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EMPLOYMENT TRIBUNALS

Claimant: Mrs B Kiszycka

Respondents: 1. Uplands Care Centre Ltd
2. Mr B Mutubuki

Heard at: East London Hearing Centre

On: Tuesday to Thursday 4-6 & Tuesday 11 September 2018
(Tribunal only)

Before: Employment Judge Prichard

Members: Ms M Long
Mr L O'Callaghan

Representation

Claimant: In person

Respondents: Mr N Smith (counsel, instructed by Davies & Partners Solicitors, Birmingham)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) There was an agreed termination of employment. The claimant was not dismissed and therefore her claim of unfair dismissal fails and is dismissed.
- (2) The ending of the claimant's affair with Mr B Mutubuki and its ending are not protected characteristics for the purposes of the Equality Act 2010. Her complaints of sex discrimination fail.
- (3) The complaint of sexual harassment arising from an alleged sex video fails on the facts and is dismissed.

- (4) The claimant was not constructively dismissed.**
- (5) The respondent is ordered to pay the claimant one month's pay in respect of her suspension, in the sum of £1,089.40. This is a payment net of tax and national insurance.**

REASONS

1 The claimant, Mrs Beata Kiszycka, is currently 39 years of age. She worked for the respondent for nearly 3 years from 1 August 2014 to the 19 July 2017 when her employment ended in circumstances which are in dispute. The respondent's contention is that it was an agreed termination; the claimant's that it was a constructive dismissal.

2 It is an unusual situation. Uplands Care Centre is a residential care home whose owner and the responsible person for the CQC is Mr Akash Soni. The home's registered manager for the CQC is Mr Bob Mutubuki. It is a 17-bed rehabilitation centre, caring for adults with a range of conditions and a large range of care needs. Many of the residents have acquired brain injuries (ABI), some tracheostomies.

3 The staff group consists of qualified nurses such as Mr Mutubuki. Then there are rehabilitation assistants/senior rehabilitation assistants (the equivalent of care workers). There is a physiotherapist. There are 2 chefs and a full-time maintenance man.

4 Mr Soni has many businesses. He is a qualified solicitor with a current practicing certificate. His offices are in Harrow. He runs a family law practice. He himself is an expert in care home law, and a consultant to Redcliffe Le Brasseur. He also owns a garment factory in Dubai. This is his only care home. It is on the seafront in Westcliffe on Sea. He visits the home weekly staying for 8 hours or more.

5 The claimant worked as a rehabilitation assistant from April 2016 to 15 March 2017.

6 The claimant and Mutubuki had a personal sexual relationship in their own time, at Mr Mutubuki's home. It was not general knowledge in the workplace that this was going on.

7 As it turns out, and we shall describe, this was not the first time that Mr Mutubuki had had sexual relations with members of staff there. He has been candid about it at this hearing. Mr Soni was unaware that this was going on. Generally Mr Mutubuki was discreet about these goings, when he was at work. We accept that, in his position as registered manager, he could ill afford to be otherwise. It seems at the time the claimant too was quite discreet. We heard no evidence to the contrary.

8 The affair ended suddenly on 15 March 2017. The arrangement had been that

Mr Mutubuki saw the claimant at weekends. During the week he apparently had another girlfriend.

9 The claimant is divorced with a young daughter. She has a good relationship with her ex-husband and they work out co-parenting arrangements. The fact was that after nearly a year Mr Mutubuki had never been to the claimant's home. On that particular day, 15 March, it was not suitable for them to meet at his home and he made plans to go to the claimant's home.

10 We have seen 2 pages of screenshots of texts between them on that day. The claimant had to give him her postal address so that he could find her place. He arrived apparently sometime around 7pm. He stated he could not stay as long as he originally planned to stay. Her version then is that he had to go back because he was promised elsewhere. His version was that she was so wild and intoxicated that he felt he could not stay there. He said he would have to go. We find that she showed him out of the door which is at the bottom of a flight of stairs, and that she pushed him on his way. She was obviously angry as the texts bear witness to. At 8.30 there was a text:

"That was supposed to be really nice evening. I've prepared so many things why did you fuck it up?"

You idiot

OK. Is it about the hooker girlfriend? Then ok .. you need to compromise man

Mind you one day you really going to regret it.

11 The following day she appeared to have relented and sent him a text:

"Bob I am sorry I kicked you out. Let's finish this without hard feelings. Good luck dear"

He did respond to that:

"I have no ill feelings at all but ... I don't think it's a good idea either to keep seeing each other.

