Case Number: 1801351/2018

1808537/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Miss A Byrne**		
Respondent:	**British Telecommunications Plc**		
Heard at:	**Sheffield**	**On:**	**28, 29 and 30 September 2018**
			8 October 2018
			7 November (Reserved)

Before:	**Employment Judge Rostant**
Members:	**Mr K Smith**
	Mrs K Grace

Representation

Claimant:	In person
Respondent:	Mr J Boyd of counsel

RESERVED JUDGMENT

The claim fails and is dismissed.

REASONS

1. By a claim presented on 15 January 2018 the claimant brought a claim of sexual harassment. The case was the subject of three preliminary hearings the first before Judge Little on 9 March, the next, also before Judge Little on 9 May and the third by telephone before Employment Judge Brain in 23 July 2018. In all three hearings the claimant was represented by Mr P Clay of the Communication Workers Union.
2. In his preliminary hearing of 9 May Judge Little set out at paragraph 6 the claims and issues being pursued by the claimant. That assessment of the issues was later modified by agreement as is set out in paragraph 7 of Judge Brain's order. As a result of those two orders this Tribunal was required to decide whether the claimant was harassed in relation to her sex as follows:-

a. Unwanted conduct of a sexual nature contrary to section 26(2) of the Equality Act 2010 and section 40 of the Equality Act 2010 in that Mr Medleycott engaged in unwanted conduct of a sexual nature by kissing and hugging the claimant on 6 September 2016, 17 November 2016 and/or 22 November 2016; Mr Medleycott engaged in further unwanted conduct of a sexual nature by touching the claimant's back on 17 September 2017;

b. Unwanted conduct because of the claimant's rejection of Mr Medleycott's sexual advances contrary to section 26(3)(c) and section 40 of the Equality Act the conduct being all on the part of Mr Medleycott and comprising as follows – the sending to the claimant an unprofessional aggressive text message on 7 December 2016; withdrawing support from the claimant as a manager and not following the respondent's process with regards to medical notes and general practitioner advice in February 2017; ignoring medical advice that the claimant should return to work on reduced hours; failing to take appropriate action to ensure the claimant was provided with a suitable chair following physiotherapy support; the claimant being penalised for James Medleycott's mistakes; the sending of an unprofessional email to the claimant and others on 16 December 2017 and shouting and swearing at the claimant;

c. Harassment by the respondent; failing to acknowledge and investigate a complaint of harassment by the claimant against Mr Medleycott.

3. Those claims raised all the issues inherent in claims of harassment. That is to say whether or not the conduct complained of was unwanted and whether it related to the claimant's sex or was of a sexual nature or in the case of complaints brought under section 26(3)(b) whether it was caused by the claimant's rejection of the unwanted conduct of a sexual nature. Given that the complaints in some cases date back to 2016, 18 months or more before the bringing of the claim the respondent also wished to advance arguments in relation to time.

4. Although the claimant by the time she brought this claim to the Tribunal had been dismissed by the respondent there was no complaint before the Tribunal in relation to that dismissal and the Tribunal was only focussing on the matter set out above.

The progress of the hearings

5. The Tribunal hearing commenced on Tuesday 28 August. On the first day there was no evidence heard until just after midday, the first part of the hearing being occupied with discussions about documents and the reading of witness statements. Eventually the Tribunal heard from three witnesses only, the claimant and for the respondent Mr Johnson and Mr Medleycott. The claimant gave evidence first. Mr Johnson's evidence started at 3.30pm on the second day and continued on to the third day. It was agreed when Mr Johnson's evidence was completed that there would not be enough time to hear Mr Medleycott in the time remaining and the matter was adjourned to a single day (8 October) to hear Mr Medleycott's

evidence and for submissions to be made and 7 November was selected as a day when the Tribunal could meet for Reserved Judgment.

The law

6. Section 40 of the Equality Act 2010 makes it unlawful for an employer to harass an employee. Section 26 of the Equality Act 2010 defines harassment and for the purposes of this case section 26(2) and section 26(3) are relevant. Section 26(2) defines harassment as consisting of unwanted conduct of a sexual nature having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Section 26(3) extends the definition of harassment to include less favourable treatment by the alleged harasser because of the claimant's rejection of conduct of a sexual nature. The burden rests upon the claimant to prove the fact of the conduct complained of and that it had the relevant effect. When judging the question of effect, the Tribunal must consider whether or not it was reasonable for the claimant to treat the conduct as having that effect and to consider her perception and all the relevant circumstances. Where it is alleged that the conduct has the purpose of creating the prohibited conditions in section 26(1)(b) the burden of proof changes if the claimant can show sufficient facts as would cause the Tribunal to presume that the conduct was done with that purpose and in such a case it would be for the respondent to show that it was not done with any such purpose.

7. Section 123 of the Equality Act provides that proceedings brought to the Employment Tribunal complaining of a contravention of the Equality Act must be brought within three months starting with a date of the act complained of or such other period as the Employment Tribunal thinks is just and equitable. That three months is subject to the extension provided for by the period of early conciliation. Section 123(3) provides that conduct extending over a period of time is treated as done at the end of that period.

8. In considering any issues of time the Tribunal must therefore decide whether conduct complained of is part of a continuing course of conduct the last act of which occurred less than three months before the date on which the claimant first sought early conciliation and, if not, whether it would be just and equitable to extend time. The Tribunal here sets out a neutral chronology of uncontroversial factual matters.

9.

9.1 The claimant first began work at the respondent as an agency worker supplied and employed by Manpower. She was employed at the respondent's Doncaster contact centre in a team managed by Mr Medleycott.

9.2 The claimant began work at the end of August 2016.

9.3 Advised and supported by Mr Medleycott, the claimant applied for employment direct with the respondent and successful in obtaining employment with BT, moving to that contract on 12 February 2017.

