



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Brooks

**Respondents:** (1) T P Clarke Groundworks Limited  
(2) Mr T Clarke

**Heard at:** Teesside                      **On:** 9-13 July 2018 inclusive

**Deliberations**                                      **19 July 2018**

**Before:** Employment Judge Morris

**Members:** Mrs C E Hunter  
Mr G Gallagher

***Representation:***

**Claimant:** Mr A Mugliston of Counsel  
**Respondent:** Ms K Anderson of Counsel

## **RESERVED JUDGMENT ON LIABILITY**

- 1 The unanimous judgment of the Employment Tribunal is as follows:
  - 1.1 The claimant's complaint that he was harassed by the second respondent in the course of the latter's employment by the first respondent is well-founded.
  - 1.2 The claimant's complaint that the the first respondent and the second respondent, in the course of his employment by the first respondent, directly discriminated against the claimant because of the protected characteristic of sexual orientation and subjected him to detriment ultimately leading to the claimant's resignation in circumstances amounting to a constructive dismissal is well-founded.
  - 1.3 The claimant's complaint that the first respondent did not give to him a written statement of particulars of employment in accordance with section 1 of the Employment Rights Act 1996 was withdrawn by the claimant and is dismissed.

- 2 This case will now be listed for a hearing to consider remedy.

## **REASONS**

In the interests of clarity the first respondent shall be referred to in these Reasons as “the respondent”; the second respondent shall be referred to as Mr Clarke.

### **Representation and evidence**

- 1 The claimant was represented by Mr A Mugliston, of counsel, who called the claimant to give evidence and his wife, Mrs H Brooks, and two former colleagues who had also been employed by the respondent, Mr C Hugill and Mr S Smith, to give evidence on his behalf.
- 2 The respondents were represented by Ms K Anderson, of counsel, who called to give evidence Mr Clarke (on his own behalf and on behalf of the respondent), Mr Clarke’s wife, Mrs G Clarke, and two former employees of the respondent, Mr D Raper (who had been its Commercial Manager) and Ms A Roberts.
- 3 The Tribunal had before it a number of documents in an agreed bundle that was added to at the beginning of the hearing.

### **Procedural issues**

#### ***Late evidence***

- 4 At the commencement of the hearing, the respondents sought to add a number of documents to the previously agreed bundle and to introduce a previously unidentified witness, Ms Roberts. The claimant objected to both applications for the following reasons: the Orders of the Tribunal arising from a preliminary hearing on 7 March 2018 included that the parties were to agree the bundle of documents by 18 May 2018; no explanation had been provided as to why the documents had not been provided earlier in accordance with those Orders; the claimant had subsequently submitted a data access request to the respondent in respect of e-mail correspondence that had never been forthcoming; this late disclosure meant that the claimant was unable to put the documents into context or to obtain information to counter the points that it appeared the respondent would wish to make by reference to the documents; thus the parties would not be on an equal footing. Similarly, the witness statement of Ms Roberts had not been provided until 6 July 2018, which was contrary to the Order of the Tribunal that witness statements should be exchanged simultaneously on 14 June 2018, and again no explanation had been given as to why the witness statement had not been served in accordance with that Order.
- 5 On behalf of the respondents it was submitted that there was nothing in Ms Roberts’ witness statement that would prejudice the claimant as he had already given information as to what she had witnessed. As to the documentation, it fell into two principal types: the first comprised documents that had arisen during the course of the claimant’s employment and he therefore well knew the issues referred to and, therefore, could have made enquiries to counter those issues

raised; the second category post-dated the claimant's employment and, while it was accepted that he had never seen these before, they supported the evidence of the respondents' witnesses and the response in the ET3 and might assist the Tribunal in coming to its judgment. One final document related to enquiries the respondent had made with the recruitment agency through which the claimant had been placed with the respondent upon which Ms Anderson would cross-examine him in any event.

- 6 The Tribunal, having considered the submissions on behalf of the parties, some of which are set out above, decided as follows. The overriding objective of the Employment Tribunals Rules of Procedure 2013 is to enable Employment Tribunals to deal with cases fairly and justly. Introducing documents and a witness statement woefully late and contrary to the Orders of the Employment Tribunal goes against all principles of and the purpose of case management including that the parties should know well before the start of the hearing the case that they have to address. The failure to disclose documents was contrary to the Orders of the Tribunal of 7 March 2018 and, more generally, the acknowledged professional duties of representatives with regard to disclosure.
- 7 In these circumstances, the general approach of the Tribunal was not to admit those of the newly produced documents that the claimant did not know about and could not have known about. Thus:
  - 7.1 Documents coming into existence after the resignation of the claimant would not be admitted.
  - 7.2 Documents coming into existence before his resignation would be admitted as follows: first, letters from Partner Limited, Caterpillar and Bellway Homes all of which were mentioned in the witness statement of Mrs Clarke and which the claimant could have contacted as his representative had suggested he would now wish to do; secondly, any e-mails or other documents written to the claimant or of which he had or should have had knowledge.
  - 7.3 Similar principles arise in respect of the letter received from the recruitment agency. There is nothing in the documents before the Tribunal that suggested that the claimant had been forewarned about this point, which the respondents could have investigated and raised much earlier. As such, this letter would not be admitted.
  - 7.4 The evidence of Ms Roberts would be admitted. The claimant had mentioned her as a witness, or possible witness, of a number of events of which he complains and it is right, therefore, that the Tribunal should hear from her.

### ***Vulnerable witness***

- 8 The respondents' representative applied for reasonable adjustments to be made for Mr Clarke when giving his evidence in relation to which she relied upon a letter from Dr A Corbett, his general practitioner, dated 3 July 2018. That letter records that Mr Clarke suffered a traumatic brain injury after a fall of 15 feet in

October 2014. He had made a remarkable recovery since his discharge from hospital in December 2014 and had continued to improve fantastically. He still struggles, however, with some expressive dysphasia and can be quite emotional at times due to the frustration he feels because of this, and he can often have trouble with certain words/objects, which can be worsened if he is in an unfamiliar place. He at times struggles with some tiredness, which again frustrates him. She expressed concern that Mr Clarke's appearance in court may lead to him becoming agitated and distressed as he does not cope well with pressure. She made various suggestions as to how Mr Clarke might be assisted in this regard during the course of the hearing. The Tribunal had no hesitation whatsoever in agreeing this application and was at pains to ensure that the doctor's concerns were respected.

- 9 More generally, the Tribunal had in mind the decisions in Higgins v Home Office [2015] UKEAT/0296/14/LA (in which it was stated that the overriding objective requires "the tribunal to have regard to any disability of which it is aware") and East of England Ambulance Service NHS Trust v Sanders [2015] ICR 293, and the guidance given by the Senior President in the decision in AM (Afghanistan v Secretary of State for the Home Department) [2017] EWCA Civ 1123. By reference to the guidance provided by Langstaff P in Sanders, the Tribunal ensured, throughout the hearing, that the form of questioning of Mr Clarke was appropriate and sought to ensure that he gave the best evidence that he could provide. The note of caution in that judgement was also heeded, however, that sensitivity with a witness "must not lead the tribunal to abandon impartiality".
- 10 Also in this regard, Tribunal took frequent breaks when the Tribunal considered necessary (including on one occasion where Mr Clarke said that he would continue) or when such were indicated by Mr Clarke, his representative or his family. Furthermore, the respondents' representative did not hesitate to interrupt the cross-examination of Mr Clarke if she thought that he was being asked a question that was too complex or he otherwise might have difficulty in understanding. The claimant's representative clearly acknowledged Mr Clarke's condition, conducted himself appropriately and with courtesy throughout and showed considerable patience while conducting his cross-examination.