She said

"Good"

and then added 10 minutes later:

"Call me when you split with the hooker dear"

He responded 2 days later:

"Let's be civil"

That was the end of the relationship.

12 The claimant said that their relationship was not continuous, but on hold when she had another boyfriend around September/October 2016. Mr Mutubuki said it was

never paused for 2 months.

13 This claim is for unfair dismissal, sex discrimination and unpaid wages. The unlawful deductions from pay is that during her later disciplinary suspension, which lasted for a calendar month, she was paid nothing. She was forced to use leave to preserve her pay over that period.

14 Having seen a copy of the employee handbook later in this hearing, disciplinary suspension will be on full pay. The respondent immediately conceded that they were wrong in suspending her without pay and agreed that the claimant was owed one month's full pay hence the award of £1,089.40 net award.

15 The sex discrimination case is based on harassment under section 26 of the Equality Act 2010, direct discrimination because of sex under section 13, and victimisation under section 27.

The events leading to the claimant's termination

16 The easiest way to relate the narrative is to go to near the end of the account and the events which led to the claimant being invited to a disciplinary hearing and the termination of her employment and how that happened.

17 On 27 May 2017, after the end of the relationship on a Saturday night there was to be a work outing. The arrangement was that they would first go for a meal to Tang's restaurant, a Thai restaurant in Central Southend, and after the meal they would go on to the Varsity Nightclub, about 5 minutes' walk from there.

18 The claimant who was working a late shift that day and agreed with the deputy manager of the home, Kerri Mushemeyi, that the claimant would go off shift at 7.30 early so that she could be at Tang's restaurant at 8 o'clock when they were all meeting up. The claimant denies that this was the way it happened. She said she in fact had an arrangement with Ashleigh Surgrue that she would meet the others at 10 and she showed us a slip of paper written by Ashleigh on which Ashleigh had written her mobile number so she would be able to meet up with them all.

19 The claimant did leave work at 7.30 but what she did then is anybody's guess. There is consensus amongst the many witnesses we heard from that the claimant was wild and intoxicated when she arrived at Tang's restaurant when they first saw her that evening, it was about 9.30pm. She did not sit down with them but wandered wildly around the restaurant looking for a drink. She appeared to them to be under the influence of something more than just drink - what it was we were not told. She herself by way of explanation has alleged that her drink was spiked somehow, although she could make no suggestion as to who had done this or where.

20 As Ms Kerri Mushemeyi the deputy stated, if her drink had been spiked somewhere it had happened before she arrived at the party because, from the outset, she was wild, disinhibited, and behaving in a sexually provocative way. She was very tactile with all the male members of staff. Later, that tactileness extended in the Varsity to other members of other groups, nothing to do with Uplands, also towards females as

well. The claimant was feeling up her female colleagues inappropriately, groping their breasts. Some of them took great offence. We accept the account because it is said by more than one person. She almost tore a colleague's skirt (Paulina). The security at the club informed one of the witnesses that they considered that she was on speed.

21 At around 10 it seems they went from the restaurant to the club. When she arrived, she had more drinks. She was drinking beer apparently. There was dancing, and she was going on to the dance floor and behaving in a wild disinhibited way. She was dancing in a way that resembled pole dancing, in a seductive and provocative way. Various individuals tried to calm her down, including Kerri, to no avail. She was not listening to people. She fell over tables spilling all the drinks.

22 She sought out Bob Mutubuki who was sitting at a table with the other nursing staff. He was watching boxing on the TV. She made provocative comments and overtly sexual comments to him which we accept from the evidence of Mr Mutubuki. She said: "I want to fuck you tonight". He asked her to get off him but she did not and said: "Don't you want to fuck. I have always imagined you fucking me and I don't know why you keep turning me down. You don't know what you're missing Bob. You scared of your hooker girlfriend?" Mr Mutubuki had to move away from her. She seemed to have lost awareness of her handbag and mobile, and Bob Mutubuki safeguarded them for her.

23 It seems a curious comment for her to have made but we accept she made it. Mr Mutubuki's recollection seemed clear and reliable. It is a curious comment for her to have made because as she did not have to imagine having sex with him. She had had plenty of sex with him.

24 At one stage the claimant seems to have left the club for about an hour. But she returned and came over to the table where he still was with the nurses. She was trying to reach over the table because he was on the far side of it with his back to the wall. She gave him 2 slaps to the face and they appeared to be hard slaps. They knocked his head sideways. The others then shielded Bob who looked shocked at what had happened and they tried to restrain the claimant. One of them went to ask the security to help because it was clear that she would have to be forcibly removed from the club. The doormen came and the claimant had to leave.

