

**Reserved judgment**



**Between:**

**Claimant:** Miss KL

**Respondent:** Sussex Hospitality Services Limited

**Heard at London South Employment Tribunal on 4 & 5 September 2017**

**Before Employment Judge Baron**

**Lay Members:** Ms J Bird & Mrs R C Macer

**Representation:**

**Claimant:** *Nikolas Clarke*

**Respondent:** *Peter Starcevic*

**JUDGMENT**

It is the judgment of the Tribunal that the claims made by the Claimant under the provisions of the Equality Act 2010 succeed to the extent set out in the reasons below but not further or otherwise.

**REASONS**

*Introduction*

- 1 This case involves allegations of sexual assault. The Claimant is therefore entitled to anonymity and the Tribunal made an appropriate order under section 11 of the Employment Tribunals Act 1996 and rule 50 of the Employment Tribunals Rules of Procedure 2013. The Claimant is known for the purposes of these proceedings as 'KL' which are letters chosen totally at random.
- 2 The Respondent is a wholly owned subsidiary of Harvey & Son (Lewes) Limited ('Harvey's'), a well-known Sussex brewer. The function of the Respondent is to provide staff to certain of Harvey's public houses. The Claimant was employed as the General Manager of one such public house with effect from 1 February 2016. We will simply refer to the establishment as 'the pub'. There was accommodation at the pub, and that was occupied by the Claimant, and two young relatives of hers, 'R' and 'S' who also worked at the pub.

- 3 The Claimant reported to David Pritchard. She was dismissed with effect from 31 August 2016. The Claimant is alleging that she was the subject of sexual harassment on 11 March and 15 June 2016 within section 26(1) or 26(2) of the Equality Act 2010, and also that her dismissal was a further act of harassment as being less favourable treatment within section 26(3) of the 2010 Act. Mr Pritchard is the alleged perpetrator. Section 26 is as follows insofar as relevant:

**26 Harassment**

- (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).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether 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) The relevant protected characteristics are—
- ....;
  - sex;
  - ....

- 4 Submissions were made by each of Mr Clarke and Mr Starcevic relating to the evidence, and we have taken those submissions into account when making our findings. Mr Starcevic also referred us to the extract set out below from paragraph 22 of the judgment of Underhill J (as he then was) in *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336 EAT, a case of race discrimination.

We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the tribunal indeed indicated by the size of its award.

- 5 We heard evidence from the Claimant, and also from R and S. We heard evidence from Mr Pritchard. We also heard evidence from Hamish Elder,

the Chairman and Joint Managing Director of Harvey's, and Joanna Ball, the then HR Manager of the Respondent. It is obviously very important in a case such as this to consider with great care the evidence of the witnesses, and that we have done. We found each of Mr Elder and Ms Ball to be particularly credible. We note that Ms Ball left the Respondent in September 2016 for other employment, and has no personal interest in the proceedings.

- 6 In making our findings of fact we have taken care to consider the totality of the evidence. Rather than setting out our factual findings and then our conclusions separately, we will set out our legal conclusions alongside out factual findings.
- 7 We have mentioned that the Claimant reported to Mr Pritchard. He also had others reporting to him. The Claimant and Mr Pritchard had regular weekly meetings, almost invariably on a Wednesday. No formal notes were made or minutes taken of such meetings. Mr Pritchard also had regular weekly meetings with Ms Ball to discuss any HR issues.
- 8 There was a celebration at the pub on 11 March 2016. The Claimant and Mr Pritchard, and other staff from the Respondent and Harvey's, were present. Inevitably alcohol was consumed. In her claim form ET1 the Claimant alleged that Mr Pritchard 'asked if he could stay the night when he was fully aware that all of the rooms were occupied'.
- 9 This incident was first mentioned by the Claimant when she spoke to Ms Ball at a meeting on 13 September 2016, which has been referred to as a 'grievance appeal meeting'. The nature of the 'grievance' and what occurred is mentioned in chronological order below. The notes of that meeting made by a notetaker record that the Claimant said that 'David said to me he wished he could arrange to stay over.' Mr Pritchard needed to make a train journey to get home from the pub.
- 10 The Claimant made a complaint to the police on 20 September 2016, and again we refer to that below. The complaint refers to this alleged incident, and also other alleged incidents on 15 June 2016. The notes made by the officer concerning the March incident refer to Mr Pritchard as having been drunk, and 'asking to stay the night in one of the rooms.' The note continues by saying that the Claimant 'thought this a bit odd and told him no as he knew already all rooms were occupied'.
- 11 However, in paragraph 8 of her witness statement prepared for this hearing the Claimant's evidence is much more detailed. The Claimant now alleges that Mr Pritchard specifically asked if he could stay with her, meaning in her bedroom, and that when she said 'I don't think so, mate!' Mr Pritchard replied 'Oh come on, [K]'. In cross-examination Mr Pritchard said that he had no recollection of the incident at all.
- 12 Mr Starcevic submitted that the first record on the incident as noted on 13 September 2016 was the most likely to be accurate, and that what occurred was not unwanted conduct, it was not related to the Claimant's sex, nor was the request or wish of a sexual nature, and that it did not

