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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. A Smith

**Respondent:** Saxton 4x4 Limited

**Heard at:** East London Hearing Centre

**On:** 5<sup>th</sup> - 7<sup>th</sup> February & 15-17<sup>th</sup> May 2019

**Before:** Employment Judge McLaren

**Members:** Mr. T Burrows  
Mr. T Brown

## Representation

**Claimant:** Mr. L Dilaimi Counsel

**Respondent:** Mr. T Perry Counsel

# JUDGMENT

It is the unanimous decision of the tribunal that

1. The claimant was the victim of harassment relating to sexual orientation in relation to 3 specific incidents, two of which occurred on 5 June 2015 and one of which occurred on 6 June 2015.
2. The claimant's grievance on 12 June 2015 was a protected act, however, the claimant was not treated unfavourably because of that protected act.
3. The claim for harassment succeeds in part, the claim for victimisation is not upheld.

# REASONS

## Background

- 1 The respondent is a family owned business selling high end second-hand vehicles to the general public. It employs between 80 and 100 staff in its showrooms in Chelmsford. The claimant was employed for some 15 months as trainee Business Manager His employment ended, either on 17<sup>th</sup> August as the claimant resigned, or on 4<sup>th</sup> September 2015 for alleged gross misconduct.
- 2 The claimant brings a complaint of harassment and victimization We heard evidence from the claimant on his own behalf and from Miss X in support of his case.
- 3 The respondent also called witness evidence from Mr. Healey, Mr. D Austin, Mr. Cripps and Mr. A Austin. In addition, we were provided with a bundle numbering some 386 pages. We were also provided with skeleton arguments by both parties and had the benefit of submissions. In reaching our decision we considered this witness evidence and such parts of the documentary evidence to which we were referred.
- 4 We have referred to the witness who supported the claimant as Miss X because she had given evidence in another case for which an anonymity order had been made. The parties requested that her anonymity be preserved as much of the evidence she gave covered the same ground for which the prior order had been made. The respondent did not object and we agreed to do this.

## Amendment

- 5 On day 4 of the hearing the claimant applied to amend his claim form. We considered Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT. That provides that in determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.
- 6 In Selkent, the then President of the EAT, Mr. Justice Mummery, explained that relevant factors would include:
  - (a) The nature of the amendment  
Applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations that change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.
  - (b) applicability of time limits  
If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause

of action is out of time and, if so, whether the time limit should be extended

(c) timing and manner of the application

An application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor.

- 7 In the context of the discretion whether to allow a proposed amendment, the first key factor identified was the nature of the proposed amendment. Selkent made it clear that this should be considered first, before any time limitation issues are brought into the equation, as it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from 'relabelling' the existing claim.
- 8 We concluded that this amendment is the addition of a new facts but accepted that it arises from the same factual matrix against the same witnesses and on the same legal basis as the other complaints.
- 9 Turning then to the speed in which the claimant made the application, we accept that he was not legally represented at the time he put the claim form in and find that it is not unreasonable for a claimant not to consider a claim could be brought about matters which occurred a considerable period after his employment ended. He was, however, represented in February and an amendment application could have been brought then and not at the start of day 4 of this part heard matter.
- 10 We have gone on to consider the balance of justice and the comparative hardship to either party should we amend or refuse this amendment. The respondent has indicated it is able to continue without any adjournment if this amendment is permitted. Despite the delay in making the application, we determined to allow the amendment because the relevant document is already in the bundle and we have yet to hear from the relevant witness. The prejudice would therefore be greater for the claimant if we were not to permit the amendment than to the respondent in allowing it.

### The issues

- 11 At the outset of the hearing the issues of fact and law we must determine were confirmed by the parties as those set out in the case management discussion of 22<sup>nd</sup> June 2018 as set out below (amended to take account of the additional point raised).

### . Section 26: harassment relating to sexual orientation

- 12 Did the respondent engage in unwanted conduct as follows?
- (i) 30/5/15: in front of Mr. J Healy, Mr. D Austin and Mr. A Rushen, Mr. Traylor called the claimant" a faggot,a cock sucking prick and/or gay twat";
  - (ii) 5/6/15: in front of colleagues, Mr. Traylor accused the claimant of calling him a fucking liar;

- (iii) 5/6/15: Mr. Bowman (a technician) said to the claimant I hear you like moustaches and hairy arses;
  - (iv) 5/6/15 Mr. Traylor said to the claimant that Mr. Healey was feminine in his mannerisms and greeted a colleague in a gay way;
  - (v) 6/6/15: Sharon (a cleaner) told the claimant that Mr. B Florey had described the claimant as a shirt lifter, and he felt that he had better watch himself working with the claimant;
  - (vi) the respondent's failure to stop or prevent such comments despite managers Mr. Danny Austin, Mr. Glenn Austin and Mr. Neil Cripps being aware of the same;
  - (vii) interviewing all members of staff and staff at external finance suppliers as part of the claimant's grievance investigation
  - (viii) 27/6/15: failure to uphold the grievance and finding that the claimant had instigated inappropriate sexual comments;
  - (ix) taking unwarranted disciplinary action against the claimant for allegedly sexually inappropriate comments and showing inappropriate material on his mobile telephone;
  - (x) 17/8/15: requiring the claimant to attend a disciplinary hearing;
  - (xi) the cumulative effect of such conduct causing the claimant to resign on 17 August 2015
  - (xii) October 2017 not providing a reference to the claimant on request by a new employer
- Was the conduct related to the claimant's sexual orientation?
  - Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Section 27: victimisation

- 13 Was the claimant's grievance on 12 June 2015 a protected act?
- 14 Did the respondent treat the claimant unfavourably because of that protected act?
- 15 The claimant relies upon the following:
- (i) 22/6/15: in the grievance investigation meeting, focusing on the claimant's conduct as instigator is not as the victim of inappropriate conduct;
  - (ii) failure to investigate the grievance in a neutral manner;
  - (iii) 27/6/15: failure to uphold the grievance and finding that the claimant had instigated sexual comments;

- (iv) 1/7/15: decision to commence disciplinary action against the claimant for alleged gross misconduct;
  - (v) 7/7/15: failure to deal adequately with the claimant's appeal against the grievance outcome, in particular delay and failure to consider his complaint fairly and neutrally;
  - (vi) 14/8/15: not upholding the claimant's appeal against the grievance outcome;
  - (vii) 17/8/15: requiring the claimant to attend a disciplinary hearing;
  - (viii) the cumulative effect of such conduct causing the claimant to resign on 17 August 2015.
  - (ix) October 2017 not providing a reference to the claimant on request by a new employer
- 16 While the claimant's schedule of loss had referred to damages for wrongful dismissal and for holiday pay, these claims had not been brought and their inclusion in the schedule was an error.

