



EMPLOYMENT TRIBUNALS

Claimant: Helen Haines

Respondent: Rainbow Theatre Productions

Heard at: Southampton **On:** 9th and 10th October 2017 for
Employment Tribunal evidence and submissions; 11th
October tribunal deliberations

Before: Employment Judge Mr. M. Salter,
Members: Ms. A. Sinclair and Mrs. C.L. Date

Representation:

Claimant: Mr. Morgan of counsel

Respondent: Mr. Lomas a consultant.

JUDGMENT

It is the unanimous judgment of the tribunal that the claimant's complaints of:

- a) the Claimant was subject to sexual advances by Mr. Lewandowski as direct discrimination;
- b) Me Lewandoski said: "do you want to sleep with me" as direct discrimination;
- c) that Mr. Lewandowski said, "do you want to have sex" as direct discrimination;
- d) that Mr. Lewandowski said, "do you want a threesome with me and Natalie" as direct discrimination;
- e) that Mr. Lewandowski called the Claimant a "slut" on WhatsApp as direct discrimination;
- f) that on approximately 20th September Lee Payne ("Mr. Payne") said to her that "your tits aren't as big as the last actress" and made comments about breasts on daily basis;
- g) in October/November Mr. Payne says to the Claimant "you're a lesbian, aren't you?";
- h) on 4th November Mr. Payne says, "I reckon its Helen's vagina making those noises";
- i) on 5th November, a photo was placed on Facebook showing a sexually explicit act;

succeed, all others fail and are dismissed

REASONS

Introduction

1. These are the reasons of the tribunal for the reserved judgment above.

Background

The Claimant's case as formulated in her ET1

2. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 1st March 2017 is, in short, she was subjected to sexual harassment, harassment related to her sex and direct discrimination by people for whom the Respondent is liable.

The Respondent's Response

3. In its Form ET3, the Respondent denied these claims. Initially the Respondent sought to advance the employer's defence, however at a Preliminary Hearing for Case Management on 18th May 2017 the Respondent indicated it did not, in fact, intend to advance this defence.

The Final Hearing

General

4. The matter came before the tribunal for Final Hearing on Monday, 9th October 2017. The Claimant was represented by Mr. Morgan of Counsel, whilst the Respondent was represented by Mr. Lomas, a consultant.
5. By way of correspondence dated 6th October 2017 the parties were notified that the tribunal could only sit for three days and, as a result of this a reserved decision would be given. The original timetable agreed at the Preliminary Hearing had the fourth day for deliberation, delivery of judgment and a remedies hearing (if necessary), so no time for evidence would be lost by the reduction.
6. As it transpired, owing the industry of the representatives, all evidence was heard by 1450 on Tuesday 10th October 2017 and the Tribunal were able to use Wednesday, 11th October for its deliberations. A provisional remedies date as listed for 12th December 2017.

Evidence via Video Link

7. The Respondent wished to call evidence from a Mr. Chay Lewandowski ("Mr. Lewandowski"). He was a key witness for the Respondent. He was out of the country in Cyprus and his absence was foreseen at the time of the Preliminary Hearing. However, in the week preceding the start of the hearing it became apparent that the video link system used by the tribunals was not compatible with that used by Mr. Lewandowski and as such he could not give evidence that way.
8. At the start of the hearing Mr Lomas raised the possibility of Mr. Lewandowski giving evidence by way of skype call. A discussion was held where the practicalities of what the tribunal would require for such evidence to be given (namely a screen for the tribunal and a screen for the public, as well as confirmation from Mr. Lewandowski that there was no-one else around him and that the only material he had in front of him was the bundle and witness statements).
9. Mr. Morgan did not oppose this in principle but reserved his position on any practical or late developing matters that occurred as a result of evidence being provided in this way.
10. Mr. Lewandowski gave evidence via skype on Tuesday morning. He gave evidence by way of affirmation which was administered by the Employment Judge, and Mr. Lewandowski confirmed he had an unmarked set of papers and witness statements in front of him and that there was no-one else with him. Other than a slight delay when it became apparent that Mr. Lewandowski had a different version of the bundle the delivery of his evidence was smooth and given in circumstances where the tribunal are satisfied they were able to assess him as a witness as well as if he had been present before us.

List of Issues

11. The matter came before Employment Judge Harper for the Preliminary Hearing identified above during which the issues identified at paragraph 4.1 of the Agenda produced for that hearing were adopted as the list of issues for the Final Hearing, and a time estimate of four-days was agreed.

12. At the outset of the Final Hearing on Tuesday, 10th October 2017 the tribunal raised the list of issues with the parties. It was agreed that the following was a particularised list of issues for the tribunal to consider. This was clarified at the end of the hearing by Mr. Morgan who confirmed under which cause of action he brought the relevant claims:

Jurisdiction of the Tribunal

- a) It is accepted that the Claimant has presented her claim to the tribunal within the relevant limitation period contained within s123 of the Equality Act 2010 as affected by ACAS conciliation.

Coverage by the Equality Act

- b) It is accepted that the Claimant falls within the coverage of the Equality Act 2010.

Protected Characteristic

- c) The Claimant is female, the protected characteristic she relies upon is sex.

