EMPLOYMENT TRIBUNALS

Claimant: C

Respondents: 1. A Ltd
2. A

Heard at: Manchester **On:** 17-20 July 2018

Before: Employment Judge Slater
Mr D Wilson
Ms B Hillon

REPRESENTATION:

Claimant: Mr A Barnes, Consultant
Respondent: Mr R Quickfall, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of direct sex discrimination in relation to dismissal is well-founded.

2. The complaints of harassment referred to by the following allegation numbers are well-founded: 3, 5, 7 8 and 10, in part.

3. The complaints of harassment referred to by the following allegation numbers are not well founded: 1, 2, ~~3~~, 4, 6, 9 and 10, insofar as the allegation at number 10 relates to squeezing the claimant's breasts.

4. The complaint of breach of contract in respect of notice is well-founded and the claimant was entitled to one week's notice as reasonable notice.

5. The complaint in respect of holiday pay is not well-founded.

6. The complaint of breach of contract in respect of expenses is not well-founded.

7. The complaint of unlawful deduction from wages in respect of pay for 4 and 5 November 2017 is not well-founded.

8. The complaint of automatic unfair dismissal is dismissed on withdrawal by the claimant.

REASONS

Claims and issues

1. The claimant complained of direct sex discrimination in relation to her dismissal. She made a number of allegations of sexual harassment, details of which were set out in a Scott Schedule. At the start of the hearing, we went through the Schedule and the claimant's representative clarified which matters were pursued as allegations of harassment and deleting other matters which were background narrative. He provided further details, on instructions, of some of the complaints. The respondents objected to some of the matters being pursued, saying these were new matters. We considered the claimant required an amendment to pursue an allegation relating to events on 9 October 2017 and refused leave to amend the claim in this way, on the basis that this was a completely new complaint. We allowed the claimant to pursue the other complaints, as clarified, the further details provided being further particulars of complaints included in the original claim. This left ten allegations of sexual harassment which we set out in the section headed "Conclusions". The claimant also claimed unpaid holiday pay under the Working Time Regulations 1998, unlawful deduction from wages in respect of pay she alleged was due for work done on 4 and 5 November 2017 and breach of contract in relation to failure to give notice of termination and failure to reimburse expenses.

2. The parties agreed that the issues to be considered remained as in the notes of the preliminary hearing held on 19 March 2018, although, unfortunately, it appeared that these notes had not been received by the claimant prior to the final hearing and had only been received by the respondents shortly before the final hearing, when requested by them.

Application of The Sexual Offences (Amendment) Act 1992

3. From the clarification of complaints at the start of the hearing, it became apparent that the claimant was making an allegation of a sexual offence. Section 1 of the Sexual Offences (Amendment) Act 1992 provides a lifetime statutory prohibition on publication of any matter that is likely to lead members of the public to identify a person who is alleged to have been a victim of a sexual offence. Because of this provision, the parties in this case have been anonymised. The tribunal alerted the parties to the application of the 1992 Act during the hearing and of the tribunal's intention that the parties should be anonymised in the judgment and any written reasons. Neither party applied for a restricted reporting order or anonymization order to be made, being content to rely on application of the 1992 Act.

Facts

4. To avoid unnecessary duplication, our findings of fact on some disputed matters are dealt with in the section headed "Conclusions.

5. The claimant is a lorry driver. She is in a small minority of lorry drivers who are female.

6. The second respondent is also a lorry driver and set up his own haulage business, operated by the first respondent company. The second respondent is the owner and sole director of the first respondent. At the time he met the claimant, he had only one truck and one other driver, who worked at night. By the time of this hearing, the first respondent had three trucks and four drivers and a number of contracts for haulage and transportation services.

7. The claimant and the second respondent met for the first time in June 2017 at a motorway service station in Cumbria. It is common ground that they exchanged numbers at that time. We find that they met again on 2 September. We preferred the claimant's evidence to that of the second respondent in finding that they did meet on that date. The texts that were exchanged after 2 September are more consistent with the claimant's account of events than that of the second respondent. It is apparent from those texts that they had clearly been discussing business plans by that time.

8. We find that the claimant started working on some matters and planning in respect of the respondents' business after that meeting, as evidenced by the texts. The claimant was still employed by another haulage company at that time. We find that she did not become an employee of the first respondent until 9 October 2017. We find that what she did in September 2017 was with a view to starting work for the first respondent at a later date. She did not resign until 24 September from the haulage company which was her employer at that time.

