Appeal No. UKEAT/0313/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 April 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

A APPELLANT

CHIEF CONSTABLE OF WEST MIDLANDS POLICE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS ELAINE BANTON (of Counsel) Instructed by: Pattinson & Brewer 4th Floor 11 Pilgrim Street London EC4V 6RN
For the Respondent	MR JONATHAN HOLL-ALLEN (of Counsel) Instructed by: DWF LLP One Snow Hill Snow Hill Queensway Birmingham B4 6GA

SUMMARY

HARRASSMENT

VICTIMISATION DISCRIMINATION

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

A complained that she had been subject to sexual harassment by B, her supervisor and of superior rank, over some 18 months. The Employment Tribunal found that was not so: the relationship had been consensual but had turned sour at the very end over two days, during which he had pestered her. On those two days, there had been harassment related to her sex. She complained about this to a senior officer on the last day (thus doing a protected act), after which B made no contact with her. The Employment Tribunal rejected her complaint of victimisation, which was that because, when the Respondent considered her complaint about B's conduct, it did not sufficiently do so because it was a complaint of sexual harassment. An appeal against this conclusion was rejected, both on the facts and because it was difficult to contemplate how a failure to hear a complaint fully could be caused by the making of the complaint in the first place.

The Appellant also argued that the Employment Tribunal was in error in failing to make specific findings as to particular features of two earlier incidents - when it was said B had grabbed A against her will. Seen in context, however, the Employment Tribunal had dealt with the issues sufficiently, and though it would have been better if it had dealt with each matter specifically, it was not an error not to have done so in this particular case.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. An Employment Tribunal in Birmingham (Employment Judge Lloyd, Mrs Dainter, Mr Liburd) heard some eight days of evidence in relation to a claim brought by a serving police officer, A, that she had been sexually harassed by her superior officer, B, over a period of some 18 months and that when she complained about it, was victimised by the Respondent, who I shall simply call "the Force".

2. In its Reasons, sent to the parties on 11 June 2014, the Tribunal found that there had been harassment on the grounds of sex contrary to section 26 of the **Equality Act 2010** but that this had been relatively short-lived over a period of some two days, 23 and 24 October 2011. It dismissed all the other complaints.

The Background Facts

3. The facts are set out extensively in the Tribunal Judgment. It is necessary only to give a sufficient synopsis of them to understand the Judgment which follows. A, who was a young officer, complained that after March 2009 and until October 2011 she had been increasingly subject to the unwelcome attentions of a sergeant, B. She ultimately complained that those actions amounted to harassment on the grounds of her sex on 24 October 2011. The Tribunal rejected her evidence in the main. It concluded that until 23 October 2011, the relationship between her and B had been an entirely mutual one and thus had not been one of harassment. There had been a consensual relationship. Many of the incidents had been instigated by her. They had been close. They communicated with each other without inhibition about matters emotional and sexual, often flirtatious and suggestive and their candour with each other had no boundaries (paragraph 11.5). They were happy to work together.

4. Accordingly (paragraph 11.10) the Tribunal found that the Claimant's role in her relationship with B was not, as she had suggested in her evidence, one of rebuff or of attempts to distance herself from him, nor was her conduct that of compliance with his demands under duress because of fears of his reprisals and his disclosure of her private past, about which she had told him and which she had said he threatened to disclose to others. The Tribunal added:

> **"… We find that she voluntarily returned his attentions and affections. B was led to believe with good reason that it was a two way genuine mutual bond."**

5. Towards the end of the relationship there was a particular incident at a barbecue held at another sergeant's house on 30 July 2011. The Claimant was there. So too was B. A third officer, C, who was becoming close to A and with whom A has since come into a long-term relationship, was also there. B's long-term partner herself came, somewhat unexpectedly, because she was concerned with the extent of the relationship which she thought she had seen developing between B and A. There was a confrontation involving that person, F, and B. The atmosphere between B and the Claimant became tense. In context, the Tribunal however added, paragraph 11.15, last sentence:

> **"… We conclude, however, that their relationship [that is, A and B] continued in much the same mutually close vein for about three months after the barbecue, until the end of October 2011."**