Acts complained of (unless indicated otherwise all claims are sexual harassment, harassment related to sex and direct ex discrimination)

- d) The Claimant complains:
1. of sexual advances by Mr. Lewandowski;
 2. that Mr. Lewandowski said: "do you want to sleep with me" [33]
 3. that Mr. Lewandowski said "do you want to have sex" [34];
 4. that Mr. Lewandowski said "do you want a threesome with me and Natalie [Turnbull ("Ms. Turnbull")]" [33];
 5. that Mr. Lewandowski called her a slut on WhatsApp [14 §4]
 6. that on approximately 20th September Lee Payne ("Mr. Payne") said to her that "your tits aren't as big as the last actress" [34] and made comments about breasts on daily basis;
 7. on 21 September 2016 Mr. Payne said she could not have weekend off [34]
 8. on 21 September 2016 Mr. Payne made comments that it is impossible to be an actor and have family [35] (harassment related to sex and direct discrimination)
 9. Mr. Lee Payne glared and told off the Claimant [34] (direct discrimination only);
 10. At the end of September Mr. Lewandowski points at his penis [33]
 11. Mr. Lewandowski discusses sex with Ms. Turnbull [34]
 12. Mr. Lewandowski and Mr. Payne discuss sex [35] (harassment: related to sex only);

Case Number: 1400362/2017

13. Mr. Lewandowski and Mr. Payne make inappropriate and derogatory comments about women [34]
14. Mr. Lewandowski uses the word "cunt" [34] LP[35]
15. Mr. Payne, in October, tells the Claimant to: "go fuck yourself" [35] (harassment: related to sex only);
16. Mr. Payne states "Helen's acting like fucking goldilocks again" [35] (Harassment: related to sex only);
17. Mid October: Mr. Payne shouts and says "it's not like I am saying you are crap" [35] (direct discrimination only);
18. In October/November Mr. Payne says to the Claimant "you're a lesbian aren't you?" [35]
19. On 4 November 2016: Mr. Lewandowski, Ms. Turnbull and Mr. Payne play a "game" of would you fuck her, shag/marry/kill [14§6]
20. Mr. Payne says "has Helen wet herself" [14§6]
21. Mr. Payne says "I reckon its Helen's vagina making those noises" [14§6]
22. That on 5th November a photo was placed on Facebook showing a sexually explicit act [14§7]
23. the Respondent failed to deal with the C's complaint (direct discrimination only)

In the Course of Employment?

- e) Did any of the acts detailed above occur in circumstances where the Respondent is not liable as they did not occur in the course of the employment of Mr. Payne, Mr. Lewandowski or Ms. Turnbull? The Respondent accepted it would be liable for the acts of these three-people subject only to its submissions that the acts did not occur in the course of their employment.

Harassment

- f) Are there facts from which the tribunal could properly decide that any such proven conduct was?
 1. related to the Claimant's sex (s26(1)) [15§11]; and/or
 2. of a sexual nature (s26(2)) [15§12];
- g) If so, has the Respondent shown it was not so related or of sexual nature?
- h) If not, was the conduct unwanted?
- i) If so, did the conduct have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant?
- j) If not, did it have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant?

- k) In deciding whether the conduct complained of had the effect referred to above, the Tribunal must have regard to:
1. The perception of the Claimant;
 2. The other circumstances of the cases; and
 3. Whether it was reasonable for the conduct to have that effect.

Direct Discrimination

- l) Did the Respondent subject the Claimant to the following treatment falling within s39 of the Equality Act 2010, namely:
1. Acts that are not harassment [32]
 2. Failure to deal with complaint
- m) Do these amount to detriments?
- n) If so, did the Respondent treat the Claimant less favorably than they treated/would treat someone whose circumstances were the same or not materially different?
- o) The Claimant relies on a hypothetical comparator being a male actor.
- p) Are there primary facts from which the tribunal could properly and fairly decide that:
1. the treatment of the Claimant was less favorable than the treatment that would have been afforded to that hypothetical comparator and,
 2. in the absence of any explanation from the Respondent, such treatment was afforded to the Claimant because she is female
- q) If so, what is the Respondent's explanation. Does it prove a non-discriminatory reason for any proven treatment?

Documents and Evidence

Witness Evidence

13. The tribunal heard evidence from the Claimant on her behalf, and from the following witnesses on behalf of the Respondent: Mr. Payne, who was an actor and director of the Respondent at the relevant time; Mr. Nick Young who is the Respondent's director and Mr. Lewandowski and Ms. Turnbull who are actors and were with the Respondent at the relevant times.
14. All witnesses gave evidence by way of written witness statements that were read by the tribunal in advance of them giving oral evidence. All witnesses were cross-examined

Bundle

15. To assist us in determining the application we had before us an agreed bundle consisting of some [76] pages (albeit page 69 has 69a-d] prepared by the Respondent. Our attention was taken to a number of these documents as part of us hearing evidence and submissions.

16. It appears there may be some missing documents as [41] appears to have a page number 3, [42] has a number 5, [43] has a 7, [44] has a 9, [45] has 11, so we appear to be missing the pages 1, 2, 4, 6, 8 and 10. No-one was able to explain this omission and the documents have not been produced during the course of the hearing or an application made to adduce them by either party. The tribunal therefore, have determined the case on the basis of the papers we have before us.

Submissions

17. Both parties presented their brief but helpful arguments orally which focused on the interpretation of the evidence we had heard in support of their respective clients' cases.