9. It is apparent from the documents that the second respondent was interested in expanding the first respondent's business and getting at least one more wagon and other drivers and a new yard and developing a website.

10. We find that, on, or at some time after, 2 September 2017, the claimant and the second respondent agreed that the claimant would start work for the first respondent on 9 October 2017. She was to drive nights for a week when the other driver was off, and to be paid £750 gross for that week. She was then to work on developing a website for the respondent for a week at a rate of £500 and she was to cover the respondent's holiday after that, working days and being paid £650 per week. We find that the employment was not time-limited to that period. It did not seem plausible that the claimant would give up permanent employment to take on a few weeks' holiday cover. The hire of a second wagon by the respondents at the beginning of November, we find to be consistent with an intention that the claimant's employment should continue after the period of holiday cover.

11. It is common ground that, on 8 September 2017, the claimant and the second respondent spent the day together in the respondent's truck. Various things have been said about the tachograph documents. We have no reason to think that the documents we have seen were not as sent by the tachograph analysis company to the respondents' representative and then on to the claimant's representative. From the records of 8 September, we note that the second respondent started driving the van at around 4am, his card already being in the tachograph from some time at the end of August. The record shows some breaks from driving or being in stop/start traffic whilst the second respondent's card was in the tacograph on 8 September. The second respondent's card was in the tachograph until 16:07 when he took his card out. In the

period 16:09 to 17:57, the claimant's card was then in the tachograph and the second respondent's card was reinserted at 17:57. We note from the pictogram that the second respondent finished driving at around 19:15. The truck moved 16 km in the period of about 1 and three quarter hours that the claimant's card was in the tachograph. The second respondent says that this was a test-drive undertaken by the claimant. We consider that the respondent's evidence on this point is implausible. His evidence changed as to where they did the handover changing the card; it varied from being on the hard shoulder, to a service station, and as to the identity of the service station. His evidence also changed about the insurance position for the claimant. We also find it inherently implausible that he would choose to start a test-drive on a motorway in stop-start traffic, only 16 km from where the claimant was to be dropped off. The claimant's evidence on this point we find to be more plausible i.e. that the claimant did not drive the truck because she was not yet insured to do so but the respondent put her card in because he was afraid of going over the legal hours limit for his driving. The second respondent's evidence to us is that, in any one day, a driver can drive a maximum of 10 hours out of a maximum 15 hour working day. Looking at the pictogram on the tachograph records, at the time the cards were changed, there was clearly a risk that the second respondent could reach the 10 hour maximum before the end of the journey; the traffic was stationary and the second respondent had started driving at 4am, albeit with some breaks.

12. On 18 September 2017, the claimant sent a text to the second respondent asking whether she was still driving for him starting on 8 October. This was before she resigned from her previous employment. On 20 September, she sent the second respondent a text with a picture of a truck, with a comment saying, "this is what [name of employer] said I can have if I stay with them" which indicates that she had spoken to them about leaving. On her evidence she resigned from her previous employer on 24 September. On 5 October, she sent a further text to the second respondent asking whether everything was sorted for her to start on Monday. On 6 October, the claimant sent the second respondent details of her driving licence number and address which would be required for the insurance. We note that in some texts, (pages 58 and 59 of the bundle), the second respondent, in writing to the claimant, referred to her as "love." He told us in evidence that he did not refer in that way to his other driver, who is a man.

13. We accept that the claimant resigned her permanent employment to work for the first respondent because the pay with the first respondent was higher and, once she was driving a truck for the first respondent, she would have little day to day contact with the second respondent.

14. We find that the claimant's employment with the first respondent started on Monday 9 October. In her first week she drove nights whilst the other driver was on holiday. The week afterwards she worked on the website. The second respondent visited her home at least once in that period in connection with the website. We note that, on 14 October, she gave him details of her address and how to get to her; she did not suggest in that text that he did not need to come at all. There is a dispute as to whether there was a second, unnecessary, visit which we will return to in our conclusions. The claimant alleges that, on this visit, on 18 October 2017, the second respondent tried to kiss her.

15. There followed quite a lot of communication by text about the website. There is no evident change of tone before and after 18 October 2017.

