

IN THE EMPLOYMENT TRIBUNAL

Claim No. 13/2019

BETWEEN

Eliza Antonacci

Claimant

-and-

Casava Enterprises (Gibraltar) Limited

Respondent

Ms. Gabrielle O'Hagan for the Claimant

Ms. Hafsah Masood with Darren Martinez, Esq. for the Respondent

DECISION

1. In these proceedings the Claimant claims against the Respondent (under paragraph 6.1 of her Claim Form):

- (i) Unfair dismissal (including constructive dismissal)
- (ii) Sexual harassment and
- (iii) Bullying

And she goes on to detail her claim as required by Section 6.2 extensively but which I summarise

- The sending to the Claimant of sexually offensive and degrading material, specifically, on 27th July 2017, the sending to the Claimant of a photograph of his genitalia, and then requesting her to delete it;

- At a client event on 12th October 2018, the referencing of the same in front of others, as though humorous, as well as a number of inappropriate and lewd comments and questions to the Claimant; and
 - Continuously throughout, the prolongation of a sexually intimidating, hostile, degrading and offensive working environment by verbal, non-verbal and physical conduct of a sexual nature (including physical contact such as hugging and touching, telling the Claimant how “gorgeous” and “beautiful” she was, invasion of personal space, suggestive remarks, unwanted comments on dress and appearance and jokes of a sexual nature), causing the Claimant and also other colleagues (there are several individuals who are willing to collaborate and substantiate this, if required) “to feel at various times deeply uncomfortable, alarmed, disgusted, distressed, upset, frustrated, anxious and stressed.”
2. She elaborates: “the conduct [she] described was unwanted and of a sexual nature. It had the purpose or effect of violating [the Claimant’s] dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment and as such constituted an ongoing clear and fundamental breach by the employer duty of trust and confidence owed by the Respondent to [the Claimant].”
 3. She argues that the alleged conduct “also amounts to bullying under the Employment (Bullying at Work) Act 2014: persistent behaviour which is offensive, intimidating, abusive, malicious or insulting, which had the purpose or effect of causing [the Claimant] to be alarmed, distressed, humiliated or intimidated.”
 4. The Claimant “hoped that the situation would improve and continued to work for as long as possible. But eventually such a working environment became untenable for her. It was however impossible for [the Claimant] to leave without a new job: she is solely responsible for her livelihood

and her only source of income is from her employment. She therefore started for a look for a new position as a matter of urgency and was finally successful in December 2018. As a result of and in response to the Respondent's fundamental breach, [the Claimant] resigned on the 21st December 2018 and was notified by the Company's HR Department that she was not required to work out her notice period."

5. "The Claimant had made her feelings clear to Mr Ruiz, but she did not raise a formal grievance until her resignation because she was concerned that such a serious complaint would prejudice her employment and or might lead to her losing her job with no other means of earning an income. However, on the date of her resignation, she did make a formal complaint the Respondent's HR Department."
6. Going back to the beginning, the Claimant applied for and was offered a job as VIP Account Manager Canada with 888 and started working on the 9th May 2016. Her department was headed by Tyrone Ruiz, VIP Operations Manager. In evidence, she alleges that from her first day, Mr Ruiz made her "intensely uncomfortable" in that he constantly touched her and other colleagues, often hugged them and seemed to have no idea of personal space or professional behaviour towards colleagues, men or women. He often commented on how she looked, on what she was wearing and gave what he seemed to think were compliments calling her "gorgeous" and "beautiful". He often made sexually suggestive remarks and comments to and about her and others.
7. She did not feel she should or could leave 888 so soon after arriving or jeopardise her job by complaining, particularly given that Mr Ruiz had been at 888 a considerable time.
8. On the 27th July 2017 she was at home with her visiting friend, Luke Alexiou, and, while awaiting a lift from Mr Ruiz to a colleague (David Peden's) birthday party about which she and Mr. Ruiz had been

communicating on WhatsApp, the Photograph appeared on her phone screen that she did not at first process until she realised Mr Ruiz had sent her a photograph of male genitalia (“**the Photograph**”). She screamed. She was absolutely shocked and alarmed. She felt deeply violated and was shaking. She showed the Photograph to Mr. Alexiou and said she wanted it as well as every other communication that Mr Ruiz had ever sent her off her phone. She thought the only way to deal with this was to send Mr Ruiz a message pretending that she believed he had sent the Photograph by mistake and when she did that Mr Ruiz quickly agreed and said that he was “sorry” and asked her to delete the Photograph from her phone. Before she proceeded to delete everything Mr Ruiz-related from her phone, Mr. Alexiou sent the Photograph to himself/his phone.