The Material Facts

18. Unusually for a case like this many of the factual allegations are accepted and the dispute is on other matters such as whether this was unwanted conduct. However, from the evidence and submissions we made the following finding of fact. We made our findings after considering all of the evidence before us, taking into account relevant documents where they exist, the accounts given by the witnesses in evidence, both in their respective statements and in oral testimony. Where it is has been necessary to resolve disputes about what happened we have done so on the balance of probabilities taking into account our assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision, we do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Rather, we have set out our principle findings of fact on the evidence before us that we consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked us to decide.

The Parties

19. The Respondent is a touring theatre company who are primarily engaged in bookings at schools during term times. The Claimant is an actor and was engaged by the Respondent for its Autumn Tour in 2016. She found the engagement via an agency: the Blue Star Agency.
20. The Claimant commenced her engagement with the Respondent on 30th August 2016. Her engagement was to last until 9th December 2016 [38]. Initially her engagement was to last until the end of the winter term (20th December) however the Claimant and Respondent varied this and the Claimant was able to recommend a replacement who undertook her role from the 9th to 20th December [66].
21. There was a one week break in the engagement which coincided with the autumn half-term holiday.
22. There were three other people in the troupe: two other actors: Mr. Chay Lewandowski and Ms. Natalie Turnbull, and the theatre director Mr. Lee Payne who also was an actor. The Respondent's company director is Mr. Nick Young. His wife Alex, is the Company secretary.
23. The previous term the Respondent had received a complaint of sexual harassment against Mr. Payne from a female member of the troupe. At that time, the troupe consisted of Mr. Payne, Mr. Lewandowski, the female complaint and another female member.
24. The Claimant quickly developed a close and familiar relationship with Mr. Lewandowski and Ms. Turnbull. Indeed, it is a fact accepted by all parties that conversations took place were frequently of an overtly sexual nature. For instance, It is accepted by Mr. Lewandowski and Ms. Turnbull that Mr. Lewandowski would ask if the Claimant wanted to sleep with him, if she wanted to have sex and if she wanted a three-some with himself and Ms. Turnbull. It was a matter of some dispute, however, as to what (if any) involvement the Claimant had in these conversations.

25. Although the Claimant, Mr. Lewandowski and Ms. Turnbull were initially close, Mr. Payne told us that he kept himself apart from the others owing, he says, to his directorial responsibilities. Mr. Lewandowski also contended that Mr. Payne remained apart from the other three members of the troupe. Despite his assertions of keeping himself separate from the group Mr. Payne, on various occasions, made comments about the Claimant which we have need to return to below.

Rehearsals

26. Rehearsal started at the end of August and the tour itself commenced on the 12th September 2016.
27. Mr. Young attended one of the rehearsals. He formed the opinion from seeing the actors that the group was happy and getting on well. He says that upon his attendance he provided the troupe with the policy document we see at [39]. This document, he says, came about as a result of the complaint the previous season. Mr. Young explains that he left copies of these policy documents on the table at rehearsal room for the actors to sign. The Claimant says she has never seen this document prior to disclosure in the litigation, whilst the other witnesses say that they all received copies and sat around the table and signed them together with the Claimant. We have not been provided with any signed copies of the policy.

The tour

28. The troupe travelled across the country to deliver its plays. They travelled by van. The van was driven by Mr. Payne. It was a transit van with a set of seats behind the drivers and front passengers' seats. The Claimant told us, and we accept, that she kept travelling in the van throughout her engagement with the Respondent as, if she were to travel to the venue of the performance herself she would be responsible for the costs incurred for her travel and, with her relatively modest earnings, this would be prohibitive.
29. On any given morning, the Claimant would travel to a location where she would be picked up by the van and then would travel together with the other actors and Mr. Payne to the venue. The troupe would then set up for their performance, change into costume, give the performance, get changed back, take down the set and

then travel back. Clearly the troupe spent a lot of time in each other's company often in the close confines of the van.

30. The Claimant told us that the sexualised conversations that took place at rehearsals continued. She explained to us that she quickly lost trust in Ms. Turnbull and felt humiliated by the discussions at some point after the 19th September 2017. The Claimant accepts she did not complain about this conduct, or that of Mr. Lewandowski and she kept quiet, kept her head down and tried to see out the duration of her contract. the Claimant did have contact details for Mr. Young (we have seen her email to him resigning), but did not contact him to complain or raise concerns over the conduct, nor did she contact her agency to complain.
31. For their part Mr. Lewandowski and Ms. Turnbull say that the Claimant was actively involved in the conversations and was a willing participant. There is clearly a conflict as to the Claimant's role. We did not find this an easy matter to resolve, however after careful consideration of the evidence before us, both oral and the contemporaneous documentation we consider that, albeit not the prime culprit in these conversations, the Claimant was a participant in them. We note, for instance that Ms. Turnbull refers to the Claimant being involved at [70]; further, we note that the Claimant could have contacted Mr. Young as she told us she had his email address, but she did not email him at all; further she did not contact her agency to complain of this conduct and he returned to the tour after the half-term break.
32. On the 20th September, the troupe were at a school. The Claimant was required to don a dress. Mr. Payne is alleged to have said to the Claimant that that her "tits aren't as big as the last actress". Mr. Payne disputes that he used these exact words but accepts that there was a comment made by him about the way the Claimant "fitted the dress" better than the last actress whose, he said, "breasts were too big". There is therefore a dispute as to the language used. Doing as best we can on the evidence we had before us the tribunal found it preferred the evidence of the Claimant in this allegation; she was clear and consistent as to the language used whilst Mr. Payne was not clear in his recollection of the language used, his witness statement says he said "words to the effect of..." and he was

unable to be that exact before us. Further, when we considered his credibility on this point we reminded ourselves that he had said to us that he kept himself apart from the group in these sorts of conversations, yet it is he who initiates this exchange. This, as we say, is in contradiction to what he told us was his position within the group, but is consistent with other findings we make as to his making inappropriate comments about and towards the Claimant.