16. In the week commencing 23 October, the claimant worked days whilst the second respondent was away on holiday. She also drove the van while he was away the following Monday and Tuesday. There were some communications by text between them whilst the second respondent was away. These were about various matters including the fuel card, the handbrake, and also the claimant making complaints about the hours when working days and wanting the respondent to switch the other driver to working days.

17. On 2 November 2017, it is agreed that the claimant and the second respondent drove together to Birmingham in the second respondent's car for the claimant to be able to drive back a hire wagon. We find the second respondent's account implausible that he hired the wagon as a back-up, because of possible problems with his truck. We find it much more plausible, and find, that the respondents hired it for the claimant to drive. This is consistent with the claimant driving the truck on work to Colchester on 3 November, with the second respondent driving his original truck, rather than the second respondent driving the hire truck while his original truck was fixed.

18. On the evening of 2 November, the claimant drove the truck back to the respondents' yard. The second respondent let her into the yard; he told us that he did not want to give her the PIN number for the lock so he was there to let her in.

19. We find that, on 3 November 2017, the claimant drove the hire truck on work to Colchester. The second respondent eventually agreed in evidence that that was the case. There is a dispute about what happened at the end of that day which we will return to in our conclusions. In the claimant's witness statement and oral evidence, she gave evidence that the second respondent let her into the yard on the evening of 3 November, although her particulars of claim made no mention of 3 November. The second respondent's evidence changed. He said at various times that he was there because he would not give her the PIN number to operate the lock to the yard and then he said that he wasn't there and must have given her his PIN number. We find, as we return to in our conclusions, that the second respondent was at the yard on the evening of 3 November when the claimant returned.

20. Over the weekend of 4 and 5 November, the claimant was trying to organise return loads for the hire wagon. She sent texts to the second respondent on 3 and 4 November about this, to which she received no reply. She sent a text on the morning of Sunday 5 November to which the second respondent replied around lunchtime. The second respondent wrote, "this isn't working out, sorry, going to have to send wagon back, figures not right thanks Sara." The claimant replied by text. The time of the text is not on the copy we have in our bundle but we understand that it was received on the same day i.e. 5 November. In this she wrote, "no problem didn't think you had it in you to expand". She wrote various things about what she would expect to be paid and that she would be consulting her aunt who wrote was an employment law solicitor. She also wrote. "however when I receive all that is due to me tomorrow I shall refrain from reporting you to all the relevant transport and tax authorities." The claimant made no mention in that text about sexual misconduct. We find, on the evidence of the texts, that the claimant clearly understood that her employment had been ended by the second respondent's text of the same day. In oral evidence she said that her reply was to raise a reaction, saying "am I sacked or am I not". We found this explanation to be unconvincing; it is not consistent with what she wrote at the time, which indicates a clear understanding that she had been dismissed by that text.

21. The following day, on 6 November, the claimant sent an email to the respondent. In this, for the first time, the claimant made allegations of sexual harassment and suggestive comments. The claimant referred in the email to there being voice recordings from her phone of suggestive comments; the claimant told us the recordings are no longer available because the phone on which they were stored fell into caustic soda. She made no mention, in the email, of an assault. She made no mention of the respondent squeezing her breasts. She wrote that her belief was, in relation to the termination of her employment, that it was because she did not succumb to the second respondent's sexual advances and innuendoes. We have been shown 2 documents (which appear at pages 39 and 40 of the bundle) which purport to have the claimant's signature on them but the claimant denies that she signed these documents and says the documents are not authentic. Not being handwriting experts and having no expert evidence available to us, we are unable to assess the authenticity of the documents. However, the weight of the other evidence persuades us that the claimant was not taken on just for holiday cover. We find that the claimant would not have left her permanent job with her previous employer for a short period of holiday cover only. The text correspondence between the claimant and the second respondent is also much more consistent with them planning a business together to continue beyond holiday cover. We also found that the respondents hired a wagon for the claimant to drive, right at the end of what the second respondent says was to be a fixed term contract for holiday cover.

22. The claimant had no written particulars of employment with the first respondent. We heard no evidence of any express agreement as to notice of termination or reimbursement of expenses.

23. In relation to expenses, the claimant says she incurred 4 tolls of £12 each time on the Humber Bridge for which she has not been reimbursed. The respondents' evidence was that these tolls could be paid for by the fuel card. The claimant has asserted that the bridge does not take cards. We have seen no documentary evidence of the toll arrangements on the Humber Bridge. The burden is on the claimant to satisfy us of the facts on which she relies; she has not satisfied us, on these facts, that she incurred expenditure for which she was not reimbursed.

