



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Taylor

**Respondents:** (1) Mr A Lewis (2) Mr T Fyfe (3) Mr K Holmes (all t/a 3 Optical Group)

**Heard at:** Leeds

**On:** 21, 22 and 23 March 2017; 7 April 2017  
(Reserved)

**Before:** Employment Judge Keevash  
Ms H Brown  
Mr J Simms

## Representation

**Claimant:** In person  
**Respondents:** Third Respondent  
Second Respondent did not attend

# RESERVED JUDGMENT

- 1 The complaints of harassment (in part) succeed.
- 2 The remaining complaints of harassment fail
- 3 The Respondents are ordered to pay to the Claimant the sum of £10,619.75
- 4 The complaint of breach of contract (notice pay) succeeds. The Respondents are not ordered to pay the Claimant any damages

# REASONS

## Background

1 By her Claim Form the Claimant complained that the Respondents, who were partners and owners of the business, and Mr Kerry, their former manager, discriminated against her. Mr Kerry was named as a Respondent. Mr Kerry and the other Respondents instructed different solicitors. By his Response Mr Kerry resisted the complaints. By their Response the remaining Respondents among other matters relied on the statutory defence set out in section 109(4) of the Equality Act 2010.

2 At a Hearing on 13 March 2017 the Tribunal queried why the Second Respondent did not attend the Hearing on 13 March 2017. Mr Holmes explained that he had no involvement in the matter and that he was happy to leave the matter in the hands of the First Respondent and himself. The Tribunal asked that the Second Respondent write a letter to the Tribunal confirming the position. The Tribunal adjudged that the Respondents were not able to rely on the statutory defence. It followed that they were liable for any unlawful action on the part of Mr Kerry during the course of his employment. The complaint of holiday pay was dismissed on withdrawal by the Claimant.

3 Mr Kerry did not attend that Hearing. He was a Respondent in these proceedings until the previous week when he settled the Claimant's claim against him by way of an ACAS conciliated agreement. Mr Holmes explained that the Respondents wished to call him as a witness on their behalf. He expected Mr Kerry to attend because he was a party and he was unaware of the settlement until he came to the Tribunal. He made an application for a witness order against Mr Kerry. In those circumstances the Tribunal granted the Respondents' application. It adjourned the Hearing and ordered the matter to be relisted for an adjourned Hearing in order to give Mr Kerry sufficient notice to attend as a witness.

4 During that Hearing the Claimant informed the Tribunal that she was bound by a confidentiality clause not to divulge details of the terms of the settlement reached with Mr Kerry. The Tribunal considered that this presented two difficulties. Firstly, if the Respondents wished to negotiate a settlement with the Claimant, they would be disadvantaged by not knowing what amount Mr Kerry had agreed to pay her. Secondly, if the Claimant succeeded as against the Respondents and the Tribunal awarded compensation to be paid to her, she would get double recovery. Accordingly, on its own initiative and in accordance with the overriding objective set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Tribunal ordered that the Claimant divulge to the Respondents the amount of compensation payable by Mr Kerry under the terms of the agreement and whether he gave her an apology. Immediately that Order was made, the Claimant confirmed that Mr Kerry had agreed to pay her £5,000 and that he had made no apology.

### **Issues**

5 The issues for determination had been identified at a Preliminary Hearing on 14 October 2016.

### **Hearing**

6 On day 1 of the Hearing Mr Holmes gave the Tribunal a letter from the Second Respondent confirming that Mr Holmes and the First Respondent had authority to act fully on his behalf. In those circumstances the Tribunal decided to excuse him from attendance.

7 At the Claimant's request made on 13 March 2017, the Tribunal arranged for a screen to be installed in the Hearing room which meant that she was unable to see Mr Kerry. It also took reasonable steps to ensure that there was no contact between them before, during and after the Hearing. Finally, the Employment Judge asked Mr Kerry the cross examination questions which the Claimant wished to put. She had previously handed in a list of those questions.