have the purpose or effect of violating the Claimant's dignity or have any of the effects in section 26(1)(b). Further it was not reasonable that whatever occurred should have had such an effect.

- 13 We do not accept the Claimant's version of events as set out in her witness statement, and conclude that the brief report to the police is the more accurate version. We find on balance that she has now elaborated on a trivial incident. We would have thought that when making the complaint to the police primarily about the alleged June incident the Claimant would have set out her allegation concerning this alleged incident in full.
- 14 The Claimant in her witness statement, which was of course prepared for the purposes of this hearing, referred to the behaviour as 'outrageous and degrading' and that Mr Pritchard was 'trying to take advantage of the situation'. Having had the benefit of hearing all the evidence, we simply cannot accept that as true. There was no evidence of any issue with the professional relationship between the Claimant and Mr Pritchard after that date.
- 15 The second alleged incidents occurred on 15 June 2016, which was a Wednesday. We find the Claimant's evidence as to the events of that day particularly unreliable. There was to be a meeting of Mr Pritchard, the Claimant and others who reported to him, at 4 pm that day. The Claimant alleged that the ordinary one-to-one meeting with Mr Pritchard which she would have had that day did not take place, and was rearranged for the following Friday and that Mr Pritchard did not attend that rearranged meeting. The Claimant stated that she considered that to have been 'almost like an admission of guilt, like he didn't want to show his face.' The evidence of Mr Pritchard was that the weekly meeting with the Claimant took place at 3 pm before the meeting with others at 4 pm. We prefer the evidence of Mr Pritchard.
- 16 We also prefer the evidence of Mr Pritchard concerning the subsequent chronology, and find that the Claimant's evidence distorts the truth. It is not possible to put exact times on what occurred, as nobody was noting the time: there was no reason to do so. The meeting finished at about 6 pm, following which a meal was served to those attending at the table at which the meeting had taken place. At about 7 pm all those present retired to the bar of the pub. The party broke up at around 10.45 to 11 pm, by which time it was too late for Mr Pritchard to catch his last train. By then he and the Claimant had been drinking for some hours. Mr Pritchard said that he had had four or five pints of beer. The Claimant confirmed in cross-examination that she had enjoyed the evening.
- 17 It is not in dispute that on two occasions there was contact between Mr Pritchard and the Claimant's breast or chest, and that then Mr Pritchard touched the Claimant's knee or leg. It is also not in dispute that there was a conversation at some stage in the evening about getting home and the possibility of staying in the pub. The details are in dispute.