9.4 By this stage Mr Medleycott's line manager had become Mr Johnson.

9.5 The claimant raised a grievance on 12 September 2017, complaining about her treatment at the hands of Mr Medleycott over a lack of support

on her return from a period of illness in February 2017 and also alleging sexual harassment by way of being hugged and kissed.

9.5 The grievance was dealt with by Mr Johnson and he supplied his outcome, not upholding the grievance on 7 November. The claimant's employment subsequently came to an end for reasons unconnected with the matters set out above.

All other relevant findings of fact will be set out in our conclusions.

10. The Tribunal has decided to approach the claims as follows. We will first deal with the factual allegations supporting the complaints brought under section 26(2) that is to say complaints of unwanted conduct of a sexual nature. Having determined the factual issues in those cases, we will turn our attention to the complaints of less favourable treatment pursued under section 26(3). Having determined the factual matters there, we will consider whether there are any time issues and also whether or not the claims or any of them can be made out. The approach adopted by the Tribunal requires the claimant to satisfy us that the complaints under section 26(2) are made out before considering whether or not the claims under section 26(3) are made out since the structure of the section makes it clear that it is only if there has been unwanted conduct of a sexual nature, having the prohibited purpose, which has been rejected, that the Tribunal could find that subsequent conduct is less favourable treatment because of that rejection.

11. Having determined the claims that relate to Mr Medleycott's conduct directly, the Tribunal will then go on to deal with the complaints in relation to the respondent's alleged failure to carry out the proper investigation of those matters.

The complaints against Mr Medleycott

12. The complaints against Mr Medleycott fall into two categories as already set out above. The first of those is complaints of unwanted conduct of a sexual nature. They are complaints that Mr Medleycott hugged and kissed the claimant on three occasions, 6 September 2016, 17 November 2016 and 22 November 2016 and, on 17 September 2017, touched her back.

13. The evidence that the Tribunal heard about these incidents largely but not exclusively comes from the claimant herself and Mr Medleycott.

14. Mr Medleycott denies ever kissing the claimant. He did accept in his witness statement that he did hug the claimant on one occasion. Mr Medleycott acknowledged that he gave the claimant a hug on 22 November 2016 when she told him that she had been successful in securing the contract with BT. The agreed background to that is that Mr Medleycott had spotted the claimant as an employee of great potential whilst she was engaged as a respondent as an agency worker. He had encouraged her and given her active support in applying for the job. The evidence showed that the claimant had texted Mr Medleycott on the day before the incident, 21 November, to tell him that she had got the job and the first time that he saw her in work after that was the following day (see page 128B of the bundle).

15. In cross-examination, Mr Medleycott went further than he had in his witness statement by acknowledging the possibility that he had hugged the claimant in September of 2016. The circumstances of that alleged contact were that the claimant had been in training and had emerged from the training room visibly upset. Although the date of the alleged incident had been identified during case management, the circumstantial detail had not been supplied until the claimant expanded on that matter in cross-examination, which evidence Mr Medleycott had heard. That incident was the one incident witnessed by another employee Megan Shuli. Miss Shuli supplied a witness statement for this hearing but did not attend to give evidence. In her witness statement she asserted that she had seen Mr Medleycott "kiss and cuddle" the claimant. Mr Medleycott in cross-examination was prepared to accept that he might well have hugged, but gone no further, the claimant if he witnessed her upset in the context of training. Mr Medleycott's evidence was that he is a tactile person and does hug colleagues both male and female and might well have hugged the claimant to comfort her.

16. There is a third incident complained of by the claimant in November 2016 where Mr Medleycott simply denies having hugged and kissed the claimant at all. This is said to have taken place on 17 November and in the claimant's witness statement there is no context to that incident at all. Although the claimant in her witness statement says that that incident was also viewed by Miss Shuli, Miss Shuli does not corroborate that in her witness statement.

17. There are therefore two areas of factual dispute in relation to the evidence of the 2016 contacts. First is whether they involved kisses and secondly is whether one of them happened at all. In cross-examination the claimant elaborated on the kissing by saying that it was not on her lips or her cheek but on her forehead. Mr Medleycott denied any kissing at all. Leaving aside for the moment Miss Shuli's witness statement, there is no direct corroboration for any of the incidents and the burden rests upon the claimant to satisfy the Tribunal on the balance of probabilities that they happened as she alleged.

18. The Tribunal is on the basis of Mr Medleycott's evidence prepared to conclude that the claimant was hugged by Mr Medleycott on 6 September and 22 November.

19. The Tribunal find that on balance the claimant does not satisfy us that there was any contact between her and Mr Medleycott on 17 November. We find that because the claimant has provided no context or explanation as to why there should be any such contact. The claimant has asserted that Miss Shuli witnessed that incident but Miss Shuli's witness statement contains no reference to that incident at all and the incident is not mentioned in the claimant's grievance against Mr Medleycott (see page 181). Furthermore, the Tribunal was influenced by the nature and tone of the text exchanges between the claimant and Mr Medleycott sent a matter of days after that alleged incident (see page 128B). They evidence a close, indeed warm, relationship between the claimant and Mr Medleycott which seems inherently improbable if by this stage Mr Medleycott has twice (as the claimant described it) "sexually assaulted"

the claimant. Finally, we do place weight on Mr Medleycott's willingness to accept on reflection the possibility that he had hugged the claimant on 6 September once he was given a context and a background to that incident.