### **The claimant's complaints**

- 11 The complaints presented by the claimant to the Tribunal are as follows:
- 11.1 Harassment contrary to section 26 of the Equality Act 2010 ("the 2010 Act") in that Mr Clarke had engaged in unwanted conduct related to the relevant protected characteristic of sexual orientation.
- 11.2 Direct discrimination because of the protected characteristic of sexual orientation (section 13 of the 2010 Act) contrary to section 39(2)(c) and (d) of the 2010 Act in that he had been constructively dismissed and subjected to other detriment.
- 11.3 He had been dismissed by the respondent in that he terminated his contract of employment in circumstances in which he was entitled to do so without notice by reason of the respondents' conduct in accordance with

section 95(1)(c) of the Employment Rights Act 1996 (“the 1996 Act”) and that dismissal was unfair contrary to section 94 of the 1996 Act taken together with section 98 of that Act.

- 11.4 The claimant also raised that, contrary to its duty under section 1 of the 1996 Act the respondent had not given him a written statement of particulars of employment when his employment began.
- 12 At the preliminary hearing on 7 March 2018 referred to above it is recorded that as the claimant’s employment with the respondent lasted from 20 June 2017 to 10 November 2017 he had not acquired the right not to be unfairly dismissed and, therefore, the Tribunal did not have jurisdiction to hear that complaint, which was dismissed.
- 13 The record of that preliminary hearing also contains the following:
- “Mr Flynn today conceded that, if the Employment Tribunal were to find that the incidents described by the claimant had in fact taken place, then they would amount to both direct discrimination on the grounds of sexual orientation contrary to section 13 of the Equality Act 2010 and harassment contrary to section 26 of the Equality Act 2010. The case will turn entirely on the Employment Tribunal’s findings of fact as to whether any of these incidents took place.”

### **The issues**

- 14 The issues which were to be determined by the Tribunal in the light of the above concession are as follows:
- 15 *Harassment*
- 15.1 Did the respondent and/or Mr Clarke engage in unwanted conduct?
- 15.2 If so, was that conduct related to the protected characteristic of sexual orientation?
- 15.3 If so, did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 15.4 If not, did the conduct have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 15.5 In considering whether the conduct had that effect, the Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

16 *Direct discrimination*

- 16.1 Did the respondent and/or Mr Clarke subject the claimant to treatment falling within section 39 of the 2010 Act; namely, dismissing him or subjecting him to other detriment?
- 16.2 Did the respondent and/or Mr Clarke treated the claimant as alleged less favourably than it treated or would have treated comparators?
- 16.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of sexual orientation?
- 16.4 If so, what is the explanation of the respondent/Mr Clarke as the case may be? Does it prove a non-discriminatory reason for any proven treatment?

**Consideration and findings of fact**

- 17 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities:
  - 17.1 The respondent was a fairly large company the business of which is said to have been civil engineering, plant and haulage. It had relatively small administrative resources and no in-house human resource but relied upon external advisers. It went into administration on 17 April 2018.
  - 17.2 The respondent was a family owned/operated business. Mr Clarke was the Managing Director and his wife, Mrs Clarke, was Company Secretary. Their daughter Ms N Clarke was also employed in the business.
  - 17.3 Further context is that, as recorded above, in October 2014 Mr Clarke fell from a roof and suffered a traumatic brain injury, which has clearly impacted upon his health, wellbeing and abilities; for example in reading, understanding and speech.
  - 17.4 The claimant commenced employment with the respondent on 20 June 2017 as Contracts Manager in the context that both Mr and Mrs Clarke were intending to step back somewhat from the operation of the respondent's business.
  - 17.5 The claimant's case is that throughout his employment he was subjected to abuse and mistreatment at the hands of Mr Clarke; not simply that but that the mistreatment was related to or because of sexual orientation.
  - 17.6 The first incident occurred on 26 June 2017 when Mr Clarke called the claimant a "dodgy fucker" and told him that he did not trust him. The claimant maintained a notebook in which he made a number of dated

entries, which he referred to during the hearing as his diary. The diary entry for that day of 26 June 2017 (page 39) includes the following:

“Told Tim [*ie Mr Clarke*] about the potential CAT Plant with Pugh’s – didn’t want the work because they were dodgy fuckers like me”.

- 17.7 Mr Clarke confirmed in evidence that he was unsure from the outset that the claimant’s appointment was right and that he did not trust him.
- 17.8 The following day, 27 June 2017, Mr Clarke came into the claimant’s office and observed that he was using a pink calculator. He spoke to him in the following terms, “What are you doing with a pink calculator. Are you gay? You’re gay aren’t you?”. Mr Clarke then walked into the respondent’s general office to tell other members of staff that the claimant was gay. This is recorded in the claimant’s diary note (page 40), “I was told I was gay by Tim for using a pink calculator”.
- 17.9 Although that is the only occasion on which the claimant records in his diary the use of the word “gay”, the Tribunal accepts that that term was also directed at him on other occasions (the claimant suggests nine occasions). This is borne out by the evidence of Mr Smith. Mr Raper also confirmed that Mr Clarke had used the word “gay” towards him.
- 17.10 The respondent had need to recruit a Quantity Surveyor and, on 17 July 2017, the claimant met Mr Raper. He told Mr Clarke about this on 18 July adding that Mr Raper had a small beard. This caused Mr Clarke to go into a rage and he called the claimant a “useless fucker” for even thinking that the respondent would employ someone with a beard as no one with a beard can work for the respondent. He said that the claimant was useless and stormed off. The claimant’s diary note of this incident records, “Told him about QS Dave has a slight Beard – went nuts on me” (page 41).
- 17.11 This continued until 19 July 2017 with Mr Clarke being angry with the claimant, calling him a useless fucker who was not to be trusted as he did not know what he was doing and declining to meet Mr Raper at all. Eventually however he and the claimant did meet Mr Raper in a car park. The claimant’s diary note records, “Tim in rage re QS Beard only confirmed last thing to meet him” (page 42).
- 17.12 The evidence of the claimant and Mr Raper was that during that meeting/interview Mr Clarke made what the claimant referred to as gesticulations by touching his face in the area of his chin. The claimant maintained that these were shaving motions whereas Mr Raper described it as if Mr Clarke was stroking a beard. While either version is not necessarily related to sexual orientation, the Tribunal finds that it is indicative of Mr Clarke’s attitude and prejudices and it does not accept his evidence to the effect that he has “no problems at all” with beards. In this connection the Tribunal notes Mr Clarke’s oral evidence, “I would normally have people in business like myself”; and, further, that most or no employees of the respondent had beards. Mr Clarke said that the

respondent employed approximately 100 lads and there were the odd ones.