25 She was fetched then by her ex-husband whom she had phoned. The claimant states that he stated he had never seen her in such a state before.

26 That was on Saturday night 27 May. This was a Bank holiday weekend. Bob Mutubuki telephoned Mr Soni, sometime prior to his next visit, to tell him in outline what had happened on the Saturday night, so Mr Soni would have time to think how to approach it. He described it more fully when Mr Soni visited on Tuesday 30 May. The claimant did not report for duty. She had telephoned the office to cancel the rest of her week's duties at Uplands. She came to the Uplands on Wednesday the 31 May and was denied entry to the building. She was also told that a letter of suspension had been posted to her home. The letter had come from head office in Harrow and was drafted by Mr Soni. It was dated 30 May, it purports to be signed by Bob Mutubuki but was in fact pp'd by somebody in Harrow.

27 The suspension was stated to be “without full pay”. We asked for a copy of the employee handbook to be provided because it was not originally in the bundle. The handbook states:

“Suspension of this kind is not a disciplinary penalty and does not imply that any decision has already been made about the allegations. You will continue to receive your full basic salary and benefits during the period of suspension.”

28 In other respects, this was a standard pro forma suspension letter with the usual clauses about not speaking to members of the staff stakeholders etc without permission from the management, specifically Bob Mutubuki.

29 At this stage Mr Mutubuki had not told Mr Soni that he had had an affair with the claimant. Had he done so it is unlikely that the suspension letter would have gone out in his name.

30 Following this there was an investigation which consisted of questioning all the staff who had attended the night out and had witnessed the claimant’s behaviour. The method of the investigation has been the subject of considerable challenge by the claimant.

31 We find it to be as follows. Bob Mutubuki handed out proforma witness statements to members of staff. It was a proforma witness statement with an accompanying sheet identifying the incident which was under investigation, and an explanation of the purpose of a witness statement in disciplinary proceedings. We are told also that the form was not mandated. We have seen that one of the statements was in the form of an email from Jacqui Macapagal. She was on annual leave at the time.

32 There was a long statement from Bob Mutubuki which he had typed up on a separate sheet and a long one from Kerri Soka Mushemeyi the deputy manager, and also a witness at this tribunal. There was Albert Tamondong who was the maintenance man, (a short one to say that he saw Betty slap Bob). There was one from Luis Faria one of the chefs. He had left early because of the claimant’s behaviour pushing people around on the dance floor. He was driving and anyway does training, he was not drinking. He said that she had ruined his night out. He too was a witness at the tribunal. The physiotherapist Winston Musngi gave a witness statement: “I was shocked when Beata confronted and slapped Bob which caused a commotion and got the other staff involved to calm the situation down. Went away but came back to confront Bob again.” He was not a witness at the tribunal. He was on annual leave at the time of this hearing.

33 Jacqui Macapagal was on annual leave. She sent the email. She is one of the nursing staff. She gave detailed evidence. Then there was Ashleigh Surgrue, senior rehab assistant. She is the one who described the claimant grouping female colleague’s breasts. She recalls one member of the public saying of the claimant: “If she bumps into me one more time I’m gonna knock her out”. She tried to calm the claimant down. She describes the claimant falling onto the table and knocking all the drinks off, breaking the glasses. She said that the claimant was screaming that she needed a drink, then she left early. She was a witness to this tribunal. She also exhibited to her witness statement a facebook message from the claimant making some very nasty

comments in response to a fun photograph of Ashleigh and a friend of hers. It came across as threatening to her:

“I hope you will think about me one day in your future, when your life/your sister, niece, maybe child, husband/will be fucked up by some idiots manipulated by some scumbag. And please start collecting monies/it’s really difficult to prove defamation at court usually, but not in that case”

34 On the subject of Facebook, there was another offensive message, this time to Luis Faria. The message from the claimant was:

“Your partner is a paedophile and I do not wish him or you checking my facebook page with my daughter’s pictures on it. Get it?”

Get the fuck out of my page you paedo.

He replied

Who the fuck are you?!”

“Fuck you his not a paedophile! And I don’t look at your shit! Watch how you talk!”

This was apparently written by Mr Faria’s partner:

The claimant responded:

“Uuu baby you know he is a paedo hehe. I am so scared huhu

Not to mention the drug dealer working with vulnerable people”

35 It was fair to adduce for the respondent to adduce this evidence in these tribunal proceedings. It is relevant and probative and helps resolve some of the extreme conflicts in evidence (see below).