33. The next day, whilst at the site of a performance, the Claimant and Mr. Payne were having a general discussion which turned to the subject of the challenges of being an actor and having a family. Again, there is a dispute in evidence here: the Claimant states Mr. Payne told her that she could not have a family and be an actor whereas Mr. Payne explained to us that the discussion was about the difficulties he had experienced in his career in balancing his busy work schedule with maintaining a relationship. On this matter, we found Mr. Payne to be a credible witness who struck us as genuinely trying to explain the challenges of being an actor and committing to a relationship. Unlike the earlier allegation, in this regard Mr. Payne was clear and credible as a witness.

34. On the same day Mr. Payne was concerned that the troupe may fall behind in their preparations and so told them that they may have to learn scripts over the weekend. Mr. Payne was of the opinion that the Claimant was struggling with learning her lines and so decided to tell her of the possibility of having to learn a new play in private. The Claimant alleges Mr. Payne told her she "could not have the weekend off". This caused the Claimant to become upset and reduced her to tears as it was the first weekend she was going to meet her new partner's family. Mr. Payne, and the other witnesses for the Respondent, accept the Claimant was reduced to tears by what she was told. However, as to what was the cause of her tears we again prefer the evidence of Mr. Payne, that is, we do not consider the Claimant was told she could not have the weekend off, as she alleges, but rather was told she would have to learn another script. Mr. Payne gave clear and credible explanations as to why he told the Claimant this alone (namely he was aware she was struggling and did not want to "drop the bombshell" as he put it, in front of the other actors) and was clear as to what the reason was for the conversation in private.

35. On a general level the Claimant also complains about the manner in which Mr Payne directed her. She complains in particular of his glaring at her and telling her off. We find however, that this was not restricted to the Claimant. Indeed, we were told by Ms. Turnbull that she herself had raised the manner in which Mr. Payne treated all members of the troupe, and she gave us an example of how when they were performing and Mr. Payne was either not performing or was off-stage they would see him staring intently at them and could "see what he was thinking". This is corroborative of the Claimants account of Ms. Turnbull having cause to complain of Mr. Payne's behaviour: the Claimant refers to Ms. Turnbull complaining that Mr. Payne was bullying them.
36. As a travelling troupe, they often had to change into and out of costume in each other's presence or in close proximity to one-another. At the end of September, whilst at a venue, the Claimant alleges Mr. Lewandowski, whilst changing, pointed to his penis. Mr. Lewandowski denies this occurred. Again, we are faced with a dispute of evidence. We find that this incident did occur as the Claimant alleges. Whilst we bear in mind that Mr. Lewandowski has accepted numerous allegations made about him and his conduct and that is to his credit, we do not consider that his denial of this allegation was credible in light of his behaviour throughout the Claimant's time with the Respondent, his clear and apparently constant motivation and focus on sex and sexualised behaviour. To us his denial lacked credibility.
37. At the beginning of October, the Claimant alleges that Mr. Payne shouted to her she should "go fuck herself" when she asked him to help he move a prop box. Mr. Payne denies this comment was made at all. We find that the comment was made: it is in line with what we have heard about Mr. Payne's style of directorship and management that could be seen as aggressive, would not be out of the norm for this environment for swearing to be used and Mr. Payne has shown a willingness to make inappropriate comments towards the Claimant.
38. Sometime later in the month it is alleged that Mr. Payne stated that "Helen's acting like fucking goldilocks again". Mr. Payne denies he swore but otherwise

accepts the comment was made in the van at the end of a performance. The Claimant states the comment was made as she was perceived as behaving like, in her words, "a brat", which is how Goldilocks was portrayed in their performance. This corresponds with Mr. Payne's evidence that the Claimant was "throwing a strop" and this resulted in him making the comment.

39. On the 14th October 2017, the Claimant became aware that Mr. Lewandowski had called her a "slut" in a WhatsApp group the Claimant, Mr. Lewandowski and Ms. Turnbull had set up. Mr. Lewandowski accepted that he did, in fact post this comment. There is no context given as to the use of this word.
40. Around the same time the Claimant alleges Mr. Payne said to her "it is not as if I am saying you are crap" as an actor. Mr. Payne's evidence on this point was not clear, his statement appears to leave open the possibility that it was said, he certainly does not deny it could have been said and would be in line with the somewhat abrasive style of directing that we were told he had. Accordingly, we find the comment as made as alleged by the Claimant who was clear and consistent on this point
41. At the end of October, the troupe were giving a performance at a school. The play involved the Claimant and Mr. Payne dressing as Vikings. As they were waiting for their entrance Mr. Payne accepts he said to the claimant: "you are a lesbian, aren't you?" he says this was part of a "jokey conversation" however, no further context is given by him, when cross-examined about this conversation he could not recall any details of it. On anyone's account these comments were made.
42. On the 4th November, the troupe were returning from a performance in the van. The journey was a long and arduous one owing to heavy traffic which led the van to be stuck in a traffic jam for a long period of time. All parties accept that Mr. Lewandowski, Ms. Turnbull and Mr. Payne began a game termed "would you fuck her" in which the participants graded members of the public as to whether they would have sex with them. This "game" then developed into one termed "shag/marry/kill" in which the participants would be given three people's names and they would have to decide which one they would "shag", which one they

would marry and which one they would kill. The Claimant pretended to be asleep for this.