Relevant law

- 17 There was no dispute on the relevant law. Three forms of behaviour are prohibited under S.26 EqA, which is entitled 'Harassment' 'general' harassment, i.e. conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) sexual harassment — S.26(2), and less favourable treatment following harassment — S.26(3).
- 18 The general definition of harassment set out in S.26(1) applies to all protected characteristics, except marriage and civil partnership and pregnancy and maternity. It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).
- 19 We were referred in submissions to Richmond Pharmacology v Dhaliwal [2009] IRLR 336 in which the EAT considered the definition of harassment and set it out this way.
- 1) *The unwanted conduct.* Did the respondent engage in unwanted conduct?
  - 2) *The purpose or effect of that conduct.* Did the conduct in question either:
    - (a) have the *purpose* or
    - (b) have the *effect*of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her?
  - 3) *The grounds for the conduct.* Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?

- 20 We were reminded of Grant v Land Registry [2011] ICR 1390 paragraphs 12 and 47, we were also referred to Heafield v Times Newspapers Ltd UKEAT/1305/12 [2013] EqLR345, [2012] All ER(D)26 that even if the conduct in question has the proscribed effect, the purpose of the conduct is still relevant to establishing the overall context.
- 21 It was agreed that constructive dismissal could not constitute a ground of harassment.
- 22 The Equality Act 2010 (EqA) includes a specific provision outlawing victimisation. S.27(1) provides: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'
- 23 It follows from S.27(1) that a claimant seeking to establish that he or she has been victimised must show two things: first, that he or she has been subjected to a detriment; and, secondly, that he or she was subjected to that detriment because of a protected act..
- 24 The following are 'protected acts' for the purpose of S.27(1):
- bringing proceedings under the EqA
  - giving evidence or information in connection with proceedings under the EqA
  - doing any other thing for the purposes of or in connection with the EqA, and
  - making an allegation (whether or not express) that A (the alleged victimiser) or another person has contravened the EqA — S.27(2)
- 25 The protected act does not have to be the only, or even the main, reason for the treatment complained of, but it must be an effective cause.

#### Burden of proof

- 26 Igen v Wong Ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.
- 27 The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

Findings of Fact

The claimant's role and salary

- 28 It was agreed that the claimant started employment with the respondent on 16 June 2014. His role was trainee business manager. He was originally paid a modest basic salary which was intended to rise by some £3000 after six months or so. The respondent could not recall whether the raise had happened. He was one of three business managers in the organisation. All three shared a commission pool.
- 29 Some six weeks into his employment the office was organised into teams so that the claimant was responsible for working with three particular salespeople. This included Mr. Traylor.
- 30 The claimant was paid salary and commission which he could only earn by selling additional products, such as insurance or warranties to a customer who had already bought a car. He therefore relied upon his three salespeople making sales for him to have the opportunity to earn commission. The claimant says that he had no reason to seek to pick fights or annoy his sales team as he depended upon their efforts to increase his own income. Mr. Healy gave a very different account. His evidence was that both he and the claimant had issues with Mr. Traylor and that he, Mr. Healy, used to support and encourage the claimant to push Mr. Traylor to extreme and take issues too far. By his account the claimant would deliberately attempt to frustrate Mr. Traylor.
- 31 On the balance of probabilities, we find that the claimant did not deliberately seek confrontation with Mr. Traylor. We accept that it was not in his interests to do that. When incidents arose, Mr. Healey did indeed encourage the claimant to pursue these, but that is not the same as actively seeking confrontation.

Company handbook

- 32 The respondents have a staff handbook which includes a grievance procedure, a copy of which was at page 230. This provided that for an informal procedure the matter is to be discussed with the line manager who will discuss the grievance fully with the individual and then try to find a solution, giving a written decision usually within 10 working days of receiving the grievance.
- 33 The policy then sets out that if an employee is dissatisfied with the outcome of an informal procedure, they should send the grievance in writing to the general manager. An investigator will be appointed, and the employer will be told the name of that investigator. There will be an interview and a report will then be presented to the general manager as soon as practicable. Once the report has been received a meeting will be arranged to discuss the grievance and the employee has the right to come to that meeting with a colleague or trade union representative. The general manager will consider the grievance after representations have been made by the employee and the decision given in writing. The handbook also sets out an appeal procedure.
- 34 The handbook contains an equal opportunities policy and a harassment policy.

The harassment policy and the grievance policy are different and while the procedure set out is similar, they have a different ethos. Alan Austin explained that at the time of the claimant's employment he had no HR Officer, relying instead on the expertise of his chief financial officer. When the claimant initiated a formal process, he dealt with it under the grievance policy and not under the harassment policy

- 35 The handbook also provides that staff will be trained on equal opportunities and this had not occurred.
- 36 We find, as the respondent's Counsel accepted in submissions, that the process used both to investigate the claimant's grievance and the disciplinary was muddled and certainly not in accordance with the published process or ACAS best practice. The roles of decision maker and investigator were confused throughout grievance hearing, the appeal was carried out by Mr. Cripps who was involved in the grievance investigation, Mr. Cripps (while not the disciplinary chair) was involved in the disciplinary hearing when it is clear from the grievance appeal outcome, he had already concluded there was a case to answer. The claimant was suspended after the investigation was concluded, his email was cut off before he was dismissed, and the respondent says that they had received complaints from staff prior to the grievance but these are not shared with the claimant.
- 37 There are many procedural errors. We accept that these arose because this is a small respondent, without, at the time, appropriate HR support and because the claimant had requested the grievance be dealt with by the managing director. The claimant also accepted Mr. Cripps as appeal chair, although he had been offered an external third party. We find that there was no significant delay in dealing with the appeal We do not find that any of these failings amounted to harassment or victimization.

