EMPLOYMENT TRIBUNALS

Claimant: Ms Sylvia Ndebele

Respondent: A Bubble Company Limited

Heard at: London South **On: 7 August 2017**

Before: Employment Judge Fowell

Representation

Claimant: Unrepresented
Respondent: Mr. Davies

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct sex discrimination is upheld.
2. The Respondent is ordered to pay the claimant compensation of £575.

REASONS

1. By a claim form dated 15 November 2016 the claimant, Ms Ndebele, brought claims of sex discrimination against two companies: The Change Group of Companies Ltd, an agency for whom she worked as a temporary worker; and A Bubble Company Ltd, or Bubble Food, the present respondent, for whom she worked as a temporary worker on 28 and 29 June 2016.

2. At a preliminary hearing on 6 March 2017 the claims against the agency were struck out but the claim was allowed to proceed against Bubble Food. The Order following that hearing set out the remaining issues, which in summary were two remaining allegations of direct sex discrimination:

    a. Not allowing her to work at a private event to be hosted by a friend of the Head of Sales, because only men were attending and a male chef was preferred; and

b. Cancelling her remaining shifts shortly after this incident.

3. We received bundles of documents from both parties amounting to about 250 pages and heard evidence from the claimant and from two members of the respondent's staff; Ms Magdalena Szojda and Mr Jens Nisson.

Findings of Fact.

4. The agency supplied catering staff for prestigious events and the respondent is a catering company based in central London, providing such services. It employs about 22 members of staff including a core team of full-time chefs supplemented by part-time or agency staff during busy periods. When the claimant worked for them it was a busy period, with about 15 to 17 chefs working in the kitchen.

5. Ms Szojda worked as Office Manager, reporting to a Mr Mark Watts, Head of Sales, and part of her role was liaising with agencies to obtain suitable staff for events, mainly front of house staff. The Head Chef, Mr Nisson, had two sous chefs reporting to him, and it was his responsibility to manage the kitchen and make sure there were enough staff.

6. On 29 June Ms Szojda was asked by Mr Watts to see if she could find a suitable chef to assist a private event, a barbecue, being hosted by a friend of his. This even had nothing to do with the Bubble Foods. She agreed and went into the busy kitchen area to ask the chefs there if they wanted to volunteer. The work was at £15 per hour, "cash in hand", so it would have been clear to them that this was not a Bubble Foods event.

7. There was an issue over whether the terms offered were £50 per hour or £15 per hour but we are satisfied that Ms Szojda's recollection on this point was more accurate. The claimant may have misheard. She was working for £9 per hour and as she readily accepted the event just involved cooking burgers, an easy task, so there was no real reason to suppose that it would attract such a high rate of pay.

8. The claimant and about four male chefs volunteered. Ms Szojda decided that the claimant would be the best person to put forward and told Mr Watts to tell him that she had found a suitable volunteer. He then objected, and told her for the first time that it was an all-male event and that a male chef would be preferable. She then went back to tell the claimant that she was not required.

9. The above facts were largely undisputed, save for the hourly rate. The only real disagreement occurred over how the conversation ended. On the claimant's account she challenged this and said that it was unlawful. On Ms Szojda's account the claimant simply asked her to clarify that she was not needed because she was a woman, which Ms Szojda confirmed.

10. On this point we prefer the evidence of Ms Szojda. She did not seem to regard this as a point of particular importance and seemed unaware of any

awkwardness or controversy. We were satisfied that this indifference was genuine and not feigned in any way. We also note that the claimant did not raise any complaint at the time outside this conversation, whether in person or in writing, either to the respondent or to the agency.

11. Later that week, on 2 July 2016, the claimant received a text from the agency to say that her shift for Monday 4 July 2016 had been cancelled, although the shifts for the rest of the week were still available.

12. On 4 July the claimant phoned the agency to confirm that she was available for the rest of the week, at which point she was told that all shifts had now been cancelled. She queried this by email that day, chased by text, and eventually had a meeting at the agency on 11 July. The relevant manager, Mr O'Brien, promised to investigate further. It is not necessary to set out all the steps taken by the agency. Suffice to say that they disclosed an email exchange with the respondent from 2 July 2016, in which the agency put forward a list of available names, including the claimant, Sylvia Ndebele. Mr Nisson responded:

> "Was it Sylvia that was with us last week? If so, don't send her please. Nice but slow."