9. Mr Ruiz duly arrived with his girlfriend, Isabela Predesel, to take the Claimant and Mr. Alexiou to the party and, when he picked them, he said she was “cool”. The Claimant did not really understand what he was referring to.
10. Mr Ruiz did not mention what had happened when they returned to work. He did not offer a proper apology or to try to give any more explanation. In the months that followed, things for her were very awkward with Mr Ruiz.
11. She said she had considered making a formal report immediately after this incident and in the months that followed.
12. Nothing of significance happened during the next 14 months or so but at a client function in The Bahamas on the 12th October 2018, Mr Ruiz referred once again to the sending of the Photograph. During 2018, the Claimant had wanted to bring into the open the incident about the Photograph and felt that she could not continue to work anywhere near him. In short, she had to leave because of Mr Ruiz’s conduct towards

her. She started seriously looking for other jobs and was finally successful in securing something in December 2018.

13. When she resigned, on the 21st December 2018, she finally felt herself free to say what had happened. She made a formal complaint to the HR Department.
14. Mr. Ruiz in his/the Respondent's Defence described himself as "a friendly and open person" as was the Claimant. He described her as "an extrovert", "was chatty" and got on with everybody. Everyone liked her and she soon made friends at 888. He named some of her friends and said that the Claimant and he were also friends. They socialised outside of work along with the other members of the team. He emphasised that he was never sexually or romantically interested in the Claimant. Most of the time that he knew her, he was in a relationship until the middle of 2018 with Ms. Predesel, whom he met in July 2017.
15. He insisted that the Photograph was not intended for the Claimant; it was intended for Ms. Predesel but he sent it to the Claimant in error. He explained that at the time he had been 'talking' to both Ms. Predesel and the Claimant (separately) on WhatsApp. As far as he could recollect, he was talking to the Claimant about a team do.
16. His relationship with Ms. Predesel was relatively new at the time and was going very well. They had spent the previous night together and he took the Photograph intending to send it to Ms. Predesel with the comment "look what you did, you killed it" as a joke referring to their night before.
17. As he was messaging the Claimant about the pick-up arrangements for the team do and Ms. Predesel on WhatsApp, he mistakenly sent the Photograph to the Claimant instead of Ms. Predesel. He could not explain how it happened but it was a genuine mistake.
18. A few seconds after sending the Photograph, he realised that he had sent it to the Claimant instead of Ms. Predesel. He immediately messaged the

Claimant, apologised and asked her to delete the Photograph. The Claimant messaged back. Her message was friendly. She said something along the lines of “Ty, you don’t have to worry.” She reassured him that she would delete the Photograph. She seemed to be fine and to understand that it was all a mistake. He also messaged Ms. Predesel straight away and told her what had happened.

19. The Claimant did not mention the incident to him again. To his knowledge, she did not say anything to Ms. Predesel either.
20. He explained the reference he had made to the Photograph in The Bahamas. At some point during the evening he came across the Complainant talking with 2 or 3 guests/team members and the conversation was about social media and “dick pics”, at which he said “like the photo I sent you” jokingly as a private comment to the Complainant and meant nothing by it. He does not think anyone else heard it and the Complainant did not appear to be upset by it.
21. He did not notice any change in the Claimant’s behaviour after the incident with the Photograph, but there were a number of events in 2018 which he believed may have contributed to her dissatisfaction with her job and the company and possibly her resentment towards him:
 - (a) In 2018, the Claimant lost her entitlement to the relocation package which is provided by the company to 888 employees, who (like the Claimant) relocate to Gibraltar for employment purposes.
 - (b) On the 23rd May the Claimant discussed with Mr Ruiz the terms of the company’s clawback agreement but confirmed she was not planning on leaving the company, but she did always joke about leaving and play with the option. The clawback agreement was not as generous as the relocation package, unlike the relocation package, it did not include a free flight.