- 18 What is materially in dispute is the chronology and timing of what occurred. In her witness statement the Claimant alleges that at about 8 pm Mr Pritchard asked another employee if he could have a lift home, and then he complained that although he would like to stay at the pub the Claimant would not let him. The Claimant alleges that the other employee offered Mr Pritchard a lift home. She then says:
- [Mr Pritchard] then turned to me and said 'There's no need to be like that, is there?'. That's when he touched me on my right breast. . . . I said to [Mr Pritchard] 'Hang on a minute, what are you doing?' [Mr Pritchard] seemed completely calm about it, and simply replied 'That's okay, isn't it?' Then before I could think what to do, he touched my breast again. Then he moved his left hand under the table, and began rubbing my right leg. This was just so shocking that I could not believe what was happening to me. But he would not stop. He kept pressing me further, and he said. 'Oh come on, [K]?' I said, 'No. No, David. I don't think so. That's enough.'
- 19 The Claimant accepted in cross-examination that her written evidence as set out above was inaccurate both as to the order of events and the timing of them.
- 20 We find what occurred was as follows. As the Claimant was sitting down at the table in the bar after dinner she brushed past Mr Pritchard and there was physical contact between them. Later he leaned across the Claimant to move some drinks and brushed past her right breast with his arm.<sup>1</sup> Mr Pritchard then apologised and patted her on the knee, or squeezed her knee. We find that the evidence in the Claimant's witness statement as set out above is a considerable distortion and exaggeration of what occurred.
- 21 We find that Mr Pritchard did not intend to make contact with the Claimant's breast or chest on either occasion. Further it is our conclusion that neither incident was such as to fall within the criteria in section 26(1) or (2) of the 2010 Act. The incidents were accidental and simply not of sufficient seriousness.
- 22 The incident of the patting of the knee is, however, in our judgment different. This was a marginal decision which we discussed at some length. We have not accepted the Claimant's evidence that Mr Pritchard 'began rubbing my leg' and that he 'would not stop.' The fact remains that he did deliberately briefly place his hand on the Claimant's knee and patted or squeezed it. Mr Pritchard should not have done that. In our judgement that action was not only unwanted and wholly inappropriate, but also did create an offensive environment for the Claimant. We bear in mind particularly that this concerns the actions of a manager with whom the Claimant had to work closely, but we have also noted that the Claimant remained sitting next to Mr Pritchard for the remainder of the evening. The incident is, however, at the very low end of harassment,

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<sup>1</sup> The phrase 'brushed past' is the one recorded as having been said by the Claimant to Ms Ball at the meeting of 13 September 2016 mentioned below.

and any compensation to be awarded to the Claimant must reflect that fact.

- 23 We turn to the final allegation of harassment which was not even mentioned in the claim form ET1. After 10.30 in the evening there was a general conversation about arrangements for going home. Again we find the Claimant's version of events as presented in her witness statement, or implied in it, to be an exaggeration. We find that there was much joking, as might be expected after an evening of drinking.
- 24 In the Claimant's witness statement she said that Mr Pritchard was pushing her (metaphorically) into a corner and that he would not take 'No' for an answer, and almost forcing her to say 'Yes', and the Claimant referred to him as 'like a dog with a bone'. We do not accept that evidence. The Claimant conceded in cross-examination that Mr Pritchard had not asked to stay with her. It is our conclusion that this was an entirely lighthearted innocent conversation among those present. As part of that general conversation about getting home Mr Pritchard said words to the effect that they could all stay at the pub. What occurred was nowhere near harassment as defined in section 26 of the 2010 Act.
- 25 The pub, and also other public houses, had annual budgets set for the calendar year, broken down into months. There were target percentages for gross profit on both dry stock (food) and wet stock (drinks). There were also targets for staff costs as a percentage of turnover. That percentage varied month by month.
- 26 We were not provided with full details but we are satisfied that Mr Pritchard had had concerns about the performance of the pub, and the Claimant's abilities as a manager, from at least late April 2016. The gross profit on both wet and dry stock was considerably below the targets, and the staff costs as a percentage of turnover was materially higher than the target at times. As a consequence Mr Pritchard was considering dismissing the Claimant. He intended to replace the Claimant with an experienced manager from another of the Respondent's public houses, and recruit a new manager from London. Enquiries were made on 6 July 2016 of Ms Ball about the practicalities of that arrangement.
- 27 Criticisms were made by Mr Clarke of the fact that there had not been disclosure of all the various reports and spreadsheets recording the financial performance of the pub, and that there were no notes of the weekly meetings between the Claimant and Mr Pritchard. For our part, we are glad that we were not required to attempt to analyse such documents, and make decisions as to whether any variations from targets were explicable. Documentation must be proportionate. We may have come to a different view if the claim was one of unfair dismissal, and the reason given by the Respondent had related to the capability of the Claimant. In such a case the Tribunal would have to be satisfied not only as to the reason for the dismissal, but would also have to consider the reasonableness of the dismissal decision.