8 The Claimant gave evidence on her own behalf. Deborah Kemp, Mr Kerry's sister, Nadine Owen, Optical Assistant, and Stephen Kerry, former manager, gave evidence on behalf of the Respondents. The First and Third Respondents gave evidence on their own behalf and on behalf of the Respondents. The Tribunal watched a CCTV recording and considered a bundle of documents.

**Facts**

9 The Tribunal found the following facts proved on the balance of probabilities:-

9.1 On 22 February 2016 the Claimant was employed by the Respondents as an Optical Sales Assistant.

9.2 The Respondents are partners trading as "3 Optical Group" manufacturing and selling optical products. At the material time they employed four employees.

9.3 On 13 May 2016 the Claimant attended for work. After the end of the day she began a period of sickness absence.

9.4 By a three page letter dated 16 May 2016 the Claimant informed the First Respondent:-

"Please accept this letter as a formal grievance.

Since starting here I have begun to feel increasingly more uncomfortable with my work relationship with Steve. The comments and physically invading my personal space Steve persistently projects to me make me unbelievably uncomfortable and I am intimidated by this ..."

She then set out details of her allegations.

9.5 On or about 16 May 2016 the Claimant contacted ACAS. She also spoke to the Equality Advisory Support service who suggested that she should consider contacting the police.

9.6 On or about 17 May 2016 the Claimant contacted the police. She was given an appointment for 19 June 2016.

9.7 The First Respondent conducted investigation meetings with Mr Kerry, Ms Owen and the two other employees, Laura and Mr Dalton.

9.8 On or about 18 May 2016 Mr Kerry gave the First Respondent a statement regarding the allegations made by the Claimant.

9.10 On 18 May 2016 the First Respondent sent the Claimant the following text message:-

"Hi Stacey just to let you know Steve's come in to see me to say he would like the opportunity to say sorry for all the upset and not to worry over an atmosphere when back to work."

9.11 On 18 May 2016 the Claimant attended a meeting which was conducted by the First Respondent. The notes of that meeting record:-

"...Ashley informed Stacey that her accusations of inappropriate behaviour regarding work colleague Steve Kerry had been fully investigated, after interviewing Steve we feel the appropriate action is to issue him with a written

warning regarding his behaviour towards Stacey and will be kept on file for 1 year with regular reviews.

It was further agreed that a memo would be circulated to all staff regarding their conduct in the work place to other members of staff and also to staff belongings and their vehicles, with a view that unacceptable behaviour will not be tolerated by the company and the breaking of this rule with (sic) have severe consequences. Also a weekly meeting will now be held to discuss and raise any grievances whether this be staff or customer related, with a view to resolve problems quickly so not to let them drag on and become much bigger issues...”

9.12 On or about 19 May 2016 the Claimant contacted solicitors and was given an appointment for the following week.

9.13 On 19 May 2016 West Yorkshire issued a Harassment Notice against Mr Kerry

9.14 By an undated letter the Claimant informed the First Respondent:-  
“...I wish to appeal the outcome of the decision that was reached.

My grounds of appeal are as followed (sic) I am not happy that the appropriate action has been issued with regards to Sexual Harassment within a workplace. I feel that a written warning is not the subsequent action for gross misconduct. The reason I feel that this is not the appropriate action to be issued is because I do not feel safe working alongside and in the same environment has (sic) Steve and having to do so is having a negative declining effect on my health causing Anxiety and Stress. I have also suffered lack of sleep and appetite ...”

9.15 By an undated letter (received on 9 June 2016) the First Respondent invited Mr Kerry to attend a disciplinary meeting to discuss six allegations of gross misconduct.

9.16 By a text message sent on 10 June 2016 Mr Kerry informed the First Respondent that he had resigned.

9.17 The First Respondent made several attempts arrange an Appeal Hearing. The Claimant responded by stating that she did not wish to attend an appeal meeting at the current time.

9.18 By a letter dated 14 June 2016 the First Respondent informed the Claimant that Mr Kerry was no longer an employee of the Respondents.