36 What also struck the tribunal when we went through the witness statements of these witnesses at the tribunal was how many of the witnesses had been working at Uplands for many, many years - 5 years, 3 years, 15 years, 9 years. Apparently, staff turnover is a factor taken into account by the CQC, so Mr Soni is pleased with their record for staff retention.

37 There was one other witness to the tribunal who was not at the meal or the club. Igor Silva is the other chef. He was the nephew of Luis Faria. The claimant has alleged that Igor told the claimant that he had said Bob Mutubuki had shown a video of Bob himself having sex with another member of staff. Igor wholly denied this to us, either seeing a video or telling the claimant he had. None of the other male witnesses had ever been shown such a sex video either of Mr Mutubuki having sex with another person or of anyone having sex with anyone. Igor also said that on numerous occasions the claimant would drop her trousers in work to show her bottom to him and (as many others have confirmed) that the claimant would often be angry, crying and extremely argumentative.

38 We find the investigation process to have been completely armslength. Though the statement forms were handed out by Bob Mutubuki but he did not monitor their content. Statements were to be returned to Jocelyn Noulton who was the Uplands administrator who works on the premises. The statements were then given to Mr Soni. Mr Mutubuki was not part of that chain.

39 The claimant states that these witness statements were “procured” by Bob Mutubuki as an act of spite against her, and that he advised people what to write in their statements and, in one case, had returned a witness statement because it was not strong enough, and had asked the witness to redo it. It is not clear where the claimant could have got this idea from. We suspect it was just an imagined construct upon the fact that he had been the person to hand the forms out. The investigation has been fairly described by the witnesses as a “paper exercise”. Mr Soni reviewed the statements and was shocked by what he had read there.

40 By letter of 2 June the claimant was invited to attend a disciplinary hearing on 7 June. The witness statements which were not anonymised were all attached and it was said that Jocelyn Noulton the company’s administrator, would be present to take minutes. A meeting was scheduled for 12 noon.

41 The claimant stated that she was not ready for this and needed a translator for some reason. Mr Soni wrote back to her and said that the company was not responsible for providing a translator or an interpreter. He also stated:

“In all your years of employment with the company no serious issue has been noted with your ability to communicate either verbally or in written English.”

42 He postponed the hearing by one week to 12 noon Wednesday 14 June.

43 The meeting took place on 14 June. The claimant attended at 11.50. Mr Soni had mis-diarised it as being at 11am. At 12 noon Jocelyn Noulton was unable to attend. The claimant turned up with nobody accompanying her and no translator. Mr Soni already had a meeting scheduled for 2pm with an outside agency.

44 The claimant had provided a handwritten statement of facts which started:

“I had an affair with Bob M between April 2016 and March 2017. I finished the affair in March 2015 telling him to leave my flat.”

45 Mr Soni had already been shocked by the content of the statements was now completely shocked to hear this about Bob Mutubuki. She then went on to say:

“After finish the affair I discovered that Bob had an affair with my other colleague Isabella and showed the video of them having sex to other male co-workers. I told him that I knew about that.”

This refers to the earlier referenced video accusation against Bob which was denied by Igor and all the male witnesses.

46 Later Mr Soni investigated this. Isabella had left Uplands at this stage but he

managed to contact her and when he spoke to her she completely denied that there had been an affair between her and Bob Mutubuki and certainly she knew nothing at all about a video. Mr Soni accepted that statement from her.

47 The claimant then went on to say the things that had formed a lot of the basis of her claim before the tribunal as follows:

“Bob started using his authority to make my time in the workplace difficult

- implying that I am not right in the head
- telling me off in front of my colleagues and residents for something others could do
- interrupting my breaks by giving me orders
- not approving my request of annual leave when approving others at the same time.”

Parts of it we do not actually understand. Paragraph 4 there is no sense in it, it does not relate to anything we have heard about. Paragraph 5 stated:

“Bob statement is a lie. I had no chance to provide my statement before the meeting on 2 June 2017.

- 6) I agree I slapped Bob at the party. Then I was strangled by Bob and slapped by Jackie as well as held against my wishes and unable to move.”

48 This was a new allegation which none of the other witnesses agreed with. Most witnesses would have been able to see this, if it had happened. She was implying that Bob Mutubuki retaliated by throttling her. Jackie joined in very actively as the claimant described. She described Jackie as kneeling on her chest pinning her down.

Paragraph 7:

“Bob is known of having sexual relationship with loads of women whom he works with. He was accused of rape of HM and got away with that.