- 28 The Claimant was informed by Mr Pritchard on 13 July 2016 that he was dismissing her on notice, and they agreed that the employment would end on 31 August 2016. The Claimant continued working at the pub up to that date. Mr Pritchard recorded in an email of 13 July 2016 that he had lost confidence in the Claimant's ability to manage the pub successfully. The Claimant asked for more detail of that reason. Mr Pritchard replied citing 'staffing standards, staffing cost control, pub cleanliness and stock management and control.'
- 29 The Claimant wished to raise the dismissal with Ms Ball and telephoned her, but it was not possible to arrange a meeting until 30 August 2016. The Claimant therefore sought a meeting with Mr Elder. That meeting took place on 12 August 2016. The Claimant was accompanied by her stepfather, Mr Mooney. Mr Elder knew that the Claimant had been dismissed but was not aware of the purpose of the meeting. He assumed that she would be looking for a different position in Harvey's. The Claimant said she was aggrieved with her dismissal, and with Mr Pritchard. We do not accept the Claimant's evidence that Mr Elder said he would seek to find another position for her. It does not make sense that the Chairman of a substantial company with a dedicated human resource officer would offer an employee who had been dismissed another post in such circumstances. Mr Elder went no further than enquiring what the Claimant was seeking from the meeting. The Claimant said that she wanted a cash settlement, and Mr Elder said that that would not be forthcoming. Part of the conversation related to parking costs incurred by the Claimant while working at the pub. Importantly there was no mention made of sexual harassment.
- 30 There was a meeting of the Claimant, R and Ms Ball on 30 August 2016. Notes were made of the meeting, and they refer to it as a 'Grievance Meeting' although the Claimant had not raised a formal grievance. The notes record that Ms Ball opened by referring to the parking issue, and then saying that she did not know what the Claimant's particular grievance was. The Claimant said that she had a grievance about the way she was dismissed, and the notes record the Claimant as acknowledging that she had told Mr Pritchard that she 'wouldn't be great at the back office stuff'. The Claimant set out some reasons which she considered explained the elements of poor performance highlighted by Mr Pritchard. Ms Ball asked her what she wanted and the Claimant said that she wanted her costs of £5K to be covered. Again there was no mention of any alleged misconduct by Mr Pritchard.
- 31 Ms Ball then met with Mr Pritchard to discuss the various specific points raised by the Claimant as Ms Ball understood them. She then wrote to the Claimant on 2 September 2016 setting out her decision. She sought to analyse the Claimant's complaints under different headings. Under the headings of control of the wage bill and stock control Ms Ball said that those matters did not form part of the reason for the dismissal. The 'grievance' was dismissed.

- 32 On 5 September 2016 the Claimant sent a long email to Mr Elder. She criticised the reasons put forward for her dismissal. She said that she was the casualty for the wish of Mr Pritchard to move a manager into the pub from another of the Respondent's public houses. She said that although the Respondent was a family run company, it did not care about its people, and added that Mr Pritchard should not be allowed to get away with treating people like that. There was clearly much emotion and bitterness behind the email. There was no mention of the allegations now before us.
- 33 Mr Elder replied saying that it was not appropriate for the Harvey's company to become involved in staffing issues of the Respondent as the Respondent had its own procedures. He did say, however, that some of the issues then raised by the Claimant were likely to be raised at one of the regular meetings between the two companies.
- 34 The letter from Ms Ball of 2 September 2016 stated that the Claimant could appeal against the decision. The Claimant did appeal by an email of 6 September 2016 simply stating that she wished to do so. She elaborated in a later email sent on that day saying that she had been unfairly treated and Mr Pritchard's loss of confidence was not a good enough reason, and she mentioned that the wage bill and stock control had not been reasons for the dismissal.
- 35 The appeal was heard by Ms Ball on 13 September 2016. On this occasion the Claimant was accompanied by Mr Mooney, and there was a notetaker present. Ms Ball allowed Mr Mooney to be present, although that was contrary to the Respondent's grievance procedure. There was criticism at this hearing of the fact that Ms Ball dealt with the appeal. That is noted, but we remind ourselves that this is not a case where the procedure adopted by the Respondent is directly relevant to the issues we have to decide.
- 36 Ms Ball referred to the reasons given by the Claimant for making the appeal in her email of 6 September, and the Claimant then raised the matters now before the Tribunal. The notes record the Claimant as saying that on 9 March 2016<sup>2</sup> Mr Pritchard had said 'he wished he could arrange a room to stay over', and also that he had 'brushed past [the Claimant's] breast, apologised did it again and squeezed [the Claimant's] knee.' Mr Pritchard had also said that he 'would love to stay here but [the Claimant] wouldn't let me.' The reason given by Mr Mooney for the matter not having been raised earlier was that the Claimant was 'looking to a long term view with Harvey's.' He alleged that the Claimant had been dismissed because she had rebuffed Mr Pritchard.
- 37 Ms Ball spoke to R and S on the telephone, and she made notes of the conversations. The relevant extract from the notes of the meeting was sent to Mr Pritchard by Ms Ball with a request for comments. In his reply