#### Events prior to 31 May

- 38 The claimant's account is that he is a very private person and while he never denies his sexual orientation, he does not always volunteer it. His statement said that when he first started working for the respondent, he tried to portray himself as heterosexual as he was working in a very male environment and he was concerned about being ridiculed. He explained that about a month after he joined the respondent Ms. Banks, an administrator, asked about his sexuality on many occasions.
- 39 At around the same time Mr. Gray and Mr. Dunnachie, constantly questioned him about girls and what he was up to and ask him about his sexual orientation. The claimant did not feel comfortable discussing this with these individuals. After a few months and many questions, he did, however, disclose his sexuality to Ms. Banks, hoping that she would help him cover it up. The claimant's evidence is that Ms. Banks would engineer opportunities to make him appear heterosexual by making comments that the claimant had commented on for example her breasts. Ms. Banks provided a written statement but did not attend in person. In her statement she expresses her concern that her texts et cetera have been shared, but she does not dispute the claimant's evidence on this point. We accept the claimant's evidence and



find that at least some of the comments of a sexual nature made in the workplace and attributed to the claimant were made deliberately by Ms. Banks in order to assist the claimant appear to be straight.

- 40 We noted an exchange of texts at page 394-8. These texts were sent in September 2014. We find that the claimant came out to Ms Banks in these texts. At page 395 the claimant is asking Ms Banks to keep his sexuality quiet and he makes it clear that he is concerned about this matter spreading. On page 397 the claimant has also told Mr. Healy. It's unclear whether this was on the date of the text or previously. Mr. Healy's recollection was that he was aware of the claimant's sexual orientation, but he thought he had been told a little earlier than September.
- 41 From page 193 of the bundle it is also clear that Warren Bean is aware of the claimant's sexual orientation, he makes a comment about the claimant having "a very gay mouth". We accept the claimant had not confided in Mr. Bean. We find that in 2014 the claimant is reserved about his sexual orientation and chooses who to come out to in the work place.
- 42 We find that as at March 2015 the claimant continued to be reserved in the workplace. The claimant referred to an incident on 7<sup>th</sup> March 2015 when a driver for the respondent, who was test driving a car with a family friend of the claimant, asked this potential customer about the claimant's sexuality. The texts relating to this incident were in the bundle pages 159 to 160. It is clear from this the claimant is taking issue with information about his sexual orientation being discussed.

#### The office environment

- 43 We find that at least some of the staff within the respondent's work environment used swear words and sexual innuendo in the form of "banter". Indeed, during the investigation which the respondent carried out following the claimant raising a grievance, staff admit to this. Mr. Jason Watts explains that he is a cheeky chappie. One of the receptionists refers to there being small banter. This point is not picked up or actioned by Mr. Austin on the basis that the woman who said this is extremely attractive so people would try their luck, but she gave out an air that this would not be welcome, so people knew their boundaries.
- 44 We also considered the texts from the claimant to and from his work colleagues and the language used in these. We consider it unlikely that those involved would use entirely different language at work or that they were alone in this use of language. At page 193 Mr. Bean is talking about a customer as a "fucking Polish prick". At page 188 an exchange between Mr. Healy and the claimant the phrases "knob head" and "penis of a man" are used as terms of abuse. Page 165 to 186 contain multiple exchanges between Chloe Banks and the claimant which is full of bad language and vulgar comments. It then moves beyond this to explicit pornographic content sent on 30 May 2015. We note the claimant does not respond to this.

- 45 We find on the balance of probabilities that similar language was used routinely in the work environment by many and was not limited to the claimant and his close work colleagues. Anglo-Saxon expletives appear to have been normal in exchanges.

Evidence of Miss X as to the work environment

- 46 Miss X was a former employee of the respondent having worked in the reception area. She brought tribunal proceedings against the respondent and the claimant had provided witness evidence in support of her claim. This had been disallowed by the tribunal as not relevant to the issues in Miss X's case. It was put to Miss X that she was supporting the claimant in this case to return the favour. Her evidence was that she was doing the right thing and supporting somebody who had gone through the same sort of things that she had had to deal with.
- 47 She also explained that there were some three or four people in the sales area who were regular offenders and who used very offensive language both between themselves and to the women in the reception admin team. Her attention was drawn to page 252 of the bundle which sets out a series of comments attributed by the respondent to the claimant. Miss X confirmed that in her experience comments of this nature were made regularly by three or four members of the sales team. She did not hear the claimant make such comments.
- 48 We accept the evidence of Miss X as to the nature of language in the office and those who were involved in it.

The events of 30 May up to the raising of the grievance

- 49 The main incident occurred on 30 May. The claimant agrees that there was an exchange in the office. On the claimant's account Mr. Cliff Traylor shouted across the office to him asking to get a customer quote immediately. The claimant objected to being shouted at in this way and went into the sales office closing the glass doors behind him. The exchange became heated, the claimant told Mr. Traylor he was being rude and called Mr. Traylor "a twat" to which Mr. Traylor responded by calling the claimant "a dick".
- 50 What happened next is disputed. The claimant's account is that as he started making his way out of the office area, he heard Mr. Traylor called him a faggot, cock sucking prick and gay twat. He believed that everybody in the office area heard this abuse and as the doors were still closing those in the showroom area also heard part of this abuse. The claimant said this made him feel scared shocked and offended and unsure how to deal with the situation.
- 51 For various reasons the claimant and Mr. Traylor did not meet again until 4 June and the claimant said he managed to avoid Mr. Traylor that day. On 5 June, however, Mr. Traylor was sitting at his desk and the claimant was also in the sales office. Mr. Traylor asked the claimant for confirmation in relation to some customer funds. The claimant said he could not process this verbal request quickly enough because he was scared and said that Mr. Traylor then shouted at him saying "so now I'm fucking liar am I".