- 8) Bob abuse his authority by grooming and eventually have sexual relationship with me which was consensual but on the grounds that if I leave it he will make my life difficult.

- 9) At Christmas party in December 2016 one of my co-workers behaved in a really inappropriate manner and she wasn't suspended.”

(The claimant later stated that this was Jackie who completely denied it).

- 10) “I don't know what are the specific accusation against me and because of that I am not able to defend myself properly.”

The latter statement is remarkable. The statements gave graphic detail of her conduct.

49 The meeting lasted approximately an hour and a half. It progressed being a strictly disciplinary meeting to a discussion about the claimant leaving Uplands on agreed terms. We find as a fact that this suggestion was initiated by the claimant, and by the claimant alone. After she had made the suggestion, Mr Soni was agreeable to

looking into that.

50 Mr Soni is a lawyer and an expert in care law and has a good sense of judgment as to what are incidents that could involve the CQC. Although he had been shocked by these allegations, and they go very much against a strict Hindu upbringing, nonetheless he concluded that the incidents in themselves did not raise a concern for patient care. However, he had to deal with them. He also took advice from his specialist insurers who have a legal helpline. If this had been a patient care incident there is usually a duty on an employer to take the disciplinary process right through and to make the CQC aware of the process and the outcome. Such incidents cannot be the subject of compromise with the employee.

51 In the run up to this disciplinary hearing the claimant had felt understandably overwhelmed by the fact that all her colleagues appeared to be against her, and against her account of the evening. That is part of her constructive dismissal claim.

52 After this discussion, Mr Soni left for his 2pm appointment. But later that same afternoon, he returned and spoke to Bob Mutubuki to ask him about all these allegations the claimant had made. Mr Mutubuki at that stage admitted the sexual affair fully. He did not try to minimise his behaviour both with the claimant and other staff members (HM). He had not only had he had an affair with HM but he had also slept with HM's mother.

53 Mr Soni left the matter at that; he did not suspend Mr Mutubuki. He described to us in clear terms that he had a real dilemma here. Clearly, he has a very high regard for Mr Mutubuki as a manager and he stated that it was very hard to find good managers for care homes such as this. This conduct, think of it what you may, did not raise patient care issues. There is no issue about Bob Mutubuki carrying out his duties professionally in the home.

54 Mr Soni took advice on what he should do about the situation with Bob Mutubuki. He in fact gave him the equivalent of a final written warning. It was a letter to him stating that such behaviour must never happen again and that if it did occur, and it came to Mr Soni's attention, Mr Mutubuki would have to tender his resignation. He did not refer Mr Mutubuki's conduct to the CQC in his professional judgment and, having taken advice, he considered he had done enough.

55 After 14 June Mr Soni went to Dubai for 2 weeks on business, overseeing the garment factory there.

56 The tribunal asked Mr Soni what he thought would have happened if the disciplinary hearing had gone ahead and whether the claimant would have been dismissed. He seemed to think on balance she probably would not have been dismissed. He would have taken advice on such a conclusion.

57 The respondent claims there was an agreed termination. The respondent is arguing that the claimant therefore had a 2-week cooling off period when she could have sought advice on the terms of her exit from the home.

58 On 30 June Mr Soni sent the claimant a letter from Harrow headed:

“Without Prejudice Termination of Employment

I refer to our meeting on Wednesday, 14 June 2017 and apologise for the slight delay in sending this letter.

At the meeting we agreed a compromise whereby your employment with Uplands Care Centre ... would be terminated by mutual consent.

I can confirm that, as part of the compromise, the Company agrees to pay you four weeks' notice and provide you with satisfactory references on strict condition that you agree to honour and abide by your duties of confidentiality, particularly around the circumstances which have led to this agreement to compromise.

If this is acceptable, please send an e-mail to me ... confirming your agreement to the terms of this compromise. Upon receipt of such confirmation, I will authorise for the agreed notice pay, together with any accrued but untaken holiday entitlement (if any) to be paid to you in the Company's July 2017 payroll and your P45 to also be issued at that time.

...

You are reminded to refrain from making any further contact with any other staff member of the Company and to direct all further communication, queries and reference requests directly to me.”

59 The claimant replied on 18 July as follows:

“I refer to your letter dated 30 June 2017, in reference to termination of employment with Uplands Care Centre.

I can confirm my agreement to the terms of compromise, detailed in the letter.

I am happy to return any Company property remaining in my possession, at any time.