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<sup>2</sup> It was agreed that that was an error and the correct date was 11 March 2016.



he said that he had no recollection of the alleged episode of 11 March 2016. His comments about the events of 15 June 2016 were as follows:

The incident when I accidentally brushed past [the Claimant's] chest did indeed occur. No malice was intended and it was light-heartedly dismissed by both [the Claimant] and I at the time. There was never any serious conversation involving me making a request to stay the night either at [the pub], or with [the Claimant].

- 38 Ms Ball wrote to the Claimant on 14 September 2016 dismissing the appeal. Her decision was that the dismissal still stood. She commented that the Claimant had had plenty of opportunities to raise the allegations previously. She said:

This is brand new information to me and I feel that it has only been brought up because of your dismissal.

- 39 The Claimant then wrote again to Mr Elder on 16 September 2016 referring to 'trespass to the person' and Mr Pritchard having asked to stay over at the pub. Mr Elder responded saying that if there was an allegation of personal assault then the matter should be referred to the police.

- 40 The Claimant did refer the matter to the police on 20 September 2016. We had a transcript of the initial telephone call. An officer then telephoned the Claimant on the following day. The notes made by the officer record the complaint as follows:

During the evening his left arm touched her boob. She appreciated this may have been accidental but challenged him anyways at which point he deliberately placed his left hand on her boob before placing a hand on her leg and squeezing whilst laughing as she objected. He then asked one of the other girls to give him a lift home making a point of saying that she wouldn't let him stay (this was challenged by [R] who told him there were no rooms as he rightly knew.)

- 41 The Claimant wished for Mr Pritchard to be spoken to by the police so that he could see that the type of behaviour in question was not appropriate. Mr Pritchard was contacted by the officer on 27 August 2015 about 'a complaint from an ex-employee'. Mr Pritchard then went as quickly as he could to the police station and met the officer in the public reception area. The officer did not make any contemporaneous notes of the conversation. The notes which were made by the officer record as follows:

He was quite shocked by the allegation but confirms that it did happen albeit with no intent other than light-hearted banter. He states they had all been drinking and enjoying themselves and continued to laugh and joke after he placed his hand on her leg so he honestly didn't realise she took any offence at this and he certainly didn't mean any.

- 42 The police documents were disclosed following the making of a third-party disclosure order by the Tribunal. Mr Pritchard had not seen the documents until 20 July 2017. Mr Pritchard said in his witness statement, and repeated in evidence, that the officer's notes misrepresented what he had said and that the phrase 'it did happen' did not mean that he had accepted the veracity of all the allegations made by the Claimant as recorded in the officer's notes. In particular Mr Pritchard said that he was

taking the inaccuracy of the notes up with the police. We find that the officer's notes are not reliable to the extent that it is not clear that all of the specific allegations as made by the Claimant were put to Mr Pritchard.

- 43 The final matter to be considered is the issue of the time limit and jurisdiction. The incident in question was on 15 June 2016. The normal three month time limit therefore expired on 14 September 2016 in respect of that incident. The dismissal decision was made on 13 July 2016, and took effect on 31 August 2016. The relevant limitation dates were 12 October and 30 November 2016. Contact was made with ACAS on 5 October 2016, and the certificate was issued on 11 October 2016. The claim form ET1 was presented on 9 November 2016.
- 44 We have found that the dismissal was not an act of harassment within section 26(3) of the 2010 Act. The only allegation which we have found to be an act of harassment occurred on 15 June 2016, and that is out of time. The question therefore is whether time ought to be extended on the basis that it is just and equitable so to do. Very limited submissions were made on the point. It was not suggested by Mr Starcovic that there was any specific prejudice caused to the Respondent by the delay. We heard full evidence from all those involved. In all the circumstances of this particular case we are satisfied that the prejudice to the Claimant in disallowing a claim which has found to have been substantiated is greater than the prejudice to the Respondent. Time is therefore extended to validate the claim.

**Employment Judge Baron  
Dated 20 October 2017**