20. The Tribunal has thought it important to determine the exact nature of the contact that we do think happened and that requires us to determine whether they involve kissing. There are two incidents in question here. The first is very early on in the claimant's employment within the first fortnight of her time with BT. On balance, the Tribunal find that Mr Medleycott did kiss the claimant on her head on that occasion and indeed on the later occasion of 22 November and our reasons are as follows. Although Mr Medleycott denies the matter, one incident was witness by Miss Shuli. Miss Shuli did not give evidence live and normally less weight would be placed on that evidence than on other evidence subjected to cross-examination. Nevertheless, it is corroboration by an independent witness for one of the incidents. Furthermore, the Tribunal has borne in mind that it was, in our view, remarkably disinhibited of Mr Medleycott to be making physical contact beyond the handshake with a young attractive female colleague so early on in their line management relationship. Whilst such contact might be appropriate at a later stage when they had become closer, at that stage Mr Medleycott really could have had no idea as to whether or not that would be welcome even if it was offered in the spirit of attempting to comfort the claimant. That level of disinhibition it seems to the Tribunal might well lead to a paternal kiss on the top of the head. As to the incident on the 22nd , that was undoubtedly offered in a spirit of congratulations when similar levels of disinhibition might have applied. On balance, the Tribunal preferred the claimant's evidence to Mr Medleycott's evidence on this point for those reasons and find that Mr Medleycott did kiss the claimant albeit on the top of the head.

21. Finally, we turn to the incident of 17 September 2017. This incident is notable in that it is alleged to have happened many months after the previous incidents. By the time that this incident is alleged to have happened, Mr Medleycott had ceased to manage the claimant at least in part because he understood that their relationship had soured and that the claimant was suggesting that he was in the habit of having sexual liaisons with female colleagues. The claimant alleges that on an occasion when she was in working on a weekend and therefore, somewhat unusually, subject to Mr Medleycott's management as the duty manager on that day, Mr Medleycott came around and whilst looking at her computer screen touched her on the back. Mr Medleycott denies that and asserts that by that stage he was so wary of the claimant and so concerned about her complaints against him that he certainly would have made no unnecessary contact with her physical or otherwise and absolutely rejects the suggestion that he touched her back. There is no corroboration for this incident for either witness.

22. On balance the Tribunal prefer Mr Medleycott's evidence on this issue. Where the Tribunal is dealing with uncorroborated evidence from two parties the Tribunal must make an attempt to determine whether there is anything beyond the mere burden of proof that would allow the Tribunal to

reach a positive finding one way or the other. Included in that is the inherent probability or improbability of the evidence being given by the relevant parties. The Tribunal takes the view that it is inherently improbable that Mr Medleycott would have initiated unnecessary physical contact between himself and the claimant given that by this stage he was already aware that the claimant had complained about him and indeed had gone as far as to assert that he was in the habit of having sexual relationships with junior female colleagues in the office. We found Mr Medleycott's evidence on this point thoroughly persuasive.

23. Having reached those conclusions as the facts, the Tribunal next had to determine whether the conduct as described above was of a sexual nature and whether it was unwanted and then further before moving to the other complaints of harassment under section 26(3) whether it had been rejected. It was Mr Boyd's submission that the claimant could not satisfy the Tribunal either that the conduct complained of was unwanted or that it had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Mr Boyd pointed out that although the claimant had used the term sexual assault she had, in an exchange with the Employment Judge, gone no further than saying that Mr Medleycott's conduct had made her feel "uncomfortable" and had gone on to say that it had not affected her general regard for Mr Medleycott which was affected not by that treatment but by what the claimant says was subsequent ill-treatment by Mr Medleycott, her having told Mr Medleycott that his hugging her was making her feel uncomfortable.

24. The Tribunal rejects Mr Boyd's submission that if the worst the claimant felt about Mr Medleycott hugging and kissing her was uncomfortable, that cannot make out the contention that the conduct was unwanted. The Tribunal would observe that nobody wants to feel uncomfortable and behaviour that makes people uncomfortable is almost always unwanted. To that extent, the Tribunal lacking any other evidence and finding no grounds for rejecting the claimant's evidence on this issue, it is prepared to accept that the claimant did not welcome being hugged and kissed by Mr Medleycott on 6 September or 22 November.

25. What caused the Tribunal more anxiety however was the question of whether or not that conduct created the prohibited circumstances set out in section 26(1)(b). Wrapped up in this question was also the question as to whether the conduct was of a sexual nature.

26. The claimant's case in broad terms is that Mr Medleycott singled the claimant out at an early stage for support and help not particularly because he was impressed by her as an employee, although he may have been, but because he was sexually attracted to her and hoped to make her employment at BT permanent the better to make it possible for his relationship with her to become something other than employer/employee.

27. Were there evidence to support that contention that would undoubtedly bolster the suggestion that the contact between Mr Medleycott and the claimant that we have found above was of a sexual nature. However, the Tribunal does not accept that there is any evidence to support that opposition.

28. In advancing that proposition the claimant pointed to two matters which, she asserted, were evidence of Mr Medleycott seeking to get inappropriate personal information from the claimant for purposes not needed by the business. The claimant's case is that that supports the contention that Mr Medleycoott's patronage of her was personal rather than disinterested.

29. The first of those was obtaining her phone number on his personal phone and sharing his personal phone number with her. The second of those was insisting on a photograph of the claimant sent to his phone.

30. Mr Medleycott accepts readily that it is the case that he did want the claimant's phone number and that he did require a photograph. Mr Medleycott's explanation for those matters is first that that is how he treated all colleagues, male and female, and secondly that there were good work related reasons for that.

31. The Tribunal is satisfied that the evidence shows that Mr Medleycott did ask all colleagues for photographs and for phone numbers and the claimant was therefore not being singled out for that particular treatment. The email correspondence which the Tribunal has seen establishes that both of those are the fact.