Yours sincerely,”

Jurisdiction

60 The claimant originally sent an ET1 claim to the tribunal form without going to ACAS. There was no EC conciliation certificate number on it. The form was rejected at the end of August. On 27 September she applied to ACAS. On 27 September was in time relative to a termination date of 19 July, which is right, given that this involved offer and acceptance. The date of the acceptance is the date of the agreed termination. The ACAS certificate was issued on 16 October and the original claim was then accepted. But then a second claim was received at Leicester on 7 November.

61 The respondent was initially taking jurisdictional point that this was a late claim. That is clearly wrong relative to a termination date of 19 July reference to ACAS on 27 September was clearly in time. If we completely forget about the claimant's initial error of not contacting ACAS on the original claim, and forget about the original ET1, it is easy. The whole sequence of steps for the second claim is all in time. The claim

itself was presented easily within a month of the certificate on 16 October.

Agreed termination

62 Nothing in the compromise agreement prevented the claimant from applying to the tribunal. There was no compromise under section 203 of the Employment Rights Act 1996. By the act of bringing this claim the claimant asserts that there was not an agreed termination in law. She is claiming it was a resignation which amounts to a constructive dismissal. The respondent challenges the basis of a constructive dismissal and asserts that this is an agreed termination, and that there was therefore no dismissal, and therefore the claimant has no right to claim unfair dismissal.

63 We were referred to a body of case law on the question of agreed termination. A useful authority is *Sandhu v Jan De Rijk Transport Ltd* [2007] IRLR 519, CA. That is a useful summary of previous decisions on this relatively narrow topic of interest to the tribunal. *Birch v University of Liverpool* [1985] IRLR 165 CA and *Logan Salton v Durham County Council* [1989] IRLR 99 EAT. Mr Smith cited paragraph 37 of the *Sandhu* judgment of judgment (Wall LJ):

“What is striking in the authorities, and is amply demonstrated by the cases I have discussed so far, is that in none of the cases in which the employee has been held to resign has the resignation occurred during the same interview/discussion in which the question of dismissal has been raised, and in no case in which the termination of the employee’s employment has occurred in a single interview has a resignation been found to have taken place.”

64 In this case the timescale was very long. There were 14 days between the meeting and the letter offering an agreed termination, and another 2 weeks before the claimant responded and accepted the offer.

65 Another earlier authority of interest was the *Logan Salton v Durham* case. The similarity was that that termination occurred during disciplinary proceedings.

66 There were comments in the case of *Staffordshire County Council v Donovan* [1981] IRLR 108 EAT; another case that involved an agreed termination in disciplinary proceedings and Wood J summarised a distinction:

“If an employee resigns upon being told that unless he resigns he will be dismissed that is a dismissal in law ... where the parties are seeking to negotiate, in the course of disciplinary proceedings, and an agreed form of resignation is worked out it would be most unfortunate if the fact that that agreement was reached in the course of disciplinary proceedings entitled the employee thereafter to say that there was a dismissal.”

67 We also consider that there was contractual consideration here. The letter inviting her to a disciplinary hearing had stated that this may be found to be gross misconduct and that the claimant could be summarily dismissed. In the end she was paid notice pay and there was also an agreement by Mr Soni that he would provide a reference for the future. That is of considerable value in care work. References are always taken up by prospective employers in the care sector. They are under a duty to

do so. It is part of the CQC regulation. He would only provide a factual reference, he said it is all he ever provides and it is all he ever receives from other previous employers.

68 The claimant was employed just under 3 years so it would look like a large gap in her CV if she was not able to get some written reference from her previous employer.

69 Thus, there was a contractual agreement whereby the parties agreed the claimant's employment would terminate. There was no dismissal. We investigate below whether the respondent's treatment of the claimant was such to make her resignation a constructive dismissal.

Sex discrimination

70 As well as unfair dismissal the claimant is claiming sex discrimination. She is claiming sex discrimination as a woman who had an affair with Bob Mutubuki who is a man and she alleges that she suffered less favourable treatment after the affair broke off.

71 At the outset we cite the law. This is a well-trodden path. We started with the case of *B v A* which is [2007] IRLR 576 EAT. The logic of the case is unimpeachable. If a claim is based on conduct arising after the end of a workplace affair it will not be sex discrimination. The sexual relationship is not a protected characteristic. The logic breaks down constructing the comparator. It could as easily be a gay same sex relationship or it could involve a senior female manager and a junior male employee. The gender is coincidental. A later case was cited by Mr Smith - *Vernon v Azure Support Services Ltd* and others. In our view the case of *B v A* undermines the whole basis of this aspect of the claimant's sex discrimination claims (direct discrimination and harassment). It cannot succeed.