24. We find, based on the claimant's evidence, that the claimant was used to receiving comments from male lorry drivers along the lines of suggesting that she should join them in the cab and her standard repost to this was "not in your dreams".

Submissions

25. Both representatives made oral submissions. We do not seek to summarise the submissions dealing with the credibility of the claimant and the second respondent and the facts which each party submitted the tribunal should find in their favour. The respondents sought to persuade us that the claimant had not proved that events had occurred as alleged by her in relation to her complaints of harassment and the claimant sought to persuade us that they had.

26. In relation to the complaint of direct sex discrimination about dismissal, the respondents submitted that the reason for dismissal was that the respondent changed his mind about getting another wagon so there was no work for her; that her fixed term contract had elapsed; and there was no more holiday cover available. The claimant

submitted that she was dismissed because she was a woman; the situation would never have arisen if she was a man.

27. The respondents submitted that the employment relationship started on 9 October 2017; the claimant submitted that it started on 2 September 2017.

28. The respondents submitted that the claimant had been employed for less than a month so was not entitled to holiday pay, none accruing until a month had been completed in accordance with regulation 15A(2A) Working Time Regulations 1998. The claimant submitted that she had been employed for more than one month so was entitled to holiday pay.

29. The respondents submitted that the claimant had no entitlement to notice under section 86 Employment Rights Act 1996 because she had been employed for less than a month and was not entitled to reasonable notice of termination because her employment ended on expiry of a fixed term contract. The claimant submitted that she had been employed for more than one month so was entitled to notice pay.

30. The respondents submitted that there was no evidence of an agreement to pay the claimant for work planning on 4 and 5 November in addition to the £650 she received for that week. The claimant submitted that she was entitled to be paid wages for 4 and 5 November.

31. The respondent submitted that the claimant had not proved the necessary facts about tolls on the Humber Bridge and whether they take fuel cards and, therefore, had not proved the necessary facts to succeed in the complaint of breach of contract in relation to expenses. The claimant submitted that she was entitled to be reimbursed for toll charges.

The Law

Holiday pay

32. Regulation 15A(2A) Working Time Regulations 1998 provides that, except in the case of certain agricultural workers, “leave is deemed to accrue over the course of the worker’s first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) and 13A(2), subject to the limit contained in regulation 13A(3), on the first day of each month of that year.”

Breach of contract - notice

33. In the absence of an expressly agreed period of notice, an employee, not employed on a fixed term contract, is entitled to reasonable notice of termination. Statutory minimum notice periods provided for by section 86 Employment Rights Act 1996 only apply once an employee has been continuously employed for at least one month.

Breach of contract - expenses

34. There is often an express term in contracts that an employee will be reimbursed reasonable expenses incurred in the course of performing their duties. In the absence of an express term, it is possible that a term for reimbursement of such expenses may

be implied, by application of one of the usual tests for implying terms e.g. custom and practice or that the term is so obvious that the parties must have intended it.

Unlawful deduction from wages

35. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Direct sex discrimination

36. Section 13(1) of the Equality Act 2010 (EqA) provides: "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". Section 4 lists protected characteristics which include sex.

37. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

38. Section 39(2) EqA makes it unlawful, amongst other things, for an employer to discriminate against one of their employees by dismissing them. Discrimination includes direct discrimination as defined in section 13 EqA.

Sexual harassment

39. The relevant parts of section 26 EqA provide:

> "(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."

Subsection (5) lists relevant protected characteristics which include sex.

40. Section 40 EqA provides:

"(1) An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) Who is an employee of A's;
(b) Who has applied to A for employment."

Conclusions

41. We deal with further disputes of facts in these conclusions in addition to applying the law to the facts found in the previous section.

Holiday pay

42. We have found that the claimant was employed by the first respondent in the period from 9 October to 5 November 2017. This was under a month. Therefore, in accordance with the provisions in the Working Time Regulations, the claimant had not accrued any entitlement to holiday pay. We conclude that this complaint is not well-founded.

Breach of contract – failure to give notice of termination

43. No statutory minimum notice applies because the claimant had been employed for less than a month. However, we found that the claimant was not employed on a fixed term contract. As a matter of contract law, an employee has an implied right to reasonable notice of termination of a contract. Doing the best we can, in the absence of any evidence from the parties as to business practices in this industry, we conclude that a week would be reasonable notice in these circumstances. In reaching this conclusion, we consider all the circumstances, including the length of service of the claimant and the fact that the claimant was giving up a permanent job to take up new employment with the respondent.

