismissal, and the Tribunal had regard to the circumstances of the dismissal when making its findings. We vary paragraph 40.3 of the Reasons to deal more expressly with these points.

Overall reconsideration of the evidence

19. Having made the additional findings described above and taking account of the arguments made by the Respondent, we reconsidered whether our core findings in the first sentence of paragraph 40.3 of the Reasons (and therefore paragraph 2 of the Liability Judgment) should be varied. We concluded that they should not be.
20. It is well recognized that the fact that a witness had lied about one matter does not necessarily mean that he or she has lied about another (see, e.g., Arnold J (as he then was) in *Gorgeous Beauty Ltd v Liu (and others)* [2014] EWHC 2952 (Ch) at [31], and more recently Cotter J in *Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB) at [12]). This is a case in which every one of the five relevant witnesses has given evidence that we disbelieved on some topics, albeit to differing degrees (e.g. Mr G as regards his inebriation; Miss I as regards Ms C having become "difficult to manage"; Ms C on various topics; Miss D and Miss E on the Facebook posts). All of this is factored into our overall assessment of the evidence as to what happened on 30 November 2019. Taking account of all the evidence, we remain of the view that it is more likely than not that, in his drunken state, Mr G did try to dance with Ms C and, in doing so, touched her bottom inappropriately and made inappropriate comments as to her attractiveness.
21. We vary paragraph 40.3 of the Reasons to further expand our discussion of why we made the findings we did.

Other matters

22. Two other minor corrections are made and are recorded here for convenience: see paragraphs 1 and 3 of the Judgment above. The first is to clarify that the Liability Judgment was the unanimous judgment of the Tribunal – this was stated in the oral reasons but was accidentally omitted in the written version. The second is to correct an error made in recording how the Respondent's counsel was instructed, as was highlighted to the Judge by the Respondent on 6 June 2023. Both concern accidental slips and are hereby corrected pursuant to Rule 69.
23. A copy of the revised Liability Judgment is provided with this Reconsideration Judgment.

Employment Judge Abbott

Date: 27 July 2023

JUDGMENT SENT TO THE PARTIES ON

Date: 10 August 2023

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FOR THE TRIBUNAL OFFICE