- 52 The claimant says Mr. Healy intervened in this altercation and the matter was resolved. In oral evidence Mr. Healy's account was unclear as he could not remember events. His witness statement does, however, confirm that he resolved this issue.
- 53 On the claimant's account it was during this conversation that he told Mr. Healy that he thought perhaps he should look for another job as Mr. Traylor was making things very difficult for him and they discussed the claimant making a formal complaint.
- 54 On the same day, 5 June, the claimant says that Mr. Traylor made fun of Mr. Healy saying that Mr. Healy was effeminate, miming his wave to Mr. Watts and calling him "a bit gay". The claimant felt that this was directed at him.
- 55 Mr. Healy confirmed the claimant had told him about this at the time. Mr. Traylor, in answer to cross-examination questions, confirmed that he had said that Mr. Healy was feminine in the way that he greeted Mr. Watts. He did not recall if he gave an impression of Mr. Healy's wave and said that he had never used the word "gay". Even if he did not use that word, we find that this was mocking directed at the claimant based on his sexual orientation.
- 56 On the same day the claimant said that while waiting to get food for mobile food vendors he was asked by a mechanic for the respondent, Mr. Bowman, if he liked moustaches and a hairy arse. The claimant accepted that he answered this in a jokey way but explained that he did this in order to deflect comments. The respondents subsequently disciplined Mr. Bowman for this conduct and accepted that it was inappropriate.
- 57 By the end of this day the claimant decided he did need to speak to somebody. As Mr. Allen was not due back from his leave for another week the claimant then decided to speak to Neil Cripps and raised a complaint about Mr. Traylor's behavior. Mr. Cripps told him that he would come back to him.
- 58 On 6 June, while in the kitchen, the claimant was speaking with Sharon Kenton who was employed to clean the offices at the weekends. Sharon told the claimant that a new sales executive had made a comment that he had not realised the claimant was a shirt lifter and that he had better watch himself around the claimant.
- 59 This lady was not interviewed as part of the grievance (although Mr. Austin did speak to the man who was said to have made this comment) because Mr. Austin considered that Sharon was not an honest witness having had some personal dealings with her in her capacity as his domestic cleaner. She did not provide a witness statement. On the balance of probabilities, we accept the claimant's account that he was told this by Sharon as there was no compelling evidence from the respondents to the contrary. We find that this comment made was homophobic and relied on a stereotype of a gay man as a sexual predator. We are not finding that the individual made this comment, merely that Sharon told the claimant it had been said.
- 60 The claimant said that he felt very paranoid and anxious for the next few days and accordingly put in a request for holiday, asking to take the 11<sup>th</sup> 12<sup>th</sup> and 13<sup>th</sup> of June as leave. On Wednesday, 10 June his regular day off, the claimant was texted by Mr. Cripps refusing permission to take Thursday off. This was

set out in the texts as being for business reasons. The claimant made it clear in his response that he was asking for time off because he was unable to cope with the events that had occurred, and he made it clear that he would not be able to attend work. Mr. Cripps nonetheless said that he was expected to attend work. The claimant explained that he had customarily put in leave applications a few days before when he wanted to take leave, and this has been granted in the past. The claimant did not raise this as an issue in the case.

### The grievance procedure

- 61 On 11 June the claimant was instructed by Mr. Cripps to attend a formal meeting with him and Allen Austin to discuss the claimant not attending work on 11 June. On 12 June the claimant made a formal complaint against Mr. Traylor by email to Alan Austin and Neil Cripps. This is at page 62 to 64. The claimant was signed off sick by his GP with stress at work.
- 62 Alan Austin confirmed that the claimant had asked him to investigate and therefore he treated himself as investigating officer with Neil Cripps being present throughout the process to advise him
- 63 The claimant was invited to a meeting on 15 June, the invitation to this meeting described as a formal meeting, but no notes were taken. Following that the claimant was sent a letter dated 17 June requiring him to attend a formal investigatory meeting. In that invitation the prior meeting is referred to as an informal meeting. Page 66 the bundle.
- 64 Alan Austin explained in his evidence that he had known nothing about the whole exchange between the claimant and Mr. Traylor until his first day back after holiday. On that first day he said that lots of staff were keen to talk to him to tell him what had happened and to say that the claimant had also used bad language towards other people including suppliers. He told all staff who tried to speak to him that he could not listen at that point, the matter would be dealt with properly and he would come to them in due course. He confirmed that going into the process with the claimant, while he tried to be neutral and fair, he already had in his mind these allegations about the claimant's conduct. He knew that he intended to investigate more widely into the claimant's conduct. He did not explain this to the claimant.
- 65 We find that Mr. Austin is a conservative individual who was genuinely concerned and shocked by the allegations made both by the claimant and about him. His motivation in investigating was to uncover what had happened and to make sure that he was protecting all his staff for whom he felt a strong duty of care.
- 66 Mr. Cripps was asked if anyone had complained to him about the claimant's conduct after the grievance was raised and before it was investigated. He originally, on the first day of this resumed hearing, said no. On the second day of the resumed hearing he changed his evidence to say several people had complained to him. We do not accept his account and find his earlier answer to be more credible. We do, however, accept Mr. Austin's account and find that prior to going into the claimant's grievance he already had in his mind

complaints about the claimant's own conduct.