- 17.13 Also during that meeting/interview with Mr Raper, Mr Clarke called the claimant gay to Mr Raper and put the claimant in the position of having to tell Mr Raper that he could not work for the respondent unless he shaved his beard off. Mr Raper's evidence was that in doing so the claimant was laughing when he said, "Tim doesn't like beards". The Tribunal considers it not unusual that someone such as the claimant, placed in an embarrassing position such as this, would have sought to make a joke of it.
- 17.14 Mr Raper's first day of employment with the respondent was on 24 July 2017. He and the claimant were in the estimating office discussing plans for the business when Mr Clarke entered and started to make derogatory remarks about the claimant to Mr Raper. He said that the claimant was a "dodgy fucker" and was "not to be trusted as he was gay and used a pink calculator". This understandably angered the claimant who felt belittled and degraded in front of a new employee and he walked out of the office and the building slamming the door as he went. He drove away and sat in a layby for approximately ten minutes where he decided that he needed to talk to Mr Clarke about what had occurred. When he entered he found Mr Clarke, Mrs Clarke, Ms Clarke and Mr Raper talking together in the central hall of the respondent's office building next to Mr Clarke's office. The claimant was probably still angry and understandably wanted the conduct to which he had just been subjected to stop. He strode past everyone in the hall to the door into Mr Clarke's office, which he opened slightly. He demanded to speak privately to Mr Clarke. The Tribunal does not accept the evidence of Mr Clarke that the claimant went into his office. None of the respondent's other witnesses confirm that to have happened. Mr Clarke reacted angrily to the claimant opening his door and demanding to speak to him by calling the claimant names, swearing at him and threatening to punch him. The Tribunal does not accept the evidence of Mr Clarke, Mrs Clarke or Mr Raper that, in fact, Mr Clarke was calm and seeking to diffuse the situation. On the contrary it finds that both the claimant and Mr Clarke were angry: the claimant with how he was being treated; Mr Clarke with how the claimant was demanding to speak to him and having opened the door to his office. This situation then developed to a point where Mrs Clarke had to restrain Mr Clarke.
- 17.15 Mr Clarke's reaction to the claimant in these circumstances is borne out by his own evidence that, "Nobody had ever been in my office and sat like that; nobody would. He shouldn't have gone into my office – any boss would have been angry. It's got to be the boss' area and he opened it".
- 17.16 Furthermore, Ms Roberts' evidence on this point was telling. She said she had witnessed these events when returning from the kitchen through the central hall to her office. She first stated that there had been no loud voices and all had been fairly calm. When, however, it was put to her that she had seen Mr Clarke being restrained by Mrs Clarke while he was loudly threatening the claimant and she was asked, "Do you remember



that”, she paused for what seemed a long time apparently reflecting upon her answer before confirming, “Yes I do”.

- 17.17 The claimant walked away from the situation out of the office building and sat on a wall in the yard outside. He was approached first by Mrs and Ms Clarke who were followed, shortly after, by Mr Clarke. They managed to resolve matters but only by the claimant agreeing to apologise to Mr Clarke. That in itself was belittling.
- 17.18 The claimant was subjected to further aggression. For example, on 2 August he was called a “useless fucker” (page 43) and told that he did not know what he was doing in trying to secure work for the respondent; on 4 August he was told that he was a “dodgy fucker” who could not organise anything and was useless. Similar abuse and phraseology was also directed by Mr Clarke at the claimant on 7, 9, 11 and 21 August and 5 September. Each of these events related to business matters but nevertheless Mr Clarke reacted angrily. The claimant does not expressly state that this reaction of Mr Clarke was related to his sexual orientation. The Tribunal deals below with this question of whether what might be conveniently termed ‘general abuse’ was, in fact, related to or because of sexual orientation.
- 17.19 Mr Smith had been employed by the respondent from 12 October 2017. Given Mr Clarke’s reaction to sudden change, however, Mr Smith’s appointment was concealed from him. The Tribunal does not accept Mrs Clarke’s evidence that Mr Smith only worked Saturday mornings by way of a trial. On the contrary, it accepts the evidence of the claimant and Mr Smith that he was employed by the respondent in the fullest sense from that date of 12 October. When it was judged that Mr Clarke could be made aware of Mr Smith’s appointment he was invited to attend a formal interview with Mr and Mrs Clarke at noon on 16 October 2017. He arrived early hoping to impress but the opposite was the result. Mr Clarke became very angry and, in Mr Smith’s terms, “blew his top” because he had arranged his day so as to be ready for the interview at noon and he was ‘wrong footed’ by Mr Smith’s early arrival at a time when he was struggling to detach equipment from a tractor. Mr Smith’s account was confirmed by the claimant in his oral evidence. Furthermore, both Mr Smith and the claimant agree that during this incident Mr Clarke shouted loudly at the claimant, “useless fucker”. Mrs Clarke, however, explained in cross-examination that her husband had not been angry. She said that she had seen him sitting in the tractor cab talking to Mr Humble, the respondent’s Yard Manager, who was standing outside. She continued that the claimant had simply told Mr Smith to go away until the interview could be rearranged for another day as removing equipment from the tractor would take longer than anticipated. The Tribunal does not accept the evidence of Mrs Clarke in this regard for a number of reasons including as follows: Mr Clarke had difficulty with hearing (as was apparent during the conduct of the Tribunal hearing) yet she maintained that he was conducting a conversation with Mr Humble while Mr Clarke was in the tractor cab with the engine was running and Mr Humble was outside; further, she agreed that to have the engine running while seeking

to remove equipment from the tractor would be unsafe; the claimant telling Mr Smith to go away until another day rather than just for an hour or so while the issue with the equipment was attended to is inconsistent with Mrs Clarke's evidence that Mr Clarke had organised his day so as to be finished well before the 12 o'clock meeting with Mr Smith. In this regard the claimant's evidence that he had hurried to Mr Smith saying to Mrs Clarke as he passed her, "Don't worry I've got this" is accepted as accurate as is Mr Smith's evidence of this incident. Obviously, this incident does not bear directly upon the question of sexual orientation but it does have a bearing on, first, the credibility of Mr and Mrs Clarke and of Mr Smith and, secondly, the attitude of Mr Clarke towards the claimant.

- 17.20 On 17 October the claimant was travelling by car with Mr Hugill on the way from a site visit at a housing development of Partner Construction Limited in Hexham. He received a call from Mr Clarke who did not realise that Mr Hugill was in the car with him and could hear what he said. The Tribunal accepts Mr Hugill's evidence (corroborated as it was by the claimant) that Mr Clarke delivered an angry, abusive barrage towards the claimant who had tried to inform Mr Clarke that the meeting had gone well, which Mr Hugill also considered it had. Mr Clarke responded that the meeting could not have gone well because he was not there. He called the claimant a "dodgy gay fucker" saying that he was useless and did not know what he was doing and only he (Mr Clarke) knew how to do things right. Mr Hugill's evidence was that the claimant was visibly upset by these comments and informed Mr Hugill that this was the normal kind of conversation that he had with Mr Clarke both face-to-face and by telephone to the extent that he was becoming scared of answering the telephone to Mr Clarke because of the constant abuse.
- 17.21 A feature of this case is that Mr Clarke would spray the claimant on his trousers and shirt from a Dettol aerosol can. He would demand that the claimant stood up saying words like, "get up you fucker you're unclean". In the context of the totality of the evidence before it the Tribunal is satisfied that Mr Clarke's use of the word "unclean" was not limited, if at all, to the claimant having dirt on his clothes or having brought dirt into the office as a result of having been on site. Rather the Tribunal is satisfied that he used the word more widely to reflect his view of homosexual orientation and practices.
- 17.22 One particular incident in this regard took place on 18 October 2017, which was the first day upon which Mr Smith had been in the office since he started his employment with the respondent on 12 October 2017. He was with the claimant in his office discussing work issues when Mr Clarke entered with Mr Raper. He said to the claimant, who had a slight mark on his shirt collar, "Do I have to get the Dettol out again". The claimant responded, "No you're not getting the Dettol can out again". Mr Clarke then left the office but came back with the Dettol can. Mr Clarke proceeded to spray the claimant's legs before putting the can down behind the claimant. Mr Clarke then stated that Mr Raper was a good guy unlike the claimant and repeated that he was a "dodgy, gay, unclean fucker". Mr Clarke 's then looked at Mr Smith and Mr Raper and asked them, "Shall I