6. In its findings of fact set out in subnumbered paragraphs in paragraph 5, at paragraph 5.14, the Tribunal set out its primary findings of fact in respect of what happened. Since this and the following paragraph are relevant to the grounds of appeal, I shall set them out in full:

> **"5.14. During the course of the barbecue, B's girlfriend arrived at the house without warning to confront B about the claimant's presence there. A heated argument between B and his girlfriend outside PS Poulter's house ensued. He decided that he would stay overnight at PS Poulter's house. The claimant also stayed overnight. B slept in a room with bunk beds. He shared it with another male police officer. The claimant slept in a separate room which she occupied with C. We accept that some exchanges took place between B and the claimant during the night, including on the landing and in B's room. We believe that there had been some element of friction between B and [the] claimant. We find that was against the background of B's argument with his girlfriend during the afternoon, which had been overheard by many of the people who were there. We do not believe that the claimant was afraid of B or needed protection from B by sharing her room with C. Indeed, it is evident that**

the relationship between B and the claimant continued on a close and intimate level during August and September 2011.

5.15. In mid-September 2011 the claimant informed B she was intending to apply for a post in the offender management team. She invited B's help in completing her application. It is normal practice for a supervising sergeant to assist officers who are applying for new roles. B supported the claimant's application and they sat down during September and early October to put a draft application together. B also conducted mock interviews with the claimant in order to ensure that she was fully prepared for the interview. On 23 September 2011 Inspector Rowe contacted B to tell him that he had received the claimant's application form and that it was not up to standard. B acknowledged that he was annoyed about this because the claimant had not followed the advice and guidance he had given her for completing the application to a high standard. He accepted that the claimant became upset and he took her into a side room at the station and sat down with her for about two hours. He has denied that in anger he physically assaulted the claimant by grabbing her arm to pull her into the side room. On 24 September, B and the claimant had a further meeting of an hour and a half to ensure that the form was completed to the required standard and on-time. B recorded that in his notebook …"

7. In late October, on the 21st, there was a road traffic accident which involved the Claimant's father. That seems to have marked, in the Tribunal's view, the beginning of what Miss Banton on behalf of the Claimant described as a "sea change" in the relationship so far as the Tribunal saw it.

8. On 22 October, B decided that he wished to abandon the relationship he had had with his previous girlfriend and sought to propose marriage to A. Though initially A had not rejected this, she began to do so and on 23 and 24 October, in short, B made himself a pest in his constant attempts to contact, persuade and plead with the Claimant. When he realised that the Claimant was speaking to the Inspector, Inspector Rowe, late on 24 October, and that it might be about his relationship with her, he approached the Inspector and was told not to contact the Claimant. He did not contact her after that.

9. It was in respect of those two days that the Tribunal found that there had been harassment in breach of section 26 of the **Equality Act 2010**. That provides, so far as material:

"(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."

10. The conduct of B in respect of 23 and 24 October was unwanted. The Tribunal found, and there is no appeal against its conclusion, that it was related to her sex, and it had either the purpose or effect (certainly the latter) of violating her dignity and creating the environment it speaks of. There is no appeal against that finding either by the Respondent.

11. What then happened was that the Claimant's complaint was investigated. The Tribunal's decision is not entirely clear as to the particular roles and scope of the investigation which was conducted, but it is relevant to the appeal to set it out. I take this from the unchallenged submissions of Mr Holl-Allen for the Respondent by reference to the **Police Conduct Regulations 2008**, which were before the Tribunal, coupled with the Tribunal's findings of fact. Where a complaint is made of the conduct of an officer, it is liable to fall under the scope of those Regulations. If so, there are three steps through which the investigation will go. First, there is an investigation by an appropriate officer. That officer has an obligation to report on his or her findings. That report is made to "the appropriate authority" (in this case another officer, Chief Inspector Harper), who will examine the report and determine for himself or herself whether the officer concerned has a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer. If the appropriate authority determines that there is a case to answer, then, by Regulation 21, the officer whose conduct is under scrutiny is to be given a written notice, which includes details of what is being alleged against that officer.

12. A third person or body then conducts those proceedings and comes to a conclusion which is within the Regulations. Here, Detective Inspector Booth conducted the investigation. The Tribunal dealt with that in paragraph 7. In summary, it set out how, within a week of the complaint being made, the investigation was under way. It considered further allegations of sexual assault in December 2011. There were reviews in January 2012, and in March 2012 it was thought a referral to the CPS was appropriate in respect of the allegations of sexual assault. The CPS, within the next three weeks, responded that the case against B in those respects failed to pass the evidential test required for prosecution. But plainly the sexual complaints had been considered with that in mind.