- 67 The claimant attended the investigation meeting on 22 June and a full transcript of that meeting was available at pages 276 to 300 of the bundle. At the outset of that meeting the claimant states that his actual grievance is against Mr. Traylor and all the other names mentioned were a build-up of stuff from the week. We accept the claimant's grievance is only against Mr. Traylor and that he was not raising complaints about the other incidents.
- 68 The claimant gives more details about what happened between him and Mr. Traylor on 31 May and makes it clear that John Healy heard about it as he told the claimant afterwards. He also referred to the incident on 4 June when he said Cliff Traylor asked the claimant if he was calling him a liar. It explained the Paris Bowman incident but again at page 294 of the bundle said that the actual grievance was about the incident had taken place with Mr. Traylor.
- 69 Neil Cripps explained to the claimant in this meeting that he is going to suspend both him and Mr. Traylor and that they are going to expand the scope of the investigation beyond just employees of the company that they may be going out to Santander or different finance houses to ask about sexual innuendo more generally. We find that the respondent is taking this step because prior to the meeting with the claimant Mr. Austin had been told by several staff that the claimant made inappropriate sexual comments. He was not therefore, solely investigating the claimant's grievance but had widened the scope of the investigation into the claimant's conduct as well. This was prior to having any official information that there could be an issue with the claimant's conduct. This was, as the claimant feared, an investigation into his conduct as well as into the facts that he raised in his grievance.
- 70 The claimant sent a follow-up email the same day, page 80 of the bundle questioning this. He raised the fact that he felt like he was being put through a disciplinary. The decision to go outside the company was not addressing his grievance but was about him. Mr. Austin believes that he replied to this email and sent a response on 23 June. This is pages 81 to 82 of the bundle. The claimant says he did not receive this response does not believe the document was written at the time. We were provided with a Microsoft outlook message at page 399 with purported to show that this document was received on 23 June, but the read receipt was not sent back. Looking at the document it does seem to us to address the points that the claimant had made, and we accept the respondent's position that this was written at the time. We also accept; however, the claimant did not see the email when it was sent and has seen it only as part of the disclosure exercise for the tribunal proceedings

#### Formal versus informal procedure

- 71 The claimant at page 63 of the bundle in his grievance complaint to Alan Austin refers to his first conversation with Mr. Cripps. He records Mr. Cripps saying that the claimant could end up being ostracised if he took this too far. The claimant did not understand what constituted too far. We accept this comment was made as the claimant refers to it in near contemporaneous documentation. We find it was capable of being a deterrent and was intended to make the claimant think about not pursuing the issue.

- 72 In the meeting on 22 June the claimant is told that the investigation will be wider. At page 74 Mr. Cripps makes the comment that whether the claimant likes it or not all those individuals will have to be investigated to establish what has taken place. At page 76 Mr. Austin states to the claimant that he doesn't think he understands the need for investigation which is inclusive of how both the claimant and Mr. Traylor portray themselves under the company banner. Mr. Cripps at page 77 says that the official route is that we have the grievance and we will be asking individuals to come into the office and state what was said when it was said and how it was said and that was normal practice. Page 77 Mr. Austin says if he could have dealt with informally, he could have wrapped it all up quicker he would have tried to find some middle ground but is not been allowed to do that. "We have to follow formal route that is serious it could cost a person his job."
- 73 The transcript of this meeting which starts at page 276 notes at page 279 Mr. Cripps saying "you might not like formal way. You might not like we have to do however that's what we have to do as a company, that means whether that's the right outcome for you personally, whether that's the right outcome for the company, whether that's the right outcome for Cliff, I'm not interested, I'm interested in the right outcome."
- 74 The grievance outcome hearing at page 302 notes that a lot of time and effort went into the investigation. The outcome letter at page 144 states again that the claimant was told that he might not like formal route, but it was his decision.
- 75 The claimant characterises these comments as a threat aimed at preventing him taking the formal grievance route. In their oral evidence Mr. Cripps and Mr. Austin confirmed that they were warning the claimant that things were going to come out about him because they had, on their evidence, already had complaints made to them about his conduct. They did not make this clear to the claimant. He was surprised by the scope of the investigation.
- 76 We find that the handling of these meetings was clumsy and not in accordance with best practice, but we accept that once the matter started and Mr. Austin was involved, these comments were not intended to be a threat to deter the claimant from bringing his case forward. They reflect Mr. Austin's preferred style of amicable resolution.

### The investigation

- 77 On 24 June 2015 Alan Austin and Neil Cripps held investigatory meetings with Cliff Traylor, sales executive, Adam Rushton, salesman, Amelia Palmer, receptionist, Kieran Kirby, salesman and Bill Florey salesman
- 78 The following day they held investigatory meetings with John Healy, business manager, Paris Bowman, technician, Andy Vowles, business manager, Karl Donnelly salesman, Grant Richardson, salesman, Jason Watts, salesman, Dean Wilson, salesman, Simon Pring, salesman and Callum Connolly, salesman.
- 79 On 26 June they held a further three meetings with Warren Ben, salesman Daniel Bryant, senior buyer, and Danny Austin, director. On 29 June five more employees are interviewed, Miss X, Taylor Chapman a receptionist Natalie

Hickmore a vehicle administrator, Natalie Archer, accounts assistant and Chloe Banks, assistant accountant.

- 80 In total 21 employees are interviewed as part of the grievance investigation. Of those interviewed for were present and witnessed the altercation on 30 May the others were not. The claimant complains that the interview process was not carried out in a neutral way. He differentiates between being asked whether comments of a sexual nature had been made and homophobic comments. He complains that the 21 witnesses are not asked questions that distinguish between these two types of comments.
- 81 In reviewing the witness statements, we find that those were said to be present on 30 May, that is Mr. Healy, Mr. Dan Austin, Mr. Bryant and Mr. Rushen were asked "can you tell me exactly what had taken place". Mr. Cripps said that they were anxious to discover what had occurred without putting words into anybody's mouth and therefore asked an open question in this way. These four individuals were then asked a second question, whether there had been any sexual comments or innuendo in the office.
- 82 In the statements made by those who are present nobody said they heard the words complained of by the claimant. Mr. Rushen said that he was not sure what was said word for word, but he was not asked any follow-up question about the gist of the comments. The claimant had been in touch with Mr. Rushen by text and at page 201 of the bundle he tells the claimant that in his interview he had said they did not know exactly what was said but "I know it was about sexuality but I don't know the words". At page 207 he also tells the claimant that the respondent was only jotting down bits and that he had told the respondent that the comments made were not banter. This does not come across from his witness statement.
- 83 Mr. Healy told investigation that it was just sexual comments the usual "fuck off" and "cunt". This is very different from the impression he gives the claimant as to what he had heard. Page 190 is the exchange of texts between the claimant and Mr. Healy. In his evidence Mr. Healy told us that he had gone along with the claimant and agreed that the words were as the claimant said. He had not disbelieved the claimant when he said this is what Mr. Traylor said, but he hadn't heard them. His texts did not say that but suggested that he did not want to get involved because he wanted "longevity" and didn't want it to turn out "you and me against them".
- 84 The claimant's case is that Mr. Healy's lack of support in the investigation process was motivated by fear of job loss, relying on this exchange in the texts. Mr. Healy's evidence is very different. He says that when faced with Mr. Austin and having to give a written statement he felt he needed to tell the truth that he had not in fact heard the words. He did accept that he had egged the claimant on by his conduct.
- 85 Dan Austin in his interview says that the comments were not of a sexual nature and that following the altercation Mr. Traylor went into the kitchen. Daniel Bryant said that the words used were "dick" and "cunt". He also says that after the altercation Mr. Traylor went into the kitchen and continued to moan. This would be consistent, to some extent, with Mr. Healy's report to the claimant that Mr. Traylor continued his comments after the claimant had left the room. It