spray him again?”. The claimant objected and said that Mr Clarke was not to spray him again. He responded by shouting at the claimant to get out of his chair and started pulling him to his feet. The claimant initially resisted but was eventually dragged to his feet and stood there while Mr Clarke had started to spray his trousers in what Mr Smith referred to as his “mid-region” pointing towards his groin. When he was asked to say precisely where the claimant had been sprayed, Mr Smith stood up and indicated from between his knees to the bottom of his rib cage. Also, as the claimant was pulled from his chair Mr Clarke was demanding that he got up saying, “You dodgy fucker, get up”. Such was the extent of this spraying incident that the claimant’s shirt and trousers were soaked in Dettol. At this point Mrs Clarke came into the office and asked what the commotion was about. The claimant replied that he had been sprayed with Dettol again and did so according to Mr Smith, in a tone showing that he was “embarrassed and deflated”. From this reference to “again” and the fact that the claimant and Mr Raper had then glossed over the incident and started to talk about jobs Mr Smith had gathered that this was a regular occurrence. The Tribunal accepts Mr Smith’s opinion that Mr Clarke asking Mr Raper and Mr Smith whether he should spray the claimant again was a show of dominance to show who was the boss. Mr Smith’s evidence, which the Tribunal also accepts, is that he was “dumbfounded” by the whole situation and the fact that this was going on in an office at work.

- 17.23 The claimant understandably did not want to remain in the office so he, Mr Smith and Mr Raper left and went back to the site. As they were about to leave Mrs Clarke took them to the cupboard in which the personal protection equipment was stored and gave Mr Smith a hard hat and high visibility vest. In doing so she had apologised for Mr Clarke’s behaviour and for the fact that Mr Smith had had to have his employment concealed until his formal appointment on the Monday. After the three men left the respondent’s office they returned to the Bellway site: on arrival there Mr Smith asked the other two men what had happened as their conversation also suggested that this was a regular event.
- 17.24 The Tribunal accepted the evidence of Mr Smith as a genuine, credible and impartial witness. Indeed, his evidence grew in stature during cross-examination where he recounted these events clearly and rapidly. It is repeated that he said that he was “dumbfounded” that such an incident took place in the office and the Tribunal accepts that he was.
- 17.25 Although not directly related to this incident alone, the Tribunal records Mr Clarke’s evidence, “I like things very very clean” and the agreement of Mrs Clarke that dirt and cleanliness are an obsession and that her husband would talk about cleanliness frequently. Further, in The Brain Injury Guidance (page 56) it is stated that one of Mr Clarke’s triggers is, “Anything related to his particular (obsessive) behaviours”.
- 17.26 Mrs Clarke’s evidence was to the effect that this incident had been accompanied by much laughing and joking and that her daughter had commented that she had never heard so much in the office before.

Clearly, therefore, something had occurred which contrasts with Mr Clarke's initial denial. Further, although the evidence of Ms Roberts was that she had not witnessed this incident, the fact that it occurred is borne out by her evidence that "within the following week" she heard a discussion in the office about it.

17.27 On 20 October 2017 the claimant and Mr Raper went to Darlington to meet Mrs Clarke to collect documents from her to take to a court in Newcastle upon Tyne in an attempt to overturn a Winding-up Petition against the respondent. The papers were not ready and she told them to stand by to collect them to take to Newcastle. She was going on to see the company accountant. The claimant and Mr Raper then headed to a building site in Stockton. While they were there, Mr Clarke telephoned the claimant and subjected him to further abuse including, once more, calling him "a useless fucker". The claimant had had enough of this and took his mobile 'phone and placed it on a car roof so that Mr Raper, who was with him, could hear. The claimant then walked off and Mr Raper ended the call. Given its findings regarding Mr Raper's general credibility referred to below, the Tribunal does not accept Mr Raper's account of this incident, which was to the effect that Mr Clarke was merely asking the claimant important legitimate questions regarding the operation of the respondent's business and that although he had raised his voice he had not been aggressive.

17.28 The claimant then called Mrs Clarke and said, "Gill, that's it I've had enough, I'm not prepared to take this fucking abuse anymore from Tim". At this point the respondent's accountant, Mr Lockett, spoke explaining that it was he who had answered Mrs Clarke's telephone. The claimant apologised to him for his language but was told not to worry. Mr Lockett explained that he had Mrs Clarke with him and they were considering how to remove Mr Clarke from the business. He asked if they achieved that, would the claimant stay on in his role and he confirmed that he would but was otherwise not prepared to continuing working for the respondent receiving the level of abuse he was getting from Mr Clarke. While Mrs Clarke disputes much of the detail given by the claimant in respect of his conversation with the accountant she does confirm that Mr Lockett did ask whether both he and Mr Raper were "happy to continue working for the company while this is going on" [*"this" being their dealing with the Winding-up Petition*] and they had both confirmed that they were. She, continued that Mr Lockett had said that she would "need help with suppliers" and had asked whether the two men would give it, and again they confirmed that they would; additionally, that they would "need to speak to the lads". Additionally, Mrs Clarke herself confirmed that she had said to claimant, "bear with us while we've got this situation".

17.29 A further incident occurred on 30 October 2017. On this date Mr Smith was in the office for only the second time, on this occasion to collect a company car. It transpired that he could not drive the car as he was not covered by the company insurance, which related only to those over 25 years of age and he was 21 years of age. Mr Clarke became incredibly distressed due to this although it was very simply and quickly rectified by

Ms Clarke. While this was attended to Mr Smith waited in Mr Raper's office sitting first in a chair next to his desk and then moving to the chair at the desk that was occasionally occupied by Ms Clarke. Mr Clarke came into the office and shouted angrily, "Get out of the chair". Mr Smith thought that Mr Clarke was joking and responded that he would do so but he would wait until Nicola got back. This caused Mr Clarke to become even more angry and he shouted at Mr Smith to, "Get up now". The Tribunal accepts further Mr Smith's evidence, "Because of what I'd witnessed with the claimant, I took it to heart and got up and moved". The Tribunal also accepts Mr Smith's assessment of the situation that this abuse of him by Mr Clarke was actually in a way directed at the claimant in that he then proceeded into the claimant's office and subjected him to further verbal assault including calling him a dodgy useless fucker. More generally, the Tribunal accepts Mr Smith's comment, "Mr Clarke can be calm but it does not take long to tick him off". The Tribunal does not accept, as was put to Mr Smith in cross-examination, that he had collaborated with the claimant to help him "plug gaps" in his evidence. On the contrary, it is repeated that the Tribunal found Mr Smith to be a credible witness.