9.20 By a letter dated 27 June 2016 the Third Respondent informed the Claimant that he would be dealing with her appeal. Among other matters he suggested meeting at a neutral venue if that was preferred. He also enclosed statements which had been taken during the course of the investigation.

9.21 By a letter dated 28 June 2016 Mr Fox, Psychological Well-Being Practitioner, informed the Claimant's GP:-  
“...we have now completed a screening assessment together.

During this assessment Stacey completed some questionnaires and on the measures of depression and anxiety her scores were as follows:-

**PHQ-9 Depression score – 18 out of 27**  
**GAD-7 Anxiety score – 15 out of 21**

It was felt that they could benefit from some input from our service and has therefore been accepted into the service and is now on the waiting list for Step 2 – Guided Self-Help which is based on Cognitive Behavioural Therapy (CBT). Stacey agreed to start her treatment this month by engaging with ‘reading for recovery’, and I have sent them some selected self help materials to help them learn some new coping strategies whilst waiting...”

9.22 By a letter dated 29 June 2016 the Claimant informed the Respondents:-  
“ ...

**Resolution**

Given the discrimination and your conduct as set out above I seek the following:

- a. Full salary and benefits to be paid for my past and all future sickness absence relating to this matter. I currently receive Statutory Sick Pay only;
- b. Compensation for injury to feelings in the sum of £26,400;
- c. Compensation for aggravated damages in the sum of £5,000;
- d. Compensation for personal injury relating to psychiatric damage in the sum of £15,000;
- e. Confirmation and details of the departure of Stephen Kerry, including whether he was dismissed, whether he resigned and whether any settlement was reached; and
- f. Confirmation and details of any action to be take against Ashley Lewis.

Given the severity of my medical condition and as my cognitive behaviour therapy has yet to begin, I need the grievance procedure to be conducted in writing...”

9.23 By a letter dated 1 July 2016 addressed to the Respondents the Claimant commented on the statements which had been sent by the Third Respondent.

9.24 The Third Respondent conducted investigation meetings with the First Respondent, Nadine Owen, and the two other employees, Laura and Luke.

9.25 By an undated letter the Third Respondent gave the Claimant his findings in relation to each of her allegations. He upheld seven in full and one partially against Mr Kerry; he rejected her allegation that the First Respondent had conducted a cover up of the harassment. He continued:-  
“However in relation to the allegations raised there is no supportive evidence that you have been subjected to a sustained campaign of personalized harassment.

Throughout the course of my investigation evidence has also arisen which challenges your view of your level distress (sic) at the situation and your view on the level to which you participated willingly in relation to some of the allegations  
...

Given your suggestion that these matters have caused you emotional and psychological distress it is my view this questions the credibility of the allegations you have made. I have therefore taken this into account when considering allegations of Stephen’s behaviour that you claim were not witnessed by other colleagues...

These concerns are heightened by your letter of the 29<sup>th</sup> June which stated that your proposed resolution to the situation was that the business should pay you compensation exceeding £46,400. In relation to the limited allegations upheld above, and that the lack of evidence that you were subjected to a personalized campaign of harassment this is clearly excessive and we are not willing to offer financial compensation...

I would also like to confirm that it is acknowledged (as above) that all in the workplace must now take a more mature and professional approach to work. With that in mind we have underlined to the staff that the workplace is not the place for jokes and immature behaviour and that this won't be tolerated in future. It has also been underlined that comments of a sexual, sexist or homophobic nature will not be tolerated in the workplace.

I would also like to facilitate a meeting between yourself and Ashley Lewis to air any outstanding concerns you may have.

With this in mind I will shortly be inviting you to a welfare meeting in which we can discuss what we can do to assist you in getting back to work ...”

9.26 By a letter dated 18 July 2016 the Claimant informed the Respondents:-  
“...I consider that the events and acts complained of constitute sexual harassment. I have also been the victim of direct discrimination. I have also suffered discrimination relating to sexual orientation. I raised a grievance and grievance appeal and you unreasonably failed to redress my grievance.

I consider the above to be a fundamental breach of my contract of employment and as a result I hereby resign with immediate effect...”