43. The van's clutch stuck and Mr. Payne commented "has Helen wet herself?" later the van made a series of strange noises; Mr. Payne commented "is it Helen's vagina making those noises?" Mr. Payne accepts making these comments.
44. During the same journey, it is accepted that Mr. Lewandowski took a photograph of the Claimant asleep. An ejaculating penis was drawn on the photograph near the claimant's face and mouth [69] and this photo was then uploaded to the Facebook page used by the actors an identified as being for the Respondent troupe. The Claimant discovered this photograph on the 5th November and resigned from the troupe by way of email to Mr. Young [67] the same day.
45. The Claimant had a telephone conversation with Mr. Young who indicated he would speak to the claimant the next day. He did not however contact her again until he wrote to her on the 8th December and again on the 6th January 2017 inviting the Claimant to a grievance hearing. The Claimant did not respond to these letters having decided she could not go through with the hearing.
46. Along with these particularised allegations there were generalised accusations made that Ms. Turnbull and Mr Lewandowski would regularly discuss sex. All witnesses agreed this occurred. It was also alleged that Mr. Lewandowski and Mr. Payne would also discuss sex and make derogatory comments about women. This was denied by Mr. Lewandowski and Mr. Payne. However, we find that they did have these conversations and did make derogatory comments about women. We find this as it is consistent with the pattern of behaviour the two men demonstrated throughout the Claimant's engagement with the Respondent and with their admitted behaviour in the van on the 4th November.
47. As part of these discussions and in their general conversations, the Claimant alleged that Mr. Payne and Mr. Lewandowski repeatedly used the word "cunt". For their part Mr. Lewandowski and Mr. Payne deny using this word. We find this language was used by Messrs Payne and Lewandowski. The sexualised

environment that existed at the Respondent, led by Mr. Lewandowski leads us to find that language of this sort was frequently used and their denials rang hollow to us in light of the admitted conduct and conversation they did have.

The Law

48. So far as is relevant the Equality Act 2010 states:

13 Direct discrimination.

(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.

...

(5) If the protected characteristic is race, less favorable treatment includes segregating B from others.

26 Harassment.

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

...

sex;

...

s109 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

s212 General Interpretation

(1) In this Act:

...

"detriment" does not...include conduct that amounts to harassment

49. We had reference, where necessary to the burden of proof in discrimination cases contained within s136 of the Equality Act and the case law there under.
50. The Equality and Human Rights Commission Employment Statutory Code of Practice for Employment defines sexual harassment as:

Sexual harassment

7.12

Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraph 7.6 and which is of a sexual nature.

7.13

Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

51. We were not referred to any particular authorities by either party in their closing submissions.
52. We do remind ourselves however, that even though the claim of harassment requires "unwanted" conduct this does not mean that in every single case the Claimant must actively indicate the conduct is unwanted by them as there are categories of conduct which are so inherently objectionable that they are clearly by their nature within the type of conduct that is unwanted.

Conclusions on the Issues

53. We took time assessing and looking through our notes of the cross-examination as well as the written statements and documents, we considered with care the submissions, the legal provisions and guidance in case law. Having made the findings of fact set out above, we returned to the agreed issues in this case in order to make these conclusions.
54. Before we address the particular allegations, it is useful to address the point advanced by the Respondent that they are would be liable for the actions of Mr. Lewandowski, Mr. Payne or Ms. Turnbull unless it could be established that the

actions did not occur in the course of their employment. They addressed the allegations which occurred whilst travelling to the schools and those which occurred at the school but not during the plays. No other basis for denying liability was advanced by the Respondent.

55. We reject this argument in the form it was advanced in. Mr. Lewandowski, Mr. Payne and Ms. Turnbull were engaged as actors and a director respectively. The tribunal were satisfied on the evidence we had heard and the submissions we had received that these acts occurred "in the course of their employment" of Mr. Lewandowski, Ms. Turnbull and Mr. Payne as required by s109 which requires a construction which a layperson would understand. It is whilst Mr. Lewandowski, Ms. Turnbull and Mr. Payne were undertaking their duties (either in rehearsals, at the site of the performance, awaiting the start of the performance, travelling to or from the site or whilst giving instructions) that the acts the Claimant complains of occurred and they occurred in circumstances which are so tightly bound up with their duties that a layperson would, we find, consider it within the course of their employment.

Allegation 1: Sexual Advances by Chad Lewandowski

Did these occur?

56. All parties accept it occurred.

Was this conduct of a sexual nature?

57. Clearly, sexual advances are of a sexual nature?

Was it unwanted?