13. DI Booth reported to the appropriate authority. Chief Inspector Harper then considered the report and its recommendations. He did not conclude that there had been sexual harassment. He did think there had been inappropriate behaviour for a police sergeant. In May 2012, Chief Superintendent Sharon Goosen was appointed to chair a misconduct hearing in respect of that. That occurred on 31 July 2012. The result was that the police sergeant was disciplined by being given a written warning. The Tribunal observed at paragraph 7.12 that Chief Superintendent Goosen was "not asked to consider whether or not B had harassed the claimant". The sanction which she gave was on the basis that inappropriate conduct had breached standards of professional behaviour and not because she thought that B had harassed A.

14. The Claimant argued that she had been victimised by this course of events. I confess to having been a little puzzled by the way in which victimisation was said to arise in this context, about which I shall say more when I consider the grounds of appeal.

The Appeal

15. A number of grounds of appeal were lodged. All bar three, summarised in the original Notice of Appeal at ground 2 and ground 5d and e, were rejected on the sift and by Judge Hand at a Rule 3(10) Hearing. What remained were these:

> **"(II) The Tribunal erred in law or found perversely on the facts that the Appellant's claim of victimisation failed in that it was proper that the Respondent narrowed the scope of its inquiry into the Appellant's complaint not to include sexual harassment …**
>
> **…**
>
> **(V) The ET erred in law or found perversely on the facts in relation to the following:**
>
> > **…**
> >
> > **(d) Failed to make a finding in relation to the allegation that B assaulted the Appellant on the landing of PS Poulter's house (Paragraph 5.14)**
> >
> > **(e) Failed to make a finding in relation to the allegation that B assaulted the Appellant by grabbing her arm (Paragraph 5.15)."**

16. The appeal thus splits into two parts: the first in relation to victimisation, both alleging errors of law and perversity, and the second into two aspects of the findings of fact, in respect of which it is said that the Tribunal did not find facts it should have done and in that respect insufficiently reasoned its decision. I shall deal with each in turn.

Victimisation

17. It is essential when considering a claim of victimisation to have regard to the terms of the statute. Section 27, which deals with victimisation, comes under a chapter of the Act headed "Prohibited conduct". The first part of that chapter has the subheading "Discrimination" followed by "Adjustments for disabled persons" and "Discrimination: supplementary" and then "Other prohibited conduct". A distinction is thus made at the outset between discrimination as such, on the one hand, and both harassment (section 26) and victimisation (section 27) which are described not as a species of discrimination but as "Other prohibited conduct". Section 27 reads, so far as material:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

18. Subsection 2 describes protected acts. In the current case, so far as I can see, there has been no formal definition by the Tribunal or for that matter by the parties of the protected act relied on. That is a pity. In order to have proper focus on the issues in a jurisdiction which is statutory, regard should be had with care to the terms of the statute concerned. However, I understand it not to be in dispute that the only protected act committed here was the Claimant's act in complaining on 24 October 2011 of her harassment. Her complaint, of course, was that she had been subject to sexual harassment by B for a period of some 18 months in a number of significant respects leading up to and culminating in the day of complaint.

Some Observations

19. First, the wording of section 27 is materially different from the wording of the sections in the predecessor Acts which covered the concept of victimisation. This is clear from, for instance, the report of the case of **Nagarajan v London Regional Transport** [2000] 1 AC 501, to which Miss Banton took me in the course of argument. Under the **Race Relations Act 1976** discrimination was defined as arising in these circumstances (section 2(1)):

> **"2(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has … [in effect done a protected act]."**

20. There is now no requirement that the behaviour which is to be condemned is a form of discrimination. There is no requirement that less favourable treatment should be shown. And the link between the adverse treatment to be condemned and the taking of a protected act is purely and clearly causative. The word "because" is used in section 27. The focus in section 2

was much more clearly upon the reason for the behaviour of the person who victimised the victim: "by reason that". It is necessary in considering a claim under section 27 to identify what is the detriment and that it is a detriment to which A has subjected B because B has done a protected act (that is, it has been caused by the act). That is all that is required.