- (c) It became increasingly apparent that the Claimant was not happy at 888, working as a VIP Account Manager.
 - (d) In July, other employees complained about the Claimant's work ethic and the impact it was having on them. Mr Ruiz met with the Claimant on the 23rd July when they discussed the matter. They met again on the 26th July when the Claimant said she would demonstrate a strong work ethic and Mr Ruiz was hopeful that her attitude towards work would change.
22. On Friday the 21st December 2018 at 16:58 hours the Claimant sent an email to Lisa Parody, the Human Resources Manager at 888, and to Sue Gemmell, HR Assistant at the time, attaching to it her letter of resignation and the photograph. The letter stated that she was resigning from her position with Casava Enterprises (Gibraltar) Limited – 888 Casino “effective 2018-12-21”. She stated as her reason for leaving the company “on separate occasions I have been sexually harassed by Tyrone Ruiz. [attaches the photograph] “The second incident, on our last work trip in Bahamas, Friday October 12th, 2018, made me recipient of more inappropriate and lude (*sic*) comments and questions from my superior, Mr Ruiz. I decided not to mention either incident until this time because I feared for my job. For these reasons and the emotional damages (*sic*) I've suffered, this makes for a physically and emotionally unsafe work environment.”
23. In her Witness Statement, Ms. Parody exhibits the Respondent's Anti-harassment, Bullying and Victimisation policy as well as the Respondent's Employee Handbook which contains sections on “Harassment” and said: “This was the first time [the Claimant] had raised any concerns about [Mr Ruiz's] behaviour with us. This did surprise me, since [the Claimant] was a person who was very vocal about

her opinions. She was the kind of employee who would ask for everything she could get..." and gives a number of examples.

24. Ms. Parody sets out the manner in which she dealt with the Claimant's complaint over the next few weeks stating that the Claimant's "resignation and complaint came just before the Christmas holiday period, and we acted as swiftly as we could." She had a meeting with the Claimant on the 2nd January 2019 when the Claimant gave her account of events and Ms. Parody asked questions where she needed to. She took notes in shorthand (and exhibited them to her Witness Statement) and typed them after the meeting (also exhibited).
25. On the 9th January she had a meeting with Mr Ruiz about the Claimant's complaint and her typed notes of the meeting are exhibited.
26. Mr Ruiz explained that the Photograph was meant for his girlfriend at the time, Ms. Predesel, but he had mistakenly sent it to the Claimant, with whom he had also been 'speaking' on WhatsApp. He had immediately contacted the Claimant and asked her to delete the Photograph. He had also apologised. Mr Ruiz had accepted that he did hug and kiss people, and they actually complained when he didn't. He stressed he was never anything sexual about it
27. Ms. Parody met Mr Wahnou, Ms. Gradecek, Ms. Friess, Miss Martinez, Dawn McCormack, and Mr Peden, who were members of the VIP team, on the same day and exhibits her handwritten and typed up notes of those meetings.
28. Having investigated the complaint, Ms. Parody states that the employer was satisfied that no sexual harassment had taken place. The general conclusion when reviewing the accounts provided by the employees that she spoke to was that Mr Ruiz could be over friendly, that he hugged fellow employees, was sometimes too suggestive (one employee said he came across "a bit lecherous") but the employer was satisfied that

although his conduct was not acceptable, it did not amount to sexual harassment.

29. The Claimant's claim that Mr Ruiz made her feel "intensely uncomfortable" from her first day at 888 and then continuously and throughout her employment subjected her to unwanted conduct of a sexual nature which caused her to feel "deeply uncomfortable, alarmed, disgusted, distressed, upset, frustrated, anxious and stressed" and which caused her to "often [dread] going into work and encountering Tyrone" lacks credibility, in my view, and is largely undermined by the following:
- (a) the evidence of work colleagues suggests that Mr Ruiz and the Claimant were not only colleagues but socialised together and had a friendship;
 - (b) Amparo Martinez states in her Witness Statement (and this was not challenged) "we would all go out together" and that "they [referring to the Claimant and Mr Ruiz] were friends and got on really well".
 - (c) Ms. Predesel states in her Witness Statement that in the months after the Photograph was sent "I socialised with Eliza and the team and she seemed happy and like she was having fun with her team and her manager. She never complained to me about Tyrone".
 - (d) The unchallenged evidence in Ms. Martinez's Witness Statement and Ms. Predesel at paragraph 5 of her Witness Statement (which was not challenged) about the Claimant making a crude remark/joke about and in the context of the Photograph.
 - (e) The photographs taken in the Bahamas in which the Claimant, who was standing next to Mr Ruiz (and has an arm across Mr Ruiz's shoulder) appears to show the Claimant entirely comfortable with Mr Ruiz.
 - (f) James Wahnnon's oral evidence that he would have noticed if the Claimant had seemed uncomfortable and described her laughing in

the office, hugging and chatting suggests no feeling of being uncomfortable on the part of the Claimant.