32. Furthermore the claimant is not in a position to disprove Mr Medleycott's explanation for that. Although there is a work mobile telephone where all staff numbers are held it is useful to employees and their managers if employees' numbers are also on their manager's personal mobile. For example, in case he does not have access to the work mobile. Indeed the undisputed evidence shows that on a later occasion the claimant was very happy to use that facility to text Mr Medleycott about a work related matter when she knew he was not at work. It seems unlikely to the Tribunal that that was the first time that had happened either. Indeed, on 21 November the claimant texted Mr Medleycott on his personal number to advise him that she had been successful in getting the job. As to the question of photographs, Mr Medleycott asserted this was done in order to obtain a photograph to put on the claimant's security badge. The claimant accepts that explanation and it is corroborated by the fact that when the claimant did eventually send the photograph to Mr Medleycott he rejected it as unsuitable for the security badge because it showed the claimant wearing a pair of sunglasses. If Mr Medleycott's desire to obtain a photograph had been based only on his sexual feelings towards the claimant it seems unlikely that the follow up email rejecting that version of the claimant's image would have happened.

33. The Tribunal therefore finds that the claimant cannot make out her general case that she was in effect being groomed by Mr Medleycott.

34. That conclusion is not, of course, determinative of the question as to whether or not the conduct that we have found did take place was of a sexual nature but it does remove an important part of the claimant's case.

35. The Tribunal starts its considerations by making the observation that not all physical contact between men and women is necessarily of a sexual nature. We find that there is no evidence other than the claimant's assertion that Mr Medleycott sexually assaulted her to support the contention that Mr Medleycott had sexual feelings for the claimant. It is

certainly the case that the claimant is a young female and that Mr Medleycott is heterosexual, as he told us. However, the suggestion that Mr Medleycott was prone to having sexual relationships with colleagues, although featured in the evidence in this case, has never amounted to more than office gossip with no evidence to corroborate the truth of it is evident that Mr Medleycott was extremely distressed by that suggestion when it came to light and denied it. Of course, Mr Medleycott might well do that even if it was true.

36. In considering this question the Tribunal has had regard to the examples of conduct of a sexual nature provided by the EHRC's employment code, which include unwelcome sexual advances, touching, sexual assaults, sexual jokes, displaying pornographic photographs or drawings, or sending emails containing material of a sexual nature. Of those, the first two are the only possibilities in this case but they rather beg the question as to whether or not what we are dealing with here is evidence of Mr Medleycott's sexual feelings towards the claimant. They do not seem to us to bear the characteristics of a sexual assault since there is no complaint that Mr Medleycott engaged in touching that would by virtue of where he touched her be inherently sexual. That leaves only a consideration of the circumstances of the touching. Mr Medleycott's evidence on this point is that he is a tactile person and that he hugs men and women and that it carries no sexual connotations at all. He asserts that any hugging of the claimant happened in circumstances that do not support the contention that it was sexual. Objectively the Tribunal does not find that the contact that we accept happened amounts to conduct of a sexual nature. We think that it was meant in a paternal or friendly way and was almost certainly received in that way at least on 6 September, given the way in which the claimant's relationship with Mr Medleycott developed thereafter.

37. If, however the Tribunal is wrong on the question of conduct of sexual nature, we have asked ourselves whether or not the evidence shows that it created the prohibited circumstances set out in the section. That is to say that it violated the claimant's dignity at work or created a hostile or intimidating atmosphere.

38. The first question is whether or not the evidence establishes that it had that purpose. The Tribunal finds that there is no evidence that could even shift the burden of proof to Mr Medleycott to show that it did not have that purpose. On the first occasion we find that it had the purpose of comforting the claimant when she was evidently in distress. On the second it was a congratulatory hug when the claimant was elated at her success. In neither circumstance can it reasonably found that the purpose was to intimidate or violate the claimant's dignity.

39. The next question is whether it had that effect and if so it was reasonable for it to have that effect. It might have had that effect if the claimant reasonably perceived the conduct was of a sexual nature. The Tribunal does not consider that the claimant could reasonably and objectively have viewed Mr Medleycott's hugging and kissing her in that way as evidence of a sexual approach for all of the reasons outlined above. Nor does the evidence of the text conversations between the claimant and

Mr Medleycott both before and after all of the alleged incidents suggest that the claimant regarded her relationship with Mr Medleycott as poisoned by an atmosphere in which her dignity was violated or work was hostile or intimidating. If her relationship with Mr Medleycott was hostile or intimidating that certainly does not explain why the claimant felt it acceptable, for example in December of 2017, after the second incident, to contact Mr Medleycott on a day off to ask him for a particular favour in relation to whether she herself could have the time off. Whilst we accept that the claimant found the contact uncomfortable, that is not sufficient to establish the elements set out in section 26. The Tribunal therefore concludes that even for the events that we did find took place the offence of sexual harassment is not made out.

40. It follows therefore that even if the claimant told Mr Medleycott that that conduct made her feel uncomfortable, thereby rejecting it, because the conduct lacked the character of conduct of a sexual nature, complaints that the claimant was later on subjected to unfavourable treatment for her rejection of it are bound to fail since the first part of the events is made out.

41. The Tribunal sees no warrant for reading into section 26 a possibility of the offence being made out on the basis that the claimant wrongly perceived the conduct to be of a sexual nature.

42. However if we are wrong about that we must still decide whether or not subsequent matters that the claimant complained about are examples of unfavourable treatment because of her rejection.

43. That forces the Tribunal to consider whether or not the claimant rejected Mr Medleycott's behaviour to her. This again is the subject of disputed evidence because the claimant asserts that on 22 November after the last of the 2016 incident she told Mr Medleycott that being hugged and kissed by him made her feel uncomfortable. Mr Medleycott, on the other hand, says that no such conversation took place. There is again no direct corroborative evidence for that conversation. The Tribunal observes that such a conversation was likely to create a cooling of relationships between the claimant and Mr Medleycott and certainly might make Mr Medleycott feel less well disposed to the claimant. There is no evidence of that immediate aftermath of that alleged conversation and to the contrary there is a text exchange (see 128C) of 6 December but evinces very cordial relationships with each party to the exchange ending their text with a kiss and a casual and friendly language being used.