21. The context is this. The right to complain of victimisation is designed to protect those who genuinely make complaints. They may not be made in bad faith. The act has to relate to a protected characteristic once such an act is done. The effect of the section is, as it were, to place complainants in a protective bubble. They may not be penalised. The response of the person to whom the complaint is made may not be such as to treat the person adversely. Though the wording of section 27 suggests that "subjecting to a detriment" may be by positive act, Miss Banton submits, and I accept, that it may also arise by an omission to act. But omissions to act must be carefully scrutinised in this regard. The purpose of the victimisation provision is protective. It is not intended to confer a privilege upon the person within the hypothetical bubble I have postulated, for instance by enabling them to require a particular outcome of a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist.

22. It follows that in some cases - and I emphasise that the context will be highly significant - a failure to investigate a complaint will not of itself amount to victimisation. Indeed there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought, asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked

on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases.

23. Here, therefore, there was significant work to be done, one might think, to get a victimisation claim off the ground where the essential complaint was that the Force narrowed the scope of the complaint because the Claimant had made a complaint. Put that way, it is not very promising. It might be different in some circumstances. An example might be if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would. For instance, if a particular employer found the prospect of dealing with a complaint of sexual harassment embarrassing to the extent that it took no action on such a complaint when otherwise it would have a duty to do so, or there was a well-established expectation that the complaint would be dealt with, it is in my view possible that a Tribunal might conclude that the omission to act, if it caused the victim of the alleged harassment a detriment in terms of the particular effects of her disappointed expectations, could conceivably come within the scope of victimisation. But it has to be said that regard to the section and words itself suggests that this is likely to be a rare event, for it postulates no particular adverse response to the making of a complaint apart from the fact of simply failing to deal with it. That, however, is not this case. The allegation is that the Force narrowed the complaint, and the suggestion has to be that it did so because the complaint itself had been made in the form that it was.

24. So much for the law. I turn to the facts, since I have emphasised the importance of context in applying the particular provisions of section 27. The essence of the complaint was that the Respondent had failed to recognise that there must have been sexual harassment since

on investigation the Force seemed to accept that there had been a sea change in the approach of A to B such that it was plain that his attentions were thoroughly unwelcome at least as from 23 October. That being so, it ought to have come to the conclusion, as the Tribunal later did, that there had been sexual harassment. But the Tribunal appeared to accept without any criticism or investigation that the employer had simply ruled that out. It said at paragraph 7.12 the police force had not asked Chief Superintendent Goosen to consider harassment. It had accepted that (paragraph 11.20): "We accept it was not her job to adjudge sexual harassment, but rather professional breach."

25. The contention is that this was improper for the Respondent, not least given its own Harassment at Work Policy and the standards of behaviour of police officers, which include, as one would expect from a public body, that they should act with politeness and tolerance. All forms of harassment, victimisation or unreasonable discrimination were regarded as misconduct. The Harassment at Work Policy was propounded over some three pages. Yet this did not find any reflection in the disciplinary charges which were ultimately brought. The Tribunal had simply accepted the fact that the Respondent chose not to investigate or treat the question of sexual harassment but did not deal with why that was.

26. In response Mr Holl-Allen, quite apart from endorsing the effect of the remarks I have already made as to the law, submits that the matter had been fully and properly investigated and the Tribunal had said so. He drew attention to the particular roles which DI Booth, then Detective Inspector Harper, and then Chief Superintendent Goosen had fulfilled. The Tribunal found DI Booth to be "an experienced and fair-minded investigator". She and her assistant, a Ms Bruckshaw, treated the Claimant's complaints "seriously and supportively". Overall, it

commented (paragraph 12.8) that, in analysing the evidence of the investigation, disciplinary and attempted resolution process:

> **"… we have been led to the clear belief that the respondent's chain of command … did what it could in a very difficult situation involving the consequences of a personal relationship between two of its officers where both in their own way had made foolish mistakes. … we are not persuaded that the respondent's conduct in seeking to manage those consequences and to support both officers as it should, engages the [Equality Act] as victimisation of the claimant."**