9.27 By a letter dated 21 July 2016 the Third Respondent informed the Claimant:-  
“... I am sorry to hear you have chosen to resign...I had hoped to hold a meeting with you to discuss a way forward and to plan a return to work. However, your resignation is a clear indication that you do not wish for this to happen. If you wish to reconsider this decision please let me know as soon as possible.”

## **Law**

10 Section 26 of the Equality Act 2010 (“the 2010 Act”) provides:-

“(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 ... 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 it 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...

Section 136 of the 2010 Act provides:-

“(1) ...

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision...”

Section 1(1) of the Employment Rights Act 1996 (“the 1996 Act”) provides:-

“Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.”

### **Submissions**

11 The Claimant and the Third Respondent made oral submissions.

### **Discussion**

**Complaints that the Respondents harassed the Claimant when Mr Kerry (a) on several occasions took her to one side away from other members of her team, grabbed or placed his hands on her arms before saying “Can I ask you something personal” (b) at the end of February 2016 said to her “You look really sexy...I can’t stop looking at your boobs...I could just grab them” (c) at the beginning of March 2016 said to her “Do you miss sex? When was the last time you had sex? It’s only natural” (d) in early Spring 2016 said to her “Your tits look really firm in that top. Ooh, I could just bang the fuck out of them” (e) in March 2016 told her to close her eyes and, when she did so, reached out to grope her breasts (f) in early April 2016 used her lint roller and returned it to her covered with hairs (g) on several occasions drew penises and wrote “I love Steve” in the dust on her car, and on 29 April 2016 wrote “Just married” on a piece of white paper which he stuck over her car number plate (h) in the week commencing 9 May 2016 described to her a hypothetical scenario and after an exchange with her concluded with the words “Well, I would just fucking rape you then”**

### **Incident (a)**

12 The Claimant gave evidence that on several occasions Mr Kerry took her to one side away from members of staff, grabbed or placed his hands on her arms before saying “Can I ask you something personal?” She felt degraded and humiliated.

13 Mr Kerry gave evidence that he did not take the Claimant away from other staff. He said that on the contrary the Claimant used to approach him. He admitted that he placed his hands on her arms but stated that she often placed her arms on his arms. She also often came physically very close to him.

14 The Tribunal found that the Claimant was a tactile woman who tended to

touch someone with whom she was having a conversation. She was friendly and chatty. She accepted that she behaved in this manner with Mr Kerry and she understood that this conduct could have been misinterpreted by him. Before she was employed by the Respondents, there had been “banter” within their workplace. As Mr Kerry explained, that included “little innuendos, jokes, general laughs, postcard humour and double entendres. The Claimant came into that environment. She joined in with it and contributed to it. In those circumstances the Tribunal found and decided that Mr Kerry’s conduct was not unwanted. In reaching that conclusion it took into account the CCTV recording of the workplace on 13 May 2016. That was the last day on which the Claimant worked. It was clear that the Claimant was very tactile towards Mr Kerry and that on several occasions she stood extremely close to him when it was unnecessary to do so.

15 Accordingly, the complaint under this head failed.

**Incident (b)**

16 The Claimant gave evidence that at the end of February 2016 in her first week of employment Mr Kerry said to her “You look really sexy...I can’t stop looking at your boobs...I could just grab them”. She felt degraded and humiliated.

17 Mr Kerry gave evidence that he did not make these comments.

18 The Tribunal accepted the Claimant’s evidence which was consistent with the contemporaneous documents. It was credible and reliable. It rejected Mr Kerry’s evidence because, as set out in other parts of these Reasons, Mr Kerry demonstrated an unwillingness to be candid about his behaviour. It was, therefore, likely that once again he wanted to put himself in a better light by denying the allegation. The Tribunal found and decided that Mr Kerry engaged in unwanted conduct. He crossed the line of acceptable wanted conduct by making such personal comments. The Claimant did not invite those comments. Mr Kerry’s conduct had the purpose of creating an adverse environment. It related to sex and was of a sexual nature.