44. The claimant places reliance on the events of 7 December as evidence of the fact that Mr Medleycott's relationship with her was affected by her rejection making it more likely that there was a rejection. For reasons which we will set out later the Tribunal does not regard the text exchange of 7 December as evidence to support the claimant's case on that point.

45. The claimant did not complain to anybody about Mr Medleycott's behaviour towards her until she spoke to Mr Johnson Mr Medleycott's line manager in January.

46. In the general way of things, a complaint to a more senior manager might be taken as corroboration of the claimant's case that she did indeed find

Mr Medleycott's treatment of her unacceptable. However, the circumstances of this particular complaint bear some close examination.

47. The conversation between the claimant and Mr Johnson came about only after Mr Medleycott had complained to Mr Johnson that the claimant had used the internal messaging system in the office to spread rumours that he, Mr Medleycott had affairs "with young girls on his teams before" (see page 149). When this came to Mr Medleycott's attention, he was so upset that he immediately spoke to Mr Johnson who spoke to the claimant in an informal discussion. The claimant told Johnson that she had had the information from a colleague Mr Whiting who had shown the claimant a photograph of Mr Medleycott with his arm around another advisor outside of work in a social situation.

48. The Tribunal has actually seen that photograph (see page 243 of our bundle). It is clearly taken at a Christmas party. Mr Medleycott is wearing a paper crown and is holding a glass of beer in his right hand. He has his left hand resting on a young woman's shoulders. Both people had broad smiles on their faces and the photograph is clearly posed. There is very little, if any, evidence to suggest that this photograph is anything other than the typical sort of photograph that might be taken at a Christmas party and certainly no evidence that Mr Medleycott is in a sexual relationship with the person concerned or that the pose is uncomfortable to her. If the claimant was placing reliance on this photograph as evidence of Mr Medleycott's inappropriate sexual relationship with junior colleagues the Tribunal's comment is that that does little or nothing to support her case and rather to the contrary suggests that the claimant is prepared to see sexual contact where there is none to be seen. The claimant must have known when she was spoken to by Mr Johnson that she had overstepped the mark and indeed was later disciplined for the sending of that message to a colleague. It was these circumstances that she chose for the first time to raise with a senior colleague the suggestion that she had been the subjected of unwanted advances from Mr Medleycott. Mr Johnson very properly offered to pursue the matter and to carry out an investigation but , in the view of the Tribunal, significantly, the claimant asked Mr Johnson not to do that. That much is agreed evidence. We shall return to the significance of that in a later part of our Judgment.

49. On balance therefore, the Tribunal concludes that although by January the claimant may well have been upset with Mr Medleycott and may well have taken the view that Mr Medleycott had turned against her, there is little or no evidence to suggest that that was because she had told Mr Medleycott that his contact with her was unwanted. It therefore follows that the claimant cannot satisfy the Tribunal that she rejected what she perceived to be unwanted conduct of a sexual nature.

50. It would of course be possible for the Tribunal to stop our consideration of the complaints of sexual harassment at this stage. Nevertheless, we think in fairness to both the parties it would be appropriate to reach our findings on the various other matters complained of by the claimant for the sake of completeness.

51. The claimant has made seven complaints of less favourable treatment. Of those, the last in time is a complaint of an unprofessional email being sent

on 16 September 2017 and the first in time is the sending of an unprofessional and aggressive text message on 7 December 2017.

52. The Tribunal will deal with each of those in turn making our finding of fact and immediately thereafter giving our conclusions as to whether or not if, which we have already found there was not, there was a rejection of unwanted conduct of a sexual nature, this was an example of less favourable treatment because of it. In applying the burden of proof the Tribunal observes that it is for the claimant to establish the facts that she is relying on and to show such facts that would cause the Tribunal to presume that the unfavourable treatment was because of the rejection. If the presumption is made in favour of the claimant then it is for the respondent to satisfy us that there was no connection between any rejection and the less favourable treatment. We are conscious that in this part of the decision we are making findings based on a hypothetical position not actually found to be the case by the Tribunal. Nevertheless, we think it fair to all parties that we do so, given the careful way in which the evidence was given before us and the importance not just to the claimant but to Mr Medleycott and Mr Johnson of the Tribunal making findings on all of these matters.

53. We start with the alleged unprofessional aggressive text message on 7 December. The facts of this matter can be put relatively simply. The claimant wanted Mr Medleycott to reach a decision different to that which had already been reached by a manager on the question as to whether or not the claimant could take some time off from work as holiday.

54. The evidence establishes that the claimant had already approached the duty manager who was at work on the relevant day and had been told that that was not possible. She then chose to contact Mr Medleycott whilst he was having a day's leave and was at a football match with family and friends.

55. There is no doubt that Medleycott was unhappy at having to deal with the claimant's request. In the course of the claimant's request to Mr Medleycott she revealed to Mr Medleycott that a colleague, Miss Shuli had lied to Mr Medleycott about the reason why she wanted time off and furthermore the lie had included the incorrect assertion that that employee had a brain tumour.

56. The evidence shows that Mr Medleycott was extremely angry about the way in which he felt that he had been fooled by Miss Shuli.

57. Mr Medleycott gave in evidence the fact that there had been no discussion between he and the claimant on the subject of the time off whilst they were both at work. The claimant gave in evidence to the contrary that there had been a discussion. We prefer the claimant's evidence on this point and that is because the text at 184 points to such a conversation (see "but if you don't trust what I have said to you I don't know what you want me to do"). That is clearly indicative of a previous discussion between the claimant and Mr Medleycott on the subject matter of the text exchange. However, it is not helpful to the claimant since it seems to us to be evidence of Mr Medleycott trying to help the claimant and giving her advice as to how to approach the matter of the time off. That begs the question why Mr Medleycott would be having conversations with the claimant in

which he was trying to be helpful if by this stage he was at daggers drawn with the claimant because of her rejection of his treatment of her. Furthermore, it is obvious that Mr Medleycott was upset by something but what he was upset by was the fact that the claimant had rejected his advice and had attempted to triangulate by involving another manager and it was only when that other manager has not been helpful that she had come back to Mr Medleycott. In point of fact the text exchange contains within it all the evidence that the Tribunal needs to understand why Mr Medleycott was upset and irritated with the claimant. The Tribunal therefore concludes that there is really no evidence to establish that this text exchange only happened because Mr Medleycott was angry with the claimant for anything that she might have said to him on 22 November and we therefore conclude that this is not an example of unfavourable treatment caused by rejection.