17.30 On 6 November 2017 the claimant was driving in his car with Mr Hugill and Mr Raper from the CAT site in Skiningrove. Mr Clarke telephoned and called the claimant a liar for not telling him about a contract. He called the claimant a dodgy fucker and accused him of lying. At this point, Mr Raper became angry and told Mr Clarke that that was not the case as both he and the claimant had informed Mr Clarke in full earlier that week. Mr Clarke calmed down towards Mr Raper but still continued to call the claimant a dodgy fucker and a liar. Mr Raper had continued to try to explain to Mr Clarke but he continued to rant. Mr Raper then terminated the call on the claimant's handsfree screen, cutting off Mr Clarke. Mr Raper appeared to be angry with what had just gone on. So much so that the three men did not go to enjoy breakfast at Asda as had been planned but instead bought sandwiches and coffee. The Tribunal does not accept Mr Raper's version of these events especially that the claimant goaded Mr Clarke. That is simply inconsistent with the agreed evidence of all concerned that it was the claimant who asked Mrs Clarke for guidance as to how to help Mr Clarke to avoid becoming distressed and/or angry and help him if he did so. That guidance is found at pages 52-60 of the bundle of documents and, for the purposes of these Reasons will be referred to as being "The Brain Injury Guidance".

17.31 Also on 6 November 2017 the claimant submitted his resignation from the employment of the respondent (page 89). In that letter it is recorded, amongst other things, as follows:

"I have been subject to a barrage of physical, mental and emotional abuse daily from Mr T Clarke, Managing Director on both an individual basis and in the presence of fellow work colleagues, both senior and junior.

As a result, I am no longer prepared to tolerate, nor should I be expected to be subjected to such unprofessional and unacceptable behaviour from my line manager and owner of T P Clarke Groundworks Limited, with in my place of work.

I have been subjected to a constant barrage of derogatory comments, outrageous physical abuse which has started to affect my mental, emotional and physical health.”

- 17.32 Those observations are repeated to an extent in an e-mail dated 8 November from the claimant to Mrs Clarke (page 90) in which, amongst other things, it is stated:

“As you are all more than aware, it is I who has been subject to a personal attack on a daily basis, with a barrage of outrageous physical, mental, verbal and emotional abuse, from Mr T Clarke, all acts of which are tantamount to harassment and bullying as defined in the equality act 2010 and have started to affect my mental, emotional and physical health.”

- 17.33 By this time, the claimant had secured a new job at a business referred to as Moorhead but the Tribunal is satisfied that the above quoted paragraphs reflect the reason why the claimant resigned from what was apparently a very good job with the respondent. It does not accept the counter-arguments that he left that employment simply to take on a new job elsewhere or because of concerns that had been raised regarding his performance both by clients of and managers within the respondent (for example Mr Clarke and Mr Raper).
- 17.34 With specific reference to that question of performance, the respondents sought to rely, amongst other things, on a letter received from Partner Construction Limited on 6 November 2017 (page 88(a)) which, at the risk of oversimplification, complains of delay on the part of the respondent. The Tribunal notes, however, first, that there is no specific reference to the claimant in that letter and, secondly, that he and Mr Raper produced a comprehensive response establishing that any delay was not attributable to the respondent. The Tribunal considers it to be to the respondents' discredit that it introduced this letter (acknowledging that that was with the Tribunal's consent) only on the morning of the first day of the hearing and did not also introduce the respondent's response to it. This also impacts upon the credibility of the respondent.
- 17.35 Additionally, with regard to the claimant's performance it was Mrs Clarke's evidence that on 2 November 2017 she had received a telephone call from the Managing Director of Partner Construction Limited to the effect that if the claimant was not removed from site his company would cancel the contract with the respondent. That evidence is not borne out however, by the fact that the claimant attended a meeting with Partner Construction Limited the following day (page 79(b)) the notes of which do not hint of any dissatisfaction.

- 17.36 Also with regard to the question of performance, the matters referred to above regarding the discussion with the respondent's accountant on 20 October 2017 are of relevance. During the course of that conversation the claimant was asked to bear with the business and engage with suppliers and employees during the difficult period of responding to the Winding-up Petition. Those overtures to the claimant are inconsistent with the respondent's position now that it was in fact the claimant who caused the problems that the respondent was facing at this time. Indeed, Mrs Clarke confirmed in evidence that the respondent was having business problems before the claimant's employment began, and that such problems had led to one company asking the respondent to leave their site at Yarm only two days after his employment commenced. More generally, there is no suggestion on the part of the respondent that any such performance issues as it now seeks to rely upon were raised with the claimant formally at any time during his employment.
- 17.37 A further factor in this regard is that in cross-examination Mrs Clarke introduced an aspect not in her witness statement that the respondent had access to third party HR advice and support. She confirmed, however, that she had not contacted that HR support in respect of any of the issues upon which the respondent now seeks to rely regarding the claimant's performance: for example dissatisfaction of clients; failing to produce documents such as employee timesheets and delivery notes; assaulting Mrs Clarke, the Company Secretary on 24 July 2017. The Tribunal did not find satisfactory Mrs Clarke's answer that she had not made such contact, "but would have down the line". Indeed her answer supports the claimant's contention that there were no performance issues at the time of his resignation.
- 17.38 A separate matter relied upon by the respondent is that the claimant did not raise a formal grievance prior to his resignation. That is correct. The Tribunal is satisfied, however, that given the close proximity within which everyone worked within the respondent's offices and the fact that raised voices could be heard, Mrs Clarke was fully aware of Mr Clarke's attitude and conduct towards the claimant. Indeed the Tribunal accepts that at times (for example when she was giving Mr Smith his PPE referred to above) she apologised about his behaviour; additionally, Mrs Clarke knew from the claimant's telephone call of 20 October 2017 that at that time he had had enough and was intending to resign due to Mr Clarke's treatment of him but was dissuaded from doing so. As such, the Tribunal accepts the claimant's position that there was no point in raising a formal grievance with the Company Secretary, which is what the respondent's grievance procedure requires. Neither does the Tribunal accept Mrs Clarke's suggestion that he could have raised such a grievance with the respondent's HR provider. That would have been inappropriate and, as she said herself, "they would contact me".

### **Credibility**

- 18 Not least given the context of the concession at the preliminary hearing referred to above, it is appropriate that the Tribunal should set out its findings as to the

credibility of the witnesses in this case. These findings are additional to the specific comments on credibility that are set out elsewhere.