27. The Tribunal noted that there had been a response, which was a proper response, to the complaint. B had been moved, not once but three times (paragraph 12.3). He was unwilling to move but was made to do so. That was in response to the complaint. The Tribunal acquitted the Respondent generally of deliberate ill-will, thereby excluding any conscious penalising of the Claimant for having complained. Any causative link thus had to be derived from other than the intention of the Respondent. It concluded that the postings of A and B respectively were managed in a balanced way. Paragraph 12.6 said:

> **"… we are not persuaded that the respondent's conduct deserves to be called into critical account here. It was a very difficult and sensitive set of circumstances. The respondent we believe truly recognised that and responded with the appropriate level of empathy and support to honour their legal duties of care to her [that is, A] as a young and potentially vulnerable member of the Force."**

28. Although the Tribunal could with benefit have analysed section 27 and its application by identifying whether there was a detriment first and secondly whether, if there was, such a detriment had been caused by the fact that the Claimant had made a complaint, the effect of those comments seems to me to rule out any suggestion that it thought there had been a real detriment here. Moreover the Tribunal did not deal with whether, if it had been detrimental behaviour by the Respondent, that was because she had complained and there is no developed criticism of this by Miss Banton.

29. Miss Banton took the more general point that the **Equality Act**, if honoured, would lead to an expectation that conduct which might fall foul of it should be properly investigated and seriously regarded.

30. I have no difficulty with accepting that as a general proposition. One would hope that, particularly in public bodies, serious care is taken when serious allegations are made and any allegation of discrimination is liable to be serious. But that is very different from saying that an action or inaction by a person who listens to a complaint which has in itself and separately disadvantaged the complainer was done or omitted because of his or her making such a complaint. It was for the Claimant to show the causative link. I see nothing in the evidence or, for that matter, in the submissions, to show the causative link at all, let alone sufficiently closely. Miss Banton drew attention to a comment made by Detective Inspector Harper in the course of his evidence. He accepted that he could have gone forward with discipline under the heading of equality and diversity (page 32C of my supplementary bundle). He said at the end of his evidence in cross-examination that he thought that the Claimant herself might have been guilty of some misconduct. When asked about that by Miss Banton, he responded according to one of the notes of evidence (the notes are all very much to the same effect) in relation to what had happened between them in a car whilst on duty:

> **"Golf course - lying on each other's laps, massages, for a male inappropriate for supervisor doing. She's brought issues forward and wouldn't want to look like bring to PSD and then discipline. Didn't feel her conduct appropriate either but not to take to disciplinary."**

31. In other words he was saying that he thought that she herself was guilty of some censure but in the circumstances the humane and appropriate course would be not to proceed against her bearing in mind, in particular, as another note suggests, that the sergeant was not only senior but also in a supervisory capacity to her and plainly should be regarded as more responsible if the behaviour of both at the same time were to be regarded as a form of misconduct. That,

suggested Miss Banton, might give the clue to why it was that the Respondent in this particular case had not proceeded with allegations of sexual harassment as part of the discipline in respect of inappropriate conduct when otherwise it might have done. Though I can see that the point might be made, I do not think it gets anywhere near persuading me that there was any sufficient evidence to show that the complaint had caused the reaction, the reaction being to fail to consider the entirety of the complaint (i.e. including those aspects which related to sex and harassment) though continuing to consider other aspects of inappropriate behaviour.

32. Accordingly, for those reasons, I reject the appeal in respect of ground 2. I turn then to grounds 5d and e. These need to be put into context. A party is entitled to know why she has lost. A Judgment will not meet the requirements of the law unless it sufficiently indicates that. To do so, a Tribunal must indicate what it has found upon the central issues in the case. In one sense the issue in any case such as the present can be expressed relatively shortly. Did A discriminate against B? Or here, as one of the issues was expressed, was the Claimant the victim of harassment under section 26(2), namely unwanted conduct of a sexual nature? However, on a route to a conclusion such as that, there may be issues of fact or law which are of central importance. If those issues are of sufficient importance, then it is an error of law for a Tribunal to fail to deal with them. Not only is this well recognised by appellate authority, but it is also a requirement of the **Rules**, now Rule 62(5):

> **"In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …**

33. As the case of **Greenwood v NWF Retail** [2011] ICR 896 points out, it is an error of law not to observe that rule. Here, the Claimant's appeal begins by noting that in respect of both of the incidents referred to at paragraphs 5.14 and 5.15, the Tribunal came to no

conclusion, clearly expressed, as to whether B had assaulted A by grabbing hold of her as was alleged on each occasion.