58. The next complaint raised by the claimant relates to the claimant's period of illness in February 2017 and whether or not Mr Medleycott followed the appropriate process in order to obtain an orthopaedic chair for the claimant. The claimant alleges it was suggested that she would be helped by an orthopaedic chair and that Mr Medleycott did nothing to process that application. The claimant asserts that that was caused by his ill-will towards her caused by the rejection. Mr Medleycott's evidence was that he had done all that could be relied of him in relation to the orthopaedic chair.

59. The claimant's period of illness was related to back and neck pain. At page 133 of the file the Tribunal finds the return to work discussion between the claimant and Mr Medleycott on 24 March 2017. At that stage the claimant had been referred for an MRI scan and was having physiotherapy. She had returned to work on reduced hours. At 134 Mr Medleycott recorded that he had agreed to refer the claimant for physiotherapy as she was currently paying for that and that the claimant would like a workstation assessment as her chair was uncomfortable. At page 137 Mr Medleycott has recorded "as part of Amy's return to work we have discussed the support available. Amy had requested physiotherapy support and has asked if she can be supplied with a new chair. She finds the ones we have to be uncomfortable which is not good for her posture". Thus far the evidence is agreed evidence because the claimant acknowledges that that was a discussion held in the meeting. The claimant's complaint is that neither of those matters were followed up by Mr Medleycott.

60. The Tribunal's first observation is that a deliberate failure to follow those matters up as a way of punishing the claimant would be a remarkably inept on the part of a manager. The paper trail would point to the fact that there had been an agreement that those matters would be followed up and a failure to do so would obviously raise questions about the manager.

61. However, more damaging to the claimant's case is the fact that the evidence shows that the matter was followed up. At 207C the Tribunal sees an email which Mr Medleycott sent to the claimant on 24 March, that is to say later on the same day, in which he supplied the number for physiotherapy advice and went on to say "I have spoken to the attendance

team about getting specialist equipment through access to work, but have been told that the ATW will not deal with anything unless it is an ongoing issue which has lasted 12 months or more. They have told me that the chairs we have are ergonomic and you should be able to adjust them to make sure you are comfortable". In other words, Mr Medleycott did follow the matter up as promised but at least in respect of the chair unsuccessfully on behalf of the claimant. The claimant does not seem to have taken the matter further. There is simply therefore no evidence to support the claimant's contention that Mr Medleycott deliberately did not pursue the matter.

62. The next question was the rather more complex one of the basis on which the claimant was to return to work. The claimant's case is that her absence from work was unnecessarily prolonged by Mr Medleycott deliberately failing to put into place appropriate regime of reduced hours and that this was again evidence of Mr Medleycott punishing the claimant. The claimant characterises this as Mr Medleycott ignoring medical advice that the claimant should return to work on reduced hours.

63. There is quite a lot of documentary evidence on this issue and there is little doubt that confusion reigned to a certain extent. What is clear is that Mr Medleycott believed that the claimant was asking not for a change to her contractual hours, which is what the claimant thought was at issue, but rather a phased return to work. Whether that was a reasonable understanding is a moot point here since the question is whether we are dealing with a deliberate decision by Mr Medleycott to ignore a recommendation of the doctor for reduced hours.

64. The text exchange as far as is relevant starts with a text from the claimant on Sunday 19 February (see page 191). It is she is essentially asking whether she can shorten her shifts next week. Mr Medleycott responds by saying he would speak to human resources but he could not change the claimant's shifts without their say so. He asked the claimant to supply medical evidence from the doctor that that would help. Apparently that medical evidence was not forthcoming until a fit note of 23 February (see page 194) which said that the claimant was not fit for work at all.

65. The Tribunal understands however that there was an earlier fit note which may or may not have suggested a phased return to work but which is now lost.

66. Mr Medleycott's evidence about that was that he had taken the question to human resources and had been told that since the claimant had only been off work for a week, a phased return to work was inappropriate and the matter would be reconsidered if the period of sickness was extended.

67. The claimant has no evidence to counter Mr Medleycott's evidence on that point and the subsequent text exchanges do not show Mr Medleycott as being deliberately unhelpful or obstructive. Rather they show that he is attempting to accommodate the claimant's request for reduced hours.

68. On 7 March the claimant texted Mr Medleycott to ask "can you advise me on what I can do to reduce my hours when returning back to work as it wasn't possible two weeks ago". Mr Medleycott repeated what he had said on the earlier occasion which is "if there is a medical reason we can put a

change of request through but the note you brought in asked for a phased return not a change of hours. For a change of hours it would need to be a case of something that isn't going to get better. I'm on leave at the moment so I can't do anything. If you speak to Lisa she will advise you". Whether or not Mr Medleycott had correctly understood the first sick note or whether or not that first sick note had been precisely expressed, the evidence does not support the contention that Mr Medleycott was being deliberately obstructive or difficult over this matter. At best it shows a level of confusion or misunderstanding and indeed the correspondence between the claimant and Mr Medleycott does not suggest that the claimant believed during that stage that Mr Medleycott was being deliberately obstructive.

69. The Tribunal therefore does not find any evidence to suggest that this is evidence of unfavourable treatment let alone unfavourable treatment caused by rejection.