Unlawful deduction from wages

44. The claimant has claimed unlawful deduction from wages in respect of pay for 4 and 5 of November. We accept that the claimant was doing work on 4 and 5 November. However, she has given no evidence of an agreement for pay other than she was to be paid £650 for the week beginning 30 October 2017, during which she had done some driving. The claimant was paid £650 for this week. She has not satisfied us that there was any other payment due to her for doing work on 4 and 5

November. We conclude that the complaint of unlawful deduction from wages is not well-founded.

Breach of contract - expenses

45. As previously stated, the claimant has not satisfied us on the facts that she incurred expenditure for which she was not reimbursed. We, therefore, conclude that this complaint is not well-founded.

Complaints under the Equality Act 2010

Complaints of sexual harassment

46. We refer to the Scott schedule which set out the allegations of harassment. There are 10 allegations for us to consider.

Allegation 1

47. This relates to June 2017, which is the first occasion on which the claimant met the second respondent. The allegation is that he commented to her that she was "too pretty to do a job like this" and suggested that she "keep him company for the night". Even if this occurred as the claimant alleges, and the second respondent denies it, the claimant's evidence in her witness statement is that she shrugged it off. We find that the comments made were of a similar nature to comments made by other lorry drivers with which the claimant deals robustly. We concluded that the definition for harassment was not satisfied since we were not satisfied that the conduct, if it happened, had the requisite effect for the definition of harassment to be satisfied. However, for another reason, we also conclude that this complaint is not well-founded. Harassment is only unlawful under the Equality Act if it is made unlawful by section 40 Equality Act 2010 i.e. it is harassment by an employer of an employee or of someone who has applied to that employer for employment. At this stage, the claimant was not an employee of the first or second respondent; neither had she applied to either respondent for employment. Even if the second respondent behaved as the claimant alleges, this conduct was not made unlawful by section 40 EqA. We conclude that this complaint is not well founded.

Allegation 2

48. This allegation relates to an incident on 2 September where the claimant and the second respondent met at a pub. The allegation is that the second respondent tried to kiss the claimant when outside the pub. We note that this complaint does not appear in the particulars of claim or in the claimant's witness statement, although there is mention of it in the Scott schedule. Even if we found that the second respondent behaved as alleged, we are not satisfied that this had the requisite purpose or effect for the definition of harassment to be satisfied. If there was an attempt to kiss the claimant which was any more than a clumsy, over familiar, way of saying goodbye, we consider the claimant would have raised this in her witness statement and in the particulars of claim. We, therefore, conclude that this complaint is not well-founded.

Allegation 3

49. This relates to events on 8 September 2017. The claimant alleges that the second respondent made attempts to persuade the claimant to try out the bunk in the van and tried to kiss the claimant on two occasions. ~~We conclude that it is not necessary to decide whether this happened because we conclude that the treatment was not made unlawful by Section 40 EqA.~~ We conclude that, if there was harassment within the meaning in s.26 EqA, this was made unlawful by s.40(1)(b) EqA since the claimant was, by this time, someone who had applied to the respondent for employment, although we found she had not started her employment by this date. We conclude that the facts were as alleged by the claimant in her witness statement. Although the claimant did not refer to this incident in the particulars of claim in the claim form, she referred to it in the Scott Schedule and in her witness statement. The fact that there was no specific reference to this in the claimant form is not sufficient to cause us to doubt the claimant's evidence on this point. Pleadings often do not set out every incident which has happened. The conduct alleged is consistent with conduct we have found occurred at other times (allegation 8 – similar comments about trying out the bunk; allegation 5 – attempts to kiss the claimant).

Allegation 4

50. This relates to the period 9 September 2017 to 8 October 2017. The claimant alleges that the second respondent made several suggestive calls to the claimant, saying: "we can have some fun once we get an office." ~~We found it not necessary to decide whether this happened as alleged since we concluded that the treatment was not made unlawful by Section 40 EqA.~~ We conclude that, if there was harassment within the meaning in s.26 EqA, this was made unlawful by s.40(1)(b) EqA since the claimant was, by this time, someone who had applied to the respondent for employment, although we found she had not started her employment by this date. The claimant has not satisfied us that the incident occurred as alleged by her. The evidence in her witness statement was not sufficient in relation to this matter. We conclude, therefore, that this complaint is not well founded.