13. We are satisfied that this unflattering email is genuine, and represents the real reason for the lack of any further shifts. It was sent by Mr Nisson following a discussion with one of the sous chefs, whom he asked how the claimant and others had got on that week.

14. The claimant challenges this email and suggests that it was fabricated between the agency and the company to conceal the real reason, which was that she had complained about this barbecue incident. As already noted, we are satisfied that there was no actual complaint about that incident, and Ms Szojda appeared oblivious in our view to the unfairness of the requirement, from which we conclude that she had no particular concern about the claimant's feelings on the point.

15. The email issue was also addressed during the Preliminary Hearing. Judge Siddall recorded in her written reasons from paragraph 24 to 26 that the only reason relied on was that the printed version of the email recorded the time as 8.00 p.m., whereas the electronic version sent to her said it was 20:00. She took the view that this was argument had no reasonable prospects of success since different computers may record the time of transmission in different formats. We agree. Mr Nisson produced, via his laptop, a copy of the original email, and the claimant confirmed that it was just the difference in time format that raised her suspicions. The printed version appears to have come from Mr Tim Smart, the Managing Director, who also attended the hearing today, and may therefore have a different time format on his email account. At any event, no technical evidence was put forward to counter the points made by Judge Siddall above, and so we find no real reason to doubt that it was a genuine email.

16. No evidence was led by the company about any training in equal opportunities or in avoiding discrimination, and Ms Szojda, when questioned by the Tribunal about her training, was quite candid that she had had none. She was aware of a Corporate Social Responsibility document, but not where to find it, and her knowledge of such matters was obtained before joining the company five years earlier.

Application of the facts to the law.

17. Section 13 of the Equality Act 2010 defines direct discrimination as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

18. Part 5 of the Act then describes the situations in which such discrimination is unlawful. Here, since Ms. Ndebele was not employed directly, the relevant section is section 41, dealing with contract workers.

> (1) A principal must not discriminate against a contract worker— …
>
> (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service; …

19. The key words here are "benefit, facility or service." Mr Davies, for the respondent, submits that this has to apply only to benefits provided *by the company*, and that they were merely acting as the messenger on this occasion. We do not accept that however. There is nothing in the language of the section to limit its scope to benefits provided by the company, which could easily have been done, and it would also be easy to suggest situations in which the company were agreeing to put forward members of staff for an outside opportunity for work or training with a third party, or even for a client.

20. We find that the claimant was not selected because of her sex, and that a male chef in the same position, having been recommended by Ms Szojda would have been offered this benefit, so the respondent is in breach of section 41.

21. Mr Davies went on to submit that the company was not vicariously liable for this discrimination, either at common law or by statute, for very much the same reason – that they were only the messenger.

22. By section 109 of the same Act

> **109 Liability of employers and principals**
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

> (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
> (a) from doing that thing, or
> (b) from doing anything of that description.

23. Adapting that statutory language to the present situation, sub-paragaph 4 becomes:

> In proceedings against Bubble Food in respect of anything alleged to have been done by Ms Szojda in the course of her employment it is a defence for Bubble Food to show that it took all reasonable steps to prevent Ms Szojda from doing that thing …

24. Hence, the next question is whether this was in the course of her employment?

25. It seems to us that it was. Ms Szojda was acting on behalf of her line manager. She went to obtain volunteers from chefs who were there and then working in the kitchen on the company's time. It was an opportunity for work of a very similar description to that carried on by the company. She noted the names and made a selection, in this case for Ms. Ndebele. All this suffices to show in our view a very close connection between her employment and the act in question.

26. Mr Davies conceded that it made no difference whether the discrimination was laid at the door of Ms Szojda or her manager, Mr Watts: in each case they were merely messengers. We agree that the same conclusions apply, whichever individual is considered. Mr Watts was also acting in the course of his employment, using company staff and time to recruit this person on behalf of a friend.

27. Having established that it was done in the course of employment, the next question is whether the company had taken all reasonable steps to avoid this act of discrimination, but given the lack of evidence presented, we have no hesitation in concluding that this company cannot meet this test. Such evidence as we heard from Ms Szojda tended in the opposite direction as there was no evidence of any equal opportunities training.