70. The Tribunal would note that although there is a separate complaint that Mr Medleycott withdrew support as a manager and did not follow the respondent's process with regard to medical notes, we have not seen any evidence to suggest that there was any other interaction between the claimant and Mr Medleycott over the medical notes than the one we have just dealt with. We have taken the view that the two are therefore essentially the same complaint.

71. We now move on to the complaint that the claimant was penalised for Mr Medleycott's mistake. At the time that that was noted by Judge Little he went on to note that further particulars of that complaint were required.

72. During the course of the hearing it emerged that what the claimant was really complaining about here was that because of her prolonged attendance, she was given a final written warning and that she was also given a warning in relation to the instant message incident referred to above. In cross-examination the claimant was asked how and in which way those matters could have been influenced by the fact that the claimant had rejected Mr Medleycott's advances. The best the claimant could say was that Mr Medleycott had interfered with the investigation on the message issue and had caused or contributed to the length of her absence.

73. What is clear is that the decision to discipline the claimant over thhe instant message matter was not Mr Medleycott's but Mr Walker (see page 155). The most that Mr Medleycott can be said to have done was to interview the claimant asking her to give her version of events and then interviewing two others mentioned by the claimant. Mr Medleycott's involvement is described in detail at page 151. He spoke to Mr Whiting and another colleague called Harley Muskos and having spoken to all of those three then decided that the matter was something that ought to be considered for investigation and possible discipline. From that time onwards, Mr Medleycott was not involved and the investigation and decision was done by others. Although the claimant is unhappy with the way of the outcome of the decision, the Tribunal takes the view that there is absolutely no evidence to suggest that that decision was influenced in any particular way by Mr Medleycott. It is certainly the case that the matter started because Mr Medleycott referred it to other management but as the

claimant acknowledged, she was indeed in the wrong in sending the message and it seems likely that there would have been an investigation whether Mr Medleycott had referred it or somebody else had. The Tribunal takes the view that if Mr Medleycott was involved at all it was because the matter came to his attention in the way he describes it at 151, that is to say in an ordinary one to one meeting with the claimant, and that his involvement was minimal and certainly not a consequence of the claimant having rejected him.

74. Furthermore, there is no evidence that the claimant asked Mr Walker that this matter be taken into account as mitigation and neither did her representative. At page 160 a summary of the hearing is given and is not challenged by the claimant. That observes that the claimant raised the following points – a failure by BT to brief the claimant on the policy, the generalised using of the messaging system for personal use by others, a failure to investigate others involved presumably including the recipient and Mr Whiting, an admission that the claimant had been foolish to pass on gossip and an apology. None of those matters amounts to an explanation or a mitigation advanced by the claimant in relation to being harassed by Mr Medleycott. In the circumstances, any claim based on a failure to take that matter into account must fail on its facts. Mr Walker could not possibly have been expected to guess that that was a matter that the claimant wanted him to take into account. The Tribunal therefore finds that any claim based on this must fail.

75. As to the final written warning for attendance, that has nothing at all to do with Mr Medleycott. The decision was taken by Mr Rogers and was based upon the claimant's poor attendance. It may have been that that poor attendance was prolonged by the misunderstanding over the hours but it cannot possibly be said that the warning was a direct consequence of the claimant rejecting Mr Medleycott's advances.

76. Mr Walker's decision was dated 30 May 2017 and Mr Roger's decision on attendance issued on 31 May 2017. The next complaint in time is not until 16 September 2017, several months later and relates to what the claimant described as an unprofessional email.

77. That email is at page 207A. It was sent by Mr Medleycott to a large number of employees all working a Saturday shift on 16 September 2017. In full the operative parts of the email read as follows:

> "Hello you wonderful bunch of Saturday workers! Today you have the pleasure of being supported by the dream team – me, Wayne Towler, James Meachen and Ben Miller. It doesn't get any better than that, and if any other manager claims that it does, don't believe them!"

For reasons which the Tribunal have been unable to understand, the claimant regarded that email as Aimed at her; unfavourable treatment and caused by her rejection of Mr Medleycott.

It was sent in circumstances in which Mr Medleycott had not managed the claimant directly since April. There had been no incident that the claimant had complained about since the receipt of the warnings at the end of May. It is evident that the email was sent by Mr Medleycott in his role as

manager, on a particular Saturday, of a large team of workers. The claimant asserts that she had never seen such an email before. Mr Medleycott asserts that it was a typical email of the sort that he might send to encourage workers who are having to work on a Saturday afternoon. Whichever might be the case, for the claimant to satisfy the Tribunal that Mr Medleycott had waited until a day when the claimant was in work and chosen an email thus worded to further subject her to unfavourable treatment is so unlikely that the Tribunal finds that the claimant falls very far short of the obligations on her to prove her case. Put simply there is nothing in this claim and the Tribunal rejects it. The email is innocuous and general.

78. This leaves us with the last complaint of shouting and swearing at the claimant. Again, Judge Little noted that this required further particulars. At best, the claimant could only say that this must have happened between 24 March and 10 April 2017. She alleged that it took place in one of the work bays although, unusually it was only her and Mr Medleycott present. The claimant said that it was a coaching meeting. In her witness statement the claimant alleged that unprovoked, Mr Medleycott had told that he was "fucking pissed off with her that she had ruined his reputation as a manger in BT". Mr Medleycott denied ever having said such a thing.