Allegation 5

51. This relates to events on 18 October 2017. In relation to this complaint, and subsequent complaints of harassment, the harassment, if found to have occurred, is made unlawful by section 40 EqA since the claimant was an employee of the first respondent from 9 October 2017. Allegation number 5 is that, on 18 October, the second respondent paid an unnecessary visit to the claimant and tried to kiss the claimant. In the Scott Schedule, the claimant asserts that they were disturbed by her daughter and her daughter's fiancé. The claimant has been consistent in alleging that the second respondent tried to kiss her, from the particulars of claim onwards. There is some inconsistency as to whether it had been witnessed by the claimant's daughter and her fiancé or not. On the balance of probabilities, we find that the second respondent did try to kiss the claimant on a visit to her house. The claimant has been consistent about the essential facts of the matter and our conclusions on this are consistent with what we go on to find in relation to allegation 10 on 3 November. We have found the second respondent's evidence on many points to be unreliable and not credible.

52. We find that the conduct was unwanted. The conduct was clearly related to sex or of a sexual nature. The conduct created the requisite effect i.e. creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant. We conclude that this complaint is well-founded.

Allegation 6

53. This relates to events on 23 October 2017, about a phone call when the second respondent was away on holiday. The claimant alleges that there were several suggestive comments made by the second respondent on the phone about being together in the bunk, saying he could not wait to try out the bunk and querying which trucks have the best bunks. There was no mention of this allegation in the particulars of claim. Although the Scott schedule allegation talks about "suggestive comments" about being in the bunk, the witness statement, in relation to this matter, refers to the second respondent saying he would rather be with the claimant than on holiday, without providing any evidence of comments relating to trying out the bunk. Given these inconsistencies and lack of evidence from the claimant as to the requisite facts, the claimant has not satisfied us, on the balance of probabilities, that this occurred as alleged in the Scott schedule. We conclude that this complaint is not well-founded.

Allegation 7

54. This relates to events on 2 November 2017 when the claimant and the second respondent drove together in the second respondent's car to Birmingham to pick up the hire wagon. The allegation is that the second respondent put his hand on the claimant's knee several times saying that they would be "alright together". The claimant has been consistent in the particulars of claim, the Scott schedule and her witness statement in alleging that the second respondent put his hand on her knee during this drive. We find, on the balance of probabilities, that this occurred. We conclude that the conduct was unwanted, it had the requisite effect to satisfy the definition of harassment and it was clearly related to sex or of a sexual nature. We conclude, therefore, that this complaint is well-founded.

Allegation 8

55. This relates to the evening of 2 November 2017 when the claimant was returning to the respondents' yard with her truck. She says that, on the phone, the second respondent made several comments about trying out the bunk. The claimant mentioned this in her particulars of claim and has been consistent about this in her witness statement. We find, on the balance of probabilities, that this occurred. It meets the definition of harassment, being unwanted conduct, relating to sex or being of a sexual nature and having the requisite effect. We conclude that this complaint is well-founded.

Allegation 9

56. This relates to events on 3 November 2017. The claimant alleges that the second respondent, on the phone, said that, if the return loads had not been sourced, the claimant would have to "tramp out" the night i.e. spend the night out in the cab, and that he would come to join the claimant. There is no evidence in the claimant's witness statement to support this allegation. We find that the claimant has not satisfied

us of the requisite facts on the balance of probabilities and we, therefore, conclude that this complaint is not well-founded.

Allegation 10

57. This relates to events on the evening of 3 November 2017, when the claimant was returning the hire wagon to the respondents' yard. The claimant alleges in the Scott schedule that the second respondent made more sexual advances, she told him she was not interested and raised her voice, and the second respondent told her she would have to be "more adaptable". At the start of the hearing, on instructions, the claimant's representative told us that the sexual advances were the second respondent touching the claimant, putting his hand round her waist, and squeezing her breasts. We note in the email the claimant wrote on 6 November 2017, which was written very soon after these events, the claimant was writing about having suffered sexual advances and innuendo. We note that the particulars of claim do not specifically refer to the 3 November and seems to elide 2 and 3 of November. However, the Scott schedule, which was provided some time in April 2018, and the witness statement refer to "sexual advances." The claimant's witness statement refers to "usual advances". We noted that the second respondent changed his evidence as to whether the claimant was driving at all on 3 November and whether he let her in the yard. We consider it not plausible that he would not give her the code to get into the yard on 2 November but would give it to her on 3 November. We find that he was with her in the yard on 3 November but denied this in his witness statement and eventually in oral evidence, saying he was in bed when she returned the truck.