- 19 First, we record that we found the claimant and the witnesses Mr Smith and Mr Hugill to be credible and we accepted their evidence. Although alert to not being swayed by the demeanour of a witness, it was difficult not to be impressed with the manner in which all three men gave evidence. Indeed, as intimated above, the evidence of each of them appeared to grow in stature during cross-examination where they answered questions clearly and consistently both with such contemporaneous documentation as was before the Tribunal and with each other.
- 20 By way of example only, Mr Smith's evidence in cross-examination of the Dettol spraying incident on 24 July 2017 was given with great clarity and rapidity, and included demonstration of actions and the positions of Mr Clarke and the claimant: more than the Tribunal considers would have been possible if his evidence was fabricated. It is repeated that the Tribunal accepted the evidence of Mr Smith as a genuine, credible and impartial witness.
- 21 The same can be said about the evidence of Mr Hugill. For example, when he was cross-examined about the incident on 6 November when he, Mr Raper and the claimant were travelling in the car together from the CAT site at Skiningrove, it was put to Mr Hugill that Mr Raper had said that during that telephone call the claimant had been goading Mr Clarke, he answered, firmly and authoritatively for a person of his apparent young age, "absolutely not". The Tribunal accepts that evidence. The general credibility of Mr Hugill was enhanced by the very clear evidence he gave during cross-examination, including as to this incident, which he, probably unknowingly, authenticated further by reference to what might appear to be a rather silly instance in the context of the totality of the evidence before us. He explained that he, Mr Raper and the claimant had planned to call in at the local Asda cafe for breakfast. He explained, however, that Mr Raper had become so angered by Mr Clarke, causing him to terminate the call, that they had not actually gone for breakfast but, instead, picked up sandwiches and coffee. In what was for many reasons a difficult five-day hearing, a relatively young man being deprived of his full English breakfast on account of Mr Raper being angered by Mr Clarke introduced a small degree of levity but, more importantly, of authenticity.
- 22 It is also relevant that neither Mr Smith nor Mr Hugill was present during those parts of the hearing that preceded the giving of their evidence. It was not possible, therefore, that they could have adjusted the answers they gave in cross-examination to address earlier evidence. That is unless the claimant had met one or both of them to coach them about what to say. The Tribunal rejects that that occurred not least given the clear and forceful manner in which they both gave their oral evidence and its general consistency with their written witness statements.
- 23 Turning to Mr Raper:



- 23.1 His evidence was that he never witnessed anything untoward as between Mr Clarke and the claimant. He says, however, that on one of the Dettol spraying incidents he was in the office doing calculations. He says that he was aware of the claimant and Mr Clarke laughing and joking as Mr Clarke, he says, tried to clean up around the claimant. He then looked up at the very moment, he says, that the claimant grabbed Mr Clarke's hand. The Tribunal is satisfied that here as elsewhere in his evidence Mr Raper was selective in what he had and had not seen, which obviously impacted upon his credibility.
- 23.2 Regarding what he had witnessed, Mr Raper's evidence changed during cross-examination to be, "Everything I've heard between Mr Clarke and the claimant I would classify as banter". Clearly, therefore, he had witnessed something yet he initially denied that.
- 23.3 The Tribunal rejects Mr Raper's evidence that there was any laughing and joking in respect of any of the Dettol incidents. That is wholly inconsistent with the evidence of the claimant and Mr Smith, which the Tribunal has accepted.
- 23.4 Mr Raper was insistent that the Brain Injury Guide was a generic document despite paragraphs clearly referring to Mr Clarke. It seemed to the Tribunal that in this respect as in others Mr Raper simply 'stuck to his script'.
- 23.5 The Tribunal also notes Mr Raper's evidence that "Mr Clarke was generally more careful with certain people so as not to offend them" and "treats everybody as individual". The Tribunal is satisfied that that actually supports the claimant's evidence that he was treated differently and was singled out for the treatment he describes.
- 23.6 Mr Raper also confirmed in cross-examination, albeit clearly reluctantly, that Mr Clarke did use the term "silly fucker" in the workplace but maintained that that was "context dependent".
- 23.7 Although Mr Raper minimised the suggestion that Mr Clarke used the word "gay", when pressed he explained that when Mr Clarke had done so it was not serious. In this regard he cited his own experience of Mr Clarke saying to him, "What are you messing about with. Are you gay you little fucker?". The Tribunal simply does not accept, as Mr Raper would have it, that this was an isolated incident and Mr Clarke had only used the word "gay" once, and that was to him. The Tribunal is satisfied that that was an attempt on his part to make his evidence consistent with that of Mr Clarke who refers in his witness statement to this incident between him and Mr Raper. Mr Raper does not mention it at all in his witness statement.
- 24 The following points arise in relation to general issues regarding Mrs Clarke's credibility:
- 24.1 With regard to Mrs Clark's evidence that the respondent takes allegations of bullying and harassment very seriously she explained that a few years

ago (she thought 2000 or 1999) an employee “got boisterous on site”, which had resulted in a written grievance that had been dealt with by Mr Clarke as Contracts Manager. She then clarified, however, that the individual who had become boisterous was a sub-contractor and he had been boisterous with an employee of a client of the respondent who was an apprentice and “could not take the banter”. In the experience of this Tribunal it is inconsistent that an event in which a sub-contractor was the alleged perpetrator and an employee of another company was the alleged victim, a written grievance would have been raised with and investigated by Mr Clarke on behalf of the respondent.

- 24.2 At one stage in her evidence, when it was put to Mrs Clarke that there was no point in the claimant raising a grievance if she, Mr Clarke’s wife, already knew all about his conduct towards the claimant. She appeared to take exception to the reference to “wife” and made the point, “By day I am Company Secretary and Mr Clarke is a Director but after the working day I am a wife and mother”. That is inconsistent with Mrs Clarke’s later evidence that she and Mr Clarke “had a meeting every night after work – lots of issues were discussed” and neither the claimant nor Mr Raper needed to know.
- 24.3 Mrs Clark’s evidence as to whether, when she was in her office, she could hear what was going on in other offices within the respondent’s building was inconsistent. When it suited her evidence that she could not hear anything she would say that adding, for example, that she might have her earphones in place whereas, on other occasions when it suited her evidence to do so, she would say that she could hear something; for example, during the incident when the claimant states that he was sprayed with Dettol, she was clear that, while in her office, “I heard laughing and joking”.
- 24.4 The Tribunal accepts the evidence of Mr Smith (corroborated by the claimant) that he commenced employment with the respondent on 12 October 2017. Mrs Clark denied that and suggested, on the contrary, that she had been asked “if he could work a few Saturdays to try him out”. This point is not directly relevant to the issues before the Tribunal but, nevertheless, does impact upon the credibility of Mrs Clarke.
- 24.5 On many occasions, the Tribunal found Mrs Clarke to be evasive when responding to questions asked of her. An example was her steadfast denial, at least initially, that the Brain Injury Guide (page 52) was specifically related to Mr Clarke. She insisted that it was “a generic document” until, after some time and having been referred to numerous examples, she accepted that it did relate specifically to Mr Clarke. Indeed she confirmed that she had written in manuscript, “Embarrassed” (page 59) explaining that she knows her husband and he is “a very proud man”. Importantly, Mrs Clarke accepted that the section headed, “What are his

triggers?” accurately reflected things and circumstances that could cause Mr Clarke to react. In this connection the Tribunal is satisfied that the triggers and reactions of Mr Clarke as set out in the Brain Injury Guide accurately reflect some aspects of the conduct and behaviour of Mr Clarke as experienced by the claimant but also by others, albeit to a lesser extent, including Mr Smith and Mr Raper.