58. As we set out above the Claimant was involved in this sort of discussion and, although not a prime mover in it, failed to satisfy the tribunal that this behaviour was unwanted from Mr. Lewandowski or, Ms. Turnbull. Bearing in mind the engagement was for a relatively short period, and the Claimant did not know any of the others prior to commencing the engagement, we were unpersuaded by her conduct in not complaining to anyone at the time, of her returning to the troupe after the half-term break, of her not raising the matter with her agency and for her not to have raised her concerns with the replacement she herself found for the period from 9th to 20th December.

59. These led us to doubt her assertion that the conduct of Mr. Lewandowski and Ms. Turnbull was “unwanted”. Against this we have the consistent accounts of Ms. Turnbull and Mr. Lewandowski that the Claimant was involved in the conduct.

60. Accordingly, we find that the Claimant has failed to show us that the conduct complained of was not unwanted by her. The harassment claim here must fail

Was it a detriment?

61. These comments are detrimental to women.

If so, was the Claimant subjected to this detriment because of her sex?

62. We are satisfied that the Claimant would not have been subjected to these comments if she was a man. It is, therefore for the Respondent to show us, on the balance of probabilities, that this was not discriminatory. They have not satisfied us of this, their defence here must, therefore as a matter of law fail.

Allegation 2: “do you want to sleep with me?”; 3: “do you want to have sex?” and 4: “do you want a threesome with me and Natalie?”

Did these occur?

63. Yes, all parties accept these occurred.

Was this conduct of a sexual nature?

64. Clearly these were all of a sexual nature.

Was it unwanted?

65. We repeat our findings above in relation to whether these acts were unwanted.

Again, therefore the harassment claim fails.

Was it a detriment?

66. Such comments are detrimental.

If so, was the Claimant subjected to this detriment because of her sex?

67. We are satisfied that the Claimant would not have been subjected to these comments if she was a man. It is, therefore for the Respondent to show us, on the balance of probabilities, that this was not discriminatory. They have not satisfied us of this, their defence here must, therefore as a matter of law fail.

Allegation 5: Being called a “slut” on WhatsApp.

Did this occur

68. Yes, Mr. Lewandowski accepts he sent the text.

Was this conduct of a sexual nature?

69. We find that it was of a sexual nature as the term is used to refer to women in a sexual way.

Was it related to sex?

70. In any event, the term is clearly related to sex.

Was it unwanted?

71. We have no context for the comment. However, we repeat our findings above in relation to whether this comment was unwanted in light of the relationship the Claimant had with Mr. Lewandowski. Again, the harassment claim fails.

Was it a detriment?

72. Such a comment is a detriment.

If so, was the Claimant subjected to this detriment because of her sex?

73. Its occurrence, it being a detriment and it is having a clear connection to the Claimant's sex means it is for the Respondent to show us on the balance of probabilities that it was not, in fact, an act of discrimination. They have failed to do this, accordingly, in law the claim of direct discrimination must succeed.

74. We are satisfied that the Claimant would not have been subjected to these comments if she was a man. It is, therefore for the Respondent to show us, on the balance of probabilities, that this was not discriminatory. They have not satisfied us of this, their defence here must, therefore as a matter of law fail.

Allegation 6: Mr. Payne telling the claimant "your tits aren't as big as the last actress" and comments on breasts on a daily basis

Did it occur?

75. We have found that the comment about the Claimant and the dress occurred as she alleges and not as Mr. Payne says.

If yes was it conduct of sexual nature?

76. We do not find that the comment was of a sexual nature.

If no was it related to sex?

77. We do find that the comment about the Claimant's breasts are related to her sex.

If yes was it unwanted?

78. Unlike the comments made by Mr. Lewandowski and Mr. Turnbull we find that the comments by Mr. Payne were unwanted conduct. On the evidence we have heard the Claimant did not have the close relationship she had with Mr. Lewandowski and Mr. Turnbull with Mr. Payne, indeed the evidence from Mr. Payne and Mr. Lewandowski was that Mr. Payne tried to keep himself separate from the group, it did not fall within the type of conversations the Claimant could expect to have from Mr. Payne.

If yes did it create an intimidating, hostile degrading or offensive environment?

79. We find that comments of this sort would create a degrading atmosphere for a female. In coming to this conclusion we have borne in mind the evidence of the claimant of the effect this statement had on her and find that it would be reasonable for a female to be offended by such comments and for the comment to create a degrading and humiliating atmosphere.

If yes was that the purpose of the comment?

80. We do not find that this was Mr. Payne's purpose however, whilst his statements were wholly inappropriate and ill-advised they were not borne of malice by him.

If no was it a detriment?

81. Having established that the claimant succeeds on her claim of harassment we do not need to proceed to consider the direct discrimination claim.

Allegation 7: Mr. Payne telling the Claimant she could not have the weekend off.

Did it occur?

82. On the facts as we have found we did not consider this occurred as the Claimant alleged

If yes was it conduct of sexual nature?

83. If it had occurred as the Claimant alleges it is clearly not of a sexual nature

If no was it related to sex?

84. If it had occurred as the Claimant alleges we would not have found the action was related to the Claimant's sex.

85. Having rejected the harassment claim we then considered the direct discrimination claim. The insuperable difficulty for the claimant here is that all the

actors had to know this new script, the Claimant was not singled out for the task, it did not occur "because" she was female. Accordingly, her claim here must fail

Allegation 8: Mr. Payne's comments that the Claimant could not be an actor and have a family

Did it occur?