19 Accordingly the complaint under this head succeeded under the provisions of sections 26(1) and 26(2) of the 2010 Act.

**Incident (c)**

20 The Claimant gave evidence that at the beginning of March Mr Kerry said to her “Do you miss sex? When was the last time you had sex? It’s only natural”. She felt degraded and humiliated.

21 Mr Kerry gave evidence that the Claimant asked him about sex as an older person. He said it was no different at any age – only a natural thing. On another occasion she asked him what was “the youngest age female he would go with”. He said it was the person that counted and age was just a number. She pressed him to give a number and he kept saying he did not know.

22 The Tribunal found that the Claimant initiated these conversations about sex. She asked him questions of a personal rather than general nature. His response, although personal, was not unwanted.

23 Accordingly, the complaint under this head failed.



**Incident (d)**

24 The Claimant gave evidence that in early Spring/April 2016 Mr Kerry said to her “Your tits look really firm in that top. Ooh, I could just bang the fuck out of them”. She felt degraded and humiliated.

25 Mr Kerry gave evidence that he did not make these comments.

26 The Tribunal accepted the Claimant’s evidence which was consistent with the contemporaneous documents. It was credible and reliable. It rejected Mr Kerry’s evidence because, as set out in other parts of these Reasons, he demonstrated an unwillingness to be candid about his behaviour. It was therefore likely that once again he wanted to put himself in a better light by denying the allegation. The Tribunal found and decided that he engaged in unwanted conduct. He crossed the line of acceptable wanted conduct by making such personal comments. The Claimant did not invite those comments. Mr Kerry’s conduct had the purpose of creating an adverse environment. It related to sex and was of a sexual nature.

27 Accordingly the complaint under this head succeeded under the provisions of sections 26(1) and 26(2) of the 2010 Act.

**Incident (e)**

28 The Claimant gave evidence that in March 2016 Mr Kerry told her to close her eyes. When she said “no”, he said “I’m not going to do anything”. She closed her eyes but shortly afterwards opened them to see him reaching out to grope her breasts. She felt humiliated.

29 Mr Kerry gave evidence that did ask the Claimant to close her eyes. Although he had his hands out in front of him towards her, he was not reaching out to grope her breasts. It was “a bit of fun”. The Claimant giggled.

30 There was no conflict between the parties other than whether Mr Kerry reached out in order to grope the Claimant’s breasts. The Tribunal found and decided that Mr Kerry engaged in unwanted conduct. The Claimant did not invite the conduct; it was his suggestion and she complied because of his reassurance. Even if the conduct did not have the purpose of creating an adverse environment, the Tribunal was in no doubt that it had such an effect. In reaching that conclusion it considered section 26(4) of the 2010 Act. The Claimant’s genuine perception was that Mr Kerry was about to humiliate her; it was reasonable for his conduct to have that effect. His conduct related to sex and was of a sexual nature.

31 Accordingly the complaint under this head succeeded under the provisions of sections 26(1) and 26(2) of the 2010 Act.

**Incident (f)**

32 The Claimant gave evidence that in early April 2016 Mr Kerry asked to borrow her lint roller. She agreed. He took it to the toilet before returning and placing it in its holder. She thought this was weird and examined it. She discovered it was covered in hairs which she believed were pubic hairs. She said to him “You never have?”. He laughed and said “What do you mean?”. She replied “put that on your thing”. He then chased her with the roller in his hand and she screamed. He repeated the incident a few days later. She felt humiliated and disgusted.

33 Mr Kerry gave evidence that he borrowed the lint roller and went into the men's washroom. He used it on his fleece jacket and on his arm which left a few hairs on the roller. He then returned it to the Claimant. He admitted the conversation as alleged by the Claimant. He denied chasing the Claimant; she did not scream. He denied any unwanted conduct; the Claimant was neither offended nor humiliated. She was giggling. His evidence was corroborated by Ms Owen.