appears, however, from the evidence of those who were present that this altercation and continued abuse at the claimant had left the room was in line with the usual level of obscene language used among the respondent's employees but did not move into homophobic abuse.

86 The claimant's witness statement identified that Mr. Glenn Austin had been present on the day of the incident. He had not been interviewed. This was put to Mr. Austin who confirmed that Glenn was not in fact on the office that day. We accept this and find that this is simply the claimant misremembering details that occurred at a number of years ago.

87 Those 17 who were not present on the Saturday were asked if there had been any sexual comments or innuendo used in the office. All 21 were asked who had instigated these types of comments. Of these 21 only three witnesses did not say that the claimant instigated these comments. One was Mr. Bowman whose own conduct was the subject of a disciplinary investigation. The other two were receptionists, Ms Palmer and Miss X.

88 The comments attributed to the claimant were set in the investigation statements and were summarised at page 252. We find that some of these are in line with the general language used by staff (use of f\*\*\* and c\*\*\*) some are more mildly offensive (your arse is looking nice today) and some are offensive and aggressive.

89 We find that there was a consistent approach to the gathering of evidence which was dependent upon the group to which the witness belonged. The overwhelming response from almost all of those spoken to was that it was the claimant who instigated sexual innuendos.

90 While there are, as we have already identified, many procedural errors in the way in which the respondent went about this investigation we find that the questions asked of the witnesses were proper ones. They were asked in a similar form of all witnesses and they were asked in a neutral way in that they are not leading questions that suggested an answer. We are satisfied that the approach to the grievance was carried out in a neutral manner.

91 Having reviewed the 21 witness statements Mr. Austin formed the view that the conduct and behaviour of the claimant required further action. He considered the witnesses remarks regarding the claimant's conversations in the workplace to be shocking as the testimonies mention the claimant consistently used language of a pornographic, distasteful and offensive nature. Mr. Austin took the view that he had a duty to protect other employees from being further subjected to unacceptable behaviour and conduct. He accordingly produced a report of his findings on 27<sup>th</sup> of June and on 3 July a formal meeting was held to discuss the outcome of the grievance investigation.

92 That meeting was conducted by Alan Austin with Neil Cripps attending. The claimant was told that his grievance was not upheld. The decision maker was Mr. Austin and he was very clear in his evidence throughout that having reviewed all the statements he determined on the balance of probabilities that Mr. Traylor's conduct was unacceptable but there was no evidence to suggest he had made any homophobic comments. Mr. Traylor was accordingly issued with a final written warning which remained on his record for 12 months.



- 93 Whether Mr. Traylor did or did not make the comments which led to the claimant's grievance was of course a hotly disputed issue in these proceedings. We find that the comments the claimant says he heard were not made. The claimant has been consistent in his evidence that they were said loudly enough for the whole office to hear and some people in the showroom, yet no one else confirms this. We accept that nobody else heard these comments. The claimant suggests that all the witnesses were in some way or other intimidated and unable to tell the truth for fear of consequences, mainly job loss. We do not find it credible that individuals, including the owner's son, would be concerned in this way.
- 94 The claimant suggests that one of the reasons the investigation did not uncover homophobic comments was because the questions were not put in an appropriate way. We do not accept that. We find that the questions were consistent and that open questions were asked of those who were present and could therefore be witnesses to the apparent homophobic comments. We accept that all staff are then asked about comments of a sexual nature or innuendos and not specifically about homophobic comments, but we find that these questions were to deal with the matters that have been raised to Mr. Austin about the claimant's own conduct.
- 95 In answer to this question nearly all the witnesses referred to crude and vulgar comments they say the claimant had made. The claimant denies that he made any such comments in the workplace. On balance we find that the weight of evidence is against the claimant on this point. We can find no reason for so many people to engage in a conspiracy against the claimant by giving false accounts. We therefore find that the claimant did make the comments attributed to him and therefore do not find him to be a credible witness on this point. Accordingly, we prefer the account of Mr. Traylor, supported by three other people, as to the nature of the words exchanged between them. We accept that there was a heated exchange, but we do not find it to contain the homophobic comments as alleged.
- 96 The claimant suggests that the outcome of his grievance was predetermined by Mr. Austin well before the investigation completed. He relies on the fact that the decision in written format was prepared on 27 June and yet five interviews were carried out on 29 June. We are satisfied that at the point of writing the conclusion Mr. Austin had interviewed most witnesses and certainly all those who were present at the time of the alleged incident. We do not find that he had predetermined the outcome.

#### Grievance appeal

- 97 On 7 July the claimant appealed the grievance outcome. He made it clear that he felt he had been discriminated against for being homosexual. He advised the respondent to look at the witness statements again and allow staff to be open and honest. He stated he was formally raising his concerns to an appeal the reason was that he wanted them to investigate the concerns which he had raised in greater detail with a view to resolving the issue as soon as possible.
- 98 On 14 July the claimant was asked to provide his views as to who should conduct the grievance appeal. The claimant agreed that Neil Cripps could hold

the meeting, (page132).