86. On our findings, this did not occur as the claimant alleges: whilst there was a conversation concerning the lives of actors we are satisfied that what occurred was Mr. Payne explaining to the Claimant the difficulty he had in balancing a demanding working life with a relationship.

Was it related to sex?

87. We do not find that the comment related to the Claimants sex: it was Mr. Payne giving his view of his experiences.

Allegation 9: Mr. Payne glaring and telling the Claimant off.

Did this Occur?

88. Doing as best we can on the evidence we have before us we find that this did occur.

Was it a detriment?

89. Glaring at people and telling them off is clearly detrimental to them.

If yes was it because of her sex?

90. We do not find however, that this was because of the claimant's sex. We have heard from the Respondent's own witnesses that MR. Payne has what could be considered an aggressive style of observation and directing and one which led to Ms. Turnbull complaining about it on behalf of the other actors as Mr. Lewandowski was unable to formulate the complaint. It would appear this is a facet of Mr. Payne's directing style as opposed to any failing that falls foul of the Equality Act 2010.

Allegation 10: Mr. Lewandowski pointing to his penis

Did it occur?

91. We have found this did occur

If yes was it conduct of sexual nature?

92. We consider this is of a sexual nature

If yes, was it unwanted?

93. This, we feel, is different in substance to the claims presented by the Claimant complaining of the comments and conversations by Mr. Lewandowski which we have addressed above, in that there is a physical element to it as opposed to being “merely” verbal. As such we have revisited our assessment of whether such conduct was unwanted and whether it would have the effect of creating a prohibited environment. We did not find this an easy conclusion to make, however, after consideration and discussion found that it fell just below the threshold for being so inherently wrong that it was clearly unwanted and, in any event, in light of all the circumstances of the case did not have the effect of creating a prohibited environment.
94. We came to this conclusion on the basis of our findings above that the Claimant was involved in the behavior that took place at the Respondent between herself, Mr. Lewandowski and Ms. Turnbull, this we feel, means behavior such as Mr. Lewandowski pointing at his penis, was escalation of what had occurred in the past and whilst in most other working environments would have been inherently unacceptable and create the prohibited environment required for harassment claims, in this working environment, it was not such that it would have the effect .
95. We should say that we do not find Mr. Lewandowski had the purpose of creating the prohibited environment for the Claimant: indeed, that was not advanced in cross-examination of him.

If no was it a detriment?

96. Turning now to the direct discrimination claim. We find that Mr. Lewandowski’s behavior could be a detriment to the Claimant

If yes was it because of her sex?

97. We do not find however that it occurred because she was female, the failing here is of Mr. Lewandowski, he did not do it because the Claimant was a woman.

Allegation 11: Ms. Lewandowski and Ms. Turnbull Discussing sex and allegation 12 Mr. Lewandowski and Mr. Payne discussing sex.

Did it occur?

98. Again, all parties accept it occurred.

If yes was it conduct of sexual nature?

99. Clearly it was of a sexual nature

If yes was it unwanted?

100. For the reasons set out above when addressing the conversations between the Claimant and Mr. Lewandowski we find that this behavior was not unwanted within the meaning of the equality Act 2010. This applies to both of the allegations we have addressed here: the conversations between Mr. Lewandowski and Ms. Turnbull and Mr. Payne were the norm for this workplace.

Direct Discrimination

101. Even if this was a detriment it did not occur because the Claimant was female, the direct discrimination claim must fail.

Allegation 13: Harassment related to sex only: Mr. Lewandowski and Mr. Payne making derogatory comments about women

Did it occur?

102. These comments were made and the language alleged was used.

Was it related to sex?

103. We find that the conversations were related to sex.

Was it unwanted?

104. For the reasons given above we do not find the Claimant has satisfied us that the comments and language used was unwanted.

Allegation 14: use of the word "cunt"

Did it occur?

105. Yes, this occurred

If no was it related to sex?

106. We find that this word is related to sex

If yes was it unwanted?

107. For the reason given above we find that this language and that like it was not unwanted by the claimant within the meaning of the Equality Act 2010.

Allegation 15: Mr. Payne telling the Claimant to "go fuck herself" (harassment relating to sex)

Did it occur?

108. This occurred.

If no was it related to sex?

109. We do not find that this related to sex, it is an abusive term used to express exasperation.

If yes was it unwanted?

110. Even if we are wrong on this we consider that this type of language was frequently used in the conversations that the parties had owing to the very nature of the conversations

If yes did it create an intimidating, hostile degrading or offensive environment

111. We heard no evidence of the impact this statement had on the Claimant, we have no material to find that it had the effect of creating a prohibited environment for her,

If yes was that the purpose of the comment?

112. We would not have found that Mr. Payne's intention was to create a prohibited environment here.

Allegation 16: Mr. Payne saying, "Helen's acting like fucking goldilocks again" (harassment related to sex)

Did it occur?

113. Yes, we found that this incident did occur as the Claimant alleges

If no was it related to sex?

114. We do not find that this is conduct related to sex. The Claimant's evidence to us was that the comment was made because she was acting, in her words, "like a brat" which was similar to how their portrayal of Goldilocks was. This is corroborated by the Respondent's evidence which was that the comment was made as the claimant was "throwing a strop".