List of issues

72 There was a list of issues set out by Judge Gilbert at her case management hearing on 12 February 2018.

73 The first claim there would be a claim for or could be a claim for sexual harassment under section 26(2) of the Equality Act. This was raised as an issue by Judge Gilbert. It is hard to understand it.

74 The claimant states that she was told by Igor that he had been shown a video of Bob having sex with Isabella (Isabella denies ever having had sex with him). The claimant was apprehensive that he might have done the same with her because the sex that they had was always at his home, not hers. To deal with this on the facts there is no doubt in the tribunal's mind that Mr Mutubuki never showed anybody any sex videos. We accept his evidence that he never made any sex videos. We consider he is unlikely to have done so. He managed to keep the affair between himself and the claimant quite well concealed. To be bragging about having sex with anybody would have been completely out of character. He is an otherwise professional manager with

this unfortunate propensity for having sex with his staff.

75 The issue at 4.1.2 the tribunal finds hard to understand as a claim of harassment against the *claimant*. It is a reference to the alleged rape of HM and the suspension and subsequent dismissal of HM's mother. The claimant enlarged on this at the hearing to make a particularly nasty allegation that Mr Mutubuki was somehow responsible for the subsequent death of HM's mother. It is a wholly unfounded, and deeply offensive insinuation. We think there is absolutely nothing whatsoever in it. Some of the evidence shown on facebook messenger (above) shows that it is not out of character for the claimant to make unfounded and profoundly nasty allegations against individuals. This is another example of that. As a complaint by the claimant it is bound to fail on the facts

76 In paragraph 4.1.3 There then follows a series of alleged unfavourable treatment unwanted conduct for the purposes of section 26. Again, as a sex discrimination claim it is completely invalidated by the logic of *B v A*. However, this is said to fuel a constructive dismissal complaint and therefore the tribunal must deal with the list of incidents.

77 4.1.3.1 On 23 March 2017, Mr Mutubuki refused annual leave request for August while granting leave for the same month for other members of staff. His answer to this was that it was too far in advance in a different holiday year. He did grant some of her leave requests, he did not grant others. Overall, we have been unable to see any pattern or anything that could involve a breach of contract either singularly or in combination with other apparently trivial incidents.

78 4.1.3.2 On 29 April the claimant says she was returning from a lunch break and he demanded that she delivered 2 jugs of juice to media visitors who were visiting Mr Soni to do some publicity filming to advertise the home. Mr Mutubuki allegedly said: "I don't care if you're on a break I told you to do it". Mr Mutubuki entirely denies this. Mr Soni states that the claimant would not ever have been asked to deliver juice, that is a job for the chefs in the kitchen who were on duty at that time. We consider it did not happen. Quite apart from the conflict of dates we find that this never happened. We accept the evidence of Mr Soni and Mr Mutubuki.

79 4.1.3.3 The claimant complains at a time when she was resting from clearing up some flooding and was outside having a cigarette with Paulina Mr Mutubuki asked her to go and close curtains of a residents' room. Mr Mutubuki recalls this. It was an important management instruction because certain residents could be seen from the street by members of the public, which should not happen in a residential care home. That could hardly be a breach of any term of an employment contract.

80 4.1.3.4 On 23 April the claimant says she had raised a request at the staff meeting that on the nightshifts her break could be split into 2 breaks so she would manage to have more cigarettes and not go for so long between cigarettes. The claimant alleges that Mr Mutubuki then said: "Betty I don't think you're right in your mind" in front of everybody else. Mr Mutubuki entirely denies saying anything of the sort. We accept his evidence. The claimant's allegation is illogical and random

81 Mr Soni had some recollection of a staff meeting when he stated that certain personal matters should not be raised in a staff meeting and if she had anything to raise that she should raise it directly with him out an open staff meeting. That was harmless enough.

82 4.1.3.5 On 23 April, the same day, apparently Mr Mutubuki told the claimant off for wearing the wrong trousers. This is a true incident. Again, the claimant's complaint is a trivial one. There are policies on this. There had been a change in uniform from wearing black trousers to the rehab assistants wearing blue trousers. The claimant was apparently wearing black trousers. It is agreed that the claimant was wearing the wrong coloured trousers. The claimant obviously took offence. The letter from Mr Mutubuki reads:

"I confirm receiving your letter in which you kindly requested I should have spoken to you in private regarding you wearing black trousers than company official blue uniform that was issued to you...