58. Taking these various matters into consideration, we find, on the balance of probabilities, that the second respondent did make some form of sexual overtures to the claimant on the evening of 3 November, including attempts to touch her, consistent with his previous conduct towards her. We find that the claimant rejected his advances and shouted at him. We find that this conduct was unwanted, it had the requisite effect, it was of a sexual nature, and satisfied the definition of harassment. We conclude that the complaint, to this extent, is, therefore, well-founded. We also find that the second respondent said that the claimant needed to be more "adaptable".

59. On the balance of probabilities, however, the claimant has not satisfied us that the second respondent squeezed her breasts. This is by far the most serious allegation that the claimant has made and we consider it inconceivable that, if it did happen, the claimant would not have raised this in any or all of the correspondence immediately after the dismissal, the particulars of claim, at the preliminary hearing, in the Scott schedule, and in the witness statement. This allegation was only made on the first day of hearing when clarifying the issues. We, therefore, find that this allegation, to the extent that it relates to an allegation that the respondent squeezed the claimant's breasts, is not well-founded.

Summary of conclusions in relation to complaints of harassment

60. In summary, therefore, in relation to the complaints of harassment, we have found that numbers 5, 7, 8 and 10, in part, are well-founded and numbers 1, 2, 3, 4, 6, 9 and 10, insofar as 10 related to squeezing the claimant's breasts, are not well-founded.

Complaint of direct sex discrimination in relation to dismissal

61. The initial burden on proof is on the claimant. We have to consider whether she has proved facts from which we could conclude that her dismissal was because of sex. If she does, then the burden passes to the respondents to satisfy the tribunal that the reason for her dismissal was in no way related to her sex. Given the findings we have made about harassment on 3 November, the claimant rebuffing the second respondent's advances and that the second respondent hired a truck for the claimant on 2 November for her to drive then changed his mind that he was not going to continue with this on 5 November, without giving us a plausible explanation for doing so, we conclude that the claimant has satisfied the initial burden of proof. We refer also to the finding we made that the respondent was present in the yard on 3 November 2017, although he had denied this was the case. The claimant has proved facts from which we could conclude that her dismissal was because of her sex.

62. We turn then to the respondents and whether they have discharged the burden of proof. The respondents advanced two reasons for the claimant's dismissal: 1) that she was employed on a fixed term contract and this had come to an end; and 2) that the second respondent had changed his mind about expanding the business. In relation to the first explanation, We consider the weight of evidence was against there being a fixed term contract. However, even if the document which appeared at p.39 of the bundle was an authentic document, and there had been a fixed term contract, by 3 November 2017, all holiday cover was over and the parties were acting consistently with the claimant's employment continuing. The respondents had hired a second truck for the claimant to drive and she had begun driving this on work for the respondents, travelling to Colchester on 3 November 2017, although the second respondent had initially denied this was the case. The second respondent said at paragraph 30 of his witness statement that the claimant's last day at work was 2 November 2017. However, the second respondent eventually agreed that the claimant had driven, on work for the respondents, to Colchester on 3 November 2017. In relation to the second explanation, the text from the second respondent at p.89 of the bundle could be read consistently with this explanation. However, we were provided with no documentary evidence of any costings done by the second respondent. The respondents gave us no satisfactory explanation as to why the second respondent's view of the viability of hiring an extra wagon had changed in such a short period. We note that the respondents did, following the claimant's dismissal, expand the business. The respondents' explanation was lacking any supporting evidence and was, we considered, wholly unconvincing. We conclude that the respondents have not discharged ~~this~~ the burden of proof. They have not satisfied us that the claimant's dismissal was in no way related to her sex, or the claimant rebuffing the second respondent's advances. The second respondent provided no plausible explanation for the claimant's dismissal only a short time after he had hired a truck for her to drive and gave us an implausible explanation about hiring a second truck as a back up in case his own truck was out of action. We, therefore, conclude for these reasons, that the complaint of direct discrimination is well-founded.

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Employment Judge Slater

Original Date: 14 August 2018

Date amended on reconsideration: 1 October 2018

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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