34. The issues for the Judge to determine were set out in paragraph 3. At paragraph 3.2 was said this:

> **"The acts which gave rise to the claimant's complaints are set out in paragraphs 36, 38, 40 and 47 of the particulars of the ET1 …"**

At paragraph 3.3:

> **"Did the acts described in paragraphs 36, 38, 40 and 47 happen?"**

35. Those paragraphs contain within themselves a number of subparagraphs. 36 contains not only the full alphabet of subheadings, but a further six. 38 describes some 12 factual assertions. Paragraph 40 concerns four. Paragraph 47 has seven sub-matters. The Tribunal was thus directing itself at the outset, by agreement between the parties at the CMD and by agreement of the parties as recorded by the Judge before it, that it needed to make factual findings on each and every one of those issues. Amongst the complaints which were set out at paragraph 36(s) was:

> **"[On 30 July 2011, B] grabbed her wrist when she went out on to the landing to speak to him and began pulling her into his room saying "come and lie down with me". …"**

And 36(u):

> **"On 23 September 2011, [B] grabbed her arm and led her to an interview room where he kept her for three hours. Inspector Rowe entered the room whilst they were in there and the Claimant was distressed …"**

36. There is then a reference to bruising on the arm. The findings at 5.14 combine with observations in the conclusion at paragraph 11.15. That puts the events of the barbecue in a little more context. Paragraph 11.15 reads as follows:

> **"We are not persuaded that by the date of the barbecue at Sgt Poulter's house on 30 July 2011, the claimant had at all made her position (as she now says it was) clear to B; namely that she did not welcome his attention. The view of the tribunal is that although there were probably cross-words between the claimant and B on the night of the barbecue that was not indicative of any rejection of B. The claimant we think preferred to be in the same room as C that night; not that she needed C's protection from B. We find there had been some flirtatious undercurrents between B and the claimant during the barbecue event. We do not believe his possibly inebriated comment that they go "upstairs now" (seemingly a sexual suggestion) was offensive or harassing to the claimant at the time. Moreover, we believe B's recollection that he discovered the claimant upstairs in her bra and that she was quite unembarrassed about that. The day of the barbecue had been fraught, since B's partner F turned up unannounced and had a confrontation with B outside. She accused him of being there with the claimant; which in truth he was. The atmosphere between B and the claimant was perhaps understandably a little tense by that night. We conclude, however, that their relationship continued in much the same mutually close vein for about three months after the barbecue, until the end of October 2011."**

37. So far as the second incident is concerned, there is far less, if any, further context provided in the Reasons. Mr Holl-Allen urges the court to put these grounds in their proper place. He argues that the Tribunal had clearly found that the relationship was consensual and continued to be so until late in October. In that context the grabbing of the arm was explicable for the reasons the Tribunal gave, if it happened, at the barbecue and it was explicable by the sergeant's upset about the Claimant's failure to fill in her application appropriately, as he had hoped and advised, on the September occasion. Neither were seen by the Tribunal as indicative of hostility which had a sexual motive. Miss Banton, for her part, argues that if the Tribunal had focussed on those matters and come to a conclusion, it might well have had some impact upon its resolution generally of whether it accepted the Claimant or B in the evidence each gave in respect of the harassment. It might have forced it to reconsider its conclusion as to the extent of the harassment of her by B.

Discussion

38. A Tribunal Judgment, as has often been said, is not expected to be the finest product of legal draftmanship. The basic test it has to fulfil is ensuring that a party knows why they have lost. In a case such as the present, where there are number of incidents of fact, it is all the more important that an overview be taken and that overview be clearly expressed. Here, as it

happens, it was. I have expressed it briefly at the outset of this Judgment. But it is significant, in my way of thinking, that both parties in the course of their closing submissions argued, by reference to the case of **Driskel v Peninsula Business Services Ltd** [2000] IRLR 151 that it was really important to consider the overall picture and not to be selective by focussing unduly on individual incidents, statements or texts to the exclusion of the remainder of the evidence. It was important to adopt an holistic approach. I accept that. What matters in respect of any finding of fact is that to which it relates. There are some findings of fact which are so critical than in themselves they are liable to determine whether a case is proved or not. They may be critical both in the context of substantive law or in the context of credibility. In a case like the present, a lot depended on credibility. There was an account given by the two main parties which dealt with a number of incidents which happened between them when others were not present. In a private relationship, which on one view it was, it could not be otherwise. Accordingly, a lot depended on what the Tribunal made of the overall picture taking into account all the facts.