- 99 On 31 July 2015 the grievance appeal meeting took place. There are no written notes of this meeting and on 14 August Neil Cripps dismissed the claimant's appeal against the grievance outcome. His letter of that date sets out what he says are the seven points that the claimant put forward and went through his findings on those.
- 100 The first point he picks up in the ground for appeal is that the claimant says the allegations in the statements made as part of the investigation are not correct, responses have been cherry picked by the respondent. The claimant also said that employees feared for their jobs as a reason why these statements were not accurate.

#### Statements made under duress

- 101 It was Mr. Cripps evidence that once the claimant complained that the statements weren't accurate, and things are been missed out, he provided a copy of their statement to all the 21 individuals who had been interviewed and invited them to make any amendments. He was confident that all had been given an opportunity to freely say what they wished and only Miss X asked for an amendment.
- 102 We accept this account and find witnesses were free to say what they wished, and their notes were accurately recorded. We make this finding because the witness statements are not all identical, some individuals do identify that other people beside the claimant and the organisation made sexual comments. Our attention was drawn to the fact that the witness interview notes were one or two pages and yet the timing on the notes suggested that the interviews had taken 45 minutes. We do not find that this means the notes were inaccurate. We find that a long meeting can often be reflected in shorter notes as there can be pauses et cetera. We do not find it credible that so many witnesses could be held to be in fear of their jobs, particularly the managing director's son. The motive the claimant ascribes to his colleagues for giving false statements is not credible.
- 103 Miss X's account of the amendment is different, but both agree that she did make a change to her statement. She says that she was interviewed as part of the grievance investigation on 29 June 2015. When she saw the typed-up notes of the meeting that she had she read them, but she felt they were not quite right. She nonetheless signed them on the spot as she felt pressurised to do so as Neil Cripps and Alan Austin was sitting there waiting for her to sign. When she got home that evening, she thought about it and realised that she had not done the right thing. She felt that while what had been written was true the sentences that she had used had been reduced and therefore important points had been missed out.
- 104 On the 31<sup>st</sup> of June she accordingly asked for her statement be corrected. This was originally to include the fact that other male members of staff made crude and vulgar comments. The first time she asked this was refused. She asked again and succeeded in getting one change made to her statement. She said that she thought this is the most important change and persevered in order to

get that put in as a correction. We conclude that changes could be made and find that all staff were asked about this once the point had been raised by the claimant.

- 105 The change Miss X made was to record that she had heard Mr. Traylor make a comment about the claimant when he was off sick along the lines of “he’s probably being taken to A&E as he’s got a cock stuck up his arse”. The claimant has not raised any complaint about this.
- 106 We found Miss X to be a credible witness and we find this comment to be like the type of crude exchanges that took place in this workplace. We conclude that Mr. Traylor did make this comment. We find this even though we note that in the interviews staff generally said that Mr. Traylor would not make sexual comments, by a number this was attributed to his fear of his wife.
- 107 We nonetheless find that he did make this particular comment since on the balance of probabilities it seems to us unlikely that in a workplace so steeped in bad language one individual did not use it and we know from his own account that he used expletives in the altercation with the claimant. While we are not critical of this, we do conclude that this was an organisation where bad language and sexual innuendo and comments were made so frequently their impact no longer had effect or were particularly noted. Both Mr. Austin and Mr. Cripps made reference to a zero-tolerance policy, but it is clear to us that if such a policy existed it was not known to the staff or enforced.

#### Other appeal points

- 108 An issue was raised in these proceedings that the claimant brought with him to the appeal meeting printouts of text messages and WhatsApp messages which now appear in the employment tribunal bundle. His account was that Mr. Cripps refused to accept these as he was unable to verify their origins. Mr. Cripps denies that the claimant provided any additional evidence. The decision letter at page 145 refers to the fact that the claimant had not brought any factual evidence and stood only on the micro-detail of statements made by employees.
- 109 The claimant did not raise any complaint about this at the time and did not respond to the grievance appeal outcome letter. The respondent relies upon this to support their position that the claimant had not provided any documentary evidence stating that had he done so he would have challenged this outcome letter. The claimant’s evidence is that he was so distressed by the process that he wanted nothing further to do with the respondent and therefore did not reply
- 110 On balance we find that the claimant did not bring these to the meeting. Mr. Cripps recorded the lack of evidence at the time, the claimant is recalling events several years later.
- 111 In the decision letter Mr. Cripps concludes that no individual fears for their jobs they are all happy with the way in which the company conducted the interviews and his supporting evidence for this was the fact that none of the statements (other than that of Miss X) had been changed or amended. The letter also states that one does not form part of the original grievance Mr. Cripps could

state that there was conclusive evidence that the claimant was the instigator of sexual comments made in a working environment which was being elevated to a disciplinary hearing.

- 112 We are satisfied that the claimant did not bring many grounds of challenge to the grievance outcome appeal, he based his appeal on the inaccuracy of the witness statements and we find that Mr. Cripps dealt with this adequately. He considered the complaint fairly and neutrally despite his previous involvement in the proceedings up to this point.