79. In favour of the claimant there is the fact that by this stage Mr Medleycott would have been aware of the fact that the claimant had alleged that he had had affairs and indeed the investigatory process into the instant message was underway. Against the claimant's case is the fact that there seems to be no other background or context as to why Mr Medleycott should lose his temper in this thoroughly inappropriate way and moreover do so in a place which the claimant acknowledged was open to all members of staff to pass through and therefore one which Mr Medleycott could have had no control over who might have heard him say those things. The matter was the subject of Mr Johnson's investigations into the claimant's grievance and Mr Johnson concluded that there was evidence to suggest that Mr Medleycott had raised his voice but not in the context suggested by the claimant. Mr Johnson had found that there was some support from other colleagues that they had heard Mr Medleycott raise his voice albeit that that support was consistent with Mr Medleycott's version of events rather than the claimant's. Mr Medleycott explained to Mr Johnson and indeed again in his witness statement to the Tribunal, that there had been an incident where he had to raise his voice to the claimant but that was because the claimant was speaking inappropriately about colleagues and he felt it necessary to raise his voice to get her to stop.

80. In the first place, the Tribunal finds it difficult to make a decision as to which of those two versions is correct. It is the case that the claimant did complain about it to Mr Johnson and it is the case that there is evidence to support the fact of a raised voice. Whether Mr Medleycott was swearing at the claimant and whether he asserted that his anger was because of the claimant ruining his reputation is the rea of factual dispute. What the Tribunal must decide however is whether any such behaviour arose from the claimant rejecting his advances. For all of the reasons outlined in relation to all of the other claims the Tribunal on balance finds that that is not so. We have little doubt that by this stage the relationship between Mr

Medleycott and the claimant was a poor one but if that was so it was for reasons not relating to any rejection of advances and much more likely to be related to what Mr Medleycott regarded as an entirely unwarranted spreading of rumours about him by the claimant. Even if we accept the claimant's version of what Mr Medleycott said, it much more obviously relates to that than to any rejection of advances. The Tribunal takes the view that we cannot be satisfied of the relevant link between the behaviour and the rejection. We do not find evidence that would to shift the burden to Mr Medleycott to disprove the connection.

The time issues

81. With the exception of the allegation of the touching of the claimant on the back and the inappropriate email, both of which happened in mid-September 2017 the last complaints in time are those related to warnings given to the claimant at the very end of May 2017. Those warnings themselves resulted from processes begun much before then. By mid-April the claimant was not being managed by Mr Medleycott any more and that certainly explains the lengthy gap between incidents complained of.

82. The Tribunal has rejected the claimant's version of events in relation to the touching on the back and has concluded that there is no substance behind the claimant's allegation that the email sent on 16 September was less favourable treatment. Therefore it follows that the last incident before those albeit one which the Tribunal has also rejected is dated at its latest at the end of May.

83. This claim was brought to the Tribunal on 15 January 2018 the claimant having first approached ACAS on 10 November 2017 the certificate being issued on 10 December. For complaints to be in time they must have happened not more than three months before 10 November. That is to say August. Complaints prior to that are all out of time even if it could be said that they are part of a continuing act. The only way in which those earlier complaints could be in time is if they were part of a continuing act with the September complaints. Since the September complaints are not complaints upheld by the Tribunal it must follow that any earlier complaints even if they had been upheld would not be in time.

84. The Tribunal has asked itself whether or not there is anything that would make it just and equitable to allow the Tribunal to extend time and we have concluded that there is no reason advanced by the claimant that would allow us to extend time. The claimant did launch a grievance on 16 September, some 2 and a half months after the May incidents. Mr Johnson's conclusion on that grievance was 7 November. The claimant could have argued that she was waiting for the outcome of that grievance before she pursued a claim to the Tribunal. She did not raise that as an explanation. The claimant had been put on notice of the necessity to consider the time points in all the preliminary hearings before Judge Brain and Judge Little. The claimant advanced no explanations as to why she had not brought her claims earlier. Certainly it is the case that the claimant now asserts that she was unhappy about all of these matters at the time that they happened and it is not a case of her learning of information at a later date that would cause her to believe that she had been the subject of discrimination. The Tribunal did consider the balance

of prejudice in allowing the claims to go forward or not. We observe that as the claims have gone forward and that there has been a full hearing the respondent has in any case suffered the inconvenience associated with having to defend claims which it might not otherwise have done and the claimant has had the opportunity of ventilating her full case. This is not therefore a situation in which the balance of prejudice really assists except to say that in respect of some of the incidents in 2016 Mr Medleycott's recollection was understandably hazy. If the claims were not permitted to go forward the prejudice to the claimant would be that she would be shut out from her chance to advance the claims. That is always the case however when claims are brought outside the time limit. We looked at other considerations namely how badly out of time they are, to which the answer is that at the very latest two and a half months and the earlier ones much more than that and whether there is a good reason as to why they are out of time. There is none and the Tribunal would not in the circumstances be prepared to extend time.

85. If that had been the only ground for dismissing the claims the Tribunal would still have dismissed these claims on the grounds that they were out of time but of course it would be seen that the Tribunal has dismissed the claims for other reasons on their own merits in any event and we are dealing with the time point simply as a matter of completeness.

The complaint that Mr Johnson failed to investigate the complaint of harassment

86. In relation to investigation into the claimant's complaints we do know that eventually the claimant did submit a grievance which included complaints of sexual harassment. They were fully investigated in depth by Mr Johnson albeit that they were then rejected and the evidence for that is set out in the documents.

87. However, the claimant's complaint is that when she first raised this with Mr Johnson, in January 2017 he did not take the matter further. There can be nothing in this. It is the agreed evidence that the claimant asked Mr Johnson to do nothing. We cannot see how Mr Johnson complying with that request can amount to unwanted conduct or difference of treatment because of sex.

88. In any event, even if there was any evidence to establish that there had been direct discrimination or harassment of the claimant by the respondent corporately for its failures as outlined above those claims too would be badly out of time since there are no subsequent events to which they could be linked as part of a continuing course of conduct.

89. For all of the reasons outlined above the Tribunal dismisses all of these claims.

Case Number: 1801351/2018

1808537/2018

Employment Judge Rostant

Date: 22nd November 2018