34 The Tribunal found that this incident occurred on one occasion. Mr Kerry's evidence was corroborated by Ms Owen whose evidence was consistent with the contemporaneous documents. The investigation notes also supported his evidence. The Tribunal found that this was a practical joke – an example of Mr Kerry's puerile sense of humour. It decided that his conduct was not unwanted because he placed the lint roller in its holder when returning it. The Claimant chose to challenge him about it. The decision would have been otherwise if had emerged from the washroom brandishing the lint roller. Even if the conduct was unwanted, the Tribunal found and decided that it neither had the purpose or effect of creating an adverse environment. The Claimant clearly enjoyed the joke and entered freely into the spirit in which it was intended. That conclusion was supported by Ms Owen's evidence; the Claimant was laughing when she subsequently told Laura about it. She would not have done that had she been offended or humiliated.

35 Accordingly, the complaint under this head failed.

**Incident (g)**

36 The Claimant gave evidence that Mr Kerry repeatedly used the dust/dirt on her car to draw penises and write "I love Steve". On 29 April 2016 he wrote "just married" on a piece of white paper which he stuck over her car number plate. Her mother drew her attention to it after she drove home from work. The Claimant was offended by this conduct. She admitted that on one occasion she drew a penis on Mr Kerry's car.

37 Mr Kerry gave evidence that on one occasion he drew two penises on the Claimant's car using his finger on the dust. Also on one occasion he wrote "I love Steve". He admitted the 29 April 2016 incident. He agreed that a penis was drawn on his car and that Ms Owen said that the Claimant was responsible. He denied that the conduct was unwanted and disputed that the Claimant was offended or humiliated by it.

38 Apart from the frequency with which Mr Kerry drew penises on the Claimant's car, there was no dispute between the parties. The Tribunal found that on the balance of probabilities Mr Kerry drew on the Claimant's car on several occasions. It reached that conclusion because, as set out in other parts of these Reasons, Mr Kerry demonstrated an unwillingness to be candid about his behaviour. It was therefore likely that once again he wanted to put himself in a better light by minimizing the number of occasions on which he did this. The Tribunal decided that Mr Kerry engaged in unwanted conduct. The Claimant did not invite that conduct. Even if the conduct was intended as a joke, the Tribunal decided that it had the purpose of creating an adverse environment. It humiliated her. The conduct related to sex and was of a sexual nature.

39 Accordingly the complaint under this head succeeded under the provisions of

sections 26(1) and 26(2) of the 2010 Act.

**Incident (h)**

40 The Claimant gave evidence that in the week commencing 9 May 2016 Mr Kerry described a hypothetical scenario. He said “What would you do if you were on a cruise ship and I was on the same cruise ship with my wife, and then we hit an iceberg and my wife died.” He said he and the Claimant survived and reached a deserted island. Several years passed and it was clear they would never be rescued. He then said “So after hearing all of that and I’m the only person left on this earth that you could sleep with, would you sleep with me?” The Claimant said “no”. He was displeased and said “Well, I would just fucking rape you then”. She felt unsafe and scared. Subsequently Mr Kerry again asked her the scenario.

41 Mr Kerry gave evidence that he described a hypothetical scenario to colleagues and that the Claimant started to ask questions. He answered the questions, in effect making up the story as he proceeded. He admitted that he had spoken the words as alleged by the Claimant. The Claimant laughed and he saw no sign that the Claimant was offended or humiliated. He was unable to recall repeating the scenario to the Claimant.

42 The Tribunal accepted the Claimant’s evidence which was consistent with the contemporaneous documents. Mr Kerry attempted to provide some context to the discussion which explained his conduct. The Tribunal did not accept that explanation because it found and decided that he was unwilling to be frank about what he had said. For example it noted that in the statement which he prepared at the First Respondent’s suggestion he said “as for the rape thing I thought I said I wouldn’t want to rape you it was only said in the contexed (sic) of the banter and story, it was never in anyway meant other than that”. That was clearly an attempt to rebut the Claimant’s allegation and to put himself in a good light.

43 The Tribunal found and decided that Mr Kerry engaged in unwanted conduct. The Claimant did not invite the comments made by him. Even if the words were spoken as part of a “jokey conversation” and were not pre-planned as stated by him, the Tribunal decided that Mr Kerry’s conduct had the purpose of creating an adverse environment. Mr Kerry’s conduct related to sex and was of a sexual nature.