39. In leading to its overall assessment, not only did the Tribunal have to consider credibility, but it had to consider the progress of the relationship so far as individual incidents would show it. The significance, as it seems to me, of the incident at the barbecue would be whether or not of itself it indicated that there had been a shift in the relationship which the Tribunal had earlier thought to exist or whether in itself it might give the lie to that which B was saying as opposed to that which A was contending. The Tribunal, in what it said, in paragraph 5.14, taken in the context of 11.15, shows that the Tribunal was plainly aware of some friction and some exchanges. If the incident in respect of the grasping of the Claimant by B did occur in the barbecue, its significance would be what it said about the relationship generally. Very few relationships, however permanent, are entirely free of friction from the

first day to the 60th anniversary. What matters is the overall context in which the adverse behaviours are displayed. It seems to me that, although it would have been better if the Tribunal had specifically answered the matter posed and dealt with it in respect of the barbecue, it sufficiently dealt with the impact which that might have had, in context, to resolve the issues which it had to resolve as a matter of overall conclusion. It would be a mistake to focus so much upon an individual event (particularly in retrospect on appeal, where matters may seem to have a very different force from that which they had below) to draw the conclusion that a decision on fact was not one which the Tribunal could properly reach. In short, I see no reason why in respect of the barbecue finding, the Tribunal's findings should be upset.

40. The conclusion in respect of the September event is not quite so easy because it seems to me that the Tribunal says less about the context. Nonetheless the same overall approach must apply. The question which I must have in mind is whether the Tribunal failed to engage with an issue which, had it done so, might have made a difference to its decision, sensibly viewed. The Tribunal was plainly well aware of all the nuances and undercurrents of the evidence. This was not a matter which was put upfront, although some half a page of Miss Banton's closing submissions (paragraph 39) were related to it.

41. In order to examine how the point arose for the Tribunal, I invited the parties to provide me with full copies of their closing submissions. They were able to do so. The Claimant's submission in writing discussed, entirely appropriately, the credibility of sergeant B. After all, the case was a contest between the acceptance of his evidence on one hand and A's on the other. It was in that context, under the heading of "further inconsistencies" that Miss Banton drew attention to what had happened in the September incident. There was a note taken in manuscript by the parties' relevant submissions. Both, as I say, were emphasising the need to

take a broad overview, which was entirely appropriate given the amount of individual detail which would feed into conclusions which had properly to be drawn at a high level. In that, the link with credibility is even clearer. Miss Banton's submissions are noted as describing B's credibility as damaged, immediately going on to discuss "Whilst giving evidence he referred to" and there are three bullet points, the third of which was headed "Grabbing her twice". Credibility was central. Credibility was resolved. It was resolved by the Tribunal generally expressing a preference for the Respondent's witnesses over the Claimant's. It was dealt with generally in its conclusions as to what had happened, taking a **Driskel**-style overview. Though I think it would have been desirable and better that the Tribunal should have looked separately at and made a discrete finding of fact as to whether the Claimant had or had not grabbed hold of the Claimant so forcibly as to bruise her on the September occasion (and it must be borne in mind that on that occasion there is ample material to suggest he did not specifically deny it, as he had done in respect of the barbecue) it needs to be placed in context. Did it indicate an attempt by him to assault her with a sexual motive or undercurrent in mind? It is plain that is what the Tribunal did not find. That being so, although I was initially troubled by the 5.15 point, I have ultimately come to the conclusion that it is no sufficient reason for holding that the Tribunal's Judgment here dealt insufficiently with the issues, nor was its decision reasoned insufficiently.

42. It follows that, for all the reasons I have expressed, the appeal must be and is dismissed, with gratitude to Miss Banton and Mr Holl-Allen for the care with which they have delivered their submissions.