28. We find therefore that there is no statutory or other defence available, and the claimant was the subject of an act of direct discrimination in relation to this potential benefit.

29. We turn to the second allegation, whether there was a further act of direct discrimination in the cancellation of future shifts. This requires the claimant to show that this was done because she is a woman, not because of any issue arising out of the BBQ incident. Had she brought a complaint at the time about that, that would be a protected act for the purposes of a claim for victimisation, a different type of discrimination, but no such claim has been brought. We canvassed at the outset whether there was any suggestion that the claimant

had made a complaint before the shifts were terminated and she confirmed that she only raised this with the agency afterwards, on 4 July. As a result, and out of caution, there is no basis for such a claim of victimisation.

30. The claimant nevertheless maintained that there is a link because she complained to the Ms Szojda at the time that this was unlawful, but on that aspect, for the reasons already given, we prefer the evidence of Ms Szojda.

31. To return to the claim before us, there was no real suggestion by the claimant that her shifts were terminated because she is female and the only evidence raised was over the authenticity of the email. Having found that this was genuine, the claimant has not shown any fact from which we could conclude, in the absence of an explanation, that there was such an act of discrimination.

32. In summary therefore the claimant is entitled to succeed in relation to the first incident only, the failure to offer her the opportunity of working at this private event, which we find was an act of discrimination for which the company was responsible.

Compensation

33. It was not necessary to hear further evidence in relation to compensation since Mr. Davies took the view that there was no mention of injury to feelings in the claimant's witness statement, and so nothing to cross-examine on. Nevertheless we invited submissions from the parties and allowed the claimant a break of about 15 minutes to formulate her thoughts. When she returned she submitted that she had been suffering from depression at the time and had been to see her GP about it who had recommended stronger anti-depressants. We retired briefly to consider this new point, which was essentially new evidence.

34. Having done so, we did not think it necessary to go back to the cross-examination stage, as this assertion was not supported by any evidence from the appellant at any stage. She referred us to a reference to health problems at page 188 of her bundle, which she raised with the agency in the course of her grievance to them, but this was to back pain and vertigo, and there was no suggestion that this was exacerbated by upset feelings. We did not therefore accept this new evidence.

35. There are two elements to the potential compensation: loss of earnings and injury to feelings. The first is straightforward. It is £15 per hour for five hours work, or £75. Mr. Davies submitted that this should be zero on the basis that even if the respondent had not discriminated, the friend of Mr. Watts would still have refused to have her and so she would never had taken up the opportunity. This overlooks the fact that she would, on our findings, have had this opportunity or benefit and the respondent is responsible in law for her loss.

36. Injury to feelings are more difficult to assess. Mr. Davies referred us to a range of cases, including to the effect that where there is no mention of any injury to feelings at any stage, a zero award would be appropriate.

37. We reminded ourselves of the relevant principles set out in the case of **Vento v Chief Constance of West Yorkshire Police (No 2) [2003] IRLR 102,** that damages are compensatory not punitive, that the real value of the monetary award had to be borne in mind and that damages should not be so low as to fail to reflect the importance society attaches to fair treatment and not so high as to bring such awards into disrepute. **Vento** was decided in 2002 and since then inflation has made a considerable change to these limits. There was a separate 10% increase more recently to take account of statutory changes to personal injury compensation. The upshot is that the lower band, adjusted accordingly, is now much closer to £1000.

38. No real protest was made at any stage by the claimant about this incident. It was raised in her subsequent grievance, but as one of many points and she expressed no hurt or upset. Nor did she in her witness statement. On the other hand, she did raise the incident – not any upset - in writing soon after, and the act itself was so blatant that it almost speaks for itself. It would be an unusual case in which no hurt or feelings of dismay or rejection did not accompany being told that she was not required *as a woman*. After some deliberation, but unanimously, we felt neither able to award no compensation in the circumstances, or to approach the £1000 level now regarded as the lower end of the lower band. And so we settled on the figure of £500 as just and equitable in the circumstances.

39. Accordingly the claimant is entitled to compensation of:

    a. £75 for loss of earnings; and
    b. £500 for injury to feelings.

40. No fee award is appropriate as none was paid.

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Employment Judge Fowell

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JUDGMENT & REASONS SENT TO THE PARTIES ON

4th September 2017