Allegation 17: Mr. Payne saying, "it's not like I am saying you are crap" (direct discrimination)

Did it occur?

115. We found this occurred.

Was it a detriment?

116. Comments of this sort can be seen as a detriment

If yes was it because of her sex

117. We do not find that this comment was made because of the claimant's sex, rather it was made because of the style of directing that Mr. Payne had: abrupt and critical.

Allegation 18: Mr. Payne asking the Claimant: "you're a lesbian aren't you"

Did it occur?

118. Mr. Payne accepts it occurred.

If yes was it conduct of sexual nature?

119. We find that it was conduct of a sexual nature, dealing as it does with sexual orientation.

If yes was it unwanted?

120. For the reasons given above concerning the relationship between the Claimant and Mr. Payne which we set out when addressing allegation 6, we find that this was unwanted conduct.

If yes did it create an intimidating, hostile degrading or offensive environment?

121. We find that this personal comment coming out of the blue, from her superior did create a prohibited environment for the Claimant and could reasonably have been expected to in these circumstances.

If yes was that the purpose of the environment?

122. We do not find that Mr. Payne's purpose was to create a prohibited environment for the claim

If no was it a detriment

123. Having determined that this is successfully brought as a claim of harassment we do not need to consider if it was direct discrimination.

Allegation 19: On 4th November Mr. Lewandowski, Ms. Turnbull and Mr. Payne played the "game" would you fuck her and then the game "shag/marry/kill"

Did it occur?

124. Yes, this occurred

If yes was it conduct of sexual nature?

125. Clearly these were games of a sexual nature.

If yes was it unwanted

126. For the reasons given above we find that this was the sort of behavior which the claimant had been involved in with Mr. Lewandowski and Ms. Turnbull and we do not find the Client has shown us that the behavior was unwanted.

If no was it a detriment

127. We do not find that the Claimant has established a claim of direct discrimination here: the games were not played because she was a woman.

Allegation 20: Mr. Payne saying, "has Helen wet herself"

Did it occur?

128. Yes, this occurred: Mr. Payne accepted he said it.

If yes was it conduct of sexual nature?

129. Comments over incontinence are not a sexual nature.

If no was it related to sex

130. Nor are comments about continence conduct related to sex?

Was it a detriment?

131. Clearly comments like this about people in the presence of others are detriments

If yes was it because of her sex?

132. We do not have any evidence however to believe this comment was made because the Claimant was female, rather it is another example of an inappropriate comment being made by Mr. Payne.

Allegation 21: Mr. Payne stating: "is it Helen's vagina making those noises"?

Did it occur?

133. Again, Mr. Payne accepts he made this comment

If yes was it conduct of sexual nature?

134. It's not a comment of a sexual nature.

If no was it related to sex?

135. It is clearly a comment relating to the Claimant's sex however.

If yes was it unwanted?

136. For the reasons given above as they relate to the relationship between the Claimant and Mr. Payne we find that this was an unwanted comment, indeed the comment is so inherently objectionable we find it falls into the category of cases where there is no need for there to be actual objection to it by a victim.

If yes did it create an intimidating, hostile degrading or offensive environment?

137. We find that it did create a prohibited environment for the Claimant. She was clear in her evidence to us that this comment "made it about her" and personalized the Behaviour of the Respondent and was hurtful to her.

138. We consider that it reasonable for such a comment to have resulted in a prohibited environment in the circumstances of this case when it is a superior making these comments and one who, on his account, was keeping himself away from the other actors.

If yes was that the purpose of the comment?

139. Again, we do not find that Mr. Payne's purpose was to create a prohibited environment

Allegation 22: Posting of the picture on FaceBook

Did it occur?

140. Yes, the Respondent accepts it occurred.

If yes was it conduct of sexual nature?

141. Clearly the image is of a sexual nature consisting, as it does, of an ejaculating penis near the claimant's mouth.

If yes was it unwanted?

142. This, we find, was unwanted conduct, and is so inherently objectionable that it does not need the Claimant to actually object to it. This was, we find, an escalation of the behavior of Mr. Lewandowski and Ms. Turnbull beyond the conversations that they had been having and consisted of physical acts of

If yes did it create an intimidating, hostile degrading or offensive environment?

143. Again, the Claimant's evidence on this was clear: the picture upset her greatly and created such a bad environment that she had to leave the Respondent.

If yes was that the purpose of the comment?

144. We do not consider, however, that the purpose of Mr. Lewandowski or Ms. Turnbull was to cause this environment to come into existence.

Allegation 23: Failing to deal with the Claimant's grievance. (Direct Discrimination)

Did it occur?

145. The Claimant never had a grievance meeting

Was it a detriment?

146. Clearly a person who requests a grievance hearing and does not have one has suffered a detriment. However, the Claimant was offered a hearing on two occasions and did not accept that offer. We consider therefore there was no detriment.

If yes was it because of her sex?

147. Further, we would not consider that the Claimant was denied a grievance hearing because of her sex. She was offered one on two occasions by the Respondent and she decided she did not want the

CONCLUSION

148. The Claimant has been partly successful in her claims. Accordingly, and unless the parties can resolve the matter in advance of that hearing, the remedies hearing listed for Tuesday, 12th December 2017 will proceed as provisionally listed.

Employment Judge Salter

Date 14 November 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

16 November 2017

FOR THE TRIBUNAL OFFICE