44 Accordingly the complaint under this head succeeded under the provisions of sections 26(1) and 26(2) of the 2010 Act.

**Complaint that the Respondents harassed the Claimant when in early Spring 2016 Mr Kerry spoke to the Claimant about homosexuals**

45 The Claimant gave evidence that in early Spring/April 2016 Mr Kerry said to her and Luke “I despise gays” and “I think that they are sick and dirty”. He also said “If my own son was to turn out gay I would disown him.” When the Claimant said “You can’t say things like that”, he said “I can and I would disown him till my dying days. If I was in charge of this country, I would get all the gay people together in a concentration camp and put a bullet in every single one of them”. The Claimant felt sickened, upset and offended by these comments

46 Mr Kerry gave evidence that the context of the conversation was that he was egged on by the Claimant who kept pressing him on the issue. He admitted that

he commented that he did not like gay people. He denied any unwanted conduct towards the Claimant and saw no sign that she was offended or humiliated.

47 The Tribunal accepted the Claimant's evidence which was consistent with all the contemporaneous documents. She was a credible witness on this matter. It found Mr Kerry to be unconvincing because he was unwilling to be frank about what he said. He told the Tribunal about a visit with his wife to Bridlington. He went to a public toilet and witnessed two men engaged in sexual intercourse. He was appalled by this incident which was spoken about at work. The Tribunal was surprised that Mr Kerry made no reference to this incident in his witness statement. It was also surprised that he failed to mention it when he was interviewed by Mr Lewis. That led the Tribunal to doubt seriously whether the incident had occurred at all.

48 The Tribunal found and decided that Mr Kerry engaged in unwanted conduct. The Claimant did not invite the comments made by him. Mr Kerry's conduct had the purpose of creating an adverse environment. He admitted the same to the First Respondent during his investigation meeting. Mr Kerry's conduct related to sexual orientation; it did not have to relate to the Claimant's sexual orientation for it to be unlawful.

49 Accordingly the complaint under this head succeeded under the provisions of section 26(1) of the 2010 Act.

**Complaint that the Respondents harassed the Claimant when Mr Kerry treated her less favourably because of her rejection of or submission to his conduct**

50 The Tribunal noted that in her detailed witness statement the Claimant barely made any reference to any evidence in support of this complaint. When questioned by the Employment Judge, she gave evidence that after incident (h) Mr Kerry was "quiet and funny" with her while he was jokey with the other employees.

51 The Tribunal found and decided that the Claimant's evidence was unconvincing, unspecific and vague. The Tribunal was not satisfied that the Claimant had been treated less favourably because of her rejection of or submission to any of Mr Kerry's conduct.

52 Accordingly the complaint under this head failed.

**Compensation**

**Injury to feelings**

53 The Tribunal found that the Claimant experienced stress, felt distraught and was sickened by Mr Kerry's conduct. She had experienced no previous episode of anxiety or depression. She consulted her GP. She was not prescribed antidepressants. She was referred to Turning Point. Following a screening assessment, she used self help sessions online until she was able to attend six to eight counselling sessions. During the period May to October 2016 she had days when she did not leave her home. After the counselling began, she gradually became calmer. She used to go for regular long walks with her dog and a family member because she was scared to go places by herself. By the end of October 2016 she was fit enough to be considered available for work.

54 The Tribunal understood that when considering an award of compensation for injury to feelings it was necessary to focus on compensating the Claimant rather than on punishing the Respondent. It carefully considered the guidelines laid down by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No. 2)** [2003] ICR 318 and noted that the limits had been revised following **Da’Bell v National Society** [2010] IRLR 19 EAT. It also decided that the award should incorporate the 10% uplift in general damages as recommended in the *Review of Civil Litigation Costs Final Report* and following the Court of Appeal decision in **Simmons v Castle**.