24.6 On a specific point it is stated at the top of page 8 of the Guide (page 58)

“Tim at the Red ‘Reactive’ Phase

What is he like?

- Threatening and angry
- Swearing
- ‘In your face’
- May get physical with objects – might ‘push’
- ‘Storming off”

In this regard Mrs Clarke was again evasive in suggesting that far from being “What is he like?” that phrase meant what people with such brain injuries “could be like”, it did not mean “that is how they are going to be”. The Tribunal does not accept Mrs Clarke’s interpretation of that phrase, which clearly uses the word “he” and comes immediately beneath the personalised heading, “Tim at the Red ‘Reactive’ Phase”.

24.7 When asked whether Mr Clarke ever used the word “fucker” Mrs Clarke replied “not at work”. She was then asked whether that answer meant that he did use the word at home. She avoided that question and replied instead, “on the building site”. The building site is, of course, at work in respect of which Mrs Clarke had initially replied he did not use that word. She then confirmed that Mr Clarke did use the word, “now and again – sometimes”.

24.8 As to the pink calculator, the evidence in Mrs Clarke’s witness statement is that it “is mine and I am the only person that would use it”. In cross-examination, however, when it was pointed out to Mrs Clarke that that evidence was inconsistent with the evidence of other of the respondent’s witnesses, she suggested, “Obviously I got it the wrong way round. I know he did use it because I gave him mine”. This vacillation is compounded by Mrs Clarke then introducing into her evidence that she had written as much in a previous witness statement. She maintained that in that earlier version of her witness statement she had written, “I did offer Mr Brooks my calculator”.

24.9 Mrs Clarke returned to there having been such a previous witness statement in respect of the incident on 24 July 2017. She accepted that she had not set out in her current witness statement the oral evidence that

she was at the time giving to the Tribunal that on that day the claimant had been aggressive. She explained, however, that she had included that in her previous witness statement and had also included there having been an argument on that day and she having been assaulted and pushed by the claimant. Mrs Clarke accepted that these were central allegations yet they were not referred to in her witness statement or, indeed, in the formal response on behalf of the respondents (ET3). She could not offer an explanation why.

24.10 Further, in respect of that incident on 24 July 2017, Mrs Clark's oral evidence was, put simply, that the altercation was attributable to the claimant and that her husband had been "calm, very calm". She accepted that nothing of this was contained in her witness statement but explained again that she had put it in her previous statement and had merely relied upon her solicitor.

24.11 While it must be accepted that many things are possible, the Tribunal simply does not accept Mrs Clarke's evidence in the above respects. The Tribunal does not find credible her explanation that key details of her oral evidence, which she advanced to answer the evidence of the claimant that she had read in his witness statement and heard orally during the earlier part of the hearing, had been fully set out in a previous witness statement: that explanation is simply too convenient.

24.12 Mrs Clark's evidence was that 18 October 2017, when she became aware of the Winding-up Petition in respect of the respondent, was the worst day in her life, which she would never forget. Yet she also stated that two days later, on 20 October when she was in the midst of trying to deal with this at the offices of the respondent's accountant, Mr Lockett, and the claimant telephoned, she was not upset. Given that it is utterly reasonable that the events on 18 October 2016 would have amounted to the worst day in Mrs Clarke's life, the Tribunal does not find it consistent that when trying to deal with the 'fallout' from that with her accountant two days later she was not upset. This is especially so given that it was during this telephone call from the claimant that he stated that he intended to leave his employment as he could not put up with the abuse from Mr Clarke any longer. The Tribunal accepts the evidence of the claimant.

24.13 As to issues with the claimant's performance, Mrs Clarke said that, during their telephone call on 20 October 2017, she had asked the claimant to bear with them "while we've got this situation". That is not consistent with the evidence she and Mr Clarke now give that the claimant was the cause of the respondent's problems.

24.14 From the outset of these proceedings the respondents have advanced contentions to the effect that the claimant's "employment would have ended in any event". Only in cross-examination, however, did Mrs Clarke

state that four of the respondent's employees had resigned because of the claimant and, further, that she had two letters confirming that. As with many other documents, those letters had not been disclosed. She explained that her failure to disclose them was, "my misfortune". Any such resignations are not referred to in Mrs Clarke's witness statement or the ET3.

24.15 In her witness statement, Mrs Clark states, succinctly, "incidents of spraying on to persons and clothing never took place." That is inconsistent with the evidence of Ms Roberts about her having heard a conversation about such an incident when she was in the respondent's office a week or so, she thought, after the incident being talked about had taken place.

24.16 Two further points impact upon the Tribunal's assessment of Mrs Clarke's credibility. They are dealt with more fully elsewhere but it is appropriate to mention them briefly in this section of these Reasons.

24.26.1 Mrs Clarke denied that her husband had been irritated by Mr Smith arriving early for his interview on 16 October 2017 and directed his resultant anger at the claimant. For the reasons explained below, the Tribunal accepts the evidence of Mr Smith and the claimant in this respect.

24.16.2 Mrs Clark also denied that Mr Clarke had been angry during the incident on 24 July 2017 and that she had had to restrain him from assaulting the claimant. That is inconsistent with the evidence of Ms Roberts, which the Tribunal accepts, that she saw Mrs Clarke having to restrain him.

## The law

25 So far as is relevant to these proceedings the relevant statutory provisions are as follows:

### Equality Act 2010

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

26 Harassment

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

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

- (b) the conduct has the purpose or effect of—
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
  
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
  
- (5) The relevant protected characteristics are—
  - .....
  - sexual orientation.”

### **Submissions**

26 After the evidence had been concluded, the parties' representatives made oral submissions by reference to comprehensive skeleton arguments, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions.

### **Application of the facts and the law to determine the issues**

27 The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

28 The Tribunal first records two preliminary points as follows:

28.16 The Tribunal's task in this regard was made easier by the concession made at the Preliminary Hearing held on 7 March 2018, which is detailed above: in short, if we were to find that the incidents described by the claimant took place, that would amount both to direct discrimination and harassment contrary to sections 13 and 26 respectively of the 2010 Act. We have so found. As such, the claimant's complaints of direct discrimination and harassment are well-founded. The Tribunal nevertheless considers it appropriate that, notwithstanding that concession, it should briefly address the legal issues, which it does below.