30. It must be noted that the Claimant did not make any mention, still less a complaint, about Mr Ruiz's behaviour whether to Mr Ruiz himself or to her friends and colleagues (including Amparo Martinez, Isabella Predesel, Anjte Friess or Gabriella Gradecek).
31. In her Claim Form the Claimant states that she had made her feelings clear to Mr Ruiz but in all of her evidence she accepted that she had not, in fact, said anything to Mr Ruiz and gave a far from convincing explanation as to the inconsistency.
32. Nor was the general gist of the Claimant's evidence about Mr Ruiz corroborated by three female members of the VIP team (whose evidence - unchallenged) was as follows:
 - (a) "Eliza never complained to me about Tyrone's behaviour" (Amparo Martinez)
 - (b) "In fact, Eliza never said anything to me about Tyrone's behaviour or conduct" (Anjte Friess' Witness Statement) and
 - (c) "I never heard Eliza complain about Tyrone's conduct...I was surprised to learn that Eliza brought a complaint against Tyrone" (Gabriella Gradecek's Witness Statement).
33. I have reviewed all the evidence adduced by both parties in the light of the relevant authorities which counsel on both sides have brought to my attention and were generally agreed upon.

Equal Opportunities Act 2006

34. Section 15(3) "It is unlawful for an employer, in relation to employment by him, to subject a person who he employs...to harassment."
35. Section 47(1) provides that "anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by

his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

36. Section 14 defines "harassment" (including "sexual harassment"):
- (2) "a person subjects a woman...to sexual harassment if he engages in any form of verbal, non-verbal or physical conduct of a sexual nature or that is related to ... sex that has the purpose or effect –
 - (a) of violating her dignity; or
 - (b) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her....
 - (5) "Conduct shall be regarded as having an effect specified in sub-section (1) or (2) only if, having regard to all the circumstances, including the perception of the other person, it should be reasonably considered as having that effect."

Employment (Bullying at Work) Act 2014

37. Section 4 defines "bullying" so far as relevant:
- "(1) A person ("A") subjects another person ("B") to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.
- (2) In sub-section (1) the reference to conduct includes –
- (a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;
 - (b) persistent unjustified criticism;
 - (c) punishment imposed without justification;
 - (d) changes in the duties or responsibilities of B to B's detriment without reasonable justification."

38. Section 6 so far as relevant "(1) An employer (A) must not, in relation to employment by A, subject an employee (B) to bullying.

...

- (5) An employer will not be in contravention of sub-section (1) in relation to a complaint of bullying where he can show –
- (a) that at the time of the act or acts complained of,
 - (i) he had in force a Bullying at Work Policy in accordance with the Schedule;
 - (ii) he has taken all reasonable steps to implement and enforce the Bullying at Work Policy; and
 - (iii) As soon as reasonably practicable, he takes all steps as are reasonably necessary to remedy any loss, damage or other detriment suffered by the complainant as a result of the acts of which he complains”

Constructive Unfair Dismissal

39. In order to show that a complainant/employee has been constructively dismissed, he must show:
- (a) That the employer committed a repudiatory breach of contract; that is, a significant breach going to the root of the contract or a breach of the implied term of mutual trust and confidence. It must be shown that the conduct of the employer was such as to destroy or seriously damage the relationship, and there must have been no reasonable and proper cause for the conduct.
 - (b) The complainant must show that he resigned in response to the repudiatory breach.
 - (c) Finally, the complainant must not have waived the breach, i.e. affirmed the contract by for example, delaying the resignation too long, or doing anything else which indicates the acceptance of repudiatory breach.

I am grateful to counsel for drawing to my attention *Harpreet Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA CIV 978* and *Underhill LJ's* suggested test at paragraph 55 that "In the normal cases where an employee claims to have been constructively unfairly dismissed, it is sufficient for the tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju [2005] ICR481*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied term]? If it was, there is no need for any separate consideration of a possible previous affirmation..."
- (5) Did the employee resign in response (or partly in response) to that breach?"

40. I have come to the conclusion that the Complainant's claims are without merit all their aspects. I am satisfied that the Photograph was sent by Mr. Ruiz to the Claimant by mistake and not for the purpose of nor had it (having regard to the nature of their relationship) the requisite effect under section 14(2) Equal Opportunities Act 2006 or under section 4(1) of the Employment (Bullying at Work) Act 2014. Nor was the Complainant, in my view, constructively unfairly dismissed because I find that she did not resign from her employment by the Respondent in response (or partly in response) to any repudiatory breach (which, in any event, I find there was none) by the Respondent.

41. I, therefore, dismiss the Complainant's claim.

Dated the 23rd October 2020.


Haresh K. Budhrani, QC

Chairman