55 The Tribunal decided that this was a case at or near to the top of the lowest **Vento** band. In reaching that conclusion the Tribunal took into account the CCTV evidence of the workplace on 13 May 2016 which was adduced by the Respondent. It noted that, notwithstanding the fact that this was only a matter of days after incident (h), the recording did not reveal any evidence that Mr Kerry made her feel unsafe or scared. As noted in paragraph 13 above she remained very tactile towards him and on several occasions she stood extremely close to him when it was unnecessary to do so. On one occasion it appeared that she allowed him to brush something off her. Also it was significant that at the end of the day she remained in the building while he was preparing to lock up. She appeared unconcerned that she was thereby exposing herself to any risk. The Claimant was unable to give any explanation for her behaviour other than that it was “daft”. She acknowledged that she took no evasive action. This evidence led the Tribunal to conclude that to some degree the Claimant had exaggerated her symptoms and the extent to which her feelings had been injured. In all the circumstances the Tribunal decided that it was appropriate to make an award of £6,600 under this head.

### **Loss of earnings**

56 The Tribunal found that the Claimant was in receipt of Statutory Sick Pay from 13 May 2016 to the date of termination. After her resignation, she received Employment Support Allowance until 30 October 2016. She was then available for work and she received Job Seeker Allowance. She attended for a couple of interviews but was unsuccessful. On 27 February 2017 she started work as an optical assistant.

### **Interest**

57 The Tribunal decided that it was appropriate to include interest on the sums awarded under the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

### **The award**

58 The Tribunal awarded compensation as follows:-

<b>(1) Injury to Feelings</b>	6,600
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#### **(2) Actual loss of earnings**

16 May 2016 to 7 April 2017

46 weeks x £264.91

12,185.86

Less receipts

16 May 2016 to 18 July 2016

9 weeks x £88.45 (Statutory Sick Pay)

796.05

19 July 2016 to 30 October 2016		
15 weeks x £73.10 (Employment Support Allowance)	1,096.50	
31 October 2016 to 27 February 2017		
17 weeks x £73.10 (Job Seeker Allowance)	1,242.70	
28 February 2017 to 7 April 2017		
6 weeks x £217.50 (net earnings)	<u>1,305.00</u>	<u>4,440.25</u>
		7,745.61
<b>(3) Future loss of earnings</b>		
13 weeks x £47.41 (continuing loss)		616.33
<b>(4) Interest on (1)</b>		
9 May 2016 to & April 2017		
$\frac{301 \text{ days}}{365} \times £6,600 \times \frac{8}{100}$		435.42
<b>(5) Interest on (2)</b>		
19 July 2016 to 7 April 2017		
262 days – therefore midpoint is 131 days		
$\frac{131}{365} \times £7,745.61 \times \frac{8}{100}$		<u>222.39</u>
		15,619.75
Less		
Amount of compensation agreed to be paid by Mr Kerry		<u>5,000.00</u>
		<u>10,619.75</u>

**Complaint that the Claimant was entitled to notice pay**

59 The Tribunal found and decided that Mr Kerry’s conduct was so serious that the Claimant was entitled to terminate her employment without notice. The conduct constituted a serious breach of her contract of employment. She was entitled to the statutory minimum period of one week’s notice. However, any award of damages under this head had been subsumed under the award of compensation for loss of earnings in her discrimination part of the claim. Therefore the Tribunal made no award.

**Complaint that the Respondents failed to provide the Claimant with a statement of particulars of employment**

60 The Claimant gave evidence that on or about 24 May 2016 she did receive a statement of terms and conditions of employment. She did not sign and return it to the Respondents because she did not agree to the days and hours which were different from what the First Respondent had promised.

61 The Tribunal decided that the Claimant had failed to show the Respondents were in breach of their duty under section 1 of the 1996 Act. Even though she disputed some of the terms in the statement, the Respondents had complied with

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their duty. Any alleged failure to keep to a promise about day and hours fell to be considered as a complaint of breach of contract. The Claim Form did not comprise any such complaint.

62 Accordingly the complaint under this head failed.

Employment Judge Keevash

Date 19 April 2017