- 28.17 Mr Clarke's evidence was that he did not know what the sexual orientation of the claimant was and did not need to know. That notwithstanding, having heard his evidence and that of the claimant and Mr Smith, the Tribunal is satisfied that Mr Clarke had a poor regard for the claimant and considered him to be what might be variously described as weak, soft or having a sensitive character. Whether the claimant was of homosexual orientation and whether Mr Clarke believed him to be of that orientation is, of course, not the issue; the issue is whether the conduct of which the claimant complains was because of (direct discrimination) or related to (harassment) a relevant protected characteristic; namely, in this case, sexual orientation: see Stephen English v Thomas Sanderson Limited [2008] EWCA Civ 1421.
- 29 Also by way of introduction, the Tribunal considered at some length whether the language that Mr Clarke directed at the claimant was related to or because of the protected characteristic of sexual orientation or was merely what might be loosely termed 'general abuse' or even, to adopt Mr Raper's word, "banter".
- 30 In this regard, the Tribunal is satisfied that Mr Clarke's reference to "gay" is related to or because of the protected characteristic of sexual orientation.
- 31 That is not so clear, however, in respect of his calling the claimant a "dodgy fucker", which is why Tribunal members specifically raised this point with the claimant. He answered that he "took it to mean that rather than being straight, I was dodgy - bent". He was asked whether he differentiated between being called a dodgy fucker and a gay fucker. He answered, "No, I took it that I was bent – not straight". It was further explored with the claimant that the word "fucker" can be a simple term of abuse but it also has a sexual connotation. He answered that in his mind Mr Clarke intended both. The Tribunal accepts that evidence and is satisfied that Mr Clarke's use of the phrase "dodgy fucker" is also related to or because of the protected characteristic of sexual orientation.
- 32 The Tribunal also accepts that Mr Clarke's use of the word "unclean" was similarly attributable to sexual orientation rather than a lack of cleanliness per se and, specifically, was not used by Mr Clarke because the claimant had brought dirt from sites he had visited on his clothing or shoes into the office; similarly Mr Clark's referring to the claimant as a "dirty fucker".
- 33 Mr Clark's references to "useless fucker" could be 'general abuse' and is certainly a stage further removed from the above terms but the Tribunal is also satisfied that such abuse was coloured by or tainted by Mr Clarke's view of the claimant and, therefore, such general abuse was also related to or because of the protected characteristic of sexual orientation.

*Harassment – Section 26 of the Equality Act 2010*

- 34 In the above context, the Tribunal first considered the question of harassment.

- 35 As will be clear from the Tribunal's findings set out above, it is satisfied that Mr Clarke in the course of his employment by the respondent conducted himself towards the claimant in front of others as the claimant has described. In light of those findings, with reference to section 26 of the 2010 Act, the Tribunal is unanimous in finding that Mr Clarke did engage in unwanted conduct related to the protected characteristic of sexual orientation.
- 36 Further, the Tribunal is also unanimous in finding that his conduct was for the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- 37 Nowhere is this more so than in respect of the Dettol spraying incidents during which the claimant was also subjected to oral abuse leading to him ultimately becoming cowed and submissive. In this regard the Tribunal accepts the evidence of Mr Smith that Mr Clarke dragging the claimant to his feet and spraying him with Dettol while calling him "dodgy gay fucker" and "unclean" was "specifically done as an attempt by Mr Clarke to show dominance and who was boss .... It was a way for Mr Clarke to prove who was calling the shots." It seems that in this Mr Clarke might have been successful given Mr Smith's oral evidence that at the end of this attack he considered the claimant to be "embarrassed and deflated".
- 38 The Tribunal is satisfied that Mr Clarke meted out such abuse to the claimant which, even in relation to that which might be described as being 'general abuse', was related to sexual orientation.
- 39 Lest the Tribunal be wrong in the above finding, however, it is unanimous in finding that Mr Clarke's conduct towards the claimant had the effect of violating the claimant's dignity and creating an intimidating, etc environment for him. That was the claimant's evidence and, having heard from him and all the witnesses who appeared before us, we accept it. We so find taking account (in accordance with section 26(4) of the 2010 Act) of the claimant's perception, the other circumstances of this case and whether it was reasonable for the conduct to have that effect. We are satisfied with regard to each of these three elements.
- 40 In summary, therefore, The Tribunal is unanimous in finding the claimant's complaint of harassment to be well-founded.

*Direct discrimination – Sections 13 and 39 of the Equality Act 2010*

- 41 The Tribunal's next considered the question of direct discrimination.
- 42 With reference to section 13 of the 2010 Act, the Tribunal is unanimous in finding that Mr Clarke treated the claimant less favourably than he treated or would treat others. This finding is borne out by, for example, Mr Clarke's treatment of Mr Raper, who the Tribunal accepts was described by him as "good guy" and,



although there was the single incident described by Mr Clarke and Mr Raper (which he referred to as “banter”), there were no other such incidents involving others such as Mr Raper, Mr Smith or Mr Hugill and certainly no physical assaults akin to the Dettol spraying incidents or physically manhandling them (even when Mr Smith was sitting in his daughter’s chair and dragging him out of it might have resulted) or repeatedly using such abusive language as “dodgy fucker” and “useless fucker”, which it is repeated the Tribunal is satisfied was used in the context of sexual orientation. While Mr Clarke might have been angry with others at times (for example during the incident when Mr Smith was sitting in his daughter’s chair) that was not unfavourable treatment because of a protected characteristic.

- 43 As was Mr Smith’s evidence, “Mr Brooks was singled out as Mr Raper and myself were not subject to any of the abuse I witnessed.”
- 44 Further, with reference to section 39 of the 2010, the Tribunal is satisfied that the respondent discriminated against the claimant by dismissing him (noting that the effect of section 39(7) is to include what is commonly referred to as being constructive dismissal) and subjecting him to other detriments as described above. In this regard it is repeated that the Tribunal accepts that the reason the claimant resigned was the conduct of Mr Clarke towards him and not simply because he has secured alternative employment.
- 45 In summary, therefore, The Tribunal is unanimous in finding the claimant’s complaint of direct discrimination to be well-founded.

*Statement of particulars of employment – Section 1 of the Employment Rights Act 1996 and section 38 of the Employment Act 2002*

- 46 Section 1 of the 1996 Act requires that when an employee begins employment the employer shall give to him or her, no later than two months after commencement, a written statement of particulars of employment. The respondent failed to comply with this statutory requirement. It did, however, send him a contract of employment on 6 September 2017.
- 47 In circumstances such as exist in this case, section 38 of the 2002 Act requires a Tribunal to make an award against the employer in favour of the employee but only if the employer was in breach of this duty, “when the proceedings were begun”. The claimant presented his complaint in these proceedings on 9 January 2018 and, therefore, the respondent was no longer in breach of its duty in this regard.
- 48 In these circumstances the claimant withdrew this aspect of his complaints, which is dismissed by consent.

## Remedy

- 49 The Tribunal considered whether it had sufficient evidence to proceed to determine remedy in this case. While to do so would obviously obviate the need for a further hearing and, at least superficially, that would accord with the overriding objective, the Tribunal is quite satisfied that it would be inappropriate, indeed unjust to the parties for it to do so in the absence of further evidence. As each of the representatives said, they could not properly address the question of injury to feelings without knowing the Tribunal's decision.
- 50 Such further evidence might fall into many categories but would include, for example, such matters as any losses suffered by the claimant arising from the discrimination/termination of his employment; where, if it all, any 'cut off' in respect of any such losses should be applied; the extent of any injury to the feelings of the claimant; whether the conduct of Mr Clarke and/or the respondent is such as to warrant an award of aggravated damages, which aspect was raised by the claimant's representative in submissions but had not been ventilated during the course of the hearing.
- 51 A further consideration, which for obvious reasons was not addressed at the Tribunal hearing, is whether any award of compensation should be made on a joint and several basis as between Mr Clarke and the respondent
- 52 In these circumstances, this case will now be listed for a hearing to consider remedy.

**EMPLOYMENT JUDGE MORRIS**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 3 September 2018**

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