



EMPLOYMENT TRIBUNALS

Claimant: Ms Marnie Harris
Respondent: CJH Aggregate Limited (1)
Mr Mitesh Patel (2)
Mr Craig Davies (3)

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On: 5 January 2024
Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr J Cato, Solicitor
For the respondent: ***debarred from taking part***

UPON judgment being sent to the parties on 5 January 2024

UPON the claimant requesting written reasons for the decision on 18 January 2024

The Tribunal provides these reasons for its judgment.

REASONS

1. This judgment results from an oral remedy hearing at which Marnie Harris, the claimant, was present and gave oral evidence, and at which she was represented by Mr J Cato, solicitor. Employment Judge Heap entered judgment on liability on 27 September 2023.
2. The respondents did not attend and have never taken any steps in the process. They are debarred from taking part in the proceedings because they failed to present any response to the claim.
3. The claimant's claims are sexual harassment, victimisation, wrongful dismissal (notice pay), a claim for pay for sick leave and a claim for unpaid holiday pay owing on termination of employment. There was a claim for harassment related to gender reassignment. That however has fallen away. I say no more about it.
4. I have heard oral evidence from the claimant, who confirmed her witness statement as true and answered some other questions from me. The claimant confirmed in evidence the contents of the grounds of complaint

were true also. She provided oral and written submissions. There was a bundle of documents of about 258 pages. I have considered those to which I was referred.

5. I begin by stating I accept the claimant's evidence. I am satisfied she is an honest witness.

Sexual harassment and victimisation

Facts

6. It is disproportionate to recite each and every allegation, especially as the grounds of complaint and statement are available for the parties themselves to read. I therefore confine myself to the gist that emphasises the key allegations the claimant relied on.
7. The claimant's employment began on 23 January 2023. She was aged 19. Before that she had worked for a different company. The first respondent employed her as a sales administrator. The claimant felt this was a step up. Her work was related to invoices and telephone calls co-ordinating affairs.
8. Her immediate line manager was the second respondent, Mr Mitesh Patel. To understand the dynamic of the interactions, I consider it important to note he was aged in his 40s. The third respondent was the overall owner, Mr Craig Davies.
9. On 26 January 2023, Mr Patel sent the claimant a text message to say how well she was doing as an employee. Mr Patel however started to exert pressure on her that was sexual in nature.
10. In submissions the claimant picked out the key events. Because I accept the summary as accurate I reproduce it below with my own observations added.
 - 10.1. 6 February 2023 - Miss Harris posted a picture of a man yawning on her Instagram account. Mr Patel response was a heart sign. He continued by telling her that he missed her. This was inappropriate.
 - 10.2. 10 February 2023 - Miss Harris was persuaded by peer-pressure to join an office WhatsApp group called "Office Nutters". Mr Davies and Mr Patel were active members of this group. The group contained sexualised and abusive comments, and pictures. Some are offensive about transgender people. Some a grossly scatological. Many are explicitly pornographic images of women and transgender women, sometimes revealing their genitals. I have mentioned them only once here. However it was a regular tirade of offensive images throughout the claimant's employment to which she did not consent.
 - 10.3. So far as I can tell, the comments are effectively made in equal measure by both Mr Davies and Mr Patel and they show themselves to be active participants.

- 10.4. The claimant began to record conversations with Mr Patel out of fear. Those conversations captured Mr Patel on 10 February 2023 asking Miss Harris to lower her computer screen so he could see her face, which she refused.
- 10.5. 11 February 2023 22h12 - Mr Patel messaged Miss Harris, "... missing u Mamie . . . I'm pissed." This caused Miss Harris to start to dread to go to work.
- 10.6. In mid-February 2023, Mr Patel told Miss Harris of a sexual encounter with a third party.
- 10.7. 23 February 2023 – in a conversation (which was recorded and whose transcript I have seen) Mr Patel tried to woo Miss Harris. She rejected him. I accept the claimant's evidence this was a regular occurrence.
- 10.8. Later on that day, the claimant hit her "funny bone" on the chair and Mr Patel referred to this as her "fanny bone" and simulated masturbation toward her.
- 10.9. On about the same date,
 - 10.9.1. the claimant was eating a Mini Egg in her office and Mr Patel made a crude remark about "putting Mini Eggs inside Miss Harris".
 - 10.9.2. Mr Patel asked the claimant to go to a hotel with him in London.
- 10.10. 24 February 2023 - Mr Patel bought the claimant chocolates.
- 10.11. Later that same day, Mr Patel inappropriately and unwantedly touched the claimant.
- 10.12. 27 February 2023 - Mr Patel asked Miss Harris why she did not respond outside of work.
- 10.13. 28 February 2023- Mr Patel spoke to the claimant and offered to "... warm you up ..."
- 10.14. 3 March 2023 - Mr Patel continued to disturb Miss Harris when they were out of the office.
- 10.15. About this time, though the date was not clear, Mr Patel and the claimant were on a car journey. Mr Patel asked her to pick the day she would go for a drink with him. I accept she felt obliged to accept this because of his constant pressure. Mr Patel asked her specifically, "So you are going to be available for me any day I want next week - is that what you're saying to me? And you're not going to fob me off like you did last time?". Later Mr Patel told her "Do you know something? I've never had to work so hard for anything".
- 10.16. Mr Patel also asked the claimant to go on holiday with him.