...I should assure you that there is nothing private or personal to warrant a private conversation with you regarding deliberate and non-compliance to the company's Policies and Procedures.

A repeat of such act may lead to disciplinary action. Please see uniform policy attached for your reference."

83 There was a dispute about how many tops and trousers the claimant was issued with. It appears from later correspondence regarding a return of company property that the claimant was originally issued 2 tops and 1 trousers. This all looks like routine, unexceptional, management. It is clear from the letter that Mr Mutubuki considered that the claimant was deliberately disobeying the lone policy. The claimant did not offer any excuse and apology for this so it did seem to be an act of defiance. This could neither be, nor contribute to, a breach of contract.

84 4.1.3.6 – The claimant claims that Mr Mutubuki allocated her morning shifts on 25 and 6 May and she had to attend training in the afternoon resulting in understaffing of the home. We looked at this in far more detail than it merits. We looked at staff rotas. Mr Soni is positive that if there was ever a risk of the home being understaffed they would, without hesitation, get agency or bank rehab assistants to make up the numbers. Training is a vital part of staff development, and a major focus of any CQC audit. We cannot see how this complaint could amount to a breach of the *claimant's* contract. What was the understaffing to her? She was training at the time.

85 The other thing about this complaint is that Kerri had sole responsibility for the rota, and not Mr Mutubuki.

86 4.1.3.7 relates to an alleged strange conversation between the claimant and Jacqui Macapagal and does not relate to Mr Mutubuki. On 26 May the claimant says Jacqui asked her: "Are you still here?". The claimant answered sarcastically asking if Jacqui was expecting her to disappear. Allegedly Jacqui had said: "I'll be so happy when you do finally". To resolve it on the facts. Like many of the claimant's allegations we find this is complete fiction. The tribunal believe Jacqui Macapagal when she stated that she had not said and would not say any such thing to the claimant or anyone else.

87 4.1.3.8 Mr Mutubuki allocated the claimant work on week commencing 29 May that she previously booked as annual leave. Quite apart from Kerri organising the rotas the claimant did have a conversation with Bob Mutubuki and the claimant did agree to work on that day and then take the leave the following week. This is therefore a non-issue.

88 4.1.3.9 deals with the incidents of 27 May which we have dealt with above in detail.

89 This list of trivial workplace complaints of less favourable treatment/breach of contract are nowhere near constituting even unfavourable treatment, let alone a breach of contract, or a breach of the implied term of mutual trust and confidence. Many are dismissed as fictional.

90 The same issues listed harassment claims under paragraph 4, are the listed again as direct sex discrimination under paragraph 5 of the list, and as victimisation under paragraph 6. Many of the so-called issues identified by Judge Gilbert never materialised at all in the hearing in the witness statements.

91 Of her list of issues relevant to the sex discrimination victimisation complaint we cannot understand the issue at 6.1.1 about the sex video as amounting to a protected act at all. The claimant states that on 18 March, after the end of their relationship, she told him what she would do to him if he showed a sex video of her to any of the male colleagues, as she had been told by a colleague (Igor) that he had done with a previous girlfriend. First, there is the *B v A* problem, and second, for reasons already given above, this fails on the facts. It did not happen. No sex video was shown. None exists

92 What might have been a protected act was 6.1.2, on 14 June 2017 when the claimant told Mr Soni about Mr Mutubuki's affair with her. However, that was the same day on which she immediately volunteered to negotiate a severance deal so everything bad that she alleged had happened to her had already happened.

93 We cannot understand anyway in which a credible victimisation claim consisting of protected act and unfavourable treatment detriment following has been advanced before us at this hearing. No such claim can be entertained.

Constructive dismissal

94 For the reasons given above at paragraph 89 we cannot uphold the claimant's complaint of constructive dismissal

95 We have done our best from Judge Gilbert's list of issues to summarise the ones that we had not previously dealt with in the foregoing narrative. Incidents of unfavourable/less favourable treatment in the workplace could not conceivably raise a constructive dismissal complaint. The failure of Mr Soni to uphold the claimant's complaint that she was attacked by Bob Mutubuki and Jacqui in the Varsity nightclub could not conceivably be a breach of contract. Mr Soni did not accept that account and

that account was contrary to the evidence every other witness. Without expressing any view on what had happened he simply moved away from the entire incident into the course that the claimant was proposing which was an agreed termination. He left it there.

96 The claimant has been paid everything that she is entitled to under the termination agreement. There is only the month's suspension pay owing.

Employment Judge Prichard

19 November 2018