#### The disciplinary process

- 113 On 17 August the claimant is invited to disciplinary hearing to take place on 27<sup>th</sup> of August. The letter at page 146 specifies that the purpose of the hearing is to decide whether disciplinary action should be taken against him in accordance the disciplinary procedure the company handbook. It sets out six items which are being considered and categorise these as misconduct inclusive of gross misconduct. Mr. Cripps sent this letter and he confirmed that he had gone through the examples in the company handbook and identified those that he thought fitted with the claimant's conduct. The letter concluded that the claimant must take all reasonable steps to attend the meeting and failure to attend was a disciplinary offence. This is standard wording that appears on all the respondent's grievance and disciplinary letter templates.
- 114 The claimant says that on receipt of this letter he resigned on 17 August with immediate effect during a telephone conversation with Neil Cripps. Mr. Cripps says that no such phone call ever occurred. We prefer Mr. Cripps evidence on this point to that of the claimant. We consider that Mr. Cripps would not have gone on to set up a disciplinary hearing if the claimant had resigned and certainly would not have postponed the first disciplinary hearing and rescheduled it when the claimant did not attend. He would know the claimant was not attending had he in fact already resigned. His contemporaneous actions are consistent with him not being aware the claimant had resigned.
- 115 When the claimant did not attend on the 27<sup>th</sup> he was sent a further letter at page 150 to 151 moving the meeting to 3 September. The respondent then dismissed the claimant in his absence on 3 September sending a letter to that effect that a 4 September.
- 116 The dismissal letter stated that the claimant's conduct constituted gross misconduct. Mr. Cripps confirmed that the decision was taken on two grounds, failure to attend and based on the evidence presented in the form of the various witness statements obtained during the grievance investigation.

#### Reference request

- 117 On 30<sup>th</sup> October 2017 Mr. Cripps received an email from Marshall motor group Limited requesting a reference for the claimant. The reference request was brief. It identified that the claimant had recently been employed by Marshall motor Holdings and asked four questions. The email included in its footer the information that Marshall motor group were regulated by the financial conduct

authority. No reference to this was made in the body of the email. The email did not refer to the position that the claimant was engaged to fulfil.

- 118 Mr. Cripps replied saying that he would not be able to supply a reference for the claimant. The claimant's evidence is that he accordingly resigned from his job because he could not continue without that reference. This was identified by the claimant as a further act of discrimination and victimisation. It was the claimant's position that FCA regulations meant that Mr. Cripps was required to provide a reference for him to carry out the role of business manager.
- 119 Mr. Cripps evidence was that the respondent is regulated by the FCA but that his understanding of the rules is that in an organisation such as the respondent a reference only has to be provided for those who occupy particular positions, that would not include business managers. He believed that he had no FCA obligation to provide a reference and he said that his motives are not doing so were intended to be helpful.
- 120 He explained that the company does provide references on some occasions, but it was his practice not to do so where the information provided would not assist the job applicant and he felt this was the case for the claimant.
- 121 We accept Mr. Cripps evidence on this point and accept that he genuinely believed he had no legal obligation to provide a reference. We find that it was not clear from the request that he was expected to do so, and we also note that there was no follow-up from Marshall's identifying this obligation.

### Conclusion

- 122 Based on our findings of fact we are satisfied that the claimant has proved facts from which we could infer discrimination has taken place. The burden of proof has shifted to the respondent.
- 123 We have then considered the issues that we were asked to determine. In relation to section 26 harassment related to sexual orientation, we have concluded that on 30 May Mr. Traylor did not use the words of which he is accused.
- 124 We do find, however, that on 5 June Mr. Traylor did accuse the claimant of calling him "a fucking liar" but this was not related to sexual orientation.
- 125 We have identified that Mr. Bowman did make the comment identified on 5 June. We've also found that Mr. Traylor did make a comment about Mr. Healy being feminine in his mannerisms. While we have not concluded whether the word gay was used, we have found that this was intended to mock the claimant based on his sexual orientation. We have accepted that the incident described between the claimant and Sharon the cleaner on 6 June did occur.
- 126 In relation to all three of these incidents we find that this conduct was related to the claimant sexual orientation and it did have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We find that, particularly as the respondent had not carried out any training of its staff on equality issues, that the respondent is liable for these acts.

- 127 We do not find that Mr. Danny Austin, Mr. Glen Austin and Mr. Cripps were aware of these comments prior to the investigation and therefore do not find for the claimant on the question of whether the respondent failed to stop or prevent such comments.
- 128 We accept that the respondent interviewed 21 members of staff, although no external finance staff were investigated. We have found that this was not unwanted conduct but was appropriate and justified in the circumstances of the complaints that had been made.
- 129 The respondent did not uphold the grievance and found that the claimant had instigated inappropriate sexual comments and we find that this was an appropriate action by the respondent and did not amount to engaging in unwanted conduct. We have found that the disciplinary action against the claimant was warranted as we accept that he did make sexually inappropriate comments. It was therefore inevitable that the claimant was required to attend a disciplinary hearing. Again, this does not amount to unwanted conduct on the part of the respondent.
- 130 We do not accept that the claimant resigned. We also find that the failure to provide a reference was not unwanted conduct and certainly was not related to the claimant sexual orientation.
- 131 We have then gone on to consider the claim of victimisation. The parties agreed the claimant's grievance of 12 June 2015 amounted to a protected act. We then had to consider whether the respondent treated the claimant unfavourably because of that protected act considering the matters on which the claimant relied.
- 132 The claimant says that he was victimised in that the grievance investigation meeting focused on his conduct as instigator and not as a victim. We have found that the procedure followed was clumsy, but we have accepted that Mr. Austin had been made aware of complaints by staff prior to investigating the grievance and conclude that his decision to consider these at the same time and in the same meetings as the claimant's complaint was not because he had raised a grievance. Staff had come to him with these complaints on his return from holiday and he was not motivated to pursue these because of the grievance.
- 133 We have found that the respondent's failure to uphold the grievance was justified because of the evidence that they gathered and was not a response to the grievance having been raised.
- 134 Again, we have found that the decision to commence disciplinary action was appropriate given the evidence that was uncovered. We have also found that the claimant's appeal was dealt with adequately and that there was no delay or failure to consider the complaint fairly and neutrally. The claimant's appeal against the grievance outcome was not upheld because the claimant did not produce any new evidence and the challenge he did make, that the witness statements were inaccurate, was dealt with appropriately by the respondent.
- 135 Requiring the claimant to attend a disciplinary hearing was an inevitable consequence of the findings the respondent made in interviewing other staff. As noted, we have not found that the claimant resigned. Similarly, we do not

find that the failure to provide a reference was an act of victimisation.

136 We have therefore concluded that the claimant was not subject to any act of victimisation but was subjected to 3 separate acts of harassment relating to sexual orientation.

Employment Judge McLaren

20 May 2019