- 10.17. 4 March 2023 – Mr Patel sent the claimant a message saying, “Damn your beautiful ... 😏”.
- 10.18. 6 March 2023 – Mr Patel responded to the claimant’s comment that she felt ill by suggesting it is a pregnancy and that she would not need a test if he had “... been through [her]”.
- 10.19. Later he told the claimant that “... other women would be very excited for me to say something like this but you clearly a different kettle of fish”
11. On 7 March 2023 the claimant was away from work ill. Her doctor signed her off ill until 21 April 2023 for “work-related stress”. She informed work. Mr Patel’s response was a long message in which he told the claimant to “bear in mind you are on a probation period”, and “I have also given you the benefit of the doubt and have been supportive and given you countless opportunities to tell me what issues you have so we can either look to resolve them or move forward” [sic.]
12. On 7 March 2023 19h16, the claimant sent to the first respondent a grievance about the above matters. It specifically identified Mr Patel as a subject of the grievance. It alleged she had been the victim of discrimination. On receipt, Anita Moore, a director at a sister-company forwarded it to Mr Patel. At 20h50 Mr Patel emailed the claimant terminating her employment. He alleged her work had been unsatisfactory and she had an unauthorised absence because she had not followed the sickness procedure. There is no evidence her work had hitherto been considered unsatisfactory, and it contradicted his initial comments. There is no evidence from the respondents she had failed to follow the correct sickness procedure. The grievance was never investigated.
13. In summary there are 17 incidents involving Mr Patel and 60 incidents in total over 43 days of employment.
14. The effect on the claimant was profound. She was a young woman who was just setting out in her working life. The effect of the behaviour caused her anxiety and stress. She became moody and withdrawn. It adversely affected her relationship with her family and friends because she felt unable to tell others, and therefore had to deal with it alone. She did not tell others because she found it humiliating. She felt this job was in effect a promotion from her former role. That however was undermined by the conduct. She became nervous and dreaded going to work. She felt unable to quit because it was “too awkward” and she did not want to be questioned about why she was leaving. I interpret this as she felt trapped. She found that the experience undermined her self-confidence and ability to speak up for herself. She continues to feel anxious and unable to trust people at work.
15. I accept this as true. The claimant is an honest witness, the documentary evidence supports her case and the period of employment was less than 2 months.
16. I note that liability has already been determined in the claimant’s favour. It is clear she has been the victim of sexual harassment as alleged. I am also

quite satisfied that she was dismissed because she raised the grievance and so was victimised. The chronology between its submission, it being forward to the subject of the complaint – Mr Patel – and his dismissal of her for reasons which are not borne out by the evidence available mean that, whatever the legal technicalities of the burden of proof in the **Equality Act 2010**, I can say I am satisfied on balance that she was dismissed because of that grievance. This just added to the overall conduct and again undermined her confidence. After mustering the courage to complain, the complaint was swept aside and she was dismissed instead.

17. I have considered whether one can apportion the discriminatory acts between the various respondents. I consider they are indivisible. At all times Mr Patel was acting in the course of his employment. Mr Davies was the owner of the business and in effect the managing director. The claimant told me they appeared to work closely together. While I accept that Mr Davies would not have witnessed every event, I see no reason to believe he was unaware of what was occurring generally. There is no reason to believe that he had no idea about Mr Patel's behaviour generally or the contents of the WhatsApp group – indeed he was an active participant. Furthermore there is no real way that one can obviously or easily divide the effects of the conduct from Mr Patel or others.

Injury to feelings

18. I am satisfied the claimant has proven she suffered an injury to feelings: **Shaw v Commissioner of Police for the Metropolis**. I am satisfied that the facts show the injury to the claimant's feelings flows from the discriminatory conduct: **Essa v Laing**.
19. I remind myself that I am compensating for the injury that the claimant suffered to her feelings and have considered the guidance in **HM Prison Service v Johnson** at [27] and in particular that the award is compensatory and not punitive, and that the approach to assessment is tortious, not contractual: **MOD v Cannock**. I have referred to the **Vento Guidelines** but remind myself that they are not rigid rules, an award is compensatory and is to be assessed by the effect on the individual: **Kemeh v MOD**; **HM Land Registry v McGlue**; **Komeng v Creative Support**.
20. I consider this a case that would fall within the middle band of the Vento Guidance. It is far more than one would expect for a simple, one-off incident but I do not consider it is the most serious cases. The Presidential Guidance of 24 March 2023 shows that (after adjustment for inflation) this is a band of £11,200 to £33,700. I consider that in this case £27,500 does justice in this case.
21. As noted above, I consider Mr Davies is as implicated and involved as Mr Patel. In any case, it is not possible to divide rationally the injury to feelings between the various respondents. Considering the guidance in **Sienkiewicz v Greif (UK) Ltd** and **Rahman v Arearose Limited**, I consider them all jointly liable.

Loss of earnings

22. Because of her discriminatory dismissal, the claimant was unemployed for 8 weeks. She took steps to find employment and was from week 9 working again for her former employer. Her net loss of pay for those 8 weeks is £2,855 (the claimant waiving the pence). I award that amount.

Interest

23. Interest on that sum at 8% amounts the figure of £2,400 to the date of the hearing. I took the starting point for interest to be half-way through the discrimination because that appeared to be the best approximation. The claimant agreed the figure.

Loss of statutory rights

24. I award no loss of statutory rights because no such rights were lost.

Aggravated damages

25. The claimant sought aggravated damages. She made submissions about what the claimant said was the respondents' egregious behaviour, citing attempts to trivialise or cover up the wrongs, the failure to investigate and the failure to do anything towards the perpetrators and ignoring the proceedings. However the claimant adduced no evidence about how this impacted on her. The claimant could not explain why the award for injury to feelings was insufficient. Rather in my view what she was seeking was exemplary damages – demonstrated by her submission being founded on **Rookes v Barnard**. She could not explain on what legal basis I could make such an award.
26. In **Commissioner of Police v Shaw, HM Land Registry v McGlue** it was made clear that aggravated damages are compensatory not punitive. In the absence of any evidence that this aggravated the claimant's injury such that the injury to feelings award is inadequate, an award of aggravated damages is not justified.

The notice pay, holiday pay and unauthorised deduction from wages

27. The contract of employment was between the claimant and first respondent alone. The second and third cannot be liable for sums due under that contract and so I order the following to be paid by the first respondent only. I note the claimant only claimed these sums against the first respondent anyway.
28. The claimant was dismissed without notice. She was entitled under the **Employment Rights Act 1996** to one weeks' notice because her employment ran from 23 January 2023 to 7 March 2023. Her gross week's pay was £402. Because it will be liable for tax, I award it as a gross payment.
29. The first respondent also failed to pay her statutory sick pay for her absence which it was obliged to do. Her daily rate was £21.80 gross. It will be subject to tax because it is earnings. Therefore I award it gross.

30. The claimant was owed holiday pay for leave to which she was entitled but had not taken when she was dismissed. Her entitlement was 3.5 days holiday for the period of her employment. I agree this should be rounded to the nearest half-day because the claimant worked whole days only, 5 days per week. Using the 43 day duration of her employment and the gross weekly wage, and noting she took no leave, the first respondent owes to her $\frac{43}{365} \times 28 \times \frac{\pounds 402}{5} = \pounds 281.40$ gross. I order the gross amount because it is taxable.

Failure to follow the Acas code of practice on grievances

31. It is readily apparent that the first respondent as employer made no attempt to even begin to implement the Acas Code of Practice on grievances – rather than investigate, it dismissed the claimant. The respondent has offered no explanation or mitigation for its conduct.

32. The first question is against whom I can order an uplift. There is no dispute the claims fall within those that give rise to the jurisdiction to order an uplift because they are in **TULC(R)A 1992 schedule A2**.

33. I consider I can only order the first respondent to pay it because it was the employer. **Section 207A** says it relates to claims by employees. The claimant was not an employee of the second or third respondent. Secondly the jurisdiction to award is founded on the **employer's** unreasonable failure to comply.

34. I consider that the breach is as serious as it is realistic to get. I consider it is therefore just and equitable to consider an uplift of 25% on the sums the first respondent owes. That amounts to £7,765.22.

35. I note this is a large sum. However taking a step back, and reminding myself this is a punitive amount, I do not consider it requires further refinement. It does not seem to me to disproportionate. The first respondent has provided no information about its financial position and has provided no mitigation. Therefore I order that sum accordingly.

Grossing up

36. The claimant waived any requirement to carry out a grossing up exercise to account for any tax. Therefore the Tribunal has not carried out such an exercise.

Employment Judge Adkinson